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Conorzio Industries Fiammiferi v Autorità Garante della Concorrenza e del Mercato, (CIF)(C-198/01), [2003] ECR I-8055, [2003] 5 CMLR 829.

Opinion of Advocate General Jacobs in *Conorzio*

All highlighted and italicised words (excluding case names) represent notes by Valentine Korah.

Introduction

1. This case concerns the scope of a principle firmly established in Community law, the so-called ‘State action defence’. Under that principle, undertakings charged with an infringement of the competition rules in Articles 81 or 82 EC can claim that their conduct falls outside the scope of those rules where it was required by national legislation or where the national legal framework itself eliminated any possibility of competitive activity on their part.

2. What is mainly at issue in the present case is whether Community law empowers, or even obliges, a national competition authority which is investigating the conduct of certain undertakings to disapply – as itself being contrary to the Treaty – national legislation that requires those undertakings to engage in anti-competitive conduct, and thereby to remove – retroactively and/or for the future – the immunity from penalties which they would otherwise enjoy on the basis of the State action defence. An additional issue is whether a national regulatory framework that substantially interferes with the working of competition leaves any room for autonomous conduct on the part of the undertakings concerned that could restrict competition in the relevant market even further.

3. Those questions arise in proceedings in which a consortium of Italian match manufacturers challenge a decision of the Italian competition authority, *Autorità Garante della Concorrenza e del Mercato* (‘the *Autorità Garante*’ or ‘the *Authority*’), in which the latter declared the legislation establishing and governing the operation of the consortium contrary to Articles 10 and 81 EC, found that the consortium and its members had infringed Article 81 through the allocation of production quotas, and ordered the consortium and its members to terminate the infringements found.

The legislation governing the manufacture and sale of matches in Italy

4. By Royal Decree No 560 of 11 March 1923 (‘Royal Decree’), the Italian legislature introduced a new regime for the manufacture and sale of matches establishing a consortium of specified domestic match manufacturers, the *Conorzio Industrie Fiammiferi* (hereinafter the ‘*CIF*’ or the ‘consortium’), and entrusting it with a fiscal monopoly (with respect to the collection and payment of a manufacturing duty) and commercial monopoly (concerning the exclusive right to manufacture and sell

matches for the Italian market). Under that system the State was responsible for fixing the retail price of matches whereas the CIF was responsible for allocating production quotas among its members.

5. Over time the regime has been subject to substantial amendments, which have opened up both the membership of the consortium (allowing new members to join, subject only to the grant of a manufacturing licence) and the market (allowing both the production of matches by non-members of the consortium and imports from other Member States). However, certain important aspects of the system remain in place.

6. Under Article 4 of the latest version of the agreement between the CIF and the Italian State (the '1992 agreement'), which regulates the operation of the consortium, production quotas are still to be allocated among member undertakings by a special committee ('the Article 4 committee'), which is appointed by the consortium's management board. The committee comprises three representatives of the member undertakings and one representative of the consortium, is chaired by an official of the Monopoli di Stato ('State Monopolies Board') and takes its decisions by majority vote. Its decisions are communicated to, and approved by, the State Monopolies Board. In addition, certain transactions, including transfers of quotas, must be communicated to and approved by the Ministry of Finance. The rules of the CIF state that production quotas must be allocated 'taking into account the existing percentage shares'. Compliance with those quotas is to be controlled by another committee ('the CIF committee'), composed of three members appointed by the management board of the consortium, which submits, at the beginning of each year, proposals to the management of the consortium for the programme of delivery of matches by the members of the consortium.

7. The 1992 agreement did not significantly alter the price-fixing aspects of the system. By Decree-Law No 331 of 30 August 1993 ('Decree-Law No 331'), however, the Italian legislature adopted new rules on excise duties and other indirect taxes. Article 29 of that Decree-Law provides that the manufacturer and the importer are directly liable for payment of the manufacturing duty. According to the referring court, that rule abolished the fiscal monopoly of the consortium. With respect to the commercial monopoly, it seems that it was abolished as early as 1983 when the prohibition on non-members of the consortium manufacturing and selling matches in Italy was lifted. Membership of the consortium remained compulsory, however, at least until the fiscal monopoly was abolished in 1993. There are however different views as to the compulsory or voluntary nature of membership of the CIF even after that date for those match manufacturers who were already members before the fiscal monopoly ended. ...

The Decision of the Autorità Garante...

9. Acting on the basis of a complaint from a German match manufacturer who was alleging difficulties in distributing its product in the Italian market, the Autorità Garante opened an investigation in November 1998 in order to ascertain whether Articles 81 and 82 EC had been infringed. The remit of the investigation was soon extended to cover in particular an agreement between the CIF and one of the main European match manufacturers, Swedish Match SA, under which the CIF had

allegedly undertaken to purchase from Swedish Match a quantity of matches corresponding to a pre-determined percentage of Italy's domestic consumption.

10. On 13 July 2000 the Authority took its final decision. The Authority found that, although the conduct adopted by the participants on the Italian match market derived more or less directly from the regulatory framework which had governed the sector since the Royal Decree, it was also partly the result of autonomous business choices. ...

Summary of Paragraphs 11 to 16

The Authority held that the operation of the CIF was contrary to Articles 3(1)(g), 10 and 81(1), citing in particular the operation of production quotas.

It held that the regulatory framework which required participation in the CIF constituted a legal shield for its members until 1994, when membership became voluntary. From this point the actions constituted autonomous business decisions for which the members of the CIF were accountable.

The Article 4 Committee's actions did not fall outside 81(1), as the manner by which it allocated production (pursuant to the 1992 agreement) demonstrated that the decisions were attributable to the CIF. In particular, the actions of the CIF created restrictions on competition exceeding those required by Italian statute.

The NCA stated that the regulatory framework had to be disapplied by any judge or public administration, and that such disapplication implied the removal of the legal shield.

17. On those grounds, the Autorità Garante decided *inter alia* that:

(a) the existence and operation of the CIF, as governed by Royal Decree No 560 of 11 March 1923 and by the agreement appended thereto, as last amended by Decree of the Ministry of Finance of 5 August 1992, were contrary to Articles 3(g), 10 and 81(1) EC in so far as, until 1994, they 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;

(b) in any event, the CIF and its member undertakings had adopted decisions as a consortium and concluded agreements which – in so far as their object was to define procedures and mechanisms for allocating among consortium members the production of matches to be marketed by the CIF in such a way as to impose restrictions of competition additional to those entailed by the enabling legislation – constituted anti-competitive conduct in breach of Article 81(1) EC;

(c) the CIF and Swedish Match SA had entered into an agreement concerning the allocation of match production and product distribution between them through the CIF, which constituted anti-competitive conduct in breach of Article 81(1); ...

(e) the CIF, its member undertakings and Swedish Match SA must terminate implementation and continuation of the infringements found, and abstain from any agreement similar in object or effect ...'

The Main Proceedings and the Order for Reference

18. The CIF brought an action for the annulment of the Authority's decision before the Tribunale Amministrativo Regionale del Lazio ('Tribunale Amministrativo Regionale'). ...

The appeal focused on the Authority's power to determine the validity of national legislation, the extent to which membership of the CIF was compulsory, and whether the statutory obligation to fix production quotas eliminated from the outset any possibility of competition.

21. By order of 24 January 2001 the Tribunale Amministrativo Regionale... referred the following questions 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 disapply that measure and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit it for the future, and if so, with what legal consequences?

2. For the purposes of applying Article 81(1) EC, is it possible to regard national legislation under which competence to fix the retail 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, as leaving room for competition which is open to hindrance, restriction or distortion by the autonomous conduct of those undertakings?' ...

The First Question

The arguments of the parties

23. The main arguments put forward by the CIF rely on the principles laid down in the *Ladbroke* judgment. [Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, in paragraphs 30 to 35 of the judgment]. In that judgment the Court held that 'Articles 85 and 86 [now 81 and 82] of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative'. Conversely, 'if anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of undertakings ... Articles 85 and 86 may apply, however, if it is found that the national legislation does

not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition'. Moreover, the Court also made it clear that 'the compatibility of national legislation with the Treaty rules on competition cannot be regarded as decisive in the context of an examination of the applicability of Articles 85 and 86 of the Treaty to the conduct of undertakings complying with national legislation'. Hence in such cases, 'a prior evaluation of national legislation affecting such conduct should ... be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition'. ...

Clarification of the relevance and scope of the question referred

31. The referring court asks whether Articles 10 and 81 EC require or permit a national competition authority to disapply national legislation which imposes or favours an agreement between undertakings (which itself is contrary to Article 81 EC) and to penalise the anti-competitive conduct of the undertakings concerned or, at least, to prohibit it for the future.

32. The relevance of that question to the proceedings before the national court seems to be based on two assumptions, first that the Authority disappplied the legislation governing the CIF, and second that, on the basis of that disapplication, it penalised the conduct of the CIF and/or its members or prohibited it for the future.

33. In the first place, however, it is not at all clear whether the Autorità Garante actually 'disapplied' the legislation at issue. ...

35. Doubts... remain as to whether point (a) of the operative part of the decision constitutes only a declaratory statement without direct consequences for the case or whether on the contrary the declaration could affect the undertakings investigated and thereby be, or at least be intended as, a disapplication. The submissions of the Authority seem to assume the latter. ...

39. In any event, under the Court's established case-law Article 234 EC is based on a clear separation of functions between the national courts and the Court of Justice. Under that separation of functions it is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver. Moreover, it is also solely for the national court before which the dispute has been brought to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court.

40. In order to respect that separation of functions, and at the same time to give a useful reply to the national court, I will deal with the question referred, examining, in particular, whether, as a matter of Community law, a national competition authority may or must –

Disapply national legislation contrary to Articles 10 and 81 EC and on that basis *penalise past anti-competitive conduct* of undertakings which was in principle shielded by that legislation;–

Disapply national legislation contrary to Articles 10 and 81 EC and on that basis *prohibit for the future* anti-competitive conduct of undertakings which would in principle be shielded by that legislation. **[Italics in the original opinion.]**

41. Before embarking on those questions it is however necessary to identify the root of the problem in the present case.

The central issue

42. In my view, the central issue in this case is not whether a national competition authority may, or in appropriate circumstances must, disapply national legislation which contravenes Community law. In principle, it is established that all national courts should do so where the Community provisions have direct effect. Indeed, that follows from the direct effect of Community law and from the primacy of Community law over national law. The power, or duty, to disapply national legislation that contravenes Community law applies not only to national courts but also, according to the Courts case-law, to 'all organs of the administration'.

43. In the Court's case-law it is also well established that, although Articles 81 and 82 EC, read in isolation, relate only to the conduct of undertakings and do not cover measures adopted by Member States by legislation or regulation, those provisions, read in conjunction with the duty of cooperation under Article 10 EC, require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. That would be the case if *inter alia* a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

44. It therefore seems clear that at least the national courts would be competent, or in appropriate circumstances obliged, to set aside a provision of national legislation where, for example, that legislation prevented a party in civil or administrative proceedings from exercising the rights conferred by Article 81 EC, either against another private party or against the public authorities.

45. Equally, it seems clear that a national competition authority, when investigating conduct by undertakings under Article 81 EC, could find, if that conduct were imposed by national legislation, that the legislation was contrary to, or incompatible with, Article 10 EC read together with Article 82 EC.

46. However, the central question in the present case is not whether a national competition authority can make such a finding of incompatibility, but whether it can thereby expose undertakings to the risk of penalties for conduct which is required by the national legislation.

47. Here it is useful to distinguish between the possible imposition of penalties for the past and for the future.

Penalties for the past

48. It seems clear beyond any doubt that a finding of incompatibility could not expose undertakings to any penalties in respect of past conduct where that conduct was required by the national legislation. Not only would that negate the State action defence as laid down in the *Ladbroke* case; it would also run counter to fundamental principles of the Community legal order, notably the principle of legal certainty and the associated prohibition of retroactive penalisation of conduct (*nulla poena sine lege*).

49. Moreover, concerns for legal certainty arise also in two other respects. First, in such a case, undertakings would be confronted with two conflicting obligations, with the risk of adverse consequences whichever option they chose. Second, as was emphasised by the CIF at the hearing, the definition of undertakings' duties under Community law depends on the interpretation of complex principles arising from the combined application of Articles 10 and 81 EC.

50. It is true that undertakings which chose, of their own initiative, to disregard the national legislation would, if prosecuted, be able to rely, by way of defence, on the incompatibility of that legislation with Treaty provisions which have direct effect. But, for all the reasons just given, they cannot in my view be required, as a matter of legal obligation, to disregard such legislation so long as it remains in force and has not been repealed by the legislature. The principles of the direct effect and primacy of Community law cannot be understood as requiring undertakings, under threat of severe penalties, to disregard their obligations under national legislation. So to hold would mean in effect imposing on undertakings the duty to enforce Community law which rather belongs to Community and national authorities.

51. Moreover, it should not be forgotten that in a case such as the present one, the responsibility for the breach of Community law is not that of the undertakings concerned but of the Member State that has enacted or maintained the legislation in issue.

52. The same principles must apply in my view whether the penalties which might be imposed by the national authorities for breach of the Community competition rules in question are classed as criminal or administrative. Where undertakings are exposed to the risk of substantial fines for breach of the competition rules, and where the purpose of the fines is retributive and deterrent, the same fundamental principles must apply, whether the proceedings leading to the imposition of the fines are administrative or criminal in nature.

53. Those principles must prevail over any argument based on the effectiveness of EC competition law, since the requirements of effectiveness remain subject to principles which are fundamental to the notion of the rule of law and which include legal certainty and *nulla poena*. In any event, the effectiveness of EC competition law could well be promoted by a declaration of incompatibility by a national competition authority: such a declaration could be expected to give the Member State a strong incentive to repeal the offending legislation; and it might provide the basis for claims for damages against the Member State by those harmed by the legislation.

54. The above arguments are not affected by the need, now increasingly recognised, for greater decentralisation in the enforcement of EC competition law, which may require national competition authorities increasingly to exercise powers hitherto exercised by the Commission. The Commission has never had the power to disapply national legislation. Nor does it have the power to impose penalties on undertakings for conduct required by national legislation, as the State action defence makes clear.

Penalties for the future

55. The above considerations on legal certainty and on the State action defence apply also where, as is apparently the case here, a national competition authority prohibits anti-competitive conduct for the future. Indeed, it may be assumed that such a prohibition is liable to be enforced by penalties. As has been expressly recognised by the Authority, non-compliance with its assessment, which is implicitly reinforced by a prohibition, might lead it to re-consider its decision not to impose penalties.

56. In such a case, therefore, the State action defence would be fully relevant.

57. Further, apart of course from the issue of retroactivity, the same concerns for the principle of legal certainty would arise.

58. While a national competition authority may well be empowered to declare the national legislation incompatible with Community law, I do not consider that such a declaration would resolve the situation of legal uncertainty for the undertakings concerned. They would still be caught between Scylla and Charybdis, in the form of two conflicting legal obligations, infringement of either of which could expose them to adverse consequences.

59. The case may however be different if an official pronouncement has removed any doubt with respect to the obligations of the undertakings concerned. That might be the case when, for example, the incompatibility of the national legislation with Community law had been definitely established by a national court, if necessary after a reference to the Court of Justice. In such a case the protection granted by the State action defence would be removed and the undertakings could be held liable for their anti-competitive conduct.

60. For the above reasons, I consider that the Court should rule in answer to the first question that Community law precludes a national competition authority from disapplying national legislation that is incompatible with Article 10 read in conjunction with Article 81(1) EC, to the extent that such disapplication leads either to the imposition of penalties on undertakings for past conduct or to a prohibition for the future sanctioned by the possibility of the imposition of penalties. That conclusion does not however preclude a national competition authority from declaring that the national legislation at issue is incompatible with Community law. ...

Conclusion

75. I am accordingly of the view that the questions referred by the Tribunale Amministrativo Regionale del Lazio should be answered as follows:

(1) Community law precludes a national competition authority from disapplying national legislation that is incompatible with Article 10 read in conjunction with Article 81(1) EC to the extent that such disapplication leads either to the imposition of penalties on undertakings for past conduct or to a prohibition for the future sanctioned by the possibility of the imposition of penalties. That conclusion does not however preclude a national competition authority from declaring that the national legislation at issue is incompatible with Community law.

(2) Where under national legislation the retail prices of a product are fixed by the national authorities and the allocation of production among undertakings is assigned to a consortium to which the relevant producers are required to belong, those undertakings remain subject to Article 81(1) EC in respect of any autonomous conduct allowed by the legislation. It is for the national court to determine, on the basis of all the facts, whether, within the national regulatory framework, there remains room for competition which is capable of being hindered, restricted or distorted by the autonomous conduct of those undertakings.

Notes and Questions on the First Part of the Opinion in *Consortio*

1. (Points 1 & 2). Sometimes the court refers to the State action defence by saying that for articles 81 or 82 to apply, the conduct must have been autonomous.
2. (Points 1 – 7). Can you think of a less competitive state of the market in matches?
3. (Point 6). How did this system differ from that in *BNIC (Bureau National Interprofessionnel du Cognac) v Guy Clair* (123/83), [1985] ECR 391, [1985] 2 CMLR 430?
4. (Points 8 – 17). The President of the Italian NCA Mr. Tesauro had previously been a strong minded Advocate General* sitting in the ECJ. Is this mentioned in the judgment? Do you think it was relevant?
There is considerable tension between the legislative power of Member States and the primacy of Community law. In *Arduino v Compagnia Assicuratrice RAS Spa* (C-35/99) [2002] ECR I-1529; [2002] 4 CMLR 866, at a time when the ECJ was particularly sensitive to the interest of member states, the ECJ held that the senior lawyers fixing fees for various kinds of legal work were advising the Minister and not representing the interests of lawyers. The distinction between advising the Minister in the public interest on the one hand and representing the interests of the profession is not easy to guess in advance and results in the ECJ being able to select the classification of facts that it prefers.
5. (Point 17(b) – (e)). Are you surprised to find that a competition authority (or, indeed ‘any public administration’) which is not a court is required to disapply a national statute for the future?
6. (Point 15). If the criteria had been set by the Minister etc the ECJ might have held that the consortium was acting for the Minister in the public interest and not in the interests of the suppliers of matches, *Arduino*.
7. (Point 23). Where the product affected is homogenous, the state does not have

to rely on the industry to collude on fixing prices or quotas, and if it does not, private undertakings will not infringe Article 81 or 82, but the state may be liable. Where the product is heterogeneous, the state usually has to persuade the trade to organise the restrictions, in which event the undertakings are liable and so is the state.

8. (Point 42). Note that Advocate General Jacobs explains the fundamental bases of the rule – the direct effect and primacy of Community law.
9. (Points 42 – 46, 51 – 54 & 60). When the conduct is autonomous both the individual undertakings and the state may be liable for breach, where the undertakings had no choice, only the state is liable, but once the legislation has been disapplied, both may be liable. See *Francovich v. Italy* (C-6 & 9/90) [1991] ECR I-5357 for the liability of the state under a directive that did not have direct effect.
10. (Point 46). Note how practical the opinion is. The AG does not focus on the language as much as on basic principles. Is that right in your view?
11. (Point 48). Are you surprised that a directly applicable provision of Community law did not override an Italian statute and prevent the statute shielding undertakings from Articles 81 and 82 for past conduct? Do you think the Advocate General's reasons are convincing?
12. (Point 52). This follows the view of the Competition Appeals Tribunal in the UK, in *Napp v. DG of Fair Trading*, CAT 1 (2002), confirmed in *JJB Sports Plc v. OFT*, CAT 17 (2004). The standard of proof is the civil standard, but where financial penalties are heavy, 'the OFT must provide strong and compelling evidence, taking account the seriousness of what is alleged. ...'. See Tony Reeves and Ninette Dodoo, 'Standards of Proof and Standards of Judicial Review in EC Merger Law', [2005] Fordham Corporate Law Institute, 115, 120.
13. (Point 58). Given the AG's opinion in point 42, that 'all organs of the administration' have the 'power, or duty, to disapply national legislation...', is his finding of uncertainty justified? Should the Community Courts concern themselves with ambiguities in national legislative systems?

Judgment on *Consortzio*

After accepting much of what its Advocate General had said on the first question the ECJ proceeded to deal with the question of delegation.

The Second Question

59. By its second question, the referring court wishes to know whether 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 preventing those undertakings from engaging in autonomous conduct which hinders, restricts or distorts competition.

60. First, it should be noted that, in the Authority's submission, the CIF was a consortium of which membership was compulsory only until 1994. Decree-Law No 331/1993 made membership optional for the undertakings.

61. In those circumstances, it is for the referring court to decide whether its second question relates solely to the period prior to entry into force of Decree-Law No 331/1993 or whether it also relates to the subsequent period.

62. It should also be borne in mind that for the purposes of the procedure set out in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter, when ruling on the interpretation or validity of Community provisions, is empowered to do so only on the basis of the facts which the national court puts before it (see Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16). It is not for the Court of Justice to apply Community law to the dispute before the national court (see Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain* [1980] ECR 2327, paragraph 6) or to assess the facts in the main proceedings. ...

The ECJ continued to give helpful advice to the national court as to how to apply this ruling to the quotas.

75. It is for the referring court to assess whether there are any grounds for such assertions.

76. Fourth and finally, the documents before the Court do not show that decisions of the CIF... fall outside the scope of Article 81(1) EC as a result of a measure taken by a public authority.

77. On the one hand, four of the five members of the quota-allocation committee are representatives of the manufacturers, whom nothing in the relevant national legislation prevents from acting exclusively in their own interests. The committee, which takes decision by simple majority, may adopt resolutions even if its chairman, the only person with public-interest duties, votes against them, and the committee can therefore act in accordance with the requirements of the member undertakings.

78. Furthermore, the public authorities do not have an effective means of controlling decisions taken by the quota-allocation committee.

79. On the other hand, the Authority's investigation showed that the task of allocating production between the member undertakings is actually carried out not by the quota-allocation committee but by the quota-compliance committee, which is composed solely of CIF members on the basis of agreements drawn up by the member undertakings.

80. The answer to be given to the second question referred for a preliminary ruling must therefore be that it is for the referring court to assess whether national legislation such as that at issue in the main proceedings, 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 precluding those undertakings from engaging in autonomous conduct which remains capable of preventing, restricting or distorting competition.

THE COURT,

In answer to the questions referred to it by the Tribunale amministrativo regionale per il Lazio by order of 24 January 2001, hereby rules:

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, one of whose responsibilities is to ensure that Article 81 EC is observed:

- has a duty to disapply the national legislation;
- may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation;
- may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard;
- may impose penalties on the undertakings concerned 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;

2. It is for the referring court to assess whether national legislation such as that at issue in the main proceedings, 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 precluding those undertakings from engaging in autonomous conduct which remains capable of preventing, restricting or distorting competition.

Note on the Judgment in *Consortio*

(Point 77). Contrast *Arduino*, where there were good reasons to think the members of the association were acting in the interest of the profession, not of the public.