On those grounds,

THE COURT

hereby

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

O'Keeffe Touffait Mertens de Wilmars

Pescatore Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 10 January 1980.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber,
Acting President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 7 NOVEMBER 1979

My Lords,

Introductory

In this action, which is brought by the Commission under Article 169 of the EEC Treaty against the Italian Republic, the Commision seeks a declaration that, in refusing to associate it with "inspection measures" concerning the establishment and the making available of the Communities' own resources, or

to communicate to it the results thereby obtained, the Italian Republic is in breach of its obligations under Community law. The Commission relies specifically on Article 5 of the Treaty, on Article 14 of Council Regulation (EEC, Euratom, ECSC) No 2/71 (OJ L 3 of 5. 1. 1971, p. 1) and on Article 18 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 (OJ L 336 of 27. 12. 1977, p. 1).

The inspection measures in question related to the use by certain persons of forged Community transit documents in order to achieve the importation into Italy of large quantities of butter and other dairy products originating in Eastern Europe without payment of the levies chargeable under Community legislation on imports of such products from third countries. The importations, which were very numerous, took place through various customs posts in Piedmont during 1974 and 1975.

What seems to have happened was this.

The goods left the Netherlands, mostly from Rotterdam, equipped with T 1 documents in which they were described as "butter". Your Lordships remember that T 1 documents are those appropriate under the procedure for "external Community transit" laid down by Title II of Council Regulation (EEC) No 542/69 on Community transit (OJ L 77 of 29. 3. 1969, p. 1), which is now replaced by Council Regulation (EEC) No 222/77 (OJ L 38 of 9. 2. 1977, p. 1). They are to be distinguished from T 2 documents which are used under the procedure for "internal Community transit" prescribed by Title III of Regulation No 542/69. During the course of the journey false T 2 documents, referring to a different description of goods, were substituted for the original T 1 documents. That substitution enabled the goods to cross the Italian frontier free of levies. Once the goods were inside Italy copies of the T 1 documents, forged to make it appear that customs clearance had been effected at Como, were sent back to the Dutch customs authorities, as if from the "office of destination" in accordance with Article 26 of Regulation No 542/69. It appears to be common ground that certain Italian customs officials connived at the irregularities.

The relevant provisions of Community law

The Commission's concern is, of course, due to the fact the under Article 2 (a) of the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Comunities' own resources (OJ L 94 of 28. 4. 1970, p. 19), those resources have, since 1 January 1971, included the revenue from levies "established or to be established by the institutions of the Communities in respect of trade with non-Member countries within the framework of the common agricultural policy".

Article 6 (1) of the Decision provides that agricultural levies and other Community resources, "shall be collected by the Member States in accordance with national provisions imposed by law, regulation or administrative action, which shall, where necessary, be amended for that purpose", and that "Member States shall make these resources available to the Commission".

Paragraph 2 of the same Article empowers the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to "adopt provisions relating to the supervision of collection, the making available to the Commission, and the payment" of the revenues in question. That power of the Council is expressed to be "Without prejudice to the auditing of accounts provided for in Article 206 of the Treaty establishing the European Economic Community, or to the inspection arrangements made pursuant to Article 209 (c) of that Treaty". Article 206 (as amended by the Financial Treaty of 22 July 1975) relates to the Court of Auditors, Article 209 (c) to the inspection of the accounts of the Community.

The Council first exercised its power under Article 6 (2) of the Decision by Regulation No 2/71. That Regulation was replaced, as from the financial year 1978, by Council Regulation No 2891/77. The events that are material in the present case occurred partly before and partly after 1 January 1978, so that both Regulations are in point. Neither of the parties argued that any difference between the two Regulations was relevant to any question that Your Lordships have to decide. So I propose to refer, in the main, to the provisions of the later Regulation.

After reciting, among other things, that "... close cooperation between Member States and the Commission will facilitate the application of this Regulation, which aims at enabling the Communities to dispose of their own resources under the best possible conditions", the Regulation provides so far as material as follows:

By Title I, which is headed "General Provisions":

"Article 1

The Communities' own resources within the meaning of the Decision of 21 April 1970, hereinafter called 'own resources', shall be established by Member States in accordance with their own provisions laid down by law, regulation or administrative action and shall be made available to the Commission and inspected as specified in this Regulation ...

Article 2

For the purpose of applying this Regulation, an entitlement shall be deemed to be established as soon as the corresponding claim has been duly determined by the appropriate department or agency of the Member State.

Where it becomes necessary to rectify an establishment recorded in accordance with the first paragraph, the competent department or agency of the Member State shall make a new establishment.

Article 3

Member States shall take all appropriate measures to ensure that the supporting documents concerning the establishment and the making available of own resources are kept for at least three calendar years, as from the end of the year to which these supporting documents refer.

Article 4

1. Each Member State shall inform the Commission, at the latter's request:

   (a) of the names of the departments or agencies responsible for es-

tablishing own resources and, where appropriate, their status;

(b) of the general provisions laid down by law, regulation or administrative action and those relating to accounting procedure concerning the establishment of own resources and their being made available to the Commission.

2. The Commission shall, at the request of the other Member States, pass to them the information referred to in paragraph 1.

Article 5

Each Member State shall draw up yearly a summary account together with a report on the establishment and inspection of own resources and shall forward this to the Commission before 1 July of the year following the financial year in question."

By Title II, which is headed "accounts for own resources":

"Article 7

1. Acounts for own resources shall be kept by the Treasury of each Member State or by the body appointed by each Member State and broken down by type of resources.

2. The established entitlements shall be entered in the accounts at the latest on the 20th day of the second month following the month during which the entitlements were established.

...

3. Each Member State shall forward to the Commission a monthly statement of its accounts.

Article 8

The new establishment recorded under the second paragraph of Article 2 shall be entered in the monthly return corresponding to the date of these establishments and shall be added to or subtracted from the total amount of established entitlements."

Title III, headed "Making available own resources", contains three lengthy Articles, from which I think I can limit my citations to the following:

"Article 9

1. The amount of own resources established shall be credited by each Member State to the account opened for this purpose in the name of the Commission with its Treasury or with the body it has appointed.

...

Article 10

1. The entry referred to in Article 9 (1) shall be made at the latest by the 20th day of the second month following the month during which the entitlement was established.

...

Article 11

Any delay in making the entry in the account referred to in Article 9 (1) shall give rise to the payment of interest by the Member State concerned ..."

I need not, I think, trouble Your Lordships with the contents of Titles IV, V and VI of the Regulation. In Title VII, which is headed "Provisions concerning inspection measures", Article 18 (which replaces Article 14 of Regulation No 2/71) is of central importance. Omitting references to the Euratom Treaty which are not relevant in the present case, that Article provides as follows:

"1. Member States shall carry out the verifications and inquiries

concerning the establishment and the making available of own resources. The Commission shall make use of its powers as specified in this Article.

2. Accordingly, the Member States shall:

— carry out any additional inspection measures the Commission may ask for in a reasoned request,

— associate the Commission, at its request, with the inspection measures which they carry out.

Member States shall take all steps required to facilitate these inspection measures. Where the Commission is associaterd with these measures, Member States shall place at its disposal the supporting documents referred to in Article 3. In order to restrict additional inspection measures to the minimum the Commission may, in specific cases, request that certain documents be forwarded to it.

3. The inspection measures referred to in paragraphs 1 and 2 shall not prejudice:

(a) the inspection measures undertaken by Member States in accordance with their own provisions laid down by law, regulation or administrative action;

(b) the measures provided for in Articles 206, 206a and 206b of the Treaty establishing the European Economic Community [all of which relate to the Court of Auditors and its work] . . .

(c) the inspection arrangements made pursuant to Article 209 (c) of the Treaty establishing the European Economic Community

. . .

4. The Commission shall from time to time report to the European Parliament and to the Council on the functioning of the inspection arrangements."

We were referred also to Council Regulation (EEC, Euratom, ECSC) No 165/74. That Regulation was adopted under a power conferred on the Council by Article 14 (5) of Regulation No 2/71, which does not seem to have been reproduced in Regulation No 2891/77. Article 14 (5) was in these terms:

"The Council shall, acting unanimously on a proposal from the Commission, determine:

(a) the conditions which officials appointed by the Commission must satisfy when they carry out the verifications provided for in this Article, in particular with regard to professional secrecy and the procedure whereby they exercise their powers of investigation;

(b) where required, other provisions for applying this Article."

The whole of Regulation No 2/71, having been repealed by Regulation No 2891/77 (Article 24) as from 1 January 1978, it may be arguable that the legal basis for Regulation No 165/74 has gone, so that Regulation has ceased to have effect. Both parties however treated it as still in force, or at least as relevant in this case, so I will proceed on that view. For the sake of intelligibility I

should mention that, in the English texts, whereas Regulation No 2891/77 refers to "measures of inspection", Regulations No 2/71 ans No 165/74 call them "measures of control".

Regulation No 165/74, after reciting that:

"... the Member States are introducing measures of control relating to the establishment and making available of own resources ... however, they are obliged to associate the Commission with such measures of control should the Commission so request;

... that obligation covers both measures of control carried out by the Member States and the additional recovery control carried out following a reasoned request by the Commission;

..."

goes on to provide, so far as material, as follows:

"Article 1

The Commision shall be associated with the measures of control referred to in Article 14 of Regulation (EEC, Euratom, ECSC) No 2/71 in the person of those of its officials whom it has specifically appointed for this purpose.

Article 2

The measures of control referred to in Article 1 shall be all those required for the establishment and the making available of own resources, both being provided for in Regulation (EEC, Euratom, ECSC) No 2/71. They shall be carried out by the departments, agencies or national authorities, a list of which shall be notified to the Commission, at the latter's request.

Member States and the Commission shall regularly maintain those contacts likely to facilitate the implementation of Article 14 (2) of Regulation (EEC, Euratom, ECSC) No 2/71 [corresponding to Article 18 (2) of Regulation No 2891/77].

...

Article 3

1. When the Commission is associated with the measures of control carried out by the Member States, the officials which it has appointed:

   (a) shall conduct themselves during the inspections in a manner compatible with the rules and usages prescribed for officials of the Member States with which they are associated;

   (b) shall be bound by professional secrecy, under the conditions laid down in Article 5 below;

   (c) shall be entitled to have contact with debtors only through the responsible national civil servant, on the understanding that it is for the competent national administration to determine where such contacts may take place.

2. As regards organization of work and, more generally, relations with the departments involved in the measures, the measures of control shall be under the direction of the department designated by the Member State pursuant to Article 2 to carry out the measures of control provided for in Article 14 of Regulation (EEC, Euratom, ECSC) No 2/71.

Article 4

1. The Member States shall ensure that the departments or agencies responsible for establishing and making available their own resources

and the authorities which they have instructed to carry out measures of control in this respect, afford the officials appointed by the Commission every assistance necessary for carrying out their duties.

2. Such officials may be associated with national measures of control relating to:

(a) establishment, based on information available to the national departments, of own resources, accounting therefor and making available thereof;

(b) conformity of the operations establishing and making available own resources with the Community rules laid down in the Decision of 21 April 1970 and Regulation (EEC, Euratom, ECSC) No 2/71;

(c) the existence of the supporting documents provided for in Article 3 of Regulation (EEC, Euratom, ECSC) No 2/71, and their conformity with the above operations.

1. All information gathered on the measures of control dealt with in this Regulation shall be subject to professional secrecy. It may not be communicated to persons other than those within the institutions of the Communities or the institutions whose duty it is to know, or be used for purposes other than those which are laid down in Regulation (EEC, Euratom, ECSC) No 2/71 unless prior consent has been given by the Member State which originally provided that information.

2. This Article shall apply to all officials and servants of the Communities."

Contacts between the Commission and the Italian Authorities

I must now summarize the history of the contacts between the Commission and the Italian authorities which gave rise to the present action and which continued after it had been brought.

Those contacts began with a letter dated 26 July 1976 from Mr Cheysson, the Member of the Commission then responsible for the matter, to the Italian Permanent Representative to the Communities (Annex 1 to the Application). The letter referred to information received by the Commission about fraudulent operations concerning the importation into Italy in 1974 and 1975 of milk products coming from third countries, for the most part via Rotterdam, and requested additional inspection measures, to which the Commission should be associated, under Article 14 (2) of Regulation No 2/71. The urgency of such measures was emphasized.

The immediate response of the Italian authorities was positive. Investigations were carried out on 6 and 7 October 1976 in the customs district of Como by Italian customs officers and officials of the Commission. Those investigations bore out the Commission's suspicion that 248 T 1 documents, returned to the Dutch authorities, had been tampered with, and that the goods to which they related had never been properly cleared by the Italian customs. A question also arose, as a result of the investigations, whether a link existed between the irre-

gularities discovered and certain operations that were the object of an inquiry undertaken by the Guardia di Finanza at the request of the Procuratore della Repubblica of Turin. This had been prompted by a road accident involving a lorry carrying illicit butter. The Guardia di Finanza is, it seems, a fiscal police force, which is generally responsible to the Minister of Finance. But one of its functions is to carry out criminal investigations and in so doing it acts, I understand, as a "judicial" police force. It did so, we were told, in this case.

Following the visit of Commission officials to Italy, Mr Cheysson wrote again to the Italian Permanent Representative on 18 October 1976 (Annex 2 to the Application). His letter mentioned three undertakings which he said had been given by the central customs authorities in Italy. viz.:

(a) that they would arrange as soon as possible a meeting with the Guardia di Finanza, to find out whether, in fact, the case was already being investigated by them;

(b) that they would open an investigation of their own in the Milan customs department, to which the customs office at Como was subordinate; and

(c) that they would let the Commission know, before the end of the month, the result of their meeting with the Guardia di Finanza.

The letter stressed the importance of determining the route followed by the importers and of identifying the points of entry into Italy.

On 22 November 1976 the Second in Command of the Guardia di Finanza in Rome made a short report addressed to the Ministers of Finance, of the Treasury, of the Interior, of Foreign Trade, and of Agriculture and Forests, as well as to the Italian Customs and to the Banca d'Italia, referring to an earlier note of his that had not been sent to all of them, but of which he now annexed copies, about the investigations that his officers in Turin had been conducting (Annex 2 to Annex 11 to the Application). No one in Rome, is seems, thought fit at the time to send a copy of that report to the Commission.

On 30 November 1976 the Director General of Customs and Indirect Taxes at the Italian Ministry of Finance wrote to the Dutch Customs to acquaint them with the problem (Annex 1 to Annex 11 to the Application). Among other things, he mentioned the name of the Dutch firm concerned and gave particulars of the vehicles in which the illicit goods had been transported, which appeared to be French.

On 20 December 1976 the Italian Permanent Representative wrote to the Commission in reply to Mr Cheysson's letter of 18 October 1976 (Annex 3 to the Application). He confirmed that there was a link between the subject-matter of the Commission's inquiries and the investigations that had been in progress since 1975 by the Guardia di Finanza. The letter went on to say, however, that matters liable to give rise to criminal proceedings fell ultimately within the province of the judicial authorities.

On 24 January 1977 the Director General for Financial Control of the Commission replied to the Italian Permanent Representative requesting a meeting with the Guardia di Finanza (Annex 4 to the Application).

It seems that in the meantime the Customs office at Turin had asked for a copy of the Guardia di Finanza's full report. On 2 February 1977 