OPINION OF ADVOCATE GENERAL JACOBS

delivered on 30 January 2003 [1]

Introduction

1. This case concerns the scope of a principle firmly established in Community law, the so-called 'State action defence'. Under that principle, undertakings charged with an infringement of the competition rules in Articles 81 or 82 EC can claim that their conduct falls outside the scope of those rules where it was required by national legislation or where the national legal framework itself eliminated any possibility of competitive activity on their part.

2. What is mainly at issue in the present case is whether Community law empowers, or even obliges, a national competition authority which is investigating the conduct of certain undertakings to disapply — as itself being contrary to the Treaty — national legislation that requires those undertakings to engage in anti-competitive conduct, and thereby to remove — retroactively and/or for the future — the immunity from penalties which they would otherwise enjoy on the basis of the State action defence. An additional issue is whether a national regulatory framework that substantially interferes with the working of competition leaves any room for autonomous conduct on the part of the undertakings concerned that could restrict competition in the relevant market even further.

3. Those questions arise in proceedings in which a consortium of Italian match manufacturers challenge a decision of the Italian competition authority, Autorità Garante della Concorrenza e del Mercato ('the Autorità Garante' or 'the Authority'), in which the latter declared the legislation establishing and governing the operation of the consortium contrary to Articles 10 and 81 EC, found that the consortium and its members had infringed Article 81 through the allocation of production quotas, and ordered the consortium and its members to terminate the infringements found.

The legislation governing the manufacture and sale of matches in Italy

4. By Royal Decree No 560 of 11 March 1923 ('Royal Decree'), the Italian legis-

1 — Original language: English

lature introduced a new regime for the manufacture and sale of matches establishing a consortium of specified domestic match manufacturers, the Consorzio Industrie Fiammiferi (hereinafter the 'CIF' or the 'consortium'), and entrusting it with a fiscal monopoly (with respect to the collection and payment of a manufacturing duty) and commercial monopoly (concerning the exclusive right to manufacture and sell matches for the Italian market). Under that system the State was responsible for fixing the retail price of matches whereas the CIF was responsible for allocating production quotas among its members.

5. Over time the regime has been subject to substantial amendments, which have opened up both the membership of the consortium (allowing new members to join, subject only to the grant of a manufacturing licence) and the market (allowing both the production of matches by non-members of the consortium and imports from other Member States). However, certain important aspects of the system remain in place.

6. Under Article 4 of the latest version of the agreement between the CIF and the Italian State (the '1992 agreement'),[2] which regulates the operation of the consortium, production quotas are still to be allocated among member undertakings by a special committee ('the Article 4 committee'), which is appointed by the consortium's management board. The committee comprises three representatives of the member undertakings and one representative of the consortium, is chaired by an official of the Monopoli di Stato ('State Monopolies Board') and takes its decisions by majority vote. Its decisions are communicated to, and approved by, the State Monopolies Board. In addition, certain transactions, including transfers of quotas, must be communicated to and approved by the Ministry of Finance. The rules of the CIF state that production quotas must be allocated 'taking into account the existing percentage shares'. Compliance with those quotas is to be controlled by another committee ('the CIF committee'), composed of three members appointed by the management board of the consortium, which submits, at the beginning of each year, proposals to the management of the consortium for the programme of delivery of matches by the members of the consortium.

7. The 1992 agreement did not significantly alter the price-fixing aspects of the system. By Decree-Law No 331 of 30 August 1993 ('Decree-Law No 331'),[3] however, the Italian legislature adopted new rules on excise duties and other indirect taxes. Article 29 of that Decree-Law provides that the manufacturer and the importer are directly liable for payment of the manufacturing duty. According to the referring court, that rule abolished the fiscal monopoly of the consortium. With

2 — Implemented by Decree of the Ministry of Finance of 5 August 1992.

3 — Subsequently converted into law by Law No 427 of 29 October 1993.

respect to the commercial monopoly, it seems that it was abolished as early as 1983 when the prohibition on non-members of the consortium manufacturing and selling matches in Italy was lifted. Membership of the consortium remained compulsory, however, at least until the fiscal monopoly was abolished in 1993. There are however different views as to the compulsory or voluntary nature of membership of the CIF even after that date for those match manufacturers who were already members before the fiscal monopoly ended.

The decision of the Autorità Garante

8. Before 1996 the Autorità Garante was competent to apply only Italian competition law, not Community competition law. Since the entry into force of Law No 52 of 6 February 1996 ('Law No 52/1996'), however, it has also been competent to apply Articles 81(1) and 82 EC.

9. Acting on the basis of a complaint from a German match manufacturer who was alleging difficulties in distributing its product in the Italian market, the Autorità Garante opened an investigation in November 1998 in order to ascertain whether Articles 81 and 82 EC had been infringed. The remit of the investigation was soon extended to cover in particular an agreement between the CIF and one of the main European match manufacturers, Swedish Match SA, under which the CIF had allegedly undertaken to purchase from Swedish Match a quantity of matches corresponding to a pre-determined percentage of Italy's domestic consumption.

10. On 13 July 2000 the Authority took its final decision. The Authority found that, although the conduct adopted by the participants on the Italian match market derived more or less directly from the regulatory framework which had governed the sector since the Royal Decree, it was also partly the result of autonomous business choices.

11. Then it distinguished the member undertakings' participation in the consortium prior to and after the entry into force of Decree-Law No 331 in 1994.

12. After observing that that decree together with the 1992 agreement had *de facto* abolished the consortium's fiscal and commercial monopolies, the Authority concluded that, from 1994 onwards, partici-

pation in the CIF was voluntary rather than compulsory [4] and the conduct of its members had thus to be regarded as the result of autonomous business choices for which they could be held accountable.

13. By contrast, with regard to the period prior to 1994 the analysis was more complex. The regulatory framework had, by limiting and controlling production and market outlets, itself restricted competition. Further, by requiring the CIF to allocate production quotas among its members, it had required the CIF to take decisions contrary to Article 81(1) EC.

14. The Autorità Garante then held that (i) prior to 1994 the regulatory framework, in so far as it required participation in the consortium in order to produce and sell matches in Italy, constituted a 'legal shield' ('copertura legale') to conduct (of the CIF and its members) otherwise prohibited; (ii) such regulatory framework had 'to be disapplied by any judge or public administration' since it was contrary to Articles 3(g), 10 and 81(1) EC; (iii) that disapplication 'would imply' ('implicherebbe') the removal of the legal shield.

15. The Authority subsequently stated that 'in any event', that is to say regardless of any determination as to the impact of the regulatory framework in force, the conduct of the members of the CIF, and in particular the power to allocate production among them, could be assessed under Article 81 EC. Thus it observed that the annual programmes prepared by the CIF committee and the consortium management, fixing total production and members' individual quotas, were contrary to Article 81(1) EC. Further the application of Article 81(1) EC to the operation of the Article 4 committee could not be excluded because, although Article 4 of the 1992 Agreement prescribed an obligation to allocate production, it did not indicate the criteria and procedures to be followed. Elements such as the composition of the Article 4 committee, the fact that it took decisions by a majority vote and the actual content of the decisions, which apparently corresponded to the requests put forward by the industry representatives, all showed that the decisions were attributable to the CIF and, in particular, to its members. Finally, the fact that all production allocation decisions were notified to and authorised by the Italian State did not prevent competition law from being applied. [5]

16. The Authority went on to analyse whether the criteria used by the CIF to allocate production quotas could effectively

4 — However the Italian Ministry of Finance in a Note of 24 November 1999 had stated that participation in the consortium continued to be compulsory until expiry of the 1992 Agreement in 2001.

5 — The Authority refers to Case 123/83 BNIC v CLAIR [1985] ECR 391, paragraph 23 of the judgment.

restrict competition beyond the restrictions already resulting from the obligations imposed by Italian law. The reliance on 'historical' quotas and the recurrence of exchanges and transfers of quotas between producers, which favoured the crystallisation of market positions and the survival of inefficient undertakings, and, finally, the commitment of the members to reduce their respective production quotas in order to guarantee a principal foreign competitor a quota for its imports, created restrictions on competition going beyond those already brought about by the legal obligation to allocate production quotas. The margin of discretion enjoyed by the CIF in discharging its statutory obligations should have been exercised in such a way as not to restrict the remaining competition even further. The investigation had thus shown that the conduct adopted by the CIF and its members was caught by Article 81(1)(b) and (c), which prohibit agreements that respectively 'limit or control production, markets, technical development, or investment' and 'share markets or sources of supply'.

17. On those grounds, the Autorità Garante decided *inter alia* that:

'(a) the existence and operation of the CIF, as governed by Royal Decree No 560 of 11 March 1923 and by the agreement appended thereto, as last amended by Decree of the Ministry of Finance of 5 August 1992, were contrary to Articles 3(g), 10 and 81(1) EC in so far as, until 1994, they required the CIF and its member undertakings... to engage in anti-competitive conduct in breach of Article 81(1) EC, and thereafter permitted and facilitated such conduct;

(b) in any event, the CIF and its member undertakings had adopted decisions as a consortium and concluded agreements which – in so far as their object was to define procedures and mechanisms for allocating among consortium members the production of matches to be marketed by the CIF in such a way as to impose restrictions of competition additional to those entailed by the enabling legislation — constituted anti-competitive conduct in breach of Article 81(1) EC;

(c) the CIF and Swedish Match SA had entered into an agreement concerning the allocation of match production and product distribution between them through the CIF, which constituted anti-competitive conduct in breach of Article 81(1);

...

