altering the selling price determined by the manufacturer or importer, allows the competitive relationship between imported tobacco and tobacco marketed by the national monopoly to be adversely affected.

The exercise of that power is also contrary to Article 30 of the Treaty, inasmuch as it allows the public authority, by a selective intervention as regards tobacco prices, to restrict the freedom of importation of tobacco originating in other Member States. It is furthermore contrary to Article 37 inasmuch as the fixing of a price other than that determined by the manufacturer or importer constitutes an extension to imported tobacco of a prerogative typical of the national monopoly, of such a nature as adversely to affect the marketing of imported tobacco under normal conditions of competition.

In Case 90/82

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

applicant,

v

FRENCH REPUBLIC, represented by Noël Museux, Deputy Director of Legal Affairs at the Ministry of Foreign Relations, acting as Agent, and Alain Sortais, Foreign Affairs adviser at the Ministry of Foreign Relations, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy,

defendant,

APPLICATION for a declaration that the French Republic, by fixing retail selling prices of manufactured tobacco at a different level from that determined by the national manufacturers or by importers has failed to fulfil its obligations under the EEC Treaty and under Council Directive No 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [Official Journal, English Special Edition, 1972 (31 December), L 303, p. 1], and in particular Article 5 (1) thereof,

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: G. F. Mancini
Registrar: P. Heim

gives the following

JUDGMENT

Facts

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

I — Summary of the facts

Under the provisions of Article 6 of French Law No 76-448 of 24 May 1976, on the organization of the monopoly in manufactured tobacco (Journal Officiel de la République Française, p. 3083), apart from the special provisions for the overseas departments and for Corsica, the retail price of each product is the same throughout France and is fixed in accordance with conditions determined by decree of the Conseil d'Etat [State Council].

Article 10 of Decree No 76-1324, of 31 December 1976, on the economic and tax arrangements applicable to manufactured tobacco in the departments of metropolitan France (Journal Officiel de la République Française, p. 189) provides that retail selling prices of tobacco are to be fixed by order of the Minister for Economic Affairs and Finance.

A memorandum from the Minister for Economic Affairs and Finance, published in the Bulletin Officiel des Services et des Prix [Official Bulletin of Prices and Services] of 27 January 1977, stated that:

Suppliers may introduce new products to the market three times per annum, on 1 January, 1 April and 1 October. For that purpose they are to submit a file to the administration and to state the retail price which they wish to have applied;

In respect of products already placed on the market, suppliers may request the application of a fresh retail price at any time; such request must be accompanied by all relevant evidence in support.

Under those provisions several orders fixing sale prices in metropolitan France for certain categories of manufactured

tobacco were adopted at various times by the Minister for Economic Affairs and Finance or the Minister responsible for the Budget.

On 26 October 1978, the Commission of the European Communities, having received certain complaints, informed the relevant French authorities that it considered such fixing of the retail selling prices of certain categories of manufactured tobacco to be contrary to Council Directive No 72/464, of 19 December 1972, on taxes other than turnover taxes which affect the consumption of manufactured tobacco and in particular Article 5 (1) thereof. That article provides:

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

On 5 January 1979 the French Government sent the Commission an interim reply.

By letter of 7 June 1979, the Commission reminded the French Government that, with regard to manufactured tobacco, it was failing to apply "a method of determining prices compatible with the principle of freedom of the latter", a principle which, it stated, was embodied in Article 5 (1) of Directive No 72/464, the interpretation of which was confirmed by the Court of Justice in its judgment of 16 November 1977 (Case 13/77, *NV GB-INNO-BM* v *Vereniging van de Kleinhandelaars in Tabak* [1977] ECR 2115). The practices followed by the French authorities were, the Commission claimed, incompatible with the provisions of Community law; the French Republic was thereby failing to fulfil its obligations under the Treaty and in particular under Directive No 72/464. The French Government was invited to submit its observations to the Commission pursuant to Article 169 of the EEC Treaty.

The French Government sent its observations to the Commission in a memorandum of 16 July 1979, in which it maintained that the French system of fixing the retail selling price of manufactured tobacco was clearly within the ambit of the Community rules. The system had been adopted to allow the public authorities to include the movement of tobacco prices within the general objectives of economic policy and in particular within the policies for controlling increases in the prices of goods and services. Furthermore, the system was very flexibly applied: requests for prices submitted for products introduced to the market for the first time were consistently accepted. Increases in price might be subject to certain modifications according to the products imported and requests for increases submitted by foreign suppliers were accepted.

On 31 October 1980, the Commission delivered a reasoned opinion to the French Republic pursuant to the first paragraph of Article 169 of the Treaty.

It pointed out therein that the observations of the French Government were not satisfactory: they did not guarantee manufacturers and importers the legal certainty necessary for the free exercise of the right to determine the retail prices of their products. The power of Member States to control the increase in prices of goods and services could not affect the right of manufacturers and importers

freely to fix the retail prices of manufactured tobacco.

The French Republic was invited to adopt within a period of one month the necessary measures to remedy its failure to fulfil its obligations under the Treaty and under Directive No 72/464.

