JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
30 March 2000 *

In Case T-513/93,

Consiglio Nazionale degli Spedizionieri Doganali, established in Rome (Italy), represented by A. Pappalardo, of the Trapani Bar, A. Marzano, of the Rome Bar, and A. Tizzano, of the Naples Bar, with an address for service in Luxembourg at the Chambers of A. Lorang, 51 Rue Albert 1er,

applicant,

v

Commission of the European Communities, represented initially by M. Mensi and E. Traversa, and, subsequently, by G. Marenco and E. Traversa, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

supported by

Associazione Italiana dei Corrieri Aerei Internazionali, established in Milan (Italy), represented by L. Magrone Furlotti and C. Osti, of the Rome Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

intervener,

APPLICATION for annulment of Commission Decision 93/438/EEC of 30 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.407 — CNSD) (OJ 1993 L 203, p. 27),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: J.D. Cooke, President, R. García-Valdecasas, P. Lindh, J. Pirrung and M. Vilaras, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 17 June 1999,

gives the following

Judgment

Legal background

1 In Italy, the activity of independent customs agents is regulated by Law No 1612 of 22 December 1960 on the legal recognition of the profession of customs agent and the establishment of registers and insurance funds for customs agents (GURI No 4 of 5 January 1961, hereinafter 'Law No 1612/1960') and by implementing provisions contained principally in a decree of the Minister for Finance of 10 March 1964 laying down rules implementing Law No 1612/1960 (GURI, Supplemento Ordinario, No 102 of 26 April 1964, hereinafter 'Decree of 10 March 1964').

2 That activity involves in particular the completion of formalities relating to customs clearance procedures (Article 1 of Law No 1612/1960). To pursue it, customs agents must possess authorisation and be entered in the national register of customs agents. This is made up of all the departmental registers held by the Consigli Compartimentali (Departmental Councils of Customs Agents) for each customs department (Articles 2 and 4 to 12 of Law No 1612/1960).

3 Supervision of the activity of customs agents is carried out by the Departmental Councils of Customs Agents. Their members are elected by secret ballot by the customs agents entered in the registers of the various departmental directorates for a renewable term of two years and the Departmental Councils are chaired by the Inspector General, head of the Customs Department (Article 10 of Law No 1612/1960).

4 The Departmental Councils of Customs Agents are headed by the Consiglio Nazionale degli Spedizionieri Doganali (CNSD), a body governed by public law, composed of nine members elected by secret ballot for a renewable period of three years by the members of the Departmental Councils (Article 13(2) of Law No 1612/1960). Until 1992 the CNSD was chaired by the Director-General of Customs and Indirect Taxes who was automatically a member of it.

5 Under Article 32 of Decree-Law No 331 of 30 August 1992, the Departmental Councils and the CNSD are to be chaired by members of those bodies elected by their co-members.

6 Only registered customs agents may be elected as members of the Departmental Councils or of the CNSD (second paragraphs of Articles 8 and 22 of the Decree of 10 March 1964).

7 Under Article 11 of Law No 1612/1960:

'Each Departmental Council shall deliberate on the amount of remuneration to be charged in respect of the professional services provided by customs agents, such amount to be submitted to the [CNSD] in order to establish the tariff.

Customs agents may not charge for their services remuneration which is in any way higher or lower than that approved by the [CNSD].

Any disputes concerning application of the tariff of professional services must be referred to the Departmental Council for a decision.'

8 Article 14 of Law No 1612/1960 provides:

'The [CNSD]:

(...)

(d) shall set the tariff for the services provided by customs agents on the basis of proposals by the Departmental Councils.'

9 Under Articles 38 to 40 of the Decree of 10 March 1964, customs agents who do not comply with the tariffs set by the CNSD are liable to disciplinary measures, ranging from a reprimand to temporary suspension from the register where the offence is repeated, or removal from the register if suspended twice in five years by the Departmental Council.

10 At its meeting on 21 March 1988, the CNSD adopted the tariff for services provided by customs agents (hereinafter 'the tariff at issue') in the following terms:

'Article 1

This tariff lays down the minimum and maximum amounts to be paid for customs transactions and services provided in the monetary, commercial and fiscal sectors, including fiscal litigation.

In determining, between the minimum and maximum amounts, the price to be paid in a specific case, the characteristics, nature and importance of the service are to be taken into consideration.

Article 2

The remuneration laid down in this tariff must in all cases be charged or entered in such a way as to distinguish it from any other heading or item of expenditure incurred in performance of the commission.

(...)

Article 3

The remuneration laid down in this tariff must be deemed to be calculated by reference to each individual customs operation or individual professional service.

Customs operations may be defined as operations subjecting foreign or national goods to customs processing, whatever the document accompanying them.

(...)

Article 5

With reference to Article 1 above, there may be no derogation from this tariff in regard to the principal, and under the tariff any agreement to the contrary shall be null and void, even where for practical reasons two or more persons are involved, in accordance with Articles 1708 and 1709 of the Italian Civil Code.

(...)

Article 6

The [CNSD] may provide for specific and/or temporary derogations from the minimum charges under this tariff.

Article 7

The [CNSD] shall ensure that this tariff is kept up to date in accordance with the indices provided by Istat (Central Institute for Statistics) — industrial sector — with effect from the date of the relevant decision.'

11 In Articles 8 to 12 the tariff at issue lays down the scales to be applied depending on the value or weight of the goods to be cleared through customs and, in the case of each category, provides for either a fixed price or, in most cases, a bracket of

prices, with minimum and maximum prices for customs clearance services provided by customs agents. The tariff at issue substantially increases the minimum prices laid down in the previous tariff, the increase exceeding 400% in some cases.

12 The tariff was approved by the Italian Minister for Finance by a decree of 6 July 1988 (GURI No 168 of 19 July 1988, p. 19) to which it forms the annex with the title 'National Council of Customs Agents: Remuneration for customs operations and professional services provided in the monetary, commercial and fiscal sectors, including fiscal litigation'.

13 Under the abovementioned Article 6, the CNSD made a certain number of derogations from the tariff at issue, in particular by decision of 12 June 1990 in favour of the Associazione Italiana dei Corrieri Aerei Internazionali (hereinafter 'the AICAI'), an association governed by Italian law established by international couriers, the object of which is to represent and give advice to its members in regard to all the problems associated with the provision of international courier services.

Facts of the dispute

14 On 21 July 1989 the AICAI lodged a complaint with the Commission concerning the CNSD's decision of 21 March 1988 establishing the tariff at issue. It maintained, first, that for the lowest-value goods, the tariff removed the progressive nature of the previous scale and increased prices disproportionately; secondly, that the effect of the tariff was to require separate invoicing of every

customs operation in order to enable its application in practice to be monitored, which is said to be incompatible with the system applied at international level, and, thirdly, that it prohibited any derogation.

15 On 1 February and 28 March 1990 the Commission asked the CNSD for information on its structure and functioning and that of the Departmental Councils, on the basis of Article 11 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

16 On 30 June 1993 the Commission adopted Decision 93/438/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.407 — CNSD) (OJ 1993 L 203, p. 27, 'the Decision'), which forms the subject-matter of the present action. In the Decision it was concluded that 'customs agents are undertakings engaged in an economic activity' (Recital 40); that the CNSD is 'an association of undertakings'; and that its decisions are 'decisions by an association of undertakings aimed at regulating the economic activity of members' (Recital 41). Under Recital 45, the restrictions of competition arising out of the tariff at issue are as follows: 'the setting of a tariff of fixed minimum and maximum rates, from which individual operators may not derogate, for each transaction carried out by customs agents', and 'the imposing of mandatory invoicing arrangements, e.g. separate invoices.' Under Recital 49, 'the tariff set by the CNSD is liable to affect trade between Member States as it fixes the rates for all customs operations relating to imports into Italy and exports from Italy.' In Article 1 of the Decision the Commission concludes that 'the tariff for services provided by customs agents which was adopted by the [CNSD] at its meeting on 21 March 1988 and which entered into force on 20 July 1988 constitutes an infringement of Article 85(1) of the EEC Treaty.' In Article 2 the Commission requests the CNSD to take all appropriate steps to bring that infringement to an immediate end.

Procedure and forms of order sought by the parties

17 By application lodged at the Registry of the Court of First Instance on 16 September 1993 the applicant brought the present action.

18 On 7 February 1994 the AICAI applied for leave to intervene in support of the form of order sought by the defendant. By order of 17 October 1994 the President of the Fourth Chamber of the Court of First Instance granted the leave sought.

19 On 28 November 1994 the AICAI submitted its statement in intervention. On 16 January 1995 the applicant submitted its observations on that statement.

20 On 19 December 1995 the Court of First Instance requested the parties to reply to certain questions. The AICAI and the applicant acceded to this request on 15 January 1996 and the Commission on 17 January 1996.

21 By an application lodged at the Court Registry on 9 February 1996 the Commission brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting and maintaining in force a law which, in granting the relative decision-making power, required the CNSD to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty (now Article 81 EC) in that it set a compulsory tariff for all customs agents, the Italian Republic had failed to fulfil its obligations under Articles 5 (now Article 10 EC) and 85 of the EC Treaty (Case C-35/96).

22 On 8 March 1996 the applicant applied for proceedings to be stayed pending the judgment of the Court of Justice in Case C-35/96. On 29 March 1996 the Commission agreed to the grant of such a stay.

23 By order of 6 May 1996 of the Fifth Chamber, Extended Composition, of the Court of First Instance, these proceedings were stayed pending the judgment of the Court of Justice in Case C-35/96.

24 On 18 June 1998 the Court gave judgment in Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851 (hereinafter the 'judgment of 18 June 1998') in which it held that, 'by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the [CNSD] to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty, consisting of setting a compulsory tariff for all customs agents, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty.'

25 On 2 July 1998 the Court of First Instance, as a measure of procedure provided for in Article 64 of the Rules of Procedure, requested the parties to communicate to it their views on the consequences to be drawn from the judgment of 18 June 1998 with regard to this case.

26 The AICAI acceded to that request on 21 July 1998 and the applicant and the Commission on 22 July 1998.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure.

28 Oral argument by the parties and their replies to the questions put by the Court were heard at the hearing on 17 June 1999.

29 The applicant claims that the Court of First Instance should:

— declare the decision null and void;

— order the Commission to pay the costs.

30 The Commission contends that the Court of First Instance should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

31 The intervener contends that the Court of First Instance should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Substance

32 The applicant puts forward a single plea alleging infringement by the Commission of Article 85 of the Treaty, inasmuch as it failed in the Decision to observe the criteria for application of that provision. This plea may be divided into three limbs. In the first limb the applicant maintains, first, that customs agents are not undertakings within the meaning of Article 85 of the Treaty and, secondly, that the professional body for customs agents, that is to say the CNSD, is not an association of undertakings within the meaning of that article. In the second limb it submits that the decisions of the CNSD were erroneously classified as decisions of an association of undertakings and that the tariff at issue is in no way restrictive of competition within the meaning of Article 85. Finally, in a third limb, it asserts that the tariff at issue is not liable to affect trade between Member States.

First limb: classification of customs agents as undertakings and of the CNSD as an association of undertakings within the meaning of Article 85 of the Treaty

Parties' arguments

33 The applicant submits that the members of a liberal profession and, in particular, customs agents, are not undertakings within the meaning of Article 85 of the Treaty because, first, theirs being an intellectual activity they do not operate via an organised production structure and, secondly, they do not carry on business at their own risk. Moreover, the business of customs agent is subject to rules which impose conditions, *inter alia*, on access to the profession.

34 It concludes that, since customs agents are not undertakings, the professional bodies under whose aegis they operate are not associations of undertakings. Furthermore, those professional bodies are legal persons governed by public law with regulatory powers of organisation and supervision; accordingly, they cannot be classified as associations of undertakings under Article 85 of the Treaty.

35 The Commission contends that, under the case-law, the economic nature of the business carried on is the sole criterion for defining an undertaking.

Findings of the Court

36 According to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others* v *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21), and any activity consisting in offering goods and services on a given market is an economic activity (judgment of 18 June 1998, paragraph 36).

37 As the Court of Justice held in the judgment of 18 June 1998 (paragraph 37), the activity of customs agents has an economic character. They offer, for payment, services consisting in the carrying out of customs formalities, relating in particular to importation, export and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal sectors. Furthermore, they assume the financial risks involved in the exercise of that activity (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73

and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 541). If there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself.

38 The Court of Justice also held in the judgment of 18 June 1998 (paragraph 38) that 'in those circumstances, the fact that the activity of customs agent is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources, is not such as to exclude it from the scope of Articles 85 and 86 of the EC Treaty.'

39 In regard to classification of the applicant as an association of undertakings under Article 85(1) of the Treaty, since the activity of customs agent is an economic activity and customs agents are thus regarded as undertakings within the meaning of Article 85, it must be concluded that the CNSD is an association of undertakings within the meaning of that article. Moreover, the Court of Justice held in its judgment of 18 June 1998 (paragraph 40) that the public-law status of a national body such as the CNSD does not preclude the application of Article 85 of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. Accordingly, the legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned (Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 17).

40 It follows that the first limb of the single plea must be dismissed.

Second limb: classification of the CNSD's decisions as decisions of associations of undertakings and the question whether the tariff at issue is restrictive of competition within the meaning of Article 85 of the Treaty

Parties' arguments

41 In the first place, the applicant claims that the CNSD is in the nature of a public body entrusted with regulatory powers. Therefore, the decisions of the CNSD, such as the decision adopting the tariff at issue, are State decisions by means of which that body performs public functions. In support of that argument the applicant observes that the decisions of the CNSD are in the nature of regulations according to Italian law and that membership of the CNSD is mandatory. Lastly, the applicant asserts that the setting of the tariff at issue constitutes a State act in itself, irrespective of the Ministerial decree approving that tariff, and that it cannot be separated from its other public functions.

42 Secondly, the applicant points out that, under the case-law, the Community rules on competition do not apply to conduct by undertakings where that conduct may be attributed to the national authorities or is imposed by them (see Case C-18/88 *RTT* v *GB-Inno-BM* [1991] ECR I-5941, paragraph 20, and Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 10). It adds that, under the judgment in Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33, '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 [of the Treaty] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.'

43 In that connection the applicant submits that in the present case the anti-competitive conduct of which it is accused was imposed on it by national

legislation. According to the CNSD, the Court of Justice itself acknowledged in the judgment of 18 June 1998 that a law enacted by the Italian Republic 'in granting the relative decision-making power, require[d] the CNSD to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty, consisting of setting a compulsory tariff for all customs agents', without allowing it any autonomous power of decision. The applicant infers therefrom that in that judgment all responsibility on its part was excluded by the Court of Justice which rightly held the Italian Republic responsible.

44 The applicant maintains that the Commission itself would appear to share its view on that important question, inasmuch as at the hearing it acknowledged that the applicant had no room for manœuvre in regard to the application of Law No 1612/1960 and that its conduct was dictated by the Italian Republic.

45 Lastly, the applicant explains that, in any event, the setting of minimum rates by a professional body cannot be regarded as a restriction on competition within the meaning of Article 85 of the Treaty. Thus, the Commission's requirement that customs agents be exempted from applying a tariff of that nature is said to be inconsistent with the objectives pursued by the rules of a professional body. There is said to be a difference between the concept of competition as between undertakings and that of competition between members of a profession inasmuch as the latter is based on the intellectual and professional qualities of those who offer the service in question. If the fixing of minimum charges for the services of customs agents were deemed to restrict competition under Article 85 of the Treaty, that conclusion would apply in all cases in which professional bodies lay down minimum and maximum rates.

46 The Commission contends that the nature of the CNSD and of the functions which it performs do not affect the applicability of Article 85 of the Treaty. In its view the decision fixing the tariff at issue contains the essential features of an

agreement between undertakings because it takes the specific form of a decision by an association of undertakings, later supplemented by a decision of the Member State.

47 The Commission stresses that the Court of Justice itself in the judgment of 18 June 1998 (paragraph 51) dealt with the issue of the application of that provision to the applicant's conduct, by holding that 'the CNSD infringed Article 85(1) of the Treaty.' That finding is, according to the Commission, inconsistent with non-applicability of Article 85 of the Treaty, thus precluding the application in the present case of the judgment in *Commission and France* v *Ladbroke Racing*, cited above (paragraph 33).

48 The Commission considers that in this case the agreement constitutes autonomous conduct on the part of the undertakings concerned. Recalling that ratification by decree is not mandatory, it contends that the fixing of the tariff at issue is not an act of a public authority but a decision adopted by the CNSD in the context of its autonomous powers, as is borne out by the fact that the derogation granted to the AICAI was subject to no public supervisory decision.

49 At the hearing the Commission stated that, even if the CNSD were required under national legislation to adopt the tariff at issue, Article 85 of the Treaty is none the less applicable and the tariff is in breach of that provision. In that connection the Commission claims that to maintain that the existence of a national law precludes the applicability of Article 85 is tantamount to reversing the relationship between the Community legal order and national legal systems and to asserting the primacy of national law over Community law. Infringements by undertakings of Article 85 of the Treaty, even when imposed by a legislative obligation, are founded on the primacy of Community law over national law. Whether the existence of the national law may attenuate CNSD's responsibility is a different question.

50 Lastly, the Commission asserts that the effects of the tariff at issue that are clearly restrictive of competition result from the fixing in that tariff of a minimum-price threshold and from the mandatory invoicing arrangements. With regard to the latter, the Commission states that the obligation under Article 3 of the tariff at issue to calculate the amounts payable to customs agents on the basis of each customs operation and each individual professional service is contrary to Article 85 of the Treaty inasmuch as it precludes the application of a flat-rate tariff.

51 The AICAI maintains that the responsibility imputed to the Italian Republic by the judgment of 18 June 1998 does not preclude the applicant from being jointly responsible. In that connection it contends that, under the case-law, the adoption of a measure by a public authority making an agreement binding on all the traders concerned cannot remove the agreement from the scope of Article 85(1) (*BNIC* v *Clair*, cited above, paragraph 23).

52 The AICAI goes on to contend that, following adoption of the Decision, the CNSD continued to apply the tariff at issue. Indeed, in a memorandum of 15 September 1997 to all the Departmental Councils of Customs Agents, the CNSD confirmed that the tariff was fully in force. Taking the view that the premisses on which the Decision was based had changed, the CNSD requested the Commission for a derogation from application of Article 85 of the Treaty. Receiving no reply, the CNSD concluded that the tariff at issue remained applicable. Thus the AICAI lodged a fresh complaint before the Commission on 1 August 1997.

Findings of the Court

53 The arguments raised by the applicant concerning the alleged public-law nature of the CNSD and of its decisions cannot be upheld. Indeed, as has already been

indicated in connection with the examination of the first limb (see paragraph 39 above), the Court of Justice held in its judgment of 18 June 1998 (paragraph 40) that the public-law status of a national body such as the CNSD does not preclude the application of Article 85(1) of the Treaty.

54 On this issue it is appropriate to add that, as the Court of Justice found in the judgment of 18 June 1998 (paragraphs 41 to 43), the members of the CNSD are the representatives of professional customs agents and nothing in the national legislation concerned prevents the CNSD from acting in the exclusive interest of the profession. On the one hand, the members of the CNSD can only be registered customs agents (Article 13 of Law No 1612/1960 and second paragraphs of Articles 8 and 22 of the Decree of 10 March 1964). On that point it should be noted that, since the amendment introduced by Decree-Law No 331/1992, the Director-General of Customs no longer acts as chairman of the CNSD. Furthermore, the Italian Minister for Finance, who is responsible for the supervision of the professional organisation in question, cannot intervene in the appointment of the members of the Departmental Councils and the CNSD. On the other hand, the CNSD is responsible for setting the tariff for the professional services of customs agents on the basis of proposals from the Departmental Councils (Article 14(d) of Law No 1612/1960) and there is no rule in the national legislation in question obliging, or even encouraging, the members of either the CNSD or the Departmental Councils to take into account public-interest criteria.

55 It follows that the members of the CNSD cannot be characterised as independent experts (see, to that effect, Case C-185/91 *Reiff* [1993] ECR I-5801, paragraphs 17 and 19; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraphs 16 and 18; and Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257, paragraphs 18 and 19) and that they are not required, under the law, to set tariffs taking into account the general interest and the interests of undertakings in other sectors or users of the services in question, as well as the interests of the undertakings or associations of undertakings in the sector which has appointed them (*Reiff*, paragraphs 18 and 24; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 17; and *DIP and Others*, paragraph 18 and the judgment of 18 June 1998, paragraph 44).

56 Consequently, the decisions of the CNSD are not State decisions by means of which that body performs public functions and, accordingly, the applicant's argument that Article 85 of the Treaty is not applicable owing to the public-law nature of the CNSD and its decisions is unfounded.

57 None the less there remains the question whether, as the applicant maintains, Article 85(1) of the Treaty was in any event incorrectly applied in the Decision, inasmuch as, in the absence of autonomous conduct on the part of the CNSD and its members, adoption of the tariff at issue does not constitute a decision by an association of undertakings within the meaning of the abovementioned article. That issue was not analysed in detail by the Court of Justice in its judgment of 18 June 1998.

58 It is clear from the case-law that Articles 85 and 86 (now Article 82 EC) of the EC Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative (Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraphs 18 to 20; Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 55; Case C-18/88 *GB-Inno-BM*, cited above, paragraph 20, and *Commission and France* v *Ladbroke Racing*, cited above, paragraph 33). 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 on competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (*Commission and France* v *Ladbroke Racing*, cited above, paragraph 33, and Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 130).

59 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 (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph

126; *Commission and France* v *Ladbroke Racing*, cited above, paragraph 34, and *Irish Sugar* v *Commission*, cited above, paragraph 130).

60 Moreover, it should be recalled that the possibility of excluding specific anti-competitive conduct from the scope of Article 85(1), on the ground that it was required of the undertakings in question by existing national legislation or that any possibility of competitive activity on their part has been eliminated, has been applied restrictively by the Community judicature (*Van Landewyck and Others* v *Commission*, cited above, paragraphs 130 and 133, *Italy* v *Commission*, cited above, paragraph 19, Joined Cases 240/82, 241/82, 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 27 to 29, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 60 and 65).

61 Accordingly, it must be determined whether the restrictive effects on competition, alleged by the Commission and found by the Court of Justice, originate solely in the national law or, at least to an extent, in the applicant's conduct. It must therefore be examined whether the legal framework applicable in the present case eliminates any possibility of competitive activity on the part of the CNSD.

62 It is not disputed that Article 14 of Law No 1612/1960 required the CNSD to adopt a tariff, as was acknowledged by the Court of Justice in its judgment of 18 June 1998 (paragraph 60). However, neither the Law nor the implementing provisions lay down specific price levels or ceilings that the CNSD should necessarily take into account in establishing the tariff. Nor does the national legislation define the criteria on the basis of which the CNSD is to draw up the tariff.

63 In that connection it should be noted that, when the applicant adopted the tariff at issue, it introduced a substantial increase in minimum prices as compared to the prices then in force, in some cases reaching 400%. It follows that the CNSD

enjoyed wide decision-making power in the determination of minimum prices. Furthermore, the consequence of that increase, as the applicant itself acknowledges in its application (p. 22), was that, as from the date of entry into force of the tariff at issue, customs agents began to apply the minimum prices whereas until 1988 they had invoiced their services at the maximum prices. Thus, the CNSD had set the previous tariff in such a way as to leave open the possibility of a certain degree of competition which could be prevented, restricted or distorted by the autonomous activity of customs agents. Therefore, if under the previous tariff a certain degree of competition did exist, by increasing minimum prices as it did, the CNSD further restricted existing competition in a manner contrary to Article 85 of the Treaty.

64 It is likewise common ground that neither the Law nor the implementing provisions seek to impose on customs agents particular methods of invoicing their services to their customers, or require the CNSD to impose an obligation of that kind on them. In particular, there is no requirement that each professional service or individual customs operation be invoiced separately.

65 However, the CNSD decided to lay down mandatory invoicing methods in order to preserve the effectiveness of the tariff at issue. More precisely, Article 3 of the tariff provides that the amounts to be paid to customs agents must be calculated in respect of each customs operation or individual professional service, thus precluding application of a flat-rate tariff. Such a requirement curtails the freedom of customs agents as regards their internal organisation, prevents them from reducing the costs of invoicing and precludes any possibility of flat-rate reductions in favour of their customers. That provision therefore constitutes a restriction on competition within the meaning of Article 85 of the Treaty.

66 Lastly, even though the national legislation does not expressly provide for the possibility of derogations from the tariff, it should be pointed out that, when it adopted the tariff at issue, the CNSD conferred on itself the right to allow derogations from the minimum tariff prices laid down (Article 6), thus creating price competition in the sectors concerned. That right has been availed of on several occasions.

67 Indeed, by a decision of 16 December 1988, the CNSD first allowed customs agents, in applying the tariff, to group together on a daily basis, for each import and customs section, all notices of *ad valorem* import duties payable under the relevant section, with an additional amount of ITL 15 000 for each additional notice of duty payable. Secondly, the CNSD granted reductions on the relevant minimum remuneration to undertakings and industrial groups carrying out during the course of the year at least 8 000 customs clearances in regard to certain goods. Thirdly, it gave a 50% reduction on certain increases provided for in regard to services rendered to certain vessels. Lastly, the CNSD abolished the minimum prices provided for in the case of customs operations concerning daily newspapers.

68 Then, by a decision dated 18 April 1989, the CNSD decided, on the one hand, to allow customs agents the possibility of applying a 15% reduction on all remuneration payable to them where they are acting on behalf of a principal or intermediary. The CNSD further provided that that reduction was to go up to 30% where the customs agents extend certain services to ships' forwarding agents and other agents.

69 Subsequently, by a decision dated 11 July 1989, the CNSD excluded from the tariff at issue, without limit as to time, certain categories of customs services, namely assistance to military vessels, to hydrofoils and to motorised fishing vessels; packets, correspondence, personal effects and furniture, valid bank notes, stamps and documents bearing stamps, daily newspapers and periodicals, and samples of goods not exceeding ITL 350 000 in value for customs purposes, not including transport and ancillary costs.

70 Lastly, by a decision dated 12 June 1990 the CNSD granted a specific derogation from the tariff at issue and its invoicing arrangements to the AICAI, allowing it to exclude from the scope of the tariff goods transported by courier up to a value of

ITL 350 000, not including transport and ancillary costs, and to grant a reduction of up to 70% on the minimum prices for operations concerning goods of a value up to ITL 2 500 000. The AICAI was also exempted from the requirement to invoice individually both to the sender and to the recipient the amount due for the customs declaration.

71 It cannot but be concluded that, by certain of these derogations, the CNSD has negated the very essence of the tariff at issue by abolishing those minimum prices and allowing real exemptions or freeing up of prices, either generally or specifically, without limit as to time. Those circumstances demonstrate that the CNSD enjoyed a margin of discretion in the implementation of the national legislation such that the nature and scope of competition in that business sector was in practice dependent on its decisions.

72 It follows from all the foregoing, first, that even though the Italian legislation imposed major limitations on competition and made it difficult in practice for there to be real competition in terms of prices between customs agents, it did not as such preclude the continued existence of a certain amount of competition capable of being prevented, restricted or distorted by the autonomous activity of customs agents and, secondly, that the CNSD had room for manœuvre in performing the obligations imposed on it by the abovementioned legislation within which it could and ought to have acted in such a way as not to restrict the existing level of competition. Accordingly, the Commission was right to take the view in the Decision that the tariff at issue constituted a decision by an association of undertakings entailing restrictive effects on competition and adopted by the CNSD on its own initiative.

73 That conclusion is not invalidated by the fact that the Court of Justice held in its judgment of 18 June 1998 (paragraph 60) that the Italian Republic required the CNSD to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty. It is sufficient to state, in that connection, that the scope of that finding is clearly limited by the phrase 'in granting the relative decision-making power', which confirms that the CNSD enjoyed autonomous

decision-making power which, as has been established above, it should have used in order to apply the Italian legislation whilst maintaining the level of competition which could be left to exist after that legislation had been implemented.

74 Lastly, the application to the applicant's activity of Article 85(1) of the Treaty cannot be called in question by the view expressed by the Commission at the hearing to the effect that the applicant had no room for manœuvre in regard to implementation of Law No 1612/1960 and that its conduct was imposed by the State. Suffice it to state in the present case that it is for the Court of First Instance to review the legality of the contested decision, and such review must take into account the statement of reasons on which the decision was based, within the meaning of Article 190 of the EC Treaty (now Article 253 EC). According to the Decision (Recital 42) it was precisely in light of the fact that the CNSD decides freely on the tariff, its level and conditions of application that the Commission deemed the applicant's conduct not to constitute a State measure but a decision by an association of undertakings capable of coming within the scope of Article 85(1) of the Treaty. Moreover, in any event, the issue as to whether the CNSD enjoyed any room for manœuvre in the application of the Italian legislation must be regarded as a question of fact for the Court of First Instance alone to decide.

75 It follows that the second limb of the single plea must be rejected.

Third limb: the issue whether trade between Member States is liable to be affected

Parties' arguments

76 The applicant maintains that since recourse to customs agents is not obligatory, the assertion in the Decision that 'the tariff also impedes trade between the Italian

market and other Community markets because it increases the cost and complexity of customs operations' is totally without foundation. It also submits that, with the completion of the internal market, there are no longer any customs operations in the context of trade between the Member States and, as is apparent from Council Regulation (EEC) No 3904/92 of 17 December 1992 on measures to adapt the profession of customs agent to the internal market (OJ 1992 L 394, p. 1), customs agents no longer carry out any operations giving rise to payment of remuneration under the professional tariff. Thus, no injury is caused, it is submitted, to trade between the Member States.

77 The Commission contends that the fetter on trade is not removed by the fact that it is not compulsory to use customs agents, since the fact that a trader may do without their services does not alter the restrictive nature of the activities which are liable to affect trade.

Findings of the Court

78 The applicant's arguments to the effect that the tariff at issue is not liable to affect trade between Member States cannot be accepted.

79 As regards the period prior to completion of the internal market, that is to say before 31 December 1992, suffice it to state that the tariff at issue fixed the price of customs operations concerning imports into Italy and exports from Italy, which necessarily affects trade between Member States.

80 As regards the period from 31 December 1992, the CNSD claims that there are no longer any customs operations in the context of trade between Member States.

81 In that connection, as the Court of Justice stated in its judgment of 18 June 1998 (paragraphs 49 and 50), the various types of import or export operations within the Community, as well as transactions between Community traders, require customs formalities to be carried out and may, in consequence, make it necessary for an independent registered customs agent to be involved. That is true of so-called 'internal transit' operations, covering the dispatching of goods from Italy to a Member State, that is to say from one point in the customs territory of the Community to another, by way of transit through a non-member country (for example, Switzerland). That type of operation is particularly important for Italy, since a large proportion of goods dispatched from regions in the north-west of the country to Germany and the Netherlands transit through Switzerland.

82 As to the applicant's argument that there is no legal compulsion to use professional customs agents, it should be noted that the owner of goods can make the customs declaration himself or be represented either by an independent or by a salaried customs agent. None the less, in order to complete the formalities connected with customs clearance and customs control, whenever a trader importing into Italy or exporting from Italy decides to be represented by a customs agent and does not have available to him a salaried customs agent, or his salaried customs agent is not authorised to practice in the department in which customs clearance is to be effected, he must have recourse to the services of professional customs agents for whom the tariff at issue is mandatory. In any event, as may be inferred from Recital 12 in the preamble to the Decision, the relevant market in establishing the existence of an infringement of Article 85 of the Treaty is that of the services provided by professional customs agents and, in that market, the existence of a mandatory tariff constitutes a restriction such as to impede trade between Member States.

83 Finally, it should be pointed out that in its judgment of 18 June 1998 (paragraph 45) the Court of Justice held that the decisions by which the CNSD sets a uniform, compulsory tariff for all customs agents are capable of affecting intra-Community trade.

84 In light of all the foregoing the third limb of the single plea must be rejected.

85 Accordingly, the action must be dismissed in its entirety.

Costs

86 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has asked for costs, it must be ordered to pay the costs incurred by the Commission. Since the intervener asked that the applicant be ordered to pay the costs of its intervention, it is right, in the circumstances of the case, to order the applicant also to pay the costs incurred by the intervener.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs as well as those incurred by the Commission and the intervener, Associazione Italiana dei Corrieri Aerei Internazionali.**

Cooke García-Valdecasas Lindh

Pirrung Vilaras

Delivered in open court in Luxembourg on 30 March 2000.

H. Jung
Registrar

J.D. Cooke
President