II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 July 1982

relating to a proceeding under Article 85 of the EEC Treaty

(IV/29.525 and IV/30.000 — SSI)

(Only the Dutch text is authentic)

(82/506/EEC)

SSI

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962 (1), and in particular Articles 3 (1), 6 and 15 (2) thereof,

Having regard to the notification made to the Commission on 20 September 1977 by the Stichting Sigarettenindustrie, in accordance with Article 4 of Regulation No 17, of a Master Agreement of 20 December 1976 and a specialist retailers' bonus scheme of 4 December 1974,

Having regard to the application submitted to the Commission on the same date by the Stichting Sigarettenindustrie for negative clearance of the abovementioned Master Agreement under Article 2 of Regulation No 17 or, failing that, exemption of the Agreement,

Having registered this case as No IV/29.525 — Stichting Sigarettenindustrie (SSI),

Having decided on 21 June 1979 to open proceedings in Case No IV/29.525,

Having heard the association of undertakings and the individual undertakings concerned on 29 November and 11 December 1979, in accordance with Article 19 of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 (2),

Having regard to the application made to the Commission on 24 December 1979 by the Stichting Sigarettenindustrie and its members for negative clearance under Article 2 of Regulation No 17, and to the accompanying notification made in accordance with Article 4 of that Regulation, of certain agreements or concerted practices between the members of the Stichting on the application of standard maximum margins to wholesalers and retailers from 1 January 1980,

Having registered this case on 27 December 1979 as No IV/30.000 — Stichting Sigarettenindustrie (SSI),

Having decided on 12 December 1980 to open proceedings in Case No IV/30.000,

Seeing that it is expedient to deal with Cases Nos IV/29.525 and IV/30.000 in a single Decision,

Having heard the associations of undertakings and the individual undertakings concerned on 10 March 1981, in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC,

Having heard the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, delivered in accordance with Article 10 of Regulation No 17 on 10 May 1982,

Whereas:

I. THE FACTS

A. THE CIGARETTE MARKET IN THE NETHERLANDS

1. The Stichting Sigarettenindustrie

(1) The Stichting Sigarettenindustrie, The Hague (hereinafter called 'the SSI'), is an association of cigarette manufacturers and importers trading in the Netherlands (hereinafter called 'the parties'). It was set up in 1955 as a foundation under Netherlands law with the object of promoting the common interests of its members.

The SSI pursues its object by arranging contacts and consultation between its members on matters affecting their interests and by representing them in dealings with the Government and organizations or institutions of a social or economic nature. Talks with the Government are generally conducted with officials of the Ministries of Economic Affairs, Finance, and Health and the Environment.

(2) The SSI can be given a mandate to undertake certain tasks in the common interest of its members. However, under its Articles, the SSI does not have the power to make rules regulating competition between its members.

(3) Ths SSI is run by a Board composed of one representative per member, each with one vote.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

The work of implementing the Board's decisions is carried out by the officers. The officers may set up preparatory or advisory committees for special assignments.

(4) Membership of the SSI is open to natural or legal persons, whether domiciled in the Netherlands or not, who are engaged themselves or through others in the manufacture of cigarettes and/or participate in the distribution of cigarettes in the Netherlands. The admission of new members is decided by the Board and may be made subject to conditions.

(5) The Board can expel a member for conduct incompatible with the objects or interests of the SSI. The member concerned has no vote at the meeting to decide his expulsion. Members may also resign from the association.

(6) The Board may lay down a procedure for settling disputes between members who wish to submit them to arbitration by a body set up for this purpose by the Board.

(7) The members of the SSI are:

	Market share 1980 (1)
1. British-American Tobacco Co. (Nederland) BV, Amsterdam	23 %
2. Sigarettenfabriek Ed. Laurens BV, The Hague	26 %
3. De Koninklijke Bedrijven Theodorus Niemeyer, Groningen	7 %
4. Philip Morris Holland BV, Amstelveen	7 %
5. R. J. Reynolds Tobacco BV, Hilversum	10 %
6. Turmac Tobacco Co. BV, Amsterdam	23 %
	96 %

Laurens and Turmac have for some time belonged to the Rothmans International group. In 1981 the Philip Morris group acquired a significant stake in Rothmans International. Together these undertakings have a market share of 56 % in the Netherlands.

R. J. Reynolds entered the Dutch market in stages. In 1972, Theodorus Niemeyer undertook to manufacture, market and distribute Reynolds' products. In 1973, Reynolds decided to switch from production under licence to production in its own factory in Germany, and from 1 September of that year a part of its cigarettes for the Dutch market were manufactured there. From 1 January 1974 it took over its sales and marketing and finally from 1 January 1975 also its distribution.

(8) According to information supplied by the SSI, there is only one cigarette manufacturer in the Netherlands that is not a member of the SSI or a party to the agreements and concerted practices to which this Decision relates, namely Yohaï and Co. Dutch Tobacco Company BV, Amsterdam. Yohai is understood to be the only manufacturer of cigarettes cheaper than those sold by SSI members.

(9) Among the importers, the following do not belong to the SSI:

1. Tabaksfabriek Gruno BV, Nijkerk (market share in 1980, 1 %), which also belongs to the Rothmans International group;
2. W. Pronk and Co. BV, Amsterdam;
3. Imperial Tobacco (Holland) BV, Boxtel, a member of the Imperial Group Ltd;
4. Reemtsma Nederland BV, De Bilt.

(10) Imperial Tobacco (Holland) BV was set up early in 1977 to distribute three brands which had previously been distributed by British-American Tobacco Co. However, because of their very small market share, the distribution of the three brands was entrusted to an agent, La Paz Siagrenfabriek, Boxtel, whilst Imperial Tobacco (Holland) BV confined itself to the purchase of revenue stamps. Since 1 January 1980, La Paz Sigarenfabriek has been distributing the Imperial Tobacco brands as an independent distributor. Imperial Tobacco nevertheless remains responsible for relations with the SSI and for paying its share of the specialist retailer's bonus (see (41) to (49) below).

Until the end of September 1979, Reemtsma Zigarettenfabriken GmbH, Hamburg, had its

(1) *Source:* The Maxwell Report: International Tobacco 1980, Part One, Lehman Brothers Loeb Research.

cigarettes distributed in the Netherlands by Theodorus Niemeyer. From 1 October 1979, distribution was taken over by a subsidiary, Reemtsma Nederland BV, set up on 21 August 1979. From February 1979, repeated talks were held between representatives of the SSI and Reemtsma Nederland BV about the possibility of Reemtsma's joining the SSI or observing the agreements concluded within the association. In November 1980, Reemtsma decided not to join the SSI or commit itself to the agreements and instead to follow an independent marketing policy. On 17 February 1981, replying to the supplementary statement of objections sent by the Commission, Reemtsma denied considering itself bound by any agreement concluded by the SSI and/or its members or taking part in any consultations within the SSI.

2. **Imports, sales and distribution of cigarettes in the Netherlands**

(11) Total consumption of cigarettes in the Netherlands, imports and sales by SSI members, Gruno, Imperial Tobacco and Reemtsma in the Netherlands were as follows in recent years (in millions of cigarettes and as percentages):

Sales and imports in relation to total cigarette consumption in the Netherlands

(× 1 000 000)

Year	Total (100 %)	SSI sales + Gruno (%)	Imports by SSI (1) + Gruno (%)	Imperial Tobacco sales (2) (%)	Reemtsma sales (2) (%)
1974	23 500	23 021 (98·0)	6 137 (26·1)	—	
1975	23 900	23 230 (97·2)	7 059 (29·5)	—	
1976	22 500	22 282 (99·0)	6 404 (28·5)	—	
1977	26 900	26 024 (96·7)	8 986 (33·4)	(3)	
1978	23 500	23 081 (98·2)	7 345 (31·3)		
1979	26 800	25 837 (96·4)	5 284 (19·7)		
1980	23 000	21 836 (94·9)	3 670 (16·0)		

(1) These imports were entirely from other Member States.
(2) All these sales are of imported cigarettes.
(3) In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

(12) The bulk of SSI members' and Tabaksfabriek Gruno's cigarettes are distributed through wholesale tobacconists. Up to the end of January 1978 these were chiefly wholesalers who had been approved by the SSI or its members. However, according to the SSI, since 1 February 1978 the distinction between approved and non-approved wholesalers has been abolished and each of the parties has been able, under Article 2 of the Master Agreement (see (33) to (40) below), to decide individually which wholesalers to supply and the terms on which to supply them, subject to the restrictions imposed by statutory provisions. To a lesser extent, SSI members also supply cigarettes direct to specialist retail shops (maximum 5 %), food wholesalers and retailers, hotel and catering establishments, petrol stations, etc. In certain cases they grant their customers varying amounts of extra premium in cash or in kind.

(13) Wholesale tobacconists in the Netherlands fall into three groups:

1. Those belonging to Tabak Express Nederland Maarsbergen (approximately 44 %);
2. Those belonging to the Eerste Grossiers Vereniging (EGV), Sassenheim (approximately 10 %);
3. Independents (approximately 46 %), who since the beginning of 1980 have been represented by Mr H. W. Wilms and include:
   His Wilms, Hippolytushoef,
   Maas Tabak, Veldhoven,
   and a number of smaller wholesalers.

(14) The retailing of cigarettes is shared between the following types of outlet as follows: specialist

retailers (35 %), food retailers (35 %), vending machines (15 %), other (other small retailers, hotel and catering establishments, petrol stations, hairdressers, etc.) (15 %).

(15) The specialist retailers of cigarettes and other tobacco products are organized in the Nederlandse Sigarenwinkeliers Organisatie (Dutch Tobacconists' Organization, hereinafter called 'the NSO'). The period from 1972 to 1977 saw a 26 % reduction in the number of specialist tobacconist shops, as against a 19 % reduction in retail outlets as a whole. In 1979 there were about 4 000 retail tobacconists in the Netherlands.

(16) About 100 brands of cigarettes are sold on the Dutch market. They can be divided into three groups: popular (accounting for 70 to 75 % of consumption), luxury and cheaper brands.

3. Cigarette trade margins

(a) *Wholesalers' margins*

(17) SSI members and Tabaksfabriek Gruno granted their wholesaler customers the following rates of discount:

Period	Margin allowed to approved (ordinary) wholesalers
1. 1. 1974 to 11. 8. 1974	11·14 % (10·92 %)
12. 8. 1974 to 2. 11. 1975	11·14 % (10·92 %) + Fl 0·04 (*)
3. 11. 1975 to 31. 1. 1978	11·14 % (10·92 %) + Fl 0·043 (*)
from 1. 2. 1978	10·50 % (10·15 %) + Fl 0·05 (*)

(*) Per 1 000 cigarettes.

(b) *Specialist retailers' margins*

(18) The SSI has claimed, in reply to a request for information issued by the Commission under Article 11 of Regulation No 17, that the margin wholesalers give to retailers is decided by the wholesaler and varies between wholesalers and between their retailer customers. However, whilst it may be true that no formal agreements have been struck between cigarette manufacturers/importers and wholesalers in the Netherlands regarding retailers' margins, the documents used during the procedure indicate that wholesalers have always taken the SSI margin to directly supplied specialist retailers as a guide in setting their own margins to such retailers.

Non-SSI manufacturers and importers have also given directly supplied specialist retailers a margin closely similar to or even identical with the SSI margin. This is shown by the table in point 19 below.

(19) The table below summarizes the rates of margin given to specialist retailers (1):

I. *Period before December 1971/February 1972*

	Minimum margin (1)	Maximum margin (1)	Standard margin (1)
SSI + Gruno	—	—	10
B (2)	—	—	10
C (2)	?	?	?
D (3)	6	10	—
E (3)	6	10	—
F (2)	7	10	—
G (2)	5	10	—

II. *Period December 1971/February 1972 to 1 February 1978*

SSI + Gruno + Imperial Tobacco (from 1977)	—	—	10·7 (4)
B	—	—	10·7
C	—	—	10
D	7	10·5	—
E	7	10·5	—
F	7	10·5	—
G	5	10·5	?

For footnotes see next page.

(1) Based on the documentary evidence used during the procedure.

III. *Period 1 February 1978 to 31 December 1979*

	Minimum margin (1)	Maximum margin (1)	Standard margin (1)
SSI + Gruno + Imperial Tobacco + Reemtsma (from 1. 10. 1979)	—	—	9·8 (4)
B	—	—	10
C	—	—	10
D	7	9·8	—
E	7·75	+ 10	—
F	7	9·8	—
G	5	10	—

(1) As a percentage of the retail selling price on the revenue stamp (including tax).
(2) B, C, F and G: independent importers, manufacturers and wholesalers.
(3) D and E: wholesalers' associations.
(4) In addition, the following extra discount ('bonus') was given:
12. 8. 1974 to 2. 11. 1975: Fl 0·60 per 1 000 cigarettes,
3. 11. 1975 to 31. 1. 1978: Fl 0·65 per 1 000 cigarettes,
1. 2. 1978 to date: Fl 0·75 per 1 000 cigarettes.

