need, expressed in Article 87 (2) (b) of the Treaty, to ensure effective supervision and to simplify administration to the greatest possible extent.

6. Although pursuant to Article 190 of the EEC Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt a decision finding an infringement of the rules on competition it is not required to discuss all the issues of fact and law which have been raised by every party during the administrative proceedings.

7. There is no reason why the Commission should not make a single decision covering several infringements of Article 85 of the EEC Treaty provided that the decision permits each addressee to obtain a clear picture of the complaints made against it.

8. The Commission is bound to respect the procedural guarantees provided for by Community law on competition; it cannot, however, be classed as a tribunal within the meaning of Article 6 of the European Convention for the Protection of Human Rights, under which everyone is entitled to a fair hearing by an independent and impartial tribunal.

9. A recommendation made by an association of undertakings and constituting a faithful expression of the members' intention to conduct themselves compulsorily on the market in conformity with the terms of the recommendation fulfils the necessary conditions for the application of Article 85 (1) of the EEC Treaty.

10. Article 85 (1) of the EEC Treaty also applies to non-profit-making associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress.

11. In order that an agreement, decision or concerted practice may 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, decision or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

In Joined Cases 209 to 215 and 218/78

(1) 209/78: HEINTZ VAN LANDEWYCK SÀRL, Luxembourg, represented by Ernest Arendt, Avocat-avoué, with an address for service in Luxembourg at his Chambers, 34 Rue Philippe II;

(2) 210/78: FÉDÉRATION BELGO-LUXEMBOURGEOISE DES INDUSTRIES DU TABAC ASBL (FEDETAB), Brussels, represented by Léon Goffin and Antoine Braun of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

(3) 211/78: ÉTABLISSEMENTS GOSSET SA, represented by Walter van Gerven of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

(4) 212/78: BAT BENELUX SA, Brussels, represented by Philippe-François Lebrun of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

(5) 213/78: COMPAGNIE INDÉPENDANTE DES TABACS CINTA SA, Schaerbeek, represented by Edouard Jakhian and Bernard Hanotiau of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

(6) 214/78: WELTAB SA, Brussels, represented by Pierre van Ommeslaghe of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

(7) 215/78: JUBILÉ SA, Liège, represented by Hans G. Kemmler, Barbara Rapp-Jung and Alexander Böhlke of the Frankfurt am Main Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

(8) 218/78: VANDER ELST SA, Antwerp, represented by Hans G. Kemmler, Barbara Rapp-Jung and Alexander Böhlke, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

applicants,

supported by:

ASSOCIATION DES DÉTAILLANTS EN TABAC, ASBL (ATAB), Brussels, represented by Jean-Régnier Thys of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt;

ASSOCIATION NATIONALE DES GROSSISTES EN PRODUITS MANUFACTURÉS DU TABAC (AGROTAB), Liège, a trade association, represented by Jean-Marie van Hille and Nadine François of the Ghent Bar, with an address for service in

Luxembourg at the Chambers of Fernand Entringer, 2 Rue du Palais de Justice;

and

FÉDÉRATION NATIONALE DES NÉGOCIANTS EN JOURNAUX, PUBLICATIONS, LIBRAIRIE ET ARTICLES CONNEXES ASBL (FNJ), Brussels, represented by Pierre Didier of the Brussels Bar, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt,

interveners,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, acting as Agent, assisted by J.-Fr. Verstrynge and G. zur Hausen, members of the Legal Department of the Commission, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

supported by:

MESTDAGH FRÉRES & Co SA, Gosselies, and EUGÈNE HUYGHEBAERT SA, Mechelen, represented by L. van Bunnen of the Brussels Bar, with an address for service in Luxembourg at the Chambers of P. Beghin, 48 Avenue de la Liberté,

FÉDÉRATION BELGE DU COMMERCE ALIMENTAIRE ASBL (FBCA), Brussels, represented by L. van Bunnen, with an address for service in Luxembourg at the Chambers of the said P. Beghin,

and

GB-INNO-BM SA, Brussels, represented by M. Waelbroeck and L. van Bunnen, advocates, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

interveners,

APPLICATION for a declaration that Commission Decision No 78/670/EEC of 20 July 1978 (IV/28.852 GB-Inno-BM v FEDETAB; IV/29.127 Mestdagh-Huyghebaert v FEDETAB and IV/29.149 — FEDETAB recommendation; Official Journal L 224, p. 29) alleging that the applicants

have committed one or more infringements of Article 85 of the EEC Treaty is void, alternatively, in certain cases, that it be amended,

THE COURT

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

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. Background to the present cases

A — Facts prior to the adoption of the decision

(1) On 2 April 1974 the company GB-Inno-BM (hereinafter referred to as "GB"), Brussels, which operates supermarkets, made a complaint to the Commission of the European Communities pursuant to Article 3 (2) of Regulation No 17 of the Council of 6 February 1962 against the Fédération Belgo-Luxembourgeoise des Industries du Tabac Asbl (hereinafter referred to as "FEDETAB"), a trade association comprising almost all the Belgian and Luxembourg manufacturers of tobacco, the Fédération Nationale du Commerce de Gros en Produits Manufacturés du Tabac Asbl (hereinafter referred to as "FNCG") and the Association des Détaillants en Tabac Asbl (hereinafter referred to as "ATAB"). By that complaint it asked the Commission to start proceedings against the three associations to compel them to put an end to various infringements of Article 85 of the EEC Treaty which arose from certain agreements made by those associations.

The Commission forwarded a copy of the complaint to FEDETAB and ATAB and on 29 July 1974 initiated proceedings under Article 9 (3) of Regulation No 17. The Commission also forwarded a copy of the complaint to the Association Nationale des Grossistes

Itinérants en Produits Manufacturés en Tabac Asbl (hereinafter referred to as "ANGIPMT"), an association of wholesalers founded following the dissolution of the FNCG in 1974.

After FEDETAB, ATAB and ANGIPMT had made their observations on GB's complaint the Commission on *18 July 1975* forwarded to FEDETAB and to all its members a *statement of the matters to which it had taken objection,* stating that in its opinion certain agreements, decisions and concerted practices of FEDETAB and of its members were contrary to Article 85 of the Treaty.

During the course of December 1975 FEDETAB and certain of its members (that is to say in particular all the applicants in these cases) answered the statement of objections. Following a request by GB to be informed of the answers to the objections the Commission forwarded to GB on 2 October 1975 certain answers (including that from FEDETAB). On 7 October 1975 the Commission received letters from ANGIPMT and the Europäischer Tabakwaren-Großhandels-Verband e.V. (hereinafter referred to as "ETV"), Cologne.

(2) On 10 and 13 October 1975 respectively Mestdagh Frères & Cie SA, wholesalers with multiple branches, and Eugène Huyghebaert SA, wholesalers of foodstuffs, (hereinafter referred to respectively as "Mestdagh" and "Huyghebaert") wrote to the Commission asking to be joined to the complaint by GB.

On 21 October 1975 Mestdagh and Huyghebaert lodged official complaints with the Commission pursuant to Article 3 (2) of Regulation No 17.

On *22 October 1975* there was a *hearing* of FEDETAB, certain of its members (that is to say in particular all the applicants) and GB.

In November 1975 the Commission forwarded to Mestdagh and Huyghebaert a copy of its objections and of certain answers by the applicants and forwarded to the applicants a copy of the complaint by Mestdagh and Huyghebaert for their comments.

(3) On 1 December 1975 FEDETAB forwarded to the Commission pursuant to Articles 2 and 4 of Regulation No 17 the text of a *"Recommendation for cigarette sales in Belgium"* adopted by the board of FEDETAB. Although the document was presented as a unilateral act by FEDETAB it was drafted with the object of being applied by all the members of FEDETAB or some of them. The purpose of forwarding the document, according to FEDETAB, was to obtain negative clearance for it from the Commission or at least a decision to apply Article 85 (3). If the recommendation were accepted by all or some of the members of FEDETAB it could be interpreted as an agreement or at least as the possible basis of concerted practices within the meaning of Article 85. In any event neither the recommendation nor the concerted practices which might result therefrom were intended to or could in fact prevent, restrict or distort competition and would not be likely to affect trade between Member States. However that might be there should be a declaration of inapplicability pursuant to Article 85 (3) in respect of the recommendation.

The other applicants, who are cigarette manufacturers and members of FEDETAB, subsequently informed the Commission that they intended to follow the recommendation and wished to be party to its notification.

During the course of December 1975 and January 1976 the applicants made written observations on the complaints by Mestdagh and Huyghebaert. In February 1976 the Commission forwarded those observations to Mestdagh and Huyghebaert and received from them written observations in answer. It also received a statement from ANGIPMT.

On 10 May 1976 the Commission extended the proceedings initiated on 19 July 1974 to the FEDETAB recommendation of 1 December 1975 and on 17 May 1976 it sent the applicants a *second notification of objections* which related to the recommendation.

The applicants answered that notification of objections and the observations by Mestdagh and Huyghebaert during July 1976. In September 1976 ATAB and the Consortium Tabacs — Groep Tabak (hereinafter referred to as "GT"), Herent, a *de facto* association comprising certain of the former members of ANGIPMT (which had ceased to exist) and future members of the Association Nationale des Grossistes en Produits Manufacturés du Tabac (hereinafter referred to as "AGROTAB") (a trade association created in 1977 following the dissolution of ANGIPMT) made written observations on the objections notified on 17 May 1976.

On *22 September 1976* the Commission gave a *second hearing* to the applicants.

(4) In July and October 1977 the Commission sent the applicants final requests for information pursuant to Article 11 of Regulation No 17.

On 13 December 1977 the Advisory Committee on Restrictive Practices and Dominant Positions gave its opinion pursuant to Article 10 of Regulation No 17.

B — The decision

On 20 July 1978 the Commission took Decision No 78/670/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/28.852 — GB-Inno-BM/FEDETAB; IV/29.127 — Mestdagh and Huyghebaert/FEDETAB; IV/29.149 — FEDETAB recommendation) (Official Journal L 224, p. 29). According to Article 4 thereof the decision was addressed to all the applicants in these cases, that is to say FEDETAB and the following undertakings (members of FEDETAB):

— Cinta SA (hereinafter referred to as "Cinta"), Brussels;

— Éts. Gosset SA (hereinafter referred to as "Gosset"), Brussels;

— Jubilé SA (hereinafter referred to as "Jubilé"), Liège;

— Vander Elst SA (hereinafter referred to as "Vander Elst"), Antwerp;

— Weltab SA (hereinafter referred to as "Weltab"), Brussels;

— BAT Benelux SA (hereinafter referred to as "BAT"), Brussels;

— Heintz van Landewyck Sàrl (hereinafter referred to as "HvL"), Luxembourg.

(a) Summary of the operative part

Article 1 of the decision states that the agreements between the undertakings referred to in Article 4 and the decisions by an association of undertakings taken by FEDETAB concerning the organ-

ization of the distribution and sale of tobacco products in Belgium and having as their object:

1. the approval and classification of wholesalers and retailers into different categories by FEDETAB in order to allocate different profit margins to such categories;

2. the maintenance of re-sale prices set by the manufacturers under the agreements of 22 May and 5 October 1967 between FEDETAB and FNCG and the supplementary agreement of 29 December 1970;

3. the restrictions imposed by FEDETAB on the approval of certain categories of wholesalers;

4. the ban on re-sales to other wholesalers, under the joint measures and the additional agreement of 22 March 1972;

5. the application to wholesalers and retailers of standard terms of payment, under the joint measures of 23 December 1971;

6. the decision of FEDETAB to oblige retailers to stock a minimum number of brands and the agreements entered into and joint measures taken by certain of its members to ensure that retailers fulfilled their obligation:

"constituted, from 13 March 1962 to 1 December 1975, infringements of Article 85 (1) of the Treaty establishing the European Economic Community".

Article 2 states that the FEDETAB recommendation which took effect on 1 December 1975 and has as its object:

1. the division of Belgian wholesalers and retailers into categories and the allocation to the latter of different profit margins;

2. the application to wholesalers and retailers of standard terms of payment; and

3. the granting to wholesalers and retailers of end-of-year rebates:

"constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community and does not qualify for exemption under Article 85 (3) thereof".

Article 3 (1) provides that the applicants are required to terminate the infringement referred to in Article 2 and in particular "they shall in future abstain from all acts whatsoever having the same object as the FEDETAB recommendation". Article 3 (2) provides that FEDETAB is required forthwith to inform all its members to which the decision was not addressed of the contents thereof.

(b) Summary of the statement of reasons

(1) Facts

(aa) The production and consumption of manufactured tobacco in Belgium (Preamble, paragraphs 1 to 10)

The Commission finds that of the manufactured tobacco products made in Belgium, 94% comes from imported unmanufactured tobacco, 4.5% from Belgian unmanufactured tobacco and 1.5% from tobacco refuse. Consumption is approximately as follows: 70% cigarettes, 13% smoking tobacco, 8% cigars and 8.5% cigarillos. Almost all the Belgian and Luxembourg producers of manufactured tobacco belong to

FEDETAB, which was set up at the beginning of 1946.

After analysing the objects and structure of FEDETAB the Commission points out that the member firms produce or import roughly 95% of the cigarettes and between 75 and 80% of the cigars and cigarillos sold in Belgium. Ten FEDETAB members also import foreign branded products and in 1974 they imported 51% of the cigarettes and 12 to 14% of the cigars imported into Belgium, or about 5% of the cigarettes and 10% of the cigars sold there. They market the imported products through the same distribution networks as products they manufacture themselves. Nearly all the tobacco products imported into Belgium and Luxembourg come from other EEC countries.

(bb) Pricing and charging of tax on manufactured tobacco products in Belgium (paragraphs 11 to 18)

The Commission observes that in Belgium there are special tax arrangements for manufactured tobacco: an excise duty taking the place of VAT is charged in the form of an *ad valorem* component calculated on the retail selling price, at the rate of 55.55% for cigarettes, for example, plus a specific excise duty of Bfr 0.048 per cigarette. In aggregate, tax accounts for approximately 70% of the retail selling price. The retail price which is used as a basis for determining the amount of excise duty payable is set by the manufacturer or importer. The duty is paid when the manufacturer or importer buys tax bands to be affixed to the products. The tax bands specify the retail selling price and are conclusive evidence that all taxes have been paid.

The Commission observes that because of the tax arrangements applicable to manufactured tobacco products in the various EEC countries, wholesalers and retailers wishing to import without going through the manufacturer or official importer will in most cases be prevented from doing so by the very fact that the foreign wholesalers from whom they might wish to buy the products will only have stocks of products already bearing their national tax bands. That constitutes a source of serious technical obstacles of a fiscal nature to their importation.

(cc) FEDETAB distribution arrangements prior to 1 December 1975 (paragraphs 19 to 57)

— Objection relating to the approval and classification of wholesalers and retailers by FEDETAB and entitlement of the various categories to fixed profit margins

The Commission observes that before Regulation No 17 entered into force on 13 March 1962, the 600 or so *wholesalers* were divided up into six categories specified by the Comité Belge de Distribution, a private research establishment set up by distributive firms and co-

operating with the Belgian Ministry for Small Businesses. In 1973 those categories were as follows: specialized itinerant wholesalers (366), handling about 65% of sales; specialized non-itinerant wholesalers (163), handling about 3.5% of sales; food and tobacco wholesalers (33); "Horeca" wholesalers (those in the hotel, restaurant and café business) (14), handling together 3.6% of sales; co-operatives, handling 3.4% of sales; and supermarkets and large stores (200 or 300 retail sales points), handling 9.3% of sales.

The remaining 15% of sales were made direct by the manufacturers.

Each of these categories received a direct rebate corresponding to the maximum margin authorized by the Belgian Ministry of Economic Affairs. The margin was set at 9.2% for popular-brand cigarettes (9.8% from 1 April 1974) and 10.2% for the cheaper and luxury brand cigarettes. Other margins applied to cigarillos and cigars.

From 1 January 1971 specialized itinerant tobacco wholesalers received an additional rebate of 0.2% payable at the end of the year.

Only the co-operatives and supermarkets, doing both wholesale and retail business, were able to keep all the direct rebate, since the regular wholesalers had to pass some of it on to their own retailer customers.

The Commission observes that the 80 000 *retail outlets* in Belgium were, under an agreement betweed FEDETAB and FNCG dated 29 December 1970, split up into "approved retailers" (numbering some 2 000) and "non-approved retailers". According to whether the retailer was approved or not, the wholesaler passed on a proportion of the maximum margin which was 8.05 or 7.05% of the selling price of popular cigarettes and 8.25 or 7.25% of the price of cheaper and luxury cigarettes.

— Objection relating to the agreement of 22 May 1967 between FEDETAB and the FNCG concerning compliance with re-sale prices set by manufacturers, as amended on 5 October 1967 and 29 December 1970

The Commission describes a series of measures taken by FEDETAB and FNCG relating to re-sale prices. It points out in particular that on 22 May 1967 FEDETAB and the FNCG entered into an agreement whereby wholesalers undertook to sell manufactured tobacco products at the price recommended by their suppliers without passing on to their customers any reductions or benefits other than the retailer's margin. Wholesalers who also ran retail outlets further undertook to sell their cigarettes at the retail price indicated on the tax band, without any form of direct or indirect discount to the consumer. By a standard agreement sent by FEDETAB to the "approved retailers" the same day,

each retailer undertook to sell cigarettes at the retail price indicated on the tax band without any reduction or benefits. On 5 October 1967 FEDETAB and the FNCG, in an additional agreement for the interpretation of the 22 May 1967 agreement, stipulated that wholesalers also running retail outlets were regarded as having undertaken to refuse to supply other retailers who did not charge the selling prices indicated on the tax band. On 26 October 1967 the FNCG wrote to its members stating that the manufacturers would not supply cigarettes to wholesalers who continued to supply retailers or distributors who persisted in giving any form of quantity discount when selling to consumers. On 30 October 1967 FEDETAB wrote to all the cigarette wholesalers, asking them immediately to suspend deliveries to several large supermarkets including three companies which subsequently became part of GB Enterprises SA.

FEDETAB and the FNCG signed a further amendment to the agreement on 29 December 1970, by which they agreed to operate a strict and methodical monitoring system to ensure that the agreements were honoured. On 30 June 1972 (the date when the agreement of 22 May 1967 would normally have expired) FEDETAB sent wholesalers a standard agreement entitled "Special agreement on cut-price selling", under which the wholesalers recognized the agreement of 22 May 1967 and the additional agreements of 29 December 1970 and 22 March 1972 (see below) and agreed that from 1 July 1972 to 30 June 1977 they would sell manufactured tobacco products at the price indicated by their suppliers without any rebate or bonus.

The Commission states that according to FEDETAB, those agreements had ceased to apply well before 1974 and could not have applied after the dissolution of the FNCG.

— Objection relating to the FEDETAB decision not to approve new businesses in certain categories of wholesalers

The Commission observes that since 1 January 1971 FEDETAB had decided not to approve any new wholesalers, except in the categories of "specialist itinerant wholesaler" or "hotels/restaurants/cafés", nor to approve new cooperatives or supermarkets except in the categories of "large department stores" and "popular department stores". Applicants for approval in the categories still open had to undertake *inter alia* to observe the set prices, to pay cash and to help with promoting all new brands.

— Objection relating to the joint measures and the additional agreement of 22 March 1972 banning the re-sale of goods to other wholesalers

The Commission observes that on 22 March 1972 the FNCG, referring to the additional agreement with FEDETAB of 29 December 1970, informed its members that in future they were forbidden to sell manufactured tobacco products (1) to food wholesalers and

other wholesalers not directly supplied by manufacturers, where the products concerned were for re-sale to retailers; (2) to wholesalers to whom the manufacturers had already allocated a quota and that supplies would be suspended if this ban were broken. Under the standard agreement which FEDETAB asked them to sign on 30 June 1972 — and which almost all did in fact sign — wholesalers committed themselves to observe the above requirements.

The Commission states that according to FEDETAB, no action was taken under the additional amendment of 22 March 1972, or under the separate agreements made under it, and both had expired one year after the standard agreement was signed, namely on 1 July 1973.

— Objection relating to collective measures on payment dates taken by certain FEDETAB members on 23 December 1971

The Commission states that on 23 December 1971 a letter written on FEDETAB writing paper on behalf of nine tobacco manufacturers, who were members of FEDETAB, was sent to wholesalers and others who enjoyed wholesale price terms, announcing that following a strict time schedule also described in the letter credit would be progressively cut back to a maximum of a fortnight. They also warned that if any of the addressees continued to be slow with their payments the signatories would act together in suspending deliveries. In the Commission's view those collective measures remained operative until December 1975, when the recommendation came into effect.

— Objection relating to agreements and joint action by FEDETAB members to ensure that retailers would stock a minimum range of brands

The Commission observes in particular that when GB Enterprises cut the number of brands of cigarettes it stocked from 62 to 24 FEDETAB announced that cigarette manufacturers would stop their supplies from 1 March 1972 unless GB Enterprises reverted to the number of brands that it had previously stocked. FNCG forbade its members to supply GB Enterprises and other large firms which had also cut their range of cigarettes and all such firms went back to their previous stocks of brands, and the refusal to supply them was ended.

(dd) The FEDETAB recommendation of 1 December 1975 (paragraphs 58 to 76)

In its decision the Commission states that this recommendation which was notified to it by FEDETAB on 1 December 1975 and which was intended to replace the above-mentioned measures concerned only distribution on the cigarette market. The other applicants informed the Commission that they intended to follow the recommendation and wished to be party to the notification.

The firms belonging to FEDETAB account for 80% of all Belgian cigarette sales and their combination within FEDETAB has very great influence on other manufacturers and importers and on wholesalers and retailers. The recommendation thus operates as a genuine mandatory rule of conduct for all firms in the industry.

The Commission observes that from the time the recommendation took effect,

tobacco distribution has been organized as follows:

(i) Maximum trade discounts on invoices to customers and minimum requirements for entitlement

— Wholesale

Any customer:

— buying cigarettes principally for re-sale to other traders,

— buying more than 15 million cigarettes per year for delivery to the same address,

— permanently stocking and regularly selling a range of at least 50 different brands of cigarettes, and

— using suitably equipped premises with adequate storage facilities,

may receive a trade discount on amounts invoiced at the rate of 9.20% of the retail price (including tax) of cigarettes bought (8.36% since 15 October 1977).

Customers satisfying the following conditions are also eligible for further discounts:

Any customer:

— selling four fifths of his purchases of tobacco products to at least 50 outlets in the "Horeca" market, and

— buying more than 5 million cigarettes per year for delivery to the same address,

may receive an extra discount on invoice of 1%, making a total discount of 10.2% (9.27% since 15 October 1977).

Any customer:

— specializing and doing at least 70% of his business in tobacco products,

— buying more than 15 million cigarettes per year for delivery to the same address and re-selling them to at least 30 outlets, or buying more than eight million cigarettes per year and selling them to at least 50 outlets,

— permanently stocking and regularly selling a range of at least 90 different brands of cigarettes,

— actively encouraging distribution and supporting promotion campaigns, and

— agreeing to play an active part in the promotion and distribution of new brands,

may receive an extra discount on invoice of 1.2%, making a total discount of 10.4% (9.45% since 15 October 1977).

— Retail

Any customer:

— buying cigarettes mainly for re-sale to the general public, and

— conducting such sales by way of his own registered business,

may receive a trade discount on invoice equivalent to 7.25% of the value of the retail selling price of the cigarettes bought (6.59% since 15 October 1977).

Customers also satisfying the following requirements may receive an additional rebate:

Any customer:

— selling at least 1.8 million cigarettes per year,

— arranging his shop and his display area in such a way as to indicate clearly that tobacco products are on sale there,

— permanently stocking and regularly selling a range of at least 60 different brands of cigarettes,

may receive an extra discount on invoice of 1%, making a total discount of 8.25% (7.50% since 15 October 1977).

Any customer:

— specializing and doing at least 70% of his business in tobacco products,

— buying at least 3 million cigarettes per year,

— permanently stocking and regularly selling a range of at least 80 different brands of cigarettes,

— using the greater part of his display area in his shop for tobacco products,

— neither selling nor stocking products or goods not in line with the tobacconist trade,

may receive an extra discount on invoice of 2.95%, making a total discount of 10.2% (9.27% since 15 October 1977).

Any customer:

— regularly distributing tobacco products to at least 30 retail outlets belonging or affiliated to him,

— buying at least 150 million cigarettes per year to be distributed among all the retail outlets belonging or affiliated to him,

— permanently stocking and regularly selling a range of at least 50 different brands of cigarettes,

may also receive an extra discount on invoice of 2.95%, making a total discount of 10.2% (9.27% since 15 October 1977).

(ii) End-of-year rebate

Every direct customer (wholesaler or retailer) may receive from FEDETAB end-of-year rebates according to the table set out in the recommendation and calculated on the basis of his total annual purchases of cigarettes of all brands from all manufacturers, whether Belgian or foreign and whether or not a member of FEDETAB.

(iii) Terms of payment

The normal rule is cash payment, but special periods of credit may be agreed on between a manufacturer and his customers of not more than a fortnight from the invoice date.

(2) Applicability of Article 85 (1) of the Treaty

(aa) FEDETAB distribution arrangements prior to 1 December 1975 (paragraphs 77 to 93)

The Commission considers that of these measures those concerning the approval and classification of wholesalers and retailers by FEDETAB, and allowing of fixed margins to the categories of wholesalers and retailers and the keeping of the minimum range constituted both

decisions by associations of undertakings and also agreements between undertakings; those concerning the maintenance of retail prices and terms of payment constituted agreements between undertakings; and the limitation by FEDETAB of access to certain categories of wholesalers constituted a decision by an association of undertakings.

These agreements and decisions have as their object and effect the restriction of competition within the common market.

The Commission gives the following reasons for that view:

The practice of dividing wholesalers and retailers up into several categories and allowing fixed margins to each category, which is what FEDETAB and its members were doing, constituted a restriction of competition for both manufacturers and wholesalers, since the manufacturers no longer had the opportunity of competing against each other on mark-ups or the wholesalers in the services they rendered to the manufacturers.

Considered as a whole the measures and actions taken before 1 December 1975 in relation to prices fixed by the manufacturers operating within the FEDETAB association had the object and the effect of preventing wholesalers and retailers from competing on prices in respect of individual brands.

The fact that Belgium, through the new Article 85 of the VAT Code (which came into force on 1 January 1971) and other excise provisions, compelled the ultimate retailer to sell his merchandise at the price indicated on the tax band does not prevent the system imposed by FEDETAB and its members on Belgian wholesalers and retailers from being caught by Article 85. In that respect the Commission points out that Article 58 of the VAT Code does not contain any clause governing wholesalers' selling prices.

The restriction placed on the number of wholesalers eligible for approval in certain categories constituted a barrier to market entry for those who were not approved.

The prohibitions on re-sale to certain intermediaries imposed on wholesalers by the collective measures and the additional agreement of 22 March 1972 had the effect of preventing them from making certain sales and hence from improving their position on the market.

The decision of 23 December 1971 to saddle wholesalers with maximum credit terms reinforced the anti-competitive effect of the other restrictive measures, notably the rule against discounts and rebates.

As regards the requirement that retailers stock the minimum range of brands, the retailers' opportunities for competition were perceptibly restricted, not only because they were prevented from pushing a particular brand on which they

could obtain a bigger discount, but also because they were forced to tie up part of their working capital in stocks of various slow-moving brands.

In answer to the claim of the applicants that such restrictions of competition were not significant because the Belgian Government levies heavy taxes and requires notification of the re-sale prices and profit margins for tobacco products so that competition is already substantially restricted and uniform conduct is imposed on all the firms operating in the market, the Commission points out that if legislation has the effect of restricting competition, the added effects of private arrangements restricting competition can only be the more significant.

As regards affecting trade between Member States, the Commission maintains that the decisions and agreements in question were likely to affect trade between Member States not only in that the largest cigarette manufacturer in Luxembourg was a FEDETAB member, and hence all its sales to Belgium were hit by the same restrictions on competition, but also because a large proportion of the cigarettes (51% of imports, or 5% of all sales) and cigars (12 to 14% of imports, or 10% of all sales) arriving in Belgium each year are imported via manufacturers who are FEDETAB members and therefore distribute these imports under the same conditions as their own products.

Although the tax arrangements in force constituted a hindrance of parallel imports by wholesalers and retailers, the fact remains that the alteration of trading conditions in Belgium was such as to divert the flow of trade from its normal course (that is, the course it would have followed in the absence of the restrictions of competition actually observed), and so to affect trade between the Member States.

(bb) The FEDETAB recommendation of 1 December 1975 (paragraphs 94 to 108)

The Commission takes the view that the recommendation is a decision by an association of undertakings within the meaning of Article 85 (1) and also an agreement between the undertakings which have agreed to it. As evidence for its finding that the recommendation has the object and effect of restricting competition in the common market the Commission puts forward the following reasons:

Like the system operated by FEDETAB and its members before 1 December 1976 the recommendation divides Belgian wholesalers and retailers into several categories and specifies profit margins for each of them, which involves the same restraints on competition as before.

The end-of-year rebates system as finally brought in by the recommendation

effectively stifled all competition in this field between the manufacturers who had signed it. The aggregated rebate scheme in the recommendation means that the total rebate granted by each manufacturer is calculated by applying the appropriate rate to the customer's total turnover. Under this system there is no incentive for intermediaries to make greater efforts with a view to obtaining improved benefits from manufacturers. Further, it enables manufacturers to know and foresee precisely their competitors' sales policy.

The joint, uniform determination of credit periods has the effect, as in the previous system, of preventing competition in this area.

In answer to the arguments put forward by FEDETAB and some of its members that a certain amount of competition continued to exist in the areas covered by the recommendation in spite of its provisions, the Commission points out that, according to the information it has obtained, all the various manufacturers, none of whom, incidentally, has disclaimed the recommendation or indicated its intention to ignore it, have adopted identical operating methods which are in line with the recommendation.

For the reasons already set out it cannot be accepted that the restrictions on competition flowing from the recommendation were not appreciable by reason of the State intervention in the tobacco industry.

Trade between Member States is liable to be affected by the recommendation for the same reasons as apply to the previous decisions and agreements and further because in practice if Belgian and other Community importers and manufacturers who did not sign the recommendation want to introduce and sell their products in Belgium, in order to obtain the collaboration of Belgian wholesalers and retailers they must offer them terms of trade at least as generous as those given by FEDETAB, and in particular must give them an end-of-year rebate at least equal to that given under the recommendation, without receiving any benefit in return.

(3) Inapplicability of Article 85 (3)

(aa) FEDETAB distribution arrangements prior to 1 December 1975 (paragraphs 109 to 112)

The Commission alleges that in the present case it is unable to consider applying Article 85 (3) to the decisions and agreements relating to the period 13 March 1962 to 1 December 1975, since the agreements and decisions were not notified to it in accordance with Article 4 (1) of Regulation No 17 although they did not belong to any of the categories of agreements and decisions exempted from notification by Article 4 (2), and the last sentence of Article 4 (1) expressly excludes the making of a decision applying Article 85 (3) to a non-exempt agreement for such time as it has not been notified.

(bb) The FEDETAB recommendation (paragraphs 113 to 134)

The Commission deals with the applicants' claim that the system for the joint fixing of proft margins, end-of-year rebates and terms of payment which they have established contributes towards improving the distribution of the products manufactured by the FEDETAB members who signed the recommendation.

It challenges in the first place the argument that the existence of a large number of retail outlets and the retailers' obligation to offer his customers a large number of brands have the automatic effect of improving distribution. There is no evidence to show why the distribution system set up by the recommendation should be more beneficial to the dealers and to their customers than a genuinely competitive system permitting full expression of consumer preferences.

The very great number of retail outlets in Belgium (80 000) must inevitably increase the cost of distributing these products, since they must be perfectly fresh when they reach the customer and therefore call for a rapid stock turnover. Of these retail outlets, a very few are specialist retailers, and most offer their customers only a very limited range of brands of cigarettes.

If the services offered by specialized wholesalers and retailers are as valuable as FEDETAB and its members maintain, retailers and consumers cannot fail to give them their custom whatever the financial conditions.

Granting specialist wholesalers and retailers more favourable conditions "in order to ensure their survival" (although specialist wholesalers, who account for 80% of sales in Belgium, do not seem to be in any immediate danger) can be interpreted only as an attempt artificially to keep firms on the market when the ultimate buyer is not convinced that they are so essential and the normal forces of competition would have put them out of business.

The Commission observes further that it is perfectly possible that people in categories benefiting from a lower margin may provide better services in many fields (for example, storage conditions, number of brands stocked, number of visits to customers, and the promotion of new brands) than specialist wholesalers and retailers.

Further, it is obvious that the protection of specialist wholesalers cannot be adduced as a reason for the end-of-year rebates system, since such rebates are granted indiscriminately to all categories of wholesalers.

Finally the wholesalers and retailers who have the disadvantage of having to stock a large number of different brands find even more onerous the recommendation prohibiting terms of payment of longer than a fortnight, a prohibition which can only increase overheads at every level of distribution with no advantage to the consumer.

The Commission observes that the recommendation does not, therefore, lead to improvements in distribution which would offset the inherent restrictions of competition, or allow consumers a fair share of any benefit which might result.

Mainly for the reasons set out above, the recommendation does not satisfy the tests for the application of Article 85 (3).

2. Course of the procedure

Each of the applicants in the present cases has brought an action for a declaration that the Commission Decision of 20 July 1978 is void or alternatively, in certain cases, for it to be amended. Those actions were brought and lodged at the Court Registry during September and October 1978.

Each of the applicants, by separate documents, applied for the suspension of the operation of Article 3 (1) (and in certain cases, Article 2) of the decision until the Court has given judgment on the substance of the case. Those documents were lodged at the Court Registry during October 1978.

By order dated 26 October 1978 the Court decided to join the present cases for the purposes of the oral and written procedure.

By an order of the same date the Court allowed ATAB and AGROTAB to intervene in support of the claims of the applicants.

By order dated 30 October 1978 the President of the Second Chamber of the Court, taking the place of the President of the Court pursuant to the second paragraph of Articles 85 and 11 of the Rules of Procedure, ordered as an interim measure that the operation of Articles 2 and 3 of the decision should be suspended pending final judgment by the Court. It was stated in particular in the grounds of the order that every member of FEDETAB was free to disregard at any time the rules agreed by the FEDETAB recommendation of 1 December 1975.

By order dated 28 March 1979 the Court decided to allow Mestdagh, Huyghebaert, FBCA and GB to intervene in support of the Commission.

By order dated 27 June 1979 the Court decided to allow the Fédération Nationale des Négociants en Journaux, Publications, Librairie et Articles Connexes Asbl (hereinafter referred to as "FNJ") to intervene in support of the applicants.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

Nevertheless pursuant to Article 21 (2) of the Protocol on the Statute of the Court (EEC) it asked the Belgian Government to answer in writing by 20 February 1980 at the latest the question set out in IV below.

II — Conclusions of the parties

1. The main or sole claim of *all the applicants* is for a declaration that the decision as a whole is void.

Weltab, the applicant in Case 214/78, claims in the alternative that the Court should refer the case back to the Commission with an order to consider the applications for exemption under Article 85 (3) of the Treaty in respect of (a) the distribution systems of FEDETAB before 1 December 1975 and (b) the FEDETAB recommendation of 1 December 1975.

Jubilé, the applicant in Case 215/78, claims in the alternative that there should be a declaration that in so far as it provides that the FEDETAB recommendation does not qualify for exemption under Article 85 (3), Article 2 of the decision is void, as is, in consequence, Article 3 (1).

Vander Elst, the applicant in Case 218/78, claims that the Court should:

in the alternative,

— Declare Article 2 and Article 3 (1) of the decision void;

in the further alternative,

— Declare Article 2 of the said decision void in so far as it provides that Article 85 (3) cannot be applied;

— Declare Article 3 (1) of the said decision void.

All the applicants claim that the Commission should be ordered to pay the costs.

The *Commission* contends in its defence that the applications should be dismissed as unfounded and the applicants be ordered to pay the costs.

In its rejoinder the *Commission* contends that the Court should:

— Dismiss the applications as unfounded;

— Dismiss the claims of the interveners, ATAB and AGROTAB, as unfounded;

— Order the applicants to pay the costs;

— Order the interveners, ATAB and AGROTAB, to pay the costs of their intervention.

2. *ATAB and AGROTAB, interveners,* support the claims of the applicants for a declaration that the decision is void and that the Commission should be ordered to pay the costs.

In its observations on the pleadings of ATAB and AGROTAB the *Commission* contends that the claims of those interveners should be rejected as unfounded and that they should be ordered to bear the costs of their intervention.

Mestdagh, Huyghebaert, FBCA and *GB,* interveners, support the contention of the Commission that the applications be dismissed as unfounded and the applicants be ordered to pay the costs including those of the said interveners.

In its answer to the interveners FBCA and GB, the applicant *FEDETAB* (Case 210/78) formally asked the Court to order those interveners to pay the costs of their intervention.

Jubilé, the applicant in Case 215/78, answered the interveners Mestdagh, Huyghebaert, FBCA and GB without, however, presenting any formal conclusions, whilst the *Commission* in its observations on the pleadings of those interveners repeated the contentions made in its rejoinder.

In its answer to the intervener GB, the applicant *Vander Elst* (Case 218/78) claimed that GB should be ordered to pay the costs of its intervention.

The *FNJ, intervener,* supports the claims of the applicants and formally asks for a declaration that the decision is void and that the Commission should be ordered to pay the costs of the action including the intervention.

In its observations on the intervention of the FNJ the *Commission* contends in particular that the submissions of the FNJ be rejected and that it be ordered to pay the costs caused by its intervention.

III — Submissions and arguments of the parties

A — Formal and procedural submissions made by most of the applicants jointly concerning in particular the rights of the defence

First submission: infringement of Article 19 (2) of Regulation No 17 and Article 5 of Regulation No 99/63 inasmuch as the Commission refused to hear the associations of wholesalers and retailers concerned

Summary of the applications

All the applicants, save *Vander Elst,* complain that the Commission refused to hear the associations ANGIPMT, ATAB and GT, in disregard of the provisions of Article 19 (2) of Regulation No 17, which provides that applications to be heard shall, where they show a sufficient interest, be granted; there is similar disregard for Article 5 of Regulation No 99/63 which provides that the Commission shall afford persons the opportunity of making known their views in writing within such time-limit as it shall fix.

Summary of the defence

In answer the *Commission* states that it did not refuse to hear the above-mentioned associations but refused only to invite them to take part in the second hearing on 22 September 1976 because since they had not taken part in the recommendation they had no sufficient interest in taking part in that hearing. Those associations had ample opportunity of making known their point of view during the administrative proceedings and had effectively made use of that opportunity primarily in writing. The Commission considered their observations in detail before taking its decision.

Second submission: infringement of Article 19 (2) of Regulation No 17 and Article 3 (3) of Regulation No 99/63 and of the rights of the defence inasmuch as the Commission refused to accede to the request by FEDETAB to hear two associations of wholesalers

Summary of the applications

This submission was made to a greater or lesser extent by *FEDETAB* and by the other applicants, save Jubilé and Vander Elst.

FEDETAB stresses that where it considers it necessary the Commission may hear anyone (Article 19 (2) of Regulation No 17) and that undertakings against which proceedings are initiated may propose that the Commission hear persons who may corroborate facts alleged (Article 3 (3) of Regulation No 99/63). In the view of FEDETAB the Commission's power is discretionary

only where its exercise does not adversely affect the rights of the defence.

On 30 June 1976 FEDETAB asked the Commission to invite to the hearing two associations of wholesalers, namely GT and the Nationale Vereniging van Familiale Groothandelsondernemingen (hereinafter referred to as "NVFG"), Vrasene, a *de facto* association of wholesalers established after the dissolution of the FNCG.

By a letter dated 20 July 1976, the Commission rejected that request and gave as reasons the fact that "the agreement ... was and remains the act of the manufacturers alone ... and no wholesalers or retailers whatsoever have taken any part therein".

The facts which the associations were in a position to corroborate related basically to whether there was an infringement and the grounds for exemption.

The Commission's refusal is all the more arbitrary in that the contested decision constantly refers to the alleged effects upon the wholesale and retail trade. It is patent from the decision itself that the Commission has acted outside its powers or has even misused its powers by depriving the applicant without legal justification of the opportunity of having the facts which it put forward corroborated. The Commission has seriously disregarded the rights of the defence.

Summary of the defence

The *Commission* states that the request made in the letter from FEDETAB of 30 June 1976 does not mention that it was made for the purpose of having certain facts put forward by FEDETAB corroborated but limits itself to asking the Commission to hear the above-mentioned undertakings "... so that the Commission may be put completely in the picture ...". In view of its wording the request by FEDETAB could not be regarded as a proposal based on Article 3 (3) of Regulation No 99/63.

The reply by the Commission of 20 July 1976 shows quite clearly that the Commission was basing its answer on Article 5 of Regulation No 99/63 relating to the hearing of third parties and not on Article 3 (3) concerning the corroboration of facts alleged.

Neither FEDETAB nor the two associations concerned gave sufficient evidence of the interest of the associations in being heard.

In any event the Commission gave the two associations of wholesalers concerned a sufficient hearing during the administrative procedure.

Third submission: disregard of fundamental principles of the rights of the defence concerning the hearings as prescribed by Regulations Nos 17 and 99/63 inasmuch as persons delegated by the Commission to conduct the hearing on 22 October 1975 were not all present during the whole of the hearing

Summary of the applications

This submission was made largely or partly by *FEDETAB* and the other applicants, save Jubilé and Vander Elst. It is based on the allegation that it was

mentioned in the minutes that the persons delegated by the Commission were not all present when the hearing resumed on 22 October 1975 at 3 p.m.

Summary of the defence

The *Commission* points out that its practice of delegating only the director who presides over the hearing is clearly shown in the note which accompanies the invitation to the hearings. Since the only person delegated to conduct the hearing of 22 October 1975 was Mr Dennis Thompson, Director of the Restrictive Practices and Abuse of Dominant Positions Directorate, it is therefore a matter of indifference that some officials who were not delegated were absent for a few minutes from that hearing.

Fourth submission: disregard of essential formalities provided for by Regulations Nos 17 and 99/63, of Article 190 of the Treaty and of the rights of the defence inasmuch as the Commission improperly joined the various cases and did not give reasons therefor in its decision

Summary of the applications

This submission has been made mainly or in part by *all the applicants.*

FEDETAB and *Vander Elst* complain in particular that the hearing on 22 October 1975 took place and was concluded without their having been informed of the complaints by Mestdagh and Huyghebaert on which, however, the contested decision is also based. In the view of *Vander Elst* the Commission has infringed essential procedural requirements.

HvL contends that in so far as the decision takes account of the complaints by Mestdagh and Huyghebaert the rights of the defence were disregarded and there was an infringement of the provisions of Regulation No 99/63 and in particular Article 4 thereof.

Summary of the defence

As far as the facts are concerned the *Commission* points out *inter alia* that the complaints made by Mestdagh and Huyghebaert on 21 October 1975 relate solely to part of the proceedings initiated on 29 July 1974 following the complaint lodged by GB, during which the Commission communicated the complaints to the applicants on 18 July 1975 and made preparations to organize a hearing on 22 October 1975.

The connexion between the three complaints lodged by GB, Mestdagh and Huyghebaert was recognized on various occasions by FEDETAB and by several other applicants as appears in particular from their statements recorded in the minutes (pages 10 to 12) of the hearing of 22 October 1975 (Annex No 2 to the defence). In any event mere perusal of the three complaints reveals that the new complaints have the same objective as that lodged by GB.

The Commission sent a copy of the new complaints to the applicants by letter dated 13 November 1975. The applicants made written observations thereon in December 1975 and January 1976. After

Mestdagh and Huyghebaert had answered at the Commission's request the observations of the applicants, the latter in July 1976 sent further written observations on that answer, which had been sent to them by the Commission, and thus expressed for a *second time* their point of view in writing on the complaints by Mestdagh and Huyghebaert.

As regards the *law,* the Commission points out that there is no rule providing that the Commission must take decisions "joining" cases of files. Since the concept of joining is alien to its administrative practice the decision did not have to state reasons on this subject. There was *only one set of proceedings* which led to the decision of 20 July 1978.

In the "sugar" cases (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and Others* v *Commission* [1975] ECR 1663) the Court stated (at paragraph 111 on p. 1930) that there was no reason at all why the Commission should not make a single decision covering several infringements. *A fortiori* it should be possible for it to give a single decision in relation to one infringement which has been the subject of several complaints even if they include fresh complaints lodged during the course of proceedings already initiated by the Commission.

In those circumstances and since it had already, following the first complaints, opened the proceedings on 29 July 1974 and sent its objections on 18 July 1975, it was sufficient for the Commission to inform the applicants of the content of the new complaints and receive their observations thereon without its having to send them a further formal notification of objections which would necessarily have repeated that sent on 18 July 1975.

In conclusion in respect of that submission the Commission states that its conduct did not make the course of the proceedings irregular and did not adversely affect the rights of the defence.

Summary of the replies

FEDETAB alleges that the very frequent decision to join different proceedings is not simply an internal measure but a decision within the meaning of Article 189 of the Treaty especially when, as in this case, it directly affects the interests of those subject thereto. The reasons on which it is based should therefore be stated pursuant to Article 190 of the Treaty.

The Commission's fundamental error was to treat three distinct proceedings haphazardly in one decision without having given prior notice to FEDETAB thereof. In particular it is clearly apparent from the Commission's letter of 13 November 1975 that the complaints by Mestdagh and Huyghebaert were the subject of separate proceedings. Although FEDETAB had the opportunity of making written observations on those complaints, they were prior to the notification of the recommendation of 1 December 1975 and could therefore relate only to the previous measures. Nevertheless the contested decision expressly states that Mestdagh and Huyghebaert challenged certain provisions of the recommendation.

It follows that since the second proceedings did not follow a regular course and since there was no notification of objections and as the hearing which FEDETAB might have obtained did not take place, FEDETAB was unable to answer the objections which were not particularized, which was in breach of the rights of the defence.

Jubilé stresses that this submission concerns the *joinder of all the three proceedings* and not only the Mestdagh and Huyghebaert proceedings; it concerns less the joinder in itself so much as the fact that it was done at the last minute *by the decision which terminated the proceedings.*

It *disputes* the fact, of which it states that it was *unaware,* that the Commission decided on 10 May 1976 to "extend" Case IV/29.852 to cover Case IV/29.149. It stresses that a preliminary draft of the decision still treated the proceedings as separate and asks that the Commission be invited to lodge that preliminary draft together with the draft decision (the French versions).

The Commission's conduct made the course of the proceedings irregular and reduced the rights of the defence.

The fact that several cases cannot be joined without the parties' being informed thereof is also apparent from Regulations Nos 17 and 99/63 and thus relates to rules on *essential procedural requirements.* Article 2 of Regulation No 99/63 provides that the Commission shall inform undertakings in writing of the objections raised against them. Article 4 provides that the Commission shall deal only with those objections raised against undertakings in respect of which they have been afforded the opportunity of making known their views.

Although it is true that the applicant has twice expressed its views regarding the complaints by Mestdagh and Huyghebaert, it has *never* done so in respect of the objections by the Commission because the Commission has never informed it of its objections in Case IV/29.127 (contrary to the position in Cases IV/28.852 and IV/29.149). The complaints by Mestdagh and Huyghebaert cannot be regarded in that respect as objections and the applicant never considered them as such since the Commission never said that it was adopting them as its own.

In the applicant's view the Commission is mistaken in stating that in the circumstances of the case it was relieved of the duty to give formal notice of the objections. Article 2 of Regulation No 99/63 is quite definite in that respect.

Disregard of the rights of the defence arising from the secret joinder of the cases led to no hearing taking place in Case IV/29.127. How could the applicant have asked for a hearing when it was completely unaware that proceedings had been initiated and *a fortiori* of the existence of objections in respect thereof?

The applicant therefore *claims* that the decision must be declared void in so far as it relates to Case IV/29.127.

Summary of the rejoinder

Regarding the *facts* the Commission refers *inter alia* to the applicant's conduct during the administrative proceedings and rejects their argument

to the effect that there were three separate proceedings with different objectives.

It admits that Mestdagh and Huyghebaert could obviously not challenge the "recommendation" dated 1 December 1975 in their requests dated 21 October 1975. Nevertheless the Commission considered in its decision that the fixing of the maximum rebates to be granted on invoices to customers and the minimum criteria they had to fulfil in order to benefit as laid down in the recommendation were challenged by Mestdagh and Huyghebaert during the administrative proceedings. On the one hand, those provisions of the recommendation basically adopt the previous system against which Mestdagh and Huyghebaert lodged a complaint and, on the other, Mestdagh and Huyghebaert wrote a letter dated 18 May 1976 on that subject (of which the applicants received a copy) maintaining their objections to the system after being notified thereof on 1 December 1975.

As regards the *law* the Commission refers to the arguments set out in its defence.

Fifth submission: disregard of the general principle of the rights of the defence inasmuch as the Commission refused to disclose the file on which the decision was based

Summary of the applications

This submission is made by *all the applicants,* save Jubilé.

The main argument on which this submission is based is set out in particular by FEDETAB to the effect that the considerable powers of the Commission regarding practices restricting competition require that those concerned shall enjoy procedural guarantees. That implies that they must have knowledge of the file on which by implication or expressly the Commission bases its decision.

That is all the more so since the Court of Justice in order to decide the present cases must have knowledge of the Commission's file and "it would infringe a basic principle of law to base a judicial decision on facts and documents of which the parties ... have not been able to take cognizance and in relation to which they have not therefore been able to formulate an opinion" (Joined Cases 42 and 49/59, *Société Nouvelle des Usines de Pontlieu* v *High Authority* [1961] ECR 53).

On 8 June 1976 FEDETAB, through one of its advisers, could only take note of the fact that the Commission had no document to forward (minutes of hearing of 22 September 1976, p. 19).

The complaints by Mestdagh and Huyghebaert were not forwarded to the applicants until after the hearing on 22 October 1975 which took place without the applicants' having had knowledge of those complaints on which, however, the contested decision is also based.

After the decision was taken the Commission did not answer requests to forward the file on which it based its decision. In that respect *Vander Elst* points out that although the Commission made observations on the matters in relation to which *inspection of the file* had been requested by its legal representative, nevertheless the file was not forwarded.

Summary of the defence

The *Commission* observes that none of the applicants asked it to forward the whole file *before* the decision was taken. The applicants received a copy of the three complaints lodged by GB, Mestdagh and Huyghebaert and were made aware of the facts on which the objections of the Commission were based when those objections were forwarded to them. FEDETAB received a copy of the letter by ANGIPMT which it had requested, namely a letter sent to the Commission by ANGIPMT on 13 February 1976. In these circumstances it was unnecessary for them to receive the whole of the file.

Before the decision was taken the applicants made no request for inspection of a specific document which the Commission did not satisfy.

The requests to inspect the administrative file made *after* the decision was taken could have no effect upon the entirely lawful course of the administrative proceedings which led to that decision. They could not therefore be relied upon for the purpose of having that decision declared void.

Sixth submission: infringement of Articles 20 (2) and 21 (2) of Regulation No 17 inasmuch as the Commission was guilty of a serious breach of business secrecy by communicating certain facts to GB

Summary of the applications

This submission was made in whole or in part by *FEDETAB* and by all the other applicants save Jubilé and Vander Elst.

In the view of *FEDETAB* when information collected by the Commission is, *by its nature*, subject to business secrecy, it may not be made known to third parties, even complainants. That follows from Article 20 (2) of Regulation No 17. *A fortiori* it is so when the undertaking in question states *expressly* that the documents which it is producing are confidential.

A table (Annex 11 to the application) tracing the trend in receipts during the last five years from 160 brands of cigarettes was annexed to FEDETAB's statement of 22 September 1975. The same statement also contained a table of the number of cigarettes bought by the main specialist itinerant wholesalers and a table showing the time the 25 main customers of the principal Belgian cigarette manufacturers took to pay.

Those three tables are of a confidential *nature*. In each case it was *specified* in the statement that they were confidential. Nevertheless they were forwarded to GB which was delighted to have them.

Disregard of that principle of Community public policy vitiates the contested decision.

Summary for the defence

As regards the *facts* the *Commission* confirms that by letter dated 2 October 1975 it forwarded to GB a copy of the whole answer by FEDETAB (including the above-mentioned tables) of 22

September 1975 to the statement of objections of 18 July 1975 which followed the complaint by GB of 2 April 1975.

GB had asked to be heard and in particular to be invited to the hearing and had moreover asked the Commission by letter dated 22 September 1975 to be able to have sight of the answers by the applicants to the objections of 18 July 1975.

It was in answer to that request by GB and to fulfil the obligations under Article 19 (2) of Regulation No 17 that the Commission forwarded a copy of certain of those answers (including that from FEDETAB) to GB and invited it to the hearing on 22 October 1975.

The particulars contained in the tables showing the trend in sales of certain brands, the volume of purchases by certain wholesalers and the terms of payment are essential parts of the answer by FEDETAB. It was therefore proper for the Commission to supply a copy to GB. That method of proceeding enabled GB to make known its point of view in detail on those essential issues.

As regards the *law* the Commission observes that recourse to Article 21 (2) of Regulation No 17 may be dismissed at the outset. It did not include particulars of the three tables in its decision.

The Commission moreover denies that those particulars were subject to business secrecy.

The Commission points out in particular that in order for certain information collected pursuant to Regulation No 17 to be *by its nature* subject to business secrecy it was not sufficient for the applicants simply to say so, and further FEDETAB itself stated in its answer of 22 September 1975 that it was the manufacturers themselves who forwarded the above-mentioned particulars, whereas each manufacturer knew that each of the other applicants could find out particulars concerning its competitors through their representatives on FEDETAB's board of administration. For that reason in particular it is obvious that the manufacturers themselves did not regard those particulars as being by their nature subject to business secrecy *vis-à-vis* their competitors.

The Commission considers moreover that even if those matters were subject to business secrecy the provisions of Article 20 (2) gave it the right and Article 19 (2) the duty to forward them to GB. Any other attitude than that which it adopted would have been capable of disregarding GB's rights of the defence and in particular its right to be fully and properly heard.

Further, and *this is the main issue*, the applicants have in no way shown how this manner of acting has in any way made the administrative proceedings irregular. There is nothing in the file to allow the presumption that the contested decision would not have been taken or would have been different.

Summary of the reply by FEDETAB

FEDETAB observes in reply that "in particular information about undertakings, their business relations or their

cost components" (Article 214 of the Treaty) and such as go beyond "general information or surveys which do not contain information relating to particular undertakings or associations of undertakings" (Article 20 (3) of Regulation No 17) are by their nature subject to business secrecy.

It follows that the three tables are *by their nature* confidential. Further, a manufacturer's business secret does not lose its confidential nature when, in reliance on Article 20 (1) of Regulation No 17 which states that information acquired shall be used only for the purpose of the relevant request or investigation, the secret is notified to the Commission by the trade association to which the manufacturers belong. Whether or not it is known to all the manufacturers a secret is no less a secret in respect of the complainant GB. It was thus a breach of the legitimate expectation derived by FEDETAB from Article 20 (1) of Regulation No 17 for the Commission to forward to GB those confidential documents of which it might make commercial use.

It is apparent from Article 20 (2) of the Regulation that it is solely on the basis of Articles 19 and 21 that the Commission may refuse to recognize the character of documents which by their nature are confidential. Article 21 does not come into question in the present case. Article 19 relating to the hearing does not dispense the Commission from having "regard to the legitimate interest of undertakings in not having their business secrets divulged" (Thiesing, Schröter, Hochbaum, "Les ententes et les positions dominantes dans le droit de la CEE" 1977, p. 66, No 8).

Moreover, it was by no means necessary to forward the whole of the three documents to enable GB to make known its point of view in detail. It was in fact quite unnecessary for the purpose of obtaining its opinion to give the detailed figures showing each manufacturer, wholesaler and brand. To reveal that detailed information is a flagrant breach of business secrecy prohibited by Article 214 of the Treaty, Article 20 (1) and (2) of Regulation No 17 and not authorized in the circumstances of the case by Article 19 of the Regulation properly interpreted.

Breach of secrecy by itself vitiates the whole inquiry and therefore the decision by a defect which must lead to its being declared void without its being necessary for the applicant to show that the decision would have been different if the breach had not been committed.

Summary of the rejoinder

The *Commission* observes in particular that the applicants did not invoke the provisions relating to *business secrecy* (Articles 19 (3) and 21 (2) of Regulation No 17 and Articles 2 (2) and 9 (3) of Regulation No 99/63).

As regards *business secrecy* the Commission challenges the statement by FEDETAB to the effect that Article 20 (3) of Regulation No 17 shows that everything that goes beyond "general information or surveys which do not contain information relating to particular undertakings or associations of undertakings" is by its nature subject to business secrecy.

In the Commission's view that provision on the contrary sets out what is in any

event not covered by the duty on the part of the Commission's officers to observe business secrecy but in no way implies that everything else is by its nature subject to such secrecy.

In its defence the Commission set out the facts, which were not challenged by the applicants, and which show that the details in the three tables in question lost their confidential nature by reason of the fact that they were divulged by the manufacturers themselves to their competitors. In those circumstances the tables must not therefore be regarded as protected by the duty to observe business secrecy which is incumbent upon the Commission's officers.

B — Formal submissions common to most of the applicants relating to Article 85 (3) of the Treaty

Seventh submission: infringement of Article 85 (1) and (3) of the Treaty, Article 4 (2) (1) and (2) (a), Articles 5 and 6 (1) and (2) of Regulation No 17, disregard of the rights of the defence and of the requirement to state the reasons on which the decision was based inasmuch as the Commission refused to apply Article 85 (3) of the Treaty to the measures prior to the recommendation of 1 December 1975 on the ground that those measures were not exempted from notification and since it did not state in answer to the submission by the parties the reasons on which its decision was based in that respect

Summary of the applications

This submission was made to a greater or lesser extent by *FEDETAB* and all the other applicants except Jubilé and Vander Elst.

FEDETAB complains that the Commission did not state reasons why, purely by implication, it rejected the submissions made by FEDETAB in its statement of 22 September 1975 and at the hearing on 22 October 1975 to the effect that the measures prior to the recommendation to which the Commission was objecting ought to have received exemption under Article 4 (2) of Regulation No 17.

It is unanimously accepted that where an agreement, decision or concerted practice is entitled to such exemption, failure to notify does not deprive the parties thereto of the right subsequently to rely on Article 85 (3) and obtain exemption from Article 85 (1) with retroactive effect (Waelbroeck, "Le droit de la Communauté économique européenne", Vol. IV, p. 134, No 44 with references).

In the present case FEDETAB alleged that it was necessary to consider separately the various agreements, decisions or concerted practices which were the subject of the notification of objections.

It is therefore for the Commission to analyse those various measures and to check in each case whether the conditions for applying Article 4 (2) of Regulation No 17 were satisfied.

The applicant sets out the reasons why in its view that was in fact the case.

Summary of the defence

The *Commission* refers to the reasons set out in paragraphs 110 to 112 of the decision for the refusal to grant exemption under Article 85 (3) to the distribution measures adopted by FEDETAB prior to 1 December 1975.

It alleges in particular that a mere perusal of Article 4 (2) of Regulation No 17 to which it referred in paragraph 110 of the decision enables it to be understood, without its being possible for any doubt to remain in that respect, that the measures in question are not affected by that provision in view of the fact that:

— manufacturers from two Member States (Belgium and the Grand Duchy of Luxembourg) were involved and several were subsidiaries of powerful groups from other Member States;

— more than two undertakings, namely at least all the applicants, were involved;

— they did not have as their sole object the matters listed in Article 4 (3) (and it has moreover never been alleged by any applicant that such was the case).

The statement of the reasons on which the decision was based as regards the question of exemption from notification is correct and sufficient.

Eighth submission: infringement of Article 85 (3) of the Treaty, Articles 4 (1) and (2), 5 (1) and (2) and 6 (1) and (2) of Regulation No 17 and Articles 2, 3 and 4 of Regulation No 27 inasmuch as the Commission refused to consider FEDETAB's letter of 26 February 1971 and its enclosures as notification

Summary of the applications

This submission was made to a greater or lesser extent by *FEDETAB* and by all the other applicants except Jubilé and Vander Elst.

In FEDETAB's view it is common ground that the letter dated 26 February 1971, including the enclosures, gave the Commission full and detailed knowledge of all the measures which the Commission subsequently challenged and set out at the same time the reasons why those measures either did not fall, in the view of FEDETAB, under Article 85 (1) or in any event were beneficial to the organization of the market.

Those documents were sent to the Commission by FEDETAB after a discussion between its Director and an official in the Directorate-General for Competition and following a request for information, but the Commission refused to recognize that they might constitute notifications within the meaning of Article 4 (1) and Article 5 of Regulation No 17 and put forward the following reasons:

— Notification was not spontaneous;

— It did not formally ask for exemption;

— It did not refer to the application of Articles 4 and 5 of Regulation No 17;

— It was not made on Forms A and B as prescribed by Regulation No 27, nor were ten copies thereof sent.

That decision is vitiated as *ultra vires* and is deficient in law and in fact for the following reasons:

There is no provision in Regulation No 17 that notification should be "spontaneous". The objective of notification is to bring an agreement, decision or practice to the knowledge of the Commission. That was done in the present case. The notification of 26 January 1971 and the enclosures stated the grounds and the justification for the measures taken and enabled the Commission to form a complete opinion on the questions raised.

No provision of Regulations Nos 17 or 27 requires the formality to which the Commission seeks to subject the applicants in requiring that there should be specific reference to Regulation No 17 and more particularly to Articles 4 and 5 thereof or that a request for exemption be made expressly.

In its letter of 26 June 1971 FEDETAB moreover not only set out the reasons why it considered that the measures it had taken did not affect the principle of competition (which means that in its view there was no ground for prosecuting it under Article 85 (1)) but further it set out in detail the reasons why its price and distribution policy appeared to it to be in the general interest, which implies that it considered that it could have the benefit of Article 85 (3) if it were held that Article 85 (1) applied.

Although Regulation No 22 prescribes formalities for notifications for the purpose of facilitating administration and allowing, by reason of the number of copies required, easy notification of the Member States, those administrative measures do not make it a nullity if they are not observed.

For those reasons the letter sent to the Commission on 26 January 1971 with the enclosures is equivalent to notification within the meaning of Article 4 of Regulation No 17. Since the Commission did not treat it as such the decision should be declared void and the Commission must be invited to rule on the application of Article 85 (3) to the measures prior to 1 December 1975.

Summary of the defence

The Commission points out *inter alia* that when it first stated its objections on 18 July 1975, it expressed the view (on p. 16) that the measures in question could not be regarded as exempt *so long* as they were not notified, since in particular they were not exempt from notification. In its answer of 22 September 1975 (pp. 84 and 85) FEDETAB stated that the letter of 26 June 1971 could in its view be treated as a valid notification.

The use of Form A/B prescribed by Regulation No 27 which refers expressly to Articles 4 and 5 of Regulation No 17 was required principally because notification in that form has important legal consequences including the possibility of granting exemption and immunity from fines.

It is therefore not possible to treat a simple letter, sent to the Commission for another purpose, making no reference to Article 85 (3) of the Treaty or Articles 4 and 5 of Regulation No 17 and moreover not containing all the particulars in answer to the vital questions put in Form A/B, as a valid notification.

FEDETAB, which did not even consider it necessary to make notification in due and proper form following the attitude adopted by the Commission when the objections of 18 July 1975 were sent, cannot in all good faith rely on that submission to obtain a declaration that the decision is void whereas it itself used Form A/B to make notification of the recommendation of 1 December 1975. That submission cannot in any event be relied upon to obtain a declaration that the parts of the decision relating to the recommendation are void.

Ninth submission: infringement of Article 85 (3) of the Treaty, disregard of the duty to state the reasons on which the decision was based and disregard of the rights of the defence inasmuch as the Commission omitted to answer in the decision the main arguments put forward in relation to the application of Article 85 (3)

Summary of the applications

This submission was made to a greater or lesser extent by *FEDETAB* and by all the other applicants except Jubilé and Vander Elst.

FEDETAB complains that the contested decision considers only certain of its arguments (paragraphs 118 to 132) whereas after referring to them itself in the previous recitals (paragraphs 114 to 117) the decision ought to have dealt with them individually.

Summary of the defence

The *Commission* maintains that far from merely answering the arguments put forward by the applicants, paragraphs 118 to 132 of the decision contain an assessment by the Commission of the recommendation in the light of Article 85 (3). The Commission is not bound to state reasons for rejecting all the submissions put forward when there is a correct statement of the reasons on which its decision was based. The statement in that respect is correct and sufficient.

Tenth submission: infringement of Article 4 of Regulation No 99/63, Article 19 (1) of Regulation No 17 and Article 85 (3) of the Treaty inasmuch as the Commission in its decision ruled on objections which had not been notified

Summary of the applications

This submission was made to a greater or lesser extent by *all the applicants.*

FEDETAB points out that before taking a decision the Commission must give the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection (Article 19 (1) of Regulation No 17) and that it may deal only with those objections in respect of which the undertaking has been afforded the opportunity of making known its views (Article 4 of Regulation No 99/63).

In the second notification of its objections the Commission refused to grant exemption under Article 85 (3) on the sole ground that the recommendation did not satisfy the first of the four conditions prescribed by that provision, namely the improvement of production

or distribution of goods or the promotion of technical or economic progress. As a result in its statement of 2 July 1976 and at the hearing on 22 September 1976 FEDETAB dealt only with that condition.

The contested decision, however, refuses exemption on the ground also that the three other conditions are not satisfied.

The applicant was thus deprived of the opportunity of showing that the three conditions were satisfied.

Summary of the defence

The *Commission* states that this submission relates to paragraphs 132 (in part) and 133 of the decision where the Commission, after considering at length in paragraphs 113 to 132 whether the recommendation contributes to improving production or distribution of the products and arriving at the conclusion that the recommendation did not lead to improvements in distribution sufficient to offset the restrictions of competition, added that the recommendation did not allow consumers a fair share of any benefit which might result and *moreover,* in view of the market share of FEDETAB and its members, the agreements made it possible for the undertakings concerned to eliminate competition in respect of a substantial part of the products in question.

It is true that the *last* consideration relating to the condition in Article 85 (3) (b) was added in the decision to the considerations referred to already in the two notifications of objections. That was done mainly because of the importance of that provision in the Treaty. On the other hand it is quite wrong to claim that the applicants did not express their views, or did not during the administrative proceedings have an opportunity of doing so, on all the conditions of Article 85 (3) which had to be satisfied.

The Commission cites in particular the judgment of the Court in Case 41/69 (*ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 91 to 94 at p. 691), to justify the fact that in its decision it took account of matters arising from the administrative proceedings and *completed* the legal argument in support of its refusal of exemption under Article 85 (3) with the considerations in paragraphs 132 (last sentence) and 133, albeit the main argument weighing with the Commission both in the two notices of objections and in the decision relate to the first condition in Article 85 (3).

Finally it points out that the Court has stated, in particular in its judgment in Joined Cases 56 and 58/64 (*Consten and Grundig* v *Commission* [1966] ECR 299 at p. 350), that where one of the four conditions in Article 85 (3) is not satisfied, exemption cannot in any event be granted so that the submission made by the applicants is not sufficient in itself for a declaration that the decision is void on that ground.

C — Observation common to the submissions 1 to 6 and 10

In its *reply FEDETAB* alleges that the seven above-mentioned submissions also constitute an infringement of Article 6 of the European Convention for the Protection of Human Rights. All the other applicants except Jubilé and Vander Elst endorse the arguments which FEDETAB puts forward in that respect.

FEDETAB states that Article 6 of the Convention provides that in the determination of his civil rights and obligations, everyone is entitled to a fair hearing by an independent and impartial tribunal.

It cites the *König* judgment of 31 May 1978 of the European Court of Human Rights (Series A, No 27, p. 30, paragraph 90) in support of its claim that Article 6 of the Convention applies to proceedings initiated by the Commission under Article 85 *et seq.* of the Treaty and of Regulation No 17. It is stated in the *König* judgment that "in ascertaining whether a case *(contestation)* concerns the determination of a civil right, only the character of the right at issue is relevant". It follows that the rights defined by Article 85 *et seq.* of the Treaty and by the implementing regulation are of a civil nature so that Article 6 (1) of the Convention must apply in this case.

Apart from the fact that the Commission is certainly not an independent and impartial tribunal since it is simultaneously prosecutor, judge and apologist of its own decision, the seven above-mentioned submissions all constitute a breach of the right to a fair trial laid down by Article 6 of the Convention.

The *Commission* refers *in its rejoinder* to the statements of the Court of Justice on the subject of fundamental rights in its judgments in *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraphs 3 and 4 at p. 1134 and *Nold* [1974] ECR 491, paragraph 13 at p. 507.

It considers that the Court may take the opportunity to declare that the institutions of the Communities are required to respect the rights protected by the Convention in the context of Community law and that the Court has jurisdiction to ensure respect for that obligation when applying Community law to individual cases.

The Commission is of the opinion that in view of the interpretation which the European Court of Human Rights has given to the expression "determination of . . . civil rights and obligations" Article 6 (1) must be treated as also applying to rights arising from the application of Article 85 of the EEC Treaty. Such application might lead to commercial agreements made by undertakings being declared absolutely void.

Nevertheless the Commission finds it less apparent that it is a *tribunal* within the meaning of Article 6 (1) of the Convention when it uses its powers to apply the rules of the EEC Treaty on competition. In particular it stresses the doubtful nature of its independence of the executive (one of the criteria of a "tribunal" laid down by the European Court of Human Rights in the *Ringeisen*

case, judgment of 16 July 1971, Series A, No 13, paragraph 94 at p. 39) in view of the fact that the executive power of the Community is vested in it.

Even assuming that it must be regarded as a "tribunal" within the meaning mentioned above it considers that the applicants' observations must be rejected because it has in no way committed an infringement of that provision.

D — Submissions relating to Article 85 (1) of the Treaty and common to most of the applicants

Preliminary remarks

In view of the fact that both the applicants and the Commission cite in their arguments a number of both national and Community rules relating to manufactured tobacco products it is appropriate to set out the following observations thereon.

1. Belgian tax rules

Manufactured tobacco and in particular cigarettes are subject in Belgium to an excise system having *ad valorem* excise duty calculated on the retail sale price including value-added tax.

The retail sale price is made up on the one hand of items representing the cost of the tobacco, namely:

— the manufacturer's or importer's share which represents the price free of tax to the wholesaler;

— the wholesaler's margin (the difference between the wholesaler's purchase price and his sale price to the retailer);

— the retailer's margin (the difference between the retailer's purchase price and the sale price to the consumer);

and on the other hand tax items, namely:

— a *specific* excise duty which is a given amount in Belgian francs per item and a special excise duty calculated in the same way;

— a *proportional* excise duty which is a given percentage of the retail sale price and a special excise duty calculated in the same way;

— value-added tax calculated on the value of the tobacco and on the excise duty, at present 6% for cigarettes.

Belgium has an almost exclusively *proportional* system of excise duty (95% proportional excise; 5% specific excise — the minimum permitted by 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 L 303; (see 2 below).

The total of the tax items is usually paid by the manufacturer or importer by buying from the tax authorities bands which are placed on the various manufactured or imported tobacco products and show the retail sale price which has been taken into account in calculating the liability to duty.

The manufacturers and importers are in general free to determine the retail sale price but subject to the Belgian system of maximum price control (see 3 below).

Nevertheless it must be pointed out that retailers are bound strictly to observe the prices shown on the bands. That requirement is imposed in the first place by Article 58 of the VAT code which entered into force on 1 January 1971 and provides that the price on the tax band "must be the imposed price on sale to the consumer".

A Ministerial Order of 9 April 1974 amended in the same way the regulation annexed to the Ministerial Order of 22 January 1948 governing the levying of excise duty on tobacco so that that decree now also provides that manufactured tobacco products must be sold to consumers at the price shown on the band.

It thus follows from the above-mentioned provisions that the retail sale price which the manufacturer or importer is free to choose automatically becomes the imposed price on sale to the consumer.

2. Community tax harmonization

The Community harmonization of tax on manufactured tobacco products is governed by Council Directive No 72/464 as amended by Council Directives Nos 74/318 (Official Journal L 180, p. 30), 75/786 (Official Journal L 330, p. 51), 76/911 (Official Journal L 354, p. 33) and 77/805 (Official Journal L 338; p. 22).

In the preamble to Directive No 72/464, which initiated the implementation of that harmonization, the Council first of all states as a principle that establishment of an economic union within which there is healthy competition and whose characteristics are similar to those of a domestic market, as regards manufactured tobacco, presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Community (first recital).

After stating that "the taxes which at present affect the consumption of manufactured tobacco do not meet these requirements" (second recital) the Council states that it is in the interest of the common market that the rules for taxes affecting the consumption of manufactured tobacco should be harmonized, in order progressively to eliminate 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). Further, as far as excise duties are concerned, harmonization of structures must, among other things, result in the opening of the national markets of the Member States and, as regards cigarettes, the tax imposed thereon should consist of a proportional excise duty combined with a specific duty, the amount of which is fixed by each Member State in accordance with Community criteria (fifth and sixth recitals).

Finally, the Council takes the view that the structures for excise duties on manufactured tobacco should be harmonized by stages and that the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco (seventh and eighth recitals).

Thus the directive states in Article 1 the principle of harmonization of the structure of the excise duty in several stages and in Article 4 lays down a system of excise duty comprising a proportional part calculated on the maximum retail selling price and a specific part calculated per unit of the product. During the first stage, that is to say until 30 June 1978, the specific part, as regards cigarettes, was to be not less than 5% of the aggregate amount of the excise duty levied on cigarettes in the most popular price category (Article 8). During the second stage the minimum rate is not amended but the turnover tax must be included in the basis of calculation (Article 10b (2) inserted in Directive No 72/464 by Article 3 of Directive No 77/805).

It is nevertheless to be observed that Article 10 (subsequently Article 10 b) of Directive No 72/464 allows Member States to levy on cigarettes a minimum excise duty, the amount of which may not exceed 90% of the sum of the proportional excise duty and the specific excise duty which they levy on the cigarettes in the most popular price category. It is common ground that the Belgian State exercises that power to the full.

Article 5 (1) of Directive No 72/464 provides that manufacturers and importers shall be free to determine the maximum retail selling price for each of their products, provided always that this shall not hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices.

3. Price control measures in Belgium

Article 1 of the Ministerial Order of 22 December 1971 provides "... manufacturers and importers are required to inform the Ministry of Economic Affairs ... at the latest three months before its application, of any price increase they propose to apply on the Belgian market in respect of all products, materials, commodities or goods and all services". Article 4 of the same Order provides that the period of three months shall be interrupted if the competent authorities find that the declaration of price increase does not contain all the requisite information. In that case the waiting period begins to run from receipt of the supplemental information. Finally, Article 5 provides that the Minister of Economic Affairs may inform the undertaking making the declaration before the expiry of the waiting period "that for a maximum period of six months either there should be no increase at all or it should be less than that notified ...". At the end of the fixed period the undertaking which has notified the price increase may, however, apply the increase as notified. It is nevertheless required to notify prices which it actually charges (Article 5 (2) of the Ministerial Order of 20 April 1972 amending the Ministerial Order of 22 December 1971).

Eleventh submission: infringement of Articles 85 (1) and 190 of the Treaty inasmuch as the Commission found all the objections well founded save that relating to the prohibition of sales with bonuses and decided that the measures proposed by FEDETAB were prohibited by Article 85 (1) whereas those measures are not restrictive of competition within the meaning of that provision

Summary of the applications

This submission has been made to a greater or lesser extent by *all the applicants* except Vander Elst, which does not make this submission separately in its application. Nevertheless in its reply it sets out certain matters under the heading to this submission.

1. Application of FEDETAB

(a) Facts

FEDETAB complains in the first place that numerous facts have been imperfectly appreciated by the Commission, wrongly interpreted or not accepted although they clearly affect the application of Article 85 (1). Those factual errors are set out in Annex 5 to the application.

Nevertheless FEDETAB considers the most serious matter to be the enormous omissions in the analysis of the health and fiscal constraints on the tobacco market and on cigarettes in particular, which turn it into quite a special market which is not to be compared with any other. Those omissions are all the more regrettable inasmuch as the Commission's attention was continually drawn to such matters both in the statements in answer to the notice of objections and at the hearings.

FEDETAB accordingly finds itself forced to reiterate those specific issues.

(aa) Influence of the fiscal constraints

FEDETAB criticizes above all the complete lack of any study of the actual or potential effect upon competition of a *proportional* or *ad valorem* system of excise duty. It describes the constraints and restrictions which in its view distort competition in the cigarette market and for which neither it nor its members are responsible.

(i) For historical reasons excise duty has always been based either on the retail sale price or on the number of cigarettes manufactured or sold. In the first case the duty is defined by a *rate (proportional* or *ad valorem)* and in the second case by an *invariable* number of monetary units (*specific* duty). Those two duties are fundamentally different in conception and in the effect which they have on prices and conditions of competition. Belgium has the proportional system of duty.

(ii) Community harmonization of taxation starts from this fundamental difference. Belgium fulfils the minimum requirements as regards such harmonization.

(iii) In a system of proportional excise duty each variation in cost price or in one of its factors has an *amplified* effect upon the resulting price. For the industry and trade that means that a variation in the "ex-factory" price or the profit margin has a multiple effect on the retail sale price which is directly proportional to the multiplier.

In support of that argument FEDETAB sets out by way of example two sets of figures showing the effect on the retail sale price of the same increase in the "manufacturer's share" according to whether the system is wholly proportional or specific. The figures in those examples are taken from the position in Belgium in May 1975. The retail sale

price of the most popular cigarette was then exactly BFR 1 per cigarette or BFR 1 000 per 1 000. In the first example the excise duty would be 61.5% of the retail sale price and in the second it would be BFR 615 per 1 000 cigarettes.

In the first example the increase in the manufacturer's share or in the "ex-factory" price of BFR 5 would mean an increase in the retail sale price of BFR 22. In the second case the increase of BFR 5 would mean an increase of BFR 6 at the retail level.

If those two examples are compared the distortions produced by the proprtional excise duty are apparent. The multiplier is the value of the relationship between the retail sale price (taken as 1) and the sum of the non-proportional elements of that price: the smaller that sum, the larger the multiplier. The multiplier thus increases in relation to the proportional elements: as their *rate* increases so does the *multiplier.*

(iv) During the first stage of harmonization from 1 January 1973 to 30 June 1978, the period in which the restrictions on competition in question also occurred, the multiplier increased from 3.46 to 4.70, so that the trend in Belgium moved in the opposite direction to the aims pursued by harmonization.

(v) The manufacturer liable for proportional excise duty, the *basis* of which is the retail sale price with *all taxes* included, must determine in advance all items of the retail sale price: the manufacturer's share, the distribution margin and the amount of the various taxes, for the State claims duty on the sum of all those items. This requirement is peculiar to tobacco.

(vi) A manufacturer who increases his "share" creates between his competitors and himself a difference of sale price directly proportional to the multiplier and bearing no relation to the difference between the "ex-factory" price and the manufacturer's "share". That fact gives rise to artificial conditions of competition and causes manufacturers to reduce their cost prices to such a point that it is no longer possible for the manufacturer's "share" to support a supplementary distribution rebate.

The manufacturer's "share" is moreover controlled by the Belgian Price Board (in 1977 it represented only 18.21%). Those circumstances place all Belgian manufacturers in an *identical* position from the point of view of competition, unaffected by the agreements, measures or recommendation. Those measures aim to *maintain an effective distribution network.*

(vii) It follows from the logic of the system that if a manufacturer wishes to compete with another manufacturer and lower his retail sale price that will *necessarily* mean a reduction in the profit margin for the distributors of his products. If he wishes to give a larger profit margin that would *necessarily* involve a large increase in the ultimate price with the risk of having to sell at a loss.

(viii) The Belgian legislation on price control restricts the opportunity for

horizontal competition on the maximum distribution margins. The Belgian Minister of Economic Affairs determines a maximum margin to be observed at each level of distribution. In the notice of objections of 17 May 1975 the Commission moreover expressed itself clearly on that subject.

The maximum margins are not imposed on each manufacturer individually but are applied to the whole cigarette sector. It is therefore not the contested measure but the legislation which is the origin and cause of the collective nature of the distribution margins.

(ix) Relying mainly on the previous considerations FEDETAB claims in conclusion that the Belgian proportional excise duty based on the retail sale price and the Belgian legislation on price control distort the conditions of competition because:

— a variation in one of the items in the cost price produces an amplified effect on the retail price;

— they force manufacturers to fix the retail price and distribution margins in advance;

— they result in general maximum margins at each stage of distribution as is confirmed by a letter from the Prices Board sent to FEDETAB (Annex 6 to the application);

— they guarantee the State's revenue by fixing a minimum excise duty ensured by the affixing of a minimum-tax label which officially lays down a minimum sale price at a given level.

(bb) Influence of public health

The Commission has not taken into account the restrictions which the protection of health places on the marketing of tobacco products. The Commission was informed of that factor and more particularly of the requirement to place a notice on cigarette packets warning against the dangers of tobacco consumption (Belgian Law of 3 April 1975) and the rules on advertising for cigarettes.

(cc) Structure and role of FEDETAB

FEDETAB stresses that it comprises solely tobacco manufacturers. Nevertheless certain members of FEDETAB are affiliated as importers of manufactured tobacco by the Fédération des Importateurs (Federation of Importers). FEDETAB has never done anything which could in the least have adversely affected imports or importers.

The structure of FEDETAB has basically three sections: cigarettes, cigars and cigarillos and smoking and chewing tobaccos and snuff. In each section large, medium and small undertakings are represented in *equal number.*

FEDETAB has *legal personality,* being a non-profit-making association with an *independent management* which clearly distinguishes it from its members.

It is the recognized negotiator for the tobacco products industry in Belgium.

(dd) The contested agreements

(i) Prior to 1 December 1975

— Approval and classification of wholesalers and retailers by FEDETAB, and entitlement of the various categories to fixed profit margins

FEDETAB classified wholesalers into eight categories based on those of the Comité Belge de la Distribution (Belgian Trade Board). That classification was intended to give each wholsesaler an income consistent with his function and to avoid all discrimination. However, the supermarkets forced manufacturers to give them the same conditions as specialist wholesalers who alone deserved special remuneration.

Since the specialist wholesalers demanded protective measures, FEDETAB on 21 December 1970 drafted a document entitled "Distribution policy from 1 January 1971". That document made it more difficult for new applicants in certain categories, in particular specialized food wholesalers, to obtain the maximum wholesale margins (the only ones which still apply). It was a non-binding working document. It is the subject of the objection dealt with in paragraphs 40 to 44 of the contested decision.

— The agreement of 22 May 1967 between FEDETAB and the FNCG concerning compliance with resale prices set by manufacturers, as amended on 5 October 1967 and 29 December 1970, together with the agreements and recommendations annexed

FEDETAB states that that agreement, directed against cut-price selling at the retail level by wholesalers who were also retailers, was renewed in 1972. However, the renewal was not implemented, since Article 58 of the VAT code put an end to cut-price selling at the retail level from 1971 onwards.

The standard agreement submitted on 22 May 1967 to the small distributors was never applied and lapsed as a result of the FEDETAB decision of January 1968.

The interpretative supplement of 5 October 1967 never had any practical consequences. Nor was any penalty ever imposed.

FEDETAB stresses that the two letters of 26 October 1967 and 8 May 1970 originated with the FNCG which informed its members that they could not give other retailers a selling price less than that laid down by their suppliers and that they must not grant the terms reserved to "approved retailers" save to retailers officially recognized by FEDETAB. The penalty for disregard of those rules was, as far as wholesalers were concerned, the loss of the wholesale terms.

Several wholesalers nevertheless continued to grant approved retailer terms to retailers not included in the FEDETAB lists. No wholesaler had ever forfeited his wholesale terms.

The interpretative amendment of 29 December 1970 signed by FEDETAB and the FNCG was forwarded on 26 January 1971 to the Agreements and Dominant Positions Directorate without inducing the least reaction.

— The agreements and recommendations banning the resale of goods to other wholesalers

The recommendation sent on 22 March 1972 by the FNCG to its members had nothing to do with FEDETAB and moreover was not followed up.

FEDETAB admits that on 30 June 1972 it invited wholesalers to sign a standard agreement according to which they undertook not to re-sell manufactured tobacco products to certain wholesalers and retailers (namely those referred to in paragraph 46 of the decision). Although disregard of those undertakings could be penalized by loss of wholesale terms, the agreements were nevertheless never implemented and expired in 1973.

— Collective measures on payment dates taken by FEDETAB members on 23 December 1971

FEDETAB states that following a request by GB to allow credit terms of 90 days from the end of the month, the members of FEDETAB informed wholesalers and others enjoying the wholesale terms that they had decided to put an end to lengthy credit, which would in future be reduced to a maximum of a fortnight. That was a legitimate defence to the practice of wholesalers, encouraged by that of the supermarkets, to grant themselves lengthy credit. A month's credit leads to an increase of a franc on a packet of popular cigarettes sold at the time for BFR 32.

— Agreements and joint action by FEDETAB members to ensure that retailers would stock a minimum range of brands

Those agreements and actions originated in the boycott of the products of Weltab und Jubilé in which GB and others engaged as retaliation against the refusal of an extension of credit. That also was legitimate defence.

(ii) The FEDETAB recommendation of 1 December 1975

FEDETAB stresses that it is not a question, as in the past, of vertical agreements but of a *recommendation* sent solely to manufacturers, and thus on a *horizontal* level. In so far as several manufacturers followed the recommendation it was still only a *horizontal agreement.*

In the interests of sound distribution the recommendation varies, according to objective criteria, the maximum rebates to be granted to customers for services rendered. No uniform conduct is imposed on manufacturers, who retain complete freedom of action.

The drawing-up of lists of retailers is effected on the basis of objective criteria.

The provisions on cash payment are inspired by the same spirit. Any extension of the terms of payment risks having an unavoidable repercussion on prices to the detriment of the consumer because of the cumulative effect of the Belgian tax system on cigarettes.

Manufacturers have recognized that the recommendation is justified and apply it with flexibility according to their own situation both in the choice of customer and in the grant of credit.

(b) FEDETAB's legal argument

FEDETAB states that in its answer to the first notice of objections it had contended that the maintenance of fair *and* orderly competition is an essential condition for a policy of effective competition. If that principle, which was moreover recognized by the Court in its judgment of 25 October 1977 in Case 26/76 (*Metro* v *Commission* [1977] ECR 1875), is applied to the present case, then it is apparent that the Commission did not take into account the fact that the contested agreements did not come within the prohibition of Article 85 (1) because of their beneficial effect on the structure of the market.

The Commission saw in the recommendation, including the part referring to the classification of wholesalers and retailers to three objective criteria, only an infringement of Article 85 (1). In particular it did not have regard to the fact, which was frequently stated by the applicant in its statements and at hearings, that it would involve discrimination to grant supermarkets or non-specialized wholesalers the same margin as specialized wholesalers although they did not fulfil the same economic function.

Further FEDETAB drew the Commission's attention to the *social* aspects of the case. The Commission's answer (paragraph 123 of the decision) is incompatible with a sound interpretation of Article 85 (1) as given by the Court in the *Metro* case:

"For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Aricle 85 (1), and, if it does fall thereunder, either wholly or in part, coming within the framework of Article 85 (3)" ([1977] ECR at p. 1905).

2. *Heintz Van Landewyck* adopts the arguments put forward by FEDETAB against the Commissions's views on the applicability of Article 85 (1) to the measures taken before the date of the recommendation.

As to the period after that date Heintz Van Landewyck states that it followed the recommendation, to which in its view Article 85 (1) is not applicable, because in the Belgo-Luxembourg Economic Union the aim of the recommendation is

to promote healthy rivalry between manufacturers so as to avoid disorganization of the market which would involve the suppression of a large number of sales outlets. In view in particular of the Italian and French monopolies there is no common market in manufactured tobacco at the EEC level.

In Case 82/77 *Van Tiggele* [1978] ECR 25 the Commission declared itself in favour of minimum profit margins. Its reasoning applies *a fortiori* to the market in cigarettes manufactured in Belgium.

3. The applicants *Gosset, Weltab and Cinta* adopt the statement of facts by FEDETAB and its legal arguments in relation to the present submission.

In addition, in relation to the recommendation *Gosset* enters into a detailed analysis of the classification of wholesalers and retailers into categories.

On the legal plan it contends that in the *Metro* case both the Commission and the Court accepted that a separation of functions in the distribution of products was justified and was compatible with a system of sound competition.

As to the measures in relation to terms of payment they are a reaction to the attempts by supermarkets to obtain excessive advantages. A measure intended to prevent an abuse of economic power cannot be contrary to the Treaty since the existence of undistorted and fair competition is one of the fundamental objectives of the Treaty.

4. Jubilé complains that the Commission takes the view that restriction on competition is contained in the very *principle* of classification and in any event the Commission did not take account of the fact that the recommendation takes as a basis new criteria of classification which are intended to determine more objectively the services which intermediaries must render manufacturers. Such an oversimplified application of Article 85 contravenes the principle laid down by the Court in the *Metro* case ([1977] ECR paragraph 20 at p. 1904).

As regards the terms of payment the Commission is wrong in thinking that they are fixed uniformly and collectively. The recommendation is not mandatory. Moreover, as far as concerns terms of payment the Commission neglects the fact that at least the applicant expressly restricted its approval by stating its intention to adhere to the principle of cash payment "independently of the said recommendation" (application, Annex 6).

Summary of the defence

(a) Preliminary observations

The *Commission* devotes certain *introductory observations* to the national and Community rules cited by the applicants.

(aa) The Belgian taxation rules and the cumulative effect

The Commission admits that an alteration in one of the cost items making up the "tobacco value" leads to an alteration in the proportional part of the tax burden. It adds that because of the fact that in Belgium the major part of

the tax comprises proportional items and that the rates of those items are relatively high, an alteration in the manufacturer's portion (or in the trade margins) results in a more than proportional alteration in the tax burden and consequently in the retail sale price. This is what the applicants call "the cumulative effect".

It must, however, be observed that such cumulative effect operates as regards alterations both upwards and downwards by the manufacturer (or in the trade margins).

The cumulative effect thus results in increasing the effects of variations by the manufacturer (or in the trade margins) on the trend in the retail price. However, it in no way results in "fixing" those items of cost at a specific level or preventing their variation either by increasing such items or reducing them.

The opportunities for competition, which the cumulative effect in no way excludes, might have at least two results, namely:

(i) to let the competitive effort determine, as regards a given retail price, how the manufacturers (and importers) and the traders divide up the sum of the cost items representing the "tobacco value" of the retail price, that is to say what will be the size of the manufacturer's share in relation to trade margins;

(ii) to allow any squeezing of the manufacturer's share (or trade margins) to be able to have a repercussion on the choice of a new retail sale price, especially by selecting a price at a level lower than that adopted in the past.

Moreover, the Belgian tax rules in no way exclude the opportunity for manufacturers, importers and traders to compete as regards prices (or margins) with products of different brands. They also have the effect of leaving all traders free to compete as regards all manufactured tobacco products in the services and other competitive advantages which they render their customers.

In this respect the effect of Article 58 of the Belgian VAT Code, which entered into force on 1 January 1971, is to ban the sale of the products to the consumer at a price less than the retail sale price marked on the band. From that ban and the fact that it is the manufacturers and importers who are generally liable for the duty arises the difficulty *traders* have in passing on to the retail price, directly and of their own initiative, any squeezing of their margin following their efforts to compete. Nevertheless there is nothing in the rules to prevent such a repercussion resulting from the competitive efforts of traders from occurring *indirectly* by the selection of a new retail price. Moreover, the *manufacturer* (or importer) is not faced with the same situation.

On the other hand when selecting the new retail sale price the cumulative effect allows the manufacturer (and importer) to magnify his competitive effort (or that of the traders) for by the compression of a single unit for cost he will obtain a more than proportional compression of the retail sale price. In that case the cumulative effect not only does not retard the competitive efforts of manufacturers and importers (or traders) but on the contrary magnifies them and works in favour of competitive undertakings.

It is therefore wrong to claim, as does FEDETAB in particular, that the rules force manufacturers and importers to fix the retail price ... "and distribution margins" in advance.

(bb) Community harmonization

The Commission contends that the Community tax harmonization set up by Council Directive No 72/464 and the others in the series preserves the free formation of the retail price and does not rule out competition which the manufacturers and importers (or traders) may engage in in relation to the manufacturers' share (or trade margins) making up the retail price.

As regards the use by the Belgian State of the opportunity given by Article 10 (subsequently 10b) of Directive No 72/464 allowing Member States to levy a minimum excise duty on cigarettes, the Commission maintains that that minimum limit concerns only one item making up the retail, namely excise duty, and in no way restricts cost fluctuations in that price, namely the manufacturer's share and the trade margins.

(cc) Belgian rules relating to the requirement to notify price increases

The Commission alleges that the Belgian rules do not exclude competition and do not even restrict it. They cannot therefore be cited either to justify the applicants' measures or to show that the measures could not have had appreciable effect because of the existence of those rules. This is what FEDETAB itself stated in relation to the Belgian market (p. 48 of its letter of 14 October 1974 to the Commission following the complaint by GB).

(dd) The Belgian measures relating to public health

The Commission considers the Belgian health measures are not likely to exclude or substantially limit the opportunity for competition by manufacturers and importers (or traders) in the manufactured tobacco sector.

(b) Restriction on competition

In its answer to this submission the Commission distinguishes between the measures prior to 1 December 1975 and the recommendation.

(aa) The measures prior to 1 December 1975, namely:

(i) Approval and classification of wholesalers and retailers by FEDETAB and entitlement of the various categories to different margins (paragraphs 19 to 27 and 81 of the decision);

(ii) The agreement of 22 May 1967 between FEDETAB and the FNCG concerning compliance with resale prices set by manufacturers, as amended on 29 December 1970 (paragraphs 28 to 38 and 82 and 83 of the decision);

(iii) FEDETAB decision not to approve new businesses in certain categories of wholesalers (paragraphs 40 to 44 and 84 of the decision);

(iv) Joint measures and the additional agreement of 22 March 1972 banning the resale of goods to other

wholesalers (paragraphs 45 to 50 and 85 of the decision);

(v) Collective measures on payment dates taken by certain FEDETAB members on 23 December 1971 (paragraphs 51, 52 and 86 of the decision);

(vi) Agreements and joint action by FEDETAB members to ensure that retailers would stock a minimum range of brands (paragraphs 53 to 57 and 87 of the decision).

As to (i) The Commission alleges that FEDETAB admitted fixing uniformly and without objective justification the margins of wholesalers other than specialized wholesalers. However, FEDETAB also deprived wholesalers in the same category of the opportunity of enjoying a different income as a result of competition (cf. paragraph 81 of the decision) and removed all inducement for the applicants to compete *inter se* in relation to the margins to be allowed traders.

As to (ii) FEDETAB simply remarked that it took those measures for the sole purpose of preventing "cut-price selling". In the Commission's view the measures had a much wider aim and effect. *Prior to 1 January 1971* their effect was in particular to force complete compliance with the retail sale price and margins for wholesalers and retailers as laid down by the applicants. Further the interest in *renewing* the measures in 1972 after Article 58 of the VAT code had entered into force on 1 January 1971 lay in the fact that the system of collective observance of the prices laid down was accompanied by a specific undertaking by the applicants to refuse to label their products at a reduced price as certain wholesalers were asking (cf. the refusal of GB's request).

As to (iii) This measure introduced an additional restrictive and discriminatory effect into the system of which Mestdagh and Huyghebaert in particular complained.

As to (iv) The letter of 22 March 1972 from the FNCG referred to the supplementary agreement made on 29 December 1970 by FNCG and FEDETAB. The measure of 22 March 1972 which supported and supplemented that of 29 December 1970 in which FEDETAB participated and which was subsequently made binding on wholesalers on the initiative of FEDETAB on 30 June 1972 may thus be regarded as being part of the whole system put into effect by FEDETAB and the other applicants.

As to (v) FEDETAB described that measure as legitimate defence and stated that any delay in reacting would have caused the market to collapse. FEDETAB thus indirectly recognized that terms of payment were an important means of competing between the various undertakings active in the market. This is precisely what the Commission

concluded at paragraph 86 of the decision.

As to (vi) The Commission observes that here too FEDETAB recognizes the facts and confines itself to attempting to justify them as legitimate defence. The position adopted by FEDETAB in this respect means that GB or any other supermarket is not free to choose the products which it wishes to sell and in particular may not sell the products only of certain manufacturers or only certain brands or presentations which would run the risk of re-introducing competition *between manufacturers.*

(bb) Recommendation of 1 December 1975

The Commission challenges the argument of several applicants, in particular FEDETAB, based on the *Metro* case (in particular paragraphs 20 to 22 thereof) in support of the claim that "... the contested agreements do not fall within the prohibition of Article 85 (1) because of their beneficial influence on the structure of the market". FEDETAB adds that the maintenance of fair and orderly competition is an essential condition of a policy of effective competition.

In the Commission's view the Court's reasoning in the paragraphs cited assumes the existence of effective competition between several competing manufacturers (or importers) who in such a situation also compete with one another by adopting an *individual* system of selective distribution (cf. also paragraph 22).

The *Metro* case is thus fundamentally distinguishable from the present case in that in the present case almost all the competing manufacturers (and importers) are agreeing to erect and apply a collective distribution system, that is to say involving their refraining from competing *inter se* by such a system, whereas the *Metro* case was concerned with a single manufacturer adopting, in the face of competition from other manufacturers, a distribution system likely to strengthen the competition which he was pursuing *vis-à-vis* his competitors and it was not established that the other manufacturers were using a similar distribution system.

There is nothing in the Commission decision to prevent certain manufacturers from individually granting higher margins to particular specialized wholesalers for services rendered if the services are more numerous or better than those of other wholesalers. What the decision on the other hand prohibits is that competing manufacturers should *confer together* on the size of the benefits to be granted to specialized wholesalers (or others) and prevent the market forces from determining the size, in particular in relation to the services which wholesalers may individually render. Such freedom means that wholesalers may cause manufacturers (and importers) to compete *inter se,* which the applicants obstinately refuse to contemplate. Although it is true that the Court took the view at paragraph 29 of the

judgment in the *Metro* case that the Commission did not infringe Article 85 (1) in considering that separation of the functions of wholesaler and retailer is in principle in accordance with the requirement that competition shall not be distorted, such consideration cannot, however, in the present case remove from the scope of Article 85 (1) concerted action between competing manufacturers in relation to the advantages to be granted to wholesalers and retailers where such concerted action does *not* concern the separation of functions of those intermediaries.

As regards the *classification of intermediaries,* contrary to what *Jubilé* in particular, states, the Commission did take account (paragraph 97 of the decision) of the new criteria of classification laid down by the recommendation and did not say that the classification of the intermediaries constitutes in itself an infringement of Article 85 (1).

As regards stocking a *minimum range* of brands, the Commission observes that the manufacturers are substituting their own choice of the number of presentations and brands of cigarettes (which the wholesalers must sell to enjoy the margins applying to each category) for the free individual choice of such number by each trader in relation to his own interests. The penalty for not observing the minimum number of 90 presentations (from 220 at present marketed in Belgium) is the immediate loss of the additional margin granted by the applicant subject to that condition.

As regards the *end-of-year rebate,* the aim of the recommendation is to have all the applicants apply a single scale of rebates. Even here the applicants do not wish to run the risk of their competing against one another.

As regards the *terms of payment,* the existence of opportunities for competition between the applicants regarding such terms is shown by the very fact that the terms did vary between them before the recommendation was adopted (cf. the table produced by FEDETAB on p. 60 of its letter of 22 September 1975).

For *all the benefits* (margins, rebates and terms of payment) which the manufacturers (and importers) may afford traders, the applicants thus knowingly substituted co-operation *inter se* on the measures contained in the recommendation for the risks of competition. The determination of the elements of the price of sale of the products by the manufacturers to the traders, even if it is simply a guideline, affects competition by the fact that it allows all the applicants to foresee with a reasonable degree of certainty what will be the policy pursued by their competitors in relation to the benefits to be granted to traders. The Commission thus contends that its decision rightly held that:

(1) the measures prior to 1 December 1975 had as their object and effect to restrict competition within the common market between manufacturers and between wholesalers;

(2) the recommendation has as its object and effect to restrict competition within the common market between manufacturers and to a lesser extent between wholesalers;

— proper and sufficient reasons were given for its decision on that issue;

— the submission must therefore be rejected.

Summary of replies

1. Reply by FEDETAB

(a) By way of introductory observation to its arguments in relation to the present and subsequent submission, FEDETAB claims that the Commission misunderstands what influence the *Belgian rules on increases in prices* have in fact on administrative practice and the economic position of cigarette manufacturers.

The manufactured tobacco sector is the one in which, for the purpose of those rules, the Minister of Finance mainly intervenes and this is the only sector where there is regular intervention. If the administration were to negotiate each brand of cigarette with every manufacturer, importer or trader, it would not be possible for the Minister to assess with the necessary precision the budgetary repercussions of any alteration in the retail prices and thus of the excise duties. The negotiations are thus conducted with the representatives of the various traders even if in theory the actual wording of the rules allows individual opportunities of price increases.

Moreover, the traders do not have the margins available to allow them to pursue a prices and costs policy other than that submitted to the competent authorities and scrupulously studied by them before approving a price increase. In addition there is the cumulative effect upon competition.

The observations of the Commission on the subject of those rules are therefore unrealistic and irrelevant to the problems confronting traders in this very special market.

(b) FEDETAB challenges the Commission's contention that the *Metro* case is no authority for this submission and the arguments in support thereof.

It cites paragraphs 20 and 21 of that judgment in support of its case to the effect that having regard to the structure and particulars of the market in question the organization of the distribution of cigarettes resulting from the measures which it has proposed and favouring the separation of the functions of wholesalers and retailers and the grant of a small advantage to specialized wholesalers and retailers to ensure their continued existence does not constitute a restriction on competition within the meaning of Article 85 (1).

As regards the social aspects of the present case FEDETAB refers expressly to the arguments put forward by the interveners ATAB and AGROTAB which are in a good position to appreciate the danger on which the Commission decision would involve the financial position of their members if it were to be upheld.

2. The applicants *Gosset, BAT, Cinta* and *Weltab* adopt the arguments contained in the reply by FEDETAB as, in general, does *HvL.*

3. *Jubilé* recalls the large number of State measures in Belgium resulting from the high proportion of the Belgian excise duty on tobacco, the fixing of *maximum* retail prices, the levying of a *minimum* excise duty, the State system of *fixed* prices and finally the practice of price *control.*

The interaction of such varied types of intervention by the State gives rise to situations which ought to be regulated also by the State but are not. By remedying that situation by voluntary co-operation those concerned are *not* in the applicants's view restricting competition within the meaning of Article 85 (1) for such co-operation is substituted for the risks of competition distorted by the State.

The applicant states that it bases its arguments on the *value system of the Treaty* founded on a system of competition which is not distorted within the common market. In its opinion measures of a private nature, even if having the general character of restrictions on competition, are not such where they are adopted in an environment of market conditions distorted by the State and of spurious competition which is the result.

That does *not* mean that because of the distortions of competition caused by the State all voluntary participation on the part of the applicants is justified, for that would mean that Article 85 (1) would be completely inapplicable in the tobacco sector in Belgium. It *simply* means that the measures in the *recommendation, inasmuch as, or precisely because, they are not mandatory,* do not constitute restrictions on competition.

The applicant observes that the Commission is now claiming that the measures in question affect competition in spite of the purely advisory nature of the recommendation in that they allow all the applicants to foresee with a reasonable degree of certainty what policy will be pursued by their competitors with regard to the benefits to be granted to traders. But the Commission by no means stated that those were the reasons on which its decision was based. To state different reasons after the decision has been adopted is unlawful according to Article 190 of the Treaty.

Moreover, the so-called principle of "independence" on which the Commission by implication relies has no place in the present case. In the sphere of prices within the tobacco sector in Belgium there remains scarcely any room for the principle of independence in view of the fact that as a result of the distortions caused by the State prices are in any event transparent throughout the whole sector. In so far as it is not the taxation rules which cause such transparence it is a result of the system of price control. The said system is applied *collectively* in the tobacco sector in accordance with the Belgian rules and that is mainly because the tax burden is determined collectively.

4. *Vander Elst* considers that contrary to what the Commission alleges the *Metro* judgment is of prime importance in the present case for in it the Court recognizes that measures which serve to maintain traditional trade are not necessarily restrictive of competition or that, if they are, they may qualify for exemption.

The main thing for the present case in the legal assessment of the SABA distribution system is that it allows a distinction to be drawn between wholesalers and retailers according to their functions and recognizes that competition by means of prices does not have an absolute priority in that respect. It is precisely that distinction between wholesalers and retailers according to their functions which is the subject of the FEDETAB recommendation.

As regards the collective nature of the recommendation, the threat weighing upon traditional trade does not arise here, in contrast to the position in the SABA distribution system, from normal competition between the various distribution channels but from a taxation system which distorts competition.

Mr Advocate General Reischl recognized in his opinion in Case 13/77 *Inno* v *ATAB* [1977] at p. 2164 that it was reasonable in principle to make available to the consumer a sufficiently tight distribution network with a comprehensive selection.

In conjunction with the rules relating to excise duties on manufactured tobacco such as fixed prices and the prohibition on labels' being attached at a subsequent level, the recommendation prevents the cumulative effect from causing an abrupt effect at distribution level, which would endanger the ubiquity and density of distribution.

In the applicant's view the cumulative effect distorts competition not only between the various distribution channels but also between the popular and less popular brands. The distribution costs at that level are higher per unit for less popular than for popular brands. The cumulative effect multiplies them and causes them to act as barriers to access to the market by less popular brands.

The recommendation is likely also to weaken the distortions arising from the cumulative effect.

Summary of the rejoinder

Before discussing the basic submissions the *Commission* makes some general observations concerning the Belgian and Community rules and figures relating to the Belgian market in manufactured tobacco. There is a reference to those observations and figures in the summary of arguments in relation to the twelfth submission.

(a) As regards the *facts* and in particular the *recommendation* the Commission wishes to challenge in the first place the statement of several of the applicants to the effect that the rates of the "cigarette scale" which the recommendation applied concern only direct sales by manufacturers (or importers) to traders whom they supply and not sales made by wholesalers to retailers. Such a statement is contrary to the whole conception and very wording of the recommendation as notified (defence, Annex 7), where it is stated "that the maintenance of this practice in a system of maximum rebates requires ceilings to be fixed also for intermediate rebates" (Annex III to the notification, p. 1).

The fact that the recommendation is not confined to direct sales is also apparent from the statements of FEDETAB, ANGIPMT and GT during the administrative proceedings.

The Commission therefore considers that it is established that the recommendation is intended to be applied also to sales by wholesalers to retailers.

(b) As regards the *law* the Commission alleges that the two matters which in the view of FEDETAB are at issue in relation to the present submission involve a serious misunderstanding by FEDETAB (and the other applicants) of

the scope of the decision and a fundamentally erroneous view of what was decided by the Commission on 20 July 1978.

(aa) Justification of concertation by the need to separate the functions of wholesaler and retailer

In the Commission's view the problem of separating or not separating the functions of wholesaler and retailer is not in issue here. The Commission confines itself to condemning concertation as established and practised by the applicants. In a system of free competition each trader in the market must remain free to decide for himself the way which appears to him best to organize his activities individually.

Moreover, the concertation between manufacturers practised by the applicants in the present case *is not solely concerned* with protecting the separation of functions of wholesaler and retailer but is a much vaster concertation encompassing the whole commercial policy in relation to margins and other pecuniary benefits which the manufacturers (or importers) grant to traders.

The Commission therefore repeats *with the greatest insistence* that the applicants are trying systematically to pretend that there is no horizontal concertation between them whereas that is at the very root of the agreement and it is the effects of that horizontal concertation which are the most harmful.

(bb) Justification of the concertation by the need to ensure the continued existence of the specialized trade

In this respect the Commission observes that it has not at any time or in any way in its decision considered that the specialized traders ought to disappear.

The Commission decision does not in any way have the effect of preventing manufacturers from granting *individually* higher margins to specialized traders on account of the services they render. What the decision attacks is the horizontal concertation by the applicants in that respect.

(cc) Assessment of the restriction on competition caused by the applicants' concertation

The Commission cites the case-law of the Court (Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977 and *Papier Peints* v *Commission* [1975] ECR 1491 in support of its argument to the effect that the market rules, which the manufacturing members of FEDETAB have observed and continue to observe and which concern horizontal concertation between the manufacturers (or importers) in relation to margins and other pecuniary benefits to be granted to traders, distorted and restricted competition within the meaning of Article 85 (1) because the applicants as a result of that concerted practice knowingly substituted mutual co-operation in relation to the measures contained in the recommendation for the risks of competition and such co-operation leads to conditions of competition which do not correspond to the normal conditions of the market.

The fixing of the main items making up the sale price of products by manufacturers (or importers) to traders, even if only a recommendation, affects competition by the fact that it allows all the applicants to foresee with a reasonable degree of certainty the policy to be pursued by their competitors regarding the financial benefits to be granted to traders.

Twelfth submission: infringement of Articles 85 (1) and 190 of the Treaty inasmuch as the Commission wrongly considered that the measures in question restricted competition to an appreciable extent

This submission has been made to a greater or lesser extent, directly or indirectly, by *all the applicants.*

FEDETAB alleges that the exceptional constraints, which do not apply to any other product, imposed by the Belgian legislation on taxation, price control and public health, in conjunction with constraints of the same kind in other Member States, are such as to exclude the application of Article 85 (1) because there was practically no competition in the sector covered by the contested agreements (before 1 December 1975) and by the recommendation of 1 December 1975.

It is true that the Commission was forced to recognize in paragraph 88 of the preamble to the decision that "if national legislation has the effect of restricting competition, the added effects of private arrangements restricting competition can only be the more significant."

However, in giving such reasons the Commission has taken the contrary view to the Court of Justice in its judgment in the *Suiker Unie* case:

"Although, as has been indicated earlier, the system of national quotas, by tending to partition national markets, only leaves a residual field for the operation of the rules of competition, that field is in turn to a great extent fundamentally restricted in its scope by the special organization of the Italian market.

These considerations show that the conduct complained of could not appreciably impede competition and does not therefore come within the prohibition of Article 85 of the Treaty" ([1975] ECR paragraphs 71 and 72 at p. 1924).

When it adds "that the tobacco industry is not alone in being heavily taxed" (paragraph 88 of the decision), the Commission shows that it has not understood the *basic* difference between a system of specific excise duty and a proportional system such as exists *only* in the tobacco sector.

If because of intervention by the authorities and the very structure of the tax involving the cumulative effect, competition in relation to prices and margins is in fact *practically excluded,* any restriction in relation thereto by the manufacturers is of necessity hardly appreciable.

It would be otherwise only if the restrictions related to the factors which were still competitive. However, it has been shown both in the statements in answer to the statements of objections and at the hearings that competition has remained extremely lively between manufacturers in relation in particular to brands, the make-up of the cigarette packets, advertising and the quality of the product.

Whilst recognizing that in *other* sectors of the market conduct similar to that referred to by the recommendation might amount to restrictions on

competition, *Vander Elst* alleges that the Community and national rules applicable in Belgium in the cigarette sector have such a decisive effect upon the conduct of Belgian cigarette manufacturers that the objective and effect of the recommendation, which would never have been made in the absence of the said rules, cannot be *to restrict competition to an appreciable extent.*

The Commission has misunderstood the *concept of appreciable restriction* on competition which the Court laid down especially in its judgment in the *Suiker Unie* case. *As a matter of principle* the Commission refused to consider the influence of the limitations imposed by national legislation on the recommendation and on the conduct of cigarette manufacturers (paragraph 88 of the decision).

Since the Commission has not appreciated the nature, extent and effect of the national rules and has not taken sufficient account of them, the decision is void because it is wrong in fact and in law. In any event no reasons are stated on this vital issue.

Vander Elst complains in the first place that the Commission misunderstood in paragraph 88 of the decision the concept of appreciable effect. The argument that the effects are "the more significant" in conjunction with the words "has the effect of restricting competition" clearly shows the legal ideas of the Commission, namely that when considering whether private conduct restricts competition appreciably, it ought to take *no* account of the influence exerted by the State on that conduct *or* at most to take account thereof to confirm that the restriction on competition is appreciable.

It is apparent from the judgment in the *Suiker Unie* case that where restrictions of a private nature are added to restrictions imposed by the State it is necessary to consider the effects of the national rules on the systems laid down by private persons in order to discover whether they allow at least a margin of workable competition which is not distorted. Those considerations based on the concept of workable competition were laid down by the Court in particular in the judgment in the *Metro* case ([1977] ECR paragraph 20 at p. 1904). The argument concerning the effects which "can only be the more significant" put forward by the Commission is incompatible with those considerations.

Moreover, the Commission's argument is contrary to its practice in relation to decisions and to the case-law of the Court as regards the assessment of restrictions on competition within a group of companies (cf. in particular Case 22/71 *Béguelin,* [1971] ECR 949; Case 6/72 *Continental Can* [1973] ECR paragraph 15 at p. 242; Joined Cases 6 and 7/73 *Commercial Solvents* [1974] ECR paragraph 37 at p. 253; Case 16/74 *Centrafarm* v *Winthrop* [1974] ECR 1183; Commission Decision of 30 June 1970 *Kodak,* Journal Officiel L 147, p. 24). The influence of the Belgian State is similar to that of a parent company within a group of companies which it controls.

Vander Elst then criticizes the Commission statement that manufactured tobacco is not the only product to be heavily taxed and subjected to governmental price controls (paragraphs 105 and 88 of the decision). In making such a statement the Commission misunderstands the nature of the national rules and thus their specific effect upon the conduct of cigarette manufacturers as regards competition. In any event it has not stated sufficient reasons for its assessment of the

significant effect and has thus infringed Article 190 of the Treaty.

In Vander Elst's view the said rules have an effect upon the competitive conduct of the Belgian cigarette manufacturers in the sense that in relation to the terms of sale to the retail trade there is no margin for effective competition which is not distorted.

In support of that argument it gives a summary of the influence exerted by the State which includes in particular the following points:

It maintains in the first place that *excise duties with a high cumulative effect* on manufactured tobacco resulted in distortion of competition. The proportional excise duty calculated on the retail sale price has the result that each item of cost which appears at the manufacturing and distribution level has an increased repercussion on the retail price. In other words the duty subjects each item of cost of the cigarette to the cumulative effect.

Competition is also limited by the *minimum excise duty.* Too high a cumulative effect and a minimum excise duty (90 % of the total taxation burden borne by the most popular price category) is the reason why in Belgium some 80 % of cigarettes are in or below the most popular price category (BFR 41 for 25 cigarettes).

The first sentence of Article 5 (1) of Council Directive No 72/464 provides that *manufacturers and importers shall be free to determine the maximum retail selling price for each of their products.* It follows from that provision that the manufacturer or importer must fix the trade margin at the same time as the maximum selling price. Since the duty and the price charged by the manufacturer are fixed items, intermediaries must be confined to the difference.

The system of *fixed prices for the consumer* established by Article 58 of the Belgian VAT Code means that traders too are unable to forego part of their margin for the benefit of consumers.

Finally, the applicant stresses the effect on competition of the *system of price control in Belgium and the practice as regards cigarettes.*

It states that pursuant to the Ministerial Order of 22 December 1971 providing for notification of prices, as amended and supplemented, manufacturers and importers are bound to notify to the Ministry of Economic Affairs (Price Department) any increase on prices on the Belgian market at least three months before its application. The Minister for Economic Affairs may tacitly approve or make a recommendation containing a refusal or limitation of the increase notified. If a price increase is intended in spite of the Minister's recommendation, five working days' written notice must be given before its application. If an increase has the Minister's tacit approval or accords with his recommendation it is authorized after a period of five days. If the increase exceeds the amount laid down in the Minister's recommendation, its application is postponed for two additional months at least and may be further postponed.

In the manufactured tobacco industry the authorities expect the application to be made by the association of manufacturers. On each price increase the Minister for Finance must determine the most popular price category, deduct the minimum amount of duty (90 % of the total duty in the most popular price category) and the minimum share of the specific item (5 % of the total duty borne by cigarettes in the most popular price category expressed in Belgian francs) and on the basis of such items may calculate the increase in his tax revenue. In addition he must provide for fresh tax bands in due time.

It is necessary on price increases for the duty to be charged afresh and when duty is increased for the prices to be re-determined.

During negotiations on prices and the duty between FEDETAB and the Government all cost items including the various maximum profit margins at each stage of marketing and the end-of-year rebates provided for in the recommendation enter into the *bases of calculation* used by the two ministries responsible.

The Commission has failed properly to appreciate the influence exerted by the State.

The applicant maintains that the *specific rules of the recommendation* do not have the object or effect of significantly restricting competition.

As regard the *classification of intermediaries and maximum margins,* the Commission claims that like the system operated before 1 December 1975 the recommendation divides Belgian wholesalers and retailers into several categories and specifies fixed profit margins for each of them; in the Commission's opinion it means that "manufacturers and dealers are subject to the same restraints on competition" (paragraphs 96 and 97 of the decision).

The Commission overlooks the fact that contrary to the system operated before 1 December 1975 the recommendation concerns only the horizontal relationship between manufacturers and not vertical relationships with intermediaries. The recommendation thus *leaves* dealers *the opportunity* "of competing at the level of resale prices to retailers".

In so far as the recommendation which is henceforth limited to horizontal relationships and fixed maximum margins, still involves any restriction on competition between dealers such restriction is no longer significant. In that respect it should be borne in mind that almost 80 % of the direct customers of the manufacturer are wholesalers and that only some 20 %, some 17 % of which are supermarkets, sell directly to the consumer. The competition which the recommendation allows between wholesalers is thus significant.

As regards the *contested restriction on competition between the manufacturers concerned,* the applicant is of the opinion that the Commission wrongly complains that the recommendation, in the same way as the system operated prior to 1 December 1975, prevents account being taken of other services which dealers may render individually (paragraph 97). In contrast to the former system which prohibited rebates and so forth the recommendation puts no obstacle in the way of remunerating individual services.

In its legal assessment of the classification the Commission ought in any event to have observed that selective distribution systems are treated as an item of competition compatible with Article 85 (1) (Decision of 15 December 1975, *SABA,* Official Journal L 28/76). The Court of Justice approved and confirmed that solution inasmuch as the nature and intensity of competition may vary according to the products considered and the economic structure of the market in question *(Metro* judgment [1977] ECR 1975 at p. 1906).

In classifying their immediate customers cigarette manufacturers aimed to maintain the traditional means of cigarette distribution through the wholesale and specialized retail trades alongside distribution through supermarkets.

With reference to the criterion of a *minimum compulsory range*, the applicant observes that the Commission considers competition to be appreciably restricted because intermediaries are "obliged to keep stocks of low-moving brands of cigarettes, thus tying up part of their working capital" (paragraph 97).

The maintenance of a certain minimum range (which varies from 90 brands for specialized wholesalers to 50 for supermarkets — which applies to the sales outlets of supermarkets as a whole and not to each of them) — is not an obligation but solely one of the criteria used to classify intermediaries. Every intermediary may choose from the total of 220 brands of cigarettes at present marketed in Belgium those which meet the demands made on him.

It is impossible to understand why the keeping of a minimum range should prevent the intermediary from pushing sales of a particular brand in preference to others, as the Commission states (paragraph 87 (f)).

Keeping a minimum range guarantees "comprehensive distribution", even of less popular brands. Their sale is *not* "slow moving", as the Commission says. The Commission is in fact taking upon itself the interests of the supermarkets which are to market only "popular" brands. Although it is true that in other sectors the problem of less popular brands is governed by the fact that the "speciality" itself bears the additional costs involved in its distribution, the cumulative effect of the duty prevents that in the case of cigarettes.

The applicant then observes that the Commission claims that the end-of-year rebate system has the effect of perceptibly limiting competition as it (a) removes the incentive for intermediaries to make greater competitive efforts with a view to obtaining improved benefits; (b) removes the incentive for intermediaries to take their custom *exclusively* to one manufacturer; and (c) makes things more difficult for manufacturers so desirous of entering the market (paragraph 98 of the decision).

As regards (a), the applicant points out that the recommendation does not absolutely ban individual reward for special effort but confines itself to ruling it out in the form of a proportional profit margin.

As regards (b) and (c), in fact the recommendation does not, by means of the rebate, encourage an intermediary to give his custom solely to particular manufacturers. The price of cigarettes is too low and their distribution too intensive for it to be reasonable for intermediaries to confine their custom to particular manufacturers.

The necessity of maintaining a tight distribution network means that the full distribution costs in a country per brand and manufacturer are not proportional to the quantities sold. The recommendation effectively creates a distribution system which is open to the new manufacturer on terms upon which the distribution costs of popular and less popular brands merge and the quantitative aspect is taken into account only for purposes of the criteria applied for classifying intermediaries and, for the small end-of-year rebate, solely on a flat-rate basis. The rebate therefore does not in any way significantly restrict competition.

As regards the *terms of payment*, the applicant observes that the Commission claims in paragraphs 100 and 101 of the decision that the joint, uniform determination of maximum credit periods has the effect of preventing competition in this area.

That complaint cannot be made of the applicant. By letter dated 18 December 1975 it informed the Commission that "... cash payment has always been the rule with our company and ... we shall continue such practice independently of the said recommendation".

Moreover, the applicant considers that a rule of immediate cash payment, assuming that it is kept by all the manufacturers, does not restrict competition, but, on the contrary, prevents distortion of competition and discrimination. Competition as regards terms of payment involves, because of the effect of taxation provisions, distortion in competition to the detriment of the manufacturers and the traditional distribution network.

The State makes the cigarette manufacturer its tax collector both as regards the duty on the consumption of manufactured tobacco and VAT. Four fifths of the debt owed by intermediaries to manufacturers is made up of the reimbursement of the tax paid by the manufacturer. It therefore appears legitimate for manufacturers to try to ensure that the details of payment are used in a *neutral* manner as far as concerns competition and that they should try to lessen the individual risk which is forced upon them.

As regards the period of payment also, neither the object nor the effect of the recommendation is significantly to restrict competition.

In its defence the *Commission* recalls in the first place that as regards *the facts* it stated in paragraph 8 of its decision "FEDETAB member firms produce or import roughly 95 % of the cigarettes and between 75 and 80 % of the cigars and cigarillos sold in Belgium ..." and in paragraph 1 of the decision it said that almost all the Belgian and Luxembourg producers of manufactured tobacco belonged to FEDETAB. Those facts and figures were not challenged by the applicants.

The Commission decision then pointed out the legal considerations on the basis of which the Commission considers that the restrictions on competition had a significant effect upon competition and upon trade between Member States, namely at paragraphs 88 and 93 as regards the measures prior to 1 December 1975 and paragraphs 102 to 107 as regards the recommendation.

Contrary to what Vander Elst in particular maintains there is therefore no lack of reasons on that issue.

As regards the reference by several applicants to certain paragraphs in the judgment in the *Suiker Unie* case (and in particular paragraphs 66, 71 and 72), the Commission claims that the regulations governing the Belgian manufactured tobacco market differ completely from those which governed the Italian sugar market (cf. paragraphs 67 to 69 of the judgment in the *Suiker Unie* case).

As regards the *law* the Commission alleges that, contrary to what Vander Elst maintains, the established case-law of the Court (Cases 56/65 *Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, 5/69 *Volk* v *Vervaecke* [1969] ECR 295, 1/71 *Cadillon* v *Höss* [1971] ECR 351 and 19/77 *Miller* v *Commission* [1978] ECR 131 at paragraph 10) shows that to appreciate the significance of an

agreement it is necessary to take account of the position of those concerned on the market in addition to the actual framework within which the agreement operates.

In this case the *position of the parties* on the market (cf. paragraph 8 of the decision) is sufficiently important for their conduct to be able to have a significant effect upon competition.

In that respect the Commission wishes to observe that the market in manufactured tobacco products in Belgium has during recent years shown a strong tendency to concentration, especially because multinational groups have taken control of the majority of the large Belgian manufacturers. In fact the seven applicants in these cases who are members of FEDETAB represent only four large groups, namely Rothmans, Philip Morris (Weltab), British-American Tobacco (BAT), Seita (Cinta) and an independent manufacturer, Gosset.

As regard the *actual framework* within which the agreement operates the Commission did not express the view in its decision that the Belgian rules had no effect upon competition. On the contrary it took account of those rules in paragraphs 83, 88, 93, 105 and 107 of the decision. On the other hand the Commission was of the opinion that the fact that the Belgian State required the retailer to sell at the retail price shown on the tax band is not such as to remove from the scope of Article 85 (1) the private rules imposed in that respect by FEDETAB and its members on Belgian wholesalers and retailers, since those rules mean that manufacturers do not compete against one another with regard to the advantages they are to give.

The Commission states that it then observed that Article 85 (1) prohibits significant restraint upon competition within the common market where such restraint is likely to effect trade between Member States *even if the restraint were encouraged* by the national law. In the present case the applicants have by no means shown in what respect the restrictions *which they applied* were encouraged by any national or Community rules.

The Commission further considers that if national legislation has the effect of (partially) restricting competition, the *added* effects of private arrangements restricting competition can only be the more significant. The reasoning of that sentence in paragraph 88 of the decision relates not to the restrictions which arise from or are covered by the national rules but to those which are additional thereto. The gloss which Vander Elst gives to the assessment contained in the decision on that issue is for those reasons wrong.

Nor is it possible to accept Vander Elst's argument to the effect that the decision on that issue is ... "incompatible with the legal idea of a company group". It is not possible to accept such an argument which tends to assimilate the economic or revenue control by the State to the control which a parent company exercises on its subsidiary such as the Court has defined in its judgments in the *Centrafarm* cases.

Finally the measures adopted by the applicants and in particular the various measures in the recommendation are part of a distribution system established by the decision as an infringement of Article 85 (1) of the Treaty. It is therefore necessary to consider whether the measures adopted (especially by the recommendation) as a whole and, contrary to what certain applicants maintain, not some of those measures taken *in isolation,* significantly affected competition.

On the major issue of restriction of competition *FEDETAB* observes in reply that this appears to be a debate between the deaf as stressed by Mr van Gerven in his final speech at the second hearing: "According to the Commission since residuary competition is limited every additional restriction by the manufacturers is all the more serious, whereas the manufacturers' view is as follows: Since competition has already to a very large extent been prevented by the actions of the authorities, any restriction by the manufacturers is necessarily of little significance" (transcript of 22 September 1976, Case IV/29.149, p. 139). The parties still cannot agree on that fundamental issue.

The Commission thinks it is possible to provide an answer in favour of condemning the agreements and the recommendation by reference to an abstract concept of competition understood as a theoretical example of perfect competition without regard to the market situation and losing sight of the fact that the Treaty aims to protect "workable competition".

Thus the Commission cites the percentages of cigarette sales in Belgium. The applicant does not discuss those figures but only their relevance. It is not the share of the market which is in issue but the scope left for free competition by the revenue rules and other laws.

The Commission persists in its erroneous application of Article 85 (1) in spite of the interpretation given by the Court in the *Suiker Unie* case, which should serve as a guide in this case. Although the rules in the two cases are obviously different the fact is that in both cases the law is so restrictive that those concerned in the market have lost their freedom of action to such an extent that whatever they do no longer has any significant effect upon the *price trend* on the market. On the other hand competition between manufacturers on the manufactured tobacco market in Belgium has remained extremely keen as regards shops, make-up of cigarette packets, advertising, choice of the best position on the shelves and the quality of the product.

As to the "tendency to concentration" by the Belgian tobacco industry as alleged by the Commission, there are in fact 124 manufacturers.

Vander Elst maintains that the Commission in its defence has evaded the question of whether *too high a cumulative effect* distorts competition by

distorting the relationship between the costs of traders and the market price.

It further alleges that the *fixing of the retail sale price by the manufacturer or importer,* whether it be a maximum price as provided by the first sentence of Article 5 (1) of Directive No 72/464 or an imposed selling price as provided by the second sentence of that paragraph, constitutes interference by the State in competition. Such fixing is for taxation purposes and not a rule corresponding to the requirements of free competition or free price formation.

The *minimum excise duty* also represents intervention in competition. It protects the price categories which produce most revenue — the dearest — from the cumulative effect of the price categories which produce the least revenue, the cheapest.

The applicant then criticizes what it calls the *practice of "sub-labelling"* which the Commission recommends as a means consistent with the Community law on competition, capable of being substituted for the position created by the recommendation. That practice would mean that the price would be reduced not only by the amount which the trade (the manufacturer) intends to forego but also by the duty on that amount (or in the event of foregoing the manufacturer's share, the duty on the margin). It is, however, obvious that neither the Belgian State, nor any other Member State, would consent to such a formula, which would cause it to lose considerable revenue. National law and Community directives support it.

The basis of taxation is in no way the price on the band. According to Belgian law the basis is the retail sale price, which includes the *usual* costs (Article 7 of the 1948 Regulation on tobacco) and according to Article 4 (1) of Directive No 72/464 it is even the *maximum* retail selling price. There is scarcely any doubt that a formula which allows a manufacturer to fix any number of "maximum prices" for one and the same product using for that purpose any number of different bands has not much in common with taxation on the basis of the *maximum* price. It would then no longer be taxation on the basis of the *maximum price* but of the actual *consumer price.* That is, however, not what the directive lays down. Article 5 (1) of the directive is intended to *ensure* taxation on the basis of a single maximum price in accordance with Article 4 (1). If the person liable for the duty is the *only person* to "determine the *maximum* retail selling prices of each of his products" that would ensure *uniformity* of the maximum price for each product of a given taxpayer.

According to the system of maximum prices laid down by the Community the consequence of sub-labelling would be that the State could obtain payment from the taxpayer, namely the manufacturer, of the difference in relation to the tax due on the maximum price. That means either that the manufacturer is charged on a price higher than the consumer price or that the consumer is charged at a rate higher than the legal rate. Where, as in Belgium, the manufacturer must also pay the VAT by means of the tax band such system would moreover conflict with Community law on VAT which allows the tax to be based only on the actual consumer price.

According to the applicant, however, the Commission misunderstands above all the influences which the tax rules have on competition. It is such that as regards the distribution conditions of manufacturers and traders there are no "normal"

market conditions but distorted conditions of competition contrary to the Treaty and in those circumstances the recommendation has no significant effect upon competition.

The applicant gives figures for the influence which the tax rules have on competition. On the basis of its analysis it concludes that the effects of distortion of and restriction on competition caused by the tax rules as a whole may be summarized as follows:

The *multiplier,* considered in isolation:

— multiplies for the benefit of the State every item of the manufacturers' and traders' costs at the level of the retail sale price;

— considerably widens the range of retail prices much more than would correspond to the competitive efforts of manufacturers and traders;

— results in price differences between various forms of distribution which do not bear any relationship to the differences in the distribution services;

— encourages forms of distribution which are already strong as a result of the capital they have available and their competitive position, and which offer a restricted service, and discourages the traditional trade which is weaker both from the competitive and capital point of view but which offers an extended service;

— carries the principle of competition in performance to absurd lengths in the interests of the State;

— leads to prohibitive distribution costs per unit for small brands.

Minimum excise duty:

— quickly restricts the possible range of retail sale prices below the most popular price category by making the cumulative effect impossible "towards the lower end".

Taxation of the maximum price, that is to say the ban on sub-labelling:

— prevents manufacturers, importers and the trade from applying retail sale prices varying according to the product.

The fixed price and the multiplier:

— prevent the individual adjustment of remuneration for services rendered by the trade and the fixing by the trade of different retail sale prices.

Price control:

— leads manufacturers, the trade and the State to negotiate, when any of them seeks to alter prices, as regards the share of each party in the final price;

— prevents individual remuneration for services and individual adjustments of prices beyond a relatively modest limit.

The rules as a whole:

— give the market an exceptional degree of transparency.

The applicant considers that the taxation system for cigarettes, based on the EEC directives, as it exists in Belgium is, because of its effects, in conflict with the principles of the Treaty and the law and in particular with:

— the principle of identical taxation of identical products;

— the requirement of competition which is not distorted;

— the requirement of the possibility of parallel importation;

— the requirement of competition based on service; and

— the principle of independence contained in Article 85.

The basis of taxation provided by Community law, namely a fictitious maximum price (rather than as at present an actual price — "Festpreis"), is also in conflict with the principles of the Treaty or other legal principles, namely that of identical taxation of identical products and that of payment of a tax on consumption by the consumer and not by the manufacturer.

The applicant relies on the argument, which Jubilé also puts forward, to the effect that the various tax rules *call forth measures* to correct the distortion of the differences in distribution costs at the level of the retail sale price. *The recommendation is such a measure.*

Further the recommendation does not significantly restrict competition since:

— it is not mandatory;

— it was approved by distributors (save by undertakings such as GB);

— it does not, as a whole, have the effect of the agreements prohibited by Article 85 (1) of allowing those concerned to make excessive profits (Paragraph 70 of the judgment in the *Suiker Unie* case) but its effect is not to charge excessive prices to the consumer.

The Commission's assessment of the question of significance is wrong because it is based on the following argument: where State rules involve a restriction on competition, additional restrictions of a private nature are *consequently all the more significant.*

On the one hand that argument is mistaken in that it is not compatible with the concept of workable competition according to which it is necessary to know, in applying the rules on competition, whether there is workable competition, which means also *competition which is not distorted.*

Further that argument is mistaken because the fiscal rules distort competition for *the sole purpose of maximizing the State's revenue.*

In its rejoinder the *Commission* refers to what is said in its defence on the *actual effect which the national and Community rules cited by the applicants may have had on competition* and, in the light of the replies, adds the following observations:

1. The Belgian taxation rules and the cumulative effect

The Commission points out in particular that the applicants in their replies have no longer maintained their allegations that the *cumulative effect* "fixes" the economic make-up of the retail sale price at a particular level and prevents their fluctuation. It also takes note that the applicants are also no longer denying that the taxation system in question does not prevent manufacturers or importers from competing in the choice of the retail sale price for their products.

In reference to what Jubilé says (in its application) and BAT (in its reply), the Commission observes that these applicants have admitted that wholesalers may compete by accepting higher or lower margins. It also observes that the

applicants have not maintained that competition was restricted in areas other than prices and margins.

As regards *Article 58 of the Belgian VAT Code*, the Commission states that it has, pursuant to Article 169 of the Treaty, given the Belgian Government formal notice to submit observations thereon. The Commission considers that that provision is contrary to Articles 30 to 36 of the Treaty.

The Commission nevertheless wishes to stress that although the manufacturers or importers must take account of the traders' margins when the retail sale price is fixed in advance, the necessity of fixing it in advance does not make it impossible for the margins granted to traders to vary individually, and that the manufacturers or importers have to take them into account only in the aggregate.

As for the *Belgian tax policy* the Commission alleges that although it is true that the Belgian State has increased the rates of taxation as stated, it does not nevertheless follow that such increases have the effect of no longer allowing the make-up of the retail sale price, on which the taxation is based, to vary. Proof that the Belgian State when increasing the taxation leaves a large scope for competition is shown by the fact that it makes available to the undertakings a whole range of tax bands corresponding to various retail prices (rejoinder, Annex 13), which allows undertakings to ensure that variations in the make-up of the retail price, which their competitive efforts might bring about, are reflected in the choice of price.

The Commission alleges *in conclusion* that the applicants have not shown how the Belgian tax rules make necessary concerted action *between manufacturers* on the subject of the benefits to be granted to traders. Nor have the applicants shown that those rules deprive of any significant effect the concerted action *which they take* on the subject of those benefits.

2. Community harmonization of taxation

The Commission observes that the aim of Directives Nos 72/464 and 77/805, which are based on Articles 99 and 100 of the Treaty, is to abolish, as far as required by the establishment and working of the common market, distortions in competition which may arise from the disparity in taxation laws on the matter. The directive did not, however, establish that those disparities were or are likely to exclude all competition or to exclude the competition which the various manufacturers and importers on the Belgian market may engage in *inter se* on the subject of the benefits to be granted to traders.

As regards the provisions of those directives which allow Member States to levy a minimum excise duty the amount of which may not be higher than 90% of the aggregate amount of the proportional excise duty and the specific excise duty which they charge on cigarettes in the most popular price category, the Commission maintains that such provisions do not exclude competition in view of the fact that the range of bands corresponding to the various retail prices will always include a certain number of bands corresponding to prices lower than those of cigarettes

of the most popular price category (the so-called "popular" cigarette as regards Belgium).

In any event those provisions do not allow it to be shown that the concerted action in which the applicants have indulged on the subject of the benefits to be granted to traders was not capable of having significant effects.

3. The obligation to notify price increases in Belgium

The Commission challenges in particular the claim by FEDETAB that the Commission ignored economic reality inasmuch as traders, in the view of FEDETAB, enjoy too low a margin to allow them to pursue any other price policy.

Although FEDETAB alleges that it submitted evidence to the Commission thereon, the Commission maintains that FEDETAB never showed that its members were unable to sell their products at prices less than the retail prices notified to the Ministère des Affaires Économiques or that they had too small a margin for that purpose.

The fact that there is a range of tax bands corresponding to a whole range of different retail sale prices suggests that even the Belgian authorities were convinced of the contrary since they allow prices to fluctuate within the range of bands corresponding to various prices.

4. Observations on the rules as a whole (in particular the tax rules)

The Commission challenges the claim by Vander Elst and Jubilé that the provisions of the recommendation were made necessary by the existence of those tax rules and that the effect of those provisions was to limit the distortions of competition arising from those rules.

Such a claim cannot be accepted. The existence of distortion of competition can in no event justify traders in making an additional restriction on competition by measures of a private nature. The wording of Article 85 (1) clearly shows that that provision applies to all situations where competition is distorted or restricted to a significant extent by concerted practices of traders and not only where it is established that competition is not in any way restricted or distorted by rules, especially tax rules, of a Member State.

A restriction due to such rules can therefore never justify an *additional* restriction by industry. That is moreover also shown by the fact that in paragraph 34 of the judgment in *Inno* v *ATAB* the Court considered that Article 86 prohibited any abuse by one or more undertakings of a dominant position, *even if such abuse were encouraged by a national legislative provision.* The Commission, as is evident from paragraph 83 of the decision, considers that such reasoning applies also to Article 85.

The Commission completes its rejoinder in relation to *the facts* by the submission of a number of *statistics relating to the Belgian market in manufactured tobacco.*

As regards the *law* the Commission points out that the Court has on several occasions (in particular in its judgment in the *Metro* case) stated that the competition which Article 3 (f) of the Treaty seeks to protect is workable competition. The Commission maintains that it properly took account of that requirement in its decision.

On the one hand the action undertaken by the complainants GB and Mestdagh and Huyghebaert shows in itself that workable competition remains possible in this sector and further if it were established, which the Commission denies, that the rules had already excluded the possibility of workable competition, there would be no reason for the applicants to cling so tenaciously to their concerted action and show such desire to regulate with private measures the areas covered by the recommendation.

It is easy on the other hand to understand that the applicants, who were confident that within the small group of manufacturing members of FEDETAB which they constitute no trade war would break out in relation to their share as manufacturer or importer, would have liked to "freeze" competition which might have arisen in relation to the other item in the retail sale prices (the profit margins) and that would obviously not be to the liking of traders (such as GB or Mestdagh and Huyghebaert) who are undoubtedly more active than countless wholesalers and retailers.

It is there that there are opportunities for effective competition and it is precisely there that the applicants eliminated them by their concerted action to such an extent that the secretary of FEDETAB was able to say at the hearing on 22 October 1975 that he had "managed the economy of that industry" (defence Annex 2, p. 48).

Thirteenth submission: infringement of Articles 85 (1) and 190 of the Treaty inasmuch as the Commission decision wrongly concluded that the various measures adopted before the entry into force of the recommendation and the recommendation itself may have a direct or indirect, actual or potential influence on trade between Member States or have significantly affected such trade

That submission is made separately by the applicants *HvL, BAT, Jubilé* and *Vander Elst.*

Certain applicants including in particular FEDETAB further allege, in support of the twelfth submission, that the Commission did not satisfactorily answer the applicants' arguments in relation to the significance of the influence upon trade.

The applicant *BAT* alleges in particular that the restrictions on trade between Member States are the result of the legislation in force and not of the action undertaken by FEDETAB and its members (cf. the judgment in *Inno* v *ATAB* and the opinion of Mr Advocate General Reischl which came to the conclusion that the various items of the Belgian taxation system were such that Article 58 of the VAT code would not affect trade between Member States).

That is all the more true of the agreements, practices or decisions of an association of undertakings, the subject of the present action.

Further, because of the problems in which trade between Member States is involved as a result of the taxation system applied to manufactured tobacco products, the parallel importation of such products is effectively excluded.

The measures adopted or recommended by FEDETAB were solely for the purposes of survival in the face of ever-increasing taxation and to ensure the vital minimum necessary for the sectors of the industry to survive. Those measures therefore did not significantly influence trade between Member States and the Commission in consequence committed an error adversely affecting the applicant in asking its decision of 20 July 1978 which should accordingly be declared void.

Jubilé challenges in particular the correctness of the Commission's statement (paragraph 107 of the decision) to the effect that the recommendation curtailed the opportunity, for example by large distribution undertakings, of creating channels for parallel imports. In view of the fact that the recommendation is in any event concerned only with the relations of the Belgian manufacturers with their direct customers (at the wholesale or retail level) it leaves such a system of parallel imports at the retail level quite unaffected.

Nor is it correct that with the end-of-year rebate the recommendation creates an artificial situation of competition and an additional obstacle making it more difficult for newcomers *to penetrate the market.* The so-called "ubiquity of the brand" causes the newcomer generally to forego, for reasons of cost, setting up an importing system of his own. The rebate with the clause relating to independent producers thus *encourages the reduction of costs* by using the marketing channels already existing.

In *Vander Elst's* view the statement of the reasons on which the decision was based (paragraphs 106 and 107) is inadequate in several respects and in particular the question whether the recommendation, which is confined to the territory of Belgium, affects trade between Member States. It is necessary properly to consider "the economic context in which it exists" (paragraph 27 of the judgment in the *Papiers Peints* case) including obstacles arising from the taxation system (cf. the judgment in *Inno* v *ATAB*). The Commission did not properly take cognizance of those obstacles.

The Commission has not shown convincingly that the recommendation is likely to obstruct imports (no effect upon export is alleged). Such proof is indispensable (cf. the judgment of Case 19/77 *Miller* v *Commission* [1978] ECR, paragraph 5 at p. 151).

The special system for calculating and levying the duty on the smoking of cigarettes is, at the present stage of harmonization of Community law, a basic obstacle to intra-Community trade. That is why the Court found that because of the need to satisfy control requirements the import and export of manufactured tobacco come up against inevitable obstacles and trade between States in this product requires considerable resources and skill (judgment in *Inno* v *ATAB* at paragraph 15).

Apart from the case (omitted by the Commission) of a foreign manufacturer setting up his own new distribution network *parallel* to the established network, the only possibility is that one of the Belgian specialist wholesalers, specialist retailers or supermarkets might start importing. In so far as one of those traders also sells products which he has himself imported he will have the same freedom of action, within the limits laid down by the State, as if the recommendation did not exist.

Finally the Commission found that the fact that Members of FEDETAB, as manufacturers, engaged in imports, affected trade between Member States. In the cigarette sector it is the duty which makes import and export more difficult at marketing level whilst artificially converting imports and exports carried out by manufacturers into a normal pattern of trade.

The *Commission* points out in its defence that the applicants have not challenged *the facts* and figures relating to imports of manufactured tobacco products into Belgium (paragraph 8 *et seq.* of the decision). The assessment contained in the decision in relation to trade, especially in paragraphs 91 to 93 and 106 and 107 thereof, is based on and refers to those facts. It moreover sets out clearly and explicitly the Commission's reasoning thereon.

As regards the *law,* the Commission considers that it is not bound to give reasons for rejecting all the submissions put forward during the administrative proceedings providing reasons are properly stated for its decision.

The Commission decision (paragraphs 16 to 18 and 93 and 106) moreover adopted the views expounded by the Court in paragraph 15 of its judgment in *Inno* v *ATAB.* The Commission therefore did not deny that because of the tax provisions in force wholesalers and retailers were subject to practical difficulties in relation to so-called parallel imports.

The influence on the trade in question here is not chiefly at the level of direct imports by traders (which the tax rules already make technically difficult) but rather at the level of trade for which manufacturers and importers are responsible and they can easily overcome such difficulties.

It is obvious that the conditions under which the applicants market products in Belgium (including products which they have previously imported from other Member States) are likely indirectly to affect such trade and in particular the volume of products so imported by manufacturers and importers.

The proportion of tobacco products imported into Belgium from other Member States is far from negligible and the applicant firms are of a size sufficiently large for their conduct in principle to be likely to affect trade according to the criterion in the judgment in the *Miller* case.

Jubilé denies in the reply that the measures of the recommendation are likely indirectly to affect the volume of cigarettes imported by the manufacturers. Even if that were so it would still be necessary to inquire whether that indirect or potential effect is capable of "affecting" freedom of trade between

Member States "in a manner which might harm the attainment of the objectives of a single market between States" (judgment of the Court in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR at p. 341).

In the applicant's opinion the measures in the recommendation are *not* likely in the circumstances of the present case *adversely* to affect the only import trade possible, namely by manufacturers; that is, they are not likely to affect trade.

Vander Elst alleges in particular that trade between Member States is not affected by the market position of the manufacturers because *as a result solely of the differences in taxation* of manufactured tobacco in the Member States the recommendation covers *a purely domestic situation.*

In pursuing the aim of a single market in cigarettes the recommendation *in itself* has no adverse influence going beyond the obstacles caused by taxation. It is itself a consequence of that taxation.

The latter argument is also put forward by *FEDETAB,* which admits that the applicants are practically the only cigarette importers into Belgium. Those cigarettes are mostly manufactured by large companies often belonging to the same multi-national groups as the applicants. It is therefore logical that the imports should pass through the associated companies as in the case of the vast majority of products in question.

Marketing conditions in Belgium through the specialized trade, the Horeca sector of the large distribution undertakings apply at a stage *subsequent* to import and have no influence on normal inter-State trade having regard to the need for the tax band.

It is therefore apparent that there is no effect upon trade between Member States or at least no significant effect.

The Commission observes in its rejoinder that the conduct of the applicants who control more than 95% of the total production and import of cigarettes into Belgium must of necessity be such as to affect trade in those products between Belgium and the other Member States (without mention of trade with the Grand Duchy of Luxembourg where in view of the fact that the taxation system is common with that of Belgium, such trade is completely free).

The Commission cites the case-law of the Court and in particular paragraph 5 of the judgment in *Völk* v *Vervaecke* ([1969] ECR at p. 302) to refute FEDETAB's argument that since the marketing conditions in Belgium apply after import they do not have any influence on normal inter-State trade in view of the existence of the tax band.

In the Commission's view it is obvious that the marketing conditions applicable to the products which the applicants sell in Belgium (including the products which they have previously imported from other Member States) are such as indirectly to have an influence upon the pattern of trade and in particular upon the volume of products so imported by the manufacturers and importers.

It is easy to understand that when the applicants took concerted action upon the financial benefits to be granted to traders through whom they sell their products, that concerted action created marketing conditions which are not the result of free competition and which in particular provided for a certain level of remuneration for such intermediaries;

not only will that remuneration have to be taken into account by other undertakings which import such products into Belgium (when they have to fix their sale prices for these imported products to traders), but it will also facilitate or prevent imports by the applicants themselves — imports which the applicants would or would not have been able, as the case may be, to effect if they had not taken concerted action in relation to the pecuniary benefits to be granted to traders. FEDETAB loses sight of the fact that the Court in its judgment in the *Miller* case ([1978] ECR, paragraph 15 at p. 131) stated:

"In prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition Article 85 (1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect."

The Commission considers in that respect that in any event that has well been established in its decision.

E — Summary of certain arguments of the interveners regarding submissions on Article 85 (1); answers by the principal parties

1. The *intervener ATAB* supports the submissions of the applicants to the effect that the recommendation is excluded from the scope of Article 85 (1) and in particular the submissions showing that the Commission is disregarding the case-law of the Court and apparently reversing its own previous decisions by no longer taking account of the fact that a selective distribution system makes it possible to *facilitate the sale* of a product, *ensure continuity of supply* and often constitute for *small and medium-sized undertakings* the only means of *facing competition on the market.* It has been shown in the present case how much the latter need specialist wholesalers to provide for retailers supply services not provided by non-specialist wholesalers, with all the cost that involves.

The *Commission* in its observations on the statement by ATAB says in answer that the system practised by the applicants does not conform to what is generally referred to by the expression "selective distribution system". Further the argument put forward regarding the benefits of that system relate to assessment of the recommendation under Article 85 (3).

2. The intervener *AGROTAB* stresses as regards the *facts* the economic strength of supermarkets and food distribution chains. Such undertakings aggregate the margins of wholesalers and of retailers since they buy wholesale and sell retail so that their total sales margin is far higher than that of retailers, which in turn is far higher than that of wholesalers. Specialized wholesalers guarantee their customers a range of extended service (supplying 80 000 sales outlets; extended range of stocks; regular visits to customers) whereas

supermarkets confine themselves to selling a very restricted range of products on their own premises.

With the application of the recommendation the sales margins are at present:

— 9.27% for large stores;

— 8.36% for food distribution chains;

— 7.50% for approved retailers;

— 6.50% for retail shops;

— 2.50% for wholesalers.

If the recommendation could no longer be applied, specialized wholesalers (whose net profit margin is 0.65%) would receive no more than a derisory sales margin so that they would be driven to bankruptcy.

In AGROTAB's view the new system implicitly required by the Commission would lead to the disappearance of wholesalers who organize 80% of distribution and, to the detriment of consumers, that trade would not be entirely taken over by large stores.

As regards the *law* AGROTAB points out that the normal sales margin granted to wholesalers is lower than the sales margin authorized by the Ministry of Economic Affairs under the Law of 30 July 1971 on economic rules and prices. The difference between the sales margin granted as each purchase takes place by wholesalers and the authorized sales margin corresponds exactly to the end-of-year rebate.

The Commission considers at paragraph 98 of the decision that such system restricts competition between manufacturers and provides no incentive for intermediaries to make greater competitive efforts. The rebate corresponds to the sales margin to which the intermediary would be entitled under the legislation on prices. The fact that the rebate is asked for by intermediaries and granted by manufacturers has thus nothing to do with the scope for competition between manufacturers on the one hand and intermediaries on the other.

The *Commission* observes that the fact that under the Belgian rules on the notification of price increases Belgian manufacturers have to notify end-of-year rebates to the Ministry of Economic Affairs does not prevent the application of Article 85 (1) of the Treaty to the concerted action which those manufacturers undertake in respect of the size of that benefit which they grant to traders. The fact that the rebates actually granted coincided with the rebates notified to the Belgian authorities does not affect the matter.

3. The *Fédération Nationale des Négociants en Journaux, Publications, Librairie et Articles Connexes ("FNJ")* intervener, adopts the arguments of the applicants with regard to Article 85 (1).

4. The applicant *Mestdagh* and *Huyghebaert* and the *FBCA* challenge the criteria in the recommendation for justifying the classification of wholesalers and retailers into categories.

The *annual sales volume* is manipulated in an arbitrary fashion to oust certain distributors such as Mestdagh and

Huyghebaert whereas derogations are actually granted directly in favour of others under the guise of "transitional measures".

The criterion of the *number of brands* sold has nothing to do with the occupational capacity of a retailer and should be dropped.

In any event, naturally and as a matter of demand retailers whose annual sales volume is large will be also led to offer a large variety of brands corresponding to the various tastes of customers. The greater the turnover the larger the range corresponding to the diversity of customers. Thus for example Mestdagh found that without any obligation on its part it was already offering 89 brands in its shops.

Nevertheless what appears unacceptable is to use such alleged criterion as a means of excluding this or that undertaking which although having a larger annual turnover is refused an additional margin because it does not sell 90 brands. In Belgium 17 brands alone represent 71% of the market. With 30 brands almost the whole market is already covered.

As regards the *number of sales outlets served*, Mestdagh and Huyghebaert and the FCBA complain that rival manufacturers are taking concerted action and deciding together the number of sales outlets which merit this or that benefit.

In any event the recommendation is applied in an arbitrary fashion.

5. The intervener *GB* states that it is well placed to know that the various decisions and agreements to which the applicants were parties, far from not being followed up and not being applied as the applicants pretend, were in fact strictly observed. GB refers in that respect to the facts set out in its complaint of 2 April 1974 which, with the supporting evidence, established that the measures condemned in the decision were far from remaining a dead letter. Thus on many occasions FEDETAB did not hesitate to use the boycott to ensure implementation of the decisions which it had taken.

GB then challenges the argument to the effect that the cause of the restrictions on competition should not be sought in the contested measures and observes in the first place that although *Article 58 of the Belgian VAT code* stipulates that the price on the tax band is the retail selling price and that price is fixed by the manufacturer or importer, that is its only effect on prices. It leaves the various intermediaries complete freedom in fixing margins and allows manufacturers and importers to compete in respect of retail prices since they continue to determine the price which they place on the band.

As regards the *actual impact of proportional duty* on competition, GB admits that a result of the establishment of a proportional tax is that the retail price, including tax, varies absolutely by a sum larger than the variation in the price exclusive of tax. Nevertheless relatively

the variation in the tax burden remains strictly proportional (and not "more than proportional" as the Commission wrongly states in its defence) to the price variation exclusive of tax. It follows that, contrary to what the applicants say, it is the specific duty which may be regarded as adverse to competition, whereas the proportional duty on the contrary allows undertakings to profit fully from their competitive position and consumers to benefit fully from that in enjoying a price reduction, including tax, exactly proportional to what the manufacturer foregoes on his sale price exclusive of tax.

GB further observes that Council Directive No 72/464 does not seek to abolish the proportional duty but envisages its being *combined* with a specific duty.

As regards the *Belgian rules on statements of price increases,* GB observes that the "administrative realities" thereof cited by the applicants do not concern only products of the tobacco industry. Those rules in fact apply "to all products, materials, commodities or goods and all services" (Article 1 (1) of the Ministerial Order of 22 December 1971 on notification of price increases). Contrary to what the applicants say, those rules do not lead to the abolition of competition in prices since prices may fluctuate freely below the price stated. Nor is it possible to see how those rules can restrict the freedom of manufacturers in the trade in fixing trade margins: the Minister is obviously not interested in the extent of those margins but only in the price to the ultimate consumer and not in particular variations in how that price is split up between manufacturers, wholesalers and retailers.

As regards *the argument to the effect that trade between Member States is not affected by the contested restrictions on competition,* GB observes in the first place that the very presence among the parties to the contested agreements of *HvL,* the largest Luxembourg manufacturer and exporter to Belgium, shows that the contested agreements, decisions and recommendations have had and continue to have an effect upon intra-Community trade.

GB then sets out how far in its view imports of manufactured products are controlled by members of FEDETAB.

First of all, as moreover FEDETAB recognizes in its reply, the applicants "almost always" enjoy exclusive rights which are often granted to them by large companies often belonging to the same multi-national groups as the applicants themselves.

Finally, the obligations imposed by the taxation systems of the Member States make imports by importers other than members of FEDETAB practically impossible. In the event of the export of products placed on the market in a Member State it is not possible to obtain reimbursement of the duties already paid. Having regard to the considerable effect

of the duty on the selling price, the fact that it cannot be recovered makes parallel imports entirely unattractive. Further, the Belgian customs and excise department does not allow the sale of the same product with different price labels (Annex 5). In those circumstances even if an importer were to find a foreign manufacturer willing to supply him he would be obliged to offer cigarettes so obtained at the same price as the "official" Belgian importer. In practice attempts by GB to obtain direct imports of cigarettes have proved completely fruitless since foreign manufacturers shelter behind exclusive rights contracts granted to Belgian companies or simply refuse to accept the offers made by GB (Annex 6).

The practical impossibility of engaging in parallel imports makes all the more significant the effect on intra-Community trade of the restrictions on competition resulting from the contested agreements and practices. That situation makes it easier for the applicants to ensure their control of imports and thus prevent imported products from escaping the restrictions on competition which they have erected.

Since almost all cigarettes sold in Belgium, including most imported cigarettes, are thus subject to the restrictions on competition established by FEDETAB and its members, those restrictions necessarily have an effect upon intra-Community trade.

It is therefore not possible to maintain, as does Jubilé, that the Commission has not shown in its decision how trade between Member States is affected by the clauses on terms of payment and trade margins in the recommendation.

In its observations on GB's statement *FEDETAB* says that as regards the *facts* the Community taxation system established by Directive No 72/464 requires national rules such as those applicable in Belgium as appears from a letter dated 25 June 1979 sent to FEDETAB by the Ministry of Finance (Annex 1 to FEDETAB's observations). According to those rules "sub-labelling" is prohibited. If the manufacturer did not practice such a policy the immediate retort would be an increase in the excise duty.

Further it is a fact that in Belgium, where not only taxation but trade margins are entirely *ad valorem* on the ultimate price, the government, whatever GB says, intervenes in fixing trade margins, as appears from letters from the Minister for Economic Affairs of 15 April 1975 and 12 February 1976 which FEDETAB annexes to its observations (Annexes 3 and 4).

As respects the *law,* as regards the effect upon trade between Member States, which is the third condition for applying Article 85 (1) of the Treaty, FEDETAB cites the judgment of the Court of 31 May 1979 in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869 in which the Court stated that "conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order" (paragraph 17).

In the *Hugin* case the Court said the question was whether it might be assumed that trade between Member States in Hugin spare parts would exist if the market conditions were entirely free and not subject to restrictive practices such as those applied by Hugin in that instance (paragraph 22). That question may be transposed for the purpose of the present case as follows:

"Could GB-Inno-BM SA import and sell cigarettes in Belgium at a price less than the price imposed by the manufacturers if the market conditions were entirely free and not subject to restrictive practices such as those imputed to FEDETAB and its members and in particular the recommendation of 1 December 1975?"

In fact the question would be as follows: if there were no classification of intermediaries and no provisions and end-of-year rebates or terms of payment would GB be free to act as it wished?

GB itself has answered that question in the *negative:* "In view of the considerable effect of taxation on the selling price, the impossibility (of obtaining reimbursement of the excise duty already paid) makes parallel imports entirely unattractive". It cannot be better expressed.

Therefore it is necessary to draw in this case the conclusion which the Court came to in the *Hugin* case (paragraph 25):

"In those circumstances Hugin's conduct cannot be regarded as having the effect of diverting the movement of goods from its normal channels, taking account of the economic and technical factors peculiar to the sector in question."

Vander Elst claims *in its observations on GB's statement that as regards the alleged* residual margin of competition for the *purpose of applying Article 85* et seq. GB, like the Commission, assumes a much wider margin of competition than actually exists.

If all the government rules are correctly taken into account the margin left in theory for competition covers at most the possibility of altering the profit margin in relation to the "manufacturer's share". The Commission was not able to define the residual margin of competition correctly in relation to the area which was already obstructed by the tax rules. That reason alone suffices to make the application of Article 85 (1) wrong.

As regards *distortion of competition* the applicant gives various examples with figures to illustrate how too high a multiplier distorts competition. On the basis of those examples it puts forward the argument that a high cumulative effect conflicts with three "principles" which may be regarded as fundamental to the rules on competition in the Treaty:

— "According to the spirit of the Treaty prices of goods and services are normally determined according to the laws of the market without State intervention" (Commission: Effect of national price regulations, Competition Series, No 9/1970).

— Each trader "must determine independently the policy which he intends to adopt on the common

market" *(Suiker Unie* case, paragraph 173).

— The price must bear a reasonable relationship to the economic value of the service provided (Article 86 (a) and *United Brands* case [1978], paragraphs 248 *et seq.* at p. 301).

The tax rules have the effect of restricting competition and trade between Member States so that in comparison the *recommendation in itself has no significant effect.*

Its aim and effect are to correct the distortion of competition which the *ad valorem* duty causes at the distribution level. Linked to tax rules such as the fixed price and prohibition on sub-labelling it contributes to making the distritubion of cigarettes function by means of a sufficiently dense distribution network for a varied supply and with deliveries as restricted and therefore as rational as possible. The residual margin of competition is not sufficient to ensure in this respect that the distribution functions.

As regards the applicability of Article 85 (1) to the recommendation the applicant claims that the *Commission cannot apply Article 85 (1) to the recommendation in the present stage of harmonization of excise duty on manufactured tobacco.*

The peculiarity of the present case is that the Community has *accepted* the national provisions by *directives.* Even in the taxation sphere the Community legislature has no power to limit the aims of the Treaty which are to establish a system in which competition is not distorted, goods move freely and tax burdens do not cause discrimination beyond what is necessary to attain the aim sought by the taxation. The Community law on excise duty on manufactured tobacco however *allows* Member States to introduce rules which limit those objectives *more than is necessary to attain the aim of the taxation.*

F — *Fourteenth submission:* infringement of Articles 85 (3) and 190 of the Treaty and the rights of the defence inasmuch as the Commission refused to exempt the recommendation, did not deal with the arguments put forward and made errors of fact in that respect

This submission has been made to a greater or lesser extent by *all the applicants.*

FEDETAB alleges that as regards the *classification of wholesalers and retailers into categories and the fixing of maximum margins,* the organization of distribution which it recommended aimed to preserve a specialized trade in tobacco products.

To that end it established a classification of intermediaries into categories according to objective criteria and recommended its members to grant maximum margins corresponding to the services rendered by each category. Pursuant to the recommendation specialized intermediaries, and more particularly specialized wholesalers (B 2 of the cigarette scale) who constitute the backbone of the system, are granted profit margins slightly higher than those granted to non-specialized intermediaries.

Specialized wholesalers render considerable services to the consumer and to the tobacco industry in general. Because of the wide range of brands which they distribute specialized wholesalers allow

the products of the whole industry to be distributed. Their existence makes it unnecessary for manufacturers to establish their own distribution network. They thus allow an optimum spread of the distribution costs between the various manufacturers and so contribute to improving the general conditions of distribution in the market in question. But for them, the products of numerous medium-scale and small manufacturers would find no sales outlets.

Specialized wholesalers also fulfil an irreplaceable function in so far as they are the only ones to visit customers in the most outlying parts of the country. Their assistance is therefore indispensable so that the numerous sales outlets close to the customer may be satisfactorily supplied.

The slightly higher rebate granted to specialized wholesalers is justified by the greater services they render and by the increased costs which they bear on that account.

The position at retail level is comparable: the recommendation provides for the payment to specialized retailers (A 2 of the scale) of a larger rebate than that provided for non-specialized retailers. The specialized retailers offer a wider range of products to the public.

Other intermediaries, such as wholesalers in the food industry (B of the scale), for example, cannot supply such services: they are interested only in a small number of brands and tobacco products represent only a limited percentage of their turnover.

As a result the disappearance of specialized wholesalers and retailers, which would be unavoidable if a small payment were not made to them for the above-mentioned reasons, would mean a reduction in the opportunities available to customers.

Maintenance of a specialized trade is in the consumers' interest. The Commission peremptorily rejected that argument without stating reasons (paragraph 118 of the decision) and in so doing disregarded Article 190 of the Treaty and wrongly applied Article 85 (3).

The improvement of distribution resulting from the measures for organizing the market adopted by the applicant would be of direct benefit to consumers. The second condition for the application of Article 85 (3) is thus fulfilled.

The multiplication of sales outlets and the availability in each of them of a wide range of cigarettes are to the direct and sure advantage of the consumer.

The contested decision does not deal expressly with those considerations which were nevertheless set out by FEDETAB in the statement of reasons when giving notice.

The recommendation contains no restriction which is not necessary to achieve the legitimate objectives of FEDETAB. It aims solely to ensure the maintenance of a specialized distribution in tobacco products. It does not abolish competition for a substantial proportion of the products in question.

The elimination of specialized wholesalers and retailers would concentrate trade in the best-known and best-launched brands and lead to a reduction

in the number of brands offered to the consumer. It would also have serious social consequences. The Court stressed in its judgment in the *Metro* case that social considerations, especially for the protection of employment when the economic climate is unfavourable, may be taken into account under Article 85 (3).

The organization of the market intended by the FEDETAB measures contributes to improving production and distribution of products. It avoids rivalry among manufacturers which would profit only the financially stronger firms without benefiting consumers and would favour the over-riding power of the supermarkets and eliminate in the medium term the *specialized trade.*

As to the *terms of payment* FEDETAB observes that it has already been shown that any increase in the financial burdens which would result from extending terms of payment would have a repercussion on consumer prices.

In attempting to channel the financial conditions of competition between manufacturers the recommendation seeks to regulate rivalry in the direction of a reduction in the cost price of the manufacturer by reason of technical progress and sales promotion factors such as advertising.

It is therefore in the interests of healthy distribution to provide for reasonable terms of payment for goods intended for very speedy cash sales to consumers where a large proportion of the price is made up of duty which the manufacturer himself must pay to the revenue with all the risks that that implies. It is obviously wrong to claim, as does the Commission (paragraph 131 of the decision), that the consumer has no benefit from a restriction on the terms of payment.

The restriction of freedom of action of firms in financial matters (profit margins, terms of payment and end-of-year rebate) is therefore indispensable for attaining the objective of improving production and the distribution of products.

As regards the *end-of-year rebate* FEDETAB states that the arguments put forward to show that Article 85 (1) does not apply are also, in the alternative, valid to justify the application of Article 85 (3).

Vander Elst observes as regards the *improvement of the distribution of products* that the number of sales outlets per inhabitant in Belgium is roughly *average* in relation to the number of retailers to be found in the other Member States.

HvL claims that the proceedings solely concern the profit margin of non-specialized wholesalers (supermarkets and wholesalers in the food industry) and not consumers who ought to receive a fair share of the profit.

Contrary to what the Commission states at paragraph 123 of the decision, the recommendation is not attempting "artificially" to keep on the market distribution firms which competition would

normally put out of business. Because of the need for marketing "in every locality" it is of more concern to every manufacturer and importer (as also to the consumer) to have available a distribution network which functions throughout the whole territory, which stands up to the increasing competition from supermarkets and is not confined solely to the distribution of the most popular brands of cigarettes but also provides an opportunity for the marketing and development of products demanded by a more restricted clientèle. That is why in the cigarette marketing sector specialist wholesalers are as "essential" as the Commission apparently finds supermarkets at paragraph 124 of the decision.

The applicant repeats that the end-of-year rebate *encourages* competition, especially competition by firms newly arrived on the market. It also refers to its explanation of the need for very restricted terms of payment.

As to the *consumers' proper share in the profit* arising from the recommendation, the applicant alleges that the refusal by the Commission to declare that the prohibition does not apply apparently gives no indication of why and how the consumer does not have a fair share in the benefit. In that respect it particularly criticizes paragraphs 19 to 132 of the decision.

The Commission did not take account in particular of the fact that a reduction in supply and in sales outlets would not mean a reduction in the ultimate sale price, as is shown by the example of sales outlets in France, but would make the goods more expensive (up to 20 % in France).

As regards the *improvement in production,* the applicant stresses the social and economic consequences of the Commission's reasoning if it were applied: small firms (small shops and stores and so forth) would become unprofitable; the wholesale trade would almost completely disappear (as the Commission seems at paragraph 124 of the decision to wish). As regards the condition that there shall be *no elimination of competition* the applicant challenges the Commission's statement at paragraph 133 of the decision to the effect that in view of the market share of FEDETAB and its members, "the agreements afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question". In the applicant's view the recommendation applies to only a very small fraction of the parameters to which bidders may have recourse in competition; it allows the adoption of individual competitive behaviour and it counteracts the effects of State measures on the tobacco market which distort competition.

The *Commission* states in its defence that the necessary conditions for declaring that the provisions of Article 85 (1) do not apply to the recommendation are not satisfied.

In the first place the system provided for in the recommendation does not contribute to *improving the distribution* of the products in question.

The disappearance of the *collective* system established by the recommendation would not inevitably involve the disappearance of or an appreciable reduction in the number of specialist wholesalers and retailers. The Commission expressed such doubt at paragraph 122 of the decision. If the

specialist trade offers services which are really appreciated, especially as regards prices, both by traders and consumers there would be no reason to fear their disappearance.

It is true that price competition does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded. Vander Elst relies on that finding by the Court in the judgment in the *Metro* case in claiming that the system is necessary for the maintenance of that form of distribution and must therefore enjoy exemption under Article 85 (3). In its observations on the eleventh submission the Commission has already shown that the position of the selective distribution system of SABA is in no way comparable to the collective system of the recommendation where the price competition which manufacutrers are able to engage in has a much greater significance than that of an isolated system of selective distribution.

Even if, which the Commission denies, the specialist trade would disappear in the absence of the system provided for by the recommendation, it is not possible to conclude that the distribution in the present form is better than that which would exist in the absence of such trade or in the event of its appreciable reduction. On the one hand, those products previously distributed by specialized traders would pass to non-specialized traders. Futher, it would probably result in a rationalization of distribution and an appreciable reduction in distribution costs and if that saving were passed on to the retail sale price it would profit both manufacturers and consumers.

The Commission observes that Jubilé and Vander Elst complain that the decision criticized the criteria in the recommendation for the classification of wholesalers and retailers within the system. The Commission stresses that the statements in paragraphs 125 and 126 of the decision, which the applicants moreover have not challenged, aimed only at showing that the classification system does not *necessarily* and always reflect the different degree of services actually provided by traders. That is, however, a supplementary consideration since, as has already been said regarding Article 85 (1) (eleventh submission), the decision rejected the collective fixing of common criteria intended to determine profit margins.

As to the end-of-year rebate none of the applicants has put forward specific arguments concerning an assessment of the position under Article 85 (3). As regards the terms of payment those of the applicants who claim that longer periods of credit would be reflected in the retail selling price have adduced no evidence in support of that claim.

In the Commission's view the distribution system provided for by the recommendation does not contribute to an *improvement in production* either, as Vander Elst claims. The observations of the Court in the judgment in the *Metro* case (paragraph 43) to the effect that, since it improves the general conditions of production, the search for a stabilizing factor with regard to the provisions of employment comes within the framework of the objectives to which reference may be made pursuant to Article 85 (3), cannot justify the conclusion that the Commission must of

its own motion and in the present case, which is not comparable with that of the SABA system, take account of those observations.

In the Commission's view the second condition for applying Article 83 (3) is not satisfied either. The system of the recommendation does not allow *consumers a fair share* of the resulting benefit.

On that issue Vander Elst has complained that the Commission did not state sufficient reasons for refusing exemption. In its observations in relation to the tenth submission the Commission has already explained that the issue concerning the consumer's share in any benefits from the system is of an altogether supplementary nature in view of the fact that the first condition for exemption, namely the improvement of the production or distribution of goods, is not satisfied. In those circumstances it was not necessary to discourse at greater length on that condition of Article 85 (3).

The Commission therefore contends that:

— it rightly considered that the recommendation of 1 December 1975 does not involve improvements in distribution sufficient to counteract the restrictive effects on competition which it causes and that it is not likely to allow consumers a fair share of any resulting benefit;

— the recommendation does not therefore satisfy the conditions for the application of Article 85 (3);

— the reasons on which the Commission's decision on that issue was based were properly and adequately stated;

— this submission must therefore be rejected.

FEDETAB states in its reply that the organization of distribution which it recommended aims to preserve the existence of a specialist trade in tobacco products. That objective comes within the objectives protected by Article 85 (3). It cannot be seriously doubted that the maintenance of a network of traders specializing in the distribution of tobacco products constitutes an improvement in distribution within the meaning of Article 85 (3).

To rebut the contrary case put forward by the Commission the applicant stresses the following considerations.

The disappearance of the specialist trade would mean an impoverishment of the choice available to customers.

Specialist intermediaries play an irreplaceable part in the promotion and distribution of imported products by thus encouraging the inter-penetration of markets intended by the Treaty.

Contrary to what the Commission contends the manufacturers do not impose the existence of a distribution channel (that of specialist intermediaries); it exists and the manufacturers respect it in the practical conviction that it is irreplaceable in the specific circumstances of the cigarette market. The existence of a network of specialist distributors is for the benefit of the whole tobacco industry and not solely for "large" manufacturers.

The Commission did not put forward any serious argument in support of the statement that the system recommended by FEDETAB does not allow consumers a fair share of the resulting benefit.

Tobacco products meet needs which are felt all day and every day. They are bought by consumers in small quantities. That is why it is important that the sales outlets should be as numerous as possible and as close as possible to the consumer and that the range of brands sold there be as wide as possible. A reduction in the sales outlets and the choice of products would mean an appreciable loss to the well-being of the consumer.

All the conditions are thus satisfied for granting the recommendation exemption.

As regards the *improvement in the distribution of products Vander Elst* observes that the Commission now appears "to doubt" that cancellation of the recommendation would mean the disappearance or reduction in numbers of specialist wholesalers and retailers and relies on a new ground based on its own doubts. The Commission now considers that each manufacturer could grant certain wholesalers and retailers special advantages in the form of a lower retail selling price in exchange for the traders' distributing all the products of such manufacturer.

Apart from the fact that the Belgian revenue law does not allow several retail selling prices to be fixed for the same brands of a product, the type of trader invented and recommended by the Commission would have no chance on the market.

As regards the judgment in the *Metro* case, the applicant stresses that contrary to what the Commission appears to think that judgment expresses in fact a general legal principle the validity of which is not confined to the distribution system of a single manufacturer. In the applicant's view, the Court is pointing out that the factual conditions in Article 85 (3) may be all the more satisfied "in so far as such conditions *contribute* in addition to a strengthening of competition in *sectors other than prices*". In its defence the Commission has not considered the recommendation from that angle.

As regards the criteria of classification applied by the recommendation the Commission says that the statements in paragraphs 125 and 126 of the decision are intended only "to show" that the classification system "does not necessarily and always" reflect the different degrees of services actually provided by traders.

The Commission has never considered the applicant's claim to the effect that the recommendation does not prevent a manufacturer/importer from granting certain intermediaries other benefits for special individual services. The Commission has always contented itself simply with informing the parties to the proceedings that it was the "principle" which counted with it.

In its rejoinder the *Commission* denies having abandoned the reasoning of its decision on the issue of *improvement of distribution* and having replaced it by a new statement of reasons. On the contrary the Commission declares it maintains what is said in the decision, namely that the specialist trader is not threatened if the services which he provides are really appreciated by consumers.

Referring to the possibility mentioned in the defence that the individual grant by manufacturers of certain financial advantages to the specialist trade might allow lower retail sale prices, the Commission alleges that it is for the

undertakings themselves to find answers to their problems compatible with the provisions in force in relation to competition. Even if it may prove difficult to arrive at different retail prices for one and the same product that is in any event not a sufficient reason to justify the horizontal and collective restriction on competition affecting the various products of different manufacturers (competition between products of different brands).

Such collective restriction on competition in relation to the benefits to be allowed to traders, contrary to what Vander Elst thinks, is not at all capable of being considered in the same light as the selective distribution system in the *Metro* case. It is not possible to infer from that judgment that on the one hand the maintenance of an existing form of distribution always constitutes an "improvement in distribution" and on the other hand that every means used to maintain the distribution system in question must enjoy exemption under Article 85 (3). It is difficult to see how the recommendation, which eliminates competition between the applicants and to a lesser extent between wholesalers, promotes "improved competition inasmuch as it relates to factors other than prices" (*Metro* case, paragraph 21). It in no way improves the opportunities for competition between products either of the same brand or of different brands.

The Commission considers to some extent true the claim of several of the applicants to the effect that a particular brand of cigarettes must be available throughout the country to be able to maintain itself on the market. It however challenges the conclusion drawn by the applicants that only the specialist trade is in a position to market cigarettes anywhere and everywhere and that only the trade is willing to do so. It insists that it must be for the trader himself to decide his commercial conduct in relation to market forces and his own interests and it is not for manufacturers who are his competitors to determine specifically the distribution channel which he should employ.

As regards allowing *consumers a fair share of any benefit* of the distribution system in question the Commission maintains its argument that a reduction in the sales outlets may lead to a reduction in distribution costs.

As for the consumer's preference in the choice of sales outlet where he buys his cigarettes the Commission stresses that it is for free enterprise to determine who should be so favoured. The fact that supermarkets increasingly sell more cigarettes does not correlate solely with a reduction in small food traders. For example, from 1967 to 1973 GB's cigarette sales increased by 360 %. That trend is thus the expression of a change in habits by the consumer.

G — Summary of certain arguments put forward by the interveners in relation to the fourteenth submission; answers of the main parties

1. The intervener *FNJ* states that it is a federation of regional trade associations for news-vendors and tobacco merchants

generally known as "newsagents". It represents them before the Belgian authorities and in particular negotiates the revenue due on the retail sale of tobacco. It collaborates with ATAB which groups together tobacco retailers other than newsagents.

There are some 4 500 newsagents in Belgium. They account for about 60 % of the national cigarette sales. Although important in the aggregate they are individually generally very small-scale retailers. 90 % of them are family businesses.

With variations according to regions and shops some 50 % of the turnover of newsagents is in tobacco and the remaining 50 % in newspapers, stationery, toys and so forth. Although the sale of tobacco is less profitable it is essential to the continued existence of newsagents.

Newsagents usually obtain supplies from so-called "specialist" wholesalers from whom they demand a flexibility almost without parallel in other sectors. That flexibility would not be possible without, on the one hand, preferential terms granted to specialist wholesalers and without their co-operation and that of, on the other hand, a large number of specialist wholesalers who are also family businesses. That co-operation takes place both in respect of services (very frequent deliveries, credit facilities, variety of brands) and prices (rebates).

The newsagents are surprised that there is argument about the alleged distinction between approved and non-approved retailers. In their view such a distinction has no substance because (a) wholesalers grant rebates without any regard to the classification made by FEDETAB; and (b) the revenue burdens (cf. Annex II to the observations) weigh more heavily on approved retailers than on others which cancels any difference which might have existed.

The continued existence of specialist wholesalers is necessary if newsagents are to continue in business and therefore to render service to the public. The continued existence of specialist wholesalers requires the maintenance of two vital matters in the FEDETAB recommendation namely a preferential margin and maximum margins commonly accepted.

The preferential margin allows those wholesalers to incur expenses, render services and allow the rebates necessary for newsagents to continue in business. That margin is a return for services which other wholesalers or supermarkets do not provide.

Without a system of maximum margins commonly accepted competition between manufacturers in relation to margins and premiums might in the short term lead the strongest manufacturers to increase the benefits granted both to specialist wholesalers and to others. In view of the fact that the final price is fixed, such a policy could be pursued only by reducing the manufacturers' profit (which appears

unlikely) and/or by reducing the cost of the service provided at distribution level. The increase in the margin granted to certain wholesalers is necessarily carried out by a reduction in the margin granted to others thereby eliminating any difference which there might have been.

As regards the *usefulness of newsagents,* they claim that their service is so much in demand by the consumer that they are responsible for some 60 % of national sales in cigarettes against 17 to 18 % for supermarkets in spite of the allowances, reductions and other promotion devices directly or indirectly granted by the latter.

Finally the newsagents would like to recall that the sale of tobacco is necessarily associated with that of newspapers. In this micro-economic sector loss of a quarter of the profit would not permit survival. Their disappearance as tobacco retailers would necessarily mean their disappearance as news-vendors. In distributing newspapers to the public in a way which would be difficult to replace they consider that they are contributing as far as they are able to the protection of democratic freedoms.

As regards the *law* the FNJ observes that from the point of view of *improving distribution* the size of the turnover for which newsagents are collectively responsible depends on the particular service which they provide consumers. That in turn depends on the service and benefits allowed by specialist wholesalers. Having regard to the rigidity of the retail sale price (due to the Belgian revenue legislation in force) the only possible remuneration for the services rendered by such wholesalers is in an appropriate differentiation in the margins and benefits allowed by manufacturers.

As regards the rationalization of the system of distribution at the wholesale level the quality of the service provided depends on the maintenance of numerous specialist undertakings. At the retail level it is true that there are too many sales outlets in Belgium. Nevertheless by eliminating from the market the specialist wholesalers the Commission decision would mean the disappearance of a large fraction of the 4 500 newsagents who are responsible for some 60 % of sales. On the other hand the Commission decision would in no way affect the existence of the roughly 75 000 other sales outlets in groceries, cafés, draperies and so forth, which are generally supplied with certain brands by food wholesalers or Horeca. The rationalization sought by the Commission could therefore not be achieved by the means which it advocates.

The end of a structure favourable to the traditional trade would mean its replacement by the system of supermarkets. With their purchasing power they would obtain unparalleled rebates thus reinforcing the process of concentration in the distribution trade. The ultimate consumer would be doubly penalized by losing the service without being sure of any reduction in price.

As for *allowing consumers a fair share of the benefit,* the FNJ maintains that the recommendation is to the advantage of newsagents (as a result of the benefits granted to specialist wholesalers) and to consumers (numerous sales outlets, wide range of brands and fresh products).

As for the *absence of inessential restrictions,* the need to maintain all the provisions of the recommendation is apparent from the facts already set out.

As regards the *absence of opportunity to eliminate competition,* the FNJ observes

that although the requirements of the revenue system involve a generally similar conformity on the part of firms, the various options as regards rebates and services leads to extremely lively competition which the recommendation is far from eliminating.

In conclusion, the FNJ observes that in so far as the Court is induced to consider the lawfulness of the decision on the basis of Article 85 (3) it will be induced, perhaps in spite of itself, to go beyond considering the matter strictly from the legal point of view. The direction that its judgment takes will then depend on its choice of society and its vision of the qualitative setting for human relationships.

The general concerted action on the part of the distribution trade on the one hand and the necessary anti-inflationary squeezing of prices by the public authorities on the other require that the independent retail trade as a whole be protected if it is not to disappear.

In its observations on the statement by the FNJ the *Commission* stresses that the agreement condemned by its decision is mainly a *horizontal* one between the main manufacturers (the majority of whom are in addition importers and belong to multi-national groups) operating on the Belgian market, albeit the agreement also has vertical restrictive effects on traders.

The Commission sees in the various statements made in the summary of facts by FNJ corroboration as regards in particular the significance of the effects which the concerted practice by the manufacturers has been able to have and which the restrictions applied have caused.

As regards the refusal to grant exemption under Article 85 (3) the Commission challenges the argument of the FNJ to the effect that only the service provided by the specialist wholesalers allows the public to be offered through numerous sales outlets a wide range of brands and fresh products.

In that respect the Commission says that a small *number of brands* (at the maximum 30) would allow almost the whole cigarette consumption to be covered and that the high minima imposed by the recommendation therefore involved only an obligation intended to cover a minute additional fraction of that consumption. The *number of retail sales outlets* on which the recommendation imposes a minimum number of brands is very limited (2 500 out of 80 000). The *direct sales by manu-*

facturers cover almost all the sales to supermarkets and specialist retailers. The *specialist wholesalers* sell the greater part of their products to *non-specialist retailers* on whom there is no obligation to keep a minimum number of brands. There is a very rapid *turnover* and consequently freshness is not particularly in jeopardy.

Moreover, the *trend of consumer habits* is increasingly to buy from supermarkets and in bulk and this raises doubts as to the actual need for services provided by specialist traders for it is obvious that cigarettes are a mass consumption product not requiring special services for their purchase or consumption.

2. The intervener, *GB,* challenges the applicants' argument to the effect that protecting the specialist trade would allow an improvement in distribution by increasing the quality of the service provided to the consumer.

In that respect it points out that the protection of such trade by the application of a uniform system of trade margins would not lead to an "improvement" in distribution to the benefit of the consumer but to the preservation of an entrenched position. To show that the maintenance of that situation may be described as improvement capable of having exemption under Article 85 (3) it would be necessary to show:

(1) that the protection of the specialist trade is justified by the alleged benefits;

(2) that in the absence of measures taken by all the manufacturers and importers such trade would disappear;

(3) that the measures adopted are in fact likely to ensure the protection of such trade.

GB stresses that there is a basic difference between an obligation to have a wide range (in this case the main benefit of specialization cited by the applicants) imposed by a *particular* manufacturer on traders and an obligation to have a range imposed collectively by *all* manufacturers in a particular industrial sector. Although in the first case such an obligation may be legitimate it is suspect in the latter case.

If the laws of competition actually applied between tobacco manufacturers it ought normally to be expected in the present case that the manufacturers of the popular brands should try to increase their individual sales to the detriment of those of their rivals rather than to concern themselves with maintaining on the market less popular brands and less profitable manufacturers. Nevertheless in the context of the Belgian rules where applications for price increases are made jointly by the tobacco products sector and justified by it on the basis of the cost items of all manufacturers, that policy has advantages. It allows the price increases requested to be justified on the basis of the costs of the less efficient manufacturers, which guarantees that the

more efficient manufacturers really profit from their situation.

In GB's view it is unlikely that such trade would be adversely affected to a substantial extent if the recommendation were not granted exemption.

There is nothing to prevent manufacturers from granting on an individual basis more favourable terms to certain of their distributors if the latter provide important services. If such a measure were justified by the conditions of the market it would naturally tend to be followed by other traders. Accordingly if the specialist trade has real advantages for manufacturers and consumers its protection will be guaranteed by competition.

GB recognizes that the allowance of a higher profit margin may allow the recipient to improve his competitive position by increased advertising or a more flexible policy as regard retail prices, allowing new customers to be attracted or at least the retention of old ones.

Nevertheless neither of these two possibilities is offered in the present case to the specialist trade.

On the one hand the advertising of manufactured tobacco products is done directly by the manufacturers and importers and in no way by the retail trade.

On the other hand the specialist trade is unable to allow consumers to benefit by reducing the retail sale price from the larger profit margin which it enjoys. That is first because of the Belgian rules on VAT to the adoption of which the applicants have so much contributed and secondly because of the systematic refusal of these same applicants to supply tobacco products with price labels less than the general market prices.

FEDETAB maintains that as regards satisfying the basic conditions for exemption none of the arguments cited by GB in support of the Commission's case invalidates the argument of the applicants to the effect that the contested measures in fact encourage distribution of the products in question to the benefit of consumers.

On the contrary there is ground for doubting the validity of GB's conviction to the effect that the survival of the network of small specialist distributors would not be endangered if the view of the Commission triumphed. For example, statistics showing the ever-increasing share of distribution falling to supermarkets and in particular to GB give rise to valid doubts that the trend is to the advantage of the specialist trade and supermarkets.

Vander Elst challenges GB's argument to the effect that maintenance of the present structure leads to an *improvement in distribution* only if it is shown that the protection of the existing specialist trade is justified by the advantage which it brings, that in the absence of protective measures that trade would disappear and that the recommendation ensures protection of that trade.

When considering whether those three conditions were fulfilled the intervener, like the Commission, did not see the decisive issues.

Like the Commission, it ignores the fact that the main traders affected by the

structure of the distribution network and, within it, by the obligation to carry a minimum range, are not the specialist retailers who obtain supplies *directly from manufacturers and importers* (they are relatively few) but the specialist *wholesale trade* which distributes 80 % of the cigarettes sold in Belgium.

GB then assumes that the recommendation stipulates that almost all the brands of cigarettes must be offered to the ultimate consumer. It must however know that the obligation to have a specific range can apply only to direct customers of the manufacturers and importers.

Moreover GB seems to rely on the fact that the recommendation seeks to lay down minimum profit-margins. In truth they are maximum margins which are laid down in the context of the Belgian legislation on price increases. The Commission, to whose opinion the intervener expressly refers in that respect, seems also to make the same mistake.

Finally GB wrongly imagines that both Belgian revenue law and Community law allow sub-labelling.

In the applicant's view it has to be observed that even accepting the conditions put forward by the intervener itself, maintenance of the present structure of the retail trade by means of the FEDETAB recommendation involves an improvement in the distribution of goods.

The cigarette manufacturers and importers in Belgium depend on the existing specialist trade because only the latter ensures advantageous cost terms together with the advantage of a distribution of goods close to consumers in the interest of manufacturers and consumers; it also supports the introduction of new brands. GB itself has recently provided the best evidence of the indispensable nature of the specialist trade: At the beginning of March 1979 the applicant introduced the new brand Belga Légère Bleu to the market; until the end of July GB refused to distribute that brand and included it in its range only when as a result of distribution by the specialist wholesale trade there was the certainty that the brand was a success.

That cigarette with its especially low nicotine and tar content could not have been marketed in Belgium under a distribution system such as that advocated by the intervener.

In spite of all the subsequent observations to the contrary the Commission itself saw the danger of collapse of the retail trade if the benefits it enjoys were withdrawn and in its decision expressly recognized it (paragraph 123 of the decision).

H — Submission relating to a general legal principle

Fifteenth submission: infringement of the general legal principle of equality of public and private undertakings *vis-à-vis* the Treaty inasmuch as the Commission condemned the free industry in Belgium while at the same time tolerating undoubted restrictions on competition in two countries with monopolies

This submission was made to a greater or lesser extent by *all the applicants* except Jubilé and Vander Elst.

FEDETAB observes that the opening-up of the French and Italian markets, which are State tobacco monopolies, is impeded by numerous important obstacles of a legal and administrative nature of which the following are the principal:

(a) no implementing decrees to the Law No 724 of 10 December 1975 in Italy adjusting the monopoly;

(b) maintenance of the manufacturing monopoly;

(c) prices for domestic and imported products are fixed by brand and so low that imports are obstructed;

(d) the artificial maintenance of considerable disparities between the prices of domestic products and comparable imported products, the losses of the monopoly being borne by the State;

(e) maintenance in fact of the exclusive distribution network of the monopolies and the complete absence of any network of independent wholesalers;

(f) maintenance of the monopoly of tobacconists involving a restriction on sales outlets and the complete exclusion of supermarkets;

(g) complete prohibition (Italy) or draconian restriction (France) on advertising.

FEDETAB complains that the Commission, after starting proceedings under Article 169 of the Treaty against the monopolies, limited the claim to two minor issues, namely enforcing an export monopoly and enforcing an exclusive right to import products in free circulation in another Member State but originating in a non-member country.

The Commission cannot decide arbitrarily whether or not to take proceedings for an infringement of the Treaty committed by a State or an undertaking. It is bound by the general principles of Community law.

It is generally recognized that the Treaty applies without distinction to public and private undertakings (with the sole exception of Article 90 (2)). The Commission cannot therefore be more tolerant towards a public undertaking simply because it is public.

In the case of infringement by a Member State the Commission is bound to start proceedings under Article 169. On the other hand as regards infringements of the Treaty by undertakings the Commission has a discretion and is not bound to start proceedings (cf. Gleiss, Hirsch, "Kommentar zum EWG-Kartellrecht", Note 5 to Article 3 of Regulation No 17). It follows that proceedings in relation to infringements by a Member State must have priority over proceedings in relation to infringements by undertakings.

In any event if the Commission has a discretion it is limited in the sense that where there are several comparable infringements it cannot prohibit the lesser and disregard the more serious.

The Commission is not observing those three rules limiting its discretion by ordering the Belgian industry to withdraw the recommendation whose effect upon trade is purely theoretical while tolerating since 1970 the continued monopoly structure in France and Italy.

The *Commission* denies in its defence that it is tolerating "undoubted restrictions on competition in two monopoly countries", namely France and Italy. It has required the adjustment pursuant to Article 37 of the Treaty of the monopolies of a commercial character which those two Member States have. It gives a summary of the proceedings which it has conducted for the adjustment of those monopolies.

Moreover since 1976 it has started proceedings for presumed infringement of Articles 85 and 86 in respect of exclusive rights contracts concluded by SEITA and AAMS with the majority of foreign manufacturers of tobacco products (including companies controlled by certain groups to which the applicants belong).

In making this submission the applicants have confused specific provisions relating to public undertakings (Article 90) and those of Article 37 relating to the adjustment of State monopolies of a commercial nature which come under the chapter of the Treaty relating to the elimination of quantitative restrictions between Member States. Such confusion does not allow the precise legal reasoning of the applicants on that issue to be understood and the Commission can therefore reply only by inviting the applicants to clarify the matter.

In any event it is not possible to accept the claim made by certain applicants and in particular FEDETAB to the effect that proceedings for infringements by a Member State must have priority over proceedings for infringements by undertakings and to draw the conclusion that Article 85 cannot apply to the contested measures or that the Commission cannot start proceedings and adopt a decision prohibiting such conduct.

In reference to the explanations provided by the Commission *FEDETAB* alleges in its reply that it is still of the conviction that the Commission has not respected the limits of its discretion placed on it by the principle of equality of undertakings *vis-à-vis* the Treaty. The proceedings recently commenced by the Commission in no way alter the matter. They do not seek the adjustment of the monopoly so as to exclude all discrimination.

The *Commission* specifies in its rejoinder the actions which it has commenced against Belgium, France, Italy and the Netherlands for the purpose of liberalizing the manufactured tobacco sector.

As regards *Belgium* the Commission says it sent a letter on 24 October 1978 to the Belgian Government asking for an explanation regarding the practice of refusing to provide bands for different retail selling prices for cigarettes of the same brand. The Belgian Government has not replied to that letter.

On 22 January 1979 the Commission gave the government notice to submit observations on the subject of Article 58 of the VAT code (Annex XI to the rejoinder).

As regards *France,* on 30 November 1978 the Commission started proceedings against France for infringement of Articles 37 and 30 concerning *inter alia* the marketing conditions employed by it.

By letter dated 19 January 1979 the French Government replied to the Commission's notice of 5 December 1978. Those proceedings are continuing.

On 26 October 1978 the Commission also sent a letter to the French Government asking for an explanation of the fixing of retail selling prices. The government has not yet replied to that letter.

As regards *Italy,* after the Commission commenced proceedings in January 1979 for infringement of Articles 37 and 30 the Italian authorities submitted to the Commission a draft decree implementing the Law terminating the importation and wholesale marketing monopoly. Those proceedings are continuing.

As regards the *Netherlands,* after proceedings were commenced by the Commission, that Member State terminated in 1978 an infringement of the provisions of tax directives. On 14 December 1978 the Commission commenced proceedings under Article 93 (2) in respect of certain aids granted in the cigarette sector. Those proceedings are continuing.

The Commission is at present preparing a notice of complaints under Article 85 in respect of the distribution system adopted by the Stichting Sigaretenindustrie.

As regards the *law* the Commission is of the view that in brief the only argument on which FEDETAB relies is that the Commission has exceeded the limits of its discretion imposed on it by the principle of equal treatment of public and private undertakings.

Even if it had to be accepted that such a limit exists, the Commission does not see how in the circumstances of this case it has exceeded such limit. The applicants are seeking an excuse to escape from the prohibition in Article 85 by alleging infringements committed by other undertakings or Member States. One infringement however can never justify another.

I — Submissions made by only some of the applicants

Sixteenth submission: infringement of Articles 85 and 190 of the Treaty inasmuch as the Commission wrongly regarded the recommendation of 1 December 1975 as an extension of the measures adopted before that date and therefore did not correctly appreciate the recommendation

This submission is made only by the applicants *Jubilé* and *Vander Elst.* Certain other applicants, and in particular *FEDETAB,* have however considered the matter.

Jubilé observes that in the Commission's view the provisions of the recommendation simply extend the agreements and decisions prior to 1 December 1975.

That idea, which runs as a thread throughout the decision (paragraph 103), is a gross misunderstanding of the recommendation and of such seriousness as to justify on that issue alone annulment of the decision for applying Article 85 (1) to *incorrect facts.*

That argument is taken up by *Vander Elst* which alleges that a comparison of the restrictions on competition resulting in the Commission's view from the former agreements with the tenor of the recommendation shows that they are two *quite different factual situations* thus involving *different effects upon competition.*

The obligations imposed under the former agreements (cf. Article 1 (2)-(6) of the contested decision) are not contained in the recommendation. The recommendation no longer fixes specific profit margins but recommends maximum margins. It leaves complete freedom to the manufacturers to provide for other individual rebates, it no longer binds wholesalers in any way in respect of their conditions of resale and therefore no longer contains any item giving rise to a vertical restriction on competition.

The fact that the *whole legal assessment* of the recommendation is based on a misunderstanding of the actual differences between the recommendation and the former agreements *is apparent* from paragraphs 60, 96, 97 and 103 of the decision. That factual error leads the Commission to justify its allegation as to the restrictive effects on competition of the recommendation by means of the effects of the former agreements.

As regards *the facts* the *Commission* considers that it devoted two quite distinct parts in the statement of the facts of the decision to the description of the previous measures (paragraphs 19 to 57) and the recommendation (paragraphs 58 to 76). There is no possible confusion as to the aim of those measures. On the contrary at paragraph 60 of the decision the Commission even observed that the recommendation "... replaces the arrangements described in I (C) above".

The operative part of the decision thereafter correctly maintained that distinction by treating the application of Article 85 to such measures in two separate articles namely: Article 1 for the previous measures and Article 2 for the recommendation.

It is on that basis that the legal assessment in the decision should also be read; it deals with the measures separately, namely paragraphs 77 to 93 and 110 and 112 (previous measures) and paragraphs 94 to 108 and 113 to 134 (recommendation).

It is obvious that the measures prior to 1 December 1975 and those subsequent thereto, even if revealing certain differences, have similar aims relating in particular to profit margins, end-of-year rebates and concerted practice on maximum terms of payment. It is moreover established that *all* the applicants applied those measures both before and after 1 December 1975.

As regards the *law* the Commission observes that in the judgment in the *Suiker Unie* case (at paragraph 111) the Court considered that there was no reason at all why the Commission should not make a single decision covering several infringements provided that the decision permitted each adressee to obtain a clear picture of the complaints made against it. The Commission decision allows the distinction between the various measures to be seen clearly.

The Commission maintains that it is perfectly lawful and normal having regard to Article 190 of the Treaty to refer in the part of its statement of reasons concerning the assessment of certain measures to the similar or identical facts which measures with similar aims previously had.

Seventeenth submission: infringement of Articles 85 and 190 of the Treaty inasmuch as the Commission wrongly regarded the recommendation as constituting an agreement between undertakings or as creating obligations on the part of the applicants

This submission is made only by the applicants *Jubilé* and *Vander Elst.* Certain other applicants and in particular *FEDETAB* have made observations regarding the facts in that respect.

Jubilé alleges that already in the *statement of facts* the Commission overlooked that the recommendation, regarded according to its spirit and purpose, was only a recommendation and did not operate as a "genuine mandatory rule of conduct" (decision, paragraph 61). It is not possible to invent such a legal rule simply because the recommendation was passed by the board of administration of FEDETAB. It may be that the origin of the recommendation gives it the character of a decision originating with an association of undertakings but that origin has nothing to do with its legally binding nature.

Vander Elst observes that the Commission describes the recommendation as an *agreement* between those of the undertakings which, like the applicant, gave notice to the Commission in writing that they were signing the recommendation. The Commission relies on the nature of the recommendation as a "genuine mandatory rule of conduct" (decision, paragraphs 61 and 99).

That view as to the legal effect is wrong. Only a binding *contract* under national law, made between two or more parties, may be described as an agreement. The recommendation has however *no binding effect* on behaviour in the market or on any measure intended to ensure its observance. The recommendation leaves every manufacturer *free* to observe it, partially to observe it or to ignore it.

However, the applicant considers the recommendation as a guide-line to its behaviour.

As regards the facts, after recalling the terms of the notice of the recommendation given by FEDETAB and the fact that *all* the applicants informed the Commission that they were adopting the notice by FEDETAB and that they intended to conform to the recommendation, the *Commission* alleges in its defence that it rightly considered at paragraph 94 of the decision that the recommendation must be regarded as a decision by an association of undertakings within the meaning of Article 85 (1) and also as an agreement between the undertakings which declared that they adhered to it.

As regards the law, the Commission cannot therefore accept the argument put forward in particular by Vander Elst to the effect that "only a binding *contract* under national law, made between two or more parties may be described as an agreement".

In the present case it is established, as was the position for the gentlemen's agreements in the *Quinine* case (Case 44/69 *Buchler* v *Commission* [1970] ECR paragraph 25 at p. 754), that the applicants mutually declared themselves willing to abide by the recommendation and conceded that they had done so since 1 December 1975 and that the recommendation was thus the faithful expression of the joint intention of the parties to the agreement with regard to their conduct in the Belgian market.

In its reply *Vander Elst* persists in its argument that the recommendation imposed no obligation *either horizontally or vertically.* If the manufacturer follows the recommendation and the trader subscribes to it their contractual relations will depend on criteria which the trader will fulfil in each particular case. That legal position is quite different from that in which the transfer of a trader from one category to another is subject to approval.

In its rejoinder the *Commission* observes that as regards the *facts* the main issue raised by the present submission is whether the recommendation was binding or not.

In that respect it is necessary to distinguish the various possible meanings of the word "obligation" according to the context where it is used and not to confuse the obligations which the recommendation creates for undertakings which have signed it and obligations which arise for third parties.

When it uses the expression "mandatory rule of conduct" at paragraph 61 of the decision it is obviously in the latter sense of economic constraint on other undertakings in the sector as appears from a reading of the context.

As to the question whether by their adoption of the recommendation the applicants are obliged to observe the content the Commission takes the view that an answer in the affirmative to that question appears clearly from the terms of the letters in which the applicants declared that they adhered to the recommendation. That appears also from Article 8 (2) of the articles of FEDETAB and from the terms of the notification of the recommendation.

As regards the *law* the Commission is of the view that the question whether or not the recommendation is binding does not vitiate the assessment in paragraph 94 of the decision, which described the recommendation as follows:

"The recommendation ... must be regarded as a decision by an association of undertakings within the meaning of Article 85 (1) and also as an agreement between the undertakings that agreed to it".

Whether or not the recommendation is of a binding nature does not deprive it of a restrictive effect when the applicants mutually declared they would abide by its provisions (as the applicants did not deny and as appears moreover from their letters sent to the Commission following the notification; defence, Annex 7) and admit they have been complying with it since 1 December 1975.

Eighteenth submission: infringement of Articles 85 and 190 of the Treaty inasmuch as the Commission wrongly considered that HvL took concerted action with the other parties regarding the measures prior to 1 December 1975

This submission is made solely by the applicant *HvL* which in various places in its application makes submissions in relation to the Luxembourg market which in the Commission's view are irrelevant.

HvL states that as regards the period prior to 1 December 1975 it never signed any of the agreements referred to in the decision save that, by letter dated 23 December 1971, it took part in the collective measure adopted in relation to the terms of payment.

It fell in line with the attitude of the other Belgian manufacturers and importers regarding the organization of the Belgian market, but in spite of that it is not possible to assume the existence of an agreement or concerted practice.

The *Commission* points out that as regards the *facts* FEDETAB states that the measure adopted on 23 December 1971 was a collective measure and that "... to give FEDETAB's letter all the necessary weight the main manufacturing members of FEDETAB have decided to sign". That assumes that FEDETAB intended to bind its manufacturing members (including HvL) even when they did not sign the other measures and the agreements made by their federation in their name. Their conduct moreover shows that that was indeed their intention.

As regards the *law* the Commission considers that in the above-mentioned circumstances it was possible for the decision to be validly addressed to the members of FEDETAB not only in so far as they took part directly in the measures in question but also in so far as they were responsible for the adoption of such measures through the indirect means of their trade association.

IV — Question put by the Court to the Belgian Government and its reply

On 18 January 1980 the Court invited the Belgian Government pursuant to Article 21 (2) of the Statute of the Court to answer in writing before 20 February 1980 the following question:

"Having regard to the provisions laid down by the Belgian revenue laws or regulations and the Belgian administrative practice in relation to excise duty, may a manufacturer or importer offer for sale *simultaneously* cigarettes of the same quality, same brand and with the same number in the same packet with *different price labels*?"

After obtaining extra time for reply from the Court the Belgian Government on 25 February 1980 answered the question put by the Court in the *negative* and gave detailed comments justifying its answer.

V — Questions put by the Court to the parties

By letter dated 3 March 1980 the Court invited the Commission and the applicants to answer the following questions at the hearing:

1. Questions put to the Commission

(a) What is the stage of the proceedings taken by the Commission against the French Republic and the Italian Republic pursuant to Article 169 of the EEC Treaty and why did the Commission in that respect avoid other issues criticized by the applicants in relation to the marketing of imported cigarettes in the said States?

(b) The Commission is asked to give further particulars of its contention "that the marketing conditions as regards the products which the applicants sell in Belgium (including the products which they have previously imported from other Member

States) are likely *indirectly* to have an effect upon trade" (rejoinder p. 128).

2. *Questions to the applicants*

(a) Do the cigarette manufacturers who agreed to the FEDETAB recommendation observe precisely the margins laid down therein or are there distinctions and variations (and if so to what extent)?

(b) Have the cigarette manufacturers ever tried to act separately under the Belgian rules on price control and have they encountered obstacles on the part of the administration requiring a joint approach?

(c) In so far as the Belgian manufacturers are at the same time importers do they import only cigarettes made by foreign undertakings belonging to the same group as the importer of the cigarettes?

(d) What interest have the applicants in obtaining exemption under Article 85 (3) of the EEC Treaty for the measures prior to the recommendation of 1 December 1975?

(e) What other benefits and compensation can the manufacturers give their customers apart from the profit margins and end-of-year rebates (cf. in particular the application in Case 215/78, p. 16, and the reply in Case 218/78 at pp. 9 and 67)?

VI — Oral procedure

At the sitting on 6 and 7 May 1980 the following parties made oral observations: the applicant HvL, represented by E. Arendt of the Luxembourg Bar; the applicant FEDETAB, represented by L. Goffin, A. Braun, P. F. Lebrun and P. van Ommeslaghe of the Brussels Bar and by H.G. Kemmler and B. Rapp-Jung of the Frankfurt am Main Bar; the applicant Gosset, represented by W. Van Gerven, of the Brussels Bar; the applicant BAT, represented by P. F. Lebrun; the applicant Cinta, represented by E. Jakhian of the Brussels Bar; the applicant Weltab, represented by P. van Ommeslaghe; the applicants Jubilé and Vander Elst, represented by H. G. Kemmler and B. Rapp-Jung and by A. Boehlke of the Frankfurt am Main Bar; the intervener ATAB, represented by J. R. Thys, of the Brussels Bar; the intervener AGROTAB, represented by J. M. van Hille of the Ghent Bar; the applicant FNJ, represented by Pierre Didier of the Brussels Bar; the Commission of the European Communities, represented by its Legal Adviser B. van der Esch acting as Agent, assisted by J. F. Verstrynge and G. zur Hausen of the Legal Department; the interveners Mestdagh, Huyghebaert and the FBCA, represented by L. van Bunnen of the Brussels Bar; the intervener, GB-Inno-BM, represented by L. van Bunnen and by A. Vandencasteele of the Brussels Bar.

At the hearing the Commission and the applicants answered the written questions put by the Court. Their answers may be summarized as follows:

A — Answers to the written questions

1. Answers of the Commission

(a) In answer to the first question put by the Court the *Commission* gave a summary of the present position of the

proceedings which it brought against the French Republic and the Italian Republic under Article 169 of the Treaty for failure to perform their obligations. In its answers the Commission also dealt with the obstacles to opening up the French and Italian markets mentioned by FEDETAB in its application (cf. above under the heading "Submissions relating to a general legal principle"). The Commission denied avoiding those issues.

(b) As regards the second question put by the Court to the Commission, the latter stated that it had shown in its pleadings (and in particular at p. 128 of the rejoinder) that trade between Member States was in fact affected even having regard to the obstacles inherent in the Belgian rules. The Commission expressly mentioned in its decision, for example at paragraphs 93 and 107, the difficulties which parallel imports by traders encounter. It considered however that such difficulties may be and are easily overcome by importing manufacturers. The figures for imports cited by the applicants themselves leave no room for doubt. Thus on 27 October 1978 at the hearing of the application for the adoption of interim measures the applicant Cinta, importer of "Gauloise", mentioned that 56% of its turnover was in foreign products. It cited figures to the effect that imports into Belgium from France had risen from 500 million cigarettes to more than 1 000 million and from Germany from 45 million to 140 million.

It is therefore not surprising that the Commission considered that in spite of the above-mentioned difficulties the alteration in the marketing conditions in Belgium was likely to distort trade from its natural course, that is to say from that which it would have been in the absence of the restrictions on competition observed, as the Court pointed out in its judgment of 15 May 1975 in Case 71/74, *Frubo* [1975] ECR 563.

When the applicants collectively fix the maximum level of the various financial benefits which they allow their respective re-sellers, both wholesalers and retailers, they *ipso facto* also exclude competition in relation to the prices which they might charge one another on the resale of the products which they import from other Member States. Such concerted practice by the applicants has the effect of creating marketing conditions which are not the result of free competition and which lead to a specific level of remuneration for intermediaries. That level must be taken into account by other undertakings which import or wish to import these products into Belgium in particular when they have to determine their prices for selling to traders. Moreover, in the Commission's view, it is that level which has also the effect of allowing or preventing imports which the applicants themselves might or might not have been able to make if they had not taken concerted action with regard to the financial benefits to be allowed to traders.

In the absence of the concerted action some might have been able to import more while others might have imported less so that in any event the concerted

action by the applicants is likely to affect trade between Member States.

2. Answers of the applicants

(a) As regards the extent to which the Belgian cigarette manufacturers observe the margins mentioned in the recommendation, *FEDETAB* states that the margins are observed by Cinta, Vander Elst, Jubilé, BAT and by Weltab; Weltab stated that it follows the leader Vander Elst in that respect. *HvL* stated that it scrupulously observes the margins in question.

(b) As to whether the cigarette manufacturers have ever tried to act separately under the Belgian price control rules, the applicant *BAT* maintained that any attempt to adopt a price policy of one's own would be quite futile. In that respect it cited its experience when introducing a new brand of cigarettes, namely the "Gold Dollar" at a price of BFR 32 per packet of 25 cigarettes; that was increased to BFR 37 per packet after the price increase of 15 October 1977 since the price label of BFR 37 was then the lowest available from the authorities. After the price label of BFR 35 was restored following the applicant's request, the lowest price label was increased without warning to BFR 38 per packet and the only comment from the authorities in that respect was that "some of the lowest price categories have been abolished". That experience shows that it is the State which determines the price of cigarettes.

(c) In answer to the third question put by the Court *FEDETAB* confirmed with figures in support that in so far as Belgian manufacturers are at the same time importers, the cigarettes concerned are almost solely made by foreign undertakings belonging to the same group as the importer.

(d) As regards the fourth question *Weltab* explained the reasons why the majority of the applicants persist in their claims regarding the measures prior to the recommendation of 1 December 1975. It stated on the one hand that the applicants for reasons of commercial morality prefer not to be censured. Further the agreements prior to 1975 also involve classification of intermediaries comparable in certain respects to that contained in the recommendation so that it would have appeared a little illogical not to discuss the previous situation.

(e) In answer to the last question *FEDETAB* referred to a number of benefits and advantages which manufacturers can give their customers apart from the profit margins and end-of-year rebates. Such benefits may take the form of regular visits, speedy help where retailer stocks are exhausted, promotion and advertising campaigns, introductory allowances, the supply of free samples and legal advice.

B — Answers to questions put by the Court at the hearing

1. In answer to a request to comment on the argument to the effect that although the recommendation provides for distribution margins and more parti-

cularly wholesalers' margins it is in fact the Belgian Government which determines the trade margins by way of price control, the *Commission* observed that in spite of an apparent similarity two distinct matters were involved. The Belgian price control concerns only maximum increases in the retail selling price. Its aim is to slow down price inflation. In giving his approval to maximum retail price increases proposed by FEDETAB the Belgian minister takes account of a particular item in the calculation, namely a specific increase in the maximum margin of wholesalers. The function of the agreement is different. FEDETAB takes account of the item in the calculation which allowed the minister to approve the increase in the retail price and subsequently transforms that item in the calculation into a regular restriction on competition. The two actions by the government and the trade are thus wonderfully complementary. The Commission added that it all related to increases in margins which have repercussions on the retail selling price whereas the main horizontal effect of the agreement is the ban which the cigarette manufacturers place on granting particular wholesalers, at the manufacturer's expense and without altering the retail selling prices, margins higher than those determined by the classification.

2. When the Court queried the usefulness of the recommendation if in fact, as the applicants maintain, the opportunities for competition in relation to prices and trade margins were almost non-existent because of the various interventions by the Belgian State, FEDETAB answered to the effect that in the very limited residual area of margins untouched by legislative constraints the recommendation operates a classification which gives some guarantee to the trade of survival. That classification, which above all allows wholesalers and retailers to be distinguished according to their functions, also ensures good organization and distribution.

The Advocate General delivered his opinion at the sitting on 3 July 1980.

Decision

I — General considerations

1 These actions seek a declaration that Commission Decision No 78/670/EEC of 20 July 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.852 — GB-Inno-BM/FEDETAB, IV/29.127 — Mestdagh-Huyghebaert — FEDETAB; IV/29.149 — FEDETAB recommendation, Official Journal L 224, p. 29), which found that the applicants had committed various infringements of the said article, is void.

2 The applicants who include all the addressees of that decision listed in Article 4 thereof are the non-profit-making Fédération Belgo-Luxembourgeoise des Industries du Tabac, Brussels, (hereinafter referred to as "FEDETAB"), a trade association containing almost all the Belgian and Luxembourg tobacco manufacturers and on an individual basis seven of the more important members, namely:

— Cinta SA (hereinafter referred to as "Cinta"), Brussels,

— Éts. Gosset SA (hereinafter referred to as "Gosset"), Brussels,

— Jubilé SA, (hereinafter referred to as "Jubilé"), Liège,

— Vander Elst SA (hereinafter referred to as "Vander Elst"), Antwerp,

— Weltab SA (hereinafter referred to as "Weltab"), Brussels,

— BAT Benelux SA (hereinafter referred to as "BAT"), Brussels,

— Heintz van Landewyck Sàrl (hereinafter referred to as "HvL"), Luxembourg.

3 The measures condemned by the contested decision and described below relate to the distribution of manufactured tobacco products in Belgium and may be divided into two groups. There are on the one hand certain decisions taken by FEDETAB and certain agreements made by it with other trade associations in the tobacco sector during the period from 1 February 1962 to 1 December 1975 and on the other hand provisions of a "recommendation" made by FEDETAB in relation to the sale of cigarettes on the Belgian market and notified by it to the Commission on 1 December 1975.

4 Since the applicants have made numerous submissions relating to the course of the administrative proceedings which led up to the contested decision, it is useful first of all to indicate the outline of those proceedings so as to facilitate examination of the arguments put forward by the parties in relation to the said submissions.

5 By a complaint lodged on 2 April 1974 with the Commission under Article 3 (2) of Regulation No 17 the company GB-Inno-BM (hereinafter referred to as "GB"), a Belgian supermarket company, requested the Commission to bring proceedings against FEDETAB, the non-profit-making Fédération Nationale du Commerce de Gros en Produits Manufacturés du Tabac (hereinafter referred to as "FNCG") and the non-profit-making Association

des Détaillants du Tabac (hereinafter referred to as "ATAB"). Following that complaint the Commission commenced proceedings under the said article during which it sent on 18 July 1974 to FEDETAB, ATAB and the non-profit-making Association Nationale des Grossistes Itinérants en Produits Manufacturés du Tabac (hereinafter referred to as "ANGIPMT"), an association created following the dissolution of FNCG, a notice of objections in which it declared that in its opinion certain agreements, decisions and concerted practices of FEDETAB and its members were contrary to Article 85 of the Treaty.

6 The hearing of the applicants in these cases and of the complainant GB was fixed for 22 October 1975. On 21 October 1975 the company Mestdagh Frères et Cie, SA, wholesalers with multiple branches, and the company Eugène Huyghebaert, SA, food wholesalers, asked to be joined to the complaint by GB and lodged complaints with the Commission under Article 3 (2) of Regulation No 17.

7 The hearing took place as arranged on 22 October 1975, but subsequently the proceedings were extended to the recommendation in relation to the sale of cigarettes on the Belgian market adopted by FEDETAB and notified by it on 1 December 1975 pursuant to Articles 2 and 4 of Regulation No 17. On 17 May 1976 the Commission sent FEDETAB and the other applicants who had also given notice of the recommendation a second notice of objections which related to the said recommendation and which was the subject on 22 September 1976 of a second hearing of the applicants.

8 After sending the applicants final requests for information and obtaining the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions the Commission on 20 July 1978 adopted the contested decision concerning both the complaints by GB and Mestdagh and Huyghebaert and the FEDETAB recommendation of 1 December 1975.

9 According to Article 1 of the decision, the agreements between the addressees thereof and the decisions by an association of undertakings taken by FEDETAB concerning the organization of the distribution and sale of tobacco products in Belgium and having as their object:

(1) the approval and classification of wholesalers and retailers into different categories by FEDETAB, Brussels, in order to allocate different profit margins to such categories;

(2) the maintenance of resale prices set by the manufacturers, under the agreement of 22 May and 5 October 1967 between FEDETAB and FNCG and the supplementary agreement of 29 December 1970;

(3) the restrictions imposed by FEDETAB on the approval of certain categories of wholesalers;

(4) the ban on resales to other wholesalers, under the joint measures and the additional agreement of 22 March 1972;

(5) the application to wholesalers and retailers of standard terms of payment, under the joint measures of 23 December 1971;

(6) the decision of FEDETAB to oblige retailers to stock a minimum number of brands and the agreements entered into and joint measures taken by certain of its members to ensure that retailers fulfilled their obligation:

"constituted, from 13 March 1962 to 1 December 1975, infringements of Article 85 (1) of the Treaty".

10 According to Article 2, the FEDETAB recommendation, which took effect on 1 December 1975 and had as its object:

(1) the division of Belgian wholesalers and retailers into categories and the allocation to the latter of different profit margins;

(2) the application to wholesalers and retailers of standard terms of payment; and

(3) the grant to wholesalers and retailers of end-of-year rebates:

"constitutes an infringement of Article 85 (1) of the Treaty establishing the European Economic Community and does not qualify for exemption under Article 85 (3) thereof."

11 Article 3 (1) provides that the addressees of the decision are required to terminate without delay the infringement referred to in Article 2 and in particular in future to abstain from all acts whatsoever having the same object as the FEDETAB recommendation. According to Article 3 (2) FEDETAB is required forthwith to inform all its members to which the decision was not addressed of the contents thereof.

12 By order dated 30 October 1978 the President of the Second Chamber of the Court acting in pursuance of the second paragraph of Article 85 and the second paragraph of Article 11 of the Rules of Procedure in place of the President of the Court and as an interlocutory decision ordered that application of Articles 2 and 3 of the decision should be suspended pending final judgment by the Court.

13 By applications lodged at the Court Registry in September and October 1978 each of the applicants sought a declaration that the decision in question was void, and in certain cases alternatively for amendment thereof in so far as they were concerned.

14 By orders dated 26 October 1978, 28 March 1979 and 27 June 1979 the Court allowed various parties to intervene in support both of the claims of the applicants and of the contentions of the Commission.

15 Because they are connected it is appropriate to join these cases for the purposes of judgment.

II — Submissions regarding form and procedure

First submission: Refusal by the Commission to hear certain interested associations of wholesalers and retailers

16 All the applicants except Vander Elst complain that the Commission refused to accede to the request of the associations ANGIPMT and ATAB and the Consortium Tabacs-Groep Tabak (hereinafter referred to as "GT"), a *de facto* association containing certain of the former members of ANGIPMT, to be heard during the administrative proceedings. That refusal is said to be an infringement of the provisions of Article 19 (2) of Regulation No 17 and Article 5 of Regulation No 99/63.

17 Article 19 (2) of Regulation No 17 provides that applications to be heard on the part of natural or legal persons shall, where they show a sufficient interest, be granted. For that purpose the Commission is required, pursuant to Article 5 of Regulation No 99/63, to afford them the opportunity of making known their views in writing within such time-limit as it may fix.

18 It appears from the file that the Commission's conduct is criticized solely in so far as it refused to invite the above-mentioned associations to the second hearing on 22 September 1976 in relation to the FEDETAB recommendation. On the other hand it is also apparent from the file that during the proceedings those associations sent the Commission their written observations on the recommendation. It follows that the Commission did not refuse to hear the said associations in breach of the provisions of the above-mentioned regulations since, pursuant to Article 5 of Regulation No 99/63, the Commission afforded them the opportunity of making known their views in writing and they made use of that opportunity.

19 That submission must therefore be rejected.

Second submission: Commission's refusal to accede to FEDETAB's request to hear two associations of wholesalers

20 On 30 June 1976 FEDETAB sent a letter to the Commission asking it to summon to the second hearing on 22 September 1976 two associations of wholesalers, namely GT and the Nationale Vereniging van Familiale Groothandelsondernemingen (hereinafter referred to as "NVFG"). It is, however, apparent from the first paragraph of that letter that it was intended in the

first place to inform the Commission that FEDETAB had no objection to the presence of ANGIPMT at the hearing on 22 September 1976. Nevertheless in order that the Commission may have full information it is stated in the second paragraph that FEDETAB would like the NVFG and GT also to be summoned. It is also to be observed that that letter was sent to the Commission after the receipt by FEDETAB of the second notice of objections in relation to the recommendation but before FEDETAB's answer to the said notice.

21 On 20 July 1976, after receipt by the Commission of FEDETAB's answer to the second notice of objections, the Commission answered the letter of 30 June 1976 to the effect that it had decided ultimately to invite to the hearing only "FEDETAB and such of its members as have made application". It justified that decision by saying that it saw in the recommendation an "agreement which was and remains the act only of the manufacturers and in which ... the wholesalers and retailers ... played no part".

22 In FEDETAB's view the letter of 30 June 1976 was an application under Article 3 (3) of Regulation No 99/63 which provides that undertakings and associations of undertakings against which proceedings are commenced "may ... propose that the Commission hear persons who may corroborate" the facts set out in their written observations on the objections raised against them.

23 On the other hand the Commission maintains that according to the wording of the letter of 30 June 1976 which dealt on an equal footing with the request of ANGIPMT and the request made by FEDETAB on behalf of the NVFG and GT, it was a request to hear third parties within the meaning of Article 5 of Regulation No 99/63 and not a proposal pursuant to Article 3 (3) that witnesses be heard to corroborate certain facts. It was in the context of Article 5 that the Commission made its answer on 20 July 1976.

24 It is clear from Article 3 (1) and (2) of Regulation No 99/63 that undertakings and associations of undertakings against which proceedings are

commenced may set out all matters relevant to their defence in their written observations concerning the objections raised against them. Article 3 (3) allows undertakings and associations to propose that the Commission hear persons who may corroborate those facts. When FEDETAB sent its letter of 30 June 1976 to the Commission it had not yet given its written answer to the second notice of objections so that that letter could not in any event have constituted a valid proposal within the meaning of Article 3 (3). Moreover, it must be pointed out that the written answer by FEDETAB of 12 July 1976 contained no proposal to that effect and that the letter from the Commission of 20 July 1976 brought no reaction by FEDETAB in support of such a proposal.

25 On those grounds the second submission must be rejected.

Third submission: Absence of persons delegated during part of the hearing on 22 September 1976

26 This submission which is made by FEDETAB and by the other applicants save Jubilé and Vander Elst is based on the statement to the effect that persons delegated by the Commission were temporarily absent from the hearing.

27 The Commission however answered, without being contradicted, that the only person delegated for the purpose of the hearing was Mr Dennis Thompson, Director of the Agreements and Abuse of Dominant Positions Directorate, and that he was present during the whole hearing. The temporary absence of certain persons who were not delegated by the Commission is therefore irrelevant.

28 It follows that that submission must also be rejected.

Fourth submission: Irregular joinder, without any statement of reasons, of the complaints by Mestdagh and Huyghebaert

29 This submission is mainly based on the statement that the Commission had commenced three separate proceedings which it subsequently decided to join

by a decision not accompanied by a statement of the reasons on which it was based; each proceeding was distinguished from the others by a separate administrative number. The Commission however omitted to send a separate notice of objections concerning the complaints by Mestdagh and Huyghebaert, in breach of Article 2 of Regulation No 99/63 so that the applicants were deprived, in breach of Article 4 of the said regulation, of the opportunity of making known either orally or in writing their views concerning the Commission's objections, of the nature of which they were unaware.

30 The Commission maintains that there was only a single proceeding which led to the decision of 20 July 1978. There are no rules stipulating that the Commission must make formal decisions joining cases and the concept of joinder is unknown to its administrative practice. In this case it conducted the administrative proceedings and gave a ruling in a single decision on one and the same infringement the subject of successive complaints having the same subject-matter and it did so without adversely affecting the rights of the defence and without distorting the course of the proceedings.

31 Regarding this submission it must be observed that on 10 and 13 October 1975 Mestdagh and Huyghebaert both sent a letter to the Commission asking to be joined to the complaint by GB. On 20 October 1975 the Commission informed FEDETAB that the complaint by Mestdagh would be joined to that of GB and that it had been decided to allow Mestdagh to attend the hearing on 22 October 1975. It must nevertheless be observed that as a result of the applicant's objection Mestdagh and Huyghebaert were not heard at that hearing. Further by letter dated 13 November 1975 the Commission forwarded a copy of the complaints by Mestdagh and Huyghebaert to the applicants. In December 1975 and January 1976 the applicants submitted written observations on the said complaints.

32 Article 2 (1) of Regulation No 99/63 provides that the Commission "shall inform undertakings and associations of undertakings in writing of the objections raised against them". Article 4 thereof provides that "the Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views". It is clear from all those provisions that the Commission must include in its

decision only objections of which the undertakings and associations concerned have been given written notice and an opportunity of making known their views. On the other hand there is nothing to prevent the Commission from ruling in a single decision on one and the same infringement which is the subject of several successive complaints lodged during one and the same proceeding.

33 The complaint by Mestdagh and Huyghebaert relates solely to their exclusion, which is not based on any objective criterion, from the categories of wholesalers contained in the classification made by the cigarette manufacturers through the intermediary of FEDETAB so that they are actually refused wholesale terms. That complaint therefore falls within the more general scope of that made by GB. Further, after Mestdagh and Huyghebaert had, at the request of the Commission, answered in writing the observations of the applicants the latter in July 1976 submitted written observations on that answer expressing once again their views on the complaints made by Mestdagh and Huyghebaert.

34 In those circumstances it must be observed that the complaint by Mestdagh and Huyghebaert did not make it necessary, for the purposes of respecting the rights of the defence, either to commence separate proceedings or to give an additional notice of objections. By informing the applicants of the complaint by Mestdagh and Huyghebaert and receiving their written observations thereon the Commission ensured respect for those rights.

35 It follows from the aforesaid considerations that the submission must be rejected.

Fifth submission: Refusal to disclose the file

36 This submission, which is made by all the applicants except Jubilé, is based on infringement of the general principle of the rights of the defence in that the Commission refused to disclose the file on which the contested decision was based.

37 By letter dated 21 March 1976 FEDETAB requested the Commission to forward it a letter sent to the Commission by ANGIPMT supposedly dated 13 February 1976 "together with all other documents on which the Commission based the complaints and to which it might refer at the hearing at present fixed for 29 June next". In answer to that request the Commission on 26 May 1976 forwarded to FEDETAB without any other documents the above-mentioned letter in fact dated 2 March 1976.

38 That answer did not bring forth any reaction on the part of the applicants regarding the production of other documents. Moreover, it is common ground that apart from the letter from ANGIPMT the Commission forwarded to the applicants the two notices of objections and the complaints by GB and Mestdagh and Huyghebaert.

39 Although in its reply FEDETAB lists certain facts or documents allegedly not disclosed, on which the decision is based, it has not shown that the Commission refused to produce the administrative proceedings documents relating to essential facts so depriving the applicants of necessary items for their defence. As the Court observed in its judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, it suffices if the notification of complaints sets forth clearly, albeit succinctly, the essential facts upon which the Commission relies provided always that in the course of the administrative procedure it supplies the details necessary to the defence. Since in addition to the two notices of objections the Commission supplied FEDETAB with the complaints by GB and Mestdagh and Huyghebaert and the letter from ANGIPMT, it has not been shown that it omitted to supply the applicants with details necessary for their defence.

40 After the contested decision was taken the applicants FEDETAB and Vander Elst also asked the Commission to make available to them the file on which the decision was based. The fact that the Commission refused to disclose the administrative file cannot be relied upon to obtain annulment of the decision since requests for discovery of the file made after the decision was taken cannot have had any effect upon the course of the administrative proceedings.

Sixth submission: Disclosure of confidential information

41 This submission, which is made by FEDETAB and all the other applicants except Jubilé and Vander Elst, is based on the claim by FEDETAB that the Commission forwarded to GB information which by its very nature was a trade secret and was sent to the Commission as such. In answer to the first notice of objections FEDETAB annexed to its statement of 22 September 1975 three tables the first of which showed the trend in receipts during the previous five years for 160 brands of cigarettes, the second set out the number of cigarettes purchased by the main specialists and the third showed the terms of payment of 25 main customers of the principal Belgian cigarette manufacturers. In its statement it stressed the confidential nature of those tables. The Commission nevertheless forwarded to the complainant GB the whole of FEDETAB's answer including the said tables. In so doing it infringed Article 20 (2) of Regulation No 17 which provides that "without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy". That disregard of a principle of a Community public policy is alleged to vitiate the Commission's decision.

42 The Commission does not deny that on 2 October 1975 it forwarded to GB the whole of FEDETAB's answer including the tables. That was done, according to the Commission, following a request by GB which had asked to be heard, to be summoned to the hearing and to see the answers of the applicants to the first notice of objections. In justification of this attitude the Commission puts forward the following arguments.

43 In the first place the particulars in question were not confidential. Since they had been given to FEDETAB by the manufacturers they were known to all the applicants through their representatives on the Board of FEDETAB. They had therefore lost their confidential character and could not be considered as protected by the duty of the Commission's officials not to disclose trade secrets.

44 In the second place, even assuming that the information was to be considered confidential, Article 20 (2) of Regulation No 17 gave the Commission the right and Article 19 (2) imposed on it a duty to pass the information on to GB. If it had acted otherwise it would have infringed GB's right to be fully heard.

45 Finally the Commission alleges that the applicants have in no way shown how the action of the Commission with regard to the tables has distorted the course of the administrative proceedings.

46 In answer to that line of argument it must be observed in the first place that information in the nature of a trade secret given to a trade or professional association by its members and thus having lost its confidential nature *vis-à-vis* them does not lose it with regard to third parties. Where such an association forwards such information to the Commission in proceedings commenced under Regulation No 17, the Commission cannot rely on the provisions of Articles 19 and 20 of that regulation to justify passing on the information to third parties who are making complaints. Article 19 (2) gives the latter a right to be heard and not a right to receive confidential information.

47 Nevertheless it must be observed in this case that even assuming that the three tables amounted to trade secrets and were therefore wrongly disclosed by the Commission to GB, that procedural irregularity would involve the annulment in whole or in part of the decision only if it were shown that in the absence of such irregularity the contested decision might have been different. Consideration of the file has shown that the disclosures in question supplied GB with no argument likely to have had an influence on the content of the decision in question.

Seventh submission: Exemption from notification

48 According to this submission made by FEDETAB and by all the applicants except Jubilé and Vander Elst, based on FEDETAB's argument, the Commission infringed Article 85 (1) and (3) of the Treaty and Article 4 of Regulation No 17 by refusing to apply Article 85 (3) of the Treaty to the measures prior to the recommendation of 1 December 1975 on the ground

that those measures were not notified albeit they were not exempt from notification. Further the Commission's statement of the reasons on which the decision was based on that issue is incorrect and inadequate.

49 FEDETAB alleges in support of that argument that all the previous measures or at least the larger part of them fulfilled the conditions for exemption from notification provided for by Article 4 (2) (a) of the regulation in the following terms:

"(2) Paragraph (1) shall not apply to agreements, decisions or concerted practices where:

(1) the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States;

(2) not more than two undertakings are party thereto, and the agreements only:

(a) restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold . . ."

In the view of FEDETAB the Commission ought to have considered the various measures and in each case checked whether the conditions for exemption from notification were satisfied. In FEDETAB's view, that was so.

50 The approval by FEDETAB of wholesalers and retailers and their classification into categories and the obligations with regard to the stocking by retailers of a specific range of brands are the result of decisions by FEDETAB alone, which is an association having legal personality and acting through its own organization in accordance with its articles. It is not therefore an agreement between undertakings or a decision taken by those undertakings as such. Those decisions may therefore, according to FEDETAB, enjoy the exemption from notification provided for by Article 4 (1) of the regulation.

51 Further the agreements made between FEDETAB and the FNCG are between two trade federations acting as such in the name of their members but not as delegates so that such agreements may, in FEDETAB's view, enjoy the exemption provided for in Article 4 (2) (1).

52 The standard agreements signed by several distributors at the invitation of FEDETAB and containing an undertaking to observe the ban on resale to certain wholesalers are in fact only unilateral undertakings by those distributors so that such standard agreements may, according to FEDETAB, enjoy the exemption provided for in Article 4 (2) (a) of the regulation.

53 As regards the collective measures adopted on 23 December 1971 in relation to terms of payment FEDETAB alleges that they were not decisions by undertakings or agreements between several undertakings but rather agreements made by each manufacturer with each of his customers. Such agreements are, it is claimed, obviously not subject to notification.

54 The Commission states at paragraph 110 of the decision that it was unable to consider applying Article 85 (3) to the measures adopted in relation to distribution for the period 13 March 1962 to 1 December 1975 (described in paragraphs 19 to 57 of the decision), since they were not notified to the Commission in accordance with Article 4 (1) of Regulation No 17 although they did not belong to any of the categories of agreements and decisions exempted from notification by Article 4 (2).

55 It must be observed that in adopting the measures in question FEDETAB was acting in fact in the name of its members, that is to say the majority of the Belgian tobacco manufacturers and a Luxembourg manufacturer (the applicant HvL). That appears particularly clear from Article 8 (2) of the statutes of FEDETAB according to which the requirements for membership of FEDETAB are that applicant firms must suscribe to the statutes and all decisions taken under them and satisfy all obligations flowing from them.

The manufacturers were thus parties to the said measures through the intermediary of their trade association. That fact is corroborated by various statements of FEDETAB itself. By letter dated 26 January 1971 sent to the Commission in answer to a request for information FEDETAB gave a summary of its policy and of the practice in relation to the distribution of manufactured tobacco products in Belgium. At point B on page 2 of that letter in reference to the free nature of the distribution system FEDETAB adds: "The only restriction, agreed only between members of FEDETAB and not binding on foreign manufacturers, is to confine wholesale terms to

wholesalers 'recognized' for the special services they render the industry". It is moreover apparent from the actual wording of the agreement of 22 May 1967 on cut-price selling (Annex II to the said letter) that the agreement was made between the FNCG and FEDETAB acting in the name of their respective members. The fact that the members were actually parties to the substance of the agreement is clearly apparent from Article 1 which provides:

"Belgian wholesalers represented by the undersigned of the first part (FNCG) undertake both *inter se* and *vis-à-vis* the cigarette manufacturers, represented by the undersigned of the second part (FEDETAB), to sell manufactured tobacco products bought by them at the prices indicated by the suppliers without any rebate . . ."

56 It follows from those considerations that the measures in question did not fall within Article 4 (2) of Regulation No 17 since the parties included manufacturers of two Member States, namely Belgium and the Grand Duchy of Luxembourg and there were more than two undertakings, namely at least the applicants. Since the measures were not exempt from notification this submission must be rejected.

Eighth submission: Refusal to consider the letter from FEDETAB dated 26 January 1971 as a notification

57 According to this submission made by FEDETAB and by all the other applicants except Jubilé and Vander Elst the Commission wrongly refused to consider as a valid notification of the arrangements in relation to the distribution of manufactured tobacco products the above-mentioned letter from FEDETAB of 26 January 1971, although that letter including its annexes informed the Commission of the arrangements which were subsequently condemned by the Commission and set out the reasons why those arrangements either did not come within Article 85 (1) of the Treaty or in any event were beneficial to the organization of the market.

58 In the decision (paragraph 111) the Commission points out that that letter sent to the Commission in answer to a formal request for information under Article 11 of Regulation No 17 contained no application for exemption under Article 85 (3) of the Treaty and made no mention of the application of Articles 4 and 5 of Regulation No 17. Further FEDETAB did not use the

notification forms prescribed by Commission Regulation No 27 (Official Journal, English Special Edition 1959-1962, p. 132).

59 In the defence the Commission also contends that in the first notification of objections of 18 July 1975 it had stated that the measures in question could not have exemption so long as notification of them had not been given.

60 In its answer of 22 September 1975 to the first notification of objections FEDETAB said that in its view the letter of 26 June 1971 could be regarded as a valid notification.

61 The form, content and other terms of notification provided for in particular in Article 4 of Regulation No 17 are governed by Article 4 of Regulation No 27 as amended by the Sole Article of Regulation No 1133/68 of the Commission of 26 July 1968 (Official Journal, English Special Edition 1968 (II), p. 400). It follows from the terms of that provision that notifications must be submitted on Form A/B as shown in the annex to Regulation No 1133/68 and must contain the information asked for therein.

62 The use of that form is therefore mandatory and is an essential prior condition for the validity of the notification. It takes account, for the purpose of laying down detailed rules for the application of Article 85 (3), of the need, expressed in Article 87 (2) (b) of the Treaty, to ensure effective supervision and to simplify administration to the greatest possible extent. The present case provides a striking example of the confusion and misunderstandings to which notification otherwise than on the prescribed form may give rise. It was only in its answer of 22 September 1975 to the first notification of objections that FEDETAB stated for the first time that the letter of 26 January 1971 constituted notification.

63 For the reasons set out above it is therefore necessary to reject this submission.

Ninth submission: Inadequate answer to the arguments concerning the application of Article 85 (3) of the Treaty

64 According to this submission made by FEDETAB and by all the other applicants except Jubilé and Vander Elst the Commission, instead of taking account of its decision of all the arguments of FEDETAB regarding the applicability of Article 85 (3) to the provisions of the recommendation, considered only some of those arguments and thus disregarded the requirement contained in Article 190 of the Treaty to state reasons on which its decision was based.

65 It is apparent from the decision that the Commission, after referring (paragraphs 114 to 117) to certain arguments of the parties, set out (paragraphs 118 to 132) its views regarding the application of Article 85 (3) to the recommendation. Although they contain answers to some of the said arguments, the views constitute not a detailed refutation of them but an independent argument setting out in general terms the reasons why there could be no exemption under Article 85 (3) in this case.

66 Although pursuant to Article 190 of the Treaty the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised by every party during the administrative proceedings. This submission, which is based on the assumption that there is such a requirement, must therefore be rejected.

Tenth submission: Allegation that the Commission took into account objections of which it had not given notice

67 This submission, made by all the applicants, alleges that the Commission infringed the provisions of Article 19 (1) of Regulation No 17 and Article 4 of Regulation No 99/63 inasmuch as it omitted to give the applicants the opportunity to express their points of view regarding objections which the Commission took into account in the contested decision. In the second notification of objections the Commission is said to have refused to exempt the recommendation under Article 85 (3) on the sole ground that it did not satisfy the first of the four conditions contained in that article, namely

improving the production or distribution of goods or promoting technical or economic progress. The applicants therefore dealt only with that condition. However, the contested decision refuses exemption because the three other conditions of Article 85 (3) are not satisfied. The applicants were thus deprived of the opportunity of expressing their point of view in compliance with those conditions.

68 As the Court indicated in its judgment of 15 July 1970 in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661 at p. 691, paragraphs 91 to 93, the decision is not necessarily required to be a replica of the Commission's notice of objections. In fact the Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections as have been shown to be unfounded or to supplement and re-draft its arguments both in fact and in law in support of the objections which it maintains. This latter possibility does not conflict with the principle of the rights of the defence protected by Article 4 of Regulation No 99/63.

69 In this case it is apparent from consideration of the second notification of objections that the refusal to grant exemption under Article 85 (3) of the Treaty was based solely on the finding that the first condition of the said paragraph is not satisfied. In the decision, after a detailed statement of reasons (paragraphs 113 to 131), that objection is found substantiated at paragraph 132.

70 On the other hand it must be observed that two other objections are actually taken into account in the decision. At paragraph 132 it is added that the recommendation does not "allow consumers a fair share of any benefit which might result". Moreover at paragraph 133 it is said that "in view of the market share of FEDETAB and its members, the agreements afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question".

71 The Commission observes in the first place that the applicants had already to a large extent given their views regarding the four conditions of Article 85

(3) during the administrative proceedings and in particular on notification of the recommendation. The second condition (allowing consumers a fair share of the resulting benefit) had been mentioned in the first notification of objections. Further the Commission summarized in its decision the statements of the applicants regarding that condition (in particular at paragraphs 114 to 117) and also answered certain of their arguments (at paragraphs 119, 121, 122, 125, 126 and 131).

72 Since what the Commission says is correct, the Court finds that having regard to the fact that the two notifications of objections must be regarded as a whole and that the second condition is referred to in the first notification, the objection put forward in relation to it in paragraph 131 of the decision cannot constitute an infringement of Article 4 of Regulation No 99/63.

73 As regards the reference in paragraph 133 of the decision to the fourth condition in Article 85 (3) of the Treaty the Commission claims that it merely supplements its arguments in law in support of the refusal to grant exemption and its main arguments relate to the first condition.

74 It is common ground that the two notices of objections contained no express mention of any objection relating to the fourth condition in the context of the applicability of the provisions of Article 85 (3). Since however the question of how far the recommendation gives the applicants the opportunity of eliminating competition constitutes the very basis of the second notice of objections, on which the applicants expressed their views, its introduction into the part of the decision relating to the applicability of Article 85 (3) to the recommendation cannot constitute an infringement of the rights of the defence under Article 4 of Regulation No 99/63. For that reason this submission must be rejected.

Eleventh submission: Wrong assessment of the recommendation in relation to the previous measures

75 The applicants Jubilé and Vander Elst complain that the Commission infringed the provisions of Articles 85 and 190 of the Treaty inasmuch as it wrongly considered the recommendation of 1 December 1975 as an extension of the measures adopted prior to that date and therefore did not properly assess the recommendation. It is said that comparison of the restrictions on competition resulting, according to the Commission, from the former agreements with the tenor of the recommendation shows that the factual circumstances of the two cases are quite different and have different effects upon competition. That factual error is said to have led the Commission to rely on the effects of the former agreements as reasons for the alleged restrictive effects on competition resulting from the recommendation.

76 In that respect it is well to observe in the first place that the recommendation and the measures prior to it are treated separately in the decision from the point of view of both the facts and their legal assessment. As regards the facts it is stated in paragraph 60 of the decision that the recommendation "... replaces the arrangements described in I (C) above" (namely the previous measures), which is a simple factual observation not open to challenge. The operative part maintains the distinction between the two sets of measures by dealing with them in two separate articles, namely, the previous measures in Article 1 and the recommendation in Article 2.

77 As the Court stated in its judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (*Suiker Unie and Others* v *Commission* [1975] ECR 1663 at p. 1930, paragraph 111), there is no reason at all why the Commission should not make a single decision covering several infringements provided that the decision permits each addressee to obtain a clear picture of the complaints made against it. Because of its structure the decision allows a clear picture of distinction between the various measures, even if it is true that at various places in the legal assessment of the recommendation, objectives and effects similar or identical to those characteristic of certain former measures are attributed to it.

78 It follows that the Commission has not infringed the provisions of Article 190 of the Treaty by reason of the inadequacy or lack of the statement of reasons. It will be appropriate to examine the various factual inaccuracies and resulting errors of law cited by the applicants when the submissions on the substance of the case are considered.

III — The first six submissions and the tenth submission in relation to Article 6 of the European Convention for the Protection of Human Rights

79 In its reply FEDETAB maintains that the conduct of the Commission which is the subject of the above seven submissions is also an infringement of Article 6 (1) of the European Convention for the Protection of Human Rights, which provides that in the determination of his civil rights and obligations everyone is entitled to a fair hearing by an independent and impartial tribunal. Citing the case-law of the European Court of Human Rights in support (in particular its judgment in the case of *König* of 31 May 1978, Series A, No 27, p. 30, paragraph 90), FEDETAB alleges that the rights defined in Article 85 *et seq.* of the Treaty in relation to competition and by the implementing regulation are civil rights within the meaning of the provisions of Article 6 (1) of the Convention.

80 In answer the Commission observes that when it is applying the rules of the Treaty on competition it is not a tribunal within the meaning of the said provisions. Pointing out that one of the criteria for the existence of a "tribunal" laid down by the European Court of Human Rights is its independence of the executive (cf. the judgment in *Ringeisen,* Series A, No 13, p. 39, paragraph 94), the Commission observes that since the executive power of the Community is in fact vested in it is at least doubtful whether, not being independent of that power, it can constitute a tribunal within the above-mentioned sense.

81 The arguments of FEDETAB are irrelevant. The Commission is bound to respect the procedural guarantees provided for by Community law and has done so, as is apparent from what has gone before; it cannot, however, be classed as a tribunal within the meaning of Article 6 of the European Convention for the Protection of Human Rights.

IV — Submissions on a general principle of law

82 All the applicants except Jubilé and Vander Elst complain that the Commission has disregarded a general principle of law, namely that of the equality of public and private undertakings with regard to the provisions of the Treaty. The Commission is said to have condemned the practices of the applicants in relation to distribution whilst at the same time tolerating undoubted restrictions on competition in France and Italy where there are State monopolies for tobacco products.

83 In support of that argument FEDETAB alleged that penetration of the French and Italian markets is obstructed by many serious obstacles of a legal and administrative nature, which it lists in its originating application. Answering in its reply the explanations of the Commission relating to the proceedings which the Commission has commenced for the purpose of adjusting those monopolies, FEDETAB states that it remains convinced that the Commission has not observed the limits which the principle of equality of undertakings *vis-à-vis* the Treaty places on its discretion.

84 That argument must be rejected. It is apparent from the file that various actions have been commenced by the Commission against the above-mentioned Member States so that in fact the argument is incorrect. In any event even on the assumption that the Commission has failed to fulfil certain of its obligations under Article 155 of the Treaty by failing to ensure the application of the Community law on competition and the adjustment of State monopolies in the manufactured tobacco sector, that fact cannot justify any infringements of the Community law on competition committed in the same sector in the present cases by the applicants.

V — Substantive submissions on Article 85 (1) of the Treaty

A — Wrong assessment of the nature and scope of the recommendation

85 *Jubilé* and *Vander Elst* maintain that the Commission infringed Articles 85 and 190 of the Treaty by wrongly regarding the recommendation as having constituted an agreement between undertakings or a decision of an association of undertakings or as having imposed obligations on the

applicants. To constitute such an agreement the recommendation would have had to involve features making it a binding contract under national law. In the present case it is not such a contract since the binding element is lacking.

86 That argument cannot be accepted. In the present case the applicant members of FEDETAB informed the Commission that they wished to be party to the notification of the recommendation and during the proceedings before the Court they admitted that they had complied with it since 1 December 1975. It follows that the recommendation is a faithful expression of the applicants' intention to conduct themselves on the Belgian cigarette market in conformity with the terms of the recommendation. The necessary conditions for the application of Article 85 (1) are therefore satisfied.

87 Certain applicants including the intervener AGROTAB complain further that the Commission wrongly treated the recommendation as a decision of an association of undertakings within the meaning of Article 85 (1). The recommendation is said to have been made by FEDETAB, a non-profit-making association which as such does not trade.

88 That argument cannot be accepted either. It is apparent from Article 8 of the statutes of FEDETAB that the decisions taken by it are binding on its members. Further, Article 85 (1) also applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress. Since several manufacturers have expressly stated that they are complying with the provisions of the recommendation, it cannot escape Article 85 of the Treaty simply because it has been made by a non-profit-making association.

89 Nor is it possible to accept the argument to the effect that the recommendation has no binding effect and that the decision is wrong in referring in paragraph 61 to a genuine mandatory rule of conduct for all firms in the industry. Apart from the fact that pursuant to Article 8 of the statutes of FEDETAB the provisions of the recommendation are binding on its members, it is necessary also to point out that compliance with the recommendation by seven undertakings, the applicants in the present cases,

who control a substantial part of the total cigarette sales in Belgium, has a profound influence on competition in the market in question.

B — Wrong assessment alleged by the applicant HvL

90 The applicant HvL, a Luxembourg cigarette manufacturer, complains of infringement of Articles 85 and 190 of the Treaty with regard to it, inasmuch as the Commission wrongly considered that HvL took concerted action with the other parties in respect of the measures prior to 1 December 1975. In that respect the applicant observes that as regards the period prior to 1 December it dit not sign any of the agreements referred to in the decision except the letter of 23 December 1971 laying down the maximum periods allowed for payment. It follows that only the measures referred to in that letter can be held against it. Because of pressure from the Belgian market it fell into line with the conduct of the other Belgian manufacturers and importers, but that did not mean that there could be assumed to be an agreement or concerted practice.

91 That argument cannot be accepted. The applicant has been a member of FEDETAB since 1947 and pursuant to Article 8 of the statutes of FEDETAB the applicant had to comply with all the decisions taken pursuant to the said statutes. Further, as has already been observed in relation to the previous measures, FEDETAB acted in the name of its members, who took part in the adoption and observance of the said measures through the intermediary of their trade association.

C — Submissions relating to the effect upon competition

92 The applicants moreover allege essentially that with its decision the Commission infringed Article 85 (1) of the Treaty inasmuch as it wrongly considered that the purpose or effect of the contested measures was, at the very least, appreciably to restrict competition.

1. Introductory observations

93 For the better appreciation of the applicants' arguments it is advisable in the first place to recall the nature and scope of the contested measures for the purpose of considering them in the light of Article 85 of the Treaty.

(a) The contested measures

(i) The period prior to 1 December 1975

94 As has already been stated, in Article 1 of the decision the Commission lists the measures which it condemns as constituting infringements of Article 85 (1) prior to 1 December 1975.

95 In the first place there is the approval and classification by FEDETAB of wholesalers and retailers into different categories according to a classification made by the Belgian Committee for Distribution and the allocation to those categories of different fixed profit margins including in particular a direct rebate representing the maximum margin allowed by the Belgian Minister for Economic Affairs under the system of notification of price increases. According to the Commission, that rebate was retained only by co-operatives and supermarkets which acted also as retailers since wholesalers properly so called had to allow part of it to the retailers to whom they resold their products. The retailers, numbering 80 000 in Belgium, were according to the Commission divided pursuant to an agreement made on 29 December 1970 between FEDETAB and the FNCG into "approved retailers" (numbering some 2 000) and "non-approved retailers", the latter receiving from the wholesaler a lesser proportion of the rebate than that allowed to approved retailers.

96 The Commission then points to a number of measures adopted by FEDETAB and the FNCG in relation to resale prices. It draws attention in particular to the agreement of 22 May 1967 made between FEDETAB and the FNCG according to which wholesalers undertook to resell the manufactured tobacco products at the prices indicated by the suppliers without any rebate or benefit other than the retailers' margin. Pursuant to the same agreement wholesalers having retail shops undertook to resell the cigarettes at the retail prices stated on the tax band without any allowance to the consumer. Approved retailers signed a standard agreement submitted to them by FEDETAB containing a similar undertaking. By an interpretative supplement dated 5 October 1967 to the above-mentioned agreement

FEDETAB and the FNCG specified that wholesalers operating retail shops were regarded as undertaking to refuse to supply retailers who did not observe the price on the tax band. By a further interpretative supplement of 29 December 1970 signed by FEDETAB and the FNCG the latter undertook to carry out a strict and systematic check that the agreements were implemented. On 30 June 1972 (the date on which the agreement of 22 May 1967 would in due course have expired) FEDETAB submitted a standard type of agreement described as "Special Agreement in relation to Cut-price Selling" to wholesalers who thereby recognized the agreement of 22 May 1967 and the two supplements thereto of 29 December 1970 and 22 March 1972 (see below) and undertook for the period from 1 July 1972 to 30 June 1977 to resell the manufactured tobacco products at the prices laid down by the suppliers without any rebate or bonus.

97 The Commission also refers to the refusal by FEDETAB since 1 January 1971 to approve any new wholesalers except in the categories of "specialist itinerant wholesalers" or "hotels, restaurants, cafés" or co-operatives or supermarkets except in the categories of "large department stores and popular department stores". Applicants for approval in those categories had to undertake to observe the prices laid down, to pay for their purchase in cash and to help to promote any new brands.

98 The Commission moreover refers to an additional interpretative agreement of 22 March 1972 whereby the FNCG, referring to the additional agreement of 29 December 1970, informed its members that in future they were strictly forbidden to sell manufactured tobacco products to food-wholesalers and other wholesalers not directly supplied by manufacturers, where the products concerned were for resale to retailers and to wholesalers to whom the manufacturers had already allocated a quota. Supplies would be suspended if the ban were broken. That agreement was reinforced according to the Commission by the terms of a standard agreement signed by almost all wholesalers after being invited by FEDETAB on 30 June 1972 to do so and according to which the wholesalers undertook to observe in particular the above-mentioned ban. Failure to honour these commitments, according to the Commission, would result in the withdrawal of end-of-year rebates and wholesale terms.

99 Collective measures on terms of payment adopted by certain members of FEDETAB are also the subject of an objection made by the Commission against the applicants. By letter dated 23 December 1971 on FEDETAB letter paper nine manufacturing members thereof informed all those enjoying wholesale terms that terms of payment would be reduced to a maximum of a fortnight and that manufacturers would suspend supplies of those time-limits were not observed. According to the Commission those measures were applied until the entry into force of the recommendation of 1 December 1975.

100 The Commission finally complains that the applicants required certain categories of retailers, namely large department stores and popular department stores to offer a minimum range of brands decided upon by FEDETAB and ensured that the requirement was observed by various collective measures and in particular by suspending supplies of cigarettes to GB in March 1972.

101 It should be noted that the applicants do not challenge the correctness in substance of the facts alleged by the Commission except to say that the price measures lapsed in August 1974 and those relating to the ban on resale were not followed up and in any event terminated on 1 July 1973.

(ii) The FEDETAB recommendation of 1 December 1975

102 The recommendation which replaced the previous measures and of which notice was given by FEDETAB to the Commission on 1 December 1975 concerns only the cigarette sub-sector. It is common ground that the other applicants informed the Commission that they intended to comply with the recommendation and wished to be party to the notification. According to the reasons stated in the Commission decision the firms in FEDETAB had a great influence on other manufacturers and importers and on wholesalers and retailers. The recommendation therefore operates as a genuine mandatory rule of conduct for all firms in the industry. It constitutes a decision of an association of undertakings and an agreement between them the object and effect of which are appreciably to restrict competition between

manufacturers and alternatively between wholesalers within the common market. Further, it does not satisfy the conditions of Article 85 (3) of the Treaty inasmuch as it does not contribute to improving distribution sufficiently to counter-balance the restrictive effects upon competition which it causes and does not allow consumers a fair share of the resulting benefit.

103 Under the recommendation the organization of cigarette distribution in Belgium is governed by the following three principles:

— The classification of wholesalers and retailers into categories and the laying down both for wholesale and retail trade of maximum graded rebates to be granted on invoices to customers and the minimum requirements (degree of specialization in tobacco products, volume of sales, number of brands offered and number of sales outlets served) for entitlement;

— The payment by FEDETAB to the wholesaler or retailer of an end-of-year rebate calculated on the basis of his cigarette purchases of all brands made during the year from any Belgian or foreign manufacturer whether or not a member of FEDETAB;

— The principle of cash payment with the opportunity of granting special periods of credit not exceeding a fortnight from the date of the invoice.

104 It is apparent from that analysis that the various measures adopted prior to 1 December 1975 and those contained in the recommendation, even though differing in certain respects, had basically similar aims concerning the profit margins of wholesalers and retailers (hereinafter referred to as "trade margins"), end-of-year rebates and terms of payment.

105 For the purpose of considering the question whether the object or effect of the contested measures is to prevent, restrict or distort competition within the common market it is as well to consider separately first of all the

measures relating to the trade margins, end-of-year rebate and terms of payment for the whole of the two periods.

2. Measures relating to the trade margins, end-of-year rebate and maximum terms of payment

(a) Trade margins

106 As is apparent from the description of the contested measures, one of their features is the agreement by the manufacturers of tobacco products as to the classification of the wholesale and retail trade and as to the corresponding trade margins. That system was modified by the FEDETAB recommendation of 1 December 1975 only to the effect, as the Commission pointed out in paragraph 97 of the contested decision, that the recommendation takes account of three new criteria for establishing the amount of the various margins, namely the annual sales volume, the number of brands offered and the number of sales outlets served. Further, the system established by the recommendation is confined to the cigarette sub-sector alone, whereas the measures in force previously applied to all manufactured tobacco products.

107 The Commission found at Articles 1 and 2 of the decision that the classification of Belgian wholesalers and retailers into categories and the allocation to the latter of different profit margins constitutes an infringement of Article 85 (1) of the Treaty. It gives as reason for that finding (paragraphs 81 and 97) that the system constitutes a restriction on competition both for manufacturers and for wholesalers. It deprives manufacturers of the opportunity of competing *inter se* with regard to profit margins and wholesalers with regard to the services they render manufacturers. Both in the system prior to 1 December 1975 and that established by the recommendation of that date no account is taken of services, other than those bearing on the classification, which intermediaries may render individually.

108 During the proceedings before the Court the Commission stressed that the essence of the measures in question is the horizontal concerted practice of the applicants regarding the profit margins and other financial advantages which the manufacturers and importers allow traders. In the Commission's view to make those margins and bonuses uniform is strictly equivalent to an agreement on prices between manufacturers and importers governing the price to be paid for the service of intermediaries. It constitutes a serious breach of the competitive system intended by the Treaty.

109 From that point of view it is necessary to consider whether, in so far as the contested measures relate to trade margins and other financial benefits, they have as their object or effect, contrary to Article 85 (1) of the Treaty, the prevention, restriction or appreciable distortion of competition in the sector of the products in question within the common market.

110 *Prima facie* it appears from the actual substance of the contested measures that their object is in particular to exclude the possibility of manufacturers and importers negotiating with wholesalers individual margins and more advantageous benefits according to the market situation. That is confirmed by the fact that the applicants admitted complying with the system, established both by the recommendation and the measures in force prior thereto, in relation to margins.

111 The applicants maintain however that various national rules and administrative practices in force in Belgium in the sector of manufactured tobacco products have such decisive effect upon conduct of the Belgian manufacturers and importers of those products both as regards the margins and other financial benefits allowable to traders and the sale prices to consumers that the object or effect of the contested measures cannot be to restrict competition, at least to an appreciable extent.

112 It follows from the previous considerations that it is necessary to consider the nature and scope of the said Belgian rules and administrative practices and any effect they may have on competition.

(i) Belgian rules and administrative practices

— The Belgian tax rules regarding excise duties on tobacco

113 It is apparent from the file that a feature of the tax system to which manufactured tobacco products, especially cigarettes, are subject in Belgium is an *ad valorem* excise duty calculated on the retail selling price including value-added tax. The aggregate amount of the two taxes must be paid by the manufacturer or importer when buying the tax bands which are affixed to the various tobacco products before they are marketed whether they are manufactured in Belgium or imported into that country; the tax bands show the retail price taken into account in calculating the taxes due.

114 Under Belgian law retailers must strictly observe the prices shown on the tax bands. That requirement arises from Article 58 of the Belgian Law of 3 July 1969 establishing the VAT code, which provides that as regards the said products the value-added tax is calculated on the basis of the price on the tax band which must be the imposed consumer price. It follows that as from 1 January 1971, when the provisions of Article 58 entered into force, the retail price selected by the manufacturer or importer automatically becomes the imposed consumer price.

115 It is common ground that during the whole period during which the measures in question have applied and in any event from 13 March 1962, the date when Regulation No 17 of the Council of 6 February 1962 entered into force, manufactured tobacco products have been and still are subject to a high proportional excise duty.

116 It is apparent from the file that the proportion of the retail price represented by taxation is made up as follows: a specific excise duty of a given amount in Belgian francs per article; a proportional excise duty amounting to a given percentage of the retail price; value-added tax calculated on the non-tax items of the retail price and on the total excise duty. That excise duty is almost wholly proportional, since the ratio between the specific excise duty

and the proportional excise duty is 5 : 95. It appears from a table of figures supplied by the Commission in its rejoinder, the accuracy of which has not been challenged by the applicants, that at 1 January 1979 excise duties represented 65.65% and value-added tax 5.66% of a packet of 25 cigarettes in the most popular price category in Belgium (BFR 41) so that tax represented some 71.31% of the retail sale price. In paragraph 11 of the Commission decision it is said that in aggregate tax accounts for approximately 70% of the retail selling price. It follows that the non-tax part of the retail price, made up on the one hand of the manufacturers' or importers' share of the retail price and on the other hand the trade margins, represents some 30% of the retail price.

117 It should be noted that the ratio of 5 : 95 between the specific excise duty and the proportional excise duty is in accordance with the minimum requirement imposed by Council Directive No 72/464 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 and 306, p. 3) as amended in particular by Council Directive No 77/805 of 19 December 1977 (Official Journal L 338, p. 22). That directive lays down the principle of the harmonization of the national structures of excise duties by several stages within a system of excise duties to be established by each Member State containing a proportional element calculated on the retail selling price and a specific element calculated per unit of the product. As is clear from the preamble to the directive the object of that harmonization is *inter alia* the progressive elimination of taxation systems affecting the consumption of tobacco in the Member States and the factors likely to impede the free movement of tobacco and to distort the conditions of competition both on a national and Community level.

118 Article 10 of Directive No 72/464 and Article 10 b (5) inserted therein by Directive No 77/805 nevertheless allow Member States to levy on cigarettes a minimum excise duty, the amount of which may not exceed 90% of the sum of the proportional excise duty and the specific excise duty which they levy on cigarettes in the most popular price category. It is common ground that the Belgian State uses that power to the maximum.

— Price control measures in Belgium and Belgian taxation policy

119 The Ministerial Order of 22 December 1971 provides that not later than three months before it is to take effect manufacturers and importers are required to inform the Minister for Economic Affairs of every intended price increase in the Belgian market in respect of all products, materials, commodities, goods and services. Before the expiry of the aforementioned period the Minister for Economic Affairs may inform the undertaking giving notice that the intended price increase may not take effect either in whole or in part for a maximum period of six months. On the expiry of the period laid down by the Minister the undertaking may charge the increase of which it has given notice but it must notify the prices which it in fact charges.

120 It must however be observed that although in the manufactured tobacco sector individual notifications by separate undertakings are possible, it nevertheless appears that in practice negotiations in relation to price increases are conducted in the majority of cases by the trade associations of the various branches of the sector. It also appears that during those joint negotiations all the items of the retail price, including the various maximum trade margins, are subject to careful examination both by the Minister for Economic Affairs and the Minister for Finance who exercises considerable influence on the amount of the increase in the price.

121 Since manufactured tobacco is a very important source of revenue, the Government ensures that the revenue is not reduced by reason of a too sharp increase in retail price, which might lead to a reduction in consumption. The applicants have cited certain examples of Government intervention the effect of which has been to prevent such an increase.

122 Moreover, as the Belgian Government confirmed in answer to a written question put by the Court, the Belgian provisions laid down by law and regulation in respect of revenue do not allow the manufacturer or importer simultaneously to market cigarettes of the same quality and the same brand with the same number in identical packaging but with different tax bands. The Belgian Government observes that that condition accords with Article 4 (1) of Council Directive No 72/464 which provides that the proportional excise

duty shall be calculated on the maximum retail selling price. According to the Belgian Government, if there were several maximum prices for the same product at one and the same time, it would follow that in all cases except that of the highest price the excise duty would have been levied on a lower basis than the lawful one.

(ii) Assessment of the effects upon competition caused by the rules and practices referred to under (i)

123 In paragraphs 4 to 18 of the decision the Commission has described the terms for fixing prices and for levying the duty on manufactured tobacco products in Belgium and in paragraph 36 it has taken account of the entry into force on 1 January 1971 of Article 58 of the Belgian VAT code.

124 In paragraph 88 of the decision the Commission considers that it is not possible to sustain the claim of FEDETAB and the firms involved to the effect that the measures prior to the recommendation did not constitute significant restrictions on competition because the Belgian Government levies heavy taxes and requires notification of the resale prices and profit margins for tobacco products so that competition is already substantially restricted and uniform conduct is imposed on all the firms operating on the market. It adds that if national legislation has the effect of restricting competition, the added effects of private arrangements restricting competition can only be the more significant.

125 In paragraph 105 of the decision the Commission cites the same reasoning to reject the argument that "the restrictions on competition flowing from the recommendation were not appreciable by reason of State intervention in the tobacco industry".

126 It is therefore necessary to consider in the first place whether, contrary to the Commission's argument, the Belgian rules and their application, as described above, have as their effect either to exclude, as the applicants maintain, the opportunity for manufacturers and importers to compete significantly in

relation to the margins to be allowed to the trade or to cast serious doubt on the existence of such an opportunity. In both cases the Court would be led to find that the contested Commission decision did not correctly or sufficiently take account of the effect of the said rules and their application by the competent Belgian authorities on the opportunities for competition by those in the industry.

127 In that respect it is necessary to observe in the first place, as the parties agree, that in a system of basically proportional excise duty, as applicable in Belgium, any alteration in the manufacturers' or importers' share contained in the retail price involves an alteration several times greater in the tax and therefore in the retail price itself where the said alteration is adjusted so as to be recovered in the price. That multiplier effect in principle works as regards both increases and reductions. Nevertheless in the latter case the decreasing effect of the multiplier which works in favour of the consumer is limited by the minimum excise duty laid down by the Belgian State pursuant to Council Directives Nos 72/464 and 77/805 by reason of the fact that the excise duty is fixed at 90% of the aggregate amount of the proportional and the specific excise duty levied by the Belgian State on cigarettes in the most popular price category.

128 It follows from this multiplier effect in conjunction with the minimum excise duty levied by the Belgian State to guarantee its revenue that any competitive effort in relation to profit margins by the manufacturer or the importer having a repercussion on the retail price is limited.

129 Further, although in principle the Belgian rules on consumer taxes and price controls do not prevent the manufacturer or importer from choosing the retail price desired by him for each of his products, such liberty of choice is in practice subject to various constraints. As has already been shown it seems that the practical application in the manufactured tobacco sector of the price control measures in which the revenue authorities in particular take part encourages joint negotiations with the trade associations representing the various branches of the sector even if the system does not exclude the possibility of separate undertakings' giving individual notifications especially

in the case of the introduction of a new brand. During such negotiations great influence on the fixing of the retail price is exercised by the revenue authorities whose concern is above all to guarantee the revenue arising from the taxation of the products in question. It also appeared during the proceedings that the Belgian State is able by using the range of tax bands to restrict the freedom of undertakings as regards the choice of the retail prices for their products. In that respect the applicant BAT stated that after introducing a new brand of cigarettes it was forced to increase the price by Bfr 6 per packet in order to market them at a price corresponding to the lowest tax band available from the authorities, who had abolished the tax bands for lower prices.

130 It follows from all the considerations set forth above that in the manufactured tobacco sector the Belgian rules on consumer taxes and price controls and their application pursuant to the revenue policy pursued by the State have the effect of making it practically impossible for manufacturers and importers to compete in such a way that there would be an effect upon the amount of the retail selling price.

131 On the other hand it is necessary to point out that it has by no means been shown that the said rules or their application prevent the manufacturer or importer from allowing particular wholesalers on an individual basis a larger profit margin out of the manufacturers' or importers' share of the retail price. In taking concerted action regarding the maximum level of profit margins which they allow wholesalers the applicants jointly prevent themselves from so competing and at the same time discourage those intermediaries from pursuing a sales policy which would benefit the products of the manufacturer or importer from whom they obtain or hope to obtain a more advantageous profit margin.

132 In that respect it is necessary to point out that Article 85 (1) of the Treaty prohibits any restriction on competition at any trading level between the manufacturer and the ultimate consumer. Thus Article 85 (1) (a) speaks in general terms of "trading conditions"; Article 85 (1) (b) of "production" and "markets" and Article 85 (1) (c) without any distinction between the respective stages of trade of "markets" or "sources of supply".

133 Further, in the present case even if the share of the retail price due to the revenue is large there remains for the manufacturer or importer a sufficient margin to allow effective competition even with regard to mass-produced products of current consumption in respect of which a very small reduction in the price at the manufacturing or import stage may have a significant effect at the consumer stage.

134 The concerted action in relation to profit margins involved both in the recommendation of 1 December 1975 and in the measures adopted prior thereto resulting from an agreement between the majority of manufacturers and importers of widely consumed products in a substantial part of the Common Market, namely Belgium, must therefore be regarded as constituting a restriction on competition prohibited by Article 85 (1) of the Treaty, on the assumption on the one hand that it is likely to have a significant effect upon trade between Member States and on the other hand there are no other factors in the present case allowing it to be found that the distribution system set up by the applicants is not as a whole caught by the said prohibition.

135 In the latter respect the applicants rely on the judgment of the Court of 25 October 1977 in Case 26/76 (*Metro SB-Großmärkte GmbH* v *Commission* [1977] ECR 1875) and allege that in view of its beneficial influence on the structure of the market the aim of ensuring a certain level of income for the specialized trade does not necessarily fall under the prohibition in Article 85 (1). The Court recognized in that judgment that measures which serve to maintain traditional trade by distinguishing between the functions of the wholesale and retail trades are not necessarily restrictive of competition or that if they are they may qualify for exemption under Article 85 (3). Above all the Court recognized that price competition does not have absolute priority over all other effective forms of competition.

136 The applicants complain that the Commission did not properly take account of those factors in assessing the distribution system which is the subject of the above-mentioned measures.

137 It is right, however, to observe that the Commission does not criticize the principle of the separation of functions between intermediaries but rather the concerted action between manufacturers and importers in relation to the financial benefits to be allowed to intermediaries.

138 Moreover, although it is true that the Court in its judgment in the *Metro* case gave some consideration to the question whether a selective distribution system may be compatible with Article 85 (1) of the Treaty, that case was concerned with a system conceived, as distinct from that in question in the present cases, for the purpose of distributing highly technical, durable consumer goods so that traders had to be selected on the basis of qualitative criteria.

139 It is also right to recall that in the *Metro* case the applicant was challenging a Commission decision for granting exemption under Article 85 (3) from the prohibition in Article 85 (3) in respect of a distribution system set up by an individual manufacturer. Moreover, the Court stated that it was for the Commission to ensure that the rigidity of price structure among distributors approved by the manufacturer in question was not reinforced, as might happen if there were an increase in the number of selective distribution networks for marketing the same product.

140 It therefore appears that the applicants' argument to the effect that the Commission wrongly found that the contested measures restricted competition, particularly in relation to trade margins, finds no support in the reasoning of the Court in the *Metro* case.

141 The conclusion must therefore be reached that the agreement between the applicants regarding the size of the margins to be allowed to direct traders from them, thus preventing market forces from determining the size of those benefits, in particular on the basis of the services which such intermediaries may render individually, is a restriction on competition prohibited by Article 85 (1), assuming that it is also likely to have a significant effect upon trade between Member States.

(b) End-of-year rebate

142 It appears from the annexes to the letter of 26 January 1971 sent by FEDETAB to the Commission that from 1 January 1971 the manufacturing members of FEDETAB would pay through FEDETAB to wholesalers and retailers an end-of-year rebate, the amount of which varied between 20 centimes and 200 centimes per 1 000 cigarettes depending on cigarette sales during the year. It is right to observe however that neither the statement of the reasons on which the contested decision is based (paragraphs 19 to 27 and 81) nor Article 1 of the operative part clearly takes account of that rebate for the period prior to the recommendation. It follows that it is only in respect of the recommendation that it is necessary to consider the end-of-year rebate.

143 In that respect it is common ground, as the Commission has pointed out in paragraph 74 of the decision, that every direct customer, wholesaler or retailer, may receive from FEDETAB that rebate, the scale of which is set out in the recommendation and is based on cigarette purchases of all brands made during the year from any Belgian or foreign manufacturer, whether or not a member of FEDETAB. It appears from the file that the rebate is only a fraction of 1% of the purchase price. The necessary information for calculating the rebates on cigarettes due to each customer are collected centrally by FEDETAB or by a body appointed for the purpose.

144 In the Commission's view the end-of-year rebate system as finally brought in by the recommendation effectively stifled all competition in this field between the manufacturers who had signed it inasmuch as it removed the incentive for intermediaries to make greater competitive efforts with a view to obtaining improved benefits or to take their custom exclusively to a given manufacturer and made it more difficult for manufacturers desirous of penetrating the market to do so.

145 The applicant FEDETAB maintains on the other hand that competitive effort is stimulated by the difference in the rates of return according to the quantities sold. It further claims that the sum of the direct margins and the end-of-year rebates is precisely the maximum authorized by the Minister for

Economic Affairs pursuant to the negotiations on price increases. The rebate is not formally imposed on anyone but it is vigorously demanded by wholesalers so that no supplier can escape paying it. Having regard to its very small amount it cannot in any case constitute a heavy burden on the manufacturer whatever the proportion of purchases made from him by the trader.

146 It is right to observe in the first place with regard to the said rebate that as with the direct margins allowed to the trade there is concerted action among the applicants with regard to it pursuant to the recommendation. As appears from the statement of FEDETAB itself it must be regarded jointly with the direct margins; on that basis it constitutes an item in the maximum margins the level of which is determined by joint action by the applicants, having as its object and effect, as already pointed out, the significant restriction of individual competition in this respect among manufacturers and importers in the Belgian cigarette market.

(c) Rules on terms of payment

147 As regards the measures on maximum terms of payment adopted prior to the recommendation it is necessary to recall that by letter of 23 December 1971 on FEDETAB writing paper nine cigarette manufacturers, including all the applicants except BAT, informed wholesalers and others enjoying wholesale terms that they had decided to put an end to long-term credit which would be reduced progressively to a maximum of a fortnight.

148 The recommendation of 1 December 1975 lays down the rule of cash payment subject to the possibility of a manufacturer's allowing, by way of exception, to one or more of his customers a period not extending beyond a fortnight from the invoice date.

149 According to FEDETAB the recommendation is inspired by the same concern with regard to terms of payment which led to the letter of 23 December 1971. According to FEDETAB that letter followed a request by GB, a supermarket company, that credit facilities be granted for 90 days

from the end of the month which was part of a policy of pressure by all supermarkets. It adds that "to give all the necessary weight to the letter from FEDETAB" the main manufacturing members of FEDETAB decided to sign the letter. That answer was a legitimate defence. Any considerable extension of credit would inevitably have a repercussion upon prices to the detriment of the consumer by reason in particular of the multipler effect of the Belgian taxation system on cigarettes. In those circumstances any delay would, in FEDETAB's view, have caused the market to collapse.

150 Further, the applicants cite in defence of the provisions of the recommendation on terms of payment the effect of the Belgian taxation system on the opportunities for competition in that sphere especially having regard to the purchasing power of the supermarkets. It is alleged that those provisions do not adversely affect legitimate competition but are intended to counteract the excessive competition indulged in by the supermarkets, which take advantage of the fact that the Belgian State makes the manufacturer or importer its tax-collector as regards cigarette duties. Four-fifths of the debt of intermediaries is thus made up of the reimbursement of the tax debt already paid by the manufacturer or importer who thus bears the financial risks of any failures on the part of the trade. If further it is borne in mind that the turnover of cigarette stocks is on average ten days and even three days with supermarkets, any competition going beyond that is not legitimate, the more so where several supermarket companies, profiting from their position on the market, seek to impose in addition very considerable delays with the intention of having loan capital available at no interest for financing products other than cigarettes. It therefore seems legitimate as self defence for the manufacturers and importers to endeavour to ensure that terms of payment are used in a neutral manner from the point of view of competition.

151 It appears from paragraphs 86 and 100 of the contested decision that the Commission considers that the collective and uniform fixing by FEDETAB of maximum terms of payment for those enjoying wholesale terms had and still has as effect to prevent competition in that field and to reinforce the

restrictions on competition resulting from the other measures adopted in relation to profit margins and end-of-year rebates. The Commission also insists in paragraphs 101 and 102 of the decision that according to its information credit periods are in practice tending to settle down at a fortnight or less and contrary to what FEDETAB and some of its members say the conduct of the various manufacturers, none of whom has rejected the recommendation, complies with the provisions thereof.

152 During the proceedings in the present cases certain applicants have challenged those latter statements of the Commission and have maintained that the application of the terms of payment is flexible and not uniform. For their part the applicants Jubilé and Vander Elst draw attention to the fact that the respective letters from each of them dated 18 December 1975 informing the Commission of their decision to follow the recommendation they stated that cash payment had always been the rule with their companies and that they would continue to make it their practice independently of the recommendation. They therefore contend that if it is necessary to consider approval of the recommendation as an agreement within the meaning of Article 85 of the Treaty they are not in any event a party to that agreement as regards the terms of payment and in that respect the decision was wrongly addressed to them.

153 Although it is true that the Belgian taxation system, which makes the manufacturer or importer accountable for the very high taxation element in the retail price, has a very definite influence on the competition in which the industry may engage in relation to terms of payment having regard to the speedy turnover of stock and high bank interest, it does not mean that there is no opportunity for effective competition in this sphere. It is also important not to lose sight of the fact that if the manufacturer allows the trader credit facilities, that is equivalent to the trader's receiving an additional profit margin, which is in no way prohibited or excluded by the Belgian rules on taxation or price control. Those findings are reinforced by the fact that it is apparent from a table annexed to FEDETAB's answer of 22 September 1975 to the first notice of objections that the actual credit facilities allowed by the other applicants except HvL varied from none at all (cash payment) to 40 days depending on the manufacturer and customer.

154 The joint provisions on terms of payment pursuant to both the letter of 23 December 1971 and the recommendation, by reason of their substance, have at the very least as object the significant restriction of competition; that fact suffices to bring them within the prohibition of Article 85 (1) should they be regarded as likely to affect trade between Member States.

155 In view of the fact that the opportunity for competition between the applicants with regard to terms of payment must be regarded as established and that the above-mentioned provisions are intended to restrict them significantly by laying down a maximum period of a fortnight which, as regards the recommendation, may be allowed only in exceptional cases, it is not necessary to consider the question how far those provisions have been put into effect by the applicants.

156 As regards the statement by the applicants Jubilé and Vander Elst to the effect that cash payment has always been strictly required by them and that they would continue their practice independently of the recommendation, it is right to say that such a manifestation of intent cannot be taken into account in view of the fact that it has been reiterated several times that according to Article 8 of the statutes of FEDETAB the members thereof must abide by its decisions taken pursuant to the statutes.

3. The previous measures on observance by wholesalers and certain retailers of selling prices laid down by manufacturers, the restriction on the approval of wholesalers in certain categories, the ban on approved wholesalers' supplying certain other wholesalers and the requirement on stocking a minimum range of brands

157 The agreement of 22 May 1967 made between FEDETAB and the FNCG for a period of five years, reinforced both by the standard agreement submitted by FEDETAB to approved retailers and signed by them, and by the additional interpretative agreements of 5 October 1967 and 29 December 1970 contained a set of joint measures to which the applicants were parties and had as object on the one hand to prevent wholesalers from selling to

retailers manufactured tobacco products at prices differing from those indicated by the suppliers without any reduction or benefit other than the retailers' margin and further to ensure that retailers strictly observed the price stated on the tax band on the ultimate sale to the consumer.

158 As FEDETAB admits in its application, the basic object of those measures was to prevent cut-price selling by wholesalers and retailers. According to FEDETAB cut-price selling jeopardized the existence of specialist wholesalers and retailers, whose disappearance would be against the interests of the consumer. It further appears from statements of FEDETAB in its application that the concern to protect those traders was also behind the policy after 1 January 1971 of not allowing the maximum wholesale terms to new applicants in certain categories and in particular to wholesalers specializing in food.

159 Article 58 of the Belgian VAT code, which entered into force on 1 January 1971 and provided that the price on the tax band must be the consumer price, henceforth prohibited any reduction in the retail price.

160 On the other hand it is admitted that as regards wholesalers the above-mentioned measures were renewed by the standard agreement, referred to as "special agreement on cut-price selling" submitted by FEDETAB to wholesalers on 30 June 1972 and signed by almost all of them. Pursuant to that agreement and for a period of five years wholesalers undertook on resale of the products in question not only to observe the prices indicated by the suppliers without any reduction or bonus but also to observe the ban on resale of manufactured tobacco products on the one hand to wholesalers to whom the manufacturers had already allocated a quota and to food wholesalers and other wholesalers not directly supplied by manufacturers, where the products concerned were for resale to retailers and on the other hand to retailers where the delivery was manifestly not intended to be sold to the retailer's normal customers. That ban reinforced the terms of the notice of 22 March 1972 referred to above which the FNCG had sent to its members and which, as regards the wholesalers referred to above, was to the same effect.

161 It is apparent from the actual substance of the measures described above that their aim was essentially to prevent competition from arising between the manufacturing and importing members of FEDETAB with regard to the resale prices of their products both at the wholesale level and, at least before 1 January 1971 when Article 58 of the VAT code entered into force, at the retail level.

162 Rules which have as their object such a general and systematic restriction on competition undoubtedly fall within the prohibition of Article 85 (1) of the Treaty provided they are also likely to have a significant effect upon trade between Member States.

163 As regards the obligation imposed on a limited number of retailers contained in the measures prior to the recommendation to stock a minimum range of 60 brands of cigarettes which was enforced against certain undertakings includings GB by the interruption of supplies, the Commission criticizes that measure (in paragraph 87 of the decision) for preventing retailers from pushing the sale of certain brands to the detriment of others and forcing them to tie up part of their working capital in stocks of various slow-moving brands.

164 In view however of the fact, as has already been observed, that in so far as the previous measures related to trade margins, terms of payment and observance of prices fixed by the manufacturers and importers, they essentially and in principle fall under the prohibition of Article 85 (1), it is not necessary to declare separately whether the obligation imposed on certain retailers prior to 1 December 1975 to stock a minimum range of brands was compatible with that article.

4. Effect upon trade between Member States

165 It remains to consider whether the above restrictions are also likely to have a significant effect upon trade between Member States. Only if that is so do the said restrictions fall within the prohibition of Article 85 (1).

166 The Commission alleges in the contested decision that the measures prior to the recommendation were likely to affect trade between Member States because certain manufacturing members of FEDETAB were responsible for a very substantial part of the manufactured tobacco imported into Belgium and distributed it on the same anti-competitive terms as their own products. Moreover, Belgian importers and manufacturers or those of other Member States who had not subscribed to the restrictive rules drawn up by FEDETAB and the FNCG with regard to distribution were subject to the application of those rules when they resold their products, including those originating in other Member States, to a wholesaler or retailer who observed the rules laid down by those two associations, which, having regard to the strong position of the two associations on the market, was the general rule.

167 In view of those considerations the Commission found in paragraph 93 of the decision that although the tax arrangements in force created practical difficulties with regard to parallel imports by wholesalers and retailers, the fact remains that the alteration of trading conditions in Belgium was such as to divert the flow of trade from its normal course (that is, from the course which it would have followed in the absence of the restrictions of competition found by the Commission), and so to affect trade between Member States.

168 The Commission alleges in paragraph 106 of the decision that the measures in the recommendation are liable to affect trade between Member States for the same reasons as those put forward as regards the previous measures.

169 The applicants criticize that statement of reasons maintaining essentially that trade between Member States is not affected by the market position of the manufacturing and importing members of FEDETAB since, solely because of the consequences of the differences in taxation of manufactured tobacco in the Member States, the contested measures govern a purely national situation. At the present stage of the harmonization of duties on the consumption of manufactured tobacco the individual ways of calculating and levying those duties constitute a fundamental impediment to intra-Community trade and prevent the making of parallel import arrangements. Moreover, even assuming that the contested measures are capable of having an indirect effect upon the volume of manufactured tobacco products imported by the manufacturers, it has in no way been shown that such effect is likely to affect free trade between Member States so as adversely to affect achievement of the aims of a single market between the States.

170 In the face of those conflicting arguments it is right to recall in the first place, as the Court observed in its judgment of 30 June 1966 in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235, that in order that an agreement, decision or concerted practice may 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 fact that the agreement, decision or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. The influence thus foreseeable must give rise to a fear that the realization of a single market between Member States might be impeded.

171 In that respect it is right to observe that it is common ground, that as was said in paragraphs 8 and 91 of the decision, a substantial part of the manufactured tobacco products sold in Belgium are imported through manufacturing members of FEDETAB who market them using the same distribution networks as for the products which they manufacture themselves. By way of example, in 1974 they imported 51% of the cigarettes and 12 to 14% of the cigars arriving in Belgium, that is some 5% of the cigarettes and 10% of the cigars sold there.

172 Moreover, although because of difficulties of a fiscal and technical nature which the Court pointed out in its judgment of 16 November 1977 in Case 13/77 *Inno* v *ATAB* ECR 2115, parallel imports into Belgium of manufactured tobacco are largely excluded, it is necessary to observe that the influence on the trade in question in the present cases is, as clearly appears from the statement of the reasons on which the contested decision was based, above all from the large imports made by manufacturing members of FEDETAB. In that respect it must be observed that the restrictions on competition pointed out above in relation to trade margins, end-of-year rebate and terms of payment are likely to distort trade patterns in manufactured tobacco from the course which they would have otherwise have followed. *A fortiori* the same is true as regards those of the measures prior to the recommendation which aimed at ensuring strict observance at each stage of distribution of the prices laid down by the manufacturers and importers. In taking concerted action on these fundamental aspects of the sale terms to be allowed to intermediaries, the applicants appreciably reduced still further any inducement the intermediaries may have had of encouraging the sale as regards imported products of certain products in relation to others, in exchange for individual financial advantage.

173 The Commission decision therefore rightly finds that the restrictions on competition by the applicants are likely to affect trade between Member States.

VI — Basic submission relating to Article 85 (3) of the Treaty

174 The applicants allege in substance that the Commission infringed the provisions of Article 85 (3) of the Treaty and the rights of the defence inasmuch as it wrongly refused to grant exemption to the recommendation, did not take account of the submissions made by the applicants and committed errors of fact in that respect.

175 Before considering the arguments of the parties with regard to the application to the recommendation of Article 85 (3) it is necessary to recall that an agreement which is found to be contrary to the provisions of Article

85 (1) cannot have exemption under Article 85 (3) unless it satisfies the following conditions namely that it:

— contributes to improving the production or distribution of goods or to promoting technical or economic progress;

— allows consumers a fair share of the resulting benefit;

— does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;

— does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

176 In that respect it is appropriate also to recall, as the Court stated in its judgment in the *Metro* case (at paragraph 21), that the powers conferred upon the Commission under Article 85 (3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition as regards a substantial part of the common market.

177 In paragraph 132 of the contested decision the Commission finds for the reasons set out in paragraphs 113 to 131 that the recommendation cannot enjoy exemption under Article 85 (3) because it does not satisfy the conditions for applying that provision. In particular the recommendation does not lead to improvements in distribution sufficient to offset the restrictions on competition which it causes or allow consumers a fair share of any benefit which might result.

178 In the contested decision the Commission gives a ground for maintaining its refusal of exemption under Article 85 (3) the fact that it has nowhere been shown that the distribution system established by the recommendation brings

to direct customers of the members of FEDETAB and buyers from such customers more benefits than they would receive from normal competition which would allow the consumer a free choice. While recognizing that by the indirect means of the very large number of wholesalers and retailers the system allows the consumer a wide choice of brands, the Commission maintains that such choice is available only from specialist retailers who represent only a small share of the 80 000 sales outlets a large majority of which offer customers only a very restricted range of brands. The multiplicity of sales outlets can moreover only increase distribution costs.

179 The Commission also challenges the argument to the effect that the disappearance of the collective system established by the recommendation would inevitably involve the disappearance of the specialist trade. That trade would not be threatened even if it no longer enjoyed from FEDETAB and its members financial terms more favourable than those allowed to the non-specialist trade if their services are actually appreciated by the users thereof and consumers. Whilst expressing doubts regarding the danger allegedly threatening the survival of specialist wholesalers who are responsible for some 80% of cigarette sales on the Belgian market, the Commission considers that to grant them more favourable conditions is an attempt artificially to keep firms on the market when the ultimate buyer is not convinced that they are so essential and the normal forces of competition would have put them out of business.

180 In paragraph 133 of the decision the Commission in reference to the provisions of the recommendation finds moreover that it does not satisfy either the last test for the application of Article 85 (3) because "in view of the market share of FEDETAB and its members, the agreements afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question".

181 The applicants maintain that the aim of the recommendation is to maintain in Belgium a very dense traditional distribution network comprising 80 000 retailers which would make available to the consumer and for his benefit even in the most out-of-the-way parts of the country a wide range of brands which in turn contributes to strengthening competition. The maintenance of

that system depends on the specialist trade and in particular specialist wholesalers who supply very many small retailers throughout the country.

182 The recommendation, it is said, contains no restriction which is not necessary for the attainment of the above objective. In particular a small additional premium must be allowed specialist wholesalers and retailers to ensure their survival in the face of competition from other traders, especially supermarkets, which do not give the same service. The elimination of many specialist intermediaries would, in the applicants' opinion, involve not only a reduction in the number of brands available to the consumer but also serious social consequences. In that respect it is pertinent to observe that the Court stressed in its judgment in the *Metro* case that considerations of a social nature, and in particular concern to safeguard employment in an unfavourable economic climate, may be taken into account under Article 85 (3).

183 In the first place it must be observed in that respect that the recommendation no doubt contains certain benefits in relation to production and distribution of cigarettes both for the consumer and for numerous small retailers including in particular the Belgian newsagents and tobacconists who, as is apparent from the file, are responsible for some 60% of national cigarette sales. The existence of a very large number of sales outlets in Belgium undoubtedly facilitates the purchase of cigarettes by the consumer even though it must be observed that there is a very wide range of brands only from a limited number of specialist or semi-specialist retailers who constitute an outlet in particular for new brands or those with a small turnover.

184 Nevertheless the number of intermediaries and brands is not necessarily an essential criterion for improving distribution within the meaning of Article 85 (3). The quality of a distribution sector may be judged above all by its commercial flexibility and capacity to react to stimuli both from manufacturers and consumers. As regards the latter the effectiveness of distribution implies that it can concentrate its activities on products which have the greatest performance in the eyes of consumers and is to be judged also

according to its adaptability to new purchasing habits which may become apparent. It is clear from the figures supplied by the Commission, the accuracy of which has not been challenged by the other parties to the present cases, that the cigarette sales made by supermarkets have increased much more than those made by other retailers and that is so in spite of the fact that supermarkets offer only a restricted number of the complete range of brands of cigarettes sold on the Belgian market.

185 It follows from those considerations that it may be seriously doubted whether the benefits in relation to distribution arising from the recommendation are likely sufficiently to compensate for the stringent restrictions which it imposes on competition in respect of sales terms allowed the trade to justify the conclusion that it contributes to improving the distribution of cigarettes within the meaning of Article 85 (3).

186 It is however unnecessary to give a final answer to that question since it must be recorded that another condition for applying Article 85 (3) is not fulfilled in this case.

187 For the provisions of the recommendation to enjoy exemption they must not afford the members of FEDETAB the possibility of eliminating competition in respect of a substantial part of the products in question.

188 In that respect it must be remembered, as the Commission pointed out in paragraph 8 of the contested decision, that FEDETAB member firms produce or import roughly 95% of the cigarettes sold in Belgium and that ten FEDETAB members, who also import foreign branded products, imported in 1974 51% of the cigarettes imported into Belgium, or about 5% of the cigarettes sold there. Moreover the seven applicant companies alone are responsible for a very high percentage (given as 80% in paragraph 61 of the decision and 92% in the Commission's rejoinder) of the total cigarette sales in Belgium. It is also to be observed that according to figures also given by the Commission in its rejoinder and not challenged almost two-thirds of

cigarette sales in Belgium are represented by some ten brands only, largely marketed by one or more of the applicant companies.

189 As has already been stated, the provisions of the recommendation to which the applicant companies agreed have as their object, by means of a collective agreement, the restriction on competition in which those companies might engage between themselves. Having regard to the very large share of the Belgian cigarette market held by the FEDETAB members and in particular by the applicant companies, there must be a finding that the recommendation has the effect of affording the applicants the possibility of eliminating competition in respect of a substantial part of the products in question. It follows that the recommendation cannot in any event have exemption under Article 85 (3).

VII — Conclusion

190 It follows from all the considerations set out above that the applications as a whole must be rejected as unfounded.

Costs

191 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs.

192 Since the applicants have failed in their submissions they must be ordered jointly and severally to pay all the Commission's costs, including those of the application for the adoption of interim measures, and the costs of the parties intervening in support of the Commission.

193 The parties intervening in support of the applicants must bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants jointly and severally to pay the Commission's costs including those relating to the application for the adoption of interim measures, and the intervention of Eugène Huyghebaert SA, GB-Inno-BM and the Fédération Belge du Commerce Alimentaire;**

3. **Orders the Association des Détaillants en Tabac, the Association Nationale des Grossistes en Produits Manufacturés du Tabac and the Fédération Nationale des Négociants en Journaux, Publications, Librairie et Articles Connexes, interveners, to bear their own costs.**

Kutscher Pescatore Koopmans Mertens de Wilmars Mackenzie Stuart

O'Keeffe Bosco Touffait Due

Delivered in open court in Luxembourg on 29 October 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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