JUDGMENT OF THE COURT (Fifth Chamber)
10 December 1985 *

In Cases 240 to 242, 261, 262, 268 and 269/82

Stichting Sigarettenindustrie, a foundation governed by the law of the Netherlands, whose registered office is in The Hague, represented by L. H. van Lennep, of the Bar of The Hague, practising in Brussels, with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe (Case 240/82),

Philip Morris Holland BV, a limited liability company incorporated under the law of the Netherlands, whose head office is in The Hague, represented by F. O. W. Vogelaar, an advocate practising before the Hoge Raad of the Netherlands whose Chambers are in The Hague, with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe (Case 241/82),

Theodorus Niemeyer BV, a limited liability company incorporated under the law of the Netherlands, whose head office is in Groningen, represented by R. E. P. de Ranitz, an advocate practising before the Hoge Raad of the Netherlands whose Chambers are in The Hague, with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe (Case 242/82),

R. J. Reynolds Tobacco BV, a limited liability company incorporated under the law of the Netherlands, whose head office is in Hilversum, represented by W. F. Th. Corpeleijn and O. W. Brouwer, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. C. Wolter, 2 rue Goethe (Case 261/82),

British-American Tobacco Company (Nederland) BV, a limited liability company incorporated under the law of the Netherlands, whose head office is in Amsterdam, represented by P. V. F. Bos, of the Amsterdam Bar, practising in Brussels, with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe (Case 262/82),

Sigarettenfabriek Ed. Laurens BV, a limited liability company incorporated under the law of the Netherlands, whose head office is in The Hague, represented by Hans G. Kemmler, Barbara Rapp-Jung, and Alexander Böhlke, Rechtsanwälte, Frankfurt am Main, practising in Brussels, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 B rue Philippe-II (Case 268/82),

Turmac Tobacco Company BV, a limited liability company incorporated under the law of the Netherlands, whose head office is in Amsterdam, represented by Hans G. Kemmler, Barbara Rapp-Jung and Alexander Böhlke, Rechtsanwälte, Frankfurt am Main, practising in Brussels, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 B rue Philippe-II (Case 269/82),

applicants,

* Language of the Case: Dutch and German.

v

Commission of the European Communities, represented by its Legal Adviser, B. van der Esch, acting as Agent, assisted by C. E. M. van Nispen tot Sevenaer, of the Bar of The Hague, practising in Brussels, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for a declaration that the Commission Decision of 15 July 1982 in Cases IV/29.525 and IV/30.000 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal, L 232 of 6 August 1982, p. 1) is void,

THE COURT (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 29 January 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

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Decision

1 By separate applications lodged at the Court Registry on 22, 24 and 29 September 1982, the Stichting Sigarettenindustrie, Philip Morris Holland BV, Theodorus Niemeyer BV, R. J. Reynolds Tobacco BV, British-American Tobacco Company (Nederland) BV, Sigarettenfabriek Ed. Laurens BV et Turmac Tobacco Company BV brought actions under the second paragraph of Article 173 of the EEC Treaty for the annulment of a decision of 15 July 1982 (IV 29.525 and IV 30.000 SSI, Official Journal, L 232, p. 1), in which the Commission held that they had committed a number of infringements of Article 85 of the Treaty.

2 By order of 28 October 1982 the Court decided to join the seven cases for the purposes of the procedure and of judgment.

3 The applicants are the Stichting Sigarettenindustrie (hereinafter referred to as 'SSI') and a number of Netherlands tobacco manufacturers who are members of it. The SSI is a foundation governed by Netherlands law established in 1955; most of the manufacturers and importers of tobacco products operating in the Netherlands are members. Its purpose is to promote the common interests of its members. On 20 December 1976 the members of the SSI entered into a master agreement the main points of which were that the contracting parties designated the SSI as their sole spokesman for the purpose of consultations with the authorities regarding in particular selling prices to the consumer and wholesalers' and retailers' margins. That master agreement was notified to the Commission in September 1977. It was within the SSI that most of the agrements and concerted practices found to be illegal by the Commission in the decision referred to above were adopted.

4 In its decision the Commission ruled that by entering into a number of agreements regarding the margins of wholesalers and retailers of tobacco products (that is to say, their share of the retail price) the members of the SSI had committed an infringement of Article 85 of the Treaty.

5 On 4 December 1974 the members of the SSI entered into a scheme providing for the payment to specialized retailers satisfying certain conditions of an annual rebate of a fixed amount for every 1 000 cigarettes bought from them. The bonus paid under that scheme was increased regularly, and in 1978 it stood at 75 cents per 1 000 cigarettes. That scheme was notified to the Commission.

6 In late 1979 the members of the SSI entered into an agreement with certain wholesalers setting maximum profit margins for the latter. A similar agreement was concluded during the same period between the members of the SSI and an organization representing certain retailers setting maximum margins for the retailers in the case of direct supplies. Those two agreements were notified to the Commission on 27 December 1979.

7 During the same period those agreements were complemented by a concerted practice between the members of the SSI relating to the grant of a fixed margin for

direct supplies and by concerted practices with wholesalers relating to the grant of a maximum margin in deliveries from wholesalers to specialist retailers.

8 Finally, the effects of the agreements and practices described above were reinforced by another agreement entered into by the members of the SSI on 23 April 1975. That agreement, laying down rules of conduct in the sale of cigarettes, provides that no discount may be granted other than those agreed upon by the members of the SSI.

9 Furthermore, on three occasions (1 August 1974, 7 November 1975 and 1 February 1978) the members of the SSI entered into agreements to increase their retail prices. Those agreements were limited in duration (three months) and in each case coincided with authorizations to make price increases granted under Netherlands legislation.

10 The Commission considered that all the agreements and concerted practices described above constituted infringements of Article 85 (1) of the Treaty. It refused to grant exemption under Article 85 (3) of the Treaty in respect of the agreement of 4 December 1974 on rebates payable to specialized shops and the agreements setting maximum margins for wholesalers and retailers, which had been notified to it. Finally, it imposed fines on all the applicants, except the SSI, for participating in the agreements to raise retail prices.

11 The SSI and the other applicants do not deny their participation in the agreements and concerted practices described above. In support of their applications they raise four submissions: the non-fulfilment of the conditions of application of Article 85 (1) of the Treaty, the existence of an internal contradiction in the Commission's decision, infringement of Article 15 of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) and infringement of Article 190 of the Treaty, inasmuch as the Commission failed to examine adequately the applicants' arguments. The applicants also make a number of submissions regarding the amount of the fines.

I — First submission: the conditions of application of Article 85 (1) of the Treaty were not met

12 In support of this submission the applicants put forward arguments designed to show that since no real competition was possible in the manufactured tobacco sector in the Netherlands, their agreements and concerted practices could have had neither the object nor the effect of restricting it. The legislative context, pressure exerted by the authorities and a 'high multiplier' resulting from the high level of *ad valorem* excise duty make competition impossible. The applicants go on to argue that their agreements and concerted practices were not likely to affect trade between Member States.

A. *The argument that the prohibited agreements and practices had neither the object nor the effect of restricting competition*

1. *The decisive influence of the legislative context on the applicants' conduct*

(a) Description of the legislation

13 It appears from the documents before the Court that in accordance with Council Directive 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 Netherlands legislature has chosen to levy primarily a high *ad valorem* excise duty (calculated as a percentage of the maximum sale price) on tobacco products, rather than a specific duty (the amount of which is fixed per unit of the product).

14 Duty is collected by means of tax stamps which manufacturers and importers buy from the tax authorites. The manufacturers and importers first determine the retail selling price of their products, including tax. They then pay the taxes included in that price. Finally, they affix to their products tax stamps showing the retail selling price.

15 Under Article 30 of the Netherlands Excise Duty Law (Wet op de accijns van tabaksfabrikaten of 25 June 1964, Staatsblad 208, hereinafter referred to as the

'Excise Duty Law'), tobacco products may not be sold at a price higher or lower than that indicated on the tax stamp. Furthermore, Article 28 of the Law provides that a given tobacco product may not be sold at more than one retail price, unless a distinction is clearly made within one brand or by means of the brand indicated on the cigarette packet. There is however provision for the making of exceptions.

16 With a view to combatting inflation the Netherlands authorities have established a system of price regulation on the basis of the Prices Law (the Prijzenwet of 24 March 1961, Staatsblad 135), in the form of a Ministerial Order adopted each year under the name 'Prijzenbeschikking Goederen en Diensten' (hereinafter referred to as the 'Prices Order'). That order lays down criteria for the calculation of increases in retail prices where costs rise and reductions in retail prices where costs decline.

17 Article 2 of the Prices Order prohibits manufacturers from selling their products at a price higher than that at which the product was sold on a specified date (reference date), adjusted in accordance with increases or reductions in manufacturing costs for the product since that date. Article 3 of the Prices Order prohibits dealers from selling any product at a price higher than its purchase price together with a maximum profit margin. However, a manufacturer or dealer may exceed the maximum laid down in the Prices Order with the authorization of the Minister for Economic Affairs. Infringement of the Prices Order is a criminal offence by virtue of the Economic Offences Law of 22 June 1950 (Staatsblad K 258).

(b) The alleged impossibility of competition on retail prices

18 In their written pleadings the applicants have first of all submitted that the legislation described above made effective competition with regard to the setting of retail prices impossible.

19 According to the applicants the Netherlands excise duty legislation and the Prices Orders deprive undertakings of any flexibility in their pricing policy and make it impossible for competitors to establish price differences. On the one hand, since

Article 28 of the Excise Duty Law prohibits the sale of products of a single brand at different prices, a manufacturer must sell all his stock on which the old price is indicated before changing the price of his products. On the other hand, when ministerial authorization for a price increase is granted under the Prices Order, the manufacturer (or importer), say the applicants, must take advantage of that authorization. If he decided to maintain his existing prices, which would thus become lower than those of his competitors, Article 2 of the Prices Order would prevent him from increasing his prices subsequently without ministerial authorization. That manufacturer's prices would thus be fixed at a lower level than those of his competitors. Furthermore, subsequent authorizations for price increases would be calculated on the basis of those lower prices.

20 According to the applicants, moreover, if a manufacturer nevertheless succeeded in applying prices different from those of his competitors, such conduct would not be profitable for him. The Netherlands legislature has chosen to apply to tobacco products an *ad valorem* excise duty at a very high rate, which obliges all manufacturers to reduce their costs and profits to a minimum (the applicants call this phenomenon the 'compression effect'). They therefore have very little room for manœuvre. They can only compete by reducing their profit still further. That reduction in profits, which can only be a small one, cannot give rise to more than a slight price difference in comparison with the products of their competitors. The sacrifice is in any event unprofitable, however, because of the rigidity of demand for cigarettes: the decrease in profits is not made up for by a greater than proportional increase in sales.

21 The Commission accepts that Article 28 of the Excise Duty Law may give rise to a number of practical difficulties for manufacturers. However, it considers that it is excessive to say that that provision makes competition impossible, if only because derogations can be made. The Commission also criticizes the applicants' argument with regard to Article 2 of the Prices Order. In its view the ministerial authorization is not subject to a time limit. A manufacturer may therefore decide not to increase his prices to the maximum allowed immediately but to raise them progressively.

22 Furthermore, the Commission considers that the applicants' economic arguments (compression effect and rigidity of demand) are unfounded. Even if a compression effect were shown to exist, the agreements entered into by the applicants made it

possible to evade its consequences, since by increasing prices the applicants also increased their profit margins.

23 The applicants' argument to the effect that the Netherlands legislation makes price competition impossible cannot be accepted.

24 It must first be pointed out that the Excise Duty Law does not deprive manufacturers of their freedom to set retail prices, since the obligation under Article 30 of the Excise Duty Law to comply with the price indicated on the tax stamp applies only to retailers.

25 Inasmuch as it prohibits the sale of products under a single brand at different prices, Article 28 of the Excise Duty Law may indeed cause practical difficulties for a manufacturer who desires to change his retail prices. But those difficulties are merely temporary. Furthermore, Article 28 expressly makes derogations possible. Finally, Article 28 does not prevent a manufacturer introducing a new product from applying to it a price different from those of his competitors at the outset, and thus creating a price difference which would enable him to increase his market share.

26 Furthermore, unlike the Belgian authorities, whose practice in that respect was described in the judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission* Joined Cases 209 to 215 and 218/78 [1980] ECR 3125), the Netherlands authorities do not limit the range of tax stamps available to manufacturers and thus do not prevent them from applying prices attractive to consumers.

27 An analysis of the Netherlands regulation on prices, the Prices Order, does not disclose any grounds for altering that conclusion. In order to prevent manufacturers and importers from applying prices which are too high in relation to their costs, Article 2 of the Prices Order forbids the sale of goods at a price higher than a fixed maximum. That rule does not however prohibit them from selling their products at a price lower than that maximum.

28 Furthermore, in the course of the oral argument before the Court it became clear that a manufacturer may decide not to increase his prices immediately by the amount authorized. By maintaining his prices unchanged that manufacturer may thus compete with firms which have decided to increase theirs.

29 It must therefore be concluded from the foregoing that, although the Netherlands legislation gives the tobacco manufacturer less scope for price competition, it does leave him the means of creating a price difference between his products and those of his competitors, by reducing his prices or by holding them at the same level while other manufacturers increase theirs.

30 The applicants are also wrong to assert that the compression effect makes price competition impossible in the manufactured tobacco sector.

31 First of all, assuming that the compression effect exists, it has not been shown that it reduced the costs of all tobacco manufacturers to the same level. Even if each manufacturer was obliged to reduce his own costs to the minimum, that minimum does not necessarily correspond to the minimum costs of another manufacturer. By means of the multiplier effect, which will be discussed below, a slight cost difference may, if it is passed on, therefore give rise to a greater difference in selling prices and thus make price competition possible.

32 In any event, the compression effect only arises where competition operates in a normal manner. Each manufacturer is then obliged to reduce his costs, including his profit margin, to the minimum. By means of their price agreements, however, the applicants eliminated any uncertainty regarding the prices to be applied by their competitors and were thus able to escape the compression effect. The fact that it was in the interest of the manufacturers to avoid, by means of a collective effort, the constraints which the operation of the market imposed on each of them individually does not make their agreements compatible with competition law.

(c) The alleged impossibility of competition on margins

33 The applicants also take the view that the Netherlands legislation makes it impossible to compete on dealers' margins.

34 On this point the argument put forward by the applicants is based on a contradiction between two provisions of that legislation: Article 3 of the Prices Order, founded on the Prices Law, and Article 30 of the Excise Duty Law. Article 3 of the Prices Order requires retailers to reduce their prices if their costs decrease. Where a manufacturer allows a greater profit margin to certain retailers and thus reduces their purchase prices to that extent, those retailers are obliged by Article 3 of the Prices Order to reduce their retail selling prices. The applicants call that mechanism the 'domino effect'. However, that 'domino effect' puts retailers in breach of Article 30 of the Excise Duty Law, which prohibits them from selling cigarettes at a price different from that indicated on the tax stamp. By competing on margins the manufacturers thus oblige retailers to infringe a provision of the legislation and are party to that infringement.

35 In its defence, the Commission asserts primarily that the Prices Order functions in a special manner the manufactured tobacco sector. The domino effect as described by the applicants operates to its full extent only in sectors in which retailers retain the power to set selling prices. In those circumstances it is necessary to ensure that benefits granted to them are reflected in the retail price. That is the role of the domino effect. In the manufactured tobacco sector, on the other hand, the manufacturers themselves set retail prices. It is therefore no longer necessary to require retailers to pass on cost reductions from which they benefit. When ministerial authorization for a price increase is given, the authorized increase includes the whole of the margin which the resulting price leaves for manufacturers and distributors. The allocation of that margin among the various economic operators concerned may however provide an opportunity for competition between manufacturers.

36 The applicants' argument cannot be accepted. By entering into agreements setting the margins of wholesalers and retailers and granting a special rebate to certain of them, the members of the SSI did collectively what they say they could not do

individually. The fact that they acted collectively would not have prevented beneficiaries of those agreements from being penalized if the Netherlands legislation had the scope which the applicants attribute to it. That cannot be the case, since it has not been proved that a single wholesaler or retailer was successfully prosecuted in the Netherlands for failing to pass on to consumers an advantage granted to him by the members of the SSI.

37 Furthermore, the Commission has convincingly explained in what respect the Prices Order functions in a special way in the manufactured tobacco sector. It appears from its explanation that the domino effect operates only in sectors in which each of the traders concerned is free to fix his selling prices, which is not so in the case of tobacco products because of the obligation placed on retailers by the Excise Duty Law to comply with the price on the tax stamp affixed by the manufacturer or importer.

2. *The pressure allegedly exerted by the authorities*

38 The applicants also submit that on several occasions the Netherlands authorities decisively influenced the setting of prices and of margins. The intervention of the authorities was prompted by their desire to obtain high revenues and to ensure a stable income for certain dealers. In the course of that consultation the authorities from time to time threatened to take 'measures', to use their own word, if the members of the SSI did not adapt their conduct to the objectives set by the authorities.

39 In the Commission's view the documents produced by the applicants do not show that the agreements in question were entered into with the approval or at the instigation of the Netherlands' authorities. In its reply to a request made to it by the Commission the Netherlands Government, moreover, emphatically denied that that was the case.

40 In these proceedings it is not necessary to consider to what extent pressure or encouragement on the part of the authorities may have the effect of removing agreements entered into by undertakings from the ambit of Article 85 of the Treaty. It has certainly been established that the Netherlands authorities had discussions with the undertakings concerned in the course of which the authorities

indicated certain objectives which they wished to see achieved. However, it has not been proved that the authorities indicated that those objectives should be achieved by the conclusion of the agreements restrictive of competition which have been held to be illegal by the contested decision. For its part, the Commission considers that the bonus scheme in fact made it impossible to obtain extra rebates from a manufacturer or importer.

3. *The distortion of competition caused by a high multiplier*

41 One of the applicants, Laurens, emphasizes that in its jugment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, referred to above), the Court held that *ad valorem* excise duties have a multiplier effect on retail prices. By means of that multiplier effect, which is particularly high in the Netherlands, any alteration in costs, including profit margins, which a manufacturer decides to pass on results in a much greater alteration in the retail price. In Laurens' view, the multiplier effect creates distortions of competition with regard to consumer prices and distributors' margins, since the normal relationship between the benefits offered to consumers and the selling price of the products is thrown badly out of balance.

42 The Commission accepts the existence of a multiplier effect with regard to tobacco products in the Netherlands, but emphasizes that that effect tends to strengthen competition because it magnifies any reduction in costs passed on by the manufacturer and thus allows the manufacturer to apply prices significantly lower than those of his competitors.

43 It should first be pointed out that, as the Court has already recognized in its judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, referred to above), the multiplier effect in principle works as regards both increases and reductions. By means of the multiplier effect a manufacturer who is the only one to take the initiative of passing on a cost reduction or refraining from passing on a cost increase is able to apply prices which amplify his cost advantage.

44 Consequently, far from restricting price competition, the multiplier effect tends to strengthen it, especially since in the Netherlands it operates without restriction as regards reductions. That is to say, unlike the Belgian legislature at the time of *Van Landewyck* case, the Netherlands legislature has not decided to impose a high

minimum excise duty, which would have ensured a certain level of revenue and limited the multiplier effect in the event of cost reductions.

45 Furthermore, as the Court pointed out in its judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, referred to above), the multiplier effect does not operate where, within a given price, a manufacturer or importer individually increases the share of wholesalers and retailers. To that extent competition on margins is possible without any distortion attributable to the multiplier effect.

B. *The argument that the prohibited agreements did not affect trade between Member States*

46 The applicants consider that their agreements did not affect trade between Member States for the purposes of Article 85 (1) of the Treaty. First of all, once a tax stamp has been affixed to tobacco products, they can no longer be exported to another Member State. Furthermore, tobacco products to which tax stamps have not yet been affixed are indeed transferred between undertakings belonging to the same group. However, since in that case they have not yet been placed on the market in a Member State agreements concerning them are not likely to affect trade between Member States.

47 According to the Commission, Article 85 of the Treaty does not require that trade between Member States should be restricted but merely that the distortion of competition should be likely to affect such trade, if not directly, then at least actually or potentially. The parties to the agreements and practices in question account for 90% of the Netherlands market and a large proportion of imports between Member States. In those circumstances, and in the light of paragraphs 170 to 172 of the judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, referred to above), it seems difficult, according to the Commission, to assert that the condition that trade between Member States should have been affected has not been fulfilled.

48 As the Court held in its judgment of 30 June 1966 (*Société technique minière* v *Maschinenbau Ulm GmbH* Case 56/65 [1966] ECR 235), for an agreement to be considered likely to affect trade between Member States 'it must be possible to

foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Therefore, in order to determine whether an agreement . . . comes within the field of application of Article 85, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.' It must be emphasized that the partitioning of the market is only one example of the effects on trade between Member States covered by Article 85 (1) of the Treaty.

49 As a result, even where there is no partitioning of markets an agreement concluded between undertakings established in a Member State and covering only the market of that State affects trade between Member States, within the meaning of Article 85 of the Treaty, if it concerns, even partly, a product imported from another Member State, even where the parties to the agreement obtain the product from a company belonging to their own group.

50 The same is true of agreements regarding trade margins to be allowed to distributors. As the Court emphasized in its judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, referred to above), by an agreement of such a nature the applicants significantly reduce the incentive for intermediaries, in return for individual financial benefits, to promote the sale of certain products, in particular imported products, rather than others.

51 The Commission was therefore correct to hold that the agreements and practices covered by its decision were likely to affect trade between Member States. The first submission must therefore be rejected.

II — Second submission: the existence of an internal contradiction in the Commission's decision

52 One of the applicants, British American Tobacco, considers that there is a contradiction between Article 6 of the contested decision, which prohibits the SSI

from consulting in any way with the authorities, and Articles 1 and 4 of the decision, which leave intact the provisions of the 1976 master agreement regarding that consultation.

53 For its part the Commission considers that it did not prohibit consultation between the SSI and the authorities in so far as in preparing for such consultation the necessary information is collected in a neutral and confidential manner, the results are communicated objectively and the consultation does not result in the conclusion of agreements in restraint of competition.

54 Article 6 of the contested decision provides that 'the undertakings and associations of undertakings referred to in Article 7 shall refrain in future from holding joint consultations with one another about increases in cigarette prices or changes in cigarette dealers' margins in the Netherlands.'

55 Examination of that article shows that the Commission prohibited the undertakings concerned from consulting with each other on prices or margins. It is clear from the statement of the reasons on which the decision is based that such a consultation between undertakings is contrary to Article 85 of the Treaty.

56 Nothing in that article, on the other hand, prevents the undertakings concerned from consulting with the Netherlands authorities, in so far as such consultation does not give rise to action contrary to Article 85 of the Treaty. For that reason the submission made by British American Tobacco must be rejected.

III — Third submission: failure to comply with Article 15 of Regulation No 17 of the Council

57 As has already been stated, the Commission imposed fines on undertakings which had taken part in the price agreements contrary to Article 85 of the Treaty.

58 The applicants on whom those fines were imposed contested their imposition, raising a number of arguments. They maintain that they acted neither intentionally

nor negligently. The 1978 price agreement was notified by implication. Fines could not be imposed for agreements covered by Article 4 (2) (1) of Regulation No 17. The Commission violated the principles of equal treatment and of fairness. Finally, the Commission failed to comply with Article 85 (3) of the Treaty.

A. *Lack of intent or negligence*

59 As a preliminary argument, a number of the applicants point out that fines can be imposed for infringement of Article 85 of the Treaty only if intent or negligence on the part of the parties to the agreement is proved. In this case, the Commission did not establish intent or negligence.

60 According to the applicants, in this case it is necessary to apply a principle of criminal law according to which an error of law precludes any liability. The applicants put forward a number of reasons for their error. In the first place, they point out that the scope of the competition rules with regard to tobacco products was not clear, since the Commission decision in the *Van Landewyck* case (No 78/670 of 20 July 1978, Official Journal L 224, p. 29) was adopted after their agreements. Secondly, one of the applicants, Reynolds, states that it did not take part in the consultation with the Netherlands authorities. It became party to the agreements in question only because it was convinced that the authorities considered the agreements to be necessary and that the agreements could not be impugned.

61 The Commission points out that it imposed fines on the applicants only with regard to their participation in the price agreements. An agreement of that kind is one of the most serious breaches of competition law; the Commission has always imposed fines in such cases, and the Court has never held against it on that issue. In paragraph 167 of its decision the Commission gave details of at least negligence on the part of the applicants.

62 With regard to the applicants' argument, the Commission considers first of all that it is clear that price agreements are contrary to Article 85 of the Treaty. It is sufficient to read the text of the Treaty itself. Such agreements were moreover ruled illegal from the outset, as appears from the first report on competition (First Report on Competition Policy, annexed to the Fifth General Report on the

Activity of the Communities, 1972, p. 25). Finally, it is not the consultation with the authorities that is at issue here but the applicants' actions in restraint of competition.

63 Under Article 15 (2) of Regulation No 17 of the Council, 'the Commission may by decision impose on undertakings or associations of undertakings fines . . . where, either intentionally or negligently:

(a) they infringe Article 85 (1) . . . of the Treaty . . . .'

64 In the course of the proceedings it emerged that the Commission had set the amount of the fines on the basis that the applicants had committed the infringements by negligence.

65 The members of the SSI could not have been unaware that by concluding agreements increasing prices they restricted competition. Nor could they have been unaware that the agreements had to be considered likely to affect trade between Member States, since they covered the whole of a national market and concerned products imported from another Member State. The Commission therefore rightly took the view that the applicants had been at least negligent.

66 That conclusion applies also to Reynolds, which entered the Netherlands market later but was party to the three price agreements concluded within the framework of the SSI. Reynolds, moreover, did not argue that it had been subjected to pressure to adjust its practices so as to conform with those of the undertakings already established on that market. It must therefore be concluded that it freely adopted a course of conduct contrary to Article 85 of the Treaty and thus acted at least negligently.

B. *The notification of the 1976 SSI master agreement amounted to notification of the 1978 price agreement*

67 The applicants assert that they believed in good faith that the notification of the 1976 SSI master agreement amounted to notification of the 1978 price agreement, which merely implemented the first agreement.

68 According to the Commission, the master agreement concerns consultation between the manufactured tobacco sector and the authorities, while the price agreement amounted to concerted action by the manufacturers themselves. In those circumstances the Commission does not understand how the notification of one could be thought to constitute notification of the other.

69 The applicants' argument cannot be accepted. The master agreement which established a framework for consultation between the Netherlands authorities and the tobacco manufacturers did not suggest that the object of such consultation could be the conclusion of agreements in restraint of competition. It was not shown in the course of the proceedings, moreover, that the consultations which actually took place with the authorities had that purpose. Consequently, the notification of the master agreement cannot be considered equivalent to notification of an agreement restricting competition such as the 1978 price agreement.

C. *The Commission could not impose fines for agreements covered by Article 4 (2) of Regulation No 17 of the Council*

70 The applicants emphasize that they were all established in the same Member State and that their price agreements did not concern imports or exports. They conclude from that that under Article 4 (2) (1) of Regulation No 17 of the Council they were under no obligation to notify them and the Commission could not impose fines on them for those agreements. The distinction made in Article 4 between agreements which must be notified and those which need not be notified would be meaningless if fines could be imposed for agreements covered by Article 4 (2) (1) of Regulation No 17.

71 The Commission considers first of all that the agreements in question were clearly not covered by Article 4 (2) (1) of Regulation No 17. They were entered into by firms supplying about 90% of the Netherlands market in tobacco products. In addition, the agreements concerned imported products. Furthermore, even if Article 4 (2) did apply to the agreements that would not automatically mean that fines could not be imposed. Article 15 (5) (a) of Regulation No 17 applies only in the event of minimal restriction of competition.

72 Article 4 (1) of Regulation No 17 provides that a decision exempting an agreement to which Article 85 (1) of the Treaty applies can only be taken when the agreement has been notified to the Commission. Article 4 (2) goes on to state that that rule does not apply to agreements to which only undertakings from a single Member State are party and which do not relate either to imports or to exports between Member States. It provides, however, that such agreements may be notified to the Commission.

73 The applicants' argument amounts in essence to saying that the prohibition on the imposition of fines provided for by Article 15 (5) (a) of Regulation No 17 applies also to agreements covered by Article 4 (2) of Regulation No 17 which have not been notified.

74 In that regard it must be pointed out first of all that the prohibition is expressly laid down only in the case of agreements which have in fact been notified; no distinction is made between agreements which fall under the general system established by Article 4 (1) and those covered by the special system provided for by Article 4 (2).

75 It must be observed that, contrary to the argument of the applicants, the distinction between agreements governed by Article 4 (1) and those covered by Article 4 (2) retains its importance even if undertakings may be fined for their participation in agreements covered by Article 4 (2) which have not been notified. The distinction provides two advantages from the procedural point of view. On the one hand, in the case of agreements covered by Article 4 (2) the Commission must examine whether the conditions laid down in Article 85 (3) are met even where it becomes aware of the agreements as a result of its own investigation; exemption can only be granted in respect of agreements covered by Article 4 (1) if they have been notified. On the other hand, in the case of agreements covered by Article 4 (2) the Commission may, under Article 6 (2), give an unlimited retroactive effect to its decision granting exemption; according to Article 6 (1), decisions exempting agreements governed by Article 4 (1) cannot take effect from a date prior to the date of notification.

76 Finally, it must be emphasized that the possibility of notifying agreements covered by Article 4 (2) must also be given a purpose, which can be the case only if undertakings which do so obtain benefits in return. Apart from the fact that undertakings concerned may thus ascertain whether it will be possible to obtain exemption without having to wait for an investigation to be carried out, that benefit can only lie in the fact that by taking advantage of the prohibition imposed on the Commission by Article 15 (5) (a) of Regulation No 17 they can make themselves immune from fines. It is understandable that the Community legislature should have wished to reserve that benefit for undertakings which notify their agreements, since by divulging them they run the risk of being obliged to terminate them and at the same time correspondingly reduce the Commission's investigation workload.

77 For those reasons it must be concluded that the prohibition on the imposition of fines laid down in Article 15 (5) (a) of Regulation No 17 applies only in respect of agreements which have in fact been notified.

78 It follows that even if the agreements in question were covered by Article 4 (2) of Regulation No 17 the Commission could impose fines on the applicants who took part in them in so far as the agreements had not been notified.

D. *Breach of the principles of equal treatment and of fairness*

79 In the first place, the applicants consider that there was a breach of the principle of equal treatment in so far as they were not treated in the same way as the undertakings concerned in the *Van Landewyck* case. In that case no fines were imposed, although the infringements were serious.

80 The Commission was correct to take the view that the applicants' complaint is unfounded. The fines imposed in this case were imposed in respect of the price agreements entered into by the applicants. The agreements concerned in the judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*, referred to above) did not involve an increase in prices to consumers but concerned only the share of distributors in prices set independently by each manufacturer or importer.

81 Secondly, the applicants say that it is unfair to impose fines systematically in respect of price agreements when Article 85 makes no distinction between different types of agreement.

82 It must be emphasized that the fact that no distinction is made does not mean that all infringements are equally serious. Agreements which prevent the supply of goods to consumers at the most favourable prices are particularly serious, and the Commission is justified in strictly exercising its power to impose penalties.

E. *The alleged failure to comply with Article 85 (3) of the Treaty*

83 Three applicants consider that instead of imposing fines in respect of the price agreements the Commission should have exempted them under Article 85 (3) of the Treaty. Reynolds submits that the agreements were intended to protect the structure of the distribution network and were therefore of benefit to consumers. Laurens considers that exemption should be granted so long as the distortions due to national legislation have not been eliminated. Finally, in Turmac's view, Article 85 (3) is flexible enough to be applied to a sector as distinct as the manufactured tobacco sector.

84 According to the Commission, Reynolds' argument must be rejected in view of the judgment of 29 October 1980 (*Van Landewyck and Others* v *Commission*) where the Court held that 'the number of intermediaries and brands is not necessarily an essential criterion for improving distribution within the meaning of Article 85 (3)'. For the rest, the Commission considers that the sole question is whether price competition on tobacco products remained possible in the Netherlands.

85 It is sufficient to point out in that regard that, as the Commission correctly indicated in its decision, even if exemption could have been granted in the absence of notification, it would necessarily have been refused on the ground that the price agreements benefited only the manufacturers and importers and were of no benefit to consumers.

IV — Fourth submission: the alleged breach of Article 190 of the EEC Treaty, inasmuch as the Commission failed to examine adequately the applicants' arguments

86 According to the applicants, the Commission ignored their arguments at all stages of the procedure. None of those arguments appears in the decision.

87 In the Commission's view, it is not necessary for it to discuss in its decision all the arguments put forward by the parties.

88 The Court has consistently held that, although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings. Consequently, the fourth submission must also be rejected.

V — The submissions regarding the amount of the fines

89 The amount of the fines imposed is as follows: 350 000 ECU for British-American Tobacco; 425 OOO ECU for Sigarettenfabriek Ed. Laurens BV; 100 000 ECU for Theodorus Niemeyer BV; 125 000 ECU for Philip Morris Holland BV; 150 000 ECU for R. J. Reynolds Tobacco BV and 325 000 ECU for Turmac Tobacco Co. BV.

90 All the applicants argue that should the Court uphold the fines it ought in fixing their amount to take into consideration a number of factors: the period of validity of the agreements (only three months in the case of the price agreements), the fact that the applicants believed in good faith that the notification of the SSI master agreement constituted notification of the 1978 price agreement and the domestic scope of the agreements. The Court should also take into account the effects of the applicable legislation and the role played by the authorities.

91 In the Commission's view the applicants were certainly aware of the fact that their agreements eliminated all competition on margins and on retail prices. Indeed,

they do not deny that when they entered into the agreements they were fully aware of the circumstances, but merely argue that no effective competition was possible on the market in question. The conditions laid down in Article 15 (2) of Regulation No 17 are therefore met.

92 It should be observed first of all that since the 1978 price agreement in no way constituted the implementation of the 1976 SSI master agreement the applicants cannot be heard to argue that they believed in good faith that the notification of the master agreement covered the price agreement.

93 Secondly, the domestic nature of the price agreements cannot be regarded as an extenuating circumstance since the agreements were likely to affect trade between Member States.

94 Thirdly, even if encouragement on the part of the authorities can be held to constitute an extenuating circumstance, it is sufficient to state that in this case the authorities did not encourage the applicants to enter into the agreements restricting competition found to be illegal by the Commission.

95 Fourthly, it appears from paragraph 167 of the contested decision that the Commission took into account the duration of the infringements. While recognizing that the price agreements were each concluded for a fairly short period, the Commission correctly emphasized that they applied precisely to the period during which price competition was possible. Their brief period of validity cannot therefore be regarded as an extenuating circumstance.

96 Finally, with regard to the applicable legislation, the Commission stated that that legislation restricted the parties' freedom of action to a certain extent but did not eliminate it, and that it took that fact into account in setting the amount of the fines. There is no reason to interfere with its assessment on this issue.

97 A number of applicants also put forward special extenuating circumstances. Philip Morris Holland and British-American Tobacco state that they endeavoured to adapt the structure of the SSI so as to make it compatible with competition law. It was thanks to their efforts that the 1976 master agreement was signed and notified

to the Commission. Niemeyer emphasizes that its share of the Netherlands market has significantly decreased in the last few years. Finally, Reynolds argues that it entered the Netherlands market only later and believed in good faith that it could lawfully participate in the agreements which existed in the tobacco sector.

98 The argument of Philip Morris Holland and British American Tobacco cannot be accepted. They were fined not because of their participation in the SSI master agreement but because they took part in the 1974, 1975 and 1978 price agreements. Consequently, the fact that they tried to bring the structure of the SSI into conformity with competition law is irrelevant.

99 Contrary to Niemeyer's argument, the Commission took into consideration the market share of the various firms. It appears from the documents before the Court that the amount of each fine constitutes a percentage of the turnover in 1981 of each undertaking on which a fine was imposed. The turnover of each firm reflects its market share at the time of the Commission decision. The Commission has therefore already taken into account any decrease in Niemeyer's market share between the conclusion of the agreements and the adoption of the decision.

100 Finally, in the course of the proceedings before the Court the Commission accepted that because of its late entry on the Netherlands market Reynolds played a less active role than the other applicants. It appears however from the explanations furnished by the Commission to the Court that the fine was fixed on the basis of the same percentage of turnover for all the applicants, which does not take into account the less active role played by Reynolds. The fine imposed on Reynolds should therefore be reduced from 150 000 ECU to 100 000 ECU, that is, HFL 260 884.

101 It follows from all the foregoing that the applications of the Stichting Sigarettenindustrie, Philip Morris Holland BV, Theodorus Niemeyer BV, British-American Tobacco BV, Sigarettenfabriek Ed. Laurens and Turmac Tobacco must be dismissed in their entirety and that the application of Reynolds must be upheld in so far as it seeks a reduction in the amount of the fine and dismissed in all other respects.

Costs

102 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. According to the first paragraph of Article 69 (3), however, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part. Since Reynolds's action has been upheld in part, the parties to Case 261/82 shall bear their own costs. Since the applicants in all the other cases have been unsuccessful in all their submissions they must be ordered to pay the costs jointly and severally.

On those grounds,

THE COURT (Fifth Chamber)

hereby orders:

(1) The fine imposed on Reynolds is reduced from 150 000 ECU to 100 000 ECU, that is to say, HFL 260 884.

(2) For the rest, Reynolds' application is dismissed.

(3) The other applications are dismissed.

(4) In Case 261/82 the parties shall bear their own costs.

(5) In regard to the other applications the applicants are ordered jointly and severally to pay the costs.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 10 December 1985.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber