JUDGMENT OF THE COURT (Fifth Chamber)
18 June 1998 *

In Case C-35/96,

Commission of the European Communities, represented by Enrico Traversa, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Umberto Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the Consiglio Nazionale degli Spedizionieri Doganali (National Council of Customs Agents) to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty in that it sets a compulsory tariff for all customs agents, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty,

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), J. C. Moitinho de Almeida, P. Jann and L. Sevón, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 December 1997,

after hearing the Opinion of the Advocate General at the sitting on 12 February 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 February 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the Consiglio Nazionale degli Spedizionieri Doganali (National Council of Customs Agents, hereinafter 'the CNSD') to adopt a decision by an association of undertakings contrary to Article 85 of the EC Treaty in that it sets a compulsory tariff for all customs agents, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty.

2 In Italy, the activity of customs agents is regulated by Law No 1612 of 22 December 1960 on the legal recognition of the profession of customs agent and the establishment of registers and insurance funds for customs agents (GURI No 4 of 5 January 1961, hereinafter 'Law No 1612/1960') and by implementing provisions contained principally in Presidential and Ministerial Decrees.

3 The activity involves the provision of services relating to customs clearance procedures (Article 1 of Law No 1612/1960). To pursue it, customs agents must possess authorisation (patente) and be entered in the national register of customs agents. This is made up of all the departmental registers held by the Consigli compartimentali (Departmental Councils of Customs Agents) for each customs department (Articles 2 and 4 to 12 of Law No 1612/1960).

4 Supervision of the activity of customs agents is carried out by the Departmental Councils of Customs Agents. Their members are elected by secret ballot by the customs agents entered in the registers of the various departmental directorates for a renewable term of two years. A chairman is elected by the members from among their number (Article 10 of Law No 1612/1960).

5 The Departmental Councils of Customs Agents are headed by the CNSD, a body governed by public law, composed of nine members elected by secret ballot by the members of the Departmental Councils of Customs Agents and presided over by a member elected from among their number (Article 12 of Law No 1612/1960). Until 1992 the Director-General of Customs and Indirect Taxes was automatically a member and held the chair. That rule was, however, abolished by Article 32 of Decree-Law No 331 of 30 August 1992 (hereinafter 'Decree-Law No 331/1992'). The members of the CNSD are appointed for three years and may be re-elected (Article 13(2) of Law No 1612/1960).

6 Only registered customs agents may be elected as members of the Departmental Councils or of the CNSD (second paragraph of Articles 8 and 22 of the Decree of the Minister for Finance of 10 March 1964).

7 The CNSD is responsible in particular for setting the tariff for the services provided by customs agents, on the basis of proposals from the Departmental Councils (Article 14(d) of Law No 1612/1960). The tariff is compulsory (second paragraph of Article 11 of Law No 1612/1960). Those contravening the tariff are liable to face disciplinary measures, ranging from a reprimand to temporary suspension from the register where the offence is repeated, or removal from the register if suspended twice in five years by the Departmental Council (Articles 38 to 40 of the Decree of the Minister for Finance of 10 March 1964 on rules implementing Law No 1612/1960 (Ordinary Supplement to *GURI* No 102 of 24 April 1964)).

8 At its meeting on 21 March 1988, the CNSD adopted the tariff for services provided by customs agents (hereinafter 'the tariff') in the following terms:

'This tariff lays down the minimum and maximum amounts to be paid for customs transactions and services provided in the monetary, commercial and fiscal areas, including fiscal litigation. In determining, between the minimum and maximum amounts, the price to be paid in a specific case, the characteristics, nature and importance of the service are to be taken into consideration' (Article 1).

'In relation to the provisions of Article 1 above, this tariff shall always be compulsory as regards the principal and annuls any other agreement to the contrary ...' (Article 5).

'The National Council of Customs Agents shall be empowered to make specific and/or temporary derogations from the minimum amounts laid down in this tariff' (Article 6).

'The National Council of Customs Agents shall update the present tariff according to the indexes supplied by Istat (Central Statistics Institute) — Industrial Sector — as from the date of the relevant decision' (Article 7).

9 The tariff was approved by the Italian Minister for Finance by a decree of 6 July 1988 (GURI No 168 of 19 July 1988, p. 19).

10 Pursuant to Article 7 of the tariff, at its meeting of 15 December 1989 the CNSD decided to increase the prices set by the tariff by 8% from 1 January 1990 (Communication from the Ministry of Finance published in GURI No 299 of 23 December 1989).

11 The Commission has instituted three separate sets of proceeding against the Italian legislation.

12 On 24 March 1992 it applied to the Court for a declaration that the Italian Republic had infringed Articles 9 and 12 of the EC Treaty by approving the tariff. That claim was dismissed by judgment of 9 February 1994 in Case C-119/92 *Commission* v *Italy* [1994] ECR I-393, on the ground that there was no obligation on the importer to have recourse in all circumstances to the services of a professional customs forwarding agent (paragraph 46).

13 On 30 June 1993 the Commission adopted Decision 93/438/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.407 — CNSD, OJ 1993 L

203, p. 27), in which it found that the tariff constituted an infringement of Article 85(1) of the Treaty. The CNSD brought an action for annulment of that decision which is at present pending before the Court of First Instance of the European Communities (Case T-513/93), which decided to postpone its examination of the case until the Court had delivered judgment in this case (order of the Court of First Instance of 6 May 1996, not published in the ECR).

14 Lastly, taking the view that the national legislation in question infringed Articles 5 and 85 of the Treaty, the Commission initiated the pre-litigation procedure which gave rise to this action.

15 By letter of 18 October 1993 it issued a letter of formal notice to the Italian Government, requesting it to present its observations on the matter within a period of two months.

16 In the absence of a reply, on 21 June 1995 the Commission issued a reasoned opinion, calling on the Italian Republic to adopt the measures required to comply with it within two months from its notification.

17 Since the Italian Government did not respond to the reasoned opinion, the Commission has brought this action before the Court.

18 By document lodged on 15 May 1996, the Italian Government raised an objection of inadmissibility in accordance with Article 91(1) of the Rules of Procedure.

19 The Court decided to reserve its decision on that objection for the final judgment.

20 The Italian Government has not lodged a defence.

Objection of inadmissibility

21 The Italian Government first submits a plea to the effect that the Commission was not entitled to initiate a second procedure for a declaration of failure to fulfil obligations, in respect of complaints based on Articles 5 and 85 of the Treaty, without withdrawing its first action, inasmuch as it concerned breach of Articles 9 and 12 of the Treaty.

22 It contends that this is so, first because the practices complained of consist either in the imposition of a tax, or in the conclusion of an agreement by an association of undertakings ratified by the Member State concerned, but cannot constitute both at the same time.

23 Secondly, it is clear from the general scheme of the rules relating to the action for failure to fulfil obligations that, once the Court has been seised, it has inevitably to deliver a judgment on the merits of the dispute unless the applicant discontinues the action. Accordingly, if the Commission is persuaded that the State has not failed to fulfil the obligations with the breach of which it was charged in the reasoned opinion issued in the context of the first procedure, but has failed to fulfil other obligations incompatible with the former obligations, it cannot simultaneously continue to ask the Court to adjudicate on the said reasoned opinion and initiate a fresh procedure concerning a separate allegation incompatible with the first.

24 Lastly, in so acting, the Commission has infringed the Italian Government's rights of defence, since it constrained the Italian Government to defend itself simultaneously in two cases founded on the same facts but on different provisions.

25 In a second plea the Italian Government alleges that there are lacunae in the letter of formal notice and the reasoned opinion. Thus only the application contains a detailed analysis of the factors constituting the first alleged infringement of Article 85(1) of the Treaty. However, both in the letter of formal notice and in the reasoned opinion the Commission confined itself, as far as infringement of Article 85(1) was concerned, to a reference to Decision 93/438. According to settled case-law, the reasoned opinion must contain a coherent and detailed statement of the reasons which persuaded the Commission that the State concerned had failed to fulfil one of its obligations under the Treaty (Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659).

26 With regard to the first plea, apart from the fact that only the sending of the letter of formal notice preceded the delivery by the Court of its judgment in Case C-119/92, it must be pointed out that, by virtue of Articles 155 and 169 of the Treaty, the Commission is the custodian of Community legality. In that capacity, its task is to ensure, in the general interest of the Community, that the Treaty is properly applied by the Member States and to note the existence of any failure to fulfil the obligations deriving therefrom, with a view to bringing it to an end (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15).

27 It is therefore for the Commission to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to judge at what time it will bring an action for failure to fulfil obligations; the considerations which determine its choice of time cannot affect the admissibility of the action (see Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, paragraph 4).

28 Moreover, since the subject-matter of the proceedings brought before the Court is delimited by the reasoned opinion, inasmuch as the application must be founded on the same grounds and pleas (Case 166/82 *Commission* v *Italy* [1984] ECR 459, paragraph 16; Case C-234/91 *Commission* v *Denmark* [1993] ECR I-6273, paragraph 16; and Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11), there is no course of action open to the Commission, where it considers that the national legislation of which it complains infringes other rules of Community law and it wishes to obtain from the Court a declaration to that effect as well, other than to initiate a fresh procedure for a declaration of failure to fulfil obligations in order fully to discharge the duties assigned to it under Articles 155 and 169 of the Treaty.

29 From the foregoing considerations, it is evident that 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 cannot *per se* constitute a breach of rights of defence. Moreover, the Italian Government has not put forward any other factor capable of showing that the course taken by the two procedures, viewed separately or even cumulatively, gave rise to a breach of its rights of defence.

30 As far as the second plea is concerned, it is sufficient to point out that the reasoned opinion contains a coherent and precise statement of the reasons which persuaded the Commission that the State concerned had failed to fulfil one of its obligations under the Treaty.

31 The letter of formal notice and the reasoned opinion clearly determine, albeit succinctly, the subject-matter of the dispute. Moreover both refer expressly to Decision 93/438, in which the Commission described in detail the factual and legal context in which customs agents and the CNSD operate ('I. The facts', pp. 27 to 31) and then set out its legal assessment in an equally detailed manner ('II. Legal assessment', pp. 31 to 33). Lastly the letter of formal notice and the reasoned opinion contain a detailed account of the sole question which was not dealt with in Decision 93/438, namely how the infringement of Community law alleged to have been committed by the CNSD could be attributed to the Italian Republic.

32 The application is therefore admissible.

Substance

33 In order to give judgment on the Commission's application for a declaration of failure to fulfil obligations, the question whether the tariff constitutes a decision of an association of undertakings within the meaning of Article 85 must first be examined.

34 At the hearing, the Italian Government contended that although, since they exercise a liberal profession like lawyers, surveyors or interpreters, customs agents are independent workers, they nevertheless cannot be regarded as being undertakings within the meaning of Article 85 of the Treaty because the services that they provide are of an intellectual nature and because the practice of their profession requires authorisation and entails compliance with certain conditions. Moreover, the Treaty makes a distinction between independent workers and undertakings, so that not all self-employed activity is necessarily carried on in the context of an undertaking. In addition, the indispensable organisational factor is lacking, that is to say, the combination of human, material and non-material resources permanently assigned to the pursuit of a specific economic goal.

35 Since independent customs agents are not undertakings, *a fortiori* the CNSD cannot constitute an association of undertakings within the meaning of Article 85 of the Treaty.

36 It must first be noted that, according to settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Case C-41/90 *Höfner and Elser* [1991]

ECR I-1979, paragraph 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others* v *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21), and that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7).

37 The activity of customs agents has an economic character. They 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. Furthermore, they assume the financial risks involved in the exercise of that activity (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 541). If there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself.

38 In those circumstances, 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 EC Treaty.

39 The next point to be considered is the extent to which a professional body such as the CNSD is acting as an association of undertakings, within the meaning of Article 85(1) of the Treaty, when compiling the tariff.

40 In this connection, it must be borne in mind that the public law status of a national body such as the CNSD does not preclude the application of Article 85 of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. Accordingly, 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 (Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 17).

41 Moreover, the members of the CNSD are the representatives of professional customs agents and nothing in the national legislation concerned prevents the CNSD from acting in the exclusive interest of the profession.

42 On the one hand, the members of the CNSD can only be registered customs agents, since they are elected from among the members of the Departmental Councils on which only customs agents sit (second paragraph of Article 13 of Law No 1612/1960 and second paragraph of Article 22 of the Decree of the Minister for Finance of 10 March 1964). On that point it should be noted that, since the amendment introduced by Decree-Law No 331/1992, the Director-General of Customs no longer acts as chairman of the CNSD. Lastly, the Italian Minister for Finance, who is responsible for the supervision of the professional organisation in question, cannot intervene in the appointment of the members of the Departmental Councils and the CNSD.

43 On the other hand, the CNSD is responsible for setting the tariff for the professional services of customs agents on the basis of proposals from the Departmental Councils (Article 14(d) of Law No 1612/1960). In that respect there is no rule in the national legislation in question obliging, or even encouraging, the members of either the CNSD or the Departmental Councils to take into account public-interest criteria.

44 It follows that the members of the CNSD cannot be characterised as independent experts (see, to that effect, Case C-185/91 *Reiff* [1993] ECR I-5801, paragraphs 17 and 19; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraphs 16 and 18; and Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257, paragraphs 18 and 19) and that 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 (judgments cited above, *Reiff*, paragraphs 18 and 24; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 17; and *DIP and Others*, paragraph 18).

45 Secondly, it must be held that the decisions by which the CNSD sets a uniform, compulsory tariff for all customs agents restrict competition within the meaning of Article 85 of the Treaty and are capable of affecting intra-Community trade.

46 The tariff directly sets the prices for customs agents' services. It provides, for each separate type of operation, the maximum and minimum prices which can be charged to customers. Furthermore, the tariff lays down 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 (Article 1).

47 Lastly, the tariff is mandatory (Article 5), so that a customs agent may not depart from it on his own initiative. Only the CNSD is empowered to provide for derogations (Article 6).

48 As regards the question whether intra-Community trade is affected, it need merely be pointed out that an agreement 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 (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29, and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22).

49 That effect is all the more appreciable in this case 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.

50 That is true of so-called 'internal transit' operations, covering the dispatching of goods from Italy to a Member State, that is to say from one point in the customs territory of the Community to another, by way of transit through a non-Member country (for example, Switzerland). That type of operation is particularly important for Italy, since a large proportion of goods dispatched from regions in the north-east of the country to Germany and the Netherlands transit through Switzerland.

51 From the foregoing considerations, it follows that, in adopting the tariff, the CNSD infringed Article 85(1) of the Treaty.

52 Thirdly, the question of the extent to which that infringement can be attributed to the Italian Republic must be considered.

53 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 Article 85 of the Treaty, 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 (for Article 85 of the Treaty, see Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; *Reiff*, cited above, paragraph 14; and *Delta Schiffahrts-und Speditionsgesellschaft*, cited above, paragraph 14; for Article 86 of the Treaty, see Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31).

54 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 (see Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; *Reiff*, paragraph 14; and *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14).

55 By adopting the national legislation in question, the Italian Republic clearly not only required the conclusion of an agreement contrary to Article 85 of the Treaty and declined to influence its terms, but also assists in ensuring compliance with that agreement.

56 First, Article 14(d) of Law No 1612/1960 requires the CNSD to compile a compulsory, uniform tariff for the services of customs agents.

57 Secondly, as is clear from paragraphs 41 to 44 of this judgment, the national legislation in question wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs.

58 Thirdly, the Italian legislation expressly prohibits registered customs agents from derogating from the tariff (Article 11 of Law No 1612/1960) on pain of exclusion, suspension or removal from the register (Articles 38 to 40 of the Decree of the Minister for Finance of 10 March 1964).

59 Fourthly, although no provision laid down by law or regulation confers on the Minister for Finance the power to approve the tariff, it remains the case that the Decree of the Minister for Finance of 6 July 1988 bestowed upon it the appearance of a public regulation. First, publication in the 'General Series' of the *Gazzetta*

Ufficiale della Repubblica Italiana gave rise to a presumption of knowledge of the tariff on the part of third parties, to which the CNSD's decision could never have laid claim. Second, the official character thus conferred on the tariff facilitates the application by customs agents of the prices that it sets. Lastly, its nature is such as to deter customers who might wish to contest the prices demanded by customs agents.

60 In the light of the foregoing considerations, it must be held that, by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the CNSD 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, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty.

Costs

61 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the National Council of

Customs Agents (Consiglio Nazionale degli Spedizionieri Doganali — CNSD) 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, the Italian Republic has failed to fulfil its obligations under Articles 5 and 85 of the Treaty;

2. Orders the Italian Republic to pay the costs.

Gulmann Wathelet Moitinho de Almeida

Jann Sevón

Delivered in open court in Luxembourg on 18 June 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber