OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 October 1993 *

Mr President,
Members of the Court,

1. By an application lodged at the Court Registry on 13 April 1992, the Commission brought an action for a declaration that the Italian Republic had failed to fulfil its obligations by adopting 'measures, provisions and practices' relating to customs declarations which were said to be incompatible with Regulations (EEC) No 222/77 [1] (hereinafter referred to as 'the transit regulation') and No 3632/85 [2] (hereinafter referred to as 'the declaratory regulation') . It also claimed that the defendant had infringed Articles 9 and 12 of the EEC Treaty by approving mandatory tariffs for the business services of Italian customs forwarding agents.

2. The contested legislation, namely the 'Testo Unico delle disposizioni legislative in materia doganale' (Consolidated text of the legislative provisions in customs matters, hereinafter referred to as 'the Code') was approved by Decree No 43 of the President of the Republic of 23 January 1973 [3] and has already been the subject of the judgment of 25 October 1979, [4] in which the Court was asked to examine the compatibility of certain of its provisions with Articles 30, 34 and 50 of the EEC Treaty, and not with any secondary legislation.

3. I shall briefly review here the relevant provisions of Community and national law; for a more detailed discussion, reference should be made to the Report for the Hearing. [5]

I — The declaratory regulation

4. According to the third recital in the preamble to the regulation:

'(...) the conditions under which a person is entitled to make a customs declaration must be defined at Community level so as to enable Community economic operators to carry out their customs formalities as efficiently as possible'.

* Original language: French.

1 — Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1).

2 — Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration (OJ 1985 L 350, p. 1).

3 — *Supplemento ordinario alla Gazzetta Ufficiale della Repubblica Italiana*, No 80 of 28 March 1973.

4 — Case 159/78 *Commission* v *Italy* [1979] ECR 3247.

5 — I — Facts and procedure.

5. To this end, Article 2 provides that 'the customs declaration may be made by any person able to produce or cause to be produced to the competent customs authority (...) the goods in question as well as all documents (...) governing the customs regime requested for the goods'.

6. Article 3 makes it possible for a customs declaration to be made in three different ways:

(a) in one's own name and on one's own behalf;

(b) in the name and on behalf of another person (authorization with representation or 'direct' representation);

(c) in one's own name but on behalf of another person (authorization without representation or 'indirect' representation).

According to Article 3 (2), the option of authorization without representation may be exercised only if the Member States have so provided. In such cases, recourse to the option in (b) *or* (c) may be limited by them to persons making customs declarations on a self-employed basis, either as their principal occupation or as a secondary activity related to another occupation.

7. Finally, Article 6 enables Member States to limit pursuit of the said activity to authorized persons, having regard specifically to the professional qualifications required of them and the guarantees furnished by them. Article 6 also leaves Member States free to decide that, for the purpose of making declarations in their own name and on their own behalf (Article 3 (1) (b], undertakings may use the services of paid employees specializing in making customs declarations only if they have a suitable professional qualification.

8. Substantively, the Code provides that any owner of goods may make a customs declaration either *directly* (first paragraph of Article 56) or *by representation*, on condition that the representative is a registered customs agent (second paragraph of Article 40), or if not duly registered, that he is an employee of the owner (first paragraph of Article 43).

9. Under the second paragraph of Article 56 of the Code, anyone is deemed to be the owner of the goods who presents them for customs clearance or has possession of them at the time of entry on to the customs territory or exit from that territory, which, according to the defendant, corresponds to the Community definition of 'declarant' by recourse to a legal fiction.

10. Article 47 et seq. of the Code make provision for the same authorization procedure and conditions for admission of self-employed and non-self-employed customs forwarding agents.

11. The Commission has four grounds for complaint with regard to that legislation:

— it is not in line with the definition of who is authorized to make a customs declaration, set out in Article 2 of the regulation;

— it is not possible in practice to make declarations in one's own name and on behalf of another person without having recourse to customs forwarding agents;

— the Code discriminates against legal persons as opposed to natural persons;

— the procedure for the appointment of employees specialized in making customs declarations is incompatible with Community law.

12. I shall examine these objections one by one.

A — *Infringement of Article 2*

13. As I pointed out earlier, the regulation sets out to define, in a uniform manner throughout the Community, who may be authorized to make a customs declaration to the competent authority; that being so, the Commission takes the view that the definition of 'declarant' as set out in the Code jeopardizes the direct effect of the regulation and constitutes a failure to comply with Community law.

14. Although the regulation refers to the person able to produce or cause to be produced the goods in question, Article 56 of the Code refers to the concept of owner, which includes the holder of the goods or the person producing them to customs.

15. One would thus have to conclude that the need for uniformity would be compromised by the retention of a provision which defines the person authorized to make a customs declaration by reference to concepts which are alien to the declaratory regulation.

16. This is a terminological dispute. In examining the Commission's complaint, the point is not to investigate whether the *content* of Article 56 of the Code is contrary to the declaratory regulation, but whether it is in conformity with Community law to use the Code's categories, namely owner, holder or person producing the goods to customs.

17. If the Court's case-law condemns any measure, even though it may be in conformity, which transposes a regulation into national law, a Member State must not *a for-*

tiori be allowed to maintain, as in this case, a provision which is inconsistent with Community law.

18. It follows from the Court's judgment in *Zerbone* v *Amministrazione delle Finanze dello Stato* [6] that

'by reason of the obligations imposed on them by the Treaty Member States must not impede the direct effect of regulations or other rules of Community law; [7]

the scrupulous observation of this duty is an indispensable requisite for the simultaneous and uniform application of Community regulations throughout the whole of the Community; [8]

accordingly Member States must not adopt or allow national institutions with a legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned.' [9]

19. Merely to maintain in force a national provision which is incompatible with a Community regulation was condemned by the Court, in *Commission* v *Germany*, [10] in the following terms:

'(...) if a provision of national law that is incompatible with a provision of the Treaty, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law; maintaining such a provision in force therefore amounts to a failure by the State in question to comply with its obligations under the Treaty.' [11]

20. Thus, maintaining in force the provision in question, through the retention of a definition which differs from that adopted by the relevant Community regulation, hinders the direct effect of that provision and constitutes an obstacle to its uniform application on Community territory.

21. It follows that the complaint is well founded.

6 — Judgment in Case 94/77 [1978] ECR 99.
7 — Paragraph 24.
8 — Paragraph 25.
9 — Paragraph 26.
10 — Judgment in Case 74/86 [1988] ECR 2139.
11 — Point 10.

B — *Infringement of Article 3*

22. The dispute on this point is of a substantive rather than a semantic nature.

23. Here the Commission is contesting not just the content of the Italian customs provisions, but also the practice which, in its view, amounts to a refusal to recognize that 'a person meeting the conditions of Article 2 of the declaratory regulation can actually make a declaration in his own name but on behalf of another person, *independently* of the form of representation reserved for customs forwarding agents'. [12]

24. Taking a look, first of all, at the practice in question, the Commission refers to 'numerous complaints' [13] from undertakings or associations which, it claims, have protested at the restrictive conditions applying to declarations made in their own name but on behalf of another person. Such complaints were neither communicated to the defendant at the pre-litigation stage, nor produced in evidence, with the result that they cannot be taken into consideration by the Court.

25. Secondly, so far as concerns the content of the Italian rules, the Court considered the existence of representation in one's own name and on behalf of another person in the abovementioned case of *Commission* v *Italy* in the following terms:

'(...) this possibility operates by way of the *legal fiction* contained in the second paragraph of Article 56 of the Code and treats as owner the person who presents the goods or makes the declaration in his capacity as having possession of them or by way of the legal concept of "indirect agent", whereby the declarant acts on behalf of the owner but in his own name and is jointly liable with the owner (...)'. [14]

26. The circumstances in which the Court came to this conclusion deserve to be recalled.

27. In the aforesaid case, in which the two sides differed in their interpretation of Article 56, the Court said:

'(...) the Italian Government formally stated, without being contradicted on this point by the Commission, that that provision should be interpreted and in fact was applied by the competent Italian authorities as meaning that the owner of the goods who does not make the declaration himself may, apart from the possibility of having recourse to an independent agent or employee agent, authorize any-

12 — French translation of the application, p. 14.

13 — French translation of the reply, p. 8.

14 — Paragraph 14, emphasis added.

one to make the declaration provided only that such person presents the goods to the customs or has possession of them when they enter or leave the customs territory; this includes *inter alia* the carrier and those storing the goods. It was also stated that the last sentence of Article 56, to the effect that "This is without prejudice, in every case, to the right of the Customs to ascertain, for all the purposes of the present Code, the identity of the owner of the goods which are the subject of the customs transaction in question", does not mean that the authorities may refuse to accept the declaration of a person who is not the owner who presents or has possession of the goods but is intended to allow the authorities to make the owner jointly liable with the declarant for the duties and penalties as is specified in Article 38 of the Code. [15]

(...)

Having due regard to those statements the Court finds that the interpretation of the provisions in question is compatible with their wording.' [16]

28. The Italian Republic and the Commission disagree on whether that decision has any bearing on the present case.

29. Let us say it would have been better if, in order to satisfy the requirement of transparency, the Italian Republic had not confined itself, following the entry into force of the declaratory regulation, to retaining in its range of legislative measures a provision which takes effect only by recourse to a 'legal fiction'.

30. The Court's decision is, however, unambiguous. The second paragraph of Article 56 of the Code, which is what the Commission is contesting here, was deemed by the Court to introduce into Italian law the notion of making a customs declaration in one's own name and on behalf of another person.

31. In the absence of any fresh elements, duly supported by proof, the Court's analysis must be upheld, since it has become conclusive.

32. That being so, the scope *ratione personae* of the second paragraph of Article 56 would not appear to be defective so far as concerns the requirements of the declaratory regulation.

33. As that regulation does not state that the national provision referred to in Article 3 (2) has to be adopted subsequently, the Italian Republic was justified, in the light of the Court's judgment, in taking the view that the abovementioned national provision was sufficient, and it was therefore entitled to rely on the reservation provided for in Article 3 (3) .

15 — Paragraph 12.
16 — Paragraph 14.

34. It remains to be determined whether, by maintaining in force the relevant articles of the Code, the Italian Republic complied with the option prescribed by the latter provision.

35. The second paragraph of Article 40 and the first paragraph of Article 43, concerning self-employed customs agents and specialized employees respectively, provide only for a system of 'direct' representation (Article 3 (1) (b].

36. On the other hand, 'indirect' representation (Article 3 (1) (c], which is referred to in the second paragraph of Article 56, does not require express authorization by virtue of the aforementioned legal fiction. It is not in any way restricted to customs agents only.

37. As they do not overlap, the aforementioned provisions of the Code respect the option provided for in Article 3 (3) of the declaratory regulation; no counter-argument can be derived from the circular issued by the Italian Ministry of Finance on 10 August 1989, which reaffirms the possibility for 'holders of goods to carry out themselves the requisite customs operations in the absence of the owner of the goods, without availing themselves of the services of a customs forwarding agent'. [17]

38. Any breach by this circular of Council Regulation (EEC) No 1031/88 of 18 April 1988 determining the persons liable for payment of a customs debt [18] would merely concern the system of liability and not the existence of indirect representation, with the result that, not having been raised as a separate complaint, it cannot be examined in these proceedings.

39. Accordingly, the complaint cannot be upheld.

C — *Discrimination between legal and natural persons*

40. The third complaint, it will be recalled, concerns the alleged discrimination in the Italian legislation between legal and natural persons, the Commission taking the view that legal persons cannot make a customs declaration in their own name and on their own behalf.

41. It is true that the declaratory regulation does not distinguish between legal and natural persons when it comes to making declarations. Both the former and the latter must have access, under the same conditions, to the various options provided for in Article 3.

17 — Annex IV to the reply, p. 1.

18 — OJ 1988 L 102, p. 5.

42. There would, however, appear to be nothing in the Code to prevent legal persons from making declarations in their own name and on their own behalf.

43. Nowhere does it state that the governing body of an undertaking is obliged to call on the services of customs forwarding agents. An undertaking acts of necessity through persons lawfully empowered to represent it, who are thus conventionally said to be its representatives, but this kind of representation cannot, without stretching the point too far, be equated with the kind of representation envisaged in the Code.

44. Apart from the holder or person producing the goods to customs, a legal person may therefore, as the Italian Government rightly points out, make customs declarations:

— either in his own name and on his own behalf, through those lawfully empowered to 'represent' him;

— or by way of direct representation, through customs forwarding agents or specialized employees.

45. It is true that Article 43 of the Code does not authorize him to make use for this purpose of an employee not specialized in making customs declarations. Such a restriction, provision for which is made expressly in Article 6 of the declaratory regulation, is not incompatible with Community law.

46. It follows that this plea is unfounded.

D — *Infringement of Article 6*

47. We have seen that Article 6 allows a Member State to reserve the making of customs declarations with or without representation to persons authorized to do so by that Member State, having regard to their professional qualifications and guarantees, and to authorize employees specialized in making declarations to do so in the name and on behalf of their employers, provided they have a suitable professional qualification.

48. Article 47 of the Code provides for the status of customs agent to be conferred by the grant of a licence issued by the Ministry of Finance to persons who have passed an examination, comprising a written test, a practical test and an interview (Article 52), to be held, under Article 50, before a selection board chaired by the Director-General of the Central Administration of the Ministry of Finance and comprising officials from that department and from the department for customs matters and customs agents. The examination is normally held every three years.

49. The Commission takes the view that such restrictive conditions, imposed on customs agents and specialized employees alike, are incompatible with Article 6 of the regulation.

50. I share that view, not because the requirements are the same, but because they seem excessive where specialized employees are concerned.

51. Article 6 makes the following distinction: while registered customs agents may be granted *authorization* by the competent authorities where they hold *the requisite* professional qualifications and provide the guarantees required, specialized employees can only be required to produce *evidence* of *a suitable* professional qualification.

52. Is it possible, however, as the Italian Government maintains, to derive a contrary argument from the sixth recital in the preamble to the regulation? [19]

53. There is no reason to think so, given that a similar distinction is made there between *the* 'requirements' imposed on customs agents and *the* 'suitable professional qualification' required in the case of specialized employees. While that regulation does not preclude the maintenance in force of national legislation in the matter, that is subject to the compatibility of the *requirements* for authorization, which must not impede proper access to the occupation in question. Since that regulation makes a distinction with regard to the scope for reviewing suitability, national legislation must not make the two occupations subject to the same requirements for authorization.

54. The infringement would therefore appear to be established in that respect.

II — The transit regulation

55. Regulation (EEC) No 222/77 is designed to facilitate Community transit with a view to avoiding 'the simultaneous application of several administrative procedures'. [20]

56. Title II of the regulation, which is concerned more specifically with the external Community transit procedure, provides in Article 12 (3) that

'The T1 declaration shall be signed by the person who requests permission to effect an external Community transit operation or by his authorized representative (...)'

19 — This states as follows:
'(...) there exist in certain Member States rules limiting pursuit of the occupation of making customs declarations either in the name of another person or in one's own name but on behalf of another person, to persons fulfilling certain conditions, or which make the possibility for undertakings to use the services of paid employees specializing in making customs declarations on behalf of those undertakings subject to the condition that those employees have a suitable professional qualification; whereas, in so far as such rules concern access to and the pursuit of a specific occupation, this regulation does not prevent their being maintained in force;'

20 — Ninth recital.

57. Article 13 of Regulation (EEC) No 1062/87 of 27 March 1987 [21] provides in that regard that:

'Any person named on the reverse of a guarantee certificate presented at an office of departure shall be considered the authorized agent of the principal'.

58. Under the transit regulation, the principal must furnish a guarantee in respect of a transit operation, which may be comprehensive and cover a number of such operations (Article 27) . The guarantee (certificate) may therefore be provided in a Member State other than that in which the customs operations are to be carried out.

59. It follows from those provisions that the principal or his authorized agent may make a customs declaration and submit it to any customs office in the Community; this is not contested by the Italian Republic.

60. Before the action was brought, the Commission criticized the Italian customs authorities' systematic refusal to register transit declarations signed by the principal or his authorized representative, basing its view on complaints allegedly received from certain undertakings and confirmed, moreover, by the German Minister for Economic Affairs.

61. As those complaints had not been communicated to the defendant, which disputes the existence of the practice for which the customs authorities have been criticized, the Commission was compelled, at the stage of the rejoinder, to confine itself to a legal analysis of certain provisions of the Code, concluding that they were incompatible with Community law.

62. That analysis is based on the second paragraph of Article 238 of the Code which, by placing Community transit on the same footing as the customs operations referred to in Article 55, brings into operation the general system of customs declarations and 'hence the system of *representation for customs purposes*, by virtue of the combined provisions of Articles 40 and 56'. [22]

63. The Italian Republic, for its part, relies upon the direct applicability of Community regulations.

64. It would seem that the premiss on which the Commission bases its reasoning is erro-

21 — Commission Regulation (EEC) No 1062/87 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1987 L 107, p. 1).

22 — French translation of the reply, p. 19.

neous since the second paragraph of Article 238 provides as follows:

'The Community transit procedure shall be treated as equivalent to the customs operations provided for in Article 55, and shall have the same effect, so far as concerns the penalties and all other matters which are not provided for *or regulated by Community regulations*. However, that procedure shall not apply to transports of goods which are subject to customs duties and whose origin and point of arrival are in the customs territory or which are shipped from one national port to another'. [23]

65. This provision therefore refers back to Article 55 only in respect of situations which are not governed by Community regulations. Where such a regulation does exist, Article 238 ensures that it takes precedence and has direct effect.

66. Admittedly, this might give rise to some uncertainty which, by itself, may constitute an infringement. However, that is not the approach I would suggest that the Court adopt, in so far as the Commission is basing its argument on this point not on the ambiguous nature of Article 238, but on its substantive incompatibility with Article 13 of the transit regulation, which is not the conclusion I would reach from an examination of the provision in question. [24]

67. I therefore consider that no infringement has been established in that respect.

III — Articles 9 and 12 of the Treaty

68. The Commission claims that Articles 9 and 12 have been infringed in that the tariffs applied by customs forwarding agents are fixed by the public authority and constitute charges having equivalent effect to customs duties, that they are imposed on goods on crossing a frontier and are disproportionate to the services rendered to the trader.

69. It follows from the Court's case-law, which moreover is cited by the Commission, [25] and more particularly from the judgment in *Sociaal Fonds voor de Diamantarbeiders*, [26] that

'... any pecuniary charge, however small and whatever its designation and mode of appli-

23 — Emphasis added.

24 — See, on this point, the Opinion of Advocate General Tesauro in Case C-323/90 *Commission* v *Portugal* [1992] ECR I-1887, at p. 1898.

25 — French translation of the application, p. 26.

26 — Judgment in Joined Cases 2 and 3/69 [1969] ECR 211. See also the judgment in Case 87/75 *Bresciani* [1976] ECR 129.

cation, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense (...), even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product', [27]

constitutes a charge having equivalent effect.

70. According to the Commission, the tariffs applied by customs forwarding agents comply with all the criteria laid down by the Court in that the pecuniary charge is mandatory, its quantum is determined by the public authority, it is levied when the goods cross the frontier and, lastly, the tariffs bear no relation whatever to the service rendered.

71. The Commission's premiss is based on the contention that 'traders have no means at present in Italy of escaping the application of the business tariffs of customs forwarding agents unless they decide to perform the customs operation themselves, which in most cases is impossible in practice'. [28]

72. Moreover, that is confirmed by the information given by the Commission in its Communication of 8 May 1992, [29] according to which 74% of declarations are made by forwarding agents, 3 or 4% by the actual owners of the goods, and the rest — some 22% — by specialized employees or Italian public servants.

73. As regards, first of all, the absence of choice in law, the Code in no way requires declarations, as I indicated earlier, to be drawn up by customs forwarding agents. Holders or persons presenting the goods to customs are authorized to submit a declaration, even if they are not officially approved.

74. Furtthermore, the Court had already established, in the aforementioned *Commission* v *Italy* judgment, that there was no occupational monopoly:

'... several possibilities are open to the owner of goods for having the customs declaration made by a third party without being required, as the Commission maintains, to have recourse to an agent'. [30]

75. As I said earlier, the Commission has not produced any fresh information such as to cast doubt on that appraisal of the relevant provisions of the Code. Nor does the information contained in the Commission's

27 — Paragraph 18.

28 — P. 33 of the French translation of the application. Cf. Also the points made on p. 25 of the French translation of the application.

29 — Document SEC (92) 887 final.

30 — Paragraph 14.

abovementioned communication lead to the conclusion that there has been any infringement on that ground.

76. As regards the percentages set out in that document, the Italian Government maintains that the figure of 22% concerns holders and/or persons producing the goods to customs. [31]

77. Since no firm evidence has been adduced in that regard, the Commission has not by any means demonstrated the existence of a *de facto* monopoly on the part of customs forwarding agents, but at most their dominant position, which can be explained in particular by the practical convenience of having recourse to a professional in such cases, and not by any statutory obligation to do so.

78. In my view, therefore, no infringement has been established in that respect.

79. Having regard to the foregoing considerations, it seems equitable that each party should bear its own costs.

80. I therefore conclude that the Court should:

— declare that the Italian Republic has failed to fulfil its obligations under Articles 2 and 6 of Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration;

— dismiss the remainder of the application;

— order each party to bear its own costs.

31 — P. 11 of the French translation of the rejoinder.