agreement between undertakings or associations of undertakings within the meaning of Article 85 even if they meet within an organization which the national courts have held to be governed by public law.

2. For the purposes of Article 85 (1) of the Treaty 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.

3. 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.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN delivered on 2 October 1984

My Lords,

Law No 75/600 of the French Republic (JORF of 11 July 1975) provides for the recognition of certain interprofessional organizations representing the agricultural production of a particular product. By Article 5 of that Law interprofessional organizations created by legislative or administrative decree, existing at the date when the Law was promulgated, may on demand take advantage of Articles 2, 3 and 4 of the Law. By Article 2 agreements concluded by interprofessional organisations can be 'extended', in whole or in part, for a specified period by the competent administrative authority, where they tend to support, *inter alia*, the implementation of rules governing prices. Such agreements must be reached by unanimous decision of the members or result from the procedure laid down by the Law. The effect of 'extension' is that the measures envisaged in the agreement are binding in the production zone in question on all members of the trades participating in the organization. Under Article 4, any contract for the supply of products, which is made between persons covered by an extended agreement and which does not comply with the provisions of the agreement is void. One of the conditions of extension is that the

agreement in question is compatible with the rules of the EEC (Article 2).

The Bureau national interprofessionel du cognac ('BNIC') is a legal person created by ministerial decree and financed by parafiscal levies on members of the trade. Its functions include those of considering and preparing rules concerning the acquisition, distribution, distillation, marketing, stocking and sale of wines and spirits produced in the Cognac region of France.

It appears from a letter dated 14 April 1977 from an official in the French Ministry of Agriculture to the Director of BNIC that BNIC had encountered difficulties in enforcing the prices fixed by it. Accordingly, NBIC asked to take advantage of Law No 75/600 so that its agreements could be 'extended' pursuant to that Law. Agreements made by it were subsequently granted such 'extension'.

At the time relevant to this case the internal organization of BNIC was governed by rules adopted on 19 June 1978 and approved by a decree of the Minister of Agriculture on 2 August 1978 (JORF 16-17 August 1978). Under those rules the membership of BNIC is divided into two 'families' representing the two sides of the cognac industry, which I refer to as 'dealers' and 'growers', and a third group consisting of representatives of various ancillary activities. The members are appointed by the Minister of Agriculture from lists of nominees drawn up by the appropriate trade organizations. Each family appoints an official representative and can hold its own meetings. The Director of BNIC attends meetings and may commence legal proceedings, on behalf of BNIC, against infringements of inter-trade agreements 'extended' by ministerial decree. There is also provision for the appointment by the Minister of a 'Commissaire du Gouvernement' whose function is to be present at all meetings of BNIC and who can give his assent to decisions of BNIC or submit them to the Minister for approval. The order for Reference describes the 'Commissaire du Gouvernement' as the executive officer of BNIC.

The first step in the procedure for making such inter-trade agreements within BNIC consists of a decision to invite the extraordinary general meeting of BNIC to draw up an inter-trade agreement. This decision is made at an ordinary general meeting after the matter has first been put to meetings of the two families and the representatives of the ancillary activities. The draft agreement appears to be prepared by a permanent committee comprising eight members of BNIC. It is submitted for the approval of meetings of each family. The extraordinary general meeting then hears the reports of the official representative of each family. After discussion and any eventual consultation of the meetings of the families, the decision reached by each family on the draft agreement is made known to the general meeting. If there is agreement on the draft between the families, the extraordinary general meeting applies to the Minister for the agreement to be 'extended'. If there is no agreement between the families the matter can go to arbitration.

These proceedings concern an inter-trade agreement relating to the 1980/81 marketing year which was made by the families at a general meeting of BNIC held on 7 November 1980. It was signed by representatives of the two families and by the Director of BNIC, submitted for extension and made obligatory by a ministerial decree of 27 November 1980 (JORF of 3 December 1980).

The agreement is expressed to apply to metropolitan France and to professional producers or distillers of distillable white wines or spirits entitled to the cognac appellation (Article 1), and to have been made by unanimous decision of the families, who requested the extension of the agreement in its totality. In the agreement minimum prices for wines intended for distillation, the price of spirits distilled in 1980 and previous years together with a minimum price for cognac, are fixed. (See Articles 2, 3, 4, 5 and 8.)

