

Case C-35/96

Commission of the European Communities

v

Italian Republic

(Action for failure to fulfil obligations — Agreements, decisions and concerted practices — Fixing of business tariffs — Customs agents — Legislation reinforcing the effects of an agreement)

Opinion of Advocate General Cosmas delivered on 12 February 1998 .....	I - 3855
Judgment of the Court (Fifth Chamber), 18 June 1998 .....	I - 3886

Summary of the Judgment

1. *Actions for failure to fulfil obligations — Initiation by the Commission of two procedures on the same facts but based on different provisions of Community law — Breach of rights of defence — None*  
(EC Treaty, Arts 155 and 169)
2. *Competition — Community rules — Undertaking — Definition — Customs agent — Included*  
(EC Treaty, Arts 85 and 86)

3. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings or associations of undertakings — National professional body which has fixed a uniform compulsory tariff for customs agents*  
(EC Treaty, Art. 85)
4. *Competition — Agreements, decisions and concerted practices — Prejudicial to competition — Trade between Member States affected — Fixing by a national professional body of a uniform compulsory tariff for all customs agents*  
(EC Treaty, Art. 85)
5. *Competition — Community rules — Obligations of the Member States — Rules designed to reinforce the effects of preexisting agreements — Definition — Legislation requiring a professional body to adopt a decision by an association of undertakings consisting in the setting of a compulsory tariff for all customs agents*  
(EC Treaty, Arts 5 and 85)

1. In view of the general scheme of the rules relating to the action for failure to fulfil obligations, the fact that a Member State is constrained to defend itself in two separate cases in which the facts are the same but which are based on different provisions of Community law cannot *per se* constitute a breach of rights of defence.

2. The activity of customs agent falls within the concept of an undertaking for the purposes of the application of the Community competition rules, since under competition law that concept covers any entity engaged in an economic activity, in particular an activity consisting in offering goods and services on a given market, regardless of its legal status and the way in which it is financed.

The fact that the activity of customs agent is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources is not such as to exclude it from the scope of Articles 85 and 86 of the Treaty, since that activity has an economic character. Customs agents offer, for payment, services consisting in the carrying out of customs formalities relating in particular to the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas; they assume the financial risks involved in the exercise of that activity and, if there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself.

3. In setting a compulsory tariff for all customs agents, a professional body

comprising representatives from the profession acts as an association of undertakings within the meaning of Article 85(1) of the Treaty where, under national law, those representatives cannot be characterised as independent experts and they are not required, under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the general interest and the interests of undertakings in other sectors or users of the services in question.

The fact that the professional body in question has public law status does not prevent the application of Article 85 of the Treaty which, on its wording, applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned.

various scales on the basis of the value or the weight of the goods to be cleared through customs or of the specific type of goods, or type of professional service, and is mandatory, so that a customs agent may not depart from it on his own initiative.

Those decisions are capable of affecting intra-Community trade where the tariff, by extending over the whole of the territory of a Member State, has, by its very nature, the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about. That effect is all the more appreciable because the various types of import or export operations within the Community, as well as transactions between Community traders, require customs formalities to be carried out and may, in consequence, make it necessary for an independent registered customs agent to be involved.

4. The decisions by which a professional body sets a uniform, compulsory tariff for all customs agents restrict competition within the meaning of Article 85 of the Treaty where the tariff directly sets the prices for customs agents' services, provides, for each separate type of operation, the maximum and minimum prices which can be charged to customers, lays down
5. Although Article 85 of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation, the fact nevertheless remains that that article, in conjunction with Article 5, requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition

rules applicable to undertakings. Such would be the case if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

A Member State thus fails to fulfil its obligations under Articles 5 and 85 of the Treaty by adopting and maintaining in force a law which, in granting the relative decision-making power, requires a professional body to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty, consisting of setting a compulsory tariff for all customs agents.