(20) During the period 1 October to 31 December 1979, Reemtsma Nederland BV at first continued to apply the margins (including the bonus) at which Theodorus Niemeyer had previously traded on its behalf. From 1 January 1980, however, it applied the standard SSI wholesalers' and retailers' margins and bonus. During the last quarter of 1980 Reemtsma gave its big wholesaler customers the opportunity of earning extra margins by achieving higher sales targets. Since the general price increase on 15 February 1981, it has pursued an independent prices and margins policy.

B. THE CURRENT COMMUNITY AND NATIONAL LEGISLATION

1. The EEC Directives

(21) The preamble of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (1) states that the establishment of a free market in the tobacco products sector, which includes cigarettes, presupposes that the excise duties levied on such products by the Member States do not distort conditions of competition or impede the free movement of tobacco products within the Community. Since tobacco excise duties were not neutral from the point of view of competition and were often a serious obstacle to the interpenetration of markets, the Council had decided to harmonize these duties. For this purpose a system designed gradually to reduce the influence of excise duties was introduced, combining a proportional *ad valorem* excise duty based on the maximum retail selling price and a specific excise duty per unit of the product, the amount of which would be fixed by each Member State in accordance with Community criteria.

(22) Under Article 5 of the Directive, manufacturers and importers were to be free to determine the maximum retail selling prices of their products, subject to national legislation on price control and resale price maintenance. However, to facilitate the levying of excise duty, the Member States could fix a scale of retail selling prices for each type of tobacco product, provided the scale was sufficiently wide and varied to reflect the variety of Community tobacco products. Each scale was to apply to all tobacco products of the type concerned, without distinction as to quality, presentation, origin of product or raw materials, characteristics of the undertakings concerned or any other criterion. Under Article 6 (2) of the Directive, the same rules concerning the levying and payment of the excise duty were to be applied to importers and national manufacturers of tobacco products alike.

(23) The harmonization of the structure of tobacco excise duties was to proceed in stages under the Directive. The first stage originally covered a period of 24 months from 1 July 1973, but was extended until 30 June 1978. The second stage (2) was to run from 1 July 1978 until

(1) OJ No L 303, 31. 12. 1972, p. 1.
(2) Council Directive 77/805/EEC of 19 December 1977 amending Directive 72/464/EEC on taxes, other than turnover taxes, which affect the consumption of manufactured tobacco (OJ No L 338, 28. 12. 1977, p. 22).

31 December 1980, but has since been extended until 31 December 1982 (1).

At the beginning of the first stage, the amount of the specific excise duty on cigarettes was to be fixed by reference to the most popular price category according to the data available on 1 January 1973.

During the first stage this specific component had to be not less than 5 % or more than 75 % of the total proportional and specific duty on the cigarettes.

During the second stage, it has had to lie within the range of 5 % to 55 % of the total proportional and specific duty and turnover tax on this category. When harmonization is complete, the ratio of the specific excise duty to the total proportional duty and turnover tax must, pursuant to Article 1 of Directive 77/805/EEC, be the same in all Member States, so that 'the range of retail selling prices reflects fairly the difference in the manufacturers' delivery prices'.

In both the first and the second stages, the Member States were free to fix a minimum rate of excise duty not exceeding 90 % of the total proportional and specific duty on cigarettes in the most popular price category.

2. **The Netherlands legislation**

(a) *The Excise Duty (Tobacco Products) Law*

(24) Under the Excise Duty (Tobacco Products) Law of 25 June 1964 (Staatsblad 208) (2), tobacco products, including cigarettes, manufactured in, or imported into, the Netherlands are subject to excise duty.

The Netherlands is one of the Member States which has a predominantly *ad valorem* system of excise duty coupled with a specific duty within the band permitted under the EEC Directives. It is also one of the countries that lays down a minimum excise duty for all cigarettes, as allowed by the Directives.

The duty is collected by means of revenue stamps showing the retail price (3), which are purchased and affixed to the packets by the manufacturer (defined as persons who, in the course of trade in the Netherlands, partially or wholly prepare tobacco for consumption or carry out further processing or treatment of tobacco already partially or wholly prepared for consumption) or, in the case of imported cigarettes, by the importer. The excise duty represented by the revenue stamps must be paid at the time of the application made by the manufacturer for those stamps.

(25) The Law defines retail selling price as the price at which tobacco products are sold other than for resale, including all taxes and duties and the cost of packaging, but excluding any discounts or other reductions in price. Manufacturers and dealers may not market the same tobacco product, or allow it to be marketed, at more than one retail selling price, except as distinct brands or when packed under distinct brands. The Minister can authorize exceptions to this rule.

(26) Tobacco products may not be sold, offered for sale or supplied at a higher price than that shown on the attached revenue stamps, unless the additional excise duty has been paid.

(27) Equally, tobacco products may not be sold, offered for sale or supplied, other than for resale, at a lower price than that shown on the revenue stamps. The following are considered to be infringements of this prohibition:

(a) the granting of discounts off the retail selling price that is payable according to the revenue stamp for the quantity sold;

(b) engaging in the following practices when selling tobacco products other than for resale:

1. the giving in any form of presents, free gifts or vouchers, or similar practices;

2. cooperating with others in such acts intended to favour third parties.

(1) OJ No L 5, 9. 1. 1982, p. 11.

(2) Last amended by the Law of 24 December 1980 (Staatsblad 704).

(3) Retail price, retail sale price, price given on revenue stamps and price to the public are treated as synonyms, both in the trade and for the purposes of this Decision.

The Minister may authorize exceptions from this rule also.

(28) The said Law provides that tobacco products in free circulation in the Netherlands may be sold, offered for sale, or stocked for sale on premises or through facilities equipped for trade in those products, namely:

(a) on premises, other than vending machines:

1. which are not located in, directly or indirectly connected with, or adjoining a factory;
2. which are located on a permanent site;
3. which are accessible from the public highway; and
4. which display a sign conforming to specifications determined by the Minister;

(b) in vending machines installed in, outside or in the immediate vicinity of premises as specified at (a) and satisfying the requirements there set out.

(b) *The Tobacco Products Excise Decree and the Excise Duty (Tobacco Products) Order*

(29) Further provisions on tobacco excise duty are contained in the Decree of 26 June 1964 laying down the excise duty on tobacco products (Staatsblad 1964 209), as last amended by the Order of 29 January 1981 (Staatsblad 1981 25), and the Excise Duty (Tobacco Products) Order of 29 June 1964 (Staatscourant 1964 123), as last amended by the Order of 13 February 1981 (Staatscourant 1981 30). Under these provisions, the Government determines the allocation to price categories for which different revenue stamps are used.

(c) *The Prices Law and the Prices (Goods and Services) Orders*

(30) Under the Prices Law [1], the Government has introduced a system of Prices Orders for goods and services as part of its strategy for controlling prices and preventing inflationary price increases.

(31) Prices Orders have been issued every year, with slight modifications but with the basic structure unchanged, since 1 January 1973. The Prices Order lays down the way in which prices are to be calculated. It does not attempt to fix or freeze prices, but merely to ensure that they rise or fall in line with increases or reductions in costs. The prices and margins calculated according to the prescribed criteria are maxima. Manufacturers or distributors may not exceed them without the authorization of the Minister of Economic Affairs. Voluntary reductions of prices or margins are possible at any time.

Planned increases in prices or margins under a Prices Order must be notified, with a statement of the reasons for the increase, to the Ministry of Economic Affairs and may not be introduced until one month thereafter.

A letter from the Ministry of Economic Affairs to the Commission dated 20 July 1981 makes it clear that the periodical increases in cigarette prices are not based on a strict application of the Prices Order in force at the time, but a number of alterations are allowed in cigarette pricing, involving anticipation of future cost changes and subsequent adjustment to the cost increases that have actually taken place (see (88) below). Under the method, cost increases since a certain reference date may, and cost reductions must, be passed on. Trade margins are checked to see, firstly, whether the increase in the cash margin is acceptable, and, secondly, whether or not the percentage margin has remained the same. Thus, as long as the cash margin received by the wholesaler or retailer is deemed acceptable, any increase in their percentage margin, although technically an infringement of the Order, will be ignored.

The Prices Order applies only to transactions on the Netherlands market. The prices of products imported into the Netherlands are freely determined by the foreign supplier. The foreign supplier's price is the purchase price of the Dutch importer or dealer, on the basis of which he applies the calculation methods laid down by the Prices Order.

(32) Infringement of the Prices Order is a criminal offence by virtue of the Economic Offences Law of 22 June 1950 (Staatsblad K 258), many times amended.

[1] Law of 24 March 1961 laying down rules for the prices of goods and services (Staatsblad 1961 135), many times amended.

C. THE AGREEMENTS

1. The notified agreements

1.1. The SSI Master Agreement of 20 December 1976

(33) The SSI has told the Commission that the Master Agreement came into being as a result of a decision to introduce new arrangements in the light of the Commission's proceedings against Fedetab (Cases IV/28.852, 29.127 and 29.149), on which it had taken outside advice.

In the second half of 1976, the SSI held consultations with the Ministries of Economic Affairs, Finance and Health about the consequences of such new arrangements. The SSI expressly claims that its only motive in ending or adjusting the agreements in force until that time was to remove any danger of these agreements subsequently being found by the Commission to be contrary to Article 85 (1) of the EEC Treaty.

(34) Although the Master Agreement was signed by SSI members and Tabaksfabriek Gruno on 20 December 1976, it was not notified until September 1977. According to the SSI, this was mainly due to uncertainty as to whether the Agreement was notifiable and to the large number of signatories. The Master Agreement was concluded for an indefinite period and entered into force the day it was notified to the Commission.

Any manufacturer or importer of cigarettes trading in the Netherlands, whether represented in the SSI or not, was admitted to the Agreement without further conditions. Parties were free to withdraw unilaterally upon one year's notice.

As stated at point 10 above, in 1979 and 1980 Reemtsma Nederland BV had talks with the SSI about the possibility of signing the Agreement.

(35) It is claimed that the reasons for concluding the Master Agreement were:

(a) that the Netherlands Government wished to deal with a single spokesman for the cigarette industry, in view of its importance for the national budget, prices and health; such a spokesman could not fulfil his role effectively unless those he represented were prepared to abide by the agreed results of his negotiations;

(b) that the commercial behaviour of firms in the industry was largely dictated by the outcome of consultations with the Government because of the major bearing this behaviour had on excise revenue and because of the effect of cigarette prices on the prices policy;

(c) that it was impossible for firms in the industry to make commercial decisions completely on their own without coming into conflict with Government policies as these were explained to the industry in the negotiations; and

(d) that firms had to keep within the bands allowed by the annual Prices Order for goods and services when fixing their prices and margins for the cigarette market in the Netherlands.

(36) The aim of the SSI Master Agreement was to create the essential conditions for a smoothly-operating market, whilst leaving each of the parties free to make his marketing arrangements as he saw fit, independently of his partners.

(37) The parties agreed to allow the SSI to act as their spokesman in consultations with the Government likely to lead to agreements, and with any other interested parties, regarding:

(a) final prices and questions concerning excise duty and VAT revenue;

(b) the wholesaling function and wholesalers' margins;

(c) the retailing function and retailers' margins;

(d) public health and the parties' advertising policy.

The parties undertook not to negotiate individually on any of the above matters, except where they specifically concerned their firm.

They also appointed the SSI to negotiate an agreement with the Ministry of Health and other

interested parties on voluntary restraint in their individual advertising activity and agreed to abide by any restriction so agreed [1].

(38) The parties were free to decide the margins they allowed to wholesalers within the limits laid down in the Prices Order and in the negotiations with the Ministry of Economic Affairs. Unlike the situation under previous arrangements (see (81) to (87) below), each party could decide his own criteria for approving wholesalers.

(39) In relation to retailers, the parties were bound by the Bonusregeling Speciaalzaken ('specialist retailers' bonus scheme') of 4 December 1974, which recital 10 and Article 3 of the Master Agreement show as forming an integral part of the Agreement.

(40) The expenses incurred by the SSI in administering the Master Agreement were covered by annual contributions from the parties related to their shares of the Netherlands market.

At the end of each calendar year, the SSI chairman was to inform each of the parties of their share of the expenses without disclosing the shares of the other parties.

1.2. The specialist retailers' bonus scheme of 4 December 1974

(41) The specialist retailers' bonus scheme was signed by SSI members and Tabaksfabriek Gruno on 4 December 1974, and applied retroactively from 12 August of the same year. The original version was amended on 24 January 1977 with effect from 1 January of that year. Only this new version was notified. Since January 1978 Imperial Tobacco (Holland) BV has participated in the scheme, although without signing the Agreement. It has also contributed to the pool out of which the bonus is paid. Imperial Tobacco maintains it had no alternative but to join the bonus scheme since its predecessor, British-American Tobacco Co. (Nederland) BV, from which it had taken over the distribution of its products early in 1977, had taken part in it. Pronk and Co. BV and Reemtsma Nederland BV do not participate in the scheme.

Unilateral withdrawal from the bonus scheme was not possible. This had not been thought desirable, because the scheme had come about with the Ministry of Economic Affairs' backing and at the request of specialist retail tobacconists, for whom it was a means of support. No signatory has apparently ever asked to withdraw unilaterally from the scheme.

(42) Under the bonus scheme, specialist retailers satisfying certain conditions were to be granted an extra discount in the form of an annual bonus in addition to their normal percentage discount.

The additional bonus has amounted, since 1 February 1978, to 75 cents (60 cents from 12 August 1974 until 31 December 1975 and 65 cents from 1 January 1976 until 31 January 1978) per thousand cigarettes bought for resale direct to the consumer by the specialist retailers from the parties, whether direct or through one or more wholesalers. The increases were fixed in discussion with the Government, mainly in the context of a general increase in the retail price of cigarettes.

(43) Specialist retailers are defined as individuals, partnerships or companies who specialize in retailing tobacco products in shops recognizable as such from the public highway (unless exempted under the Excise Duties (Tobacco Products) Law) and whose turnover from tobacco products, in terms of retail prices, accounts for at least 60 % of their total business. In 1979, some 2 000 retail tobacconists (half of the total on the Netherlands market) qualified for the bonus scheme. A further 400, although satisfying the requirements set out in detail below, preferred to stay out of the scheme. Multiple retailers and supermarkets usually fail to qualify either because they do not stock a big enough range, because their turnover from cigarettes does not represent a big enough percentage of their business, or because of the way in which they sell cigarettes to the public (without advice or other personal services). However, according to the SSI, the parties are free to negotiate special discounts with such retailers where they supply them direct, or wholesalers may do so.

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[1] These negotiations led to the Agreement of 9 February 1979 on restriction of individual advertising activity, which took effect on 1 May 1979 for an initial period of five years. The Agreement was notified to the Commission on 4 April 1979 as a supplement to notification No IV/29.525, but is not the subject of this Decision. The Agreement has been replaced by a new advertising code which was brought to the Commission's attention by letter of 8 April 1982.

(44) The conditions specialist retailers must satisfy in order to qualify for the bonus are as follows:

(a) they must stock at least 60 % (originally 80 %) of the brands of cigarette (1) supplied to the Dutch market without discriminating between the parties;

(b) at least a quarter of the retailer's shop window and counter space, taken together, must be used for displaying cigarettes and/or cigarette advertising material;

(c) the retailer must assist the parties to launch new brands, either by stocking or starting to sell a new brand within a week of the parties' informing him of the launch or by accepting the usual launching stocks sent by them. The retailer must display at least one pack of the new brand prominently in his shop for at least two weeks;

(d) the retailer must be able to point to sales in the preceding calendar year of at least 1·5 million cigarettes sold at retail revenue stamp prices which he purchased from one or more wholesalers and/or direct from the manufacturers and/or importers. This sales figure may include only cigarettes sold in the shop run by the retailer concerned or from vending machines fastened on the same premises and operated by the retailer on his own account.

(45) Wholesalers also running specialist retail outlets may qualify for the bonus only if completely separate accounts are kept for the retail outlet showing clearly the number of cigarettes sold at retail prices from the outlet.

(46) The procedure for obtaining the bonus is as follows:

(a) the retailer must submit, by a certain date, an application in the prescribed manner to the Commissie Speciaalzaken ('Specialist Retailer Committee'), enclosing a return on his cigarette purchases over the year, certified by an accountant or bookkeeper known to the Committee;

(b) the Specialist Retailer Committee may require retailers to substantiate the accuracy of their returns and may take such measures as it considers necessary to verify returns or to check that the requirements set out at points 44 and 45 are satisfied. The Committee may disqualify from the bonus for a maximum period of three years any retailer who knowingly submits a false return. The Committee may also waive the requirements set out at points 44 and 45 for a one-year period, extendable to a further year;

(c) the Committee must announce its decision on applications within two months, stating reasons, and, if the application is rejected, inform the applicant of the right to appeal;

(d) the bonus is paid by the SSI in the first quarter of each year in respect of the preceding year's purchases of cigarettes from the parties;

(e) appeals against decisions of the Committee are decided by the Commissie Beroep ('Appeals Board') as far as possible within three months. Its decision is final. It gives reasons for its decision. The Appeals Board allows the appellant to put his case and may hear any other evidence likely to assist it in reaching a fair decision.

(47) The composition of the Specialist Retailer Committee, whose members are appointed and removed by the parties, is as follows:

(a) four cigarette manufacturers;

(b) three nominees of the Federatie van Organisaties van Sigarenwinkeliers ('Federation of Tobacconists' Organizations');

(c) two members jointly nominated by the wholesalers' organizations Tabak Express Nederland and Eerste Grossiers Vereniging;

(d) the chairman of the SSI.

(48) The total sum required by the SSI to pay the bonus is divided each year between the manufacturers and importers belonging to the bonus scheme in proportion to their sales through tobacconist shops over the relevant

(1) Each version of a brand (e. g. plain, filter-tipped and 'mild') is regarded as a separate brand.

period. The parties' market shares for this type of outlet are determined each year by a market research firm and reported to the SSI chairman, who informs the parties only of their own market share and the amount of the bonus payable by them, without disclosing the market shares of other parties.

The parties then remit their share of the bonus to the SSI for distribution to specialist retailers.

(49) The most frequent cause of specialist retailers failing to qualify for the bonus is the requirement for minimum annual sales of 1·5 million cigarettes.

When the bonus scheme started, in particular, there were a large number of appeals to the Appeals Board against decisions of the Specialist Retailer Committee.

Year to which appeal refers	Number of appeals	Partially or wholly upheld	Dismissed
1974	54	25	29
1975	—	—	—
1976	1	—	1
1977	1	—	1

1.3. The agreements connected with the increase in excise duty and prices on 1 January 1980

(50) The agreements which the SSI notified to the Commission on 27 December 1979 were the result of an understanding reached by the SSI with representatives of cigarette wholesalers and retailers (1). The SSI stated that only a unilateral understanding had in fact been reached between the manufacturers/importers concerned and described the resulting agreement as purely horizontal. After the Commission has questioned this, the SSI conceded that in theory at least there could be said to be a vertical arrangement and asked it to consider the vertical arrangement also as notified.

(51) The points of the agreement between the SSI and the distributive trade as far as wholesalers were concerned were:

(a) a maximum gross margin of 34·79 % of the pre-tax retail selling price;

(b) a maximum gross margin of 31·5 % of the pre-tax retail selling price on immediate deliveries by representatives ('car sales') (2);

(c) consultations between manufacturers and wholesalers on the consequences, if any, on changes in the specific component of excise duty;

(d) consultations in 1980 on the timing of the industry's application to the Government for a new price increase to offset rising costs;

(e) consultations between manufacturers and wholesalers at least twice a year.

(52) As far as retailers were concerned, the points of the agreement were:

(a) a maximum margin of 32·7 % of the pre-tax retail selling price for retailers supplied direct by the manufacturer;

(b) the contribution by manufacturers of a Fl 500 000 fund (to be topped up each year) for the benefit of retailers;

(c) continuation without change of the specialist retailers' bonus scheme.

2. The unnotified agreements

(53) During the investigations into the case, the Commission received information, following requests issued under Article 11 of Regulation No 17, about the following agreements, which had not been notified under Article 4 of that Regulation.

2.1. The price agreements between cigarette manufacturers and/or importers

(54) These were agreements signed by a number of cigarette manufacturers/importers operating in the Netherlands which mainly concerned increases in cigarette retail prices and were

(1) For wholesalers, Tabak Express, the EGV and the independents; for retailers, the NSO.

(2) According to the SSI, the gross margin on 'car sales' previously varied between 9·5 and 9·8 % of the retail selling price including tax.

concluded after consultations on price and tax increases with the Netherlands Government. The agreements often also covered the margins to be allowed to wholesalers and to direct retailer customers.

According to the SSI, the purpose of the price agreements was to ensure acceptance by the public of the new prices of cigarettes in the 'popular' price category. With 75 % of sales, this is the most important category as far as Government tax revenue is concerned. Among the factors tending to make this adjustment difficult, which the SSI claims were focused on in its consultations with the Government, were:

(a) the increase in the price of popular brands;

(b) the launch of new brands in the cheaper categories, accompanied by (large-scale) advertising campaigns;

(c) the promotion of existing cheaper brands through heavy advertising;

(d) changes in number of cigarettes per packet or in versions, which had harmed the popular price category.

(55) The price agreements were in effect for a limited period and covered a range of old and new price categories, each category containing brands sold for the same retail price in the same size of packet (20 or 25 cigarettes). In agreements from 1974 onwards the number of categories was progressively reduced.

(56) The agreements included minimum purchase requirements for direct deliveries to specialist shops and an obligation to charge wholesalers the same price regardless of the quantities delivered. According to the SSI, the minimum purchase requirements were set by each manufacturer individually and were intended to avoid orders that were too small and administratively costly both for the supplier and the customer. The agreements also provided, at least as far as the cheaper price categories were concerned, for a 'control period' during which sales restrictions applied and no changes were allowed to the range of brands, versions, packet sizes or retail prices. The SSI maintains that signs of this control period were apparent to the consumer for, at most, about six weeks, due to the stockbuilding by retailers that tended to precede a price increase. Just before a price increase comes into effect, most retailers attempt to buy any cigarettes still available at the old price in order to be able to sell to the consumer at the old price for as long as possible.

The SSI has admitted that outside the control period manaufacturers/importers are, in theory, free to alter the final prices of their products as they please in order to obtain a competitive advantage over their competitors. However, in practice, it claims that this freedom is virtually non-existent.

The SSI argues that, in the present legal framework, the theoretical scope for price competition in practice cannot be exploited. Being unable to compete effectively and flexibly on prices, manufacturers/importers therefore have to try to compete on points such as

— range,

— advertising,

— quality (taste and packaging),

— tar and nicotine content,

— margins, discounts and bonuses to wholesalers and direct retailer customers,

— advisory services to wholesalers and retailers.

(57) All but one of the price agreements in force between 1974 and 31 January 1976 coincided with price increases.

In their consultations with the Government the parties always agreed to pass on to their wholesaler and direct retailer customers the maximum margins allowed to the Prices Order. An analysis of general price increases to see how the extra return is apportioned between the Government, manufacturers and wholesalers and retailers shows that the Government's share has risen faster than that of manufacturers and distributors.

(a) *The price agreement of 1 August 1974*

(58) This agreement was signed by all members of the SSI and involved an increase in the retail prices of cigarettes of Fl 0·25 per packet of 25 from 12 August 1974. The agreement entered into force on 9 July 1974 and lasted until 30 November

1974. It was not possible to withdraw from it. The SSI claims that the price increase was necessary because of increases in manufacturers' costs and the need to improve trade margins without a simultaneous increase in tax by the Government.

(59) The scale of retail prices set out in the agreement covered the 13 price categories existing hitherto and also 12 new categories, the prices for three of which were described as fixed prices and for three others as minimum prices. Two individual prices were given for packets of 50.

(60) In preparation for the price increase, the parties informed the SSI of the brands of cigarettes they would have in their range, with their retail selling prices, and undertook to observe a control period of about three months, from which there were only two clearly-defined exceptions.

(61) During the control period the parties further undertook to keep their average monthly sales to a maximum of 110 or 125 % (depending on the price category) of previous figures. Exceptions were made for two manufacturers.

(62) Wholesalers were to be allowed a standard margin (per 1 000 cigarettes) of 10·92 or 11·14 %. The standard margin for direct retailer customers was to be 10·70 % (also per 1 000).

(63) A minimum size of delivery (10 000, 15 000 or 20 000 cigarettes, depending on the manufacturer) was imposed for direct deliveries to retailers. All wholesalers had to be charged the same price irrespective of the quantity delivered.

(64) The agreement also provided for a bonus of Fl 0·60 per 1 000 cigarettes for approved specialist retailers with effect from 12 August 1974.

(65) Wholesalers approved under the agreement on the approval of wholesalers of December 1971/February 1972 were to be granted a rebate of Fl 0·04 per 1 000 cigarettes with effect from 12 August 1974.

(b) *The price agreement of 7 November 1975*

(66) This agreement was signed by all SSI members and involved an increase in the retail price of cigarettes of Fl 0·25 per packet from 3 November 1975. The agreement entered into force on 1 September 1975 and expired on 31 January 1976. In the consultations held with the Ministry of Economic Affairs, this period was considered to be sufficient to allow the new prices to become established. Those who had signed it could not withdraw from the agreement. According to the SSI, the manufacturers had applied for an increase of only Fl 0·15 to cover further increases in costs, but the Government had insisted on a Fl 0·25 increase for budgetary reasons and so that the distributive trades would be able to benefit from the extra Fl 0·10 increase.

(67) The new scale of cigarette retail prices was composed of 11 price categories, for eight of which a fixed price was laid down and for the three others a minimum price.

(68) As at the time of the previous price increases (see (60) above), the parties had to file their range of brands and undertook to observe a control period of about three months, from which there were a few clearly-defined exceptions.

(69) During the control period the parties undertook to keep their average monthly sales to a maximum of 110 % of the previous monthly sales. An exception was made for one brand.

(70) Additional detailed rules restricting the parties' total sales and their sales at a 'new price' were included in this agreement. If the prescribed quantities were exceeded, the offending manufacturer was liable to be fined Fl 10 by the SSI, for every 1 000 cigarettes sold in excess of the permitted quantities. According to the SSI, this penalty was never applied.

(71) Wholesalers were to be allowed a standard margin (per 1 000 cigarettes) of 10·92 % + Fl 0·043 or 11·14 % + Fl 0·043. The standard margin for direct retailer customers (also per 1 000) was to be 10·7 %.

(72) A minimum size of order (10 000, 15 000 or 20 000 cigarettes, depending on the

manufacturer) was imposed for direct deliveries to retailers. Wholesalers had to be charged the same price regardless of the quantity delivered.

(c) *The 1978 price agreement*

(73) In connection with the price increase on 1 February 1978, a price agreement was in force from 1 February until 30 April 1978. The price increase of Fl 0·35 on a packet of 25 was based on the 'current account' formula (see (95) below) and, at the Government's request, took the form of an excise and VAT increase leaving room for passing on cost increases at the manufacturing and distribution levels.

(74) Before the price increase, the SSI suggested to the Ministry of Economic Affairs that the increase be coupled with measures similar to those taken in the earlier price agreements, including a ban on price cuts, restriction of sales, and a ban on new-brand launches or changes in packet sizes.

According to the SSI, the Ministry of Economic Affairs had indicated that measures similar to the 1974 and 1975 arrangements were desirable. Imperial Tobacco (Holland) BV denies that it was in any way involved in the discussions between the SSI and the Government, but it nevertheless increased its prices by the same amount as SSI members. Although SSI members had indicated that they were willing to keep the proposed measures in force for a maximum of nine months (i.e. up to 31 October 1978), the Government informed the SSI that it agreed to the measures but wanted them to last for only three months (until 30 April 1978). On 29 May 1978, however, the SSI wrote to the Ministry of Economic Affairs that it felt unable to support an extension of the period in view of the repercussions on competition. The industry felt that the new prices had already settled down.

(75) The new scale of increased retail prices contained seven price categories, for six of which a fixed price was laid down and for the other a minimum price. Not all price categories, however, showed the planned price rise.

The SSI has given the following explanation of this:

— the consultations on a price increase were always based on the increase in costs or the new tax take per 1 000 cigarettes,

— the price of 1 000 cigarettes was usually converted to packets of 20 or 25,

— the prices per packet always had to be rounded off to Fl 0·05, whilst the range of permitted pack sizes was statutorily limited to 100, 50, 25, 20, 10 and five cigarettes per packet.

2.2. The agreement of 23 April 1975 on rules of conduct in the cigarette trade [1]

(76) Although all members of the SSI are mentioned in this agreement, only British-American Tobacco Co. (Nederland) BV, Sigarettenfabriek Ed. Laurens BV, Koninklijke Bedrijven Theodorus Niemeyer BV and Turmac Tobacco Co. BV signed it. R. J. Reynolds Tobacco BV did not sign the agreement, maintaining that there was no need for it. Although not a party to the agreement, Tabaksfabriek Gruno applied the launch discounts it prescribed. The SSI claims that the contracting parties sincerely believed that these rules of conduct were necessary because of the rules agreed with the Government on margins. The agreement was terminated on 9 June 1976 on legal advice.

(77) Under the agreement the contracting parties undertook not to grant their customers to whom they supplied cigarettes in the Netherlands any benefit in any form whatsoever other than as provided for in the agreement and apart from the agreed margins and any agreed additional discounts — to so-called primary trade and launch discounts — and to refrain from any act partially involving a benefit for their customers. In particular, it was forbidden to comply with demands for extra discounts from large customers. It was also decided that parties should ensure that their sales budgets did not leave any room for such extra benefits.

(78) When launching new brands only the following discounts were to be given:

[1] This was the last version in force. Similar versions had been in force earlier (definitely in 1973).

— to wholesalers:

'a maximum of three packets of 20 or 25 per 1 000 cigarettes or their retail price equivalent on the invoice in cash, i.e. not as a percentage',

— to retailers:

'a maximum of two packets of 20 or 25 or their retail price equivalent on the invoice, as with wholesalers'.

The launch discount could be given for at most the first four weeks of delivery and no reference should be made to a launch discount in per cent.

In the case of 'car sales', the parties were to apply certain maximum percentage discounts.

(79) A number of further obligations were accepted:

— cigarettes must not be supplied on consignment,

— when a brand was withdrawn, it was permitted to give the wholesalers concerned the maximum discount of Fl 0·50 per 1 000 cigarettes taken back to cover the cost of returning the products,

— no matches must be supplied either at cost price or free of charge,

— no transport-related discounts must be given.

(80) The SSI was responsible for enforcing the rules of conduct.

Any party who was in doubt as to whether or not a particular practice would be contrary to the rules was required to seek the advice of the SSI chairman for him to issue a ruling on the matter to the manufacturer concerned and the other parties.

Any party who believed what another party was doing to be against the rules could ask the SSI chairman to give a ruling. The ruling was to be binding and notified to all parties.

2.3. The agreements on approval of wholesalers (prior to the Master Agreement)

(a) *The agreement of December 1971/February 1972*

(81) This agreement was signed by all SSI members and Tabaksfabriek Gruno. It was concluded for an indefinite period and lapsed on 1 February 1978 after the signing of the Master Agreement of 20 December 1976. According to the SSI, the agreement 'came about at the express request of the wholesalers' organizations', which the agreement says wished to set up 'a system to prevent unhealthy competition on margins' and to lay down certain approval standards.

(82) The agreement laid down a number of conditions to be met by wholesalers in order to qualify for approval; they must:

— trade under their own name and on their own account,

— supply a minimum of 50 retail outlets,

— stock at least 80 % of the range of brands sold by the parties, and

— have minimum annual sales of 25 million of the parties' cigarettes.

The SSI maintains that all those concerned had detailed consultations about the approval rules with the Ministry of Economic Affairs.

(83) Approval was decided by an 'Erkennings-commissie' (Approval Committee), made up exclusively of representatives of the parties to the agreement and the SSI. There was a right of appeal against decisions of the Approval Committee to the Appeals Board, which was made up of persons unconnected with the cigarette industry.

Approval was on an annual basis and could be provisional while the minimum sales figure was not achieved.

(84) On 21 December 1971, the SSI, on behalf of the parties to the agreement, informed 'customers having wholsesaler status' that from 1 January 1972 the wholesalers' gross margin of 10·92 % on retail selling prices was to be raised by 0·22 % for specialist wholesale tobacconists who gave an undertaking to individual manufacturers not to give their customers a discount of more than 10·5 %.

(b) *The standard clauses on discounts and other terms of sale in the contracts between cigarette manufacturers and approved wholesalers*

(85) The contracts between manufacturers and the approved wholesalers contained the following standard clauses:

1. 'The wholesaler agrees to comply with the terms of sale laid down for him by the manufacturer, as these terms now read and including any future amendments ...';

2. 'Instead of the normal wholesaler's discount of 10·92 %, the wholesaler shall receive a discount of 11·14 % of the retail selling price, on condition that when supplying cigarettes to his customers he does not give a discount of more than 10·5 %.'

(86) Wholesalers were also required to keep their accounts in such a form that they could show they had abided by the contract. An independent third person was appointed who could be instructed by a manufacturer in exceptional cases to investigate infringements and report his findings to an advisory committee.

The possible penalties for infringements were:

(a) compulsory deposit of a security not exceeding Fl 10 000, liable to be forfeited in whole or in part if the infringement were repeated;

(b) a reduction of 0·22 % in the rate of discount for a specified period.

(87) According to the SSI, the standard clauses between manufacturers and approved wholesalers were abolished as a result of the revocation of the agreement of December 1971/February 1972.

D. THE CONSULTATIONS BETWEEN THE GOVERNMENT, THE SSI AND THE DISTRIBUTIVE TRADES

1. General

(88) Under its national legislation, the Netherlands Government has used the periodical increases in cigarette retail prices and trade margins as an opportunity for furthering objectives of fiscal policy (i.e., maximizing tax revenue), counter-inflationary prices policy (i.e., allowing manufacturers to pass on only the actual cost increases shown to be the average for the industry) and general economic and social policy (i.e., maintaining the profitability of the wholesale retail trades). For this purpose it has held consultations with manufacturers and/or the distributive trades. During these consultations the Government has indicated what it would regard as an acceptable or desirable apportionment of the new pre-tax retail prices between manufacturers and distributors, in order to prevent manufacturers taking most of the disposable part of the price increase to pass on their own cost increases for a considerable period but not allowing the distributive trades to do the same.

The Government considers that consultations with manufacturers are 'essential as a result of its prices policy and as a means of putting that policy into effect'.

In its letter dated 20 July 1981 to the Commission, the Ministry of Economic Affairs expressly stated that it was customary for the expected increase in retail prices to be indicated in the explanatory memorandum to the Law increasing tobacco excise duty, whilst the Prices Order merely gave the maximum permissible increase in the retail prices. Neither this indication in the explanatory memorandum nor the recommendations given by the Government as to the apportionment of the disposable part of price increases between manufacturers and distributors have the force of law. They do, however, mean that should this apportionment clearly be contrary to the Government's prices policy, an individual Prices Order on cigarettes could be issued, although until 1981 the need to do so had not arisen.

(89) Manufacturers have had to work within fairly narrow limits when fixing the new retail selling prices of their products, because of the high rates of tax that have to be included in the new prices, of which tax accounts for about 70 %, and the maxima that have been set on prices and on trade margins. The breakdown of the price structure per 1 000 cigarettes in the popular price category were as follows:

	Before 1 January 1980	1 January 1980 to 14 February 1981	After 15 February 1981
Retail price	Fl 104 (100 %)	Fl 120 (100 %)	Fl 130 (100 %)
Tax	Fl 72 (69·23 %)	Fl 38 (71·67 %)	Fl 94·50 (72·69 %)
Income to manufacturers and the distributive trades	Fl 32 (30·77 %)	Fl 34 (28·33 %)	Fl 35·50 (27·31 %)

After a general increase in the retail price of cigarettes, the industry has not, in the past, been able to make a further increase in prices for a period of one or two years. Interim individual increases seem also to have been impossible.

(90) At the time of a general price increase, manufacturers have been entitled to carry out the individually-permitted maximum increases but have not been bound to do so. They have, however, been bound to pay the Government the increased rate of tax.

2. **The consultations in connection with the various agreements**

(91) The notified and unnotified agreements referred to in the original statement of objections and the agreements and/or concerted practices mentioned in the supplementary statement were entered into by cigarette manufacturers/importers and/or associations of cigarette manufacturers/importers, wholesalers and retailers without the Netherlands Government being a party. To quote from the Government's statement, the price agreements and the specialist retailers' bonus scheme 'cannot be said to be an embodiment of agreements with the Government. Our involvement is confined to maximum prices and margins, within which manufacturers' room for manoeuvre may well be very limited or non-existent. The price agreements cannot be regarded as an essential part of the integration of excise duty revenue into the Government's financial and monetary policy. The 1976 agreement on rules of conduct was certainly not ... a necessary consequence of the rules on margins ...'

The Government has also stated that 'except for the consultations on the continuation of the specialist retailers' bonus scheme in 1977 and 1979 ... the Government neither "consulted with" SSI members about concluding the said agreements or measures nor "encouraged" them to do so'. At the hearing on 29 November 1979, the SSI conceded that the agreements and schemes to which the Commission took objection were of a private law nature and that no statutory duty had been imposed by the Government to establish agreements and concerted practices in the form in which it had done so.

(92) On the consultations with the Government concerning the SSI Master Agreement of 20 December 1976, see points (33) to (40) above.

(93) The specialist retailers' bonus scheme arose out of the negotiations surrounding the 1974 price increase. After unsuccessfully attempting to establish such a scheme in 1971, the specialist tobacconists made new approaches in 1974 to the Ministry of Economic Affairs seeking a structural improvement to make them better able to withstand the increasingly fierce competition from supermarkets. After joint consultations between the Ministry, the SSI and the NSO, the bonus scheme was established with the support of all sectors of the industry including wholesalers. In 1974 and 1975 the rebate or bonus was regarded as an extra amount not covered by the Prices Order and coming entirely out of the pockets of manufacturers. In 1978, the SSI claims, the Government unilaterally decided to treat the rebate as part of the usual trade margin, causing great difficulties in the negotiations with the wholesalers' organizations.

(94) Prior to the 1974 price increase, negotiations were held between the SSI and the Ministry of Economic Affairs. The Ministry of Economic Affairs was directly concerned because of the effect on the interests of the distributive trades which came within its policy on small businesses. The Ministry held simultaneous talks with the SSI and with wholesalers and retailers. The Ministry of Finance was merely kept informed of the consultations since no increase in cigarette duty was planned.

(95) The 1975 price increase was the subject of consultations between the SSI and both the Ministries of Finance and Economic Affairs. The originally planned increase in tax was not implemented, however. In the course of the talks with the Ministry of Economic Affairs, the 'current account' system of evaluating increases in costs was devised to prevent the parties being placed at an unnecessary disadvantage relative to manufacturers in other industries owing to the combined effect of the excise duty system and the Prices Orders. According to the SSI, the following statement was drawn up between it and the Ministry of Economic Affairs:

'This price increase is subject to the condition that, barring special developments, the industry does not claim another increase on the ground of increased costs for one year after the increase takes effect. Before the end of the year, consultations will be held in good

time on whether or not the increase in costs since 1974 — on the basis of the statements made in the SSI's letter of 6 June 1975 — justify an extension of the period. Account will be taken of the loss of income sustained by the industry due to the fact that the price increase was originally planned for 1 September 1975.'

In 1976, the factors to be evaluated in the 'current account' were defined as follows:

— on the credit side, the extra income received by manufacturers as a result of the price increase being Fl 0·25 instead of Fl 0·15 per packet,

— on the debit side:

(a) the loss of earnings to manufacturers resulting from the postponement of the price increase of Fl 0·15 per packet;

(b) compensation to the distributive trades for the loss of income resulting from the postponement of the price increase;

(c) passing on the remaining costs which the Ministry of Economic Affairs had allowed, amounting to Fl 0·13 per 1 000 cigarettes;

(d) the promised increase in the retailer's bonus to Fl 0·05 per 1 000 cigarettes (the extra discount to wholesalers of Fl 0·003 per 1 000 cigarettes was included in the increased wholesaler's margin);

(e) the increases in costs that had occurred in the intervening period;

(f) the margins to the distributive trades.

The 'current account' formula was also applied in later price increases.

Consultations were also held before the general price increase of 7 November 1975 between the Ministry of Economic Affairs and wholesalers' and retailers' organizations. The SSI likewise had talks with wholesalers and retailers and on a number of points agreement was reached between all concerned. Later, however, the wholesalers dissociated themselves from this agreement.

(96) For the 1978 price increase, talks were held between the manufacturers and the Ministry of Economic Affairs from January 1977. During these talks it was found reasonable that, in view of the fact that manufacturers could increase prices only at long intervals, part of future increases in costs should be allowed for, provided these could be predicted with sufficient accuracy. It was also intended that the Ministry of Economic Affairs' Economic Monitoring Unit should collect data for the evaluation of costs from a sample of representative firms.

Partly because of difficulties over application of the 'current account' formula and the Government's proposal to increase duty by Fl 0·40 per packet (the manufacturers' cost increase came to only Fl 0·10, the contacts between the Government and the SSI extended over many months. The SSI felt that such a drastic increase in tax would sharply reduce turnover, with all the implications that would have for manufacturers, the distributive trades and the Government itself (a possible fall in its total tax revenue). The SSI claims that, in view of the burdens which the tax and price increase would place on manufacturers (the disposable part of the increase for manufacturers and distributors was only Fl 0·069), the Ministry of Economic Affairs was not averse to an agreement between the manufacturers involving detailed arrangements designed to avoid a situation in which the newly-formed price categories could not stand up in the competitive environment. However, no actual agreements were concluded on this matter.

When the Government had decided on the increase in tax, it urged manufacturers to give the distributive trades the maximum increase in margins.

Consultations were also held prior to the general price increase of 1 February 1978 between the Ministry of Economic Affairs and wholesalers. The SSI also had talks with wholesalers and retailers. One of the main points discussed was whether or not the bonus to retail tobacconists and the extra margin for wholesalers were included in the calculation of the new retailers' and wholesalers' margins. The Government took the view that they should in future be included in the margin. However, it was the SSI that later informed the Government of the arrangements arrived at with wholesalers and retailers on this subject.

(97) With regard to the general price increase of Fl 0·40 per packet of 25 on 1 January 1980, the SSI has denied that the manufacturers entered into any verbal or written agreement, or engaged in any concerted practice, concerning 'setting new retail and trade prices and laying down rules

on stockbuilding and the observance of restrictions during a settling-down period, as had been customary in the past'.

However, during the last quarter of 1979 there were consultations between the Ministries of Economic Affairs and Finance and the manufacturers' and distributive trade organizations in order, as the Government put it, 'to ensure that, over the period (the two years from 1 January 1980), developments with regard to the total disposable portion of the new retail selling price accruing to manufacturers and the distributive trades as far as possible accord with the Government's wishes'. Imperial Tobacco (Holland) BV maintains that neither itself nor its distributor followed the instructions agreed between the Government and the SSI.

With regard to the agreements in connection with the increase in excise duty and prices on 1 January 1980 (see (50) to (52) above), which were notified by the SSI, the Government has stated that the agreement cannot be seen as a direct or indirect result of the consultations between it and the SSI. The Government has also denied the SSI's suggestion that it encouraged manufacturers to make agreements on prices and margins. Indeed, it claims to have urged wholesalers and retailers to negotiate margins individually. In its letter to the Commission dated 20 July 1981, the Ministry of Economic Affairs stated that from September 1979 the Government repeatedly told the industry that margins should be negotiated individually.

II. ASSESSMENT

A. APPLICABILITY OF ARTICLE 85 (1) OF THE EEC TREATY

1. The notified agreements

1.1. The specialist retailers' bonus scheme of 4 December 1974 and the SSI Master Agreement of 20 December 1976

(98) The undertakings that signed and/or have applied the specialist retailers' bonus scheme of 4 December 1974 and the SSI Master Agreement of 20 December 1976 are manufacturers or importers of cigarettes. Both agreements constitute agreements between undertakings within the meaning of Article 85 (1).

(99) The specialist retailers' bonus scheme and the SSI Master Agreement, the latter at least in so far as it requires the parties to observe the specialist retailers' bonus scheme as an integral part of the Agreement, have as their object and result an appreciable restriction of competition within the common market. The grounds for this finding are as follows:

(a) The object and effect of the agreements is that specialist retailers who satisfy certain conditions be given a standard annual rebate ('bonus') per 1 000 cigarettes on their total purchases from the parties, either direct or through one or more wholesalers, for sale to the public over the previous year. This scheme considerably restricts competition on extra discounts to retailers among manufacturers/importers, among wholesalers and between manufacturers/importers and wholesalers. The rebate is based solely on the retailer's aggregate annual turnover from all suppliers, whether parties to the agreements or wholesalers. Thus, the retailer has no incentive to concentrate his custom on one or more suppliers or render them special services in order to earn an extra discount. The scheme thereby takes away the dealer's freedom to decide what efforts to make, in conditions of free competition, in his own commercial interest.

(b) The joint restriction of the rebate to specialist retailers (i.e. tobacconists which meet the criteria laid down by the SSI (see (44) above), to the exclusion of the other types of retail outlet which play a large part in cigarette distribution in the Netherlands, such as food retailers, multiple chains and supermarkets, is a discrimination prohibited by Article 85 (1) (d). It is irrelevant that the other types of retailer may be able to negotiate special discounts individually; the fact remains that the rebate provided for under the bonus scheme is not available to them.

(c) The definition of 'specialist retailer' in the bonus scheme includes a contractual criterion additional to the statutory criteria laid down in Article 26 (1) of the Excise Duty (Tobacco Products) Law, related to the proportion of the retailer's total turnover accounted for by tobacco sales. This additional criterion places a restriction within the meaning of Article 85 (1) on certain other retailers who are unable or unwilling to meet it, by excluding them from the rebate.

(d) The following further joint requirements which are laid down in the bonus scheme and which specialist retailers must meet in order to qualify for the rebate constitute appreciable restrictions, within the meaning of Article 85 (1), on retailers:

1. The requirement to stock at least a relatively high proportion of the brands of cigarettes available on the Dutch market 'without discriminating between the parties' not only compels retailers to keep a number of brands in stock for which there is perhaps little consumer demand, thus needlessly tying up working capital, but also discourages them from concentrating their custom on suppliers who would be prepared to offer bigger discounts.

2. The requirement to help in launching all new brands means that retailers cannot decide for themselves the degree of their involvements in launches.

3. The requirement to make a certain minimum annual level of sales of cigarettes sold at prices indicated on the revenue stamps, given that this requirement can lead, and has in certain cases led, to refusals by the Specialist Retailers Committee and dismissal of appeals by the Appeals Board for the grant of supplementary bonuses.

4. The requirement to devote a minimum of shop window and counter space to displays of cigarettes or cigarette-advertising material means that retailers no longer have full control over the lay-out of their shops if they wish to qualify for the rebate.

(e) The requirements for retailers to submit annual returns of their retail sales of cigarettes and for wholesalers also running a retail tobacconist's shop to keep completely separate accounts for the shop showing the volume of retail sales from it constitute restrictions in private law on the retailers and wholesalers concerned, which are additional to the existing Government regulations on the keeping of such accounts. With the associated vetting procedure and penalties for non-compliance, those requirements also enable the cigarette manufacturers/importers parties to the agreements to ensure that their cigarettes are sold to the consumer at the retail prices they prescribe.

(f) As there is no provision for withdrawal from the bonus scheme, the parties are obliged to continue to take part in the restrictive practices even if they might wish, for private business reasons, to discontinue them.

(g) As a result of the operation of the bonus scheme, the parties are in a position, through their membership of the SSI Board, to find out the market shares of their competitors established each year by a market research firm, in spite of the fact that the SSI does not officially disclose the other parties' shares to them. The system thus poses the danger of manufacturers/importers obtaining information about their competitors enabling them to plan their strategies towards one another in a way that would not be possible if the bonus scheme were not in operation and is contrary to the principle that firms should decide their policies in the common market independently of one another.

The SSI maintains that the Board's independent chairman ensures that the commercial policy of member firms is not

discussed on the Board and that data on these matters is kept in the chairman's archives and files in his office and cannot be seen without his permission. Nevertheless these safeguards in the agreements are not sufficient to exclude the possibility of an additional restriction of competition aggravating the other restrictions resulting from the agreements. Whilst there is no objection to a firm adapting its policy to the known or expected commercial policies of competitors, steps must be taken to prevent the agreements leading to any form of direct or indirect contact between firms for the purpose of influencing the commercial policies of existing or potential competitors or informing competitors of the commercial policies they themselves have adopted or propose to adopt.

(h) The virtually general coverage of the bonus scheme with almost all cigarette manufacturers and importers in the Netherlands belonging to it means that new entrants on to the Dutch market have little alternative, by virtue of the fact that the accounting procedures for the calculation of bonuses have regard only to purchases from its members and wholesalers, but to grant retailers a better rebate than that given under the bonus scheme. This is confirmed by the facts set out at points 19 and 20 above, which show that, for a considerable period after entering the Netherlands cigarette market, Imperial Tobacco (Holland) BV and Reemtsma Nederland BV gave their customers discounts which are at least as large as those given to SSI members.

(i) The restrictions of competition are appreciable because they are carried out by almost all the undertakings in this sector of the economy.

(100) The argument that the Community Directives (see (21) to (23) above) and the Netherlands legislation on tobacco duty ((24) to (29)) and prices and margins ((30) to (32)) take the specialist retailers' bonus scheme and the SSI Master Agreement out of the scope of Article 85 (1), within the meaning of point 99 above, must fail since the agreements are private in character and were not contracted in pursuance of any statutory requirement imposed by the Government.

(a) Article 5 of Council Directive 72/464/EEC provides that cigarette manufacturers and importers should freely determine the retail selling prices of their products, subject to Government price controls, if any. This provision cannot be said to eliminate competition.

(b) Similarly, Netherlands tobacco duty legislation which imposes rather heavy taxes (see (89) above), whilst allowing less scope for competition than exists in many other industries, still leaves a sufficient margin within which manufacturers/importers and dealers could compete with one another. The resale price maintenance provisions in the Excise Duty (Tobacco Products) Law which prohibit the sale of cigarettes at above (see (26)) or below (see (27)) the prices shown on the revenue stamps do not affect the manufacturer's or importer's freedom in originally setting those prices. Moreover, exceptions from the resale price maintenance rules can be authorized.

(c) The Netherlands prices legislation, which is mainly concerned with maximum prices and margins, does not stop manufacturers/importers voluntarily reducing prices or margins, as the SSI concedes (see second paragraph of (91) above), or increasing them by a smaller percentage than is statutorily permitted. The prices legislation incidentally does not only apply to the tobacco industry in general or the cigarette trade in particular.

(d) Thus, whilst the Netherlands legal framework admittedly limits to some extent the scope for competition in the industry, it cannot be argued that there is no scope at all for competition or that the scope is so limited that there would no longer be any scope for active competition. Furthermore, it is even more important in situations where the scope of competition is limited by legislation that firms should not make agreements or engage in practices that eliminate the scope for competition that remains. This is especially true where mass-produced non-durable

consumer goods are concerned, such as in this case, since even a small price reduction at the production or import stage can have a considerable effect on the price to the consumer.

(101) The fact that the SSI held consultations on the bonus scheme with the Netherlands Government, as it did in connection with other matters (see (91) to (93) above), is no excuse for its concluding an agreement contrary to the Community competition rules. The first duty of business undertakings and their associations is to observe Community law, which the Court of Justice has long recognized as overriding national law. The Member States' sovereignty to enact legislation in pursuance of their fiscal, counter-inflationary and general social and economic policies extends only as far as that legislation does not conflict with Community law.

(102) There is a sufficient likelihood that the specialist retailers' bonus scheme and the SSI Master Agreement have affected, directly or indirectly, actually or potentially, trade between the Member States in a manner prejudicial to the attainment of a single Community market.

(103) Neither the existence of Community and national legislation nor the consultations with the Government can be cited as evidence that the restrictions on competition imposed by the agreements are not liable to affect trade between Member States. This is made particularly clear by the fact that a relatively large share (between 16 and 34 % — see point 11) of cigarettes sold in the Netherlands are imported by SSI members, Tabaksfabriek Gruno or Imperial Tobacco (Holland) BV, which distribute them on the Dutch market through the same sales networks as the products they produce themselves. This proportion is incidentally considerably higher than the percentages quoted by the Court of Justice in ground 171 of the Fedetab judgment [1].

The volume of cigarette imports into the Netherlands by SSI members, Tabaksfabriek Gruno and Imperial Tobacco is such that the agreements are likely to have diverted the flow of trade between Member States from the course it would otherwise have followed.

(104) The agreements referred to in point 98 reduce the incentive of the firms concerned to stimulate sales of foreign cigarettes through discounts or other benefits which they do not grant on other cigarettes. This affects the potential volume of imports. Here, too, the Court of Justice's Fedetab judgment, in particular ground 172, is relevant [2].

(105) The agreements and concerted practices implemented within the SSI have a preponderant influence on the Netherlands cigarette market. Consequently, it is in the interest of foreign manufacturers or their representatives attempting to penetrate that market, such as Imperial Tobacco and Reemtsma, to adopt immediately conduct identical to that of SSI members, even if they do not formally join it or do not formally accede to the agreements. Account should also be taken of the fact that it is in the newcomers' interest to use the same distribution system as SSI members since, if they wished to choose another distribution policy, they would have to incur higher costs in penetrating the Netherlands market.

1.2. The agreements connected with the increase in excise duty and prices on 1 January 1980

(106) The understanding between the SSI and wholesalers' and retailers' organizations in connection with the increase in excise duty and prices on 1 January 1980 (see (50) to (52) above) involved both a set of agreements between associations of undertakings within the meaning of Article 85 (1) and an agreement between the members of the SSI. The understanding was between the SSI and wholesalers and the SSI and retailers, and the various parties involved were acting as the official (in the case of the SSI, Tabak Express, the EGV and the NSO) or unofficial (in the case of the independent wholesalers) representatives of business undertakings.

[1] Joined Cases 209-215 and 218/78 Heintz van Landewijck Sarl and Others v. Commission [1980] ECR 3125 at 3274.

[2] [1980] ECR 3275.

An understanding between associations of undertakings may constitute an agreement within the meaning of Article 85 (1) even if its terms have not been set down in a written document signed by the parties.

(b) Consultations between manufacturers and wholesalers on the response to changes in the specific duty component, new price increases and the like (see (51) (c), (d) and (e) above) further reduce the scope left within the legal framework for competition between firms in the various parts of the industry, with the result that 'effective competition' between them can no longer be said to exist. The remarks in the last paragraph of point 107 (a) apply as regards the horizontal and vertical aspect of this restriction.

(107) The agreements have as their object and effect an appreciable restriction of competition. They cover a major market area where competition between firms in the industry remains possible and have the object and have had the effect of substantially reducing competition in that area between firms belonging to the various sections of the cigarette industry since 1 January 1980. The grounds for this finding are as follows:

(108) For the reasons set out at points 102 to 105 above, the agreements are likely to have appreciably affected trade between Member States.

2. The unnotified agreements and concerted practices

2.1. The price agreements between cigarette manufacturers and/or importers

(a) The fixing of maximum margins to wholesalers (see (51) (a) above), on 'car sales' (see (51) (b)) and to retailers supplied direct by the manufacturer/importer (see (52) (a)) prevents wholesalers and manufacturers/importers from deciding or negotiating such margins independently subject only to observance of the relevant national legislation (in so far as it is not contrary to Community law). The fact that national authorities happened to have imposed a ceiling on the increases in the margins to the distributive trades did not entitle firms in the industry to take action of their own that was likely to reduce the scope for competition still further. Indeed, the Government repeatedly advised the trade before the price increase that margins should be individually negotiable (see (91) above).

(109) The unnotified agreements described at points 54 to 75 above, constituted agreements between undertakings within the meaning of Article 85 (1). All the parties who signed and/or applied the agreements were cigarette manufacturers and/or importers.

(110) The price agreements had as their object and effect an appreciable restriction of competition within the common market, for the following reasons:

(a) First of all, these agreements laid down increased retail selling prices for cigarettes in various price categories (see (54) and (55),(58) and (59), (66) and (67) and (73) to (75) above). Article 85 (1) (a) specifically mentions among the types of agreement between undertakings that are prohibited as incompatible with the common market, agreements which directly or indirectly fix selling prices.

The fact that, according to the SSI, the agreements were drawn up after consultations with the Government aimed at ensuring that the price increases did not fail to generate the desired increase in tax revenue is no justification for concluding the agreements.

The resultant restrictions affect not only the relations between the individual members of the associations of undertakings taking part but also those between the associations representing the various sections of the cigarette industry, since, whilst each association endorsed the understanding on behalf of its own members, the various associations had reached this understanding with one another.

The Netherlands Excise Duty (Tobacco Products) Law (see (24) to (28) above) does not provide that a given brand of cigarette must always be sold at the same retail price, but only that it must not be sold other than for resale at above the maximum price or below the minimum price.

Reference should be made in this connection to the Court of Justice's judgment of 16 November 1977 in Case 13/77 [1], in particular grounds 17 to 22, where it is stated that the imposition of maximum prices is usually designed to safeguard tax revenue, whilst the reasons for imposing those prices as minimum prices are not necessarily fiscal but socio-economic, namely to prevent excessive concentration in the retail trade by stopping small retailers being forced out of business through cut-price selling.

It is also an underlying principle in the EEC Directives (see (21) to (23) above) that there should be no distortion of competition in the industry and that cigarette manufacturers and importers should determine their maximum retail prices independently, subject to any national price control

(b) Under the price agreements, the parties were required to set a minimum quantity for direct delivery to specialist retailers and to charge wholesalers the same price regardless of the quantity delivered (see (56), (63), (72) and (74) above). These requirements constituted appreciable restrictions on retailers and wholesalers respectively, especially when they were used to reinforce the effect of the restriction on competition arising from the agreement on fixed retail prices (see (110) (a) above).

(c) Whilst the agreements were in force, the parties were required to restrict their sales of cigarettes in certain price categories to below a certain percentage increase on previous sales levels (see (56), (61), (69) and (74) above).

This requirement, especially when used to reinforce the effect of the restriction arising from the agreement on fixed retail prices (see (110) (a) above), can only perpetuate existing market shares, as manufacturers would otherwise be able to meet any increased demand for their products above the percentage to which they had agreed. This could mean parties being unable to meet some customers' orders and losing potential sales. The fact that these restrictions applied only for a limited period does not make them any less severe, especially as they were in operation during the crucial period following a price increase during which its effects are strongest.

The ban on manufacturers/importers changing the range of brands or packet sizes they offered while the agreement was in operation (see (56), (60) and (68) above) also prevents them from bringing new products or old products in new sizes of packet on to the market and thereby denies consumers an increased choice. Moreover, this prohibition was part of a set of collective measures designed to keep competition in the industry under the tightest possible control during a certain period.

The fact that competition in the cigarette market is also directed at aspects other than price (see last paragraph of (56) above) does not make agreements between manufacturers and importers which include restrictions on price competition compatible with the Community competition rules since, in general, price is one of the most important factors in the consumer's decision to buy goods.

(d) Many of the agreements prescribed the margins which manufacturers/importers were to allow wholesalers and directly-supplied retailers respectively (see (54), (62) to (65) and (73) above). This prevented the parties from competing on the margins they allowed their customers. These margins mainly took the form of a certain percentage of two retail

[1] GB-INNO-BM v. ATAB [1977] ECR 2115 *et seq.*

prices. The margin took no account of any special promotion effort performed by the wholesaler or retailer. The only form of incentive to wholesalers was the standard extra cash rebate for every 1 000 cigarettes sold. However, as this was the same for all brands, it could not serve to stimulate competition between brands. Nor could any part of the extra discount be passed on to retailers or consumers since retail prices were fixed. Wholesalers were in any case prevented by their fixed margins from competing with one another on their selling prices to retailers.

The Prices Orders cannot be claimed as the basis of this system of uniform prescribed margins, since these only lay down the maximum margin that may be allowed.

(111) The price agreements of 1 August 1974 and 7 November 1975 (see (65) and (71) above) prescribed a bigger margin for wholesalers who had been approved than for those who had not. This discriminated in a manner contrary to Article 85 (1) against non-approved wholesalers who were unable or unwilling to meet the parties' approval requirements.

(112) For the reasons set out at points 102 to 105 above, the price agreements are likely to have appreciably affected trade between Member States.

2.2. The agreement of 23 April 1975 on rules of conduct in the cigarette trade

(113) The unnotified agreement described at points 76 to 80 above was an agreement between undertakings within the meaning of Article 85 (1). All the parties who signed and/or applied the agreement were cigarette manufacturers and/or importers.

(114) The agreement had as its object and effect an appreciable restriction of competition within the common market, for the following reasons:

(a) The clause whereby the parties were strictly forbidden to grant their customers extra benefits other than what was provided for in the agreement (see (77) above) prevented them from competing with one another on extra discounts or benefits in kind (such as free packets of cigarettes or free or cut-price matches), which in normal circumstances might well sway a customer's decision to buy from a particular supplier.

The effect of this ban was reinforced by the clause specifically prohibiting the parties from meeting demands for extra discounts from large-scale customers, who account for a large and in recent years sharply increasing proportion of cigarette distribution to the final consumer. The restrictive effect was also increased by the supervision of sales budgets to ensure that they left no margin for such extra benefits.

(b) The clause laying down the maximum discounts that could be granted when launching new brands and limiting the period during which such discounts could be given prevented manufacturers and importers from competing with one another in the promotion of new brands by giving wholesalers and retailers extra discounts. Percentage discounts off the selling price, which are the commonest form of discount, were expressly forbidden.

Competition on 'car sales' was also restricted by the circulation to manufacturers of maximum percentage discounts. Although the 'car sales' market may be small, it is quite possible that the offer of discounts freely and independently set by manufacturers/importers above the percentages agreed within the SSI would have made one manufacturer's or importer's brands more attractive to customers than those of his competitors; the members of the SSI after all apparently saw a need to regulate this market, to however limited an extent.

(c) The effect of the restrictions described at point 114 (a) and (b) was reinforced by a number of other clauses (see (79) above) which prevented cigarette manufacturers/importers from competing in certain areas other than discounts and their customers from negotiating more favourable terms from them.

(d) The institution of a procedure for vetting particular practices for conformity with the rules of conduct (see (80) above) reinforced the restrictive effect of the rules on any firm that might wish to pursue a vigorously competitive policy.

(115) For the reasons set out at points 102 to 105 above, this agreement is likely to have appreciably affected trade between Member States.

2.3. The agreements on approval of wholesalers (prior to the Master Agreement)

2.3.1. *The agreement of December 1971/ February 1972*

(116) This agreement had as its object and effect an appreciable restriction of competition within the common market, for the following reasons:

(a) The requirements which wholesalers had to meet in order to qualify for an extra margin constituted appreciable restrictions on those who had to ensure that they did so and on those unable or unwilling to do so. These requirements were:

(i) to supply a minimum number of retail outlets;

(ii) to stock a relatively high minimum proportion of the range of brands sold by the parties;

(iii) to have a minimum annual turnover in the parties' cigarettes.

For the same reasons as set out at point 99 (d) above, these requirements acted as a restriction on competition.

(b) The fact approval was given only for one year at a time and in certain circumstances might only be provisional allowed the SSI to exercise constant supervision of compliance with the requirements and to impose sanctions for non-compliance. This undoubtedly increased the restrictive effect of the agreement.

(c) The restriction of the extra margin to approved wholesalers discriminated in a manner contrary to Article 85 (1) against wholesalers unable or unwilling to meet the requirements for approval.

(d) The fixing of margins at a certain percentage of the retail selling price prevented the parties from competing on the margins they allowed to wholesalers.

(e) The granting of a bigger margin on condition that the wholesalers did not give their own customers more than a certain percentage margin prevented wholesalers from earning a bigger margin for extra effort and restricted retailers' margins, thereby obstructing competition at the retail level.

(117) An important consideration in assessing the restrictiveness of the agreement is its collective element, namely that it was signed by all members of the SSI and also one non-member (see (81) above) and that it was intended to regulate the manufacturers/importers' commercial relations with the distributive trades.

(118) For the reasons set out at points 102 to 105 above, the agreement is likely to have appreciably affected trade between Member States.

2.3.2. *The standard clauses on discounts and other terms of sale in the contracts between cigarette manufacturers and approved wholesalers*

(119) These clauses had as their object and effect an appreciable restriction of competition within the common market, for the following reasons:

(120) (a) The general obligation to comply with the terms of sale laid down by the manufacturer, including any subsequent amendments thereto, involved a restriction on the wholesaler.

(b) The clause whereby a bigger margin was granted on condition that the wholesaler limited the size of the margin he gave to retailers involved discrimination and other restrictions, as described at point 116 (c) to (e) above.

(c) The institution of a procedure for supervising compliance with the clauses and the provision of penalties for non-compliance increased their restrictive effect.

(121) An important consideration in assessing the restrictiveness of these standard clauses is the fact that, although contracted individually, they were intended to regulate the commercial relations between cigarette manufacturers/importers and wholesalers.

(122) For the reasons set out at points 102 to 105 above, the clauses are likely to have appreciably affected trade between the Member States.

2.4. The concerted practices on margins to specialist retailers

2.4.1. *The concerted practice between manufacturers/importers involving the granting of a fixed margin to directly-supplied specialist retailers*

(123) The granting by the manufacturers/importers referred to below of the same margin to directly-supplied specialist retailers (see (19) above), namely:

— 10·7 % of the retail price on the revenue stamp, over the period December 1971/February 1972 until 31 January 1978 by members of the SSI and Tabaksfabriek Gruno and the period 1977 until 31 December 1978 by Imperial Tobacco, and

— 9·8 % of the retail price on the revenue stamp, over the period 1 February 1978 until 31 December 1979 by members of the SSI, Tabaksfabriek Gruno and Imperial Tobacco and the period 1 October 1979 until 31 December 1979 by Reemtsma,

constituted a concerted practice between the members of the SSI and Gruno, as well as Imperial Tobacco and Reemtsma for the whole period during which they themselves distributed their brands. The parties are cigarette manufacturers and/or importers and hence undertakings within the meaning of Article 85 (1). That these undertakings consistently applied the same margins and always maintained a common front when new agreements were made is clearly evidenced by the documents of the case.

This was a concerted practice which was the result of coordination manifested in the behaviour of the participants and led to conditions of competition which cannot be regarded as normal. It is inconceivable that the practice was simply a product of the market situation without contact between the participants.

(124) The practice had as its object and effect an appreciable restriction of competition. By giving their directly-supplied specialist retailer customers no more than the same basic margin, manufacturers and importers substantially reduced or eliminated competition between them in this area of their sales. The basic trade-discount or margin is one of the most important, if not the only, areas in which suppliers can compete with one another, since it is the retailer's chief and most direct source of income, overriding any other benefits in money or money's worth that might be obtainable. Because of the existence, and observance by SSI members, of the rules of conduct prohibiting them from granting customers extra benefits other than the basic trade-discounts (see (76) to (80) above), specialist retail tobacconists could not in fact receive any significant extra benefits from manufacturers or importers. Although the rules were mainly applicable to sales to wholesalers, it has not been established that SSI members gave direct retailer customers extra benefits either. It should be emphasized that Netherlands law does not require the grant of a fixed margin of this kind. The fact that direct sales account for only 4 to 5 % of supplies to the retail trade does not diminish the restrictive effect

of the concerted practice, especially as wholesalers tended to take the SSI margin to specialist retailers as a guide when setting their own margins to such customers (see the last part of (18) above).

(125) The fact that Netherlands law imposes ceilings on the increases in trade margins (and prices) does not diminish the restrictive effect of the concerted practice. Whilst cigarette wholesalers in the Netherlands are clearly bound to observe Government regulations, they are prohibited under Community competition rules from engaging in concerted practices, among themselves or in association with manufacturers/importers, which go beyond those regulations. Furthermore, although the Netherlands Government traditionally indicated to the distributive trades and/or manufacturers prior to a general increase in cigarette duty and prices what it would regard as an acceptable or desirable apportionment of the pre-tax retail prices (see (66) above), neither manufacturers nor the distributive trades were obliged to follow its recommendations, let alone adopt standard margins.

The fact that the Netherlands Government held consultations with manufacturers and the distributive trades prior to general increases in cigarette duty and prices is no justification for engaging in a concerted practice contrary to the Community competition rules.

Although tax accounts for some 70 % of the labelled retail prices of cigarettes and swallows up the bulk of any price increase, there is still a sufficient margin within which both manufacturers/importers and wholesalers could compete with one another. Within the limits allowed by the law, manufacturers/importers and wholesalers should be free to decide individually what proportion of the retail price they wish to retain as their profit margin.

(126) As regards the appreciable impact of these concerted practices on trade between Member States, the statements made in points 102 to 105 are equally applicable here.

2.4.2. *The concerted practice involving the setting of a maximum rate for the margin allowed by wholesalers to specialist retailers*

(127) The setting of a maximum rate for the margin allowed by wholesalers to specialist retailers, namely 10·5 % of the labelled retail price over the period December 1971/February 1972 to 1 February 1978 and 9·8 % over the period 1 February 1978 until 31 December 1979 (see (19) above), constituted a concerted practice between SSI members and Tabaksfabriek Gruno and between these and the wholesalers and their associations (Tabak Express, EGV and the independent wholesalers), all being undertakings or associations of undertakings within the meaning of Article 85 (1).

With reference to the period December 1971/February 1972 to 1 February 1978, it should be taken into account that the agreement of December 1971/February 1972 contained a general clause (see (84) above) under which specialist wholesale tobacconists had to promise individual manufacturers not to give their specialist retailer customers more than a 10·5 % discount. A similar clause was contained in the standard contracts between manufacturers and approved wholesalers (see (85) above). These facts are sufficient evidence of the concerted practice alleged in the previous subparagraph. Moreover, at no point during the proceedings in this case have the parties denied applying a maximum margin.

As for the grant of a standard maximum discount for the period 1 February 1978 to 31 December 1979, the concerted practice then in operation can be seen as a continuation, reflecting the structure of the market, of the concerted practice of December 1971/February 1972 to 1 February 1978, despite the fact that the agreements between manufacturers and wholesalers had officially been terminated.

(128) This concerted practice had as its object and effect an appreciable restriction of competition. The maximum rate for retailers' margins prevented wholesalers passing on a bigger proportion of their gross margin. This restriction was exacerbated by the fact that the maximum rate was the same as the standard margin given by manufacturers/importers, so that wholesalers were unable to grant a bigger margin than

manufacturers/importers. The measure thus restricted competition in this sector of the market not only among wholesalers but also between wholesalers and manufacturers/importers, at least in respect of direct supplies to specialist retailers.

(129) The observations in point 125 above apply to the argument that the restriction on competition resulting from the concerted practice was necessitated by Netherlands legislation.

(130) As regards the appreciable impact of these agreements on trade between Member States, the statements made in points 102 to 105 are equally applicable here.

B. APPLICABILITY OF ARTICLE 85 (3) OF THE EEC TREATY

(131) Article 85 (3) states that the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings 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:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. The notified agreements

1.1. The specialist retailers' bonus scheme of 4 December 1974 and the SSI Master Agreement of 20 December 1976

(132) The provisions of the specialist retailers' bonus scheme and the SSI Master Agreement, the latter at least in so far as it requires the parties to observe the specialist retailers' bonus scheme as an integral part of the Agreement, fail several of the tests for exemption laid down by Article 85 (3). It is sufficient for an agreement to fail only one of the tests for an exemption from Article 85 (1) not to be granted.

(133) The scheme under which a standard annual rebate is granted to retail tobacconists, however objective the criteria for granting it might be (see (43) and (44) above), does not contribute to improving the distribution of the products of the manufacturers/importers who subscribed and/or have applied the scheme. It prevents retailers from earning a rebate related to their individual efforts in the distribution of the products rather than merely to their total sales. The imposition on retailers of requirements that may conflict with their buying and selling policy and their disqualification from the rebates should they fail to meet those requirements do not contribute to an improvement in distribution.

(134) The requirement that all retailers' sales of tobacco products must account for a minimum percentage of their total business (see (43) above) does not necessarily contribute to improving the distribution of cigarettes. The only persons to benefit are the manufacturers/importers, whose sales are thereby boosted. Also, by favouring the large rather than the small retailer, the rule runs counter to one of the declared aims of the bonus scheme of protecting the specialist retailer in that it depends exclusively on the total turnover of tobacco products.

(135) The requirement that all retailers must stock a certain proportion of the range of brands available (see (44) (a) above) does not necessarily improve the distribution of cigarettes, since retailers themselves are in the best position to decide how many brands they need to stock in order to meet the demand from their customers, and to practice efficient stock control taking

account of product freshness and facts such as the lack of demand for certain products. Compliance with this requirement may involve increased costs and other disadvantages for retailers which are not outweighed by any benefits to the consumer.

(136) The requirements that the retailer must use a minimum proportion of his shop window and counter space to display cigarettes (see (44) (b) above) and to assist in launching new brands (see (44) (c)) do not necessarily contribute to improving the distribution of cigarettes. They favour mainly manufacturers and importers, together with those who resell cigarettes. Indeed, these requirements are intended solely to boost sales of the products in question. The consumer does not receive any benefit as long as his demand is met.

(137) The requirement that the retailer must have minimum annual sales of cigarettes (see (44) (d) above) does not contribute to improving the distribution of cigarettes and benefits only the manufacturers/importers without yielding any benefit to consumers. The fact that the aggregate sales figure is taken regardless of the source of supply (manufacturer/importer or wholesaler) discourages retailers from attempting to make manufacturers/importers and wholesalers compete for their business. Such a situation can only benefit manufacturers/importers and wholesalers.

(138) The hypothetical benefits deriving from the requirements described at points 132 to 137 above are chiefly benefits to cigarette manufacturers/importers. The requirements are not indispensable to the attainment of the objectives in view. The disadvantages, mainly to retailers, outweigh any such benefits to them and prevent consumers receiving a fair share of them as would be necessary for the benefits to outweigh the disadvantages.

1.2. The agreements connected with the increase in excise duty and prices on 1 January 1980

(139) These agreements do not contribute to improving the production or distribution of cigarettes.

The argument that they help to keep in business a large number of retail outlets must fail, because it is not for the industry itself to decide whether a large number of retail outlets is needed. It is primarily for consumers to decide where they want to buy their cigarettes, either from specialist shops or elsewhere. The sector in question should have sufficient flexibility to respond to consumer preferences.

The argument that these agreements help to make a wider range of brands available to consumers at a large number of retail outlets also fails, since this, too, is primarily a matter for the consumer to decide. The fact that the majority of smokers patronize a small number of brands, each of which holds a large share of the market, indicates that it is unlikely the consumer needs or sets any store by such a large range of brands.

It is also impossible to see how any other alleged aims of the agreements could contribute to improving distribution.

(140) Consumers do not receive a fair share of any benefit which might result from the agreements. Any benefit accrues mainly, if not exclusively, to the manufacturers/importers and wholesalers/retailers, to whom the agreements guarantee either a fixed income or an income higher than they could earn in a normal competitive environment.

(141) Even accepting that the purpose of the agreements was to guarantee tobacco wholesalers and retailers a steady income, it is impossible to believe that the restrictions the agreements imposed were indispensable for that purpose. There is no reason why dealers whose activities are subject to market forces and who are obliged to adapt to changing situations on the market should not be able to earn enough to stay in business, without the need for schemes such as that described.

(142) The agreements have the object and effect of eliminating competition in respect of a substantial part of the products in question. The manufacturers and/or importers who were parties to the agreements produce or import

almost all the cigarettes sold in the Netherlands. They are the backbone of a distribution system, largely of their making, which affords them the possibility of eliminating competition for a substantial part of the products in question.

2. The unnotified agreements and concerted practices

(143) In order that an exemption decision may be made under Article 85 (3), a new agreement or a new concerted practice must have been notified to the Commission in accordance with Article 4 (1) of Regulation No 17 unless the obligation to notify is inapplicable by virtue of Article 4 (2) of that Regulation.

The agreements and concerted practices in question do not fall within one of the categories not requiring to be notified by virtue of Article 4 (2) of that Regulation. They do not fall within Article 4 (2) (1) because, although like the notified agreements they are concerned with the distribution of cigarettes in the Netherlands, they also have a direct bearing on imports and exports between Member States, in view of the large quantities of cigarettes imported into the Netherlands by the manufacturers/importers participating or having participated in them (see (11) above). It also should be noted that some of these imported cigarettes are manufactured by firms belonging to the same group in other Member States and are distributed through the same channels as cigarettes manufactured by the firms in the Netherlands. As long as the agreements and concerted practices have not been notified, the Commission cannot grant them an exemption under Article 85 (3).

In any case, even if the agreements and concerted practices fulfilled the conditions of Article 4 (2) of Regulation No 17 and were not subject to the obligation to notify, an exemption under Article 85 (3) could not be granted for the reasons set out below.

2.1. The price agreements

(144) The agreements between manufacturers covering the retail selling prices of their products and the margins on those prices to be allowed to their trade customers did not contribute to improving the distribution of the products, and the resulting benefit accrues solely to the manufacturers/importers concerned and no part of it to consumers.

(145) The restrictions which were in effect during the agreements against manufacturers or importers changing their range of brands or the sizes of packet in which brands were sold or allowing their sales to increase beyond certain limits did not contribute to improving the distribution of the products and benefited solely the manufacturer/importer, whose market shares they were meant to stabilize. Such restrictions were a burden rather than a benefit for the distributive trades since manufacturers/importers would be unable to meet their requests for changes in brand ranges or packet sizes or for supplies in excess of the maximum increase.

(146) The classification of wholesalers into approved and non-approved, whereby the approved category of wholesalers was granted more favourable terms, namely a higher rate of trade-discount, than other wholesalers, did not contribute to improving the distribution of the products concerned, and would not have done so even if the classification had been based on common criteria the fulfilment of which could be objectively recognized. Classification of wholesalers on the basis of such criteria cannot take account generally of all the efforts and services they actually undertook.

(147) The requirement to set a minimum quantity for delivery to retail tobacconists was solely of benefit to the suppliers, whose sales it was intended to increase. It was, if anything, a burden on retailers since it restricted their control over their purchasing and selling policies.

(148) The obligation to charge the same price regardless of the quantity delivered was to the purchasers disadvantage since it prevented them from negotiating a price related to the size of the order. It also involved a disadvantage for consumers, who were denied the benefits which cigarette dealers would have been able to pass on to them, at least in part, if they had been able to negotiate a price related to the quantity delivered.

2.2. The agreement of 23 April 1975 on rules of conduct in the cigarette trade

(149) The obligations undertaken by the parties to this agreement did not contribute to improving the distribution of cigarettes since they prevented manufacturers/importers from granting wholesalers and retailers discounts related to the actual work they performed in the distribution of the products.

2.3. The agreements on the approval of wholesalers

(150) The requirement for the wholesaler to supply a minimum number of retail outlets and have a minimum annual turnover of cigarettes did not contribute to improving distribution; the resulting benefit accrued solely to the manufacturer/importer and no part of it to consumers since these rules were solely intended to boost sales.

(151) The requirement to stock a minimum number of brands of cigarettes did not necessarily contribute to improving distribution and did not yield any benefit to consumers such as would outweigh the disadvantages.

(152) The classification of wholesalers into approved and non-approved and the granting of a higher rate of discount to the former did not contribute to improving distribution, since the more favourable terms given to a particular group of wholesalers were unrelated to the individual services they rendered to distribution. The system was of no benefit at all to consumers.

(153) The granting of the fixed margins to wholesalers did not contribute to improving distribution and benefited only the manufacturers/importers by relieving them of the need to compete with one another on margins, but was of no benefit to consumers.

(154) The clause imposing a general obligation on the wholesaler to observe the manufacturer's terms of sale mainly benefited the manufacturer but was of no benefit to the consumer since it was liable to place the distributive trades in a position of complete dependence on manufacturers.

(155) Any benefits that might have resulted from the above arrangements accrued mainly to the cigarette manufacturers/importers. The disadvantages outweighed any such benefits and prevented consumers receiving a fair share of them, as would be necessary if the benefits were to outweigh the disadvantages.

2.4. The concerted practices on margins to the distributive trades

(156) These concerted practices did not contribute to improving the distribution of cigarettes. They significantly restricted competition between suppliers (manufacturers/importers and wholesalers), without allowing consumers a fair share of the resulting benefit. The argument that the concerted practices helped to stabilize incomes in the cigarette trade and thereby to keep specialist tobacconist shops in business must fail, since it was not the job of those who engaged in the concerted practices to take action of this kind. It is primarily for purchasers and consumers to influence the organization of distribution channels through their purchasing habits in such a way that they adapt to demand and not merely attempt to keep themselves in business. Reference is also made to the observations in point 141 above.

C. APPLICABILITY OF ARTICLES 3 AND 15 (2) OF REGULATION No 17

1. Ending of the infrigements

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

1.1. The notified agreements

(158) For the reasons set out above, the specialist retailers' bonus scheme, which has been in force from 12 August 1974 to date, constitutes an infringement of Article 85. The undertakings which signed and/or have applied this agreement

should therefore be required to terminate it without delay and to refrain from any other agreement or concerted practice having the same object and/or effect. The SSI, as the association of undertakings which played an active part in devising and administering the agreement, should also be required to terminate that agreement and to refrain from any practice having the same object and/or the effect.

(159) The SSI Master Agreement, in so far as it requires observance of the specialist retailers' bonus scheme, also constitutes an infringement of Article 85. The association of undertakings and individual undertakings concerned should therefore be required to terminate the relevant section of that Agreement, which has been in force since 20 September 1977.

(160) For the reasons set out above, the agreements between the SSI and the wholesale and retail trades in connection with the increase in excise duty and prices on 1 January 1980 constitute infringements of Article 85. The associations of undertakings concerned should therefore be required to terminate any of the agreements that are still in force. In addition, the associations should inform their members, or the undertakings they represent, that the agreements are terminated.

1.2. **The unnotified agreements and concerted practices**

(161) For the reasons set out above, the concerted practices on the margins to specialist retailers constitute infringements of Article 85 (1). The undertakings concerned should therefore be required to terminate any of the practices that are still in operation.

2. **Fines**

(162) Article 15 (2) of Regulation No 17 empowers the Commission to impose by decision a fine on undertakings of from 1 000 to 1 000 000 units of account, or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings concerned, where either intentionally or negligently the undertakings infringe Article 85 (1) of the Treaty. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

2.1. **The *notified* agreements**

(163) The Master Agreement and the specialist retailers' bonus scheme were not notified until 20 September 1977, although the bonus scheme had been in operation since 12 August 1974. The agreements, which for the reasons set out above constitute infringements of Article 85 (1), therefore render the association of undertakings and the individual undertakings concerned liable to fines.

(164) However, the Commission considers that it would not be appropriate to impose fines for these infringements, in view of the fact that its decision in the Fedetab case, which was concerned with agreements between firms in the same industry and covered comparable, if not identical, issues, was not taken until 24 July 1978 and the Court of Justice did not give judgment on the appeal against the decision until 19 October 1980.

(165) The agreements between the SSI and the wholesale and retail trades in connection with the increase in excise duty and prices on 1 January 1980, which have also been found to be infringements of Article 85 (1), were notified to the Commission immediately, so that under Article 15 (5) of Regulation No 17 the parties to the agreements are not liable to fines.

2.2. **The unnotified agreements and concerted practices**

(166) The abovementioned unnotified agreements and concerted practices, which are found for the reasons set out above to be infringements of Article 85 (1) (see (109) to (129) above), render the associations of undertakings and individual undertakings concerned liable to fines.

(167) The following factors have been taken into account by the Commission in fixing the amount of the fine:

(a) The price agreements referred to above, which can affect trade between Member States, constitute serious infringements of the Community competition rules. Agreements covering selling prices are specifically mentioned in Article 85 (1) (a) among the prohibited measures that prevent, restrict or distort competition. In earlier decisions the Commission has held price agreements to be

contrary to Article 85 (1) and has been confirmed in this view by the Court of Justice.

(b) The price agreements in question were each concluded for a period of three to five months (see (58), (66) and (73) above) from each new general price increase, which was the period during which scope for price competition was greatest.

(c) The freedom of manufacturers and importers in making price increases was limited, though not eliminated, by the legal framework.

(168) The Commission considers that fines of the amounts stated in Article 5 of this Decision should be imposed on the undertakings there mentioned.

(169) The Commission does not consider fines appropriate in respect of the other unnotified agreements and concerted practices,

HAS ADOPTED THIS DECISION:

Article 1

The following agreements constitute infringements of Article 85 (1) of the Treaty establishing the European Economic Community:

1. The specialist retailers' bonus scheme of 4 December 1974 and, in so far as it requires the parties to observe the bonus scheme, the 'Stichting Sigarettenindustrie' Master Agreement of 20 December 1976, which have been applied by the members of the Stichting Sigarettenindustrie and also by Tabaksfabriek Gruno BV and Imperial Tobacco (Holland) BV;

2. The agreements between the members of the Stichting Sigarettenindustrie and between Stichting Sigarettenindustrie and the representatives of the cigarette wholesalers and retailers in the Netherlands in connection with the increase in excise duty and prices on 1 January 1980.

Article 2

The following agreements and concerted practices constituted infringements of Article 85 (1) of the Treaty establishing the European Economic Community:

1. The price agreements of 1 August 1974 and 7 November 1975, signed by members of the Stichting Sigarettenindustrie, and the price agreement entered into by members of the Stichting Sigarettenindustrie in connection with the price increase on 1 February 1978;

2. The agreement on rules of conduct in the cigarette trade of 23 April 1975, signed by British-American Tobacco Co. (Nederland) BV, Sigarettenfabriek Ed. Laurens BV, Koninklijke Bedrijven Theodorus Niemeyer BV and Turmac Tobacco Co. BV, and also applied by Tabaksfabriek Gruno BV;

3. The agreement of December 1971/February 1972 on approval of wholesalers, signed by the members of the Stichting Sigarettenindustrie and by Tabaksfabriek Gruno BV, and the individual clauses on discounts and other terms of sale concluded by manufacturers and recognized cigarette wholesalers on the basis of this agreement;

4. The concerted practice between the members of the Stichting Sigarettenindustrie, Tabaksfabriek Gruno BV, Imperial Tobacco (Holland) BV and Reemtsma Nederland BV relating to the grant of a fixed margin to direct specialist retailer customers and the concerted practices between the members of the Stichting Sigarettenindustrie, Tabaksfabriek Gruno BV and cigarette wholesalers in the Netherlands relating to the grant of the same maximum margin for wholesalers' deliveries to specialist retailers.

Article 3

The application for an exemption under Article 85 (3) of the EEC Treaty in respect of the agreements referred to in Article 1 is hereby refused.

Article 4

The Stichting Sigarettenindustrie and the undertakings listed in Article 1 shall cease to apply these agreements without delay.

The shall also refrain from taking any action in the future with the same object or effect as the agreements referred to in Article 1.

Article 5

1. For their involvement in the infringements referred to in Article 2 (1), the following fines are hereby imposed on the following undertakings :

(1) British-American Tobacco Co. (Nederland) BV, Amsterdam,

a fine of 350 000 ECU,
i.e. 913 094 Dutch guilders;

(2) Sigarettenfabriek Ed. Laurens BV, The Hague,

a fine of 425 000 ECU,
i.e. 1 108 757 Dutch guilders;

(3) De Koninklijke Bedrijven Theodorus Niemeyer BV, Groningen,

a fine of 100 000 ECU,
i.e. 260 884 Dutch guilders;

(4) Philip Morris Holland BV, Amstelveen,

a fine of 125 000 ECU,
i.e. 326 105 Dutch guilders;

(5) R. J. Reynolds Tobacco BV, Hilversum,

a fine of 150 000 ECU,
i.e. 391 326 Dutch guilders;

(6) Turmac Tobacco Co. BV, Amsterdam,

a fine of 325 000 ECU,
i.e. 847 873 Dutch guilders.

2. These fines shall be paid to Amrobank, Amsterdam, to the account of the Commission of the European Communities No 41 60 95 518, within three months of the date of notification of this Decision to the undertakings concerned.

Article 6

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

Article 7

This Decision is addressed to:

— Stichting Sigarettenindustrie, The Hague,

— British American Tobacco Co. (Nederland) BV, Amsterdam,

— Sigarettenfabriek Ed. Laurens BV, The Hague,

— De Koninklijke Bedrijven Theodorus Niemeyer BV, Groningen,

— Philip Morris Holland BV, Amstelveen,

— R. J. Reynolds Tobacco BV, Hilversum,

— Turmac Tobacco Co. BV, Amsterdam,

— Tabaksfabriek Gruno BV, Nijkerk,

— Imperial Tobacco (Holland) BV, Boxtel,

— Reemtsma Nederland BV, De Bilt,

— Tabak Express Nederland, Maarsbergen,

— Eerste Grossiers Vereniging (EGV), Sassenheim,

— Mr His Wilms, Hippolytushoef, as representative of the independent wholesalers,

— De Nederlandse Sigarenwinkeliers Organisatie, The Hague.

This Decision shall be enforceable in accordance with Article 192 of the Treaty establishing the European Economic Community.

Done at Brussels, 15 July 1982.

For the Commission

Frans ANDRIESSEN

Member of the Commission