(e) the CIF, its member undertakings and Swedish Match SA must terminate implementation and continuation of the infringements found, and abstain from any agreement similar in object or effect...'

The main proceedings and the order for reference

18. The CIF brought an action for the annulment of the Authority's decision before the Tribunale Amministrativo Regionale del Lazio ('Tribunale Amministrativo Regionale').

19. Before that court the CIF raised *inter alia* the following pleas, all challenged by the Authority:

(1) The Authority had no power to determine the validity of legislation enacted by the Italian State as it did in paragraph (a) of the operative part of the decision. Such competence had not been conferred on it by Law No 52/1996 nor did it derive from the principle of primacy of Community law. The principle of primacy provides a basis only for incidental disapplication of national law, but not for direct control of the compatibility of national law with Community law.

(2) The Authority misinterpreted Article 29 of Decree-Law No 331 which did not alter the compulsory nature of CIF membership. The conduct of CIF members, even after the entry into force of that rule, could therefore not be attributed to business choices made in complete independence and the distinction drawn by the Authority between the period before and after the entry into force of the Decree-Law had to be regarded as unfounded.

(3) The Authority misapplied Article 81 EC since the statutory obligation to fix production quotas already created, by definition, a situation such as to eliminate from the outset all possibility of competition between the member undertakings independently of the criteria which may have been adopted in practice in order to set those quotas. Any restriction of competition ensuing from the fixing of production quotas could therefore not be attributed to the CIF and its member undertakings.

20. Although it considers that by virtue of the principle of primacy of Community law

not only national courts but also administrative authorities should normally disapply national legislation which conflicts with Articles 10 and 81 EC, the Tribunale Amministrativo Regionale none the less doubts whether in the specific circumstances of the present case the Authority had the power to disapply the legislation governing the CIF. That is because, in its view, the disapplication was done in the exercise of its law-enforcement powers ('potestà repressiva'). Moreover, the disapplication was made *in malam partem*, that is to say in a manner disadvantageous to the undertakings concerned. According to the referring court, in such a situation (i) the disapplication of national legislation is not a basis for the protection of rights conferred on individuals by Community law, (ii) the undertakings 'shielded' by the legislation in question may have acted in good faith, (iii) a disapplication *in malam partem* in the exercise of law-enforcement powers may conflict with the principle of legal certainty, and (iv) the only way for the undertakings concerned to avoid the risk of sanctions, or, in any event, of investigation by the Authority, would be to refuse, on their own initiative, to comply with an obligation imposed by national legislation, conduct that, with all its risks and uncertainties, would appear problematic.

21. By order of 24 January 2001 the Tribunale Amministrativo Regionale therefore referred the following questions for a preliminary ruling:

'1. Where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices or market-sharing arrangements, does Article 81 EC require or permit the national competition Authority to disapply that measure and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit it for the future, and if so, with what legal consequences?

2. For the purposes of applying Article 81(1) EC, is it possible to regard national legislation under which competence to fix the retail prices of a product is delegated to a ministry and power to allocate production between undertakings is entrusted to a consortium to which the relevant producers are obliged to belong, as leaving room for competition which is open to hindrance, restriction or distortion by the autonomous conduct of those undertakings?'

22. Written observations were submitted by the CIF, the Authority and the Commission, which were also represented at the hearing.

The first question

The arguments of the parties

23. The main arguments put forward by the CIF rely on the principles laid down in the *Ladbroke* judgment. [6] In that judgment the Court held that 'Articles 85 and 86 [now 81 and 82] of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative'. Conversely, 'if anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of undertakings... Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition'. [7] Moreover, the Court also made it clear that 'the compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in the context of an examination of the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings complying with national legislation'. [8] Hence in such cases, 'a prior evaluation of national legislation affecting such conduct should... be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition'. [9]

24. For the CIF those statements are fully transposable to the present case, which involves the decentralised application of Community competition rules by national competition authorities. Hence the CIF argues, first, that the conduct of the undertakings under investigation, being required by national legislation, was not autonomous and thus was not caught by Article 81 EC; moreover those undertakings could not be obliged to disregard binding national legislation which was still in force. Secondly, the Authority should have limited its assessment of the Italian legislation to the question whether that legislation prevented the CIF and its

6 — Joined Cases C-359/95 P and C-379/95 P Commission and France v Ladbroke Racing [1997] ECR I-6265, in paragraphs 30 to 35 of the judgment.

7 — Paragraphs 33 and 34 of the judgment.

8 — Paragraph 31 of the judgment.

9 — Paragraph 35 of the judgment.

member undertakings from engaging in autonomous conduct. Strictly speaking, the judgment in *Ladbroke* implies that there was no need for the Autorità Garante to disapply the national legislation under scrutiny in the instant case. However the CIF also accepts that, in order to guarantee the effectiveness of the Treaty provisions which are 'directly applicable', national administrations would be entitled to disapply national legislation which is incompatible with them but only 'incidentally' and with effects limited to the parties investigated, and not with effects *erga omnes*.

25. The Autorità Garante submits that the power, and even the obligation, to make a finding that the legislation governing the CIF is contrary to Articles 10 and 81 EC derives from the principles of direct effect and primacy of Community law as developed in the case-law, in particular in the *Fratelli Costanzo* decision. [10] It underlines that, in making such a finding, it did not exercise direct control of the legislation at issue. The declaration of incompatibility of that legislation with Articles 10 and 81 EC was incidental, in the context of an investigation of the conduct of the CIF and its members. The assessment of the relevant regulatory framework was however necessary because of its direct impact on the conduct of the undertakings concerned. The Authority submits that the declaration it made does not strictly amount to a disapplication. Nor, *a fortiori*, does it imply the annulment or the abrogation of such legislation, it being for the national legislature alone to abrogate or modify legislation. However the effect and consequence of the declaration, according to the authority, is that all national courts and administrative bodies called on to consider the national legislation at issue are obliged to disapply it, and the undertakings under investigation are obliged to terminate conduct shielded by that legislation.

26. The Authority also underlines that it did not 'condemn' the CIF and its members for the conduct covered by the national regulatory framework but only for those restrictions of competition which were additional to those resulting from the legislation governing the CIF. Observing that it is an inherent feature of the administrative enforcement of competition rules — and, more generally, of any form of administrative enforcement — that the national competition authority's primary task is to ensure not the protection of rights conferred on individuals, but rather the 'public interest' in the effectiveness of those rules, the Authority addresses the referring court's preoccupations concerning the breach of good faith and legal certainty, and the disapplication of national legislation *in malam partem* summarised above. First, the Authority observes that, in the large majority of cases of disapplication of

10 — Case 103/88 [1989] ECR 1839.

national legislation incompatible with Community law, adverse effects are a logical and frequent consequence of such disapplication. [11] Analogously, as to the concern for legal certainty, the Authority points out that the situation is identical to the cases in which a national court declares national legislation contrary to Community law and disapplies it. Finally, the Authority underlines that it did not fail to take due account of the good faith of the undertakings concerned, by 'condemning' only the conduct that was not shielded by the legislation in issue, and, in any event, by not imposing any penalties on them.

27. The Autorità Garante, however, also suggested at the hearing that, even though an assessment that national legislation is incompatible does not necessarily imply any liability on the part of the undertakings under investigation for the conduct shielded by that legislation, it might reconsider the decision not to penalise those undertakings if they continued with the anti-competitive conduct despite its assessment.

28. The conclusion of the Authority is that a national competition authority entrusted with the application of Articles 81 and 82 EC can, when it is investigating the conduct of undertakings, assess, and, if necessary, disapply national legislation that is incompatible with Articles 10 and 81 EC.

29. The Commission suggests that, pursuant to the direct effect and primacy of Community law, a national competition authority is empowered to disapply national legislation that conflicts with Articles 10 and 81 EC. Like the referring court, however, it seems to regard the adverse consequences of such disapplication as the main problem in this case. Nevertheless it believes it possible to distinguish this case, in which the application of directly effective Treaty provisions is at issue, from the case-law that denies that directives may impose obligations on individuals. [12] In particular, the Commission considers that no rule of national or Community law prevents obligations and liabilities for individuals from deriving from Community rules which are directly applicable *erga omnes*. That principle has been expressly endorsed by the Court as regards regulations and must *a fortiori* apply with Treaty provisions such as Articles 10 and 81 EC. As to the legal effects of those provisions in this case, the Commission considers that they are limited to the addressees of the decision since the Authority did not seek to deprive the national legislation of its legal effects. Further, the Commission seems to suggest

11 — The Authority cites two examples found in the case-law: Case C-179/90 Merci Convenzionali Porto di Genova [1991] I-5889 on special and exclusive rights and Case C-399/98 Ordine degli architetti delle province di Milano e Lodi and others [2001] I-5409 on public procurement directives.

12 — The Commission cites Case 14/86 Pretore di Salò [1987] ECR 2545, Case C-91/92 Faccini Dori [1994] ECR I-3325, Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, and Case C-168/95 Arcaro [1996] ECR I-4705.

that the applicability of Article 10 in conjunction with Article 81 EC presupposes conduct of the undertakings concerned that, albeit imposed by the legislation under scrutiny, is none the less the result of an 'autonomous business choice'. The Commission then underlines that there may well be two distinct breaches, one of Articles 10 and 81 EC which is attributable to the State and one of Article 81 EC for which the undertakings concerned are responsible.

30. The Commission suggests by way of answer to the first question that Articles 10 and 81 EC do not preclude the Authority from disapplying national legislation which is incompatible with those articles, even where such disapplication produces adverse effects on the undertakings under investigation.

Clarification of the relevance and scope of the question referred

31. The referring court asks whether Articles 10 and 81 EC require or permit a national competition authority to disapply national legislation which imposes or favours an agreement between undertakings (which itself is contrary to Article 81 EC) and to penalise the anti-competitive conduct of the undertakings concerned or, at least, to prohibit it for the future.

32. The relevance of that question to the proceedings before the national court seems to be based on two assumptions, first that the Authority disapplied the legislation governing the CIF, and second that, on the basis of that disapplication, it penalised the conduct of the CIF and/or its members or prohibited it for the future.

33. In the first place, however, it is not at all clear whether the Autorità Garante actually 'disapplied' the legislation at issue.

34. In paragraph 175 of its decision the Autorità Garante stated in general terms that such legislation had 'to be disapplied by any judge or public administration' without stating what it would itself do or would have to do in the present case. In fact, in paragraph 176, it used the conditional mood and stated that the disapplication of the legislation 'would imply' ('implicherebbe') the removal of the legal 'cover' granted by the legislation. Further, in the operative part, point (a) simply states that the national legislation is contrary to Articles 10 and 81 EC without spelling out the consequences of that conflict either for the decision or for future litigation or

administrative procedures. Point (b) of the ruling concerns only the conduct of the CIF and its members which restricted competition beyond the restrictions already attributable to the legislation at issue. However, although point (e) of the operative part requires the undertakings to terminate 'the infringements found', it is not clear what those infringements are and in particular whether they refer only to the conduct going beyond what the regulatory framework required (under point (b)) or also to that 'shielded' by the legislation (which is found to be incompatible in point (a)).

35. Doubts therefore remain as to whether point (a) of the operative part of the decision constitutes only a declaratory statement without direct consequences for the case or whether on the contrary the declaration could affect the undertakings investigated and thereby be, or at least be intended as, a disapplication. The submissions of the Authority [13] seem to assume the latter.

36. Moreover, no penalties seem to have been imposed on the undertakings concerned, the only order being the termination of the infringements established. Hence it is further doubtful whether the reference in the question to the power to penalise is not hypothetical.

37. If that understanding of the two said assumptions were correct, the relevance of the first question referred might be called into question.

38. However, the decision of the Autorità Garante is ambiguous on the point of the disapplication and on the prohibition, and the written submissions of both the CIF and the Commission seem to be based on an understanding of the decision which is similar to the one underlying the referring court's question. Further, as I will attempt to show, the concerns arising from the possible imposition of penalties are also relevant when the national competition authority has only issued an order to terminate anti-competitive conduct. That is apparent in the present case, where, at the hearing, the Autorità Garante suggested that it may well reconsider its decision not to impose penalties should the undertakings concerned not abide by its assessment. [14] It is therefore necessary in my opinion to address the first question referred by the Tribunale Amministrativo Regionale.

39. In any event, under the Court's established case-law Article 234 EC is based on a clear separation of functions between the national courts and the Court of Justice. Under that separation of functions it is not for the Court of Justice, but for the national court, to ascertain the facts which have

13 — See paragraphs 25, 27 and 28.

14 — See paragraph 27.

given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver. [15] Moreover, it is also solely for the national court before which the dispute has been brought to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. [16]

40. In order to respect that separation of functions, and at the same time to give a useful reply to the national court, I will deal with the question referred, examining, in particular, whether, as a matter of Community law, a national competition authority may or must

— *disapply* national legislation contrary to Articles 10 and 81 EC and on that basis *penalise past anti-competitive conduct* of undertakings which was in principle shielded by that legislation;

— *disapply* national legislation contrary to Articles 10 and 81 EC and on that basis *prohibit for the future* anti-competitive conduct of undertakings which would in principle be shielded by that legislation.

41. Before embarking on those questions it is however necessary to identify the root of the problem in the present case.

The central issue

42. In my view, the central issue in this case is not whether a national competition authority may, or in appropriate circumstances must, disapply national legislation which contravenes Community law. In principle, it is established that all national courts should do so where the Community provisions have direct effect. Indeed, that follows from the direct effect of Community law and from the primacy of Community law over national law. The power, or duty, to disapply national legislation that contravenes Community law applies not only to national courts but also, according to the Courts case-law, to 'all organs of the administration'. [17]

43. In the Court's case-law it is also well established that, although Articles 81 and

15 — See, for example, Case C-435/97 World Wildlife Fund and Others [1999] ECR I-5613, paragraphs 31 and 32 of the judgment.

16 — See, for example, Case C-281/98 Angonese [2000] ECR I-4139, paragraphs 18 and 19 of the judgment.

17 — Fratelli Costanzo, cited in note 10, paragraph 32 of the judgment.

82 EC, read in isolation, relate only to the conduct of undertakings and do not cover measures adopted by Member States by legislation or regulation, those provisions, read in conjunction with the duty of cooperation under Article 10 EC, require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. [18] That would be the case if *inter alia* a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. [19]

44. It therefore seems clear that at least the national courts would be competent, or in appropriate circumstances obliged, to set aside a provision of national legislation where, for example, that legislation prevented a party in civil or administrative proceedings from exercising the rights conferred by Article 81 EC, either against another private party or against the public authorities.

45. Equally, it seems clear that a national competition authority, when investigating conduct by undertakings under Article 81 EC, could find, if that conduct were imposed by national legislation, that the legislation was contrary to, or incompatible with, Article 10 EC read together with Article 82 EC.

46. However, the central question in the present case is not whether a national competition authority can make such a finding of incompatibility, but whether it can thereby expose undertakings to the risk of penalties for conduct which is required by the national legislation.

47. Here it is useful to distinguish between the possible imposition of penalties for the past and for the future.

Penalties for the past

48. It seems clear beyond any doubt that a finding of incompatibility could not expose undertakings to any penalties in respect of past conduct where that conduct was required by the national legislation. Not only would that negate the State action

18 — Case 13/77 INNO v ATAB [1977] ECR 2115.

19 — See, for instance, Case 267/86 Van Eycke v ASPA [1988] ECR 4769, paragraph 16 of the judgment, which contains a restatement of the case-law on the joint application of Articles 10 and 81 EC.

defence as laid down in the *Ladbroke* case;[20] it would also run counter to fundamental principles of the Community legal order, notably the principle of legal certainty and the associated prohibition of retroactive penalisation of conduct (*nulla poena sine lege*).

49. Moreover, concerns for legal certainty arise also in two other respects. First, in such a case, undertakings would be confronted with two conflicting obligations, with the risk of adverse consequences whichever option they chose. Second, as was emphasised by the CIF at the hearing, the definition of undertakings' duties under Community law depends on the interpretation of complex principles arising from the combined application of Articles 10 and 81 EC.

50. It is true that undertakings which chose, of their own initiative, to disregard the national legislation would, if prosecuted, be able to rely, by way of defence, on the incompatibility of that legislation with Treaty provisions which have direct effect. But, for all the reasons just given, they cannot in my view be required, as a matter of legal obligation, to disregard such legislation so long as it remains in force and has not been repealed by the legislature. The principles of the direct effect and primacy of Community law cannot be understood as requiring undertakings, under threat of severe penalties, to disregard their obligations under national legislation. So to hold would mean in effect imposing on undertakings the duty to enforce Community law which rather belongs to Community and national authorities.

51. Moreover, it should not be forgotten that in a case such as the present one, the responsibility for the breach of Community law is not that of the undertakings concerned but of the Member State that has enacted or maintained the legislation in issue.

52. The same principles must apply in my view whether the penalties which might be imposed by the national authorities for breach of the Community competition rules in question are classed as criminal or administrative. Where undertakings are exposed to the risk of substantial fines for breach of the competition rules, and where the purpose of the fines is retributive and deterrent, the same fundamental principles must apply, whether the proceedings leading to the imposition of the fines are administrative or criminal in nature.

53. Those principles must prevail over any argument based on the effectiveness of EC

20 — Cited above in note 6.

competition law, since the requirements of effectiveness remain subject to principles which are fundamental to the notion of the rule of law and which include legal certainty and *nulla poena*. In any event, the effectiveness of EC competition law could well be promoted by a declaration of incompatibility by a national competition authority: such a declaration could be expected to give the Member State a strong incentive to repeal the offending legislation; and it might provide the basis for claims for damages against the Member State by those harmed by the legislation.

54. The above arguments are not affected by the need, now increasingly recognised, for greater decentralisation in the enforcement of EC competition law, which may require national competition authorities increasingly to exercise powers hitherto exercised by the Commission. The Commission has never had the power to disapply national legislation. Nor does it have the power to impose penalties on undertakings for conduct required by national legislation, as the State action defence makes clear.

Penalties for the future

55. The above considerations on legal certainty and on the State action defence apply also where, as is apparently the case here, a national competition authority prohibits anti-competitive conduct for the future. Indeed, it may be assumed that such a prohibition is liable to be enforced by penalties. As has been expressly recognised by the Authority, non-compliance with its assessment, which is implicitly reinforced by a prohibition, might lead it to re-consider its decision not to impose penalties. [21]

56. In such a case, therefore, the State action defence would be fully relevant.

57. Further, apart of course from the issue of retroactivity, the same concerns for the principle of legal certainty would arise.

58. While a national competition authority may well be empowered to declare the national legislation incompatible with Community law, I do not consider that such a declaration would resolve the situation of legal uncertainty for the undertakings concerned. They would still be caught between Scylla and Charybdis, in the form of two conflicting legal obligations,

21 — See paragraph 27 above.

infringement of either of which could expose them to adverse consequences.

59. The case may however be different if an official pronouncement has removed any doubt with respect to the obligations of the undertakings concerned. That might be the case when, for example, the incompatibility of the national legislation with Community law had been definitely established by a national court, if necessary after a reference to the Court of Justice. In such a case the protection granted by the State action defence would be removed and the undertakings could be held liable for their anti-competitive conduct.

60. For the above reasons, I consider that the Court should rule in answer to the first question that Community law precludes a national competition authority from disapplying national legislation that is incompatible with Article 10 read in conjunction with Article 81(1) EC, to the extent that such disapplication leads either to the imposition of penalties on undertakings for past conduct or to a prohibition for the future sanctioned by the possibility of the imposition of penalties. That conclusion does not however preclude a national competition authority from declaring that the national legislation at issue is incompatible with Community law.

The second question

61. By its second question the referring court asks whether for the purposes of applying Article 81(1) EC it is possible to regard national legislation under which competence to fix the retail price of a product is delegated to a ministry and power to allocate production among the undertakings is entrusted to a consortium to which the relevant producers are obliged to belong, as leaving room for competition which is capable of being hindered, restricted or distorted by the autonomous conduct of those undertakings.

62. The answer to that question thus requires an analysis of the impact on the functioning of competition in the relevant market of a regulatory framework such as the one under examination, which *inter alia* provides for the fixing of retail prices by the State and requires a consortium of producers to allocate production quotas among its members. In particular, what has to be assessed is whether that regulatory framework leaves room for any autonomous anti-competitive conduct on the part of the undertakings when they are discharging their statutory duty to allocate production quotas.

63. In a reference for a preliminary ruling, the Court is called on to interpret the Community rules in question whereas it is for the national court to apply them to the facts of the case before it. I will therefore refer to the factual circumstances of the

case only in so far as that is necessary to provide a useful answer to the question put by the referring court. My concern will mainly be to clarify those principles of Community law, as developed in the case-law of the Court, which may help the Tribunale Amministrativo Regionale in the resolution of the issues before it.

64. It may be useful to refer again to the *Ladbroke* decision. The underlying principle is that Article 81 EC (and indeed also Article 82 EC) applies only to anti-competitive conduct engaged in by undertakings on their own initiative, since the restriction on competition must be attributable to them. The test laid down by the Court is whether the conduct of the undertakings is autonomous, in the sense that it must be possible for those undertakings to engage in competitive activity. Conversely, as has been seen in examining the first question, [22] if the anti-competitive conduct is required by national law or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, then Article 81 does not apply.

65. That approach was applied by the Court of First Instance in *Consiglio Nazionale Spedizionieri Doganali* v *Commisson*. [23] After underlining that the State action defence, inasmuch as it excludes anti-competitive conduct from the scope of Article 81(1) EC, has been applied restrictively by the Community judicature, [24] that Court considered that what must be determined under the *Ladbroke* test is whether the restrictive effects on competition *originate solely* in the national law or, *at least to an extent*, in the applicant's conduct. [25]

66. In the instant case, the referring court has therefore to determine whether, under the regulatory framework at issue, the undertakings concerned enjoyed sufficient autonomy to restrict competition further than was already done by national legislation. If so, then the effect of *Consiglio Nazionale Spedizionieri Doganali* is that, even if the restrictive effects attributable to the undertakings' conduct are indeed limited, that is enough for them to be held liable under Article 81(1) EC.

22 — See above, paragraph 48.

23 — Case T-513/93 [2000] ECR II-1807; see also the order of the Court of First Instance in Case T-59/00 Compagnia Portuale Pietro Chiesa v Commission [2001] ECR II-1019.

24 — Consiglio Nazionale degli Spedizionieri Doganali, paragraph 60 of the judgment, which refers to Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck v Commission [1980] ECR 3125 and other cases.

25 — Consiglio Nazionale degli Spedizionieri Doganali, paragraph 61 of the judgment.

67. Moreover I would underline, as the referring court also does, that the allocation of production quotas represents a particularly serious infringement of the competition rules.

