OPINION OF ADVOCATE GENERAL COSMAS
delivered on 12 February 1998 *

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1. In this action brought pursuant to the second paragraph of Article 169 of the Treaty, the Commission asks the Court to hold that, by adopting and maintaining in force a law which requires the Consiglio Nazionale degli Spedizionieri Doganali (National Council of Customs Agents, hereinafter 'the CNSD') to adopt a decision by an association of undertakings contrary to Article 85 of the Treaty, consisting in the fixing of the level of a compulsory tariff for all customs agents, the Italian Republic is in breach of its obligations under Articles 5 and 85 of the Treaty.

2. The case gives the Court an opportunity to decide *inter alia*, first, whether those exercising a professional occupation, in this case customs agents, may be regarded as undertakings under Community competition law and are consequently subject to the restrictions laid down therein and, secondly, whether a national professional organisation with the status of a public body, which fixes by decision the tariff (maximum and minimum amounts) for services provided by its members, may be regarded as constituting an association of undertakings whose decision fixing a tariff is contrary to Article 85 of the Treaty.

I — Legal background

A — *Community legislation*

3. Under Article 85(1) of the Treaty:

'1. The following shall be prohibited as incompatible with the common market all ... decisions by associations of undertakings ... which may affect trade between Member States and which have as their object or

effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

...'.

B — *National legislation at issue*

4. In Italy the activity of customs agent, which is a professional occupation, is governed by Law No 1612 of 22 December 1960 (hereinafter 'Law No 1612/1960') [1] and the implementing provisions contained in subsequent texts such as presidential and ministerial decrees. A customs agent's activity includes the provision of services in the context of customs clearance procedures (the provision of services in the monetary, commercial and fiscal areas and any other area related to customs clearance) (Article 1 of Law No 1612/1960).

1 — Law on the Legal Recognition of the Profession of Customs Agent and the Establishment of Registers and Insurance Funds for Customs Agents, *Gazzetta Ufficiale della Repubblica Italiana (GURI)* No 4 of 5 January 1961.

5. In order to pursue the activity of customs agent, authorisation (patente) is required for an unlimited period as well as registration in the national register of customs agents, which is made up of all the departmental registers held by the departmental councils of customs agents (Consigli compartimentali) for each customs department of the Italian Republic (Articles 2 and 4 to 12 of Law No 1612/1960).

6. Supervision of the activity of customs agents is carried out by the departmental councils. They are elected by secret ballot from among the members entered in the register of a departmental council, for a term of two years. Each council is presided over by a member elected by his colleagues (Article 10 of Law No 1612/1960).

7. The CNSD is a body governed by public law. It is composed of nine members appointed for three years by secret ballot from among the members of the various departmental councils of customs agents and is presided over by a member elected by his colleagues. Its members may be re-elected (Article 13 of Law No 1612/1960).

8. Formerly the Director-General of Customs and Indirect Taxes was by law a member of the CNSD and held the chair *ex*

officio. However, Decreto legge (Decree-law) No 331 of 30 August 1992 (Article 32) abolished that rule.

9. Law No 1612/1960 (Article 14(d)) confers on the CNSD principally the power to set the tariff for the professional services provided by customs agents on the basis of proposals from the departmental councils. Under the second paragraph of Article 11 of that Law, the tariff is mandatory.

10. Under a Decree of the Minister for Finance of 10 March 1964, [2] those contravening the tariff face disciplinary measures (Articles 38 and 40), ranging from reprimand to temporary suspension from the register where the offence is repeated (Article 40(d)), and, in the case of temporary suspension from the register by the departmental council twice in five years, the penalty of definitive removal from the register of customs agents may be imposed.

11. At its meeting of 21 March 1988, the CNSD adopted the tariff for services provided by customs agents, stating as follows:

(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 areas, 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 5) 'In relation to the provisions of Article 1 above, this tariff shall always be compulsory as regards the principal and annuls any other agreement to the contrary ...'.

(Article 6) 'The National Council of Customs Agents shall be empowered to make specific and/or temporary derogations from the minimum amounts laid down in this tariff.'

(Article 7) 'The National Council of Customs Agents shall update the present tariff according to the indexes supplied by Istat (Central Statistics Institute) — Industrial Sector — as from the date of the relevant decision.'

2 — Decree on rules implementing Law No 1612 of 22 December 1960, *Supplemento ordinario alla GURI*, No 102, of 24 April 1964.

12. Pursuant to that latter provision, at its meeting of 15 March 1989 the CNSD decided to increase the prices set by the tariff by 8% from 1 January 1990. [3]

13. The tariff drawn up by the CNSD at its meeting of 21 March 1988 was approved by the Italian Minister for Finance by a decree of 6 July 1988. [4]

II — Infringement procedure

14. The Commission considered that the Italian legislation was in breach of Community law and set in motion three different procedures against the Italian Republic.

15. First, by application lodged at the Court Registry on 24 March 1992, it brought an action against the Italian Republic, seeking a declaration that the latter had infringed Articles 9 and 12 of the Treaty by approving, and making mandatory, tariffs for customs agents (Case C-119/92). The Court dismissed that action by judgment of 9 February 1994. [5]

16. Subsequently, on 30 June 1993, the Commission adopted Decision 93/438/EEC, [6] which states (Article 1): 'The tariff for services provided by customs agents which was adopted by the Consiglio Nazionale degli Spedizionieri Doganali ("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'. [7]

17. Lastly, taking the view that the provisions of Law No 1612/1960 are contrary to Articles 5 and 85 of the Treaty, the Commission initiated the pre-litigation procedure which resulted in the case now before the Court.

18. More precisely, pursuant to Article 169 of the Treaty, by letter of formal notice dated 18 October 1993 [8] the Commission informed the Italian Republic of its reasons for considering that State to be in breach of Community law and invited it to present its observations on the substance within two months from receipt of the letter. The Commission received no answer from the Italian authorities.

3 — Communication from the Ministry of Finance published in GURI No 299 of 23 December 1989.

4 — GURI No 168 of 19 July 1988, p. 19.

5 — *Commission* v *Italy* [1994] ECR I-393.

6 — Commission Decision relating to a proceeding pursuant to Article 85 of the EEC Treaty, OJ 1993 L 203, p. 27.

7 — The CNSD brought an action before the Court of First Instance (Case T-513/93) which is still pending, seeking the annulment of that decision. The Court of First Instance decided to postpone judgment until the Court had reached its decision in this case.

8 — Reference SG(93) D/16736 93/2181.

19. On 21 June 1995, the Commission sent the Italian Republic a reasoned opinion, calling on it to adopt all the measures necessary to comply with it within a period of two months from notification. The Italian authorities did not reply to the Commission's reasoned opinion.

20. Subsequently, by an application lodged at the Court Registry on 9 February 1996, the Commission brought the present action for a declaration that the Italian Republic was in breach of its obligations.

21. By document lodged on 15 May 1996 at the Court Registry, the Italian Government asked that the action be declared inadmissible. The Court decided to reserve its decision on that objection for the final judgment. For the rest, the Italian Government allowed the time-limit for submitting a defence to elapse. [9]

III — Pleas in law of the parties

22. The Commission asks the Court

(a) to declare that, by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the Consiglio Nazionale Spedizionieri Doganali to adopt a decision by an association of undertakings contrary to Article 85 of the Treaty establishing the European Community in that it sets a compulsory tariff for all customs agents, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty, and

(b) to order the Italian Republic to pay the costs.

23. The Italian Republic asks the Court to hold the application inadmissible.

IV — Admissibility of the application

A — *First plea of inadmissibility*

(1) Initiation of a second procedure for infringement in the course of the first

24. The Italian Republic maintains that the Commission was not entitled, on the basis of the same facts, to initiate a second procedure

9 — To be more exact, it sought to have the time-limit for submitting a defence extended, in reliance on *force majeure*, but the Court dismissed its request.

against it for infringement of its obligations under the Treaty, in particular Articles 5 and 85 thereof (the present case C-35/96), in other words for reasons that are different from and incompatible with those on which it relied in its first action based on Articles 9 and 12 of the Treaty, without withdrawing the first action (Case C-112/92). That is because what is involved is either a customs duty or an agreement by an association of undertakings ratified by the Member State, but not both at the same time. The Court of Justice should first of all deliver judgment on the substance of the dispute in the first case and the Commission should then initiate the procedure for infringement of other obligations by the same Member State, asking the Court to find accordingly.

25. The Commission maintains that the Italian Government's argument to the effect that it is not possible for the same national legislation to be challenged on the basis of different Treaty provisions is misconceived. In support of that contention, it relies on the Court's case-law where, in a large number of cases, the Court has held that national measures simultaneously infringed more than one provision of the Treaty [10] or provisions of the Treaty and of secondary Community law. [11] It maintains that no provision or general principle of law indicates that one procedure for infringement is excluded in relation to another, in so far as the legal basis of the second is fundamentally different from the legal basis of the first. At the hearing the Commission explained that by way of the procedure against the CNSD based on Council Regulation No 17 [12] it reached the conclusion that the legislation of the Italian Republic was responsible for the infringement on the part of the CNSD of Article 85 and accordingly initiated infringement proceedings under Article 169. It emphasised that there is no rule that requires the procedure of Regulation No 17 and that of Article 169 to be initiated successively.

26. First of all I would point out that in Case C-119/92 the Court dismissed the Commission's action against the Italian Republic, [13] on the ground that importers were not obliged in every case to have recourse to the services of a customs agent and consequently the compulsory tariff for services provided by customs agents fixed by the CNSD could not be regarded as a charge

10 — See Case 45/75 *Rewe-Zentrale* [1976] ECR 181, paragraphs 21 to 27, concerning infringement of Articles 37 and 95 of the Treaty; Case 78/76 *Steinike & Weinlig* [1977] ECR 595, concerning Articles 92 and 95 of the Treaty; Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, concerning Articles 90(1), 86, 30 and 48 of the Treaty; and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, concerning Articles 59 and 67 of the Treaty.

11 — Such as Article 30 of the Treaty and provisions of secondary Community law, for instance a regulation on the common organisation of a market; see, for example, in the context of an action under Article 169, Case 127/87 *Commission* v *Greece* [1988] ECR 3333 concerning the common market in sheepmeat and goatmeat. See also Case C-280/89 *Commission* v *Ireland* [1992] ECR I-6185 concerning the common structural policy in the fisheries sector, and Case C-228/91 *Commission* v *Italy* [1993] ECR I-2701 concerning health controls in the fisheries sector.

12 — Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

13 — Cited in footnote 5 above (in particular paragraphs 46 and 47).

having effect equivalent to a customs duty within the meaning of Articles 9 and 12 of the Treaty.

27. Regardless of the decision reached by the Court in Case C-119/92, I consider it important to examine whether the Commission was entitled, when the first infringement procedure was pending, to initiate a second procedure against the same Member State if it considers that the same legislation infringes other provisions of the Treaty as well, or whether it is bound to conclude the procedure under Regulation No 17 and then initiate the procedure under Article 169.

28. According to Articles 155 and 169, the Commission is the custodian of Community legality since, in the general interest of the Community, its function is to ensure that the provisions of the Treaty are applied by the Member States and to note the existence of any failure to fulfil the obligations deriving therefrom, with a view to bringing it to an end. [14] Consequently, it is for the Commission to determine whether it is expedient to take action against a Member State [15] and to judge at what time it will initiate such an action against a State [16] whose legislation it considers to be contrary to Community legislation, determining what provisions, in its view, the Member State has infringed, and consequently choosing the time to bring the action. [17]

29. In my view it is also for the Commission to choose whether to proceed first against an undertaking whose conduct it considers to be affecting competition and subsequently against the Member State whose legislation requires or favours the conclusion of agreements or cooperation contrary to Article 85 or, conversely, if it considers it expedient not to take action against the undertaking, it prefers to initiate proceedings under Article 169 against the Member State.

30. In addition to the above, I consider that from the point in time when the Commission decides to exercise its powers under Article 169, by sending the Member State a letter of formal notice and, principally, the reasoned opinion, the subject-matter of the dispute becomes entrenched. Consequently the diagnosis of infringement is made primarily in the reasoned opinion and consequently the subject-matter of the case brought against a Member State for infringement always follows from that set out in the reasoned opinion. In other words, the reasoned opinion delimits the subject-matter of the dispute before the Court, in so far as both the application and the reasoned opinion must be founded on the same grounds and pleas in law; [18] the submission of new complaints on the part of the Commission or

14 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15.

15 — See the analysis by Denis Simon 'Recours en constatation de manquement' in *Jurisclasseur*, 1991, Fasc. 380, § 46.

16 — Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 12.

17 — Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, paragraph 4.

18 — See, for instance, Case 166/82 *Commission* v *Italy* [1984] ECR 459, paragraph 16; Case C-234/91 *Commission* v *Denmark* [1993] ECR I-6273, paragraph 16; and Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11.

even an extension of its reasoning by relying on new evidence in the context of the same complaints is inadmissible. [19] Correspondingly, the competence of the Court when hearing the action under Article 169 is clearly defined; it is restricted to review of the legality of the evidence contained in the reasoned opinion and reproduced in the application. [20]

31. From the above it follows, in my view, that the Commission may very well, on the basis of its powers under Article 169, take action, in the context of a new procedure, against the Member State in question, where it considers that the same legislation is contrary to rules other than those of the preceding procedure, even if the latter has not yet reached its conclusion. Furthermore, given that the procedures under Article 169 and Regulation No 17 are independent of each other, and that the Commission is acting against a Member State in the first situation and against an undertaking or association of undertakings in the second, the Commission was not bound to carry out one procedure before the other to ensure the admissibility of the action brought under Article 169 if all the requirements set out in that provision are fulfilled. Consequently, the argument put forward by the Italian Government to the contrary must be rejected as unfounded.

19 — See Case C-296/92 *Commission* v *Italy*, cited in footnote 18.

20 — Thus the Community Court cannot substitute a different period for that laid down in the reasoned opinion; see Case 28/81 *Commission* v *Italy* [1981] ECR 2577, paragraph 6; and Case 29/81 *Commission* v *Italy* [1981] ECR 2585, paragraph 6.

(2) Infringement of the rights of defence in the procedure against the Member State for infringement

32. According to the Italian Government, the Commission was not entitled to initiate a second procedure for a declaration of infringement on grounds that were different from and incompatible with those on which it based its first action, since it is thus affecting its right to develop its defence, obliging it to defend itself, at the same time, in two cases, whose subject-matter consists of exactly the same facts but which are based on different provisions. In addition, during the hearing, it maintained that it was not in a position to submit its observations on its alleged infringement since, in adopting Decision 93/438, the Commission presented it with a *fait accompli* and its right to defend itself was thus rendered nugatory.

33. According to the Commission, that argument by the Italian Republic is unfounded, since it did not react to the sending of the documents in the pre-litigation procedure; its sole reaction was to put forward a plea of inadmissibility.

34. I consider that the question whether the defendant Member State's rights of defence were respected or not must be assessed separately in the context of each proceeding for infringement brought on the basis of Article 169. That requires examination as to whether

the Commission complied with all the pre-litigation stages of the procedure, sending successively to the defendant Member State the letter of formal notice and reasoned opinion as laid down, and whether, from their content, the Member State was made fully aware of the Commission's complaints. [21] The fact of not replying to those documents is clearly its own responsibility, and it must assume the consequences implied by that failure.

B — *Second plea of inadmissibility: substantive lacunae in the documents in the pre-litigation procedure and the application*

35. In the second and, in my view, more important plea of inadmissibility, the Italian Government contends that there are substantive lacunae in the letter of formal notice and the reasoned opinion and divergences between the application and the reasoned opinion. That is because only the application contained a full and detailed analysis of the factors constituting infringement of Article 85(1). Conversely, both the Commission's letter of formal notice and the reasoned opinion were formulated with exceptional brevity on the points relevant to the case, since they read as follows: 'By Decision of 28 June 1993, the Commission found that the tariff adopted by the Consiglio Nazionale degli Spedizionieri Doganali at its meeting on 21 March 1988 constitutes an infringement of Article 85(1) of the Treaty.' That finding is not in accordance with the criteria laid down in the case-law of the Court, since the reasoned opinion did not 'contain a coherent and detailed statement of the reasons which persuaded the Commission that the State concerned had failed to fulfil one of its obligations under the Treaty.' [22] In the view of the Italian Government, both the letter of formal notice and the reasoned opinion addressed to it by the Commission merely refer to the decision of 30 June 1993 [23] in which details of the reasons underlying the Commission's view that the adoption of the tariff by the CNSD constituted a breach of Article 85 are in fact given. Moreover, Decision 93/438 was expressly addressed to the CNSD and consequently its binding effect could not be relied on against the Italian Republic, as the latter maintains.

36. The Commission maintains that the grounds and reasoning supporting both the reasoned opinion and the application are wholly the same. Specifically it points out that both the letter of formal notice and the reasoned opinion contain express reference to Commission Decision 93/438, which was

21 — See, for example, Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraphs 20 and 21: 'As the Court held in its judgment of 11 July 1984 (Case 51/83 *Commission* v *Italy* [1984] ECR 2793), the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 169.' See also Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 15, and Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraphs 16 and 17.

22 — Reference is made, for example, to Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659, paragraph 22.

23 — More accurately reference was made to the decision of 28 June 1993, apparently inadvertently, instead of 30 June 1993, as is correct. Inasmuch, however, as it briefly describes that decision as to its contents, even though neither the date nor the number of the decision are given correctly, there is not on that ground alone a defect in the documents in the pre-litigation procedure preceding the bringing of the present action.

published in the *Official Journal of the European Communities*, [24] and that that meant that reference was made to the content of the decision both as regards the facts and the legal assessment which led to the adoption of the decision that there was an infringement of Article 85(1) of the Treaty. The application simply reproduced the structure of Decision 93/438. The difference in the presentation of the letter of formal notice and the reasoned opinion on the one hand and the application on the other can be explained simply by the intention of the Commission to give additional emphasis to the responsibility of the Italian Government.

37. I consider that the plea of inadmissibility put forward by the Italian Government cannot be upheld.

38. As the Court has consistently held: 'the Commission must indicate, in any application made under Article 169 of the Treaty, the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based.' [25] I consider that those conditions are satisfied in this case.

39. The position maintained here is also reinforced, in my opinion, by the case-law of the Court concerning the legal effects of the reasoned opinion, according to which, as stated above, the latter delimits the subject-matter of the dispute before the Court.

40. More specifically, I consider that in both the letter of formal notice and, primarily, the subsequent reasoned opinion sent by the Commission to the Italian Republic, the subject-matter of the dispute was outlined with clarity, albeit succinctly; in other words it set out 'a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question [had] failed to fulfil one of its obligations under the Treaty ...'. [26]

41. In addition, given that there was an express reference to the content of Decision 93/438, the only issue on which the Commission's analysis should have been more detailed, both in the letter of formal notice and, primarily, the reasoned opinion, was whether the Italian Republic was responsible for the infringement of Community legislation by the CNSD. In fact, apart from the express reference in Decision 93/438, the Commission does indicate the specific complaints on which the Court is called upon to give a decision in relation to the responsibility of the Italian Republic.

24 — Commission Decision 93/438, cited above in footnote 6.

25 — See, for instance, Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 35; and Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17.

26 — See, for instance, Case 274/83 *Commission* v *Italy*, paragraphs 20 and 21, and Case C-289/94 *Commission* v *Italy*, paragraph 15, both cited in footnote 21.

V — Substance of the dispute

42. In Decision 93/438/EEC of 30 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty, [27] the Commission states that the tariff for services provided by customs agents adopted by the CNSD constitutes an infringement of Article 85(1) of the Treaty.

43. Moreover, according to the Commission, the CNSD's decision, which is prejudicial to competition by reason of the imposition of a compulsory tariff for all customs agents, results directly from the abovementioned provisions of Law No 1612/1960, which provides for the adoption by the CNSD of a decision by an association of undertakings contrary to Article 85 of the Treaty; therefore, by adopting that law and maintaining it in force, the Italian Republic has infringed its obligations under Articles 5 and 85 of the Treaty. [28]

44. I shall examine the Commission's arguments in two sections, as follows: in the first section, I shall examine whether, in the exercise of the activities of the CNSD, Article 85 of the Treaty is infringed and, subsequently, in the second section, the question of attribution of responsibility to the Italian Republic will be examined. That is because only if it is shown that the CNSD's activity in relation to the fixing of a tariff for the services provided by customs agents constitutes an infringement of Article 85(1) of the Treaty will the question of the responsibility of the Italian Republic have to be investigated.

A — *Infringement of Article 85 by the CNSD*

45. I shall first examine the question whether the occupation of customs agents constitutes the activity of an undertaking for the purposes of Article 85 of the Treaty and, subsequently, whether the CNSD constitutes an association of undertakings under that same provision. I shall then deal with the question whether the CNSD's decisions imposing a compulsory tariff for the services provided by all customs agents may be characterised as decisions by an association of undertakings restrictive of competition under Article 85 of the Treaty, and lastly whether those decisions might affect intra-Community trade.

(1) Does the occupation of customs agents constitute the activity of an undertaking within the meaning of Article 85 of the Treaty?

46. In the course of the hearing, the Italian Government maintained that the occupation

27 — Cited in footnote 6.

28 — As stated above (footnote 7), in an application lodged in the Court of First Instance, the CNSD sought the annulment of that decision. That case (T-513/93) is still pending.

of customs agent is a liberal profession; customs agents are independent, autonomous workers, like lawyers, surveyors, or interpreters, who cannot be regarded as undertakings under Article 85, since the services they provide are of an intellectual nature, and the occupation may be exercised only provided that the relevant permission has been granted and certain conditions are satisfied. It maintained that the Treaty distinguishes between independent workers and undertakings, and between activity as an employee and self-employed activity, and that it does not follow from the Treaty that a self-employed activity constitutes an undertaking. In addition, the organisational element which is necessary to determine whether or not there is an undertaking is lacking, in other words there is no unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis. [29] Lastly, the Italian Government maintained that it was not possible, on the basis of the law as it stands, to consider that all self-employed activities are undertakings, in accordance with Article 85 of the Treaty, and that legislative amendment would be necessary to extend application of the competition rules to independent occupations.

47. The Commission pointed out at the hearing that customs agents are undertakings, according to Article 85, and that Community competition law is autonomous, not solely in relation to national law but also in relation to other rules of Community law.

29 — On this point it relies on Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311.

48. I shall first examine the case-law of the Court as regards which entities constitute undertakings under Community competition law and shall then go on to examine the substance of the question whether the occupation of customs agent and by extension a liberal profession [30] may be regarded as an undertaking. [31]

30 — According to Italian law, the organisation of the liberal professions is based traditionally on the corporatist model which seeks, on the one hand, to protect the interests of the professional category in question and, on the other hand, to ensure that the specific professional activity is exercised lawfully. In other words, a distinction is drawn between undertakings and independent workers with whom the liberal professions are classified.

31 — I would point out that the Commission has also taken action subsequently in a decision against a professional organisation which, by decision, fixes scales of charges for services provided by the branch in question. Specifically, on 30 January 1995, the Commission adopted Decision 95/188/EC relating to a proceeding under Article 85 of the EC Treaty (OJ 1995 L 122, p. 37). That decision was addressed to the Colegio Oficial de Agentes de la Propiedad Industrial (COAPI — Association of Industrial Property Agents), a legal person governed by Spanish public law. The Commission found that the fixing by the general meeting of industrial property agents of a scale of charges which are compulsory, on pain of sanctions, for all persons requiring services concerning the performance of the requisite formalities linked to a patent application, the registering of a trademark or other industrial property rights and all services concerning renewal and monitoring of those rights constituted an infringement of Article 85. The Commission reached that conclusion after first finding that industrial property agents constitute undertakings for the purpose of Article 85(1) and that the COAPI, which incorporates all industrial patent agents, constitutes an association of undertakings under that provision, even though, under Spanish law, it constitutes a legal person governed by public law, and that its Regulations, concerning the setting up of the COAPI and its functioning, constitute both an agreement between undertakings and a decision by an association of undertakings for the purposes of Article 85(1) of the Treaty. In addition, the decisions of the general meeting (and of the administrative board of the COAPI) relating to the fixing of charges, which are adopted pursuant to the COAPI Regulations, constitute decisions by an association of undertakings within the meaning of Article 85(1). Furthermore, the Commission considered that by reason of the restrictions on prices there was an appreciable restriction of competition which could affect trade between the Member States. The Commission emphasised, moreover, that the COAPI could not disclaim liability by relying on the fact that its conduct resulted from provisions of law, even if the Kingdom of Spain could be rendered liable.

49. The Court has consistently held that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. [32] In other words, according to that case-law, the concept of an undertaking and consequently of an economic activity is always given a broad interpretation. Consequently it is a *conditio sine qua non* to determine whether the activity of a body or administrative authority constitutes the exercise of public power or the exercise of an economic activity of an industrial or commercial character, which is 'capable of being carried on, at least in principle, by a private undertaking with a view to profit'. [33]

50. It is worth pointing out that in order to decide whether an activity is economic or not, the Court examines its nature regardless of the operator exercising the activity. It thus recognises that [34] 'the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market' [35] and that in order to classify an activity as a public undertaking the lack of legal personality separate from that of the State is not a vital factor. It has stated that 'In order to make such a distinction, it is therefore necessary in each case, to consider the activities exercised by the State and to determine the category to which those activities belong'. [36]

51. In order to reach those conclusions, the Court examined primarily the nature of the activities exercised, determining, in other words, whether they were economic or not, and whether they could, in principle, be carried on by a private undertaking in order to make a profit. It also examined the aims and the rules to which they were subject. [37] The Court took into consideration simultaneously a series of factors which, taken alone, do not suffice to preclude an activity

32 — See, for example, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; in that case the Court considered that the German Bundesanstalt für Arbeit was an undertaking, since that agency was engaged in an economic activity as a separate entity in the employment procurement sector, acting as an intermediary between job-seekers and those recruiting staff. See also Case C-55/96 *Job Centre* [1997] ECR I-7119 (paragraph 21), which repeated the solution given in *Höfner and Elser*, and Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others* [1995] ECR I-4013, paragraph 14.

33 — See point 9 of the Opinion of Advocate General Tesauro in the Eurocontrol case, Case C-364/92 *SAT Fluggesellschaft* v *Organisation Européenne pour la Sécurité de la Navigation Aérienne* (Eurocontrol), judgment in which was given on 19 January 1994 [1994] ECR I-43.

34 — See Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, in which the Court stated (in paragraph 8) that the Italian Amministrazione Autonoma dei Monopoli di Stato constituted a public undertaking; it did not have legal personality separate from the State, but exercised an economic activity offering goods and services on the market in the processed tobacco sector.

35 — For example, in Case 107/84 *Commission* v *Germany* [1985] 2655, in particular at paragraphs 14 and 15, the Court held that only some of the postal activities exercised by a public law body may be regarded as the activities of a public authority in the strict sense.

36 — Case 118/85 *Commission* v *Italy*, cited in footnote 34, paragraph 7. See also Case C-92/91 *Taillandier* [1993] ECR I-5383, paragraph 14. In addition, in Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 20, the Court considered that the schemes introduced by British Telecom, in the exercise of its statutory powers, must be regarded as an integral part of BT's business activity.

37 — See Case C-364/92 *Eurocontrol*, cited in footnote 33, at paragraph 30, where the Court held that Eurocontrol's activities relating to the control and supervision of air space, did not constitute the activities of an undertaking but the exercise of public powers. In Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, the Court held that sickness funds and auxiliary bodies do not exercise an economic activity but 'fulfil an exclusively social function' (paragraph 18), because their activity is subject to control by the State (paragraph 14), and 'is based on the principle of national solidarity and is entirely non-profit-making' (paragraph 18).

being economic in character and hence not falling under the competition rules. Specifically it assessed whether the entity whose activities were under examination functioned in compliance with rules laid down by the administrative authorities, whether, in particular, it had the power to influence the level of the consideration sought for the provision of services to users and whether it aimed to make a profit.

52. In addition the Court has held that [38] 'In competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal ...'. [39] In that same case, Advocate General Lenz, in his Opinion, stated: [40] 'It is clear that the term "undertaking" must be construed in a functional sense and for that reason unquestionably covers natural persons in so far as they carry on a business activity'.

53. Economic activity is any activity where goods or services are offered on the given market. [41] As the Commission rightly maintains, it is beyond all doubt that the activity exercised by customs agents is of an economic nature in the above sense, because it consists in offering to the undertakings concerned, in return for payment, services concerning the completion of customs formalities, mainly those connected with the import, export and transit of goods, as well as other services supplementary to the above, such as, for instance, the supply of services in the monetary, commercial and fiscal areas, including tax litigation. [42]

54. Furthermore, I would add that the carrying out of customs agents' activities clearly

38 — Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11. The case concerned an agreement between a company (Hydrotherm) and three separate persons, specifically one natural person and two companies.

39 — It continued (paragraph 11): 'The requirement of Article 1(1) of Regulation No 67/67 is therefore fulfilled if one of the parties to the agreement is made up of undertakings having identical interests and controlled by the same natural person, who also participates in the agreement. For in those circumstances competition between the persons participating together, as a single party, in the agreement in question is impossible.' Commission Regulation 67/67 of 22 March 1967 concerned the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (Official Journal, English Special Edition 1967, p. 10).

40 — See point B(1), sixth subparagraph, of his Opinion in Case 170/83 *Hydrotherm*, cited above in footnote 38.

41 — See, for instance, Case 118/85 *Commission* v *Italy*, cited above in footnote 34, paragraph 7. It is also possible to find examples in the Court's case-law where the term 'economic activity' has been interpreted very broadly. That is the case where value added tax is applied to the provision of services, where it has been held (see Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 15), that 'inasmuch as they carry out independently economic activities consisting in the supply of services to third parties, in return for which they receive fees for their own account, notaries and bailiffs in the Netherlands must be regarded as taxable persons for VAT purposes, within the meaning of Article 4(1) and (2) of the Sixth Directive.' The latter is Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (OJ 1977 L 145, p. 19). In addition the Court, in the same judgment (Case 235/85), stated, at paragraph 22: 'Consequently, even assuming that in performing their official services notaries and bailiffs exercise the powers of a public authority by virtue of their appointment to public office, it does not follow that they may enjoy the exemption provided for in Article 4(5). The reason is that they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession'.

42 — That is mentioned in Chapter II, entitled 'the Tariff', of the Annex to the decision of the Italian Minister for Finance of 6 July 1988 (referred to above in footnote 4), which ratified the tariff for services provided by customs agents adopted by the CNSD.

requires a minimum organisational framework of personal, tangible and intangible elements (for instance the existence of a fully equipped office, communications, and so forth) which have been set up for a certain purpose, which is the offer of services to the operators concerned with a view to profit. [43]

55. In addition to the above, as the Commission maintains and as was not disputed by the Italian Government, customs agents, in the exercise of their duties, fully assume all the economic risks involved therein, risks inherent, moreover, in the exercise of any economic activity which seeks to make a profit. [44] That is the risk that the costs of the various factors intervening in the process of supplying the services will not be covered by the payment for the services supplied to carry out the customs operations. [45] As the Commission points out, if there is an imbalance between expenses and receipts, it is the customs agent himself who is required to make up the administrative deficit and run the risk of insolvency. Consequently, from the above factors, taken together, it follows, in my view, that customs agents, who are independent professionals exercising an economic activity, constitute undertakings for the purpose of Article 85 and the Italian Government's submissions to the contrary at the hearing should be rejected as unfounded.

(2) Does the CNSD constitute an association of undertakings for the purposes of Article 85(1) of the Treaty?

56. At the hearing, the Italian Government maintained that since customs agents are not undertakings under Article 85, *a fortiori* the CNSD does not constitute an association of undertakings under that article.

57. Again at the hearing, the Commission stated that the special feature of this dispute lies in the fact that the tariff for services provided in customs procedures is not determined directly and separately by customs agents, who are undertakings, as provided by Article 85, but that those tariffs are determined in common through the CNSD.

43 — The Italian competition monitoring authority (Autorità Garante della Concorrenza e del Mercato), basing itself on a functional criterion for defining an undertaking, that is to say on the nature of the activities exercised (whether economic or not) regardless of its legal status, expressly recognised that the activity of liberal professions, under which customs agents are included, constitutes the activity of an undertaking, that their classification as undertakings is not incompatible with the special characteristics of the liberal professions and, accordingly, that they may fall under the competition rules; see the decision (delibera) of 1 January 1994 in 'Bolletino dell'Autorità Garante della Concorrenza', No 47/94.

44 — See Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663.

45 — I would mention, for example, the cost of equipping and/or renting and maintaining an office, the costs of telecommunications and the payment of taxes.

58. Accordingly I shall now proceed to examine the crucial question for the solution of the dispute, which is whether a professional organisation, such as the CNSD in this case, which under Italian law constitutes a public-law body, [46] acted as an association of undertakings, under Article 85(1), inasmuch as it is responsible for the determination of tariffs for services provided by customs agents.

59. In examining that question it is, I believe, necessary to cite the pertinent case-law of the Court. In Case 123/83 *BNIC* v *Clair*, [47] the Court was called upon to rule on the question whether there was an association of undertakings within the meaning of Article 85 in the case of BNIC and held that the members of the administrative board of that body were 'persons who, although appointed by the public authorities, were, apart from the two appointed directly by the Minister, proposed for appointment by the trade organisations directly concerned and who consequently must be regarded as in fact representing those organisations in the negotiation and conclusion of the agreement.'

60. That idea of direct representation, as the Commission appositely describes it, of the interests of operators in a specific sector has, let us note, been reiterated by the Court, which has laid down the conditions in which the members of certain committees given the responsibility of fixing tariffs to be applied to all undertakings exercising a certain activity *may not* be regarded as representatives of the professional undertakings to which they relate. [48]

61. That is the case, according to the case-law of the Court, where: (a) the members of the committees in question (tariff committees) are not bound by orders or instructions from the undertakings or associations which proposed them, they cannot be regarded as meetings of representatives of undertakings in the sector in question and consequently can be classified as independent experts [49] and (b) the members of those tariff committees are bound by law to set tariffs, [50] taking into account not solely and exclusively the interests of the undertakings or associations of undertakings in the sector which appointed them but of the general interest [51]

46 — Under Italian legislation the task of the CNSD is to organise and coordinate the economic activities of the members of the professional organisations of customs agents for the purpose of facilitating the achievement of the aims of an industrial or commercial character pursued by their members.

47 — [1985] ECR 391, paragraph 19. BNIC stands for the Bureau National Interprofessionnel du Cognac, which constituted a joint-trade organisation in the cognac sector, whose members were appointed by the Minister for Agriculture and which fixed by decision the prices of distillable white wines and cognac.

48 — See, for instance, Case C-185/91 *Reiff* [1993] ECR I-5801; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517; Case C-96/94 *Spediporto* [1995] ECR I-2883; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP Spa and Others* [1995] ECR I-3257.

49 — Case C-185/91 *Reiff*, paragraphs 17 and 24; Case C-153/93 *Delta*, paragraphs 16 and 18; and *DIP*, paragraphs 18 and 19.

50 — Or to formulate an opinion on the issue of trading licences for operating shops (the *DIP* case).

51 — At the hearing the Commission referred to the example of lawyers, where the competent minister fixes the tariff of fees taking account of the public interest.

and the interests of undertakings in other sectors or of the users of those services. [52]

62. Consequently in view of the Italian legislation in question, it is necessary to examine the conclusions to which the criteria for interpretation laid down in that case-law lead, when applied to this case, as regards the issue of the classification of the CNSD as an association of undertakings for the purpose of Article 85(1). I consider that a bundle of factors will help us answer the question whether the CNSD constitutes an association of undertakings under Article 85.

63. First, I consider it to be clear under the provisions of Italian law that the CNSD's members represent a certain professional category, that of customs agents, and their interests. We have, moreover, recognised that customs agents constitute undertakings under Community competition law. As the Commission rightly states (paragraph 8(a) of the application), when someone becomes a member of a national council for that profession, he represents that profession both externally and internally, in the relationship of the council with its members. I would point out that, according to Article 10 of Law No 1612/1960, the departmental councils of customs agents are elected by secret ballot from among those registered in the register of each department for a term of two years, whilst, under Article 13 of the same law, the CNSD is made up of nine members who are appointed for a three-year term from among the members of the departmental councils. Moreover, that is made wholly clear both from the provisions of the implementing decree of the Minister for Finance of 10 March 1964, which sets out in detail the procedure for electing both the departmental (Article 8 et seq.) and national (Article 22 et seq.) councils laying down that only duly registered customs agents may be elected members of the departmental councils or the CNSD. [53]

64. In addition, the Italian Minister for Finance, by law the monitoring authority for that particular organisation, cannot intervene in the election of members of either the departmental councils or the CNSD.

65. Consequently the principles of interpretation given by the Court in *BNIC* v *Clair* may *a fortiori*, as the Commission correctly maintains, be applied in this case. In *BNIC* v *Clair* the professional organisations simply *proposed* the members of BNIC's general meeting, who were subsequently *appointed by the competent Minister* [54] and that did not prevent the Court from classifying BNIC,

52 — See Case C-185/91 *Reiff*, paragraphs 18 and 24; Case C-153/93 *Delta*, paragraphs 17 and 23; Case C-96/94 *Spediporto*, paragraphs 24 and 42; and *DIP*, paragraphs 18 and 31, all cited in footnote 48.

53 — Articles 8, second paragraph, and 22, second paragraph, of the Ministerial Decree of 10 March 1964 cited above in footnote 2.

54 — The French Minister for Agriculture.

without hesitation, as an association of undertakings.

66. Secondly, I consider that the link of representation clearly binding the members of the national councils of the professional organisation in question with the customs agents who elected them results by implication for a further reason. In the applicable Italian legislation, in particular Article 14(d) of Law No 1612/1960, the CNSD is entrusted with the fixing of the tariff for the professional services provided by customs agents on the basis of the proposals submitted by the departmental councils. In other words there is no rule in that legislation analogous to that found in the German law relating to the transport of goods by road, [55] the German law relating to river transport, [56] or the Italian law on the retail trade. [57] Consequently, since they are not expressly forbidden to take account of any indications (directives or orders) given by those who elected them, accordingly the members of the CNSD may not be classified as independent 'tariff experts' within the meaning of the *Reiff*, [58] *Delta* [59] and *DIP* [60] cases.

67. Thirdly, I consider that a further factor suggests that the CNSD constitutes an association of undertakings. In the Italian legislation at issue it is not possible to find a rule expressly requiring the members of the CNSD to establish the tariff by reference to 'considerations of public interest' [61] and not solely the interests of customs agents, by whom the national councils of that professional organisation are elected. Consequently, since the Italian law lays down that the members of the CNSD are customs agents and because there is no special rule, as was the case in *Reiff*, *Delta*, *Spediport* and *DIP*, we cannot conclude that the CNSD sets the level of the tariff on the basis of 'considerations of public interest', as the Commission rightly contends.

68. Another argument which the Commission uses to support its position lies in the fact that, under the last paragraph of Article 13 of Law No 1612/1960, 'the members of the CNSD are appointed for three years and may be re-elected'. It could, therefore, be argued that in that way the members of the CNSD, theoretically at least, are made more susceptible to pressure exerted by the professional organisations they represent, since they wish to be re-elected and that that constitutes a further indication that the CNSD is an association of undertakings under Article 85.

55 — Case C-185/91 *Reiff*, cited in footnote 48.
56 — Case C-153/93 *Delta*, cited in footnote 48.
57 — *DIP*, cited in footnote 48.
58 — Paragraphs 4 and 17.
59 — Paragraphs 6 and 16.
60 — Paragraphs 5, 6 and 18.

61 — See, for instance, the cases cited in footnote 48, *Reiff* (at paragraph 24), *Delta* (at paragraph 23) and *Spediporto* (at paragraph 24).

69. A fourth and last indication that the CNSD constitutes an association of undertakings under Article 85 is the fact that after the recent amendment made by Legislative Decree No 331/1992, the rule that the Director-General of Customs and Indirect Taxes automatically held the chair of the CNSD has been repealed. That change heightened the picture that the CNSD is the direct and exclusive emanation of all those exercising the profession of customs agent.

70. In view of the foregoing analysis it follows, in my view, that the CNSD should be regarded by the Court as an association of undertakings inasmuch as it is responsible for determining the tariff for the services provided by customs agents. In other words, the national professional organisation of customs agents, in the context of the exercise of its power to fix the tariff, constitutes an association of undertakings under Article 85. Any other conclusion would deprive Article 85 of any useful effect, since undertakings (in this case the professionals in question) would be able, using the legal framework of an association, to conduct themselves without impediment in a manner restrictive of competition.

71. Clarification of one last issue is, I believe, necessary. The CNSD has, by law, a number of other powers. In particular it is responsible for keeping the national register of customs agents and the imposition of disciplinary sanctions on registered members (Article 14(a) and (c) of Law No 1612/1960). [62] The feature characterising those powers, however, is that they are not aimed at laying down rules concerning the conduct of customs agents on the market of the supply of services in connection with the carrying out of customs procedures, as the Commission states. On the contrary, decisions relating to the power to fix tariffs undoubtedly involve choices of an economic nature arrived at by customs agents in a specific market and, consequently, because it has that type of power, the CNSD must be classified with associations of undertakings under Article 85. [63] Moreover, I think that the fixing of tariffs for customs agents in the context of the services provided to their customers does not constitute an indispensable element of the fulfilment of the other powers

62 — The fact that in other Member States too professional organisations are by law entrusted with similar powers does not preclude the national legal systems from providing that the competition rules apply to the fixing of tariffs by those organisations. For example such fixing of tariffs is expressly prohibited under French, Finnish and Swedish law. In other Member States the competent authorities have adopted decisions finding that national competition rules have been infringed by professional organisations when fixing the level of tariffs (that has been the case, for instance, in Germany, Denmark, Spain, Portugal and Belgium).

63 — I would point out that in Case C-364/92 *Eurocontrol*, cited above in footnote 33, the Court distinguished between the powers conferred on that body, finding (in paragraph 28) that Eurocontrol's activity in collecting route charges was not an economic activity but could not be separated from the other activities of public interest carried on by that body, which acted in the exercise of public powers relating to the control and supervision of air space. Moreover, in Case C-343/95 *Calì & Figli* v *SEPG* [1997] ECR I-1547, the Court used the same analytical method and found (paragraph 25) that 'Article 86 of the EC Treaty is to be interpreted as not being applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity.' Powers had, however, been conferred on that legal person to intervene rapidly where there was pollution of the port area (the petroleum port of Genoa). See also Case 107/84 *Commission* v *Germany*, cited in footnote 35 (paragraphs 14 and 15).

conferred on the CNSD by the national legislature. [64]

74. Furthermore, the classification of the CNSD's decisions fixing a compulsory tariff under the power conferred on by Article 14(d) of Law No 1612/1960 as decisions by an association of undertakings restrictive of competition under Article 85(1)(a) of the Treaty does not, in my opinion, present any particular difficulty.

(3) Restriction of competition by the fixing of a compulsory tariff by the CNSD

75. In fact the drawing up of the tariff by the CNSD by its decision of 21 March 1988 constitutes a typical case of direct fixing of sale prices for the services provided by customs agents to their customs agents, as the Commission indeed rightly points out. The tariff in question provides, for each separate type of activity (customs formalities or other associated activities), maximum and minimum amounts to be charged by the customs agent to the customer. As is set out in detail in Commission Decision 93/438 (recitals 24 to 36 and 45 to 48 in the preamble), that tariff sets various scales on the basis of the value or weight of the goods to be cleared or the particular type of goods or, further, the particular type of professional service to be provided (for example services in monetary, commercial and fiscal areas and any other area related to customs clearance, including fiscal litigation (see, in particular, recital 26)).

72. I now come to examine the question whether the CNSD's decisions concerning the imposition of a compulsory tariff for all customs agents have as their object or effect the prevention, restriction or distortion of competition in the context of a specific market (that of the services provided by customs agents in Italian territory), in the sector of transport, and air transport, of goods.

73. My starting point will be that customs agents are undertakings under Article 85(1) of the Treaty and that the CNSD constitutes an association of undertakings as regards its decisions determining the conduct of customs agents in that market.

64 — As stated above, these include, for example, the keeping of a register, the imposition of disciplinary sanctions, the settlement of differences in respect of the local powers of departmental councils, etc.

76. It is, I consider, worth recalling the CNSD's decision in order to show that the Commission's arguments are well founded.

77. Under Article 1 of the CNSD'S decision, 'This tariff lays down the minimum and maximum amounts to be paid for customs transactions and services provided in the monetary, commercial and fiscal areas, including fiscal litigation.'

78. Under Article 5, '... this tariff shall always be compulsory as regards the principal and annuls any other agreement to the contrary ....' In other words, a customs agent may essentially demand neither less nor more than the minimum fixed tariff laid down for a particular category of activity.

79. Lastly, under Article 6 of the CNSD's decision, only 'the National Council of Customs Agents shall be empowered to make specific and/or temporary derogations from the minimum amounts laid down in this tariff', in other words by a decision with a general content concerning all customs agents and compulsory for all registered customs agents. Consequently, it follows *a contrario* that no customs agent in question may depart from the minimum prices laid down.

80. To sum up, we can therefore say that the decision adopted by the CNSD on 21 March 1988 constitutes an agreement restricting competition, since it is a decision adopted by an association of undertakings (the CNSD) for the purpose of laying down a tariff for the provision of services by customs agents. [65]

(4) Effect on trade within the Community

81. The Commission maintains that because of the compulsory character of the tariff fixed by the CNSD trade between the Member States is affected.

82. First of all, I would point out that in accordance with the settled case-law of the Court 'Article 85(1) of the Treaty does not require that agreements referred to in that provision have actually affected trade between Member States, which, moreover, is difficult to prove to a sufficient legal standard in most cases, but requires that it be established that the agreements are capable of

65 — I would point out that the Autorità Garante della Concorrenza del Mercato has repeatedly held, in connection with that question, that it regards the price-fixing system in force as not justified on grounds of public policy which might lead to those competition rules not being applied. According to the Autorità, adapting the system of remuneration to those rules would necessitate both the abolition of the power of the CNSD to fix the level of the tariff and the abolition of the compulsory character of the tariff determined by the CNSD; see *Supplemento al Bolletino dell'Autorità Garante* No 14/1995. See also the conclusions formulated by the Autorità following a study of professional organisations and councils of 3 October 1997, point 29 (in *'Guida al Dirito, il Sole — 24 Ore'* of 8 November 1997, No 42, p. 102).

having that effect.' [66] Also according to consistent case-law, 'in order that an agreement, decision or concerted practice 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 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 to give rise to the fear that the realisation of a single market between Member States might be impeded.' [67]

83. I would also point out that in accordance with the Court's settled case-law, [68] '[a]n agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.'

84. As the Commission explained in more detail (paragraph 12 of its application), the compulsory tariff drawn up by the CNSD and applicable without exception affects trade between Member States, within the meaning of Article 85(1), because there are various types of import and export transactions within the Community and also imports and exports of goods between traders in the Community which require customs formalities to be completed and consequently may necessitate the involvement of an independent registered customs agent. [69]

85. In particular the following operations may be required:

(a) Internal transit operations [70] which cover the sending of goods from Italy to another Member State, that is to say from one point in the customs territory of the Community to another, via a third country; [71] for example from Italy to Germany, with transit through Switzerland. This is of great significance for Italy, since a large proportion of goods

66 — See, for instance, Case 123/83 *BNIC* v *Clair*, cited above in footnote 47 (paragraph 22); Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19; and the older Case 19/77 *Miller* v *Commission* [1978] ECR 47, paragraph 15.

67 — See, for example, Case C-219/95 P *Ferriere Nord* v *Commission*, cited above in footnote 66 (paragraph 20); Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4545, paragraph 18; and Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235; and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 170.

68 — See, for instance, Case 8/72 *Vereniging van Cementhandelaren* v *Commission* [1972] ECR 977, and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22.

69 — In recital 52 in the preamble to Commission Decision No 93/438, it is stated: 'Furthermore, in view of the fact that in Italy in 1990 imports represented some 25% of goods consumed, exports were equivalent to some 18% of gross domestic product, some 58% of imports were of Community origin and around 59% of exports were to other Member States, it must be concluded that the effect on trade was substantial.'

70 — See Articles 163 and 165 of the Community Customs Code (Council Regulation (EEC) No 2913/92 of 12 October 1992, OJ 1992 L 302, p. 1, hereinafter 'the CCT'), and Article 381 of the Commission's implementing regulation (Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, OJ 1993 L 253, p. 1).

71 — In this case the issue of a transit document (T2) is required either at the place of departure of the goods or at the national customs border post.

sent from the north-western part of the country to Germany and the Netherlands go through Switzerland.

(b) External transit operations [72] which cover the import into Italy of goods from a third country and their despatch, under the transit procedure, to another Member State and their customs clearance in the Member State of final destination. [73] The same occurs in a case of external transit 'on entry', where customs clearance of the goods imported into another Member State takes place in Italy as the State of final destination.

(c) Import and export operations between Italy and territories which, because of the applicable provisions of the VAT [74] and excise duty [75] directives, do not constitute part of the fiscal territory of the Community even though they are part of the customs territory, but are treated for the purpose of import and export operations and transit formalities as third countries; [76] examples of these are the islands of Aaland, the Canary Islands and the French Overseas Departments. Those formalities are *a fortiori* necessary in trade between Italy and certain territories which are not part of the customs territory of the Community, such as Gibraltar and the cities of Ceuta and Melilla.

(d) Operations relating to trade in goods falling under the special arrangements of Article 36 such as, for example, weapons and drugs, in other words goods in respect of which, because there is no relevant Community regulation, the Member States retain their entitlement to require, primarily for reasons of public order or public health, the completion of customs formalities on entry, exit or transit via national territory.

(e) Lastly the Commission refers to certain 'triangular' operations, as it describes operations in which goods belonging to a Community vendor but from a third country are purchased by an Italian customer to be imported and cleared for customs directly in Italy.

72 — See Articles 91 to 97 of the CCT and Articles 341 to 380 of the Commission's implementing regulation, Regulation No 2454/93.

73 — In this case the issue of a transit document (T1) is required, principally to allow the transfer of goods imported from territory outside the Community under the arrangements whereby customs duty, VAT and excise duty are suspended.

74 — Article 3 of Council Directive 77/388/EEC, Sixth VAT Directive, cited above in footnote 41.

75 — Article 2 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

76 — Article 33a of the Sixth VAT Directive, as amended by Council Directive 92/111/EEC of 14 December 1992, OJ 1992 L 384, p. 47.

86. In the light of the settled case-law of the Court cited above and the obviously large number of cases where the services of customs agents may be needed, I consider it clear that trade between the Member States may be affected because of the compulsory

nature of the tariff adopted by the CNSD. In my view the fact that in its decision (Article 3) the CNSD provides that the charges in the tariff should be calculated for each particular customs operation or professional service provided leads to that conclusion.

B — *Liability of the Italian Republic*

87. We have reached the conclusion that the decision of 21 March 1988 adopted by the CNSD restricts competition, that is to say, it falls under the prohibition in Article 85, because it is a decision adopted by an association of undertakings (the CNSD) for the purpose of fixing the tariff for the provision of services by customs agents and that tariff may affect intra-Community trade.

88. The CNSD was in breach of Article 85 when it exercised the powers conferred upon it by the Italian legislation. For that reason we must examine the Commission's arguments to the effect that in addition the Italian Republic incurs liability for infringement of Articles 5 and 85 of the Treaty.

89. At the hearing the Italian Government contended that if the Italian Republic were held liable that would throw into question national legislation regulating the liberal professions and that the national legislature, in laying down rules for those professions, did not intend to lay down rules relating to undertakings.

90. I would point out in that connection that the Court has repeatedly stated that Article 5 in conjunction with Article 85 requires the Member States to comply with the competition rules. In particular it has held [77] that 'Articles 85 and 86 of the Treaty are concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation. The Court has consistently held, however, that, read in conjunction with Article 5, Articles 85 and 86 of the Treaty require Member States to refrain from introducing or maintaining in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.'

77 — In particular with regard to Article 85 of the Treaty see, for instance, *DIP* (paragraph 14), Case C-185/91 *Reiff* (paragraph 14), and Case C-153/93 *Delta* (paragraph 14), all cited in footnote 48. See also Case 267/86 *Van Eycke* v *Aspa* [1988] ECR 4769, paragraph 16, and Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14.

91. Furthermore, as the Court has frequently held, [78] 'Articles 5 and 85 are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects, or where it deprives its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere'. [79]

effects of the CNSD's decisions fixing that tariff. Lastly, in the alternative, whether the Italian legislation transfers to private undertakings of public authority powers as regards the fixing of a tariff.

(1) Requirement under the Italian legislation that the CNSD fix a uniform tariff for the provision of services by customs agents

92. I shall examine the Commission's arguments concerning the liability of the Italian Republic in the following order: First, the question whether Italian legislation requires the CNSD to adopt a decision on a compulsory tariff for the provision of professional services by customs agents. Secondly, whether the Italian legislation reinforces the

93. Pursuant to Article 14(d) of Law No 1612/1960, the CNSD is to 'set the tariff for the professional services provided by customs agents'. From that provision it follows that the CNSD has no discretion but a mandatory duty, [80] in other words is required, to draw up the tariff, as the Commission correctly maintains, [81] even though the Italian law does not provide for sanctions in the case of failure to fix a tariff. Apart from that, that obligation of the CNSD does not mean that the Italian law does not allow it a wide

78 — See *DIP* (paragraph 15), Case C-185/91 *Reiff* (paragraph 14), and Case C-153/93 *Delta* (paragraph 14), all cited in footnote 48, and Case 267/86 *Van Eycke* v *Aspa*, cited in footnote 77, paragraph 16, and Case 311/85 *VVR* v *Sociale Dienst* [1987] ECR 3801, paragraph 10.

79 — I would point out that in Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33, the Court stated that: 'Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative .... 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 the undertakings.' (see 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*, cited in footnote 44 (paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72)). The Court went on to state (paragraph 34): '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 ....' It concluded as follows (paragraph 35): 'When the Commission is considering the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings, a prior evaluation of national legislation affecting such conduct should therefore be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.'

80 — The indicative 'redige' stands, I should say, for the imperative 'deve redigere'.

81 — That conclusion is also borne out, as the Commission moreover argues, by the fact that, under the Italian legislation in force (Article 14(a) and (c) of Law No 1612/1960), the CNSD is to keep a national register of customs agents and decide on appeals submitted to it against disciplinary sanctions imposed by departmental councils. In other words, the national council of a professional organisation does not have a discretion but a mandatory duty to keep a national register of persons who are entitled to exercise the particular profession and to decide on appeals against the decisions of the departmental councils of the organisation in question, because those are powers essential to its existence and functioning.

margin of discretion. More accurately, Law No 1612/1960 allows it, in my view, to choose whether, for instance, it will set for each operation effected by customs agents maximum and minimum charges or will simply lay down certain criteria which the professions concerned must comply with when they determine their charges. Nor, moreover, does Law No 1612/1960 impose on the CNSD a certain method of invoicing, such as individual charges. If the CNSD chose a certain method it no doubt did so in order to ensure the effectiveness of the tariff which it laid down.

94. In addition, according to the Commission, the power to draw up the tariff conferred on the CNSD by Article 14(d) of Law No 1612/1960 must be examined not only as the conferral of a decision-making power on a highest level of a professional organisation but also as an obligation flowing from the public-law status which Italian law ascribes to the CNSD as a professional organisation.

95. In view of the foregoing, I consider that it must be held that the Italian legislation in question requires the CNSD to adopt a decision relating to the fixing of a uniform tariff for services provided by customs agents, even though, under the CNSD's decision at issue (Article 6), it is competent to grant special and/or temporary exemptions from the maximum amounts in the tariff in force and those exemptions are not subject to any restriction. [82]

(2) Reinforcement by the Italian legislation of the effects of the CNSD's decisions fixing a tariff for services provided by customs agents

96. The Commission's basic argument consists in the fact that Law No 1612/1960 first of all expressly prohibits customs agents (in Article 11), from charging an amount for their professional services lower or higher than those set by the CNSD. The fact that customs agents are not allowed to deviate from the tariff fixed by the CNSD is reinforced, consequently, by that same Law No 1612/1960, which, according to the Commission (paragraph 15 of its application) gives legal force to the contractual relationship under that professional association of those registered in the register and consequently can no longer be abolished by the will of the parties. [83]

97. Further, we should note that, pursuant to the decree of the Minister for Finance of 10 March 1964, [84] those contravening the

82 — That does not, of course, mean that in exercising its powers the CNSD does not have to comply with the provisions of Article 85 of the Treaty and, more generally, with any provision ranking higher than Law No 1612/1960.

83 — As, moreover, was confirmed by Articles 5 and 6 of the CNSD's decision of 21 March 1988.

84 — Decision cited in footnote 2.

tariff by charging less or (theoretically at least) more face disciplinary measures (Articles 38 and 40), ranging from reprimand to temporary and definitive suspension from the register of customs agents, in other words this is a 'highly effective sanction' [85] against customs agents who are in breach of their obligations under the law. Those rules accordingly constitute the legal basis for the disciplinary measures which the CNSD may take against customs agents who do not comply with the maximum and minimum charges in the tariff fixed by the CNSD, as laid down for each category of services provided.

98. The Commission further points out that neither Law No 1612/1960 nor any other Italian law empowers the Italian Minister for Finance to approve the tariff for services provided by customs agents, as was done in this case by way of the decree of 6 July 1988. It also notes that the 1970 tariff which was in force prior to the 1988 tariff was not the subject of any ministerial approval. [86] Since that is the situation under Italian legislation and the Italian Government does not contest that point, it must be recognised that the Minister's approval of the tariff fixed by the CNSD was clearly a formality and has no special significance that would refute a finding that that decision was taken solely and exclusively by the CNSD, which was not obliged to take account of 'considerations of public interest' as I mentioned in a previous point. Moreover, that would appear to be supported by the last recital in the preamble to the ministerial decree, which is formulated as follows: 'whereas the relevant procedure has been properly complied with'; in other words, on the one hand that approval simply confirmed that the appropriate procedure had been followed and on the other hand the binding effect of the CNSD's decisions predates that decree and is a direct result of Italian Law No 1612/1960.

99. As, however, the Commission emphasises, the existence of that ministerial decree of 6 July 1988 gives the CNSD tariff the form of a public regulatory measure, which the CNSD'S decision of 21 March 1988 did not have *per se*. First, as a result of the publication in the *Serie Generale* of the *Gazzetta Ufficiale della Repubblica Italiana*, any third party is presumed to have knowledge of the tariff. Mainly, however, as the Commission rightly points out, the fact that that there is a ministerial decree approving the tariff lends the tariff fixed by the CNSD an official character and reinforces its effects. That official character on the one hand facilitates application by customs agents of the charges fixed in that tariff to all who have recourse to their services and, on the other hand, has an unquestionably deterrent effect on customers who might wish to question the charges

85 — See on this point Case 311/85 *VVR* v *Sociale Dienst*, cited in footnote 78 (end of paragraph 23). In that judgment the national court raised the question *inter alia* whether the fact that a State requires travel agents by law or regulation to observe prices and tariffs set by tour operators (subject to sanctions and in particular withdrawal of licences to carry on business as a travel agent), prohibits agencies from sharing their commission on sales of travel or to give customer rebates and considers such practices as unfair competition was incompatible with the obligations of the Member States under Article 5, in conjunction with Articles 3(f) and 85, of the Treaty. The Court held (paragraph 24), that it was in fact incompatible with the obligations of the Member States under those articles 'where the object or effect of such national provisions is to reinforce the effects of agreements, decisions or concerted practices which are contrary to Article 85.'

86 — It maintains that it was not fortuitous that the tariff of 16 April 1970 was published in the series *Foglio inserzioni*, GURI No 307 of 4 December 1970, and not in the usual GURI issue as was the case of the tariff of 21 March 1988.

demanded by customs agents and, in consequence, the legality of the uniform tariff decided upon by the CNSD. [87]

(3) Delegation by the Italian legislation to private economic operators of the power of the public authorities with regard to the fixing of the customs agents' tariff

100. Lastly, the Commission also examines the possibility that the fixing of the tariff might require the intervention of a public authority for the purpose of protecting some public interest. Even on that hypothesis, it maintains (point 18 of its application) that it is a perfect example of a situation in which the public authorities 'abandon their prerogatives' [88] to a private professional organisation.

101. Although we concluded previously that the fixing of the tariff by the CNSD does not require the intervention of a public authority for the purpose of protecting some public interest, nevertheless I shall now examine the Commission's arguments on that point to cover the eventuality that the Court decide otherwise.

102. I shall start with the observation that, as the Court has repeatedly held, [89] 'Articles 5 and 85 are infringed where a Member State ... deprives its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere'. Consequently it is necessary to examine whether it could be considered, in the light of the Court's case-law, that that is the case here. To that end an assessment is required of a number of factors in order to conclude with certainty that in this case the responsibility for taking decisions affecting the economic sphere, belonging to the public authorities, was delegated to private economic operators.

103. First, from the evidence in the file cited by the Commission, which was not contested by the Italian Government, it appears that the CNSD has, under Law No 1612/1960 (Article 14(d)), its own decision-making power rather than the power purely and simply to formulate opinions or submit observations, [90] as the Commission rightly notes.

87 — In the case-law there are instances of measures, similar to the ministerial decree, taken by competent national authorities and approving agreements in respect of the fixing of air ticket prices and in that way reinforcing their effects, which the Court found to be contrary to Articles 5 and 85 of the Treaty; see Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, principally paragraph 76, and Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, principally paragraph 49.

88 — As was precisely held to be the case in *Reiff*, cited in footnote 48 (paragraph 24).

89 — See, for instance, Joined Cases C-140/94 to C-142/94 *DIP* (paragraph 15), Case C-185/91 *Reiff* (paragraph 14) and Case C-153/93 *Delta* (paragraph 14), all cited in footnote 48, and *Van Eycke*, cited in footnote 77 (paragraph 16).

90 — That was the case in Case C-96/94 *Spediporto*, cited in footnote 48 (paragraphs 24 and 25), concerning the fixing in Italy of tariffs for the transport of goods by road, and in Joined Cases C-140/94 to C-142/94 *DIP*, which was also cited in footnote 48 (paragraphs 18 and 19), concerning the issue, by mayors, to private undertakings in Italy of licences to trade.

104. Secondly, the Italian Minister for Finance has no power to nominate the nine members of the CNSD, who are elected by the departmental councils. [91] In the light of its formation and composition it is accordingly more independent than the 'tariff committees' in *Reiff* and *Delta* [92] and the 'central committee' in the *Spediporto* case. [93] Furthermore, the CNSD is made up completely of members of the professional organisations of customs agents, and that makes it fundamentally different from the central committee in *Spediporto* and the 'municipal committees' in *DIP*, in which the Court took account of the fact that the representatives of the traders' organisations constituted a minority in relation to all the members of the above joint bodies.

105. Thirdly, from the Italian legislation cited it appears that neither the Italian Minister for Finance nor any representative could take part, even occasionally, in the meetings of the CNSD as the German Minister for Transport did in *Reiff*.

106. Fourthly, the Italian legislation at issue shows that the Italian Minister for Finance has no power to ensure that the CNSD fixes the tariff taking 'considerations of public interest' into account. [94] As already mentioned in the previous points, according to evidence cited by the Commission and not disputed by the Italian Government, apart from not having a legal basis and consequently not being a prerequisite of the validity and applicability of the CNSD's decision, the Minister's decree approving the tariff concerned only the legality of the procedure followed by the CNSD and not the substance of the measure. [95] In other words it did not concern the question whether the measure was in accordance with the requirements of public interest, compliance with which, I would repeat, is not imposed on the CNSD under the national legislation when it draws up the tariff.

107. Lastly, as the Commission points out and was not disputed by the Italian Government, nowhere does it appear that the Minister for Finance could intervene, and refuse to approve or substitute his own wishes for the expressed wishes of the

91 — I would reiterate that formerly the Director-General of Customs and Excise was by law a member of the CNSD and *ex officio* its chairman. However Decree-Law No 331/1992 (Article 32) abolished that arrangement. The CNSD is elected for three years and its members may be re-elected (Article 13(2) of Law No 1612/1960).

92 — Cited in footnote 48. In those cases the members of the tariff committees were appointed by the German Minister for Transport.

93 — The Italian Minister for Transport appointed the members of the central committee with which Case C-96/94 *Spediporto* was concerned.

94 — See, for instance, *Reiff* (paragraph 24), *Delta* (paragraph 23) and *Spediporto* (paragraph 24), all cited in footnote 48.

95 — As the Commission emphasises and was not contested by the Italian Government, the previous tariff of 16 April 1970 was valid without a prior ministerial decision while the CNSD decided on subsequent increases on its own initiative without the involvement of the Minister (which took place by way of the decision of 15 December 1989). Furthermore, it decided, in complete independence, to allow exemptions from the tariff to certain categories of users (such as airmail services) as it had power to do under Article 6 of the CNSD's decision of 21 March 1988.

CNSD if he considered that the body was not acting in compliance with the requirements of the public interest. [96]

108. In view of the foregoing, should the Court find that the intervention of a public authority is required in fixing the tariff, it should be held that under a system for determining the level of the maximum and minimum charges for the provision of the services of customs agents, such as that contained in the Italian legislation in question (Law No 1612/1960), there is a delegation to private operators of the power of the public authorities in the area of fixing charges. Consequently the Italian Republic has infringed its obligations under Articles 5 and 85 of the Treaty.

VI — Conclusion

109. In view of the foregoing analysis, I suggest that the Court:

(a) Declare that, by adopting and maintaining in force a law which, in granting it the relative decision-making power, requires the Consiglio Nazionale degli Spedizionieri Doganali (CNSD) to adopt a decision by an association of undertakings contrary to Article 85 of the Treaty establishing the European Community, consisting in the fixing of a compulsory tariff for services provided by customs agents, the Italian Republic is in breach of its obligations under Articles 5 and 85 of the Treaty; and

(b) Order the Italian Republic to pay the costs.

96 — The German Minister for Transport had a power to substitute, or at least amend, the proposed tariffs in *Reiff* (paragraph 22) and *Delta* (paragraph 21), cited above.