II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(Only the French and Dutch texts are authentic)

(78/670/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Article 3 thereof,

Having regard to the application made to the Commission on 2 April 1974 (IV/28.852) by the company then known as GB Entreprises SA, Antwerp, and now called GB-Inno-BM SA, Brussels, for the initiation of proceedings to find that certain decisions taken by the Fédération belgo-luxembourgeoise des industries du tabac (Fedetab), Brussels, and certain agreements entered into between that federation and other trade associations in the manufactured tobacco industry constituted infringements of Articles 85 and 86 of the EEC Treaty,

Having decided on 29 July 1974 to initiate proceedings, in response to the application, in accordance with Article 3 of Regulation No 17,

Having regard to the applications made to the Commission on 21 October 1975 (IV/29.127) by SA Mestdagh Frères & Cie, Gosselies, and SA Eugène Huyghebaert, Mechelen, for a finding that certain decisions, concerning them taken by cigarette manufacturers being members of Fedetab, constituted infringements of Articles 85 and 86 of the EEC Treaty,

Having regard to the notification made to the Commission on 1 December 1975 (IV/29.149) by the Fédération belgo-luxembourgeoise des industries du tabac (Fedetab) in accordance with Articles 2 and 4 of Regulation No 17 concerning a recommendation for cigarette sales in Belgium,

Having decided on 10 May 1976 to extend to that notification the proceeding commenced on 29 July 1974,

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and Article 7 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

Having regard to the opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions, pursuant to Article 10 of Regulation No 17, on 13 December 1977,

Whereas :

I. THE FACTS

A. Production and consumption of manufactured tobacco in Belgium

(1) Of the manufactured tobacco products produced in Belgium, 94 % comes from imported unmanufactured tobacco, 4·5 % from Belgian unmanufactured

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) OJ No 127, 20. 8. 1963, p. 2268/63.

tobacco and 1·5 % from tobacco refuse. The breakdown by type of product is approximately as follows: 70 % cigarettes, 13 % smoking tobacco, 8 % cigars and 8·5 % cigarillos. Cigarette sales are increasing steadily, sales of cigarillos remain fairly stable, whereas demand for cigars and even more so for cut tobacco is decreasing. Almost all the Belgian and Luxembourg producers of manufactured tobacco belong to the Fédération belgo-luxembourgeoise des industries du tabac (hereinafter referred to as 'Fedetab'), which was set up at the beginning of 1946.

(2) The objects of Fedetab are:

(a) uniting all firms in the tobacco industry so as to protect and defend their shared interests;

(b) representing the business, administrative and social interests of companies in the trade, in dealings with the public authorities and private organizations;

(c) promoting harmonious relations and coordination between the various sectors of the tobacco industry;

(d) informing government authorities, both legislative and executive, of the requirements, desires, suggestions, objections and proposals of member firms;

(e) studying, encouraging and carrying out any social, economic, technical, legal and tax measures of commercial and ethical interest to members in particular and to the tobacco industry in general;

(f) setting up, promoting and sponsoring all such facilities or services as would be conducive to the smooth operation of productive activities and to the welfare of all employed personnel, by whatever means available.

(3) Responsibility for interpreting the content and scope of the federation's objects lies with the board of management.

(4) Membership is open to any legal or natural person owning in Belgium or Luxembourg a business with the main or subsidiary object of buying, importing or producing tobacco for processing into products for sale to distributive firms and consumers.

(5) Companies not registered in either Belgium or Luxembourg are eligible for membership only in exceptional cases authorized by the board;

(6) The requirements for membership are that applicant firms must, apart from doing business in the tobacco industry:

— subscribe to the statutes and internal rules of Fedetab and all decisions taken under them, and satisfy all obligations flowing from them, and

— receive the approval of the board, whose decision is taken by a simple majority and is final.

(7) The Belgian and Luxembourg tobacco manufacturers that belong to Fedetab are classified in three trade sections depending on whether they produce cigarettes, cigars and cigarillos or pipe and cigarette tobacco. They are also classified in three categories according to their volume of output — large, medium-sized and small firms, which number 14, 28 and 101 respectively.

(8) Fedetab 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 the products they manufacture themselves.

(9) The rest of Belgian consumption is covered by about 50 importers, most of whom do not belong to Fedetab.

(10) Nearly all the tobacco products imported into Belgium and Luxembourg come from other EEC countries. In 1975 the share of BLEU (Belgo-Luxembourg Economic Union) imports accounted for by Community products was 98·2 % for cigars, 99 % for cigarillos, 99·9 % for cigarettes and 99·6 % for pipe and cigarette tobacco.

B. Pricing and charging of tax on manufactured tobacco products in Belgium

(11) 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 Bfrs 0·048 per cigarette. In aggregate tax accounts for approximately 70 % of the retail selling price.

(12) 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.

(13) The tax bands specify the retail selling price and are conclusive evidence that all taxes have been paid.

(14) With tax arrangements such as these it is necessary to ensure that manufacturers or importers do not understate the value of their products when paying tax by prohibiting the sale of tobacco products to the consumer at a price in excess of the retail selling price set by the manufacturer or importer and specified on the tax band.

(15) On the other hand, as the Court of Justice pointed out [1], there is nothing in the tax arrangements to suggest that retailers should be prohibited from selling below the price specified on the tax band since in any event, when the tax band was purchased, the State received payment of tax corresponding to the price specified.

(16) As regards the possibility for a retailer to import tobacco products direct, set his own resale prices and buy tax bands specifying a price different from that set by the manufacturer or the official importer, this could be done only with cooperation both from the manufacturer or official importer and from the national tax authorities which, as the Court has said, may well be difficult to obtain.

(17) 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. These wholesalers will therefore have to remove the tax band affixed in the country of origin, or see that it is removed by the foreign buyer as soon as the products enter the latter's country and to replace it by the tax band required in the importing country.

(18) Moreover, replacing the tax band of one Community country by that of another generally entails destroying the external packaging (the legislation of a number of countries, including Belgium, actually requires the manufacturer to affix the tax band in such a way that removal tears the packaging and above all requires the importing wholesaler or retailer to apply in each case to the appropriate revenue authorities in the country of origin for exceptional repayment of the duties already paid.

C. Fedetab distribution arrangements prior to 1 December 1975 [2]

1. *Approval and classification of wholesalers and retailers by Fedetab and entitlement of the various categories to fixed profit margins*

(a) Wholesalers

(19) From quite an early date, 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 cooperating with the Belgian Ministry for Small Business.

(20) In 1973, these categories were as follows:

(a) specialized itinerant wholesalers (366), handling about 65 % of sales;

(b) specialized non-itinerant wholesalers (163), handling about 3·5 % of sales;

(c) food and tobacco wholesalers (33); and the

(d) 'Horeca' wholesalers (those in the hotel, restaurant and café business) (14), handling together 3·6 % of sales;

(e) cooperatives, handling 3·4 % of sales; and

(f) supermarkets and large stores (200 or 300 retail sales points), handling 9·3 % of sales.

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

---

[1] CJEC of 16 November 1977 (ATAB/Inno, Case 13/77), Report 1977, page 2115.

[2] Date on which the Fedetab recommendation took effect.

(22) 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 at 10·2 % for the cheaper and luxury-brand cigarettes. The rebate on cigarillos varied between 18 (14 % fixed rebate plus 4 % special rebate based on the wholesaler's total purchases) and 21 %, whereas for cigars it varied between 22 (18 plus 4 %) and 25 %.

(23) From 1 January 1971 wholesalers in the first category (specialized itinerant tobacco wholesalers) received an additional rebate of 0·2 %, payable at the end of the year.

(24) Only the cooperatives 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.

(25) It should be noted that at an early stage the specialized itinerant wholesalers combined in provincial federations that subsequently constituted the Fédération nationale du commerce de gros en produits manufacturés du tabac (FNCG) in 1957 ; this was dissolved in 1974 and replaced by two separate associations — the Association nationale des grossistes itinérants en produits manufacturés du tabac and the Nationale Vereniging van Familiale Groothandelsondernemingen — both of which were recognized by Fedetab.

(b) Retailers

(26) There are in all 80 000 retail outlets in Belgium, out of which only 150 are members of the tobacco retailers association (Association des détaillants en tabac, or ATAB) founded in 1966. Under an agreement between Fedetab and what was then the FNCG dated 29 December 1970, all 80 000 retail outlets are split up into 'approved retailers', previously known as 'small distributors' (numbering some 2 000), and 'non-approved retailers'. Their remuneration came from the wholesalers, who, as has already been stated, passed on part of their direct rebate to them.

(c) The remuneration of retailers and wholesalers

(27) 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. Since the total profit margin for the whole of the distributor trade was 9·8 % for popular brands and 10·2 % for the others, the itinerant wholesaler's profit margin was 1·75 or 2·75 % on popular brands and 1·95 or 2·95 % on other brands, depending on whether he was supplying an approved retailer or not (1).

2. *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*

(28) 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, rebate stamps, discounts or other bonuses, direct or indirect, in cash or in kind, 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. The manufacturers promised to give their full cooperation to the operation of these arrangements, while leaving it to the signatories to work out between them the exact terms of the separate agreements by which each party would undertake to honour these commitments. The penalty for failure to do so would be the withdrawal of the benefits of the wholesale terms from the offending wholesalers. The agreement, which was to last for five years, included an arbitration clause.

(29) 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 reductions, rebates, discounts, etc.

(30) On 5 October 1967 Fedetab and the FNCG, in an additional agreement for the interpretation of the 22 May 1967 agreement, stipulated that wholesalers who had signed the separate agreement because they also ran retail outlets had thereby undertaken as wholesalers to refuse to supply other retailers who did not charge the selling price indicated on the tax band.

(1) All the percentages given here are calculated on the final selling price to the consumer, inclusive of tax. They would be three or four times higher if calculated on pretax prices.

(31) 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.

(32) On 30 October 1967 Fedetab wrote to all the cigarette wholesalers, asking them immediately to suspend deliveries to several large supermarkets, which had broken this rule, including three companies which subsequently became part of GB Entreprises SA.

(33) On 8 May 1970 the FNCG circulated a letter to its members reminding them that, according to the agreement with Fedetab of three years earlier, they were obliged to sell their products at the price indicated by the supplier or importer, without giving any form of rebate or discount. This being so, the FNCG told its members that :

1. the special concessions for 'approved retailers' should be granted only to retailers officially recognized by Fedetab, a list of whom could be obtained from Fedetab or the area chairman or secretary ;

2. they should not charge any other retailers a price lower than the one recommended by their supplier.

(34) The FNCG reminded its members that wholesalers breaking these rules, which were logically implied in their earlier commitments, would be penalized by withdrawal of wholesale terms.

(35) 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, and reminded their members that the end-of-year rebates would be available only to wholesalers who honoured their commitments and would be renewing them when the agreement duly lapsed on 30 June 1972. From 1971, onwards, rebates would be increased by 0·2 % and paid into a special 'Fedetab' account by the manufacturers, and the wholesalers' share at the end of the year could be suspended and ultimately withheld from those who had not kept their side of the bargain. This addition to the agreement also set the percentages for the direct discounts and end-of-year rebates on cigarettes ; it tightened up the rules for granting wholesale concessions and banned the approval of new wholesalers in certain categories (see I (C) (1) (a) above), both of these measures to have effect from 1 January 1971.

(36) Following the entry into force of the new Article 58 of the Belgian VAT code on 1 January 1971, with the effect that the consumer had by law to pay the price on the tax band, Fedetab informed GB Entreprises by letter of 7 January 1971 that cigarette manufacturers had unanimously decided to comply strictly with the VAT legislation and to refrain in future from using any form of labelling which did not conform to it.

(37) By a circular letter dated 21 September 1971 Fedetab asked the cigar manufacturers to ignore requests from certain wholesalers to put cut-price labels on their products.

(38) On 30 June 1972 Fedetab sent wholesalers a standard agreement entitled 'Special agreement on cut-price selling', under which the wholesalers recognized the agreement concluded between the FNCG and Fedetab on 22 May 1967 and the additional agreements of 29 December 1970 and 22 March 1972 (see (4)) and agreed that from 1 July 1972 to 30 June 1977 they would :

'(a) sell manufactured tobacco products at the price indicated by their suppliers, without any rebate, reduction, discount, stamp or other form of bonus, whether direct or indirect, in the form of goods or of services ;

(b) ...'

(39) According to Fedetab, these agreements had ceased to apply well before 1974 and could not have applied after the dissolution of the FNCG.

3. *Fedetab decision not to approve new businesses in certain categories of wholesalers*

(40) As aforementioned, wholesalers and retailers in the Belgian tobacco trade who wished to benefit from the maximum margin had to receive the unilateral approval of Fedetab, whose decision was final.

(41) Since 1 January 1971 Fedetab had decided not to approve any new wholesalers, except in the categories of 'specialist itinerent wholesaler' or 'hotels / restaurants cafés', nor to approve new cooperatives or supermarkets except in the categories of 'large department stores' and 'popular department stores'.

(41a) Applicants for approval in the categories still open had to undertake :

(42) 1. if they were specialist itinerant wholesalers :

— to sell all the brands offered to them and to help to promote any new brand,

— to keep to the prices laid down for each level of distribution,

— to pay for their purchases in cash ;

(43) 2. if they were 'Horeca' wholesalers :

— to guarantee that half their total turnover and at least 80 % of their turnover in tobacco products should result from dealings with hotels, restaurants and cafés,

— to observe the set prices,

— to pay cash,

— to help with promoting all new brands ;

(44) 3. if they were 'large department stores' or 'popular department stores' :

— to observe the set prices,

— to pay cash,

— always to keep 60 different brands of cigarette in stock and to help with promoting all new brands.

4. *Joint measures and the additional agreement of 22 March 1972 banning the resale of goods to other wholesalers*

(45) By letter dated 8 May 1970 the FNCG told its members that according to the terms of sale observed by the majority of tobacco manufacturers, wholesalers were prohibited from reselling their purchases to other wholesalers, including the 'Makro' wholesale complex at Deurne, Antwerp, which had been offering tobacco products for sale below the price on the tax band.

(46) On 22 March 1972 the FNCG, referring again to the additional agreement with Fedetab of 29 December 1970 and its statement that 'any merger or cooperation likely to strengthen the food trade's position in the tobacco market should be avoided', emphasized that cigarette manufacturers had kept their side of the bargain but certain wholesalers had supplied food wholesalers, thereby putting other tobacco wholesalers at a serious disadvantage. It therefore informed its members that in future they were strictly forbidden to sell manufactured tobacco products :

'1. to food wholesalers and other wholesalers not directly supplied by manufacturers, where the products concerned were for resale to retailers ;

2. To wholesalers to whom the manufacturers (Fedetab) had already allocated a quota',

and that supplies would be suspended if this ban was 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 not to resell manufactured tobacco products :

'...

(b) to food wholesalers or other wholesalers not directly supplied by the manufacturers, where the products concerned were for resale to retailers ;

(c) to approved retailers or other retailers, where from the size of the order in comparison with the previous year's order the delivery was manifestly not due to be sold to the retailer's normal clientèle ;

(d) to wholesalers to whom the manufacturers had already allocated a quota or to wholesalers who had incurred the disfavour of the supervisory committee.'

(47) Failure to honour these commitments would result in the withdrawal of end-of-year rebates and wholesale terms. An arbitration clause was also included.

(48) Wholesalers also undertook to furnish the supervisory committee or its experts with any business papers or tax documents they might ask for ; failure to do so would be deemed to constitute admission by the wholesaler that he had failed to honour his commitments.

(49) Lastly, the standard agreement also reminded wholesalers that they could not grant wholesale conditions to a third party unless Fedetab had previously given its considered approval.

(50) According to Fedetab, no action was taken under the additional amendment of 22 March 1972, nor under the separate agreements made under it, and both had expired one year after the standard agreement was signed, namely on 1 July 1973.

5. Collective measures on payment dates taken by certain Fedetab members on 23 December 1971

(51) On 23 December 1971 a letter written on Fedetab notepaper on behalf of nine of the largest tobacco manufacturers, namely :

— SA Cinta, Brussels ;
— Éts Gosset SA, Brussels ;
— Heintz van Landewyck SARL, Luxembourg ;
— Jubilé SA, Liège ;
— Éts Laurens SA, Brussels ;
— Éts Odon Warland SA, Brussels ;
— NV Tabalux, Merksem ;
— Vander Elst SA, Antwerp ;
— Weltab SA, Brussels,

was sent to wholesalers and others who enjoyed wholesale price terms, announcing that they had decided to act collectively to put an end to the extended periods of credit — sometimes as long as three months — that traders had been using, which they felt to be quite out of place in view of the rapid turnover in tobacco products. They announced that, consequently, over a period of two years and 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, and they would also act together against any reprisals.

(52) The Commission is given to believe that these collective measures remained operative until December 1975, when the recommendation came into effect.

6. Agreements and joint action by Fedetab members to ensure that retailers would stock a minimum range of brands

(53) The complainant, GB-Inno-BM, then known as GB Entreprises, considering that Fedetab, by announcing its decision on terms of payment, had broken the joint measures agreed upon on 19 and 20 February 1968, reacted by cutting the number of brands of cigarette it stocked from 62 to 24. By letter of 28 January 1972 Fedetab asked GB Entreprises to reverse this decision, and on 22 February 1972 it announced that cigarette manufacturers would stop their supplies from 1 March 1972, unless the complainant reverted to the number of brands it had stocked before 1 January 1972.

(54) On 1 March 1972 the FNCG stated that it was pleased to inform its members that Belgian cigarette manufacturers had decided that same day temporarily to withhold supplies of cigarettes from GB Entreprises. It expressed '100 % support for this decision' and reminded its members that the end-of-year rebates would be withheld from any wholesaler usurping the industry's role and supplying cigarettes at whatever prices to the complainant, GB Entreprises.

(55) GB Entreprises reverted to its previous number of brands, and the joint refusal to supply was ended on 7 March 1972.

(56) The FNCG realized that other large firms had followed the example of GB Entreprises, and it told its members on 22 March 1972 that the ban on deliveries announced in its letter of 1 March 1972 applied not only to GB Entreprises but also to all the other large distribution firms which they had not previously supplied.

(57) These other distribution firms also went back to their previous stocks of brands, and the refusal to supply them was lifted on 27 March 1972.

D. The Fedetab recommendation of 1 December 1975

(58) On 1 December 1975 Fedetab notified the Commission of a recommendation for cigarette sales in Belgium, which appeared to be a unilateral act on the part of Fedetab but was so worded that it might be applied either by all its members or by some of them. Within a short space of time a number of Fedetab members anounced in writing to the Commission that they intended to follow the recommendation, and wished to be party to the notification.

(59) The following firms were concerned :

— Weltab SA, Brussels ;
— Jubilé SA, Liège ;
— Vander Elst SA, Antwerp ;
— Éts Gosset SA, Brussels ;
— BAT Benelux SA, Brussels ;
— SA Cinta, Brussels ; and
— Heintz Van Landewyck, SARL, Luxembourg.

(60) This recommendation, which replaces the arrangements described in I (C) above, concerns only distribution on the cigarette market. No recommendation concerning other parts of the manufactured tobacco industry has been notified to the Commission.

(61) Although the document is described merely as a 'recommendation' and only a small number of Fedetab manufacturers officially endorsed it — the same firms as signed the letter of 23 December 1971 concerning payment periods less two cigar manufacturers who are not affected — it nevertheless operates, as will be seen below, as a genuine mandatory rule of conduct for all firms in the industry. It was passed by the Board of Fedetab, which represents the most important firms in the industry, including all the manufacturers that were parties to the notification; there are seven of them, accounting for roughly 80 % of all Belgian cigarette sales, and their combination within Fedetab has very great influence on other manufacturers and importers, who are much smaller than they are, and on wholesalers and retailers.

(62) From the time this recommendation took effect, tobacco distribution has been organized as follows :

1. *Maximum trade discounts on invoices to customers, and minimum requirements for entitlement* [1]

(a) Wholesale

(63) Any customer :

— buying cigarettes principally for resale 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).

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

(65) Any customer :

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

— buying more than five 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).

(66) 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 reselling 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 extra discount on invoice of 1·2 %, making a total discount of 10·4 % (9·45 % since 15 October 1977).

(b) Retail

(67) Any customer :

— buying cigarettes mainly for resale 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).

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

(69) 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,

[1] On 15 October 1977 the Belgian Government imposed an increase of up to five francs in the price of a pack of 25 cigarettes. Of these five francs, 4·86 were for the State and 0·14 for the various stages of distribution; the effect was that, although the actual sales of distributive firms were increased in absolute figures, the maximum margins calculated on the retail selling price inclusive of all taxes declined from 10·2 to 9·27 % and from 10·4 to 9·45 % respectively.

— 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).

(70) Any customer :

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

— buying at least three million cigarettes per year,

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

— using the greater part of the 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).

(71) 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).

(72) Apart from fixing the profit margin of wholesalers and retailers by setting the maximum trade discounts on invoices and the minimum requirements giving entitlement, the recommendation provides for a list of distribution businesses which satisfy the requirements of the recommendation to be drawn up and kept up to date by Fedetab or a body appointed for the purpose.

(73) It is these provisions in the recommendation that have given rise to the complaints made to the Commission by Mestdagh, a multiple-branch wholesaler, and Huyghebaert, a food wholesaler.

2. *End-of-year rebate*

(74) 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.

(75) Fedetab or a body appointed for the purpose is to centralize the information required for calculating each customer's rebates on cigarettes.

3. *Terms of payment*

(76) The normal rule is that payment should be made cash ; special periods of credit may be agreed on between a manufacturer and one or more of his customers but they may not extend beyond a fortnight from the invoice date. Enquiries made of the notifying firms have revealed that periods of credit have tended to shorten since the recommendation took effect, and never break the fortnight rule.

