1. The fact that an agreement has been entered into by two groups of traders in the framework of an organization subject to public law does not remove the agreement from the scope of Article 85 of the Treaty.

2. An agreement fixing production quotas with a levy to be paid if they are exceeded is likely to restrict competition between producers because by penalizing any increase in production it tends to freeze the existing situation and make it more difficult for a producer to improve his competitive position on the market.

3. Agreements requiring payment of levies where marketing quotas are exceeded are likely to affect trade between the Member States where they deal with a semi-finished product which is not normally sent out of the region in which it is produced but none the less constitutes the raw material from which another product is manufactured which is marketed throughout the Community.

4. A national regulatory measure making agreements which are contrary to Article 85 of the Treaty generally binding on all traders in the sector concerned, and thus reinforcing their effects, is incompatible with Member States' obligations under Article 5 of the Treaty, read together with Articles 3 (f) and 85 thereof.

REPORT FOR THE HEARING
delivered in Case 136/86 *

1. Facts and written procedure

The plaintiff in the main proceedings, the Bureau national interprofessionnel du cognac (hereinafter referred to as 'BNIC'), is an inter-trade body concerned with the market in Cognac wines and spirits and was established by 1941 legislation which has been amended on several occasions. According to the provisions applicable at the material time (order of the Minister for Agriculture of 10 May 1975), the BNIC is composed of:

(a) two persons appointed by the Minister for Agriculture, one representing wine-growers and the other representing dealers in the defined region in which the registered designation of origin 'Cognac' may be used;

(b) delegates of wine-growers and distilling cooperatives, delegates of wine dealers and commercial distillers and delegates of the ancillary industries, also appointed for three years by the Minister for Agriculture on the basis of lists drawn up by the trade organizations concerned.

According to the order of 14 November 1960, the proceedings of the BNIC are

* Language of the Case: French.

presided over by a senior official of the Ministry of Agriculture, appointed by the Minister for Agriculture, who also appoints a government commissioner and, if necessary, a deputy government commissioner. The commissioner attends all meetings of the BNIC and its standing committee. He may either give his assent to the decisions adopted or submit them to the Minister for approval (Article 4).

On 15 June 1978, the general assembly of the BNIC adopted rules of procedure laying down its working procedures, as provided for in Article 5 of the said order. The rules of procedure, approved by an order of the Minister for Agriculture of 2 August 1978, determine the conditions under which ordinary and extraordinary general assemblies are called and how they are conducted, the powers of such assemblies, and the powers and working procedures of the standing committee and the technical committees. Sanctions are also laid down for infringements of the inter-trade agreements made generally binding under the law of 10 July 1975.

Article 2 of that law, supplemented and amended by Law No 80-502 of 4 July 1980, provides as follows:

'Agreements concluded by recognized inter-trade organizations may be made generally binding in whole or in part for a specified period by the competent administrative authority where they are designed, by means of standard form contracts, marketing agreements and joint action compatible with the general interest and with the rules of the European Economic Community, to promote:

(i) the compilation of information concerning supply and demand;

(ii) the adjustment and regularization of supplies;

(iii) the application, subject to State control, of rules on marketing, prices and conditions of payment;

(iv) product quality;

(v) inter-trade relations in the sector concerned, especially the establishment of technical standards and programmes of applied research and development;

(vi) the sale of the product on the domestic and external markets.

Such agreements may be made generally binding only where they have been adopted by the various trade interests represented in an inter-trade organization by a unanimous decision or in accordance with the procedure laid down in Article 1 of this law.'

Article 3 of the law of 10 July 1975 also provides that:

'Recognized inter-trade organizations as referred to in Article 1 may charge all members of participating trades levies established by agreements made generally binding according to the procedure laid down in the preceding article; notwithstanding their binding nature, such levies remain debts subject to private law.

Levies may also be charged on imported products under conditions defined by decree. At the request of the beneficiary organizations, those levies may be collected by the customs authorities, at the expense of the said organizations. (Article 12 of Law No 80-502 of 4 July 1980).

Such levies are not exclusive of parafiscal charges.'

On 29 October 1979, the government commissioner to BNIC, following the

deliberations of that body on 18 October, adopted a decision regulating certain matters in regard to the 1979/80 marketing year. Under Article 3 of that decision, the production quota provided for in Article 2 of the decision of 2 July 1976 supplementing the organization of the market in the Cognac region was to be composed as follows:

'(1) A marketing quota uniformly fixed at 4.5 hectolitres of pure alcohol per hectare, which may be produced either as wine for distilling or as raw or matured spirits, sold either wholesale or retail.

However, the following additional quotas shall be granted:

(a) 0.5 hectolitres of pure alcohol per hectare shall be granted to yo ung wine-growers aged less than 35 years in 1974 who made a harvest declaration in 1976 and who currently have not more than 5 hectares of vineyard (whether in production or not), provided that it is composed entirely of newly planted vines, to the exclusion of vines acquired by way of succession, gift, purchase or transfer;

(b) 1 hectolitre of pure alcohol per hectare shall be granted to wine-growers established after 1 January 1979 who have been awarded young farmers' grants.

Those additional quotas may not be combined.

(2) A storage quota of:

2 hectolitres of pure alcohol per hectare for Grande Champagne, 1.5 hectolitres of pure alcohol per hectare for Petite Champagne and Borderies,

1 hectolitre of pure alcohol per hectare for Fins Bois, Bons Bois and Bois Ordinaires.

That quota is in addition to the preceding quota.'

Article 9 establishes a trade levy for the financing of measures for the organization of the market in Cognac wines and spirits and in particular for the study and identification of outlets (other than cognac and Pineau de Charentes) for musts and wines from the specialized white vineyards of the defined region of Cognac. That levy was payable as follows:

'(A) FF 300 per hectolitre of pure alcohol for any quantity marketed in excess of 4.5 hectolitres of pure alcohol per hectare (or 5 hectolitres for young wine-growers fulfilling the conditions laid down in Article 3 of this decision, or 5.5 hectolitres of pure alcohol per hectare for wine-growers established after 1 January 1979 who haye been awarded young farmers' grants), subject to a maximum limit of 8 hectolitres of pure alcohol per hectare for the whole of the defined region or 8.5 hectolitres of pure alcohol per hectare for Grande Champagne.

(B) Any unmarketed production in excess of the cognac production quota (increased by the quantities specified in paragraph A above) shall be placed in a market reserve.

The marketing of that additional production shall be authorized:

(a) at the individual level, where production is less than two-thirds of the average yield of the locality for the year in question or in the event of a disaster proclaimed

under the law on agricultural disasters;

(b) by locality, on the basis of the needs expressed by one or more associations composing the Famille du Négoce (representatives of dealers' interests). The representatives of the wine-growers of the locality concerned shall have a right of veto over the decision to market the reserve stock if there is a danger that the inter-trade price will not be observed.

In addition:

(C) Any quantity marketed in excess of the maximum limit stipulated in paragraph A shall be subject to a supplementary levy of FF 3 000 per hectolitre of pure alcohol;

(D) Any quantity of cognac produced in excess of the maximum yield laid down in Article 2 shall be treated as "prohibited distilled spirit" and shall be subject to a supplementary levy of FF 1 500 per hectolitre of pure alcohol. Such spirit may not undergo the normal ageing process and shall not be marketable. Certificates will not be issued by the National Board in respect of such spirits.'

The funds raised by the implementation of that provision were to be used in the following manner: FF 300 per hectolitre of pure alcohol was to be paid to wine-growers who had been unable to sell their marketing quotas in whole or in part and who agreed not to produce cognac from it: the remainder, after deduction of operating costs, was to be paid into a fund intended to finance the measures referred to above (Article 10).

The part of that decision dealing with the levy was reproduced in an inter-trade agreement concluded within BNIC on 29 October 1979. In addition, Article 4 of that agreement provides as follows:

'In accordance with Article 10 of the government commissioner's decision of 29 October 1979, the funds raised under Articles 2 and 3 of this agreement shall be used for the study and identification of outlets other than cognac and Pineau des Charentes for the musts and wines from the specialized white vineyards of the defined region of Cognac, (it being agreed that that effort will be directed principally towards export markets), after deduction of operating costs and a sum of FF 300 per hectolitre of pure alcohol to be paid to wine-growers who have been unable to sell all or part of their marketing quota, who agree not to produce cognac from it and who submit a written application for such payment before 15 April 1980.'

The agreement was made generally binding by a ministerial order of 2 January 1980 adopted under Law No 75-600 of 10 July 1975.

BNIC has brought proceedings before the tribunal d'instance, Saintes, against a wine-grower from the region concerned for payment of the amount of FF 7916.02, the levy owed by that wine-grower for exceeding the marketing quota fixed at the maximum of 8 hectolitres of pure alcohol per hectare (Article 9 (A) of the decision of the government commissioner and Article 2 of the inter-trade agreement).

The tribunal d'instance raises the question whether

'the fixing of a production quota and consequently a marketing quota and a storage

quota should be regarded as a concerted practice which may distort competition within the common market by limiting production and markets, even though the measure was taken with a view to improving the production or at least preserving the quality of the product "cognac" in the best interests of consumers, which, by virtue of Article 85 (3), might make Article 85 (1) of the Treaty of Rome inapplicable to the production quota.'

It also notes that those quotas are fixed by decision of the government commissioner and not, as in the case of the fixing of a minimum purchase price for cognac, by a mere inter-trade agreement made generally binding by an inter-ministerial decree. It further observes that it was the aim of the levy that was specified by the inter-trade agreement of 23 November 1979, which was made generally binding, as stated above, by a ministerial order.

Consequently, the tribunal d'instance, after pointing out that having regard to the aim of the levy at issue, the inter-trade agreement is contrary to Article 85 (1) of the EEC Treaty (judgment of the Court of 30 January 1985 in Case 123/83 *BNIC* v *Clair* [1985] ECR 391), and part of that aim is to fix a price for cognac different from that provided for in the Community rules (since part of the levy was intended to be used to pay a price supplement to certain producers), stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are provisions establishing production quotas consisting of a marketing quota and a storage quota compatible with the provisions of Article 85 of the Treaty of Rome in so far as they are intended to limit the production of a product in order to maintain its quality?

(2) If they are not so compatible, is a levy based on such a quo ta compatible with those provisions of the Treaty of Rome?'

The order for reference was received at the Court Registry on 4 June 1986.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 22 August 1986 by the Commission of the European Communities, represented by Giuliano Marenco, acting as agent, and on 25 August 1986 by the plaintiff in the main proceedings, represented by Philippe Calmels, Avocat.

Upon hearing the report of the Judge-Rapporteur and the view of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it asked the plaintiff in the main proceedings to reply in writing to a certain number of questions and to furnish the Court with certain documents. The plaintiff complied within the prescribed time-limit.

2. Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities

2.1. BNIC submits the following observations:

2.1.1. By way of introduction, *BNIC* describes the economic situation on the market in white wines and musts and in that of cognac, as the latter is organized under national law. It draws attention to the

increase in production until quotas were introduced for the 1975/76 marketing year, the stagnation and sometimes even the drop in sales between 1972 and 1973 (as a consequence of the oil crisis) and the increase in stocks. It was necessary to take action to diversify and improve production, particularly in regard to the quality of the finished product, cognac, and to develop a programme of study and identification of new outlets for agricultural products, wines and musts in order to ensure the economic stability of the region, in which 63 000 wine-growers and about 9 000 persons employed by wine dealers earn their living from viticulture. It emphasized that it was also necessary to take account of satellite industries situated in the region and of the importance of the latter in regard to foreign trade. Cognac alone represents one-third of the Poitou-Charente Region's exports, one-quarter of French exports of wines and spirits and 12% of French exports of agricultural and food products.

It is for that reason that the French authorities have long regulated the wine and spirits market.

2.1.2. After describing its own functioning, BNIC expresses the view, on the basis of the judgment in the abovementioned case in which it was a party, that Article 85 (1) of the Treaty is not applicable in this case for the following reasons.

First, with regard to wines and musts, which constitute agricultural products within the meaning of Article 38 (1) of the Treaty, it observes that such products are subject to the rules on competition, but only in accordance with Regulation No 26 applying certain rules of competition to production of and trade in agricultural products. Article 2 of that regulation provides that 'Article 85 (1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding article as form an integral part of a national market organization or are necessary for the attainment of the objectives set out in Article 39 of the Treaty'. The inter-trade agreement on wines and musts is clearly part of a national organization of the market in white wines and musts and is closely linked to the principle of payment of a levy intended to finance that national organization, which is intended to attain the objectives set out in Article 39 of the Treaty.

Only Cognac spirits, which, as the Court has held constitute industrial products, are subject to Community law (Article 85 (1)).

BNIC also claims that the inter-trade agreement emanates from a body governed by public law of a semi-administrative nature, not from any relationship governed by private law. As the tribunal d'instance, Saintes, points out, regulatory power is vested in the government commissioner.

2.1.3. Furthermore, the production quotas do not hinder trade between the Member States. Neither wine-growers nor dealers in the defined region of Cognac can be in a position of inferiority *vis-à-vis* other French or even foreign wine-growers or dealers producing or marketing competing spirits inasmuch as they hold considerable stocks for production and commercial activities, abundant raw materials which increase in value with the passage of time. It is not in the areas of production, marketing or storage that wine-growers and dealers in the defined region can compete with each other

or with their French or foreign counterparts but by improving the quality of wines for distillation and spirits from Cognac.

2.1.4. The sole purpose of the quota is to provide a point of reference on the basis of which the levy may be charged, and that levy has absolutely no practical effect with regard to commercial and economic relations between producers, wine-growers and dealers at national level and at the level of imports and exports. It is therefore perfectly compatible with Community law. The establishment of the special levy for a single year cannot distort competition. It is intended merely to finance a study and research programme designed to promote technical and economic progress in wine-growing and to improve the quality of wines, and the results of such a programme are uncertain.

Having regard to its aim, the levy thus has no influence either on the price of wines and musts or, *a fortiori* on imports or exports of competing wines.

The limit of 4.50 hectolitres of pure alcohol (marketing quota) merely makes it possible to determine the amount of the levy of FF 300, rather like an index. That is not true of the additional levy provided for in Article 3 of the inter-trade agreement, of FF 3 000 and FF 1 500, which acts as a penalty for any breach of the marketing quota for spirits, an industrial product subject to the provisions of Article 85 of the Treaty, and the quota is thus the essential element in the charging of that levy, the purpose of which is to impose a sanction.

However, the levy of FF 1 500 and FF 3 000 was never claimed by BNIC, nor were proceedings ever initiated in respect thereof.

2.1.5. *BNIC* concludes that:

'1. In regard to the professional agreement — a decision by an association of undertakings or a concerted practice — BNIC leaves the matter to the wisdom of the Court.

2. The production quotas, which are divided into marketing and storage quotas, concern only wines for distillation and spirits from Cognac, in the context of a national organization of the market.

3. Article 85 (1) of the Treaty may be applied only to cognac, which is an industrial product; wines for distillation, which are agricultural products within the meaning of Article 38 (1) of the EEC Treaty since they appear in Annex II to the said Treaty, are subject to Article 38 *et seq.*, contained in Title II (Agriculture) of the EEC Treaty, and to the rules on the common organization of the market in wine (Regulation (EEC) No 337/79 of 5 February 1979).

4. BNIC leaves the issue of the compatibility with the Treaty of Rome of the production, marketing and storage quotas to the wisdom of the Court.

5. Wines and musts, which are agricultural products within the meaning of Article 38 (1) of the EEC Treaty since they appear in Annex II to the said Treaty, are subject to the Community rules on the market in wine (Regulation (EEC) No 337/79 of 5 February 1979).

Article 42 of the Treaty makes the application of the rules on competition to

agricultural products subject to certain restrictions concerning the application of Article 85 of the Treaty pursuant to Regulation No 26 "applying certain rules of competition to production of and trade in agricultural products".'

2.2. The *Commission of the European Communities* submits the following observations.

2.2.1. The Commission begins by analysing the compatibility of the cognac production quotas with the common organization of the market in wine and the prohibition of measures equivalent in effect to a quantitative restriction on exports. It suggests a reply in the negative to those questions. First of all, spirits, and therefore cognac, are not subject to the common organization of the market in wine and are not even an agricultural product within the meaning of the Treaty, since they do not appear in Annex II. Secondly, the production quota, by definition, makes no distinction between goods intended for the internal market and those intended for export.

2.2.2. With regard to the compatibility of the measures at issue with Article 85, the Commission points out that they were adopted by the government commissioner after discussion in the general assembly of BNIC. The question is therefore whether the State measure may interfere with the effectiveness of the competition rules applicable to undertakings.

The *Commission* does not feel able, at this stage, to suggest to the Court an appropriate reply to the questions of the national court. It simply puts forward two possible approaches:

First approach

It cannot be said that the conclusion of agreements contrary to Article 85 was favoured by the provisions at issue. Nor do those provisions reinforce the effects of an agreement. The present case, unlike *BNIC* v *Clair* (judgment of 30 January 1985 in Case 123/83 [1985] ECR 391, 402), does not concern an agreement made generally binding on third parties by a ministerial order. The decision of the government commissioner was not preceded by an agreement but, as the last citation in the preamble indicates, by resolutions of the general assembly of BNIC. Those resolutions may not be analysed as agreements within the meaning of Article 85 (1) inasmuch as they were not intended to determine the behaviour on the market of the undertakings represented in BNIC.

Second approach

The Commission goes on to raise the question whether it could not also be considered that, in this case, the State measure interferes with the effectiveness of Article 85. The government commissioner's decision merely incorporates the results of the discussion within BNIC (according to Article 4 of the inter-ministerial order of 14 November 1960, it would appear that only the Minister for Agriculture may adopt measures different from those agreed between the undertakings concerned). He did not, therefore, merely hear the groups concerned before reaching his decision.

It is true that persons represented at the general assembly of BNIC are not bound in regard to their behaviour on the market by the resolutions of that assembly; it is the State intervention which gives those resolutions binding force. However, that inter-

vention renders nugatory conduct of the same kind on the part of undertakings, prohibited by Article 85 (1) of the Treaty.

The fixing of production quotas constitutes a restriction of competition capable of affecting intra-Community trade when a large part of the production at issue is exported within the common market, as is the case here. It therefore comes within the scope of Article 85 (1).

3. Replies to questions put by the Court

BNIC replied to questions put by the Court asking it to state the date on which the inter-trade agreement made generally binding by the ministerial order of 2 January 1980 was concluded and the reason why an inter-trade agreement was concluded after the decision of the government commissioner of 29 October 1979, an agreement which reproduced the part of the decision concerning the levy for exceeding marketing quotas.

The inter-trade agreement was drafted and signed on 23 November 1979.

With regard to the need to adopt that agreement, since the objectives were those fixed in the government commissioner's decision on the organization of the marketing year 1979/80, namely the identification of new markets and the principle of the establishment of a levy, the most important thing was to finance those objectives by creating new resources in the form of levies, since the use of parafiscal charges was not legally possible.

Therefore, since it was necessary to create a levy by inter-trade agreement, that agreement being governed by the law of 10 July 1975 by virtue of the procedure provided for, in particular, in the BNIC rules of procedure, it was essential for the draft inter-trade agreement to be submitted to the extraordinary general assembly after discussion by assemblies of each of the two interest groups (dealers and wine-growers) dealing exclusively with the implementation and detailed rules for the levy.

However, leaving aside the permanent and dirigiste intervention of the government commissioner in the drawing up of the inter-trade agreement, it is necessary to point out that that levy is only the consequence or at least the essential means of attaining the objectives defined in the government commissioner's decision organizing the marketing year, without forgetting the need for the procedure making the inter-trade agreement generally binding, in accordance with Article 2 of the Law of 10 July 1975.

J. C. Moitinho de Almeida
Judge-Rapporteur