By a letter sent to the Commission on 14 January 1981, the French authorities, on the one hand, disputed the legal arguments expounded in the reasoned opinion and, on the other hand, informed the Commission of their intentions regarding the fixing of retail selling prices of manufactured tobacco.

II — Written procedure

By an application lodged on 16 March 1982 the Commission, pursuant to the second paragraph of Article 169 of the EEC Treaty, brought before the Court of Justice the alleged failure of the French Republic to fulfil its obligations with regard to the fixing of the retail selling prices of certain categories of manufactured tobacco.

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. However, it requested the Commission to reply in writing to certain questions in order to clarify the object of its action; that request was complied with within the period allowed. For its part, the Government of the French Republic was requested to reply to certain questions during the hearing.

III — Conclusion of the parties

The *Commission* claims that the Court should:

Declare that the French Republic, by fixing the retail selling prices of certain categories of manufactured tobacco at a different level from that determined by the manufacturers or importers, has failed to fulfil its obligations under the EEC Treaty and under the provisions of Council Directive No 72/464/EEC of 19 December 1972, and in particular Article 5 (1) thereof;

Order the French Republic to pay the costs.

In reply to the questions put by the Court, the Commission specified that it considered the general exercise by the French State of the power which it had reserved to itself by Law No 76-448 to fix officially the retail selling prices of both manufactured tobacco imported from other Member States and of national manufactured tobacco to constitute a failure to fulfil its obligations under Community law.

The *Government of the French Republic* contends that the Court should:

Dismiss the Commission's application;

Order the Commission to pay the costs.

IV — Submissions and arguments of the parties during the written procedure

The *Commission* states that it has received various complaints relating to the French system of fixing retail selling prices of manufactured tobacco. That system entails discrimination against

Community products in favour of French products either inasmuch as the prices fixed for the marketing of imported cigarettes in France were fixed at a level too low to guarantee profitability, or because they were fixed at a level very much higher than that determined by the manufacturers or importers, in such a way as to extend the difference in prices existing between French cigarettes and imported cigarettes, or because the administration, after approving the price determined by the foreign manufacturer or importer later reduced the price of the competing French brand, thus distorting competition.

As to the law, the Commission describes the situation prior to Directive No 72/464, the work in preparation for its adoption, its main provisions, its relationship to the progress of harmonization and the reasons behind the system of harmonization and maintains that for a Member State to fix the selling price of certain manufactured tobacco imported from other Member States of the Community at a level different from that determined by the manufacturers or importers is incompatible with Directive No 72/464, in the light of the general spirit of the system of harmonization, of the actual terms of Article 5 (1) of the directive, of the objectives of the directive and of the provisions of the Treaty which provide the background for its interpretation.

(a) Uniform market conditions, which are necessary for the achievement of free movement and free competition in the tobacco sector, require above all the harmonization of tax structures. That harmonization is based, on the one hand, on the adoption in each Member State of identical excise duties for all categories of cigarettes, and, on the other hand, on a range of retail selling prices which fairly reflect the wholesale prices, namely the differences between the cost of production and the cost of distribution. It requires that Member States should not intervene in the determination of retail selling prices; otherwise the States would be in a position to render nugatory fiscal neutrality or to stifle any growth of genuine competition.

(b) According to Article 5 (1) of the directive the manufacturers and importers are to be free to determine the maximum retail selling price for each of their products. The second sentence of that provision, which provides that the freedom of manufacturers or importers to fix prices may not hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices, does not have the meaning which the French Government attempts to attribute to it.

Article 5 (1) must, of necessity, be interpreted in such a way that the two statements contained therein are complementary rather than contradictory. In the judgment in *GB-INNO-BM* the Court very clearly stated the complementary nature of the two sentences of Article 5 (1): it recognized the right of a Member State to exercise certain functions relating to price fixing, but "always provided that" there has been free determination of the prices by traders. Similarly the Council and the Commission in a foot-note to the minutes of the Council, were in agreement in considering that the expression "imposed prices" was to be taken as meaning "prices fixed by manufacturers or importers and if appropriate approved by the State".

The imponderable factor in the system is the free determination by producers and importers of the selling price of their brands; the price ratios between each brand must be determined by the free play of market forces and by the costs of production. At that level, the power of Member States should be restricted to providing information and approving prices freely fixed by the market; there can be no question of a system in which the Member States have reserved to them the power directly to fix retail prices.

On condition that they do not jeopardize the objectives or the operation of the system of excise duties on tobacco, which is in the course of harmonization, Member States may take general measures for the "control of price levels" or adopt rules relating to "the observance of imposed prices"; thus, to combat inflation, a Member State may certainly impose a price freeze whilst still complying with the requirements of the Treaty. Those powers reserved to Member States may not however affect the right of importers freely to fix prices for their products within the general framework thereby defined.

The free determination of price at the time of introduction of a new product on to the market is by itself insufficient: each producer or importer must be able freely to adjust the competitive relationship between his products and competing products.

Nor does the possibility of an annual price adjustment appear to be sufficient to ensure the free determination of sale prices by the market: regard being had to the fluctuations of the market forces concerned, it is necessary to make more flexible the means by which price changes are effected.

(c) The manufacturers' and importers' freedom to determine prices derives from the objectives and from the general structure of the system established by Directive No 72/464, the first recital in the preamble to which states that the application of taxes on the consumption of products in the manufactured tobacco sector must not distort conditions of competition or impede their free movement within the Community. The final recital records that the requirements of competition imply a system of freely formed prices for all groups of manufactured tobacco.

The purpose of the directive also lies within the scope of an economic union; such a union cannot however be achieved by the harmonization of tax structures and rates alone. In order to attain characteristics "similar to those existing in a national market", harmonization of the taxable basis (that is, the duty-free price) of products of the same brand is an essential factor if not a matter of priority.

According to the structure of the Treaty, such a harmonization must, as a matter of priority, derive from the competitive forces of the market, in particular as a result of the possibility of parallel imports. A spontaneous harmonization of prices between Member States would be inconceivable if each State were to retain the power to impose prices on products of the same brand; a complete harmonization of the structures, rates and

conditions of distribution is not sufficient to achieve the Common Market in the products concerned. The Council could therefore only provide a system of free fixing of prices, modified by powers reserved to the national authorities.

(d) Article 5 of the directive must be interpreted in the light of the relevant provisions of the Treaty, in particular Articles 30 and 37.

With regard to Article 30, the Court has several times defined the procedure for giving effect to the prohibitions on the subject of prices contained in that article.

Thus in its judgment of 24 January 1978 (Case 82/77, *Openbaar Ministerie of the Kingdom of the Netherlands* v *van Tiggele* [1978] ECR 25), the Court declared that "a minimum price fixed at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price" constitutes a measure having an effect equivalent to a quantitative restriction.

In that judgment the Court also held that "imports may be impeded in particular when a national authority fixes prices ... at such a level that imported products are placed at a disadvantage in relation to identical domestic products ... because the competitive advantage conferred by lower cost prices is cancelled out".

The determination by a Member State of an increase in price greater than that requested by the foreign manufacturer or importer, his inability to reduce his price subsequently and thereby to adapt himself to competition with domestic products, the impossibility for him to absorb increases in taxation by a reduction in his costs or profit margins would indisputably result in cancelling out any competitive advantage which the manufacturer or the importer of goods imported from other Member States might have as against the products of the monopoly, thereby placing the former at a disadvantage by comparison with the latter.

The right of a Member States to determine a single minimum sale price, applicable to all identical products is not in dispute. The intervention of public authorities in the competitive structure established by prices may, however, constitute a measure having equivalent effect within the meaning of Article 30, both when it is applicable to imported and to domestic products alike and when it is applicable in a differential manner to the detriment of imported products.

According to the Court in its judgment of 13 March 1979 (Case 91/78 *Hansen GmbH & Co.* v *Hauptzollamt Flensburg* [1979] ECR 935), "Article 37 remains applicable wherever, even after the adjustment prescribed in the Treaty, the exercise by a State monopoly of its exclusive rights entails a discrimination or restriction prohibited by that article"; the same judgment also declared that "Article 37 is intended to render the sales policy of a State monopoly subject to the requirements of the free movement of goods and of the equal opportunities which must be accorded to products imported from other Member States".

The unilateral fixing of a retail selling price for imported products by a mon-

opoly or its supervising authority does not allow the necessary equality of opportunity. The monopoly or its supervising authority fixes all the prices including those of its competitors, in terms of the sales policy which it deems suitable for the marketing of its own products; Community traders would thus be deprived not only of all opportunity to plan commercial strategy by means of prices, but also of the chance to adjust prices optimally in accordance with market conditions.

Free determination is not, it is true, the prerogative of monopolies; the restrictive nature of the individual fixing of selling prices in the circumstances in question is however considerably reinforced by the existence of a monopoly. The Service d'Exploitation Industrielle des Tabacs et Allumettes [Tobacco and Matches (Industrial Exploitation) Organization] ("SEITA"), which is a public undertaking, holds the monopoly of production in France; for its part, the State has reserved to itself the monopoly of distribution in retail selling outlets. If the French Government had, in addition, the discretionary right to determine the individual prices of imported products, a complete monopoly, from manufacture to distribution, would *in fact* be reconstructed; thus the assumption of equality of opportunity would be negated.

Moreover, the legislative means employed for fixing prices form part of the legislation peculiar to the monopoly, were it so organized.

Thus the system of marketing of manufactured tobacco in metropolitan France involves the intervention of a public monopoly, acting pursuant to its exclusive right to determine prices for the whole of the products concerned, both national and imported; the existence of that right is not in conformity with the requirements of the free movement of goods or the equality of opportunity which must be ensured for products imported from other Member States.

The *Government of the French Republic* recalls the main features of the French system of retail sale prices for manufactured tobacco; it emphasizes, in particular, that for products newly introduced on to the market the administration always accepts the retail price suggested by the supplier.

With regard to the French tobacco monopoly, it may be noted that, within the scope of its organization, the exclusive rights of the monopoly as regards the importation of and wholesale trade in products originating in other Member States has been abolished; the right to import and deal by wholesale in products originating in other Member States has been freed from all restrictions; any person wishing to engage in that activity is required only to make a declaration. Nor are manufacturers or importers from other Member States in any way obliged to use SEITA as an intermediary for the importation and wholesale distribution of their products; they are free to establish their own wholesale distribution network and to establish direct links with the public authority in matters of price. The fact that most manufacturers and importers from Member States of the EEC continue to rely on SEITA for the marketing of their products is due to the fact that the services of that agency satisfy them and allow them to make savings in setting up an independant system of wholesale distribution; manufacturers and importers from the EEC

have only contractual relations with SEITA, from which they may discharge themselves if they so wish.

The complaints mentioned by the Commission do not establish that the disputed retail selling prices were fixed at a level such that traders could only sell their products at a loss or that their competitive advantage had genuinely been cancelled out. Moreover, certain declarations of the complainants are contracdictory and certain of the conclusions drawn from them by the Commission are inaccurate.

As to the law, none of the arguments put by the Commission regarding the compatibility of the French system of retail selling prices of manufactured tobacco with the Treaty, with Directive No 72/464, with the case-law of the Court or with Articles 30 and 37 of the EEC Treaty appears to be well founded.

(a) The well established case-law of the Court recognizes the power of Member States to intervene in the field of prices, subject to any limits which may be imposed by Community law. Thus, in its judgment of 23 January 1975 (Case 31/74, *Galli* [1975] ECR 47), the Court declared that the system of prices established by two regulations relating to the common organization of the agricultural market "is applicable solely at the production and wholesale state, with the result that these provisions leave Member States free — without prejudice to other provisions of the Treaty — to take the appropriate measures relating to price formation at the retail and consumption stages, on condition that they do not jeopardize the aims or functioning of the common organization of the market in question."

Since it is recognized in respect of products governed by the Common Agricultural Policy and subject to common organizations of markets, the power of Member States to intervene in the establishment of prices may, *a fortiori*, be exercised in a field where the Treaty has not affected their competence in that respect, subject to the provisions applicable to the matter in question.

(b) Directive No 72/464 has not affected that power of intervention with regard to manufactured tobacco products.

The objective of the directive is "that the rules for taxes affecting the consumption of manufactured tobacco should be harmonized" (third recital in the preamble), in order that "the application ... of taxes affecting the consumption of products in this sector does not distort conditions of competition" (first recital).

The meaning of Article 5 (1) of the directive is clarified by Article 4 (1) which provides that "national and imported cigarettes shall be subjected to a proportional excise duty calculated on the maximum retail selling price". Since the basis of assessment of this tax on consumption is the final price applicable at the consumption stage, that price must be determined in advance and the retailers must be prevented from selling those products at a higher price, in the absence of which one part of the price paid by the consumer might escape tax. The advance determination of the maximum retail selling price was therefore laid down by the directive for technical fiscal reasons; in giving traders, in the first place, the duty to determine

that price, the Community legislature did not thereby intend adversely to affect the powers of the public authorities in that field, but, on the contrary, wished to preserve them by the second sentence of Article 5 (1).

It is impossible to accept the interpretation of that provision put forward by the Commission: the expression "control of price levels" means not only supervision but also restraint of price levels. The power of intervention, recognized by the case-law of the Court, would be devoid of meaning, except for statistical purposes, if it allowed national laws only to record prices determined by traders.

The declaration annexed to the minutes of the Council, referred to by the Commission, was interpreted by the Council, in its written observations submitted to the Court in the *GB-INNO-BM* case as meaning that "the Community legislature wished to except national legislation on imposed prices, whether they were fixed directly by a public authority or determined by the importers or manufacturers and later approved by the State".

In the *GB-INNO-BM* judgment the Court gave a preliminary ruling on a question which had been submitted to it pursuant to Article 177 of the EEC Treaty and which in substance asked whether a Member State might impose upon retailers a selling price for manufactured tobacco fixed by traders; the Court therefore gave a ruling on a situation concerning the last part of the second sentence of Article 5 (1), and not the first part thereof.

Directive No 72/464, far from adversely affecting the power of Member States, on the contrary authorizes three different systems for fixing the retail, selling prices of manufactured tobacco:

A system in which traders, importers or manufacturers themselves fix the maximum price which retailers may not exceed; the latter however retain the opportunity of selling below that price (first sentence of Article 5 (1);

A system in which the power of Member States to fix retail prices directly is reserved (first part of the second sentence of that article);

A system of which the Member States may impose upon retailers the prices fixed by importers and manufacturers (second part of the sentence of that article).

It is of course understood that the Member States must exercise the powers reserved to them within the limits imposed upon them by Community law.

(c) One of the first limits in that respect appears from Article 30 of the Treaty, which prohibits quantitative restrictions on imports as well as any measure having equivalent effect.

The Court has clarified the scope of that provision in relation to national price rules.

The Court has declared that: "A maximum price ... constitutes ... a measure having an effect equivalent to a quantitative restriction, especially when it

is fixed at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the product in question into the Member State concerned can do so only at a loss" [Case 65/75, *Tasca* [1976] ECR 291, at paragraph 13 of the decision]. That declaration is applicable equally to retail prices and to wholesale prices.

As to minimum prices, the Court has ruled that a minimum price fixed at a specific amount, even though it is applicable without distinction to domestic and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price.

It appears clearly from that case-law that national rules do not, by themselves, constitute a measure having an effect equivalent to a quantitative restriction, but that it may produce such an effect to the extent to which it either makes the marketing of imported products impossible or more difficult than that of national products, or prevents imported products form being profitably marketed under the conditions laid down or cancels out the competitive advantage deriving from lower cost prices. In this case the Commission has not produced any evidence demonstrating, in the specific examples which it has put forward, that the marketing of imported products has been made more difficult than that of national products or made impossible, that they could not have been marketed in profitable conditions or that the competitive advantage which they were perhaps enjoying has effectively been cancelled out.

(d) The Commission is wrong to rely upon Article 37. That article is not relevant in this case; the determination of retail prices by the public authority does not form part of the scheme of the monopoly; such a system of rules might remain in force independently of the existence of the monopoly.

Moreover, even supposing that Article 37 (1) were applicable, the fixing or retail selling prices by the public authority does not fall within the concept of "discrimination regarding the conditions under which goods are procured and marketed ... between nationals of Member States": there is no differentiation of treatment on the basis of nationality, national products and imported products being placed on the same footing with regard to price rules.

In any event, the Commission's view is not supported, as regards the substance, by any evidence. Since the establishment of the monopoly, the proportion of all cigarette sales in France represented by imported cigarettes has risen from 13% in 1977 to 26.5% in 1980 and 35% in 1982.

The policy followed by the public authority on retail prices for tobacco has purposes entirely different from those alleged by the Commission: in fixing prices, the public authority may have in mind objectives such as combating price rises or the protection of public health or of tax policy. The homogeneity of prices throughout the national territory corresponds to analogous considerations, to which may be added a concern to ensure equality of all retailers and of consumers, both of whom are taxpayers. These various considerations may of course be difficult to reconcile; they demonstrate,

in any case, that the intention of the French authorities to remain in control of price trends for the goods in question is explained by considerations other than those alleged by the Commission.

V — Oral procedure

At the sitting on 1 March 1983 the Commission, represented by R.-C. Béraud and the Government of the French Republic, represented by N. Museux, gave oral explanations and answered questions put by the Court.

The *Commission* confirmed that its application concerned the very principle of the determination by the French State, by compulsory powers, of the price before tax of manufactured tobacco, whether imported or not.

The dispute should be seen in the context of the general principles of the harmonization of the structures of excise duties on manufactured tobacco; in that respect, the Council resolution of 21 April 1970 on taxes, other than turnover taxes, on the consumption of manufactured tobacco (Official Journal, English Special Edition, Second Series, No IX, p. 35) indicates that the harmonized system of excise duties on cigarettes is to combine a proportional component with a specific component, "in order that at the final stage, . . .a fixed relation between those two components may be attained so that the range of retail sale prices freely fixed by the manufacturers should reflect to a fair extent the differences in delivery prices". The Commission and the Council therefore intended to reproduce, at the final price level, with all taxes included, the actual competitive range existing at the level of the supply prices of the various types of cigarettes. Member States are required to fix the level of each excise duty at an identical level for all the cigarettes available on their market and to establish a fixed relationship between specific duties and proportional duties. On the Community level the movement towards harmonization of the structure of excise duty would be devoid of meaning if the Member States retained the power to intervene in the determination of prices which constitutes the basis of assessment for tax purposes. Article 5 (1) of Directive No 72/464 must be interpreted as meaning that the second sentence thereof allows the Member States concerned to seek means of combating inflation and eliminating tax evasion; those two objectives are achieved by the imposition of maximum prices.

The *Government of the French Republic* stated that the closely circumscribed object of the directive was to ensure that the effects of taxation on competition in the field of manufactured tobacco were cancelled out; it did not attempt the reform or the approximation of systems for determining retail selling prices. The purpose of Articles 4 and 5, taken together, is to determine the basis of assessment of excise duties; the directive, according to a statement of the Council, excepted national legislation on the subject of imposed prices, whether they were fixed directly by public authority or determined by importers or manufacturers and later approved by the State; Member States may choose between the levying of taxes on consumption of manufactured tobacco either on the basis of a maximum retail selling price or on the basis of a fixed retail selling price. The French Government had exercised

its power to fix retail selling prices in conditions which were in conformity with Community law. The economic objective pursued is three-fold: restraint of price rises in a period of inflationary pressure, stability of public finances and normal profitability for manufacturers and traders.

The Advocate General delivered his opinion at the sitting on 27 April 1983.

Decision

1 By application lodged at the Court Registry on 16 March 1982 the Commission of the European Communities brought an action, pursuant to Article 169 of the EEC Treaty, for a declaration that the French Republic, by fixing retail selling prices of manufactured tobacco at a different level from that determined by the manufacturers or importers, had failed to fulfil its obligations under the EEC-Treaty, and, in particular, under the provisions of Council Directive No 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal, English Special Edition, 1972 (31 December), L 303, p. 1).

The background to the dispute

2 By Law No 76-448, of 24 May 1976, on the organization of the monopoly in manufactured tobacco (Journal Officiel de la République Française, p. 3083), the French Republic adopted a series of measures designed to comply with its obligations under Article 37 of the EEC Treaty on the organization of national monopolies of a commercial character. That Law was implemented by Decree No 76-1324, of 31 December 1976, on the economic and tax arrangements applicable to manufactured tobacco in the departments of metropolitan France (Journal Officiel de la République Française, p. 189).

3 In accordance with those provisions, the importations and wholesale distribution of manufactured tobacco from Member States of the Community were liberalized, whilst the importation and wholesale distribution of manufactured tobacco originating in non-member countries, as well as the manufacture and retail sale of manufactured tobacco, were reserved to the French State. The monopoly affecting the importation and wholesale distribution of manufactured tobacco originating in non-member countries and the manu-

facturing monopoly are entrusted to the Service d'Exploitation Industrielle des Tabacs et Allumettes [Tobacco and Matches (Industrial Exploitation) Organization, known as "SEITA"], whilst the retail sale monopoly is granted to the revenue authorities, which administer it through retailers nominated as its agents.

4 Under Article 6 of Law No 76-448, the retail price of each product is the same throughout the country. That price is fixed under conditions laid down by decree. In conformity with Article 10 of Decree No 76-1324, retail selling prices of tobacco are fixed by order of the Minister for Economic Affairs and Finance.

5 After those provisions were put into effect the Commission, following the publication of various orders fixing the selling prices of tobacco under the aforementioned provisions, drew the attention of the French authorities to the fact that the system described above was not compatible with the principle of the free determination of maximum retail selling prices by manufacturers and importers embodied in Article 5 (1) of Directive No 72/464. Since its communication called forth no reaction from the French authorities, the Commission on 7 June 1979 sent the French Government a letter in which it called attention to the fact that the fixing by compulsory powers of a price for imported tobacco different from that determined by the manufacturers and importers constituted a breach of the French Republic's obligations under the EEC Treaty and in particular under Directive No 72/464.

6 By letter of 16 July 1979, the French Government informed the Commission that it considered its legislation and the administrative practices developed on the basis of that legislation as being in conformity with the provisions of the directive referred to, pointing out that the principle of the free determination of prices by manufacturers and importers is limited by the effect of the second sentence of Article 5 (1), which makes a reservation as regards the application of national legislation on the control of price levels or the observance of imposed prices. In the same letter, the French Government stated that the French legislation had been adopted to allow the public authorities to include the development of tobacco prices under the general objectives of economic policy, and in particular the programme for the control of increases in the price of goods and services. It emphasized that, in

practice, the application of those legal rules was very flexible and that, in principle, requests for the fixing of prices for products which were put on the market for the first time were consistently accepted.

7 On 31 October 1980 the Commission sent the French Government a reasoned opinion, pursuant to Article 169 of the EEC Treaty, in which it expressed the view that the observations submitted by the French Government were not satisfactory, in view of the fact that they did not ensure the necessary legal certainty for manufacturers and importers in the free exercise of the right to determine selling prices for their products.

Consequently, the Commission stated that it was essential for the French legislation to be amended in order formally to allow manufacturers and importers of tobacco the right freely to determine the selling price of their products. Finally, it invited the French Republic to adopt the necessary measures to comply with the reasoned opinion within a period of one month from the date of its notification.

8 The French Government refused to comply with those requirements and the Commission submitted its application to the Court on 16 March 1982.

The substance of the dispute

9 The Commission claims that the French legislative provisions, inasmuch as they reserve to the Government compulsory powers for the fixing of the price of imported tobacco, in certain cases by alteration of the prices determined by the manufacturers or importers, are contrary to the provisions of Directive No 72/464 as it must be interpreted in the light of Articles 30 and 37 of the Treaty and in accordance with the case-law of the Court relating to those provisions. According to the Commission the purpose of Directive No 72/464 is to prevent the tax arrangements for tobacco from distorting competition in that sector or from preventing the free movement of those products within the Community.

10 The two sentences of Article 5 (1) must be interpreted in such a way as to complement each other and not to contradict each other. The Commission does not dispute, however, the right of Member States to apply to tobacco general measures intended to restrict the increase of prices; however, apart from such measures, the freedom of manufacturers and importers must

remain untrammelled so far as the determination of their selling price is concerned. On this point the Commission recalls the case-law of the Court relating to the control of prices, as set out in particular in the judgments of 23 January 1975 (Case 31/74, *Galli*, [1975] ECR 47), 26 February 1976 (Case 65/75 *Tasca* [1976] ECR 291 and Joined Cases 88 to 90/75 *SADAM and Others* v *Commission* [1976] ECR 323) and 24 January 1978 (Case 82/77 *Openbaar Ministerie of the Netherlands* v *van Tiggele* [1978] ECR 25) in which the court stated that any measure whose purpose was to fix prices at a level such that the marketing of imported products became either impossible or more difficult than that of national products was incompatible with the Treaty. Such an effect may derive either from the fixing of a maximum price, if it is set at a level so low that it prevents importers from marketing their products profitably, or from the determination of a minimum price, fixed at a level so high that it cancels out the competitive advantage arising from the lower cost price of the imported product.

11 The Commission further refers to the judgment of 13 March 1979 (Case 91/78, *Hansen GmbH & Co.* v *Hauptzollamt Flensburg* [1979] ECR 935) in which the Court emphasized that Article 37 remains applicable, even after the adjustment of the monopolies prescribed by the Treaty, to the extent to which the exercise by a State monopoly of its exclusive rights entails any form of discrimination or restriction prohibited by that article. It notes that, in that judgment, the Court declared that the purpose of Article 37 was to subject the sales policy of a public monopoly to the requirements of the free circulation of goods and of the equality of opportunity which must be ensured for products imported from other Member States. Those opportunities for marketing are adversely affected where the supervising authority of the monopoly fixes all tobacco prices, not only those covered by the monopoly but also those of its competitors, pursuant to a sales policy which it deems suitable for the marketing of its own products. On this point the Commission draws attention to the fact that the legislative means used to fix tobacco prices, including those of imported tobacco, derive from the national legislation relating to the monopoly and not from general legislation relating to the control of price levels.

12 In the course of the proceedings, the Commission referred to various complaints made to it by importers, from which it appears that, according to

the variations in the policy applied by the French Government, the sale prices suggested by manufacturers or importers were subject sometimes to reductions and at others to increases which, in the view of the parties concerned, were to the detriment of their competitive position as against the tobacco of the French monopoly.

13 In its defence, the French Government points out that the expression "control of price levels" in Article 5 (1) of Directive No 72/464 does not mean only "to verify" but also, where necessary, "to curb" the level of prices. It draws attention to the fact that the provisions criticized by the Commission are merely the transposition to the field of the marketing of tobacco of the principles of Order No 45-1483 of 30 June 1945 on prices, which allow the Government to fix prices or price-limits on production and, where necessary, at all stages of distribution, in particular by the determination of the price itself or by prescribing an increase or a reduction. As those positions are not applicable to the "monopoly products", it was necessary to introduce their equivalent in the legislation relating to the organization of the tobacco monopoly.

14 According to the French government, the system of fixing prices for manufactured tobacco, which is applied with great flexibility by the administration, has three purposes, namely combating inflationary tendencies, obtaining the best returns for the public revenue and the adoption of measures against abuse of tobacco.

15 The French Government in its turn refers to the judgments cited by the Commission, emphasizing that they recognize, in principle, the compatibility with Community law of national measures adopted in relation to price control.

16 The compatibility of the French provisions relating to the fixing of the price of manufactured tobacco with Community law must be considered in relation to the provisions of Article 5 (1) of Directive No 72/464, as they appear in the light of the system and purpose of that directive and of Articles 30 and 37 of the Treaty.

17 The purpose of the directive is to establish general principles for the harmonization of the system of taxation of tobacco which, by reason of its special characteristics, has the effect of impeding the free movement of tobacco and the establishment of normal competitive conditions on that special market, as is recognized by the second recital in the preamble. According to that recital, taxes on the consumption of manufactured tobacco "are not neutral from the point of view of competition and often constitute serious obstacles to the interpenetration of markets". It is therefore with a view to establishing "healthy competition" within the Common Market (first recital), to eliminating "from the present systems those factors which are likely to hinder free movement and distort the conditions of competition, whether at national level or at Community level" (third recital), and to effecting the "opening of the national markets of the Member States" (fifth recital) that the directive states, as the foundation and basis of the system, "a system of freely formed prices for all groups of manufactured tobacco" (eighth recital).

18 It is to that end that Article 5 (1) provides as follows: "Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. This provision may not, however, hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices."

19 The compatibility with that provision of the French legislation on the organization of the monopoly therefore depends on the meaning which is to be attributed to the double reservation set out in the second sentence of Article 5 (1) relating to the application of national legislation on the control of price levels or the observance of imposed prices.

20 Those reservations must be interpreted in such a way as to reconcile their content with the rule of the free determination of selling prices by the manufacturer or importer inasmuch as that rule constitutes, in the area to which the directive relates, the expression of the principle of the free movement of goods under normal conditions of competition referred to in the preamble to the directive.

21 From that point of view, the expression "control of price levels" cannot be interpreted as reserving to the Member States a discretion to fix the price of tobacco, as the exercise of such extensive power would constitute the virtual denial of any effectiveness to the principle of the free determination of price set out in the first sentence of Article 5 (1).

22 It follows from the usual meaning of the expression "control", as well as from a comparison of the different versions of the directive in the various languages and of the reference, in many of those versions, to the "level" of prices, that the expression "control of the price levels" can refer only to national legislation of a general nature intended to check the increase in prices.

23 As to the expression "observance of imposed prices", the Court has already had occasion, in its judgment of 16 November 1977 (Case 13/77, *GB-INNO-BM* v *Vereniging van de Kleinhandelaars in Tabak*, [1977] ECR 2115) to explain that, within the context of the system for taxation of tobacco, that expression must be understood as referring to a price which, once determined by the manufacturer or importer and approved by the public authority, is compulsory as a maximum price and must be observed as such at all stages of the distribution network, up to the sale to the consumer. The effect of that mechanism appears with particular clarity in the application of tax labels bearing the selling price, as is the practice in several Member States.

24 The purpose of that mechanism for the fixing of prices is to prevent any detrimental effect upon the integrity of fiscal receipts by the charging of a price in excess of the imposed price and it is in the light of that purpose that the meaning of the expression used in the directive must be interpreted.

25 It thus appear that, in the system provided for by the directive, there is no contradiction between the rule of the free determination of prices by the manufacturer or importer and the power reserved to Member States to ensure the observance of imposed prices, the second price being nothing other than the import price determined by the manufacturer or importer

invested with the approval of the State and as such compulsory for all traders.

26 Those considerations regarding the system and the objective of the directive and the interpretation, in that context, of Article 5 (1) reveal that the power reserved to the government by the French legislation on the fixing of prices for manufactured tobacco is incompatible with Community law to the extent to which that power, by altering the selling price determined by the manufacturer or importer, allows the competitive relationship between imported tobacco and tobacco distributed by the national monopoly to be adversely affected.

27 The exercise of that power is also contrary to Article 30 of the Treaty, inasmuch as it allows the public authority, by a selective intervention as regards tobacco prices, to restrict the freedom of importation of tobacco originating in other Member States. It is furthermore contrary to Article 37 inasmuch as the fixing of a price other than that determined by the manufacturer or importer constitutes an extension to imported tobacco of a prerogative typical of the national monopoly, of such a nature as adversely to affect the marketing of imported tobacco under normal conditions of competition.

28 It thus appears that, although it remains lawful for the French Republic to limit the effect of the principle of the free determination of selling prices by the manufacturer or importer, by the application of any measures of a general nature intended to ensure control of the increase of prices, it is contrary both to Directive No 72/464 and to Articles 30 and 37 of the Treaty to extend to imported manufactured tobacco the application of provisions relating to the fixing by compulsory powers of the price of manufactured tobacco which the French State has reserved to itself within the scope of the provisions organizing the public tobacco monopoly.

29 The arguments put forward by the French Government relating to the defence of its fiscal interests and to the need for measures against tobacco abuse cannot prevail against that conclusion. The Member States retain the freedom to determine, in conformity with the provisions of the directive, the level of taxation affecting all tobacco. The integrity of the fiscal receipts

resulting therefrom is guaranteed under the scheme of the directive by the mechanism of the "imposed price" understood as a maximum price, whose function consists precisely of avoiding an underestimate of the selling price at the time of the payment of the duty. As to obtaining the best return for the revenue, the level of the latter is in essence a function of the rate of the tax; that objective cannot be pursued by means of an increase in price imposed on imported tobacco. The same observation applies to the adoption of measures against tobacco abuse; in so far as the increase of tobacco prices may be a means suitable for that purpose, that campaign may not, in any event, be pursued by means of an increase in price borne solely by imported tobacco.

30 It must therefore be concluded that the French Republic, by fixing the retail selling prices of manufactured tobacco at a different level from that determined by the manufacturers or importers, has failed to fulfil its obligations under the EEC Treaty.

Costs

31 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that the French Republic, by fixing the retail selling prices of manufactured tobacco at a different level from that determined by the manufacturers or importers has failed to fulfil its obligations under the EEC Treaty;**

2. Orders the French Republic to pay the costs.

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 21 June 1983.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 27 APRIL 1983 [1]

Mr President,
Members of the Court,

1. The case dealt with in this opinion is an action brought by the Commission under Article 169 of the Treaty of Rome. In it the Commission seeks a declaration that the French Republic has failed to fulfil its obligations under Council Directive No 72/464/EEC of 19 December 1972 "on taxes other than turnover taxes which affect the consumption of manufactured tobacco" (Official Journal, English Special Edition 1972 (31 December), L 303, p. 1) and under the EEC Treaty. The default is alleged to consist in the fixing of the retail selling price of certain categories of national and imported manufactured tobacco at a different level from that freely determined by the manufacturers and importers.

2. Let me first describe the present system in France. Pursuant to Article 37 of the EEC Treaty and to the task undertaken by the Council of the Communities by a resolution of 21 April 1970, the monopoly in manufactured tobacco was reorganized by Law No 76-448 of 24 May 1976 and the relative implementing Decree No 76-1324 of 31 December 1976 (Journal Officiel de la République Française, 1976, p. 3083 and 1977, p. 189).

To be specific, the exclusive rights of importation and wholesale dealing in

1 — Translated from the Italian.