Despite its earlier date, this agreement appears to be the inter-trade agreement which a decision dated 13 November 1980 of the Commissaire du Gouvernement attached to BNIC contemplated would be made. His decision deals with production quotas and the amounts to be purchased by dealers, and with the retention of stocks. By Article 17 minimum prices for wines intended for the production of cognac were to be fixed by an inter-trade agreement.

Mr Clair trades as a dealer in cognac and is duly registered as such. Between 10 December 1980 and 30 June 1981 he bought just over 146 hectolitres of spirits from several producers at prices below those fixed by the inter-trade agreement. BNIC brought proceedings against him for the annulment of the contracts and damages. When the annulment claim came before the Tribunal de Grande Instance at Saintes, Mr Clair argued that the inter-trade agreement was in breach of Article 85 of the EEC Treaty. The Tribunal de Grande Instance referred three questions for a preliminary ruling. It is convenient to take the first two together:

'(1) Is the bringing together of the family of growers and the family of dealers in BNIC to be considered an association of undertakings given that the agreement reached between them has also been signed by the President of BNIC?

(2) Is the fixing of a minimum purchase price for potable spirits by the family of producers and the family of dealers to be regarded as a concerted practice?'

The object of both questions is to find out if, in the circumstances of the case, the fixing of prices through the inter-trade agreement constitutes a restrictive practice prohibited under Article 85 (1).

It is clear that spirit distilled from wine is to be considered an industrial product so that the rules relating to agricultural products do not apply. In addition, the order for reference states that no procedure under Regulation No 17 of 6 February 1962 (OJ English Special Edition 1959-62, page 87) has been commenced for the exemption of the inter-trade agreement from Article 85 (1) of the Treaty.

Article 85 prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market'. There has been much discussion as to whether the arrangements made by or within BNIC can fit into any of these categories. It is for this purpose that an examination of the structure of BNIC has become necessary.

In the first place it is said that BNIC is not an undertaking because it is an

administrative body which does not produce, distribute or trade in goods. The fact that the agreement is signed by the Director shows that it is really the act of a public body. The agreement is in any event merely an advisory document by an organization set up for that purpose which is subject to control by the central Government authority which itself is the only decision-making body. BNIC is not an association of undertakings because there is no contractual link between the members which is an essential prerequisite of there being an association. BNIC does not constitute 'undertakings' because its members are chosen from amongst interested trade associations who are not themselves members of BNIC. As a result fixing of prices between the two families cannot be considered to be a concerted practice.

On behalf of Mr Clair, it has been submitted that the coming together of the two families is an association of undertakings, or at any rate an association of associations of undertakings, a useful shorthand phrase to reflect the essential nature of BNIC. The fact that BNIC is a public body and does not engage in commerce is irrelevant. The fixing and application of prices by the machinery of the inter-trade agreement is a concerted practice.

The Commission considers that the members of BNIC are representatives of the trade associations which put their members' names forward for appointment. This makes BNIC an association of undertakings and it acts as such when it reaches agreement on the fixing of prices. When undertakings take measures producing anti-competitive effects, such measures constitute a decision of an association of undertakings whatever the nature under national law of the organization of which the undertakings are members. Even if price-fixing does not result from a decision of an association of undertakings, the members of the two families come to a meeting of minds on the price to be fixed and this constitutes an agreement within the meaning of Article 85 (1).

It has not been argued that BNIC should be treated as an undertaking covered by Article 90 of the Treaty.

Is BNIC an undertaking?

For the purpose of applying Article 85, an 'undertaking' is to be understood as an economic unit, whatever its legal form (cf Case 170/83 *Hydrotherm Gerätebau GmbH* v *Compact*, 12 July 1984, [1984] 2999, at paragraph 11) and whatever the economic activity in which it is engaged. (For example, a body which manages copyright and related rights is an 'undertaking' even if it is not involved in the production of or trade in goods (e.g. Case 127/73 *BRT* v *SABAM and Fonior* [1974] ECR 313). A body which, on the other hand, is created by ministerial decree and whose sole function is to consider and prepare rules which regulate the conduct of economic activities by others does not itself carry out an economic activity and is not to be considered 'an undertaking' for the purpose of the competition rules. It does not seem to me, on the facts here, that BNIC is 'an undertaking'.

Is BNIC an association and, if so, is it an association of undertakings?

Apart from the two 'personalities', one representing each side of the industry, members of BNIC are appointed from lists drawn up by the interested trade associations. The fact that these trade associations put names forward without compulsion of law, and that the persons

nominated agree to serve, seems to me to indicate that when they meet in BNIC they are to be seen as an association for the purposes of the competition rules. The fact that they meet within the framework of a decree, such as that of 18 February 1975 (JORF of 26 February 1975) and pursuant to the rules in force at the time, does not make them any the less an association. There was clearly a combination of persons brought together for a common purpose.

For BNIC to be or to comprise an association of undertakings, two conditions would, in my view, have to be fulfilled: (1) the persons appointed by the Minister must either be or represent an undertaking; (2) they must be appointed and act in their capacity as undertakings or representatives of undertakings.

In the present case, it does not seem that the members of the two families are appointed by the Minister in their capacity as undertakings even though they may, in fact, be undertakings in their own right. On the other hand, the two 'personalities' are appointed as representatives of the two sides of the industry; the remaining members are appointed as representatives of the trade associations who have put their names forward. The decrees refer to them as 'delegates' ans state that no person carrying on the trade of dealer, broker, distiller or any other allied trade can 'represent' producers and vice-versa. The BNIC's internal rules provide that a member's appointment terminates automatically if his capacity as member of a trade or an association, which was the basis for his appointment, ceases.

Counsel for BNIC has contested this view of the capacity of the members of BNIC. In his submission, the members are not mandated by the trade associations but are appointed by the Minister. This, in my opinion, is not conclusive. A member may still represent a trade association even if his right to participate derives from an act of the Minister. Secondly, it is said that the members are appointed by name in their own capacity and not as representatives. On the other hand, counsel for BNIC accepts that the members do in fact 'represent' the different sides of the cognac industry. Therefore, as I understand the argument, it is said that, while the members of BNIC are appointed to represent the commercial interests of the different elements of the cognac industry, they are not formally appointed as representatives of specific undertakings or trade associations.

At the end of the day, it is, of course, for the French courts to determine the capacity in which the members of BNIC act. On either view, however, it seems to me that there is here an association of undertakings for the purposes of Article 85.

If the trade associations which put forward lists of candidates are undertakings in their own right, the two families can, in my opinion, be said to be associations of undertakings. In BNIC, on that view, decisions are taken by associations of undertakings. If the trade associations are not 'undertakings', it still seems to be the case that they are associations of undertakings. Each of the two families and BNIC itself can, as is submitted on behalf of Mr. Clair, be considered as associations of associations of undertakings. This does not put them outside the scope of the competition rules. Article 85 (1) is not to be read restrictively as referring only to 'associations of undertakings'. It includes 'associations of associations of undertakings'. If the position were otherwise, it would be easy for undertakings to sidestep the application of the competition rules. The better view is that, while an association of associations of undertakings may be different in form from an association of undertakings, there is no difference in substance and no reason to exclude the application of Article 85.

The crucial factor is that the members of the two families settle the terms of the inter-trade agreement on the basis of the interests

of the different parts of the cognac industry, which makes them in substance if not in form, the representatives, through the trade associations, of the undertakings comprising the industry. This was virtually admitted by counsel for BNIC at the hearing. The fact that the agreement may be 'extended' and given a separate or different legal force does not prevent it from being an agreement or decision for the purposes of Article 85. The public policy aspect of price fixing intervenes only after the inter-trade agreement has been made. The fact that the Minister of Finance may refuse to agree to the extension of an inter-trade agreement, as he did refuse in respect of the 1982/83 marketing year, apparently because the prices fixed were too high and were incompatible with the French Government's counter-inflationary policy, if anything confirms that a decision had already been reached through the inter-trade agreement made by the representatives of undertakings and in their commercial interest. That inter-trade agreement falls within Article 85 (1) of the Treaty.

If I had come to the conclusion that there was no 'decision' within the meaning of Article 85 (1), e.g. because BNIC was not strictly 'an association of undertakings', I should consider on the facts here that by fixing prices which were observed by growers and dealers, BNIC was a party to a concerted practice prohibited by Article 85 (1).

Although the first question referred says that the inter-trade agreement was signed by the President of BNIC, it appears on the face of the agreement itself that this is not so. The agreement was signed by the representatives of the two families and the Director of BNIC, who, as it appears from Article 9 of BNIC's internal rules, is a person distinct from the President of BNIC. It seems to be agreed that, in signing, the Director certifies the content of the agreement. There is no requirement that he should sign it. He then sends it to the Commissaire du Gouvernement so that it can be presented for extension. In the circumstances, signature by the Director does not affect the application of Article 85. The same would appear to follow if the agreement were signed by the President.

The third question referred is as follows: 'Is the fixing of a minimum purchase price for potable spirits to be regarded as capable of affecting trade between Member States and as having as its object or effect 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 conformed to the requirements for the registered designation of origin for cognac and that cognac distilled from grapes is consumed undiluted almost without exception?'

The present case concerns the fixing of prices for the spirits used in the blending of cognac, although the inter-trade agreement also fixes prices for the wine used for distillation, the cost of distillation and the finished product. On behalf of BNIC it has been submitted that there is no effect on trade between Member States in so far as the fixing of prices (1) relates to transactions concerning semi-finished products (i.e. the spirit used for blending cognac) not normally delivered for consumption or shipped outside the Cognac region; (2) has little effect on consumers; or (3) ensures that growers have a fair standard of living, stabilizes markets and

guarantees security of supplies. BNIC has relied in particular on the statement of objections served on it by the Commission in the proceedings which led up to Commission Decision No 82/896 of 15 December 1982 (OJ 1982 L 379, p. 1). There the Commission took the view that the fixing of minimum prices for wine intended for distillation and spirits did not affect trade between Member States to an appreciable degree. Counsel for Mr Clair contends that the fixing of prices does affect trade between Member States because cognac is in competition with other spirits such as whisky and the purchase price of the spirits used for blending cognac accounts to 40-50% of the sale price of a bottle of cognac and 60-70% of the sale price of casked cognac. In addition, there is nothing to prevent somebody from buying spirits for blending outside the Cognac region or even outside France. On behalf of the Commission, it has been said that the fixing of minimum prices for spirits restricts competition between producers of spirits and between dealers at the level of supply costs. This restriction on competition is carried over to the price of the finished product because the price of the spirit is the most important factor in the price of cognac. Intra-Community trade is liable to be affected, even though the spirit is not traded between Member States, because 50% of the cognac produced from the spirit is sold in other Member States.

Article 85 (1) prohibits combinations which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition, with particular reference to those which 'directly or indirectly fix purchase or selling prices or any other trading conditions'. The inter-trade agreement does, in my view, introduce a restriction of competition which is of the type envisaged by Article 85 (1). The fact that prices are fixed for a specified product from a strictly defined geographical area (the Cognac region) does not of itself mean that there is no effect on trade between Member States. The fact that cognac is generally consumed neat does not prevent it from being in competition with other products, or prevent different cognacs from being in competition with each other.

The requirement that the arrangement may affect trade between Member States is satisfied if it is 'possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States' (Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235 at p. 249). As a result, it is sufficient if the arrangement is capable of affecting trade between Member States (see, for example, Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131 at para. 15, Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563 at para. 17 and the *Züchner* case at para. 18). If the object of the arrangement is found to be the prevention, restriction or distortion of competition, it is not necessary to consider whether it actually has this effect (e.g. Cases 56 and 58/64 *Consten & Grundig* v *Commission* [1966] ECR 299 at p. 342). Conversely, if this is not the object of the arrangement, it must be seen whether the effect on competition is significant or appreciable. In order to determine the

object of an arrangement, it is not necessary to investigate the intention or the state of mind of the parties. It is sufficient if the arrangement by its nature prevents, restricts or distorts competition (cf. the *Maschinenbau Ulm* case at p. 249, the *Miller* case at para. 7 and Case 61/80 *Coöperatieve Stremsel- en Kleurselfabriek* v *Commission* [1981] ECR 851 at paras 12 and 13).

As the Court pointed out in Case 168/78 *Commission* v *France* [1980] ECR 347, there is at least partial competition between cognac and other potable spirits, some, such as armagnac produced in France, and others, such as whisky, grappa and genevas, produced in other Member States. In addition, there is competition between different brands of cognac. These products, and the different brands of cognac, compete both on the French market and on the markets in other Member States. It does not appear to be disputed that the common market as a whole accounts for about 52% of total sales of cognac, with exports to the nine other Member States representing about 40% of total exports, and that trade between Member States in cognac and competing spirits is in economic terms significant. There seems to be no trade between Member States in the spirits used for blending cognac, although the possibility of such trade developing cannot be excluded entirely.

The question is, therefore, whether the fixing of prices in the inter-trade agreement may affect trade between Member States and the structure of competition within the common market by its effect (a) on price competition between cognac and other competing spirits and between different brands of cognac or (b) on competition within the cognac producing industry itself.

The fixing of prices for the spirit used to make cognac must be seen in the context of the price fixing arrangements in the inter-trade agreements as a whole. They cover every stage in the production of cognac from the sale of wine to distillation to the first sale of the finished product. The Commission has suggested that the price paid by Mr Clair for the spirit in question would have enabled him to reduce his prices for cognac in casks and in bottles by 27% and 15% respectively. While it may be accepted that quality and reputation are particularly influential in the choice of a cognac or brand of cognac by the consumer, the possibility of price competition, if restrictions were removed, cannot be excluded, particularly as between cognacs or brands of cognac of lower quality or reputation.

It seems clear that a decision fixing the price of the basic spirit is capable of having an effect on the price of the finished product and therefore on trade between Member States. Although in some industries the effects of the restriction on competition may be felt by undertakings operating in only one Member State, trade between Member States in cognac seems to be capable of being affected to a significant degree because of the volume of cognac exported from France to other Member States though of course ultimately this is a matter for the national court to assess. It is only if the effect is negligible that it can be ignored. On the facts before the Court that would seem to be unlikely.

The Commission has already held in Decision No 82/896 that the fixing of minimum sale prices for cognac itself infringes Article 85 (1) and is therefore void under Article 85 (2). Even if the fixing of prices for the finished product were itself compatible with Article 85, the fixing of prices for the semi-finished product is still capable of having a restrictive effect on competition by increasing the overall cost of supplying the finished product.

Quite apart from the effect on the price of cognac, the fixing of the price of the spirit used for making cognac, coupled with the fixing of prices relating to the earlier stages in production can affect competition between dealers by limiting or neutralizing any competitive advantage flowing from, for example, the scale of operations. It may also tend to favour larger undertakings, which are likely to be in a better position to bear inflated costs, and to hinder the appearance of new dealers or new brands on the market. To some extent, the dealers prejudiced by the fixing of prices at the production stages may be cushioned from the full effects of the distortion of competition, however, if the price of the finished product is also fixed. However, this simply worsens the effect of the restriction of competition on the competitive structure of the Community, however much it may palliate the effect on specific undertakings. Counsel for BNIC emphasized at the hearing the beneficial effects of the inter-trade agreement for the cognac industry, in particular its role in balancing supply and demand and in ensuring an adequate income for growers. Depending on the circumstances, these are matters which might justify exempting the agreement from prohibition under Article 85 (3) if the inter-trade agreement had been notified to the Commission. However, the Court was told that the Commissaire du Gouvernement gave instructions that no notification should be made by BNIC because this would be to admit that Article 85 applied. As a result, any adverse consequences which might flow from a failure to notify cannot be complained of in these proceedings.

For these reasons, it is my opinion that the questions referred should be answered on the following lines:

(1) and (2) The fixing of prices by an inter-trade agreement made by the family of growers and the family of dealers constituted under the rules of the Bureau national interprofessionnel du cognac constitutes a decision by an association of undertakings within the meaning of Article 85 (1) of the EEC Treaty notwithstanding that such agreement is also signed by the President or Director of the Bureau.

(3) The fixing of a minimum price for potable spirits used in the production of cognac can be regarded as capable of affecting trade between Member States and as having as its object or effect the prevention, restriction or distortion of

competition in the common market if, either by itself or in combination with any other conditions imposed on the production and marketing of cognac relating *inter alia* to price, the fixing of a minimum price has more than a negligible effect on the sale price of cognac or on the ability of dealers to compete between themselves.

The costs of the parties to the proceedings before the referring court fall to be dealt with by that court. No order should be made as to the costs of the Commission.