# JUDGMENT OF THE COURT (Sixth Chamber)
21 January 1999 *

In Joined Cases C-215/96 and C-216/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

**Carlo Bagnasco and Others**

and

**Banca Popolare di Novara soc. coop. arl (BPN)** (C-215/96),

**Cassa di Risparmio di Genova e Imperia SpA (Carige)** (C-216/96),

on the interpretation of Articles 85 and 86 of the EC Treaty in relation to certain standard bank conditions which the Associazione Bancaria Italiana imposes on its members when contracts are concluded for current-account credit facilities and for the provision of general guarantees,

* Language of the case: Italian.

THE COURT (Sixth Chamber),

composed of: G. Hirsch (Rapporteur), President of the Second Chamber, acting for the President of the Sixth Chamber, G. F. Mancini, J. L. Murray, H. Ragnemalm and K. M. Ioannou, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Carlo Bagnasco and Others, by Anna Collivadino, of the Genoa Bar,

— Banca Popolare di Novara soc. coop. arl (BPN), by Giacomo Traverso, of the Genoa Bar,

— Cassa di Risparmio di Genova e Imperia SpA (Carige), by Laura Granata, of the Genoa Bar,

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato,

— the Commission of the European Communities, by Fabiola Mascardi and Wouter Wils, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 January 1998,

gives the following

## Judgment

1 By two orders of 15 May 1996, received at the Court Registry on 21 June 1996, the Tribunale di Genova (Genoa District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Articles 85 and 86 of that Treaty concerning certain standard bank conditions ('Norme Bancarie Uniforme', hereinafter 'NBU' or 'standard bank conditions') which the Associazione Bancaria Italiana (Italian Banking Association, hereinafter 'the ABI') imposes on its members when contracts are concluded for current-account credit facilities and the provision of general guarantees.

2 Those questions were raised in two actions brought by Carlo Bagnasco and Others against Banca Popolare di Novara soc. coop. arl (hereinafter 'BPN') (Case C-215/96) and by Carlo Bagnasco and Others against Cassa di Risparmio di Genova e Imperia SpA (hereinafter 'Carige') (Case C-216/96) concerning the repayment of loans granted by those banking establishments.

3 The plaintiffs in the main proceedings, Mr Bagnasco, as principal debtor, and his sureties, as joint and several debtors, appealed against two provisionally enforceable orders made by the President of the Tribunale di Genova on 1 June 1992 on application by BPN and Carige, requiring them to pay,

to BPN the sum of ITL 222 440 332, made up as follows:

— ITL 170 444 332, being the debit balance of a current account opened in the name of Carlo Bagnasco under a contract concluded on 8 October 1991, together with interest as from 1 April 1992 at the rate of 17%;

— ITL 9 400 000, being the debit balance of a current account opened in the name of Carlo Bagnasco under a contract concluded on 27 December 1991, together with interest as from 1 April 1992 at the rate of 17.50%;

— ITL 21 600 000, corresponding to the amount of four promissory notes issued by the individual firm Fidaurum, owned by Mr Bagnasco, and discounted by BPN, in respect of which the other four plaintiffs each provided a guarantee on 22 January 1992 for the sum of ITL 5 400 000, together with interest as from 22 May 1992 at the legally prescribed rate of 10%; and

— ITL 21 000 000 for bills drawn on Mrs Sbardella, discounted and credited to current accounts 'subject to payment by the principal debtor', as listed on documents signed by Carlo Bagnasco, and for the pledging of instruments, again payable by Mrs Sbardella, discounted by Carlo Bagnasco, in respect of all of which the debtor was the subject of a protest, with the result that, under the contract, that person also forfeited all rights as regards the unmatured instruments, together with interest on that sum at the rate of 15% as from the date of the order requiring payment;

and to Carige the sum of ITL 124 119 497, made up as follows:

— ITL 48 798 664, being the debit balance of a current account opened in the name of Mr Bagnasco under a contract concluded on 28 August 1989, together with interest as from 11 June 1992 at the rate of 17.50%;

— ITL 75 320 833, together with interest as from 11 June 1992 at the rate of 15%, in respect of a 'bank advance' of ITL 95 000 000 arranged on 12 November 1991, for which Mr Bagnasco had issued 19 promissory notes.

4 The orders addressed to the plaintiffs in the main proceedings, who are joint and several debtors, were obtained by reason of the specific guarantee which they had given for the unpaid promissory notes and of the 'general guarantee' (*fidejussione omnibus*) which they had signed for up to ITL 300 000 000 (Case C-215/96) and ITL 195 000 000 (Case C-216/96).

5 The plaintiffs have asked the national court to declare the orders at issue invalid or unenforceable or — in the alternative — to determine precisely what amount is owed to the two banks. They plead, in particular, that the NBU, on which the claims of the defendants in the main proceedings are based, are incompatible with Articles 85 and 86 of the Treaty.

6 According to the Tribunale di Genova, it is undisputed that Articles 85 and 86 of the Treaty confer rights on individuals which they may rely on before national courts. Similarly, the NBU imposed by the ABI on its member banks and applied 'as such' by all Italian banks in their dealings with customers constitute a concerted practice and, in particular, a decision of an association of undertakings within the meaning of Article 85(1) of the Treaty.

7 The national court considers, however, that the compatibility with Articles 85 and 86 of the Treaty of certain clauses of the contracts for the opening of a current-account credit facility and the provision of general guarantees is questionable.

8 As regards the contracts for current-account credit facilities, that court states that the contracts concluded by Mr Bagnasco with BPN provide, in paragraph 2, for the application of annual interest rates of 17% and 17.5%, plus commission of 0.125% on the highest debit balance for each calendar quarter or part thereof.

9 Paragraph 2 also provides that 'interest rates ... may be increased or decreased by reason of changes occurring on the money market'. Paragraph 12 of the contract provides that 'the banks shall be entitled at any time to vary interest rates ... by means of a notice displayed at their premises or in such manner as they consider most appropriate'. Clauses of that kind, included in the ABI standard contract, also appear in Mr Bagnasco's contract with Carige.

10 According to the national court, only the initial determination of the debit rate reflects direct negotiation between the parties: any further increase in the interest rate following changes in the money market is unforeseeable or, at least, difficult for average customers of the bank to foresee. Thus, the bank's right to decide when both changes are to be made to that rate and what procedure is to be followed for notifying them to customers is strengthened.

11 As far as the general guarantee is concerned, the Tribunale di Genova observes that the relevant clauses of the ABI standard contract and of the contracts at issue in these proceedings concern:

— the giving of a guarantee 'at the same rate of interest as that prescribed for the transaction covered and in any event a rate not lower than the current bank rate' ... 'in respect of any breach of any obligation vis-à-vis the bank in connection with banking transactions of any kind, already made available or hereafter to be made available to the said person (or any subrogated party)'; the guarantee also covers 'any other obligation to which the principal debtor may

find himself subject at any time vis-à-vis the bank in relation to guarantees already given or to be given in the future by the same debtor to the bank for the benefit of third parties' (thus triggering the mechanism of the 'guarantee of a guarantee' which is capable of being extended, as regards the persons concerned, to a practically unlimited and uncontrollable extent);

— in paragraph 5, the guarantor's obligation to keep himself apprised of the debtor's financial situation and in particular to obtain information from the debtor regarding the course of his relations with the bank, the latter being released from any obligation to seek from the guarantor the special authorisation provided for in Article 1956 of the Civil Code, which provides: 'A guarantor of a future obligation is released from his liability if the creditor, without special authorisation from the guarantor, has granted credit to the third party, even though he knows that the latter's financial circumstances have become such as to make it considerably more difficult for him to pay off the loan';

— in paragraph 6, the release which the guarantor gives the bank from its obligation to act within the time-limits laid down in Article 1957 of the Civil Code, which provides: 'The guarantor shall remain liable even after the principal obligation has expired provided that the creditor has, within six months, commenced proceedings against the debtor and pursued them diligently'); paragraph 6 goes on to say that the guarantor remains liable, notwithstanding that provision, 'even if the bank has not commenced proceedings against the debtor and any joint obligors and has not continued the same', thus continuing to be jointly and severally liable 'until total extinguishment of the debt, without limitation as to time or the fulfilment of any conditions';

— in paragraph 7(1), the obligation undertaken by the guarantor to 'pay immediately to the bank, upon simple written request, even in the case of opposition by the debtor, whatever is owing to it by way of capital, interest, expenses, taxes, charges, and any other incidentals';

— in paragraph 7(3), the statement that 'for determination of the debt secured by the guarantee, the figures set out in the bank's accounting records shall be con-

clusive as against the guarantor, his heirs and successors and assigns, and the bank shall not be required to send to the guarantor, on its own initiative, any communication regarding the state of the accounts and relations with the debtor in general';

— in paragraph 7(5), the derogation from Article 1939 of the Civil Code, according to which '[t]he guarantee shall not be valid in the event of the principal obligation not being valid, unless it is given in respect of an obligation undertaken by a person subject to an incapacity', with the result that the 'obligation shall remain effective in every respect even if the principal obligation is invalid for any reason, the guarantor thus intending, in the event of the principal obligation being declared void or being annulled, to commit himself as if he had undertaken the obligation personally.'

12 With respect to all those clauses, the national court considers that a decision from the Court of Justice is needed as regards the sums which BPN and Carige consider are due to them under the current-account contracts concluded by Mr Bagnasco and under the guarantee in respect of those sums given by the other plaintiffs in the main proceedings. It therefore stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

(1) Whether the Norme Bancarie Uniforme (Standard Bank Conditions) laid down by the ABI for its members in relation to contracts for the opening of current-account credit facilities — since they are laid down and applied in a uniform and binding manner by the banks belonging to the ABI — are compatible with Article 85 of the Treaty, where they make the credit facility subject to conditions for determination of an interest rate which is not previously determined and is not determinable by the customer, and they are liable adversely to affect trade between the Member States and have as their object and effect the prevention, restriction or distortion of competition within the common market;

(2) What effects any finding of incompatibility of the kind referred to in Question 1 may have on the corresponding clauses of the contracts for the opening of a

current-account credit facility, concluded 'downstream' by member banks with individual customers, since, as a group, the banks belonging to the ABI may be regarded, within the meaning and for the purposes of Article 86 of the Treaty, as holding a joint dominant position in the national credit market, whose specific application of the rules in question (in connection with determination of the interest payable on the loan) is regarded as an abuse;

(3) Whether the NBU laid down by the ABI for its members in relation to the 'general' guarantee covering the credit facility — since they are applied in a uniform and binding manner by the member banks — are, taken as a whole, compatible with Article 85 of the Treaty, as regards the individual clauses discussed in the grounds of this order, in that they are liable adversely to affect trade between the Member States and have as their object and effect the prevention, restriction or distortion of competition within the common market;

(4) What effects any finding of incompatibility of the kind referred to in Question 3 may have on the corresponding clauses of the 'general' guarantee agreements and on the agreements themselves concluded 'downstream' by individual banks, since, as a group, the banks belonging to the ABI may be regarded, within the meaning and for the purposes of Article 86 of the Treaty, as holding a joint dominant position in the national credit market, whose specific application of the rules in question is regarded as an abuse.

13 It must first be noted that, after the contracts at issue were concluded, the Italian rules applicable to the opening of current-account credit facilities and the provision of general guarantees were amended. Law No 154/92 changed the rules on general guarantees by requiring banks to determine in advance the maximum amount secured by the guarantee.

14 Furthermore, by memorandum dated 22 February 1993 the ABI decided to notify its standard banking conditions to the Commission for examination by the latter for the purposes of Article 85 of the Treaty. The same documents were forwarded to the Banca d'Italia (hereinafter 'the Bank of Italy') as the competent national authority for application of the rules on protection of competition and of the market in the credit sector.

15 By letter of 7 July 1993 the Commission informed the Bank of Italy that it had decided to examine only 3 of the 26 agreements notified. Without expressing a view as to the existence or otherwise of any restriction of competition, the Commission stated that the majority of the agreements, including those for the opening of current-account credit facilities and the provision of general guarantees, did not appear capable of affecting, entirely or appreciably, trade between Member States. In that connection, it pointed out, first, that the banking services in question are limited to national territory and involve economic activities which, under contractual provisions or by reason of their very nature, must be carried on only within Italian territory or have a very limited influence on trade between Member States and, second, that the participation of subsidiaries or branches of non-Italian financial establishments is limited. It therefore stated that it did not intend undertaking any further examination of those agreements, taking the view that Article 85 of the Treaty was not applicable to them.

16 The only agreements which the Commission considered as falling within its terms of reference deal with the conditions for current accounts incorporating a foreign-currency credit facility and with the conditions governing the collection or acceptance of negotiable instruments or letters of credit payable in Italy or abroad.

17 On 23 November 1993 the Bank of Italy initiated a procedure under Law No 287/90, Article 2(2) of which reproduces the provisions of Article 85(1) of the Treaty, for examination of the 23 agreements excluded from the Commission's examination. The procedure concluded with Decision No 12 of 3 December 1994 (*Bolletino dell'Autorità Garante della Concorrenza e del Mercato* of 19 December 1994, year IV, No 48, p. 75) in which the Bank of Italy determined that both the

NBU for guarantees covering credit facilities and those covering the opening of a current account credit facility were liable to affect competition. That decision called on the ABI to amend the agreements and to notify the changes made to its members. The ABI was also called on to make it clear to its members that the NBU were merely for guidance, were not binding in any way and were not in the nature of a recommendation and that, therefore, members were entitled to use them or to decline to do so, and also to make any changes to them which they considered appropriate.

18 Following that decision, the ABI amended the NBU in the manner required by the Bank of Italy. Those amendments do not, however, operate retroactively so as to affect existing contracts.

## The admissibility of the reference for a preliminary ruling

19 The BPN submits, first, that the questions referred to the Court are not relevant to the decision to be given in the main proceedings. In its view, it is clear from the contractual documents and from the summary payment order that, as far as contracts granting credit facilities are concerned, the clauses and, therefore, the measures imposed by the ABI relate not to the interest rates which may be varied or are influenced by market conditions but rather to the rates agreed *a priori* on a fixed basis and that, as far as guarantees are concerned, the contract is one in which any clause liable to involve infringement of Articles 85 and 86 of the Treaty is entirely irrelevant.

20 According to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (see Case C-472/93 *Spano and Others* v *Fiat Geotech and Fiat Hitachi* [1995] ECR I-4321, paragraph

15, and Case C-373/95 *Maso and Others* v *INPS and Italian Republic* [1997] ECR I-4051, paragraph 26). A request for a preliminary ruling may be rejected as inadmissible only where it is plain that the interpretation or the examination of the validity of a Community rule requested by the national court has no bearing on the actual facts or subject-matter of the case before the national court (see, in particular, Case C-472/93 *Spano and Others*, cited above, paragraph 15, and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 61).

21 In this case it need merely be observed that the contracts concluded by the parties to the main proceedings contain clauses relating to the NBU regarding which the national court has considered it necessary to seek from the Court of Justice guidance as to the interpretation of Community law in order to enable it to appraise their compatibility with Articles 85 and 86 of the Treaty.

22 In those circumstances, the objections raised by BPN regarding the admissibility of the questions submitted cannot be upheld and an answer must be given to those questions.

## The first question

23 By its first question, the national court wishes essentially to ascertain whether the NBU, in so far as they allow banks, in contracts for current-account credit facilities, to change the interest rate at any time by reason of changes on the money market, and to do so by means of a notice displayed on their premises or in such manner as they consider most appropriate, have as their object or effect a restriction of competition or may affect trade between Member States within the meaning of Article 85(1) of the Treaty.

24 The plaintiffs in the main proceedings consider that a concerted practice exists in Italy for determination of the interest rates applied by banks to their debtors and that there are even agreements and/or concerted practices relating to the general conditions in contracts, drawn up within the ABI and set out in the NBU, which banks systematically include in the standard contracts which they offer to their customers. Under those clauses, the position of principal debtors and of guarantors, of any nationality, who are under an obligation to an Italian bank is weaker than that of any other debtors or guarantors dealing with a bank in another Member State.

25 Even the base rate is not the outcome of free negotiation between parties since the banks affiliated to the ABI are required to comply with the decisions of the cartel; the customer will not therefore find any significant differences between the rates applied by the various credit establishments.

26 According to the plaintiffs in the main proceedings, the banks are also unilaterally empowered to change rates, prices and other conditions. The only protection available to the customer lies in cancellation of the contract. However, that possibility is purely hypothetical since it will be very difficult for the customer to find any credit establishment which applies different interest rates, precisely because the banks form a cartel. A customer who needs to open a current-account credit facility is therefore in a position of absolute subjection to the banks affiliated to the ABI.

27 The BPN contends that the view that its contracts are subject to constraints and obligations imposed by the ABI, such as the situation envisaged in the order for reference, has no basis in fact and is inconceivable. Moreover, an analysis of the relevant market — as regards both the product and the geographical area involved — shows that there is not a sufficiently large margin in the banking business for it to be possible to apply a uniform banking 'policy' in such a way as to prevent, restrict or distort competition.

28 Carige submits that the rules applicable to interest rates which are not entirely determined or determinable are not incompatible with Article 85 of the Treaty in that they are not the result of agreements between undertakings which are liable appreciably to affect competition on the market in services involving transfers of capital.

29 The Italian Government observes that, by memorandum of 22 February 1993, the ABI notified to the Commission the circulars containing the NBU sent to its members so that the Commission could examine them in the light of Article 85 of the Treaty. The same documents were sent to the Bank of Italy, the competent national authority for application of the rules on protection of competition and of the market in the credit sector.

30 The Italian Government considers that the only agreements which the Commission regarded as falling within its terms of reference relate to the conditions for current accounts incorporating a cash credit facility, conditions for current accounts incorporating a credit facility in foreign currency and conditions governing services for collection or acceptance of negotiable instruments or letters of credit payable in Italy or abroad. Those agreements have no bearing on the present case.

31 According to the Commission, whilst it cannot be ruled out that the clauses in question might be restrictive of competition in so far as they involve some limitation of the contractual freedom of member banks of the ABI, those clauses are nevertheless not incompatible with Article 85 of the Treaty in the absence of any appreciable effect on trade between Member States.

32 It must be borne in mind that, under Article 85(1) of the Treaty, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market are incompatible with the common market.

33 According to settled case-law of the Court, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (see Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 76, and Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 90).

34 Whilst Article 85(1) of the Treaty does not restrict such an assessment to actual effects alone, in so far as it must also take account of the agreement's potential effects on competition within the common market, an agreement will nevertheless fall outside the prohibition in Article 85 if it has only an insignificant effect on the market (Case C-7/95 P *Deere* v *Commission*, cited above, paragraph 76, and Case C-8/95 P *New Holland Ford* v *Commission*, cited above, paragraph 91).

35 In that connection, it must be stated that the opening of a current-account credit facility is a banking transaction which, by its nature, is linked with the right of the bank to change the agreed rate of interest by reference to factors such as, in particular, the conditions for re-financing of the loan by banks. Although that right means that the bank's customer runs the risk of paying more interest during the currency of the contract, it also offers a chance of lower interest. Since, as in this case, any variation of the interest rate depends on objective factors, such as changes occurring in the money market, a concerted practice which excludes the right to adopt a fixed interest rate cannot have an appreciable restrictive effect on competition.

36 As regards the clause under which banks notify changes in interest rates by means of a notice displayed in their premises or in such manner as they consider most appropriate, it need merely be pointed out that that clause does not prohibit the banks from arranging for a more appropriate means of notifying their customers.

37 The answer to the first question must therefore be that standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility, to change the interest rate at any time by reason of changes occurring in the money market, and to do so by means of a notice displayed on their premises or in such manner as they consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty.

## The third question

38 By its third question, the national court seeks essentially to ascertain whether standard bank conditions relating to the provision of general guarantees required to secure the opening of a current-account credit facility, as described in paragraph 11 of this judgment, have as their object or effect, when taken together, a restriction of competition or whether they may affect trade between Member States within the meaning of Article 85(1) of the Treaty.

39 The plaintiffs in the main proceedings observe that a person who has given a guarantee to a bank operating in Italy is required, by virtue of Italian case-law, to pay all sums claimed by the bank in respect of both present and future banking transactions carried out by the bank for the benefit of the principal debtor, whether they are habitual, incidental or occasional, even where those transactions involve, as a result of the discretion enjoyed by the bank, an unforeseeable increase in the customer's total indebtedness to that bank in the course of his relationship with it.

40 In support of that argument, the plaintiffs in the main proceedings refer to paragraph 7(5) of the guarantee contract, under which the commitment given remains wholly effective even if the principal obligation is invalid for any reason whatsoever, the guarantor being deemed, in the event of the principal obligation being declared void or annulled, to have given the commitment as if acting on his own account.

41 Carige submits, on the other hand, that the rules imposed by the ABI in relation to the general guarantee contract concluded to secure the opening of a credit facility are compatible with Article 85 of the Treaty since they are not liable appreciably to affect competition in the market by reason of the nature of the services provided.

42 The Commission emphasises that, according to the information at present available to it concerning cross-frontier supply of and demand for bank services in respect of current-account credit facilities and the provision of general guarantees, the services in question do not appear to be of decisive importance as regards access to the Italian financial market for banks from other Member States. Referring to the reasoning given in its letter of 7 July 1993, the Commission submits that the NBU on the basis of which the contracts at issue in the main proceedings were concluded do not fulfil one of the necessary conditions for the application of Article 85(1) of the Treaty, namely that of being liable appreciably to affect trade between Member States.

43 It must be noted, at the outset, that the provision of a guarantee is a traditional form of surety which may be used, in particular, to secure a current-account debit balance. Under Italian law, sureties are governed by specific rules in the Civil Code, from which derogations are available under certain conditions.

44 To the extent to which they lay down 'rules concerning guarantees to secure banking transactions', by a way of derogation from the rules in the Civil Code, the NBU are intended to secure the claims of banks in the most effective manner.

45 On the other hand, since those rules are, according to the findings of the national court, binding on the members of the ABI, they limit the contractual freedom of the banks by preventing them from offering to customers who apply for a credit facility more favourable conditions for the associated guarantee contract. The latter, however, is merely ancillary to the principal contract, of which in practice it is usu-

ally a precondition (see Case C-45/96 *Dietzinger* [1998] ECR I-I-1199, paragraph 18).

46 In those circumstances, rather than examining at the outset the question whether that limitation of contractual freedom involves appreciable effects on competition, it is appropriate first to consider what effects clauses such as those contained in the general guarantee contracts at issue in the main proceedings might possibly have on trade between Member States.

47 In that regard, the Court has consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22). Accordingly, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Case C-250/92 *Gottrup-Klim* v *Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 54).

48 It is also settled case-law that, whilst Article 85(1) of the Treaty does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19).

49 In this case, as far as the effects of the rules on the provision of general guarantees on intra-Community trade are concerned, it is conceivable that the subsidiaries or branches of banks of other Member States which are established in Italy might be obliged, in order to benefit from the advantages of membership of the ABI, to apply the NBU and thus forgo the possibility of applying more favourable condi-

tions. Similarly, having regard to the fact that the great majority of Italian banks are members of the ABI, customers wishing to conclude a contract for a current-account credit facility might find that their choice of bank was restricted where the conclusion of such a contract depended upon the provision of a surety governed by the NBU, to which, for the most part, no exceptions are possible.

50 It is true that, in principle, the answer to the question whether or not the conditions for the application of Article 85(1) of the Treaty are fulfilled depends on complex economic assessments which it is for the national court to undertake, if appropriate, in accordance with the criteria laid down by a the case-law of the Court of Justice. However, in certain circumstances, and having regard to the indications given by the Court, no such analysis appears necessary (see Case C-250/92 *Gottrup-Klim* v *Dansk Landbrugs Grovvareselskab*, cited above, paragraph 55). Such is the position in the present case.

51 It must be borne in mind that the Commission, when approached by the ABI concerning the compatibility of the clauses governing the provision of general guarantees in relation to Article 85 of the Treaty, found that the banking service in question involved economic activities which have a very limited impact on trade between Member States and that the participation of the subsidiaries or branches of non-Italian financial establishments was limited (see paragraph 15 of this judgment). Moreover, the Commission has made clear, in reply to a question put to it by the Court, that potential recourse to contracts for credit facilities and contracts for the provision of general guarantees by the main customers of foreign banks, that is to say large undertakings and foreign economic operators, is not great and, in any event, is not a factor of decisive importance in the choice made by foreign banks as to whether or not to establish themselves in Italy, in so far as contracts of the kind at issue in the main proceedings are only rarely used by customers of that kind. The Commission's findings to that effect have not been called in question in the present proceedings.

52 Moreover, there is nothing else in the documents before the Court to justify the conclusion, with a sufficient degree of probability, that the reservations entertained by customers wishing to conclude a current-account credit facility contract regarding their choice of bank by reason of the existence of standard bank conditions relating to the provision of general guarantees is of such a kind as to have an appreciable effect on intra-Community trade.

53 The answer to the third question must therefore be that standard bank conditions relating to the provision of general guarantees to secure current-account credit facilities, which derogate from the general law concerning guarantees, such as the rules in the main proceedings, are not, taken as a whole, liable to affect trade between Member States within the meaning of Article 85(1) of the Treaty.

## The second and fourth questions

54 By its second and fourth questions, the national court seeks first to ascertain whether the application of the NBU constitutes an abuse, as contemplated by Article 86 of the Treaty, of a collective dominant position by the banks belonging to the ABI. It then asks what effects any incompatibility of the NBU with Articles 85 and 86 of the Treaty might have on the corresponding clauses of the contracts concluded between banks and their customers.

55 The BPN does not see in what way the clauses in question might constitute a manifestation of a dominant position since the self-imposed limitation deriving from the ceiling on overdrafts and the clauses granting the sureties specific rights concerning cancellation, information, and other matters belies the hypothesis that clauses of uniform content or 'concerted practices' are used to give effect to a contractual intent on the part of persons unconnected with the direct contractual relationship in question to limit or restrict freedom of competition.

56 The Commission states first, referring to the case-law of the Court (see Joined Cases C-140/94 to C-142/94 *DIP and Others* v *Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257, paragraphs 26 and 27), that the mere fact that the ABI's membership includes almost all Italian banks is not a sufficient reason to conclude that its members together hold a collective dominant position.

57 Nor, in its view, could it be contended, even if it were conceded that the member banks of the ABI together held a collective dominant position, that the conduct described by the national court constituted an abuse of that dominant position.

58 It must be borne in mind that, under Article 86 of the Treaty, the abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is incompatible with the common market and is prohibited in so far as it may affect trade between Member States.

59 Without its being necessary to consider whether the banks which are members of the ABI hold a collective dominant position within the meaning of Article 86 of the Treaty, it need merely be stated that, since, as is clear from consideration of the first question, any change in the interest rate for a current-account credit facility depends on objective factors, such as changes occurring in the money market, that conduct cannot, in any circumstances, constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty.

60 As regards the NBU relating to the provision of general guarantees to secure the opening of a current-account credit facility, it is clear from consideration of the third question that the application of those NBU, taken as a whole, is not liable appreciably to affect trade between Member States.

61 In those circumstances, the answer to the second and fourth questions must be that the application of the said NBU does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.

62 In view of the answers given to the foregoing questions, it is unnecessary to answer the question concerning the effects which any incompatibility of the aforesaid NBU with Articles 85 and 86 of the Treaty might have on the corresponding clauses of the contracts concluded by banks with their customers.

## Costs

63 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunale di Genova by orders of 15 May 1996, hereby rules:

1. **Standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility, to change the interest rate at any time by reason of changes occurring in the money market, and to do so by means of a notice displayed on their premises or in such manner as they**

**consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of Article 85(1) of the EC Treaty.**

2. **Standard bank conditions relating to the provision of general guarantees to secure current-account credit facilities, which derogate from the general law concerning guarantees, such as the rules in the main proceedings, are not, taken as a whole, liable to affect trade between Member States within the meaning of Article 85(1) of the EC Treaty.**

3. **The application of the abovementioned standard bank conditions does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.**

Hirsch Mancini Murray

Ragnemalm Ioannou

Delivered in open court in Luxembourg on 21 January 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber