COMMISSION DECISION

of 30 June 1993

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/33.407 — CNSD)

(Only the Italian text is authentic)

(93/438/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the EEC Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the application submitted pursuant to Article 3 (2) of Regulation No 17 by the Associazione italiana dei corrieri aerei internazionali (Aicai),

Having regard to the Commission decision of 25 September 1991 to initiate proceedings in this case,

Having given the association of undertakings known as Consiglio nazionale degli spedizionieri doganali (CNSD) the opportunity to make known its views on the objectives raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The complaints

(1) The Commission received a number of complaints from industrial, commercial and transport enterprises in the Community.

(2) The complainants complained of certain customs clearance difficulties encountered in Italy in connection with the activity of customs agent.

(3) One of the complaints, lodged by the Associazione italiana dei corrieri aerei internazionali (hereinafter referred to as 'Aicai'), refers, *inter alia*, to the decision of the Consiglio nazionale degli spedizionieri doganali ('CNSD') concerning the fixing of the tariff of rates ('the tariff') charged by customs agents (*spedizionieri*) for the provision of customs clearance services requested by international couriers.

B. The CNSD

(4) The business activities of customs agents are regulated in Italy by Law No 1612 of 22 December 1960 and the implementing provisions contained in the Ministerial Decree of 10 March 1964 and the Presidential Decree No 43 of 23 January 1973 (Testo unico delle disposizioni legislative in materia doganale).

(5) In order to be admitted as a customs agent, it is necessary to satisfy the conditions provided for in the customs legislation in force. In particular, the Presidential Decree of 23 January 1973 stipulates that the title of customs agent is conferred by an authorization of indefinite duration.

Authorization is granted provided candidates satisfy certain requirements and pass an examination which is held usually every three years.

(6) The business of customs agent may be carried on either as an employee of an undertaking or independently, on the agent's own account.

An agent who is an employee of an undertaking must hold an authorization and is entered in a register which is kept and kept up to date by the appropriate departmental Council ; such an agent can represent only his or her employer.

In order to carry on the business of customs agent on one's own account, it is necessary to hold an authorization and to be entered in the national register, which is made up of all the departmental registers (of which there are currently 13 : Bari, Bologna, Bolzano, Cagliari, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice).

Any agent, whether independent or employed, may operate only within the department for which he or she is authorized.

(7) In each department there is a departmental Council, the number of whose members depends on the numbers of persons on the register. Members are elected for two years by the agents on the register.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

(8) The Councils are responsible for keeping the register of employed agents and the register of independent agents.

They also monitor the behaviour of the independent agents and give opinions in the event of disputes between agents and their customers. They also have powers to sanction registered agents.

(9) Each Council is chaired by an official of the Ministry of Finance who is also head of the customs department. Councils also draw up proposals for the remuneration of agents to allow the National Council (CNSD) to establish the tariff.

(10) The CNSD has its registered office in Rome and is composed of nine members appointed for three years by the members of the departmental Councils.

The Director-General for customs and indirect taxation of the Ministry of Finance is automatically a member, and holds the chair.

(11) He keeps the national register and settles conflicts of competence between departmental Councils. He draws up the agents' tariff, which is fixed and to which agents must adhere. The CNSD may approve derogations in individual cases and subject to time limits.

C. The market

(12) In order to import goods into Italy, or to export them, it is necessary to carry out a series of formalities linked to customs clearance and customs control. Under Community legislation it is possible to entrust the power to complete all those processes to professionals — customs agents — who for payment undertake to carry out those formalities. The relevant market is therefore that of those services provided by customs agents.

(13) These services are used in particular by international couriers.

International couriers operate through organizations made up of various enterprises, usually members of a group which sets up a network of links between several countries.

(14) Each enterprise in the network is responsible in its country of origin for collecting (for dispatch abroad) and distributing (in its own country) mail and parcels and performing all activities related to their transport, including customs clearance. The courier collects consignments from the sender and has them delivered to the addressee.

(15) The sender pays for the service and the customs duties, unless he makes it clear that costs are to be borne by the addressee. Customs clearance costs are always included in the price charged to the sender. Normally the addressee is charged only for customs duties in excess of a certain amount; some 60 % of deliveries are below that amount.

(16) Thus an Italian courier never has any contact with a foreign sender, but only with Italian senders and, sometimes, if the fixed amount is exceeded, with Italian addressees in order to recover customs duties paid.

(17) Deliveries are usually channelled through a sorting centre so that group deliveries may be made to each destination. Thus frequent daily contact is had with customs agents in respect of a large number of customs declarations, all more or less the same.

This organization makes it possible to deliver consignments in 24 hours in Europe and 48 hours in the rest of the world.

(18) At the request of the Aicai, a survey was carried out by a market research organization in June 1988, a few days before the new tariff, adopted by the CNSD and approved by Ministerial Decree of 6 July 1988, entered into force, in order to determine how much use was made of the service provided by couriers and what users thought of the service; the survey covered a sample of 400 enterprises representative of Italian industry.

(19) The results of the survey showed that 41,3 % of the undertakings surveyed were habitual users of the services of international couriers; of those undertakings, 80,1 % use private couriers such as the members of the Aicai, 4,8 % use the CAI (rapid delivery service provided by the Italian post office) and 15,1 % use the service provided by Alitalia.

(20) As regards the reasons given for using this type of service, 86,9 % of enterprises gave speed of delivery and 45,5 % also the fact that delivery times were adhered to.

(21) As regards country of delivery, for 83,9 % of enterprises deliveries are in Europe; the survey also shows that 77,8 % of the enterprises concerned achieve over 35 % of their turnover in exports.

(22) Because of the large number of deliveries, many couriers use firms of customs agents and, where self-employed agents were used, prior to the entry into force of the new tariff, they operated under agreements stipulating a flat rate for all deliveries under a certain value.

(23) The tariff adopted by the CNSD on the 16 April 1970, which remained in force until July 1988, provided for a 35 % reduction in the minimum rate applicable to forwarding undertakings; no provision was made for couriers, which did not start their activities until 1980. They were, however, granted the same terms. Subsequent increases were decided on by the CSND and approved by Ministerial Decree, and took the form of a coefficient applied to the 1970 tariff.

The present decision concerns the new tariff of 1988 which is the only tariff currently applicable. Companies can only avoid the tariff by negotiating a derogation granted by the CNSD.

D. The tariff and the 1988 Decree approving it

(24) Pursuant to Article 14 of Law 1612 of 22 December 1960, which empowers the CNSD to establish on the basis of proposals by the departmental Councils the tariff for services provided by customs agents, the CSND at its meeting on 21 March 1988 adopted the tariff currently in force.

(25) By Decree of 6 July 1988, the Minister of Finance:

— having regard to the Law of 22 December 1960, which regulates the business activities of customs agents,

— having regard to the decision approving the tariff adopted by the CNSD at its meeting of 21 March 1988,

— having regard to the procedure being in order,

approved the tariff (Article 1) and fixed the date of its entry into force (Article 2) as the day following its publication in the Italian Official Journal (1), i. e. on 20 July 1988.

(26) The tariff establishes various categories, based on the value or the weight of the goods to be cleared, each category comprising in some cases a fixed price and in most cases a bracket of prices, with minimum and maximum prices for customs clearance services provided by customs agents.

(27) In addition to stipulating that:

— the amounts indicated relate to each customs transaction or service provided,

— derogations from the tariff are not authorized, as is provided for by Article 5 thereof which prohibits customs agents form applying amounts less than those indicated,

— derogations may be authorized by the CNSD but only in specific instances and, in any event, for a limited period,

— the CNSD enjoys autonomous powers to grant such derogations which are not subject to ministerial approval and are therefore not published in the Official Journal,

the new tariff introduced a substantial increase in prices.

(28) The innovation which most affected couriers was the change in the range of categories, involving the charging of a fixed minimum price for deliveries to Italy with a value not exceeding Lit 3 million (see Table in paragraph 30).

(29) The previous tariff comprised categories ranging from Lit 0 to 1 million, thereafter rising in steps of Lit 1 million up to 10 million, and then in increments of Lit 10 million by category. Some 60 % of deliveries fell into the first category, customs duties being borne by the courier.

(1) *Official Journal of the Italian Republic* No 168, 19. 7. 1988.

(30) Comparison between the two tariffs:

Imports

(lire)

Previous tariff		New tariff:	
Value of goods in Lit:		Value of goods in Lit:	
1. from 0 to 1 million	minimum Lit 16 250	— from 0 to 3 million (virtually fixed amount)	minimum Lit 65 000
2. from 1 to 3 million	minimum Lit 25 000	— from 3 to 10 million	minimum Lit 80 000
3. from 3 to 4 million	minimum Lit 30 000		

which represents an increase of 400 % in category 1, 260 % in category 2 and 266,66 % in category 3.

Exports

(lire)

Previous tariff		New tariff:	
Value of goods in Lit:		Value of goods in Lit:	
1. from 0 to 1 million	minimum Lit 7 500	— from 0 to 10 million	minimum Lit 40 000
2. from 1 to 4 million	minimum Lit 11 250	— from 10 to 50 million	minimum Lit 60 000
3. from 4 to 10 million	minimum Lit 13 750		
4. from 10 to 50 million	minimum Lit 17 500		

which represents an increase of 533,33 % in category 1, 355,55 % in category 2, 290,9 % in category 3 and 324,86 % in category 4.

(31) Comparison of effect on the value of goods of the old and new tariffs if the minimum prices shown below are applied:

Imports			Exports		
Value of goods	New tariff	Previous tariff	Value of goods	New tariff	Previous tariff
Lit 100 000	65 %	16,25 %	Lit 100 000	40 %	7,5 %
Lit 500 000	13 %	3,25 %	Lit 500 000	8 %	1,5 %
Lit 1 000 000	6,5 %	1,625 %	Lit 1 000 000	4 %	0,75 %
Lit 2 000 000	3,25 %	1,25 %	Lit 2 000 000	2 %	0,562 %
Lit 3 000 000	2,17 %	1,00 %	Lit 3 000 000	1,333 %	0,416 %

The increase in rates, the change in categories and the obligation to invoice both the sender and the Italian consignee separately for customs clearance charges are claimed to have had the effect of paralysing the activity of couriers as a result both of the time lost in complying with the new provisions and of the prices which most of their customers reportedly consider excessive.

E. The derogation of 11 June 1990

(32) At its meeting on 11 June 1990 the CNSD:

— having regard to the request made by the Aicai,

— in view of its decision of 11 July 1989 which excluded (1) from the rates in force goods whose value did not exceed Lit 350 000, exclusive of transport or other costs,

— in view of the type of service provided by international couriers,

(1) 'Excluded' meaning that the decision, which did not apply to Aicai, had granted an exemption from the tariff to allow *inter alia* a reduction in the minimum rates of up to 60 % for deliveries not exceeding a value of Lit 350 000; this derogation which was granted 'to take better into consideration particular situations and the needs put forward by interested categories' did not specify the categories but only indicated the operations excluded from the tariff.

— in view of the fact that couriers bear the entire cost of the service provided by customs agents,

— having regard to the undertaking given by couriers to include on their price list, which is published, and on documents accompanying the consignment, the following words: 'the charges for services relating to customs formalities are determined by the Ministerial Decree of 6 July 1988 and by any derogations adopted by the CNSD pursuant to Article 6 of the tariff',

(33) decided as follows:

— to apply to deliveries made by international couriers the derogation forming the subject of the Decision of 11 July 1989 concerning goods worth less than Lit 350 000, excluding transport and other costs,

— a reduction of up to 70 % may be applied to the rates for customs formalities for deliveries of goods made by international couriers and worth less than Lit 2 500 000.

(34) The decision is subject to the condition that Aicai lodges the contracts concluded between customs agents and their customers, the couriers, with the competent departmental Council by 30 July 1990 for the first time and prior to implementation of the contract thereafter.

(35) The decision also exempts couriers from the obligation to send separate invoices to both sender and consignee for the amount owed for customs clearance.

(36) The decision was comunicated to the Commission on 4 December 1991 by the complainant, Aicai.

F. The reply of CNSD to the statement of objections

(37) In a letter to the Commission dated 8 January 1982, the CNSD put forward the following arguments:

— the agreement between Aicai and CNSD, formalized by decision of the CNSD on 11 June 1990 and communicated to the Commission by Aicai on 4 December 1991, settled the difference between Aicai and CNSD, thereby obviating the need for the present proceeding,

(38) — there are no grounds for the fears implicit in Aicai's letter of 4 December 1991, that the derogation might be revoked; the derogation was adopted only because a formal modification of the tariff (which required five years' work) would have taken too long and because it would therefore have beeen impossible to accede to any fully justified requests from operators in the sector,

(39) — furthermore, the actions before the Italian courts seeking annulment of the tariff had been abandoned since they had become redundant following the adoption of the derogations.

II. LEGAL ASSESSMENT

A. Article 85 (1)

1. *The undertakings*

(40) The fact that the business occupation of a customs agent is viewed under Italian law as a liberal profession is not inconsistent with the fact that customs agents are undertakings engaged in an economic activity; indeed, according to the case-law of the Court of Justice, confirmed most recently in its *Höfner* judgment of 23 April 1991 in Case C-41/90 (1), 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.

(41) Consequently, the CNSD is an association of undertakings and its decisions, as a body appointed by its members to keep the register, are decisions by an association of undertakings aimed at regulating the economic activity of members.

2. *The decision of an association of undertakings*

(42) The CNSD decides freely on the level and conditions of application the tariff and therefore operates like any other organ of an association of undertakings. The tariff is drawn up by the CNSD and approved by Ministerial Decree; that approval does not, however, alter its status as a decision of an association of undertakings, as is shown in particular by the fact that decisions allowing derogations from the tariff do not have to be approved by the Minister; it follows that all decisions relating to the tariff express the intention of the CNSD.

(43) The CNSD cannot argue that Articles 11 and 14 of Law No 1612/1960 impose obligations on it such as the adoption of a scale of compulsory rates which in practice would result in behaviour liable to infringe the Community competition rules.

(1) [1991] ECR I-1979, at page I-2016, paragraph 21.

(44) According to the Court of Justice (see, for example, Joined Cases 43/82 and 63/82, *VBVB* and *VBBB* v. *Commission*(1), and Case 123/83 *BNIC* v. *Clair*(2)), national law cannot prevail over the Community competition rules and, in particular, cannot impede or prevent their application. The existence of national laws requiring firms to act in a certain manner or, as in the present case, giving an association of undertakings the task of deciding certain matters, cannot from a legal standpoint prevent the Commission from formally deciding that CNSD has infringed Article 85 (1) of the Treaty.

3. *Restrictions*

(45) The restrictions of competition arising out of the CNSD decision of 21 March 1988 are as follows:

— the setting of a tariff of fixed minimum and maximum rates, from which individual operators may not derogate, for each transaction carried out by customs agents,

— the imposing of mandatory invoicing arrangements, e.g. separate invoices.

(46) The restrictions limit the freedom of customs agents not only as regards the price they charge their customers, which is fixed and the same for everyone, but also as regards their internal organization, as they could group their operations and thereby reduce costs. The tariff imposes standard, individual invoicing for operations.

(47) The fact that CNSD reserves the right to derogate from the tariff temporarily in special cases does not make the restrictions any less serious, as the derogations are dependent on the discretionary power of CNSD.

The contention of CNSD that the derogations, in particular that of 11 June 1990 in favour of Aicai members, obviate the need for the present proceeding must be rejected; the restrictions constituted by the tariff and the compulsory invoicing arrangements are still in force and being applied.

The CNSD decisions to derogate from the tariff and from the compulsory invoicing arrangements simply mitigate, for those operators having secured a derogation, the negative effects of the restrictions but do not remove them.

(48) The option allowed by the legislation of being represented for customs clearance either by an independent customs agent or by an employed customs agent cannot mitigate the restrictions.

The fact that some agents are employees does not affect the market in any way. Such agents are the employees of firms that opted for this system because they find it less costly than regular recourse to self-employed agents. They consequently do not compete with self-employed agents because neither the employed agents nor the firms employing them operate on the market for the supply and demand for customs clearance services.

4. *Effect on trade between Member States*

(49) The tariff set by CNSD is liable to affect trade between Member States as it fixes the rates for all customs operations relating to imports into Italy and exports from Italy.

(50) Under existing law, owners of goods required under customs regulations to make a declaration, to take certain steps, to comply with certain obligations or special rules, or to exercise certain rights may act through a representative, i.e. an agent who is an employee or an independent agent.

(51) All firms importing into Italy and all Italian export firms which have no customs agent in their employ (or which have such an employee, but where the latter is not authorized to operate in the department where customs clearance is to take place) are therefore affected by the tariff, because all the independent customs agents apply it.

(52) Furthermore, in view of the fact that in Italy in 1990 imports represented some 25 % of goods consumed, exports were equivalent to some 18 % of gross domestic product, some 58 % of imports were of Community origin and around 59 % of exports were to other Member States, it must be concluded that the effect on trade was substantial.

(1) Judgment of the Court of Justice of 17 January 1984 [1984] ECR 19.
(2) Judgment of the Court of Justice of 30 January 1985 [1985] ECR 402.

(53) The tariff also impedes trade between the Italian market and other Community markets because it increases the cost and complexity of customs operations. In addition, prices are not linked even to the quality of the service or the type of service provided, since the minimum and maximum prices are fixed by reference to the value or the weight of the goods.

B. **Article 85 (3)**

(54) As there was no notification, it is not necessary to consider whether the CNSD decision of 21 March 1988 qualifies for exemption.

It can, however, be concluded that the conditions for exemption under Article 85 (3) have not been met. According to the administrative practice of the Commission and the case law of the Court of Justice, the concerted fixing of prices and of minimum prices in particular does not qualify for exemption,

HAS ADOPTED THIS DECISION :

Article 1

The tariff for services provided by customs agents which was adopted by the Consiglio Nazionale degli Spedizionieri Doganali ('CNSD') at its meeting on 21 March 1988 and which entered into force on 20 July 1988 constitutes na infringement of Article 85 (1) of the EEC Treaty.

Article 2

The CNSD shall take all appropriate steps to bring to an immediate end the infringement referred to in Article 1.

Article 3

The CNSD shall inform in writing the customs agents listed in the national register of this Decision and of the fact that the infringement referred to in Article 1 has been terminated ; it shall specify consequences, in particular the fact that they are free to depart from the tariff referred to in Article 1.

The CNSD shall, within two months of notification of this Decision, communicate to the Commission the information sent to customs agents in accordance with the first paragraph.

Article 4

This Decision is addressed to the :

Consiglio Nazionale degli Spedizionieri Doganali (CNSD),
Via XX Settembre 3,
I-00187 Rome.

Done at Brussels, 30 June 1993.

For the Commission
Karel VAN MIERT
Member of the Commission