JUDGMENT OF THE COURT
30 January 1985 *

In Case 123/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance [Regional Court], Saintes, for a preliminary ruling in the proceedings pending before that court between

Bureau national interprofessionnel du cognac

and

Guy Clair

on the application of Article 85 of the EEC Treaty to inter-trade agreements concluded within the Bureau national interprofessionnel du cognac (BNIC) fixing the price of cognac,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

gives the following

* Language of the Case: French.

JUDGMENT

Facts and Issues

The facts, procedure and written observations submitted under Article 20 of the Protocol on the Statute of the Court of the EEC may be summarized as follows:

1. Facts and written procedure

1.1. As is apparent from the national court's order and from the other documents before the Court, French law (Law No 75-600 of 10 July 1975 on the agricultural inter-trade organization, as supplemented and amended by Law No 80-502 of 4 July 1980) provides for the possibility of making agreements within an agricultural inter-trade organization which are designed, by means of standard form contracts, marketing agreements and common action compatible with the general interest and with the rules of the European Economic Community, to promote:

The compilation of information concerning supply and demand;

The adjustment and regularization of supplies;

The application, subject to State control, of marketing rules, prices and conditions of payment;

The quality of goods;

Inter-trade relations in the sector concerned, especially the establishment of technical standards and programmes of applied research and development; and

The sale of products on the domestic and external markets.

After their adoption such agreements may, at the request of the inter-trade organization concerned, be made generally binding for a specified period by ministerial order. The effect of this is to make the agreement binding on all members of the trades making up the inter-trade organization.

Where a contract of supply which is subject to an agreement that has been made generally binding does not comply with the agreement, it is automatically void and the inter-trade organization concerned is entitled to bring an action for a declaration to that effect.

Finally the inter-trade organization is entitled to ask the court to award it compensation for the damage it may have suffered in the event of a breach of the rules of agreements which have been made generally binding.

The plaintiff in the main proceedings, the Bureau national interprofessionnel du cognac [National Inter-Trade Board for Cognac, hereinafter referred to as 'the Board'] is an inter-trade organization for the marketing of Cognac wines and spirits created by legislation originally enacted in 1941 and subsequently amended on a number of occasions. Under the provisions applicable at the time of the facts (Order of the Minister for Agriculture of 10 May 1975) the Board was composed of:

(a) two persons appointed by the Minister for Agriculture to represent respectively wine-growers and the trade in the area entitled to the registered designation of origin cognac;

(b) delegates of wine-growers and distillation co-operatives, representatives of dealers and commercial distillers and delegates from associated trades, 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 internal rules adopted by the Board on 19 June 1978, which were the rules in force at the time of the facts, its members were assigned to groups, namely

dealers and wine-growers, each of which selected a representative.

Pursuant to a Ministerial Order of 14 November 1960 the Chairmanship of the Board is entrusted to a general agricultural engineer appointed by the Minister for Agriculture, who also appoints a Government Commissioner to take part in the deliberations of the Board and in those of its permanent committee; the Commissioner 'may either approve the decisions adopted or submit them for approval by the Minister'.

For the purpose of applying the legislative provisions relating to the above-mentioned inter-trade agreements, the Board laid down a special procedure in its internal rules, which were approved by an Order of the Minister for Agriculture dated 2 August 1978.

It must first be decided in general meeting, by a majority of 3/4 of the members and after consultation with the meetings of the two groups and representatives of ancillary trades, to call an extraordinary general meeting.

The extraordinary general meeting debates a draft agreement, which 'must previously have been submitted to the meetings of the two groups'.

The text of the agreement is the result of bilateral negotiations between the wine-growers' group and the dealers' group at the extraordinary general meeting. The position adopted by each of the groups is itself the result of internal negotiations followed by a decision reached by a qualified majority of the members representing various trade groups.

Only after it has been established that there is a consensus of opinion in favour of doing so, does the general meeting request the competent administrative authority to make the agreement generally binding.

In accordance with the aforementioned provisions the Board reached an agreement on 7 November 1980 entitled:

'Inter-trade agreement on the prices of distillable white wines and cognacs submitted, pursuant to the provisions of Law No 75-600 of 10 July 1975 (as supplemented and amended by Law No 80-502 of 4 July 1980), with a view to the issuing of an order making it generally binding.'

That agreement was signed on behalf of the dealers' group and the wine-growers' group.

The agreement was also signed by the salaried director of the Board but did not bear the signature of the Government Commissioner, who in his decision of 13 November 1980 on the organization of the 1980-81 marketing year refers only (Article 17) to 'an inter-trade agreement fixing a minimum price for wines of the Cognac district intended for the production of cognac' without mentioning a minimum price for new or matured spirits or a minimum price for cognac.

Subsequently, as required by the second paragraph of Article 2 of the Law of 10 July 1975, that agreement was adopted unanimously in general meeting by the various trades represented on the Board. When that condition had been satisfied the agreement was made generally binding by Order of the Minister for Agriculture of 27 November 1980, published in the Journal Officiel de la République Française on 3 December 1980.

The agreement in question covers by way of sub-designation and on the basis of age all the essential components of the cost price of cognac and in particular:

In Article 2, the minimum price of wines intended for the distillation of spirits entitled to the designation 'cognac';

In Article 3, the cost of distillation;

In Article 4, the producer price of new spirits, that is to say less than one year old;

In Article 5, the price of matured spirits, that is to say with an age of one or more years;

In Article 7, time-limits for payment; and

In Articles 8 and 9, the minimum price of cognac.

After an inquiry carried out by its agents as a result of a complaint from various wine-growers, the Board instituted proceedings against Mr Clair, a dealer in Brie-sous-Matha, before the Tribunal de Grande Instance, Saintes, for buying cognac from various wine-growers at prices much lower than the inter-trade price. In those proceedings, which were brought on the basis of the inter-trade agreement of 7 November 1980, it was claimed that transactions which did not comply with that agreement were automatically void under Article 4 of Law No 75-600 of 10 July 1975.

The claim was opposed by Mr Clair on the ground that it was contrary to the provisions of Articles 85 and 86 of the EEC Treaty and he asked in the alternative that a request for interpretation be made to this Court. The Board opposed the request on the ground that, on the one hand, cognac fell outside the scope of the Community provisions referred to and, on the other, the measure on which the proceedings against Mr Clair were based was an administrative measure which the Tribunal de Grande Instance could not interpret by reason of the principle of the separation of jurisdiction between courts and administrative tribunals.

As regards the Board's first contention concerning the applicability of the provisions of Articles 85 and 86 of the Treaty to cognac, the Tribunal de Grande Instance, Saintes, accepted that cognacs, which were derived from second stage processing, were not agricultural but industrial products.

The national court reached that conclusion on the basis that the Commission had unequivocally stated that they were of an industrial nature in a letter of 7 May 1981, in which it referred to the exhaustive list of agricultural products set out in Annex II to the Treaty. Furthermore, under French national legislation such spirits were classified as industrial products, as was clear from a letter of 28 July 1979 from the Ministry of Economic Affairs and Finance to the Board.

As regards the Board's second contention, the Tribunal de Grande Instance considered that the Board was unquestionably a quasi-administrative body in view of the fact that it was financed by parafiscal levies and the Government Commissioner on the Board was an executive agent of a legislative authority.

However, the Tribunal held that that Law of 1975, as amended by the Law of 4 July 1980, was legally separate from the rules governing the functioning of the Board. It was true that the Law applied to three categories of products, namely cognac, champagne and armagnac, and that the trade groups concerned with those products had a quasi-administrative status; however, the agreement concerning cognac concluded on the basis of the Law of 1975 made no reference to that special status.

The national court stated that the agreement in question was signed jointly by the representative of the dealers' group, the representative of the wine-growers' group and by the Chairman (Director) of the Board and that the Government Commissioner on the Board took no decision fixing a minimum producer price but merely established maximum sales values, a measure quite different from the fixing of minimum prices, in respect of which he merely provided (in Article 17 of his decision of 13 November 1980) for an inter-trade agreement between the parties.

The Tribunal de Grande Instance, Saintes, therefore held that the measure in question was separate both from the above-mentioned measure of the Government Commissioner and from the Ministerial Order of 20 November 1980 making it generally binding; it was an agreement between dealers and producers and the fact that the Chairman (Director) of the Board was present could not confer upon it the character of legislation.

As regards the legal status of the parties to the agreement, the national court referred to a decision of the Commission of the European Communities of 26 July 1976 (76/684/EEC). In that decision, which was addressed to a body similar to the Board, the Bureau interprofessionnel de l'Armagnac [National Inter-trade Board for Armagnac], and which related to proceedings under Article 85 of the Treaty, the Commission considered that 'Armagnac producers, cooperatives, distillers and dealers which are represented within the Bureau national interprofessionnel de l'Armagnac by their trade associations are undertakings within the meaning of Article 85 (1) of the EEC Treaty'.

In view of its findings, the Tribunal de Grande Instance, Saintes, addressed itself to the question whether under the rules on competition the Board might be regarded as an association of undertakings.

On 21 June 1983 the Tribunal de Grande Instance stayed the proceedings and referred the following questions to the Court for a preliminary ruling on the interpretation of Articles 85 and 86 of the Treaty:

'(1) Since the wine-growers' group and the dealers' group are both represented within the Bureau national interprofessionnel du cognac, are they to be regarded as an association of undertakings, having regard to the fact that the agreement reached between them was also signed by the Chairman of the Bureau?

(2) Must the fixing by the wine growers' group and the dealers' group of a minimum purchase price for potable spirits be regarded as a concerted practice?

(3) Must the fixing of a minimum purchase price for potable spirits be regarded as capable of affecting trade between Member States and as having as its effect or purpose the prevention, restriction or distortion of competition within the Common Market, in the light of the fact that the potable spirits referred to in the agreement of 7 November 1980 conform to the requirements for the registered designation of origin for cognac and that cognac distilled from grapes is consumed undiluted almost without exception? '

1.2. The national court's order was received at the Registry on 1 July 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 6 September 1983 by the Commission of the European Communities, represented by Mrs N. Coutrelis, acting as Agent, on 12 September 1983 by the defendant in the main proceedings, represented by P. Kappelhoff-Lançon, Advocate, and on 23 September 1983 by the Board, the plaintiff in the main proceedings, represented by X. de Roux, Advocate.

Upon hearing the report of the Judge Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the parties to the main proceedings and the Commission of the European Communities to answer in writing a number of questions. That was done within the time-limits laid down.

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

2.1. The *Board* submits the following observations.

2.1.1. It starts by defining what is meant by cognac and giving an account of its production, marketing and economic importance for the areas concerned.

The Board maintains that any discussion of the question whether cognac is an agricultural or industrial product for the puposes of the EEC Treaty is, from an economic point of view, artificial and pointless since what is in question is the

exploitation of an agricultural product (white wines distilled to produce cognac) which represents the livelihood of 80 000 people, 3/4 of whom are farmers. The Board maintains that the national court has wrongly classified cognac as an industrial product, since under French law cognac is an agricultural product to which the Law of 10 July 1975 applies, although subjecting it to a special scheme. In that respect the Board points out that Article 5 of the Law in question distinguishes between bodies created by 'laws or regulations' and bodies which have a contractual origin (referred to in Article 1) and claims that the Board itself comes under the first category. In the Board's view, since it was created by legislation or regulation before the enactment of the Law of 1975 it retained its public status but was nevertheless entitled to avail itself of the provisions of that Law by virtue of Article 5 thereof, which provides that inter-trade organizations created by legislation or regulation before the adoption of the Law may avail themselves of Articles 2, 3 and 4, concerning the conclusion and binding nature of agreements such as the one in question.

2.1.2. To demonstrate that it has the status of a public body the Board examines the provisions relating to its establishment, organization and operation.

It states that it has its origin in an order of 5 January 1941 and that an order of 4 December 1944 entrusted its powers to a Government Commissioner, assisted by an advisory council whose members were appointed by order and were chosen from among representatives of the wine-growers and dealers.

It adds that on 28 April 1945 a new ministerial order approved the rules of the Bureau National de Répartition des Vins et Eaux-de-vie de Cognac [National Board for the Distribution of Wines and Cognacs] and that two orders of 21 January 1946 and 20 February 1946 supplemented those rules; the latter order provided for the keeping of accounts and the monitoring of the age of cognac.

It states that on 15 June 1945 a parafiscal levy was imposed on distillers and dealers to cover the financing of the Board and that an order of 9 July 1946 conferred upon it the form which it essentially has today. It states that the composition of the Board was subsequently altered several times (order of 14 November 1960 and order of 16 November 1964) but that the spirit and objective of the rules governing its activity were not altered.

The Board adds that it is constituted by a commission, the members of which are appointed by order of the Minister for Agriculture on a proposal from the trade organizations concerned; the meeting is presided over by a general agricultural engineer, who is also appointed by the Minister (Article 2 of the order of 14 November 1960).

The task of the Commission, according to Article 2 of the order of 9 July 1946, was:

'To study and prepare any regulations concerning the acquisition, distribution, distillation, marketing, storage and sale of wines and spirits produced in the region',

that is to say its task was to study and prepare and not to decide, since the decision remained with the representative of the State, the Government Commissioner, who alone was entitled to take enforceable decisions (Article 2 of the order of 4 December 1944).

It observes that implementation of those decisions and the ministerial orders is entrusted to the Board, the director of which is generally a senior official of the French State.

The Board states that it is still financed by the revenue from a parafiscal levy, the rate of which is approved each year by the French Parliament in the Loi de Finances [Finance Law].

The Board adds that, whilst at one time there may have been some dispute in France regarding its legal nature, the Conseil d'Etat [State Council] took the view that it was a public body enjoying financial autonomy and having legal personality and that its decisions had to be referred to administrative tribunals rather than to the courts.

It considers that that view is reasonable since the Board has a public function inasmuch as it:

monitors the age of cognac;

regulates the sales descriptions;

ensures observance of the rules on maturing;

and above all regulates the market in wines and cognacs.

From its status as a public body the Board draws conclusions about the legal nature of the agreements entered into as part of its functions and tasks. It observes that each year the Government Commissioner, on a proposal from the general meeting, submits to the Government what is customarily called a draft inter-trade agreement on the prices of distillable white wines and cognacs.

It states that if the Government agrees with the proposals made to it, it issues an order which makes the proposal binding and requires dealers and growers to observe the prices fixed; if the Government does not agree, it makes such amendments as it wishes.

The Board states that it is responsible, in conjunction with the administration (Departments responsible for Fraud Investigation, Taxation, Competition and Prices), to ensure observance of the prices fixed by the order published in the Official Journal of the French Republic and adds that the fixing of prices for transactions between wine-growers and dealers forms part of the wider task of regulating production, which is its primary function.

According to the Board, the objective of the public authorities in this sphere is to reduce reserves in order to control financial costs by reducing the burden of overstocking which weighs on wine-growers.

It states that this policy of progressively eliminating the disequilibrium can succeed only if it is supplemented by a price system which allows wine-growers to bear those heavy burdens during this difficult period and to survive pending the re-establishment of a fundamental equilibrium in the wine-growing economy of the cognac-producing area.

It observes that to allow prices to depend on supply and demand would lead to a collapse which wine-growers could not withstand and that the fall in the value of stocks would mean that wine-growers would no longer be able to meet their financial commitments with their banks.

From the above-mentioned considerations the Board concludes that Article 85 of the EEC Treaty does not apply to it because it is neither an undertaking nor an association of undertakings within the meaning of that article.

To show that it is not an undertaking the Board refers to the definitions of the term contained in legal literature; according to those definitions the entity concerned must first of all have an appropriate organization and secondly must pursue a specific economic aim; the Court has added the notion of a 'separate legal entity' pursuing an economic aim (judgments of 13 July 1962 in Joined Cases 17 and 20/61 *Klöckner* v *High Authority* [1962] ECR 325 and Case 19/61 *Mannesmann AG* v *High Authority* [1962] ECR 357).

The Board considers that of those factors it is the 'specific economic aim' which is particularly important and that in the absence of any definition by the Court the definitions in legal literature must be adopted; although

those definitions are very wide they do not cover the Board's activity because they basically assume that an undertaking is involved in economic activity by way of production, distribution or trade in goods or services.

The Board claims that, in view of its statutory origin, financing, powers and public function, it cannot be regarded as being involved in production or trade in products or services.

As regards the suggestion that it is an association of undertakings, the Board observes that, in its Decision of 15 December 1982 (IV/29.883-AROW/BNIC, 82/896/EEC) relating to a proceeding brought against it under Article 85, the Commission took the view that it was an 'association of undertakings' within the meaning of Article 85 of the EEC Treaty and that its decisions constituted 'an act separate from the subsequent extending order' and in consequence imposed upon it a fine of 160 000 ECU.

The Board observes in that respect that its Government Commissioner took the view that the penalty related to a measure which had been abandoned and was of little importance; in consequence, on instructions from the French Ministry for Agriculture, it was decided not to appeal simply to establish a point of law. However, the procedure adopted for payment of the fine shows the eminently public nature of the Board. It points out that the Commission took proceedings not against the undertakings which were said to have agreed unlawfully to fix a minimum price but against the Board itself on the basis that the Board, despite its express statute, was an association of undertakings.

To refute that analysis and to show that it is a public body the Board emphasizes first of all that it is financed by a parafiscal levy annually approved by the French Parliament and is subject to public-sector accounting rules.

It then observes that the Commission's view that its members are delegates of trade organizations, which are themselves made up of undertakings, may be refuted by considering the method by which its members are appointed.

In that respect it points out that its director and chairman and the Government Commissioner are officials appointed by the Minister for Agriculture, who by ministerial order determines the composition of its meeting, chooses and directly appoints certain members thereof and also appoints others on the basis of lists drawn up by the trade organizations.

The Board thus draws the conclusion that it cannot constitute an association because an association presupposes a voluntary agreement, an 'animus societatis' with a common aim, that is to say a contractual element which is completely absent here, since it is a mandatory body whose creation and organization depend solely on the initiative of the public authorities, which are entitled to dissolve it at any time even contrary to the wishes of all its members.

The Board states that it differs from the inter-trade bodies which were created and recognized on the basis of the aforesaid Law of 10 July 1975. It cites Article 1 of the Law, which provides that orders may be issued to recognize 'bodies constituted by the trade organizations most representative of agricultural production and, where appropriate, processing, dealers and distribution, representing the various interests involved' and observes that Article 5 of the Law makes a distinction between those inter-trade groups and inter-trade organizations 'created by legislation or regulation' such as itself.

That being so, the Board observes that it cannot be regarded as an association of undertakings on the sole ground that it comprises representatives of trade organizations, since the composition of its general meeting is determined by the Minister for Agriculture and contains a certain number

of members who do not directly represent the trade organizations concerned with the production and sale of cognac.

Furthermore, the capacity in which a member is chosen must not be confused with that in which he carries out his duties because, although the ministerial orders which determine its composition provide that the majority of the members are to be chosen from candidates proposed by the trade organizations concerned, it does not follow that those members, in exercising the mandate conferred by the Minister, bind the undertakings to which they belong.

2.1.3. To answer the question whether the fixing of a minimum purchase price for spirits must be regarded as likely to affect trade between Member States, the Board refers to Recital No 49 of the statement of objections issued by the Commission on 8 February 1982 (AROW/BNIC), which reads as follows:

'Certain minimum prices fixed by the Board may appreciably affect trade between Member States. The fixing of minimum prices for the purchaser, by members of the dealers' group, of wines for distillation and new or matured spirits for members of the wine-growers' group does not in itself seem capable of appreciably affecting trade between Member States. Such prices relate to transactions in respect of intermediate products which are not normally intended at that stage to be supplied for consumption or sent out of the Cognac area. They nevertheless influence the price of the finished product likely in due course to be exported; however, such indirect influence does not lead to the conclusion in the present case that trade between Member States may appreciably be affected.'

The Board adds further that the producer price has ultimately little or negligible effect for the ultimate consumer of the product; in all countries of the Community cognac is subject to heavy duties and it is those duties which are the major item in the price of the product to the consumer.

It states that the duties amount in the United Kingdom to 64% of the cost price, in Belgium 52%, in the Federal Republic of Germany 45%, in the Netherlands 46%, in Ireland 70% and in Denmark 72%.

2.1.4. In conclusion the Board proposes that the following answers should be given to the national court:

(1) The fact that the wine-growers' group and dealers' group are both represented on the Board does not amount to an association of undertakings because:

(a) the fact that the dealers' group and wine-growers' group are represented in the general meeting of the Board does not result from a voluntary association of undertakings, but from the application of French law, as laid down in Article 9 of the Law of 27 September 1940, the order of 5 January 1941, the order of 4 December 1944, the order of 28 April 1945, the order of 9 July 1946 and in subsequent orders amending the organization of that public body;

(b) The representatives of the wine-growers' and dealers' groups on the Board do indeed represent particular undertakings, but are nevertheless appointed by order of the French Minister for Agriculture; consequently they hold their mandates and perform their duties pursuant to the ministerial order which appointed them and not as representatives of particular undertakings;

(c) The general meeting of the Board has only an advisory role and, with-

in the framework of the legislation and regulations governing its activity, merely proposes a number of measures, including the fixing of prices, to the French authorities; the inter-trade prices become enforceable on all the trades concerned only as a result of the ministerial order; proceedings taken in respect of infringements are based not on the breach of an agreement of private law but on the contravention of a French regulation.

(2) In consequence the deliberations of the general meeting of the Board cannot be regarded as a concerted practice within the meaning of Article 85 (1) of the EEC Treaty.

(3) There is therefore no purpose in considering whether, for the purposes of Article 85 (1) of the EEC Treaty, the fixing of a minimum purchase price for spirits may affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the Common Market, since the fixing of the price:

(a) has little effect on the ultimate consumer;

(b) above all meets a regional interest inasmuch as it is intended to ensure a fair standard of living for wine-growers, to stabilize markets and to ensure the availability of supplies, whilst at the same time ensuring reasonable prices for consumers.

All the aforesaid aims fall within the general objectives of Article 39 of the EEC Treaty.

2.2. The *defendant in the main proceedings* submits the following observations:

2.2.1. As regards the first question, since the wine-growers' and dealers' groups are represented on the Board, they constitute an association of undertakings and it is irrelevant that the Board is a quasi-public establishment and does not itself engage in trade.

According to the defendant, when the representatives of the two groups meet together to conclude a common agreement on minimum prices, that completely informal meeting of the two groups constitutes an association of undertakings. It is irrelevant that subsequently the inter-trade organization unanimously adopts the provisions of the agreement since the Minister for Agriculture issues an order making the agreement binding because there has first been a meeting of the two groups and their agreement.

That view is supported by the Commission's decision of 15 December 1972 (IV/29.883 AROW/BNIC) given against the Board, from which no appeal was made.

In that decision, which concerned a similar matter, the Commission took the view that:

the inter-trade agreements concluded within the Board, as distinct from the orders making them generally binding, constitute decisions of an association of undertakings;

the members of the Board appointed by the Minister represent the trade organizations or groups, which themselves are made up of undertakings;

the measures in question are not taken on the basis of the Government Commissionner's powers to issue regulations;

the Board thus constitutes an association of associations of undertakings, which for the purposes of Article 85 may be treated as an association of undertakings.

The defendant further points out that the Commission took a similar view concerning the status of the Bureau national inter-professionnel de l'Armagnac [National Inter-trade Board for Armagnac, hereinafter referred to as 'the BNIA'] in its decision of 26 July 1976 (IV/28.980, Official Journal L 231 of 21 August 1976, p. 24).

In that decision, from which no appeal was made to the Court, the Commission took the view that:

The prohibition on deliveries of bulk Armagnac of age grades 4 and 5 imposed by the BNIA in its circular 8/74 dated 29 May 1974 is the result of a decision by an association of undertakings. The Armagnac producers, cooperatives, distillers and dealers who are represented through their trade associations in the BNIA are undertakings for the purposes of Article 85 (1). The fact that the BNIA is entrusted with certain functions by decree 62/20 to control quality does not mean that it cannot be considered to be an association of undertakings for the purposes of Article 85 (1). The measure impugned exceeds the scope of measures necessary for the performance of functions assigned to the BNIA by the decree.'

In the opinion of the defendant in the main proceedings, the view taken in the present case cannot be different from that taken in the two decisions adopted against the BNIA and the Board itself.

Finally, in the view of the defendant in the main proceedings, the fact that the Board's salaried Director, and not its Chairman — as stated by the national court — countersigned the agreement is of no legal relevance, since neither the Board nor, *a fortiori*, its Director has the power to adopt regulations.

2.2.2. As regards the second question put to the Court, the defendant in the main proceedings maintains that there can be no doubt that the fixing of a minimum purchase price for spirits constitutes a concerted practice, but the fact that the inter-trade agreement is made by an association of associations of undertakings would seem to reduce the importance of the question concerning the existence of a concerted practice.

2.2.3. As regards the third question, the defendant in the main proceedings begins by describing the technical processes for the production of cognac.

He explains that it is a potable spirit which is made from a wine produced from particular vine varieties harvested in a geographical area defined by a Decree of 1 May 1909 and which is protected by a system of registered designations of origin laid down by the Decree-Law of 30 July 1935; entitlement to the designation 'cognac' is subject to regulations relating to inspection, distillation, age and marketing.

He observes that the cost price of the spirits sold by the wine-grower after distillation is determined by two factors, namely the price of the wine used and the cost of distillation.

He maintains that it is clear that the fixing of a minimum price for new or matured spirits which is higher than the level resulting from the above-mentioned factors which naturally determine the price may affect trade between Member States.

Although the great majority of purchasing dealers are established in Cognac or in the area defined by the decree of 1909, there is nothing to prevent a dealer established outside the defined area from buying spirits from the area for the purpose of blending them without losing entitlement to the designation 'cognac', whether the spirits

remain in France or are exported. The sale of spirits by the wine-growers to the dealers is thus not a strictly national commercial transaction, but may on occasions be international.

According to the defendant, it is important to note that those spirits, the minimum price of which is imposed on dealers, constitute the raw material for the finished product, cognac, the importance of which in international trade cannot be denied.

The defendant observes that the Commission stated in its aforementioned decision of 15 December 1982 that 80% of cognac sales took place outside France, that sales in the Common Market represented some 52% of total sales and that exports from France to the nine other Member States represented 40% of the total exports.

According to the defendant, the fact that the Commission in its decision of 15 December 1982 was examining a situation which was not strictly identical to that of the present case is not decisive; although the application made by AROW which led to the decision in question related to the provisions of the agreement of 7 November 1980 (and to those of 12 December 1978 and 18 October 1979) concerning deliveries of the finished product, cognac, and not Articles 4 and 5, which determine the production price of new or matured spirits, the two situations are similar because, although sales of spirits by wine-growers take place essentially on the French domestic market, the fixing of a minimum price nevertheless affects international trade.

Cognac is the only spirit produced in a country of the Community subject to a restrictive organization, since there is no price fixing in the case of other spirits, namely spirits derived from wine (French Armagnac and Italian grappa), spirits derived from fruit (plum, pear and mirabelle) produced in Germany and France or grain spirits (whisky or aquavit produced in England and Denmark).

The defendant considers that in those circumstances the cognac dealer is at a disadvantage in relation to French or foreign dealers marketing competing spirits since in determining his sale price he must take into account a purchase price for the raw material which is imposed on him instead of being freely fixed.

He observes that that argument would be weak if it related only to a secondary component of the cost price of cognac, such as the cost of labelling or packaging, but that it retains its full weight where the purchase price imposed is that of the primary constituent of the finished product.

He refers in that respect to financial statistics which show that the purchase price of spirits represents, in relation to the sale price of cognac, a proportion not less than 40 to 50% of sales in bottles (88% of the market) and 60 to 70% for sales in barrels (12% of the sales); it is only in respect of prices that small dealers can compete with the more powerful dealers, who with their large advertising budgets dominate the market, and it is in the consumer's interest that such price competition should be unfettered.

The defendant observes that the question put expressly refers to the fact that cognac enjoys a registered designation of origin and to the fact — which is indisputable — that it is drunk 'undiluted almost without exception', which shows that the national court was concerned with the question whether the exclusive nature of the registered designation of origin 'cognac' exempted cognac from the Community rules

in view of the fact that identical spirits could not be produced in any other Member State or at least not under the same name.

In that regard the defendant cites the case-law of the Court (Case 168/78 *Commission* v *French Republic* [1980] ECR 347; Case 169/78 *Commission* v *Italian Republic* [1980] ECR 383; Case 171/78 *Commission* v *Denmark* [1980] ECR 447 and Case 216/81 *Cogis* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701) and contends that the principles propounded in those cases, in the context of proceedings concerning the application or interpretation of Article 95 of the EEC Treaty, apply in the present case, because it is inconceivable that the concept of 'similar products' should be interpreted differently depending on whether it is a matter of assessing conditions of commercial competition or the protectionist intervention of a State by means of tax measures.

In those judgments the Court held that 'there are nevertheless, in the case of all spirits, common characteristics which are sufficiently pronounced to accept that in all cases there is at least partial or potential competition'. The Court reached that conclusion after making the following findings:

(1) Spirits are produced by distillation and contain, as a principal ingredient, alcohol suitable for human consumption at a relatively high degree of concentration; within the largest group of alcoholic beverages, they therefore form an identifiable whole united by common characteristics.

(2) Typical varieties of spirits may be defined by particular characteristics, so much so that some of them are even protected by registered designation of origin.

That is how the Court came to condemn the tax measures taken:

By France to protect national spirits against whisky and genevas;

By Denmark to protect aquavit and schnapps against gin, vodka, geneva, punch, rum and spirits distilled from fruit;

and by Italy to protect spirits obtained from wine and marc against spirits obtained by the distillation of cereals and sugar cane.

The defendant in the main proceedings maintains therefore that apart from the special feature arising from the designation of origin or the method of consumption the common characteristics of all spirits are sufficient for cognac to be in direct competition with all other existing spirits.

It thus concludes that the fixing of a minimum purchase price for spirits intended for the manufacture of cognac prevents free competition, adversely affects trade between Member States, restricts the market without improving quality and consequently is an obstacle to the economic inter-penetration intended by the Treaty.

2.3. The *Commission of the European Communities* makes the following observations.

2.3.1. It discusses the nature of cognac, the process by which it is produced and the applicable law. Under Community law, only white wines intended for the manufacture of spirits and subsequently cognac are agricultural products; spirits and cognac are themselves not included in Annex II to the EEC Treaty, which contains an exhaustive list of agricultural products for the purposes of Article 38. Thus, according to the Commission, the position is as follows:

(a) As regards white wines:

They are subject to the rules of the common organization of the market in wine laid down by Regulation (EEC) No 337/79 and all the regulations adopted in implementation thereof;

Pursuant to Article 42 of the Treaty, they were brought within the scope of the rules on competition (subject to certain restrictions with regard to the application of Article 85) by Regulation No 26;

(b) Spirits and cognac are subject to the general rules of Community law.

Trade between the Member States is appreciably affected by reason of the volume of cognac sales in the various countries of the Common Market.

The Commission adds that two other complaints have been lodged against the Board by the Union syndicale des négociants en cognac et eaux-de-vie [Union of Dealers in Cognac and Spirits] and that one of the complaints relates to the inter-trade agreements for 1981-82 and 1982-83 and the other is directed against the orders making those agreements generally binding.

The complaint against the inter-trade agreements (Case IV/30.622), which was lodged on 14 April 1982, is based on Article 3 of Regulation No 17 and relates to the fixing of the price to dealers of distillable white wines and new or matured spirits entitled to the registered designation of origin 'cognac' and the costs of distillation.

The case is at present being investigated by the Commission's Directorate-General for Competition and a letter sent to the Board on 22 September 1982 seeking information on the basis of Article 11 of Regulation No 17 has still not been answered.

The complaint against the orders dated 24 January 1983 was sent to the Directorate-General for Agriculture because it raised the question of the compatibility of the system established by the French authorities with the common organization of the market in wine.

The questions referred to the Court for a preliminary ruling by the national court in the present case are not new for the Commission since it has already had to decide the first question in its aforementioned decision of 15 December 1982; the second question is closely related to the first and the third question falls within the scope of the investigation currently being conducted by the Directorate-General for Competition following the above-mentioned complaint by the dealers' union (Case IV/30.622).

2.3.2. As regards the first question, the Commission cites its own decision of 15 December 1982 (paragraphs 49 to 56) and its decision of 26 July 1976 in relation to the Armagnac Board, to which the national court also refers, in support of its contention that the Board, in fixing prices by inter-trade agreement, is acting as an association of undertakings within the meaning of Article 85 of the Treaty.

The status of the Board as a private or administrative body under French domestic law determines the jurisdiction of the national courts and cannot as such be taken into account in an analysis made solely for the purposes of applying Community law.

The Commission cites the case-law of the Court (judgment of 15 May 1975 in Case 71/74 *Nederlandse Vereniging voor Fruit en Groentenimporthandel and Another* v *Commission and Another* [1975] ECR 563, at paras 30 and 31, and the judgment of 29 October 1980 in Joined Cases 209 to 215/78 and 218/78 *Heintz van Landewyck Sàrl and Others* v *Commission* [1980] ECR 3125, at para. 88) in support of its contention that the term 'association of undertakings' is to be interpreted in the light of the object of Article 85 (1), namely the removal of restrictions on competition resulting from the common intention of the undertakings in question where they act in association in taking measures which produce the effects referred to in Article 85 (1).

The Commission thus draws a distinction between, on the one hand, the activities which the Board conducts as part of its aims, as defined in the applicable legislation, and the procedures leading to the adoption of measures by the Board's Government Commissioner in the exercise of his power to issue regulations and, on the other,

'contractual' procedures conducted with a view to fixing prices pursuant to Law No 75-600, which, as in the present case, lead to the conclusion of agreements by inter-trade organizations followed by the adoption of ministerial orders making those agreements binding.

In the Commission's view that difference in procedure is in fact apparent from the decision of the Government Commissioner on the Board dated 11 November 1980, which contains a number of measures relating to wines and spirits (ceilings on production or marketing), but as regards prices themselves simply provides that 'a minimum price for wines from the Cognac region intended for the production of cognac shall be fixed by inter-trade agreement . . .'.

The agreement in question, which relates to the prices of white wines, spirits and cognac, without specifically distinguishing the white wines covered by the decision of the Government Commissioner, is described by the signatories themselves as a contractual document 'adopted by a unanimous decision of the trade groups represented' and it is they and not the Government Commissioner who request that it be made generally binding (Article 11 of the agreement).

Where at a meeting of the wine-growers' group and the dealers' group prices are fixed, whether it be in relation to wines, spirits or the finished product, cognac, the Board, which is made up of trade groups that are in turn composed of undertakings, is acting as an association of undertakings within the meaning of Article 85 of the Treaty.

In the Commission's view, that analysis is supported by examination of the practice followed by the Board in relation to inter-trade agreements concerning the fixing of prices; such an examination shows that:

From the beginning intra-trade agreements have always been of an exclusively contractual nature and drawn up by the inter-trade groups on their own;

The trend has been in the direction of widening the scope of the agreements (progressive inclusion of spirits and subsequently the finished product, cognac) and a gradually more pronounced desire to make them binding (the appearance of inspections);

Amendments or additional special measures are always presented as being desired by the inter-trade groups or as directly arising from economic necessity without reference to amendments in the legislation or regulations.

In that respect the Commission states that it is only since 1978 that Law No 75-600 has been used to make the agreement reached within the Board binding on traders who are not members of associations represented on the Board and to impose penalties, thus increasing the restrictive effects on competition; however, the fact that the agreements are transformed into regulations issued by a public authority does not mean that they cease to be decisions of associations of undertakings within the meaning of Article 85 of the Treaty.

2.3.3. As regards the second question, which is designed to establish whether the fixing of minimum prices by means of agreements constitutes a concerted practice, the Commission considers that the affirmative answer which it proposes to the first question makes an answer to the second question unnecessary.

Nevertheless, should it be decided that there is no association of undertakings in this case, the Commission contends that for the purposes of Article 85 of the Treaty there are at the very least 'agreements between undertakings' (rather than 'concerted practices' as the national court suggests).

The Commission considers that the contractual nature of the agreements in issue has been amply demonstrated and confines itself to observing that the term 'agreement' is to be understood in the abstract without regard to the question whether under French law it is legally binding on the parties independently of the ministerial order.

The Commission states that under Community law it is necessary and at the same time sufficient for there to be a common intent binding two or more parties *inter se* for there to be an 'agreement'.

It cites the judgment of the Court of 15 July 1970 in Case 41/79 (*ACF Chemiefarma NV* v *Commission* [1970] ECR 661), where it was held that a gentlemen's agreement was an agreement for the purposes of Article 85 if 'its clauses amount to a faithful expression of the joint intention of the parties', and it infers that the circumstances in which prices were fixed in the present case amounted to 'agreements' and, in the light of the aforesaid judgment of the Court in Case 71/74, 'agreements between undertakings' for the purposes of Article 85 (1).

2.3.4. As regards the third question, the Commission considers that the problem raised is not so much whether there is a restriction on competition, which is indisputable, but whether the restriction falls within the scope of Community law.

The question whether Community law or national law applies depends on whether trade between Member States is affected, and the restriction of competition within the Common Market constitutes the basic condition for the application of Article 85.

As regards the restrictive effect on competition within the Common Market, it observes that the agreement in issue fixes 'directly ... purchase or selling prices' and falls within the first class of restrictive agreements covered by Article 85 (1) of the Treaty.

In the Commission's view the effects of that agreement in the present case are:

(a) the restriction of competition between producers, who are prevented from selling at the price which they consider desirable;

(b) the restriction of competition between dealers with regard to the purchase cost of spirits, which may in the long term lead to the elimination of those who are financially smaller;

(c) the repercussion on the price of cognac which this restriction of competition has in view of the fact that the price of spirits is the main element in the cost price of cognac.

As regards the effect on trade between Member States, the Commission states that the Court held that 'the fact that a price-fixing agreement' covers only 'the marketing of products in a single Member State does not rule out the possibility that trade between Member States may be affected' (judgment of 26 November 1975 in Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491, at para. 25).

It maintains that in the present case trade between Member States is affected. Although the restriction of competition resulting from the fixing of minimum prices directly concerns spirits which are not themselves the subject of such trade, the spirits in question are the main element in the cost price of the finished product, cognac. Thus the restrictive effects on competition (obstacles to free price formation for less well-known brands, perpetuating their domination on the market by better known brands and preventing their growth and the promotion of new brands) are encountered in relation to the finished product, cognac, which is the subject of trade between Member States since some 50% of it is sold in the other Member States of the Community.

That being so, the Commission observes that there is no purpose in enquiring whether a product which is the subject of

intra-Community trade does or does not have special characteristics which distinguish it, as regards consumption or from any other point of view, from other products which may be similar.

2.3.5. The Commission therefore proposes the following answers to the questions put to the Court:

'(1) An agreement concluded within an inter-trade organization between representatives of the trades concerned with the intention in particular of fixing prices falls within the term "decision by associations of undertakings' in Article 85 (1) of the Treaty. The fact that the agreement is made generally binding by a decision of the public authority in application of the rules of national law cannot affect its status under Community law.

(2) That answer makes an answer to the second question unnecessary.

(3) An agreement or decision by an association of undertakings which fixes a minimum price is intended to restrict competition within the meaning of Article 85 (1) of the Treaty. Such an agreement or decision may affect trade between Member States if, although the product in question is not marketed in other Member States, it is an ingredient in a finished product which is the subject of intra-Community trade, so that its price has a significant effect on the sale price of the finished product.'

3. Oral procedure

At the hearing on 26 June 1984, the Board, represented by X. de Roux, *Avocat*, G. Clair, represented by P. Kappelhoff-Lançon, *Avocat*, and the Commission of the European Communities, represented by G. Marenco and N. Coutrelis, acting as Agents, presented oral argument and answered questions put by the Court.

The Advocate General delivered his opinion at the sitting on 2 October 1984.

Decision

1 By a judgment of 21 June 1983, which was received at the Court on 1 July 1983, the Tribunal de Grande Instance, Saintes (France), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 85 of the EEC Treaty.

2 Those questions were raised in proceedings brought by the Bureau national interprofessionel du cognac [National Inter-trade Board for Cognac, hereinafter referred to as 'the Board'], whose registered office is in Cognac, against Guy Clair, Director of Établissements Clair et Cie, dealers in Brie-sous-Matha, for the annulment of contracts for the purchase of potable spirits which the latter had concluded at prices lower than those laid down in accordance with the procedure described below.

3 As is apparent from the judgment of the national court and from the other documents relating to the case, the Board is an inter-trade organization in the wine and cognac sector and was set up by an Order of 5 January 1941. The income of the Board is provided by para-fiscal levies. According to the Order of the Minister for Agriculture of 18 February 1975 (Journal Officiel de la République Française of 26 February 1975), which was in force at the material time:

'The Bureau national interprofessionnel du cognac shall be composed of:

(a) Two persons, one representing wine-growers and the other representing dealers in the area defined by the Decree of 1 May 1909;

(b) Upon submission of lists drawn up by the trade organizations concerned:

19 delegates of wine-growers and distilling co-operatives;
19 delegates of dealers and commercial distillers;
A delegate from the Syndicat des Vins Vinés [Association for wines fortified for distillation];
A delegate of the producers of Pineau des Charentes;
A delegate of the brokers;
A delegate for ancillary industries;
A delegate of the executive and managerial staff (trade);
A delegate of workers in cognac cellars;
A viticultural technician;
A vineyard worker.

No person carrying on the trade of a dealer, broker, distiller or any related trade shall represent producers and vice versa.

Members of the Board shall be appointed for three years by Order of the Minister for Agriculture. Their mandate shall be renewable.

The following shall attend meetings of the Board and may take part in discussions in a consultative capacity:
Regional directors for agriculture and directors of the revenue authorities of Charente and Charente-Maritime;
The divisional inspector responsible for investigating fraud;
The officials responsible for the economic and financial control of the Board.'

In addition, a Chairman and Government Commissioner are to be appointed by the Minister.

4 By virtue of Article 5 of Law No 75-600 of 10 July 1975 on agricultural inter-trade organizations, as supplemented and amended by Law No 80-502 of 4 July

1980, the Board may, at its request, claim the benefit of certain provisions of the Law.

5 Under the Board's internal rules, as they stood at the time of the facts, its members were divided into two groups, namely dealers and wine-growers. After each had adopted its position by qualified majority following internal negotiations, the groups were permitted to conclude an agreement which, according to Law No 75-600 of 1 July 1975, could be aimed at promoting: the monitoring of supply and demand; the adjustment and regularization of supply; the implementation, subject to State control, of marketing rules, prices and conditions of payment; the quality of products; inter-trade relations in the sector concerned; and the sale of the product on domestic and external markets.

6 According to the aforesaid Article 5, in conjunction with Article 2, upon a request by the general meeting of the Board, the agreement may be made generally binding by ministerial order. The effect of this is that the agreement becomes binding on all members of the trades making up the trade organization.

7 According to Article 4 of the above-mentioned Law, a contract of supply between private persons which does not comply with the provisions of an agreement that has been adopted and made generally binding is automatically void, and the inter-trade organization concerned may seek a declaration to that effect from the appropriate court and also claim compensation for any damage it may have suffered.

8 In accordance with the aforesaid provisions and procedure, the Board unanimously adopted on 7 November 1980 an agreement entitled 'Inter-trade Agreement relating to the prices of distillable white wines and cognac'. The agreement, which provided that it was to apply throughout the whole of metropolitan France, fixed a minimum price for wines for distillation, the price of potable spirits distilled in 1980 and earlier years, and a minimum price for cognac. It provided that any contract concluded in breach of its provisions would be void and that the penalties provided for in Article 4 of the aforesaid Law of 10 July 1975 would apply. It was signed by the representatives of the two groups at a meeting of the Board and by the Board's director and was made generally binding by an Order issued by the Minister for Agriculture on 27 November 1980.

9 Mr Clair bought cognac from various wine-growers at prices lower than those laid down by the order in question, and the Board therefore brought an action against

him before the Tribunal de Grande Instance, Saintes, for a declaration that the contracts in question were void.

10 Mr Clair, the defendant in the main proceedings, contended that the action was unfounded because it was based on an agreement which was incompatible with Articles 85 and 86 of the Treaty. For its part the Board claimed, on the one hand, that cognac did not come under the aforesaid provisions of the Treaty and, on the other, that the ministerial order which Mr Clair was charged with infringing was an administrative measure and therefore its validity could not be examined by non-administrative courts.

11 The Tribunal de Grande Instance, Saintes, proceeded on the assumption that cognac was an industrial product and that consequently Articles 85 and 86 of the EEC Treaty were in principle applicable. Furthermore, it held that, although the Board had a quasi-administrative status and the Order of 27 November 1980 making the agreement generally binding constituted an administrative measure, the agreement was nevertheless concluded and signed, without the intervention of the Government Commissioner on the Board, by the representatives of the two groups; the agreement was separate from the Order even though it was made in the presence of the Chairman of the Board, who had no power to issue regulations.

12 On the basis of those considerations, the Tribunal de Grande Instance, Saintes, by judgment of 21 June 1983, stayed the proceedings and referred the following three questions to the Court for a preliminary ruling:

'(1) Since the wine-growers' group and the dealers' group are both represented within the Bureau National Interprofessionnel du Cognac, are they to be regarded as an association of undertakings, having regard to the fact that the agreement reached between them was also signed by the Chairman of the Bureau?

(2) Must the fixing by the wine-growers' group and the dealers' group of a minimum purchase price for potable spirits be regarded as a concerted practice?

(3) Must the fixing of a minimum purchase price for potable spirits be regarded as capable of affecting trade between Member States and as having as its effect or purpose the prevention, restriction or distortion of competition

within the Common Market, in the light of the fact that the potable spirits referred to in the agreement of 7 November 1980 conform to the requirements for the registered designation of origin for cognac and that cognac distilled from grapes is consumed undiluted almost without exception?'

First question

13 The national court's first question is designed essentially to ascertain whether an agreement concluded within an organization and according to a procedure such as those described above falls within the scope of Article 85 (1) of the Treaty and in particular whether an agreement concluded by the two groups (the wine-growers and dealers) is an agreement made between undertakings or associations of undertakings.

14 The Board claims as a preliminary that there is no point in discussing whether under the EEC Treaty cognac is to be regarded as an agricultural product or as an industrial product. Article 85 of the Treaty is in any event not applicable because cognac is of considerable economic importance to the farmers of the region concerned. The income of 63 000 wine-growers is directly dependent on the price of cognac. Since 1973 the wine-growing industry in Charente has been heavily burdened with debt. Moreover, it has been faced with a structural imbalance between supply and demand. Thus, the fixing of a minimum price for cognac is intended to ensure a minimum income for the farmers in Charente.

15 That argument must be rejected. As appears from Annex II to the Treaty (ex. 22.09), potable spirits are expressly excluded from the category of agricultural products. Consequently, they must be regarded as industrial products and that classification cannot be called in question by the economic importance that the products may have for farmers in the region concerned.

16 The Board maintains that the agreement between the two groups was not made on the initiative of undertakings but under the aegis of, and according to the procedure laid down by the internal rules of the Board, which, according to French administrative case-law, constitutes an institution of public law in view of the manner in which it was created, the rules concerning its financing, organization, functioning and the appointment of its members and the public-service mission entrusted to it. Consequently, its activity is not covered by Article 85 of the Treaty.

17 That argument cannot be accepted. Article 85 states that it applies to agreements between undertakings and decisions by associations of undertakings. As the defendant in the main proceedings and the Commission have rightly observed, the legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned.

18 The Board observes that the members who attended its general meeting and who negotiated and concluded the agreement in question were all appointed by the Minister for Agriculture. Thus they do not represent the various trade organizations from which they come and the agreement made between them cannot be regarded as an agreement between associations of undertakings.

19 That argument cannot be accepted. Article 85 must be interpreted as covering such an agreement, since it was negotiated and concluded by persons who, although appointed by the public authorities, were, apart from the two appointed directly by the minister, proposed for appointment by the trade organizations directly concerned and who consequently must be regarded as in fact representing those organizations in the negotiation and conclusion of the agreement.

20 It must be added that an agreement made by two groups of traders, such as the wine-growers and dealers, must be regarded as an agreement between undertakings or associations of undertakings. The fact that those groups meet within an organization such as the Board does not remove their agreement from the scope of Article 85 of the Treaty.

21 The Board maintains, moreover, that agreements concluded within it are not binding and that its role is solely to advise the central public authorities, which alone may make the said agreements binding by means of ministerial orders.

22 It must be pointed out in that respect that for the purposes of Article 85 (1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the

purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on that market.

23 As the defendant in the main proceedings and the Commission have rightly contended, the adoption of a measure by a public authority making an agreement binding on all the traders concerned, even if they were not parties to the agreement, cannot remove the agreement from the scope of Article 85 (1).

24 Finally, the national court asks whether the fact that the inter-trade agreement was signed by the Chairman of the Board affects the legal nature of the agreement for the purposes of Article 85 of the Treaty.

25 The fact that the chairman or director of a body within which an agreement intended to prevent free competition is concluded places his signature at the foot of the agreement, even though national law does not provide for such a signature, does not affect the applicability to the agreement of the provisions of Article 85 (1) of the Treaty.

26 It follows from the foregoing that the reply which must be given to the first question is that Article 85 (1) of the EEC Treaty must be taken to apply to an inter-trade agreement fixing a minimum price for a product such as cognac concluded by two groups of traders within the framework of, and in accordance with the procedures of, a body such as the Bureau National Interprofessionnel du Cognac.

Second question

27 The national court asks further whether the fixing of minimum prices for potable spirits must be regarded as a concerted practice for the purposes of Article 85. In view of the answer given to the first question, it is unnecessary to reply to the second question.

Third question

28 It appears from the documents before the Court and from the arguments presented at the hearing that the third question is concerned essentially with the fixing of prices for potable spirits used in the manufacture of cognac, that is to say an

intermediate product which is not normally sent outside the Cognac region. The national court asks in substance whether the fixing of a minimum price for such a product is capable of affecting trade between Member States and has as its purpose or effect the restriction of competition, having regard to the fact that the finished product, cognac, is protected by a registered designation of origin.

29 It must be observed in that respect that any agreement whose object or effect is to restrict competition by fixing minimum prices for an intermediate product is capable of affecting intra-Community trade, even if there is no trade in that intermediate product between the Member States, where the product constitutes the raw material for another product marketed elsewhere in the Community. The fact that the finished product is protected by a registered designation of origin is irrelevant.

30 The reply which must be given to the third question is therefore that the fixing of a minimum purchase price for an intermediate product is capable of affecting trade betweeen Member States where that product constitutes the raw material for another product marketed elsewhere in the Community, irrespective of whether the finished product is protected by a registered designation of origin.

Costs

31 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Tribunal de Grande Instance, Saintes, by judgment of 21 June 1983, hereby rules:

1. **Article 85 (1) of the EEC Treaty must be taken to apply to an inter-trade agreement fixing a minimum price for a product such as cognac concluded by two groups of traders within the framework of, and in accordance with the procedures of, a body such as the Bureau National Interprofessionnel du Cognac.**

2. **The fixing of a minimum price for an intermediate product is capable of affecting trade between Member States where that product constitutes the raw material for another product marketed elsewhere in the Community, irrespective of whether the finished product is protected by a registered designation of origin.**

Mackenzie Stuart Bosco Kakouris

Koopmans Everling Bahlmann Galmot

Delivered in open court in Luxembourg on 30 January 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President