PRICE FIXING (CUSTOMS AGENTS): THE CNSD CASE

Subject: Price fixing
Professional work
Trade associations
Undertakings

Industry: Customs agents
(Implications for other professional bodies)

Parties: Consiglio Nazionale degli Spedizionieri Doganali
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-513/93 (*Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities*), dated 30 March 2000; also Court Press Release 23/2000

(Note. This decision is little more than a postscript to the substantive decision by the Court of Justice two years ago: the case is therefore reported briefly on the basis of the Court's press release. Essentially the decision confirms that a professional body may be an association of undertakings within the meaning of the Treaty; that professional activities may be covered by the rules on competition; and that professional tariffs may be treated as restrictions on competition and therefore constitute an infringement.)

The Court of First Instance has applied Articles 85 and 86 of the Treaty to an association of undertakings, regardless of the fact that the association derives its powers from national legislation. (This legislation has been held by the Court of Justice to be incompatible with the Treaty.) In Italy the work of independent customs agents (which includes the completion of customs clearance formalities) is regulated by Law No 1612/1960. This requires customs agents to be authorised and entered in the national register of customs agents. It also regulates the Consiglio Nazionale degli Spedizionieri Doganali (CNSD). One of the tasks of the CNSD, which is recognised as a body governed by public law, is to draw up the compulsory tariff for customs services, failure to comply with which entails penalties including being struck off the register. In 1988 the CNSD adopted the tariff (subsequently approved by decree of the Minister for Financial Affairs) setting minimum and maximum charges for each customs transaction or professional service concerning monetary, commercial or fiscal matters. The CNSD is empowered to grant derogations from that tariff.

In 1993, following a complaint against the tariff, the Commission adopted a decision declaring that Italian customs agents are "undertakings" engaged in an economic activity and that the CNSD is "an association of undertakings". The Commission took the view that the tariff in force gave rise to restrictions on competition likely to affect intra-Community trade. It found that the principles of free competition had been contravened and called on the CNSD to terminate the infringement immediately. The Court of Justice had already declared (in 1998)

that the Italian legislation, in requiring the CNSD to set a tariff compulsory for all customs agents, conflicted with Community competition law. But the CNSD applied to the Court of First Instance for annulment of the Commission decision. It maintained that customs agents were not undertakings and that the CNSD did not constitute an association of undertakings. Its decisions were not decisions adopted by associations of undertakings and consequently the tariff neither restricted competition nor affected intra-Community trade.

However, the Court held that the term "undertaking" covered any entity engaged in an economic activity, regardless of its legal status or the way in which it was financed; any activity consisting in offering goods and services on a given market was an economic activity. As the Court ruled in 1998, in so far as customs agents offer services for payment and assume financial risks, they are engaged in an economic activity. Accordingly, the CNSD is an association of undertakings, regardless of its public law status.

The Court of First Instance examined the question whether the restrictive effects on competition were attributable solely to operation of the national legislation or whether independent action on the part of the CNSD was at least partly responsible. The Italian Law requires the CNSD to adopt a tariff, but is silent as to the level of charges; it does not specify maximum levels or criteria for setting charges. Nor does it determine the way in which charges are to be applied or provide that a separate charge must be made for each operation. The CNSD has in practice applied substantial increases to the minimum charges previously in force and established how the charges are to be applied, thereby curtailing considerably the freedom of organisation enjoyed by customs agents among themselves, preventing them from reducing charging costs or offering tariff reductions to customers. The CNSD also availed itself of the options legally available to it of according derogations in certain cases from the minimum charges; of authorising customs agents acting on behalf of a principal or agent to charge reduced fees; and of exempting from the tariff certain categories of customs services. This shows that the CNSD enjoyed a broad discretion in the implementation of national legislation which could have accommodated a different approach - one that would not have restricted competition in the sector. In practice, the nature and scope of competition in the sector were shaped by decisions taken by the CNSD itself.

The Court of First Instance concluded, therefore, that the tariff constituted a restriction of competition attributable to the CNSD. Lastly, in view of the fact that, even after the creation of the internal market (31.12.1992), customs formalities must be completed for various types of transaction and may require the services of an independent but duly accredited customs agent, the Court of First Instance states that the tariff affects trade between Member States.