Case C-198/01

Consorzio Industrie Fiammiferi (CIF)
v
Autorità Garante della Concorrenza e del Mercato

(Reference for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio)

«(Competition law – National legislation anti-competitive – National competition authority's power to declare such legislation inapplicable – Circumstances in which undertakings not answerable for anti-competitive conduct)»

Opinion of Advocate General Jacobs delivered on 30 January 2003

Judgment of the Court, 9 September 2003

Summary of the Judgment

1.. Competition – Community rules – Obligations of the Member States – National law making compulsory or facilitating conduct on the part of undertakings which is contrary to Community rules – Duty of the national competition authority not to apply the law – Power to impose penalties on undertakings for conduct made compulsory by national law – None – Power to impose penalties for conduct taking place after the decision finding there to have been a breach of Article 81 EC and for past conduct facilitated or encouraged by national law
(Arts 10 EC and 81(1) EC)

2.. Competition – Community rules – Obligations of the Member States – National law conferring power to fix the retail selling prices of a product on a ministry and power to allocate production between undertakings on a consortium to which the relevant producers are obliged to belong – Possibility of competition between undertakings – Assessment in each specific case of whether undertakings have acted autonomously
(Art. 81(1) EC)

1. Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority which has been made responsible for ensuring that the competition rules and, in particular, Article 81 EC are observed, is under a duty not to apply the national legislation. Since Article 81 EC, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 EC and 81 EC and if, consequently, it failed to disapply it. However, if the general Community-law principle of legal certainty is not to be violated, the duty of a national competition authority to disapply such an anti-competitive law cannot expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned. It follows that that authority may not impose penalties on the undertakings concerned in respect of past conduct when the conduct was required by the national legislation; it may impose penalties on them in respect of their conduct after the decision declaring there to be a breach of Article 81 EC, once the decision has become definitive in their regard. In any event, the national competition authority may impose penalties in respect of past conduct where the

conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted. In that regard, when the level of the penalty is set the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a mitigating factor. see paras 50, 53-55, 57-58, operative part 1

2. National legislation under which competence to fix the retail selling prices of a product is delegated to a ministry and power to allocate production between undertakings is entrusted to a consortium to which the relevant producers are obliged to belong, may be regarded, for the purposes of Article 81(1) EC, as not precluding undertakings from engaging in autonomous conduct capable of preventing, restricting or distorting competition if, in the specific case concerned, it does not preclude that possibility of competition between undertakings and if any additional restrictions for which the undertakings are blamed are not in fact attributable to the Member State concerned. see paras 66, 80, operative part 2

JUDGMENT OF THE COURT
9 September 2003 (1)

((Competition law – National legislation anti-competitive – National competition authority's power to declare such legislation inapplicable – Circumstances in which undertakings not answerable for anti-competitive conduct))

In Case C-198/01,

REFERENCE to the Court under Article 234 EC by the Tribunale amministrativo regionale per il Lazio (Italy) for a preliminary ruling in the proceedings pending before that court between

Consorzio Industrie Fiammiferi (CIF)

and

Autorità Garante della Concorrenza e del Mercato,

on the interpretation of Article 81 EC,

THE COURT,,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur) and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Consorzio Industrie Fiammiferi (CIF), by G.M. Roberti, F. Lattanzi and F. Sciaudone, avvocati,

— Autorità Garante della Concorrenza e del Mercato, by S.M. Carbone and F. Sorrentino, avvocati,

— Commission of the European Communities, by L. Pignataro and A. Berlinguer, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Consorzio Industrie Fiammiferi (CIF), represented by G.M. Roberti, F. Lattanzi and A. Franchi, avvocato, of the Autorità Garante della Concorrenza e del Mercato, represented by S.M. Carbone, and of the Commission, represented by L. Pignataro, at the hearing on 24 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2003,

gives the following

Judgment

1 By order of 24 January 2001, received at the Court on 11 May 2001, the Tribunale amministrativo per il Lazio (Regional Administrative Court, Lazio) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 81 EC.

2 Those questions have arisen in proceedings by which the Consorzio Industrie Fiammiferi, the Italian consortium of domestic match manufacturers (the CIF), challenges a decision of the Autorità Garante della Concorrenza e del Mercato, the Italian national competition authority (the Authority) of 13 July 2000, which declared the legislation establishing and governing the CIF contrary to Articles 10 EC and 81 EC, found that the CIF and the undertakings which are members of it (the member undertakings) had infringed Article 81 EC through the allocation of production quotas and ordered them to terminate the infringements found.

National legislation

3 By Royal Decree No 560 of 11 March 1923 (Royal Decree No 560/1923), the Italian legislature introduced a new regime for the manufacture and sale of matches by establishing a consortium of domestic match manufacturers, the CIF. The decree conferred on the consortium a commercial monopoly consisting of the exclusive right to manufacture and sell matches for consumption on the Italian domestic market.

4 In addition, the CIF was authorised to use the special government seals necessary for the application of manufacturing duty on matches (introduced by Royal Decree No 560/1923). Those seals were to be allocated between the member undertakings so that they could affix them to the boxes of matches produced.

5 Thus the CIF came into being as a consortium, membership of which was compulsory and restricted and which was established by Italian law for the production and sale of the matches necessary to satisfy national demand.

6 The CIF's activity was regulated by an agreement between the CIF and the Italian State — which was annexed to the decree and formed an integral part thereof. Under that agreement the Italian State undertook to prohibit the distribution on the domestic market of products originating from undertakings which did not belong to the CIF, to prevent the formation of new match-producer undertakings and to set, by a measure issued by the Ministry of Finance, the selling price for matches. The primary obligation on the CIF, on the other hand, was to ensure that all the member undertakings paid the excise duty on matches for the domestic market through the system of seals.

7 The agreement also set out detailed rules concerning the internal operation of the CIF. Under Article 4 of the agreement, responsibility for the setting and allocation of match production quotas between the CIF undertakings was conferred on a special committee (the quota-allocation committee). The committee is composed of an official of the Amministrazione dei Monopoli di Stato (the State Monopolies Board), who is the chairman of the committee, and by a representative of the CIF and three representatives of the member undertakings appointed by CIF's management board. It takes decisions by majority vote. Its decisions are communicated to the State Monopolies Board for approval. In addition, certain decisions, including those relating to transfers of quotas, must be communicated to, and approved by, the Ministry of Finance. The CIF rules provide that production quotas must be allocated taking into account the existing percentage shares.

8 Another committee, provision for which is made in the second paragraph of Article 23 of the CIF rules, (the quota-compliance committee), monitors compliance with the quotas. It is composed of three members appointed by the CIF's management board and submits, at the beginning of each year, proposals to the CIF management for the programme of delivery of matches by the member undertakings.

9 That system remained virtually unaltered until Judgment No 78 of 3 June 1970 of the Corte costituzionale (Constitutional Court), by which the CIF's detailed operating rules were declared illegal on the ground that they contravened the principle of freedom of private commercial enterprise set out in Article 41(1) of the Italian Constitution in so far as they precluded new undertakings from joining the CIF.

10 By Ministerial Decree of 23 December 1983 approving a new agreement between the CIF and the Italian State, provision was made for new undertakings to become members of the CIF as well, provided that they had been granted a licence by the treasury authorities to manufacture matches.

11 Membership of the CIF remained compulsory, however, at least until the fiscal monopoly was abolished in 1993 (regarding abolition, see paragraph 14 of this judgment).

12 The Ministry of Finance Decree of 5 August 1992 (the Decree of 5 August 1992) approved the latest version of the agreement between the CIF and the Italian State, which was to expire on 31 December 2001 (the 1992 agreement).

13 Under Article 4 of the 1992 agreement, which regulates the operation of the CIF, production quotas are still to be allocated among member undertakings by the quota-allocation committee. Monitoring compliance with quotas remains within the remit of

the quota-compliance committee.

14 By Decree-Law No 331 of 30 August 1993 (Decree-Law No 331/1993), the Italian legislature adopted new rules on excise duties and other indirect taxes. Article 29 of the Decree-Law provides that the manufacturer and the importer are directly liable for payment of the duty. In the referring court's view, that rule abolished the CIF's fiscal monopoly.

15 There are different views as to whether, since that time, membership of the CIF has been compulsory or voluntary for match manufacturers who were members of the CIF before the fiscal monopoly was abolished.

16 Before 1996, the Authority was competent to apply only Italian competition law, not Community competition law. Since the entry into force of Law No 52 of 6 February 1996 (Law No 52/1996), however, it has also been competent to apply Article 81(1) EC and Article 82 EC.

The dispute

17 Acting on the basis of a complaint from a German match manufacturer who was alleging that it was experiencing difficulties in distributing its products on the Italian market, the Authority opened an investigation in November 1998 in respect of the CIF, the member undertakings and the Consorzio Nazionale Attivà Economico-Distributiva Integrata (the Conaedi), a body representing almost all the operators of the Magazzini di Generi di Monopolio, warehouses for monopoly goods, who act as wholesalers, in order to ascertain whether there were infringements of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) and to determine whether the CIF's constitution and the various agreements entered into by the CIF and the Italian State infringed Article 85(1) of the Treaty.

18 The remit of the investigation was extended shortly thereafter to cover in particular an agreement between the CIF and one of the main European match manufacturers, Swedish Match SA (Swedish Match), a company governed by Swiss law, under which the CIF had undertaken to purchase from Swedish Match a quantity of matches corresponding to a pre-determined percentage of Italy's domestic consumption.

19 In its final decision of 13 July 2000, the Authority found that the conduct adopted by the operators on the Italian market for matches, although being a more or less direct consequence of the legislation which had governed the sector since Royal Decree No 560/1923, was none the less partly attributable to autonomous economic decisions.

20 The Authority identified three types of conduct among the CIF's activities: conduct required of it by legislation, conduct which was merely facilitated by legislation and conduct attributable to the CIF's own initiatives. In that regard, it also distinguished between two periods of time.

21 First, prior to the entry into force of Decree-Law No 331/1993, the Authority attributed exclusively to the national legislation referred to above both the creation of the CIF and the fact that it had been made responsible for the production and marketing of matches.

22 It therefore took the view (i) that in so far as it required participation by the CIF in order to produce and sell matches in Italy, the legislative framework in force at that time provided a legal shield (copertura legale) to conduct of the CIF and the member

undertakings which would otherwise have been prohibited; (ii) that the legislative framework had to be disapplied by any court or public administration, since it was contrary to Article 3(1)(g) EC, Article 10 EC and Article 81(1) EC; (iii) that disapplication would imply (implicherebbe) removal of the legal shield.

23 The Authority also held that the action taken by economic operators in the exercise of the power to allocate production, conferred by Article 4 of the agreement on a committee the majority of whose members were representatives of Italian match producers, could be regarded as the kind of conduct by undertakings covered by Article 81 EC.

24 In that respect, the Authority concluded that the rules applied in practice for the purposes of allocating production had in effect given rise to a restriction on competition additional to the restriction already brought about by the legal framework. In that regard, it referred to the fact that the quota-allocation committee awarded quotas by reference to a criterion reflecting the quotas traditionally assigned to each undertaking and to the frequent transfers and exchanges of production quotas between the member undertakings.

25 Second, after observing that Decree-Law No 331/1993 and the 1992 agreement had *de facto* abolished the CIF's fiscal and commercial monopoly, the Authority pointed out that, from 1994 onwards, participation in the CIF was no longer compulsory for the production and marketing of matches in Italy.

26 It also concluded from that that Decree-Law No 331/1993, although it did not revoke the 1992 agreement, had amended the legal rules governing membership of the CIF, making it purely voluntary, with the result that each member undertaking could withdraw before its scheduled expiry.

27 The Authority consequently took the view that the conduct of the member undertakings had to be regarded, from 1994 onwards, as the result of autonomous economic decisions for which those undertakings could be held responsible.

28 In addition, the Authority considered that two agreements concluded by the CIF were restrictive of competition. The agreement with Swedish Match, the CIF's principal European competitor, prevented Swedish Match from selling its matches directly on the Italian market. The second agreement with the Conaedi enabled the CIF to take exclusive control of the commercial channel formed by the network of Magazzini di Generi di Monopolio.

29 For those reasons, the Authority decided *inter alia* that:

— the existence and business activities of the CIF, as governed by Royal Decree No 560/1923 and by the agreement appended thereto, as last amended by the Decree of 5 August 1992, were contrary to Articles 3(1)(g) EC, 10 EC and 81(1) EC in so far as, until 1994, the relevant provisions required the CIF and its member undertakings to engage in anti-competitive conduct in breach of Article 81(1) EC, and thereafter permitted and facilitated such conduct;

the existence and business activities of the CIF, as governed by Royal Decree No 560/1923 and by the agreement appended thereto, as last amended by the Decree of 5 August 1992, were contrary to Articles 3(1)(g) EC, 10 EC and 81(1) EC in so far as, until 1994, the relevant provisions required the CIF and its member undertakings to engage in anti-competitive conduct in breach of Article 81(1) EC, and thereafter permitted and facilitated such conduct;

— in any event, the CIF and its member undertakings adopted decisions as a consortium and concluded agreements which — in so far as their object was to define procedures and mechanisms for allocating, between those undertakings, the production of matches to be marketed by the CIF in such a way as to place restrictions on competition additional to those permitted by the applicable legislation — adversely affected competition in breach of Article 81(1) EC;

in any event, the CIF and its member undertakings adopted decisions as a consortium and concluded agreements which — in so far as their object was to define procedures and mechanisms for allocating, between those undertakings, the production of matches to be marketed by the CIF in such a way as to place restrictions on competition additional to those permitted by the applicable legislation — adversely affected competition in breach of Article 81(1) EC;

— the CIF and Swedish Match entered into an agreement concerning the allocation of match production and distribution of both undertakings' products through the CIF, which constituted anti-competitive conduct in breach of Article 81(1) EC;

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— the CIF, the member undertakings and Swedish Match were to terminate the infringements found and to refrain in future from any agreement likely to have a similar object or effect.

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— the Conaedi and the Magazzini di Generi di Monopolio were to refrain in future from drawing up agreements similar in object or effect.

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Procedure before the national courts

30 On 14 November 2000, the CIF brought an action before the Tribunale amministrativo per il Lazio contesting the Authority's decision.

31 As well as challenging the Authority's assessment of the facts and its interpretation of the law, the CIF maintained that the Authority was not competent to determine the validity or the applicability of the provisions of national law, since such power had not been conferred on it either by Law No 52/1996 or by the principle of the primacy of Community law. That principle applies only for the purposes of disapplication which is incidental and not for disapplication directly sought by way of an autonomous declaration.

32 Although it does not find that distinction persuasive, the referring court entertains doubt as to the Authority's power to declare the Italian legislation inapplicable in this instance on other grounds.

33 Community case-law does not appear to it to be so conclusive in relation to the question whether national legislation incompatible with Articles 81 and 82 EC may also be disapplied in circumstances such as those in which the Authority found itself.

34 The doubts to which a question of this kind gives rise do not spring entirely from uncertainty as to whether a trader is answerable for anti-competitive conduct where his actions are or have been shielded by national law and where he may therefore be presumed to have been acting in good faith.

35 The case of disapplication *in malam partem* of national law (that is, disapplication of national legislation advantageous to the private traders concerned, which amounts to imposing obligations on them) by a body with powers to impose penalties also gives rise to doubts because of the considerable significance of legal certainty, one of the general principles of Community law.

36 The referring court also harbours doubts as to whether the Italian legislation, both before and after 1994, did or does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition. The legislation does not permit the member undertakings to enter into price competition, pricing falling within the power of the Ministry, and subjects the undertakings to a production quota system.

37 In that regard, the referring court points out that the case before it concerns a market characterised by the fact that determination of the price of the product (matches) was a matter for which the Ministry of Finance was responsible, pursuant to Article 6 of the agreement. At the same time, a quota system is in operation (albeit that its adverse effects have been tempered by the abolition of the CIF's commercial monopoly), under which power to allocate between member undertakings the production needed to satisfy national demand has been entrusted to a special committee mainly composed of representatives of those same producers (Article 4 of the agreement).

38 In those circumstances, the referring court considers that it is not possible to dismiss as manifestly unfounded the CIF's proposition that the legislation governing the sector precluded competition from the outset, leaving no room for any significant competition between the undertakings. It is possible that, from the point of view of safeguarding competition, it makes no odds that a particular quota applies to one or other undertaking, or is transferred to a third operator, since these are occurrences which are in any event internal to a system governed by rules which preclude the development of competition between the undertakings.

39 The Tribunale amministrativo regionale per il Lazio therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices or market-sharing arrangements, does Article 81 EC require or permit the national competition Authority to disap