II. APPLICABILITY OF ARTICLE 85 (1)

A. Fedetab distribution arrangements prior to 1 December 1975

(77) 1. Of the various measures taken by Fedetab and its members in relation to distribution before 1 December 1975 (see I (C) above), those concerning the approval and classification of wholesalers and retailers by Fedetab, the allowing of fixed margins to the different categories of wholesalers and retailers, the ban on resale to other wholesalers and the keeping of a minimum range constituted both decisions by associations of 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.

(78) Fedetab and several of its members must fail when they claim that the FNCG-Fedetab agreements

of 22 May and 5 October 1967 and the additional agreement of 29 December 1970 did not constitute agreements which individually bound the manufacturers who were members of Fedetab.

Even if they did not actually sign the agreements themselves, leaving it to Fedetab to sign on their behalf, it appears that none of them ever dissociated themselves from Fedetab for doing so, nor gave any reason to believe that they were opposed to the agreements, whereas Fedetab's statutes empowered it to undertake obligations on their behalf. Consequently it can be concluded that the parties concerned acquiesced in the agreements, a conclusion strengthened by the fact that they carried them out.

(79) The manufacturers likewise fail in their argument that Fedetab members had no hand in the instructions issued by the FNCG to its members on 26 October 1967, 8 May 1970 and 22 March 1972. On the first two occasions, the instructions were evidently no more than measures for applying agreements previously concluded between the FNCG and Fedetab, whilst the additional agreement of 22 March 1972, which followed on from the agreement of 26 October 1967 and the additional agreement of 29 December 1970, was brought into effect on 30 June 1972 by means of individual agreements between wholesalers and Fedetab itself. Fedetab members did not dissociate themselves from Fedetab's action on either occasion ; on the contrary, they carried out its instructions.

(80) 2. The agreements and decisions described in I (C) have as their object and effect the restriction of competition within the common market for the following reasons :

(81) (a) 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 under the pre 1 December 1975 system, 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, and the wholesalers in the services they render to the manufacturers. What the intermediary earns is his category's standard percentage of the price, irrespective of the competitive quality or extent of the services he himself may render. The various criteria considered in classifying FNCG wholesaler-members and retailers took no account of the other services that intermediaries in each category might be good or bad at providing, such as delivery rate, product display, sales incentive, response to emergency requests for stocks, etc. The limitation of wholesalers' margins, notwithstanding any competitive endeavour on their part, to those prescribed for the category in which Fedetab placed them, deprived them in turn of any possibility of competing with each other on resale prices to retailers.

(82) (b) Fedetab's decisions, the agreements it concluded with the FNCG and the additional agreements, the individual arrangements it pressed on wholesalers concerning the behaviour of firms at the various levels of distribution and aiming to ensure compliance with and enforcement of resale prices to be charged by wholesalers to retailers and by retailers to consumers from 13 March 1962 to 1 January 1971 and by wholesalers to retailers from 1 January 1971 to 1 December 1975 all had the object and the effect of preventing wholesalers and retailers from competing on prices in respect of individual brands, since these prices were fixed by the manufacturers operating within the Fedetab association. It should be recalled, in fact, that the individual agreements which Fedetab put to wholesalers and approved retailers had the object of obliging them to maintain the fixed prices and not to give reductions or discounts, even for bulk purchases, at the risk of losing the special conditions allocated to the categories in which these wholesalers and retailers were unilaterally and irrevocably placed by Fedetab, which also fixed the margins for each of these categories. Fedetab, with the help of the FNCG, by virtue of their substantial market power in Belgium, effectively prevented the dealers in question from exercising any freedom of action in this area.

(83) The fact that Belgium, through the new Article 58 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 Belgium wholesalers and retailers from being caught by Article 85. In fact, apart from the

fact that Article 58 of the VAT code does not contain any clause governing wholesalers' selling prices, it should be noted that Article 85 (1) of the EEC Treaty prohibits significant restrictions of competition within the common market which may affect trade between Member States, even where such restrictions are encouraged by national legislation ([1]).

(84) (c) The restriction placed on the number of wholesalers eligible for approval in certain categories between 1 January 1971 and 1 December 1975 constituted a barrier to market entry for those who were not approved.

(85) (d) By the collective measures and the additional agreement of 22 March 1972, Fedetab threatened wholesalers with the loss of their wholesale trading conditions if they resold their products to other wholesalers, and in particular large department stores, food wholesalers or other wholesalers not directly supplied by the manufacturers, wholesalers already allocated a quota by the manufacturers and wholesalers who had incurred the disapproval of the supervisory committee, or to retailers, whether approved or not, the size of whose orders gave reason to believe that they were reselling part of them to other distributors. The effect of these prohibitions was to prevent intermediaries in these various categories from making certain sales and hence from improving their position on the market, while their customers were prevented from buying products at more favourable prices or in greater quantities.

(86) (e) The decision taken by Fedetab and its members on 23 December 1971 to saddle wholesalers with maximum credit terms reinforced the anti-competitive effect of the other measures taken by them, notably the rule against discounts and rebates. The collective and uniform fixing of terms of payment accorded by the manufacturers to wholesalers directly affected the profit margins of manufacturers, wholesalers and retailers alike, since terms of payment, like rebates and other favours, are reflected in profit margins and, like them, provide a significant opportunity for competition between the various firms operating on a particular market.

(87) (f) As regards the joint action (which went as far as a boycott of GB Entreprises and other supermarkets in March 1972) taken by Fedetab members, with FNCG's support, to guarantee that retailers stocked a 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.

(88) 3. The claim of Fedetab and the firms involved cannot be sustained, that such restrictions of competition were not significant because the Belgian Government levies heavy taxes and requires notification of the resale prices and profit margins for tobacco products so that compeitition is already substantially restricted and uniform conduct is imposed on all the firms operating on the market. If national legislation has the effect of restricting competition, the added effects of private arrangements restricting competition can only be the more significant. Apart from the fact that the tobacco industry is not alone in being heavily taxed and subject to governmental price controls, it appears that the manufacturer's share of the retail price at the material time was 22·64 %, and that the maximum profit margins accruing to wholesalers and retailers (10·20 % of the retail price) add up to approximately 30 % of the pre-tax price, which is a higher percentage than on many other products.

(89) Fedetab and its members have defended themselves against accusations that the restrictions they placed on competition affected the market by arguing that no wholesalers or retailers were actually excluded and that approval was withdrawn following the various

([1]) CJEC of 16 November 1977 (ATAB/Inno, Case 13/77), Report 1977, page 2115 (on the applicability of Article 86).

forms of joint action undertaken by Fedetab and the FNCG, but their argument cannot be accepted since those facts do not in any way reduce the appreciable restriction on competition observed, as the mere threat of these penalties is likely of itself to have marked repercussions on the market.

(90) Moreover, the complaints received by the Commission from a variety of dealers show sufficiently that the collective action actually did lead to supplies being withheld.

(91) 4. For an agreement or decision of an association of undertakings to be capable of affecting trade between Member States, it must, on the basis of a series of points of fact or of law, permit a sufficiently probably supposition that it may, directly or indirectly and actually or potentially, affect the flow of trade between Member States in a manner which might prejudice the achievement of a single market among the States. The decisions and agreements referred to in I (C) 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 his 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, i.e. solely through wholesalers and retailers who follow the guidelines issued by Fedetab and the FNCG concerning resales.

(92) Before 1 December 1975 this meant that, even if they had not observed the Fedetab and FNCG distribution rules, Belgian and other Community importers and manufacturers could not escape the restrictions on competition which these rules entailed when they sold their products, including goods imported from other Member States, to a wholesaler or retailer who did observe these rules, and this was almost always the case because Fedetab and FNCG members were in such a strong poition. Again, wholesalers and retailers who had not signed any form of commitment to Fedetab (and this applied particularly to non-approved wholesalers) were unable to buy products, particularly imports from other Member States, from manufacturers or wholesalers who did respect the Fedetab and FNCG distribution rules, without thereby committing themselves to reselling these products on the terms recommended by the two associations.

(93) 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 (i.e. the course it would have followed in the absence of the restrictions of competition actually observed), and so to affect trade between Member States.

B. The Fedetab recommendation of 1 December 1975

(94) 1. The recommendation for cigarette sales in Belgium which was adopted by the Fedetab Board and took effect on 1 December 1975 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.

(95) 2. This recommendation has the object and effect of restricting competition in the common market for the following reasons :

(96) (a) Like the system operated by Fedetab and its members before 1 December 1975, the recommendation divides Belgian wholesalers and retailers into several categories and specifies profit margins for each of them.

(97) This classification is based on the same grounds as that applied before 1 December 1975 and means that manufacturers and dealers are subject to the same restraints on competition as before. The only noteworthy difference is that the three new criteria used for determining the amount of these margins are annual sales, number of brands sold and number of sales points supplied. As in the older system (see II (A) (2) (a) above), no account is taken of any other services which individual members of each category might render. Moreover, the link between these margins and the number of brands stocked by each intermediary means that competition

is substantially restricted, as by the decisions and agreements applying before 1 December 1975, since they are obliged to keep stocks of low-moving brands of cigaratte, thus tying up part of their working capital.

(98) (b) 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, regardless of the quantity of goods actually purchased each year from an individual manufacturer. Under this system there is no incentive for intermediaries to make greater competitive efforts with a view to obtaining improved benefits from manufacturers, or to take their custom exclusively to one manufacturer with a view to being rewarded with a larger rebate, since in both cases the system prevents intermediaries from improving rebates rates. This standard rebate system also imposes on any manufacturer wishing to enter the market a financial burden that will be all the heavier if he receives only a small part of the intermediary's aggregate business, which makes market entry more difficult.

(99) By signing the recommendation, manufacturers undertook to furnish Fedetab, or a body appointed for the purpose, with a list of the wholesalers they supplied ; intermediaries were likewise obliged to supply Fedetab with details of all the purchases they had made in the course of the previous year, so as to facilitate the calculation of their end-of-year rebates. In view of the fact that trade discount rates, end-of-year rebates and terms of payment are all standardized, these practices have the effect of preventing all competition in these three areas between the signatory firms, which are not only fully aware of their competitors' sales policy but are also safe in the knowledge that it is identical to their own.

(100) (c) The joint, uniform determination of credit periods has the effect, as in the system before 1 December 1975, of preventing competition in this area.

(101) It has also been argued by Fedetab and some of its members that a certain amount of competition over periods of credit continued to exist in spite of the recommendation, but the Commission's information is that all the manufacturers are tending to shorten their credit periods, settling down at a fortnight or less. This argument must therefore be rejected.

(102) (d) The same applies to the argument that the recommendation does not impose a standardized form of conduct on all manufacturers and that there are in practice several instances of departures from the table of margins allowed by the Ministry of Economic Affairs, and to the argument that the recommendation does not refer to standardized discounts but maximum discounts. The Commission's research has revealed that 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.

(103) It is difficult to understand why Fedetab and its members should have drafted and notified a recommendation which they did not intend to be complied with. Moreover, its provisions simply extend agreements and decisions which were current before 1975, for which the present signatories of the recommendation have already several times shown wholehearted support, notably by boycotting GB and Delhaize in 1967 and 1972.

(104) Irrespective of whether or not there is truth in Fedetab's assertion that this action was a justified response to the large stores' demands for credit facilities and permission to stock a smaller number of brands, it is nevertheless clear that the effect of the action, being that the large stores withdrew their demands in both cases, could not have been achieved without joint action from the members of Fedetab. Moreover, when Fedetab and its members expressly state that an individual manufacturer is unable to stand up on his own to pressure from wholesalers, as regards profit margins or credit facilities, they are recognizing the very real impact on wholesalers and retailers of the solidarity which they themselves demonstrated.

(105) 3. For the reasons already set out in II (A) (3) above, it cannot be accepted that the restrictions on competition flowing from the recommendation were not appreciable by reason of State intervention in the tobacco industry.

(106) 4. Trade between Member States is liable to be affected by the recommendation for the same reasons as apply to the decisions and agreements described in I (C), whose effects on inter-State trade were considered in II (A) (4).

The recommendation is further likely to influence inter-State trade since its provisions for end-of-year rebates mean that if Belgian and other Community importers and manufacturers who did not sign the recommendation want to sell their products, including products coming from other Member States, in Belgium, they find that, in entering the market, they face an additional obstacle in the artificial conditions of competition created by the collective measures of Fedetab and its members — who, it should be recalled, account for more than 90 % of the total sales of tobacco products in Belgium. Such manufacturers and importers, in order to obtain the collaboration of Belgian wholesalers and retailers, in the introduction and sale of their products on the Belgian market, 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.

(107) The continuing existence of differences between Member States' laws on tax structure and tax collection (in the latter case, at least until 31 December 1977) and of revenue-producing monopolies in two Community countries other than Belgium do not entitle the private sector to bring in its own methods of curtailing the existing opportunities for trading between Member States (e.g. by large distribution undertakings which are capable of creating channels for parallel imports). Nor is there any evidence to indicate that the measures taken by Fedetab and its members are likely to redress the differences between the different national systems.

(108) The foregoing details show that the decisions and agreements considered in II (A) and (B) above fall under the prohibition contained in Article 85 (1) of the Treaty; the question of exemption under Article 85 (3) must consequently be considered.

III. INAPPLICABILITY OF ARTICLE 85 (3)

(109) Article 85 (3) provides that the provisions of Article 85 (1) may be declared inapplicable to any agreement between undertakings, decision by an association of undertakings or concerted practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

A. Fedetab distribution arrangements prior to 1 December 1975

(110) In the present case the Commission is unable to consider applying Article 85 (3) to the decisions and agreements described in I (C) for the period 13 March 1962 to 1 December 1975, since the agreements and decisions 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 agreement and decision 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.

(111) Fedetab and the other firms in question fail in their argument that the notification requirements were satisfied when on 26 January 1971 Fedetab sent the Commission a copy of the 'Agreement to prevent cut-price sales' of 1967, the additional agreement of 29 December 1970 and the report on 'cigarette and tobacco distribution policy from 1 January 1971'. These documents and the accompanying letter were not sent to the Commission spontaneously but only in reply to a request for information made under Article 11 of Regulation No 17 on 8 January 1971. The letter from Fedetab made no mention of any form of application for exemption, nor of Articles 4 and 5 of Regulation No 17. Fedetab did not use the notification forms prescribed by Commission Regulation No 27 [1].

(112) Article 85 (3) cannot, therefore, be applied for the period prior to 1 December 1975.

B. The Fedetab recommendation

(113) 1. The parties to the notification claim that the system for the joint fixing of profit margins, end-of-

[1] OJ No 35, 10. 5. 1962, p. 1118/62.

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.

(114) This system, which Fedetab and its members regard as a specialized distribution system, sharing profits fairly between every level of distribution, is notable (again according to Fedetab and its members) for its attempt to encourage the existence of a large number of retail outlets who stock a large variety of brands; in their opinion this could not be achieved unless specialist wholesalers and retailers were given special advantages.

(115) They also maintain that specialist wholesalers are preferable to others because they have the best storage conditions for their products and ensure that the products on sale are fresh, they only operate within a specific geographical area which they can therefore cover more effectively, allowing them to make regular and speedy deliveries to isolated retail outlets and provide a sales service for numerous medium-sized and small manufacturers who could otherwise have to close down. Fedetab and its members also maintain that their system allows them to distribute products from all branches of the tobacco industry and not only a small number of brands, and that they alone can guarantee the profitable promotion of new brands, unlike food wholesalers, for example, who (according to Fedetab) consider tobacco to be a secondary product, sell only through one or two shops in any district, do not help to launch new brands, and do not supply newsagents, hotels, restaurants, cafés and wine and spirit retailers.

(116) Fedetab maintains that the advantage of having specialist retailers is that they also guarantee that their products are properly stored, and they offer the customer a wide range of brands, including foreign brands.

(117) In return, Fedetab offers specialist wholesalers and retailers the special advantage of classifying them in categories qualifying for higher fixed discounts and the end-of-year rebates from the member manufacturers, as provided by the recommendation.

(118) 2. It is impossible to accept the argument of Fedetab and its members that the existence of a large number of retail outlets and the retailer's obligation to offer his customers a large number of brands have the automatic effect of improving distribution.

(119) There is no evidence to show why that the distrubution system set up by Fedetab and its members — considering both the number of dealers and their profit margins on the one hand and the range of choice or other services offered by them on the other — should be more beneficial to the dealers and to their customers than a genuinely competitive system permitting full expression of consumer preferences.

(120) There are at present 600 tobacco wholesalers and 80 000 tobacco retailers in Belgium, a far greater number per head of population than in any other EEC country. The existence of so many retail outlets must inevitably increase the costs of distributing these products, since they must be perfectly fresh when they reach the customer and therefore call for a rapid stock turnover.

(121) Of these 80 000 retail outlets, a very few are specialist retailers, and most only offer their customers a very limited range of brands of cigarette.

(122) If the services offered by specialized wholesalers and retailers are as valuable as Fedetab and its members maintain, retailers and consumers cannot fail to be aware of them and so to continue to give them their custom whatever the financial conditions granted by Fedetab and its members.

(123) Granting them more favourable conditions 'in order to ensure their survival' (although specialist wholesalers, who at present account for 80 % of sales in Belgium, do not seem to be in any immediate danger) can only be interpreted as an attempt artificially to keep businesses 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.

(124) By recognizing that without the recommendation manufacturers would not be able to stand up to joint action from the various categories of wholesalers pressing for discounts, Fedetab and its members demonstrate sufficiently clearly that non-specialist wholesalers are just as essential to them.

(125) There is as much variation in the quality of service offered by specialist wholesalers and retailers as by non-specialist wholesalers and retailers as regards storage conditions, number of brands stocked, number of weekly visits to customers, emergency delivery service and more or less active assistance to promote new brands.

(126) It is perfectly possible that people in categories benefiting from a lower margin may provide better services in many of these fields than specialist wholesalers and retailers.

(127) Fedetab and its members have themselves admitted that the lists of categories were drawn up by collating the lists of dealers regularly purchasing from these members and lists of their subsequent customers ; these listings were drawn up systematically by Fedetab, following standards suggested by the Comité belge de la distribution, and these standards have been contested not only by the complainants — a large distribution firm, a food wholesaler and a multiple-branch wholesaler, but also by the largest wholesalers federation representing the specialist itinerant wholesalers, whose protection was, according to Fedetab and its members, one of the principal reasons for the introduction of this distribution system.

(128) The protection of specialized wholesalers cannot be adduced as reason for the end-of-year rebates system, since under the terms of the recommendation these rebates are granted indiscriminately to all categories of wholesaler, including food wholesalers. Moreover, the amount of the end-of-year rebate is calculated on the aggregate purchases made by these intermediaries from all manufacturers, even those who do not belong to Fedetab. There is therefore a strong similarity between this rebate and a simple bonus proportional to the size of the wholesaler or retailer and therefore not geared to the services they offer to each manufacturer, nor indeed the extent of his efforts to promote his products. The manufacturer finds in fact that the bonus he has to pay becomes proportionally more onerous as his customer makes fewer purchases.

(129) This being the case the system can hardly contribute to improving the distribution of the products concerned.

(130) In any case, the advantages which Fedetab and its members claim to enjoy as a result of the existence of specialist wholesalers and retailers do not appear likely to compensate for the fact that the latter are currently placed at a disadvantage by being unable to choose which brands of cigarette they wish to sell or to limit the number of brands in the light of their own clients' preferences.

(131) 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 15 days, a prohibition which can only increase overheads at every level of distribution with no advantage to the consumer.

(132) 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.

(133) 3. Moreover, 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.

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

IV. APPLICABILITY OF ARTICLE 3 OF COUNCIL REGULATION No 17

(135) Under Article 3 (1) of Regulation No 17, where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 of the EEC Treaty it may by decision require the offending undertakings or associations of undertakings to bring such infringement to an end.

(136) For the reasons set out above, Fedetab and its members are found to have committed infringements of Article 85 of the EEC Treaty and should be required to terminate forthwith those infringements which have not already been terminated.

(137) It also appears necessary that all members of Fedetab be informed of the contents of this Decision ; Fedetab should therefore be required to communicate the contents without delay to those of its members to whom the Decision is not addressed,

HAS ADOPTED THIS DECISION :

Article 1

The agreements between the undertakings referred to in Article 4 and the decisions by an association of undertakings taken by the Fédération belgo-luxembourgeoise des industries du tabac (Fedetab), of Brussels, 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 Fédération nationale du commerce de gros en produits manufacturés du tabac (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 1977 ;
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

The recommendation for cigarette sales in Belgium notified to the Commission by Fedetab and :

— Weltab SA, Brussels ;
— Jubilé SA, Liège ;
— Vander Elst SA, Antwerp ;
— Éts Gosset SA, Brussels ;
— BAT Benelux SA, Brussels ;
— SA Cinta, Brussels ;
— Heintz van Landewyck SARL, Luxembourg ;

which took effect on 1 December 1975 and having 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 on 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. Fedetab and the undertakings mentioned in Article 2 are hereby required to terminate without delay the infringement referred to in that Article. In particular, they shall in future abstain from all acts whatsoever having the same object as the Fedetab recommendation of 1 December 1975.

2. Fedetab is required forthwith to inform all its members to which this Decision has not been addressed of the contents thereof.

Article 4

This Decision is addressed to :

— Fedetab ASBL of Brussels ;

and to the undertakings :

— Cinta SA of Brussels ;
— Éts Gosset SA of Brussels ;
— Jubilé SA of Liège ;
— Vander Elst SA of Antwerp ;
— Weltab SA of Brussels ;
— BAT Benelux SA of Brussels ;
— Heintz van Landewyck SARL of Luxembourg (Grand Duchy).

Done at Brussels, 20 July 1978.

For the Commission

Raymond VOUEL

Member of the Commission