68. In my view there is no reason to assume that, as a matter of principle, the possibility of *any* room for competitive activity is excluded by the pre-determination of prices by the State. Indeed price competition 'does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded'. [26] Although limited, competition may still focus on factors such as, for example, the quantity and/or quality of the products or services at issue. Evidently, however, that is an issue for the national court to decide, considering the actual market and product.

69. Similarly, I do not agree with the consortium's contention that, in the case of a national provision which requires certain undertakings to allocate production among themselves, all possibility for competitive activity would be eliminated at the outset on the ground that all adverse effects on competition would 'originate solely' in the provision itself. When a legal provision simply provides for an obligation to allocate production quotas but does not define criteria and procedures whereby that allocation should be carried out, the competitive process can indeed, at least hypothetically, be affected differently depending on the allocation actually carried out and can, in any event, be distorted further than is done by the statutory obligation itself. That was confirmed in *Consiglio Nazionale Spedizionieri Doganali*: there the Court of First Instance found that where national legislation requires an association of undertakings, constituted of representatives of the relevant industry who act and take decisions in their exclusive interest, to adopt a tariff but does not determine either specific price levels or ceilings or the criteria to be taken into account in establishing the tariff, the possibility that a certain degree of competition is left open by the legislation at issue, which is then capable of being distorted, cannot be excluded. [27]

70. It is also clear from the case-law that decisions do not fall within the scope of application of Community competition rules if the body which takes them is composed of a majority of representatives of the public authorities and if, on taking a decision, it must observe various public-interest criteria. [28] From what emerges from the file, that does not seem to be the case here.

26 — Case 26/76 Metro v Commission [1977] ECR 1875, paragraph 21 of the judgment, whose finding, despite referring to the effects on price competition of a selective distribution system, can be of more general relevance.

27 — Cited in note 23, paragraph 62 of the judgment

28 — See, among others, Case C-96/94 Centro Servizi Spediporto v Spedizioni Marittima del Golfo [1995] ECR I-2883, paragraphs 23 to 25 of the judgment, and Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraphs 41 to 44.

71. It must also be underlined that the fact that the anti-competitive arrangements are communicated to and subject to authorisation by a public authority is not necessarily a decisive factor. In *BNIC* v *Clair*, [29] the Court held that, by its very nature, an agreement fixing a minimum price for a product (an infringement which is comparable in seriousness to production- and market-sharing) and submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on that market. The Court went on to hold that the adoption of a measure by a public authority making an agreement binding on all the traders concerned, even if they were not parties to the agreement, cannot remove the agreement from the scope of Article 81(1) EC. Those conclusions are all the more relevant when it is considered that the State action defence has been applied restrictively [30] and when, as is suggested by the Autorità Garante, the scrutiny actually exercised by the State Monopolies Board does not seem to be very intense. [31]

72. It is in the light of those principles that the national court should assess whether the regulatory framework at issue, and in particular the obligation to allocate production quotas, did leave room for competition which is capable of being hindered, restricted or distorted by the autonomous conduct of the undertakings concerned.

73. In that regard, I would only observe that in the case at issue it seems that the undertakings concerned, individually and through the various bodies of the consortium, determined plans, criteria, procedures and levels of production with a view to allocating the quotas of production among themselves. It appears from the file that they also concluded a production- and market-sharing arrangement with a major foreign competitor whereby the undertakings agreed to reduce their own individual production quotas to allow that competitor to enter the Italian market, conduct that appears to have no legal basis in the statutory obligation to allocate production quotas among the members of the consortium.

74. Although it seems that those arrangements, as has been argued by the Autorità Garante and the Commission, are indeed likely to distort competition further, it is none the less for the national court to apply the principles above to the facts before it and reach its own conclusion.

29 — Case 123/83, cited in note 5, paragraph 22 of the judgment.

30 — See paragraph 65.

31 — See Case C-309/99 Wouters [2002] ECR I-1577, paragraph 68 of the judgment.

Conclusion

75. I am accordingly of the view that the questions referred by the Tribunale Amministrativo Regionale del Lazio should be answered as follows:

(1) Community law precludes a national competition authority from disapplying national legislation that is incompatible with Article 10 read in conjunction with Article 81(1) EC to the extent that such disapplication leads either to the imposition of penalties on undertakings for past conduct or to a prohibition for the future sanctioned by the possibility of the imposition of penalties. That conclusion does not however preclude a national competition authority from declaring that the national legislation at issue is incompatible with Community law.

(2) Where under national legislation the retail prices of a product are fixed by the national authorities and the allocation of production among undertakings is assigned to a consortium to which the relevant producers are required to belong, those undertakings remain subject to Article 81(1) EC in respect of any autonomous conduct allowed by the legislation. It is for the national court to determine, on the basis of all the facts, whether, within the national regulatory framework, there remains room for competition which is capable of being hindered, restricted or distorted by the autonomous conduct of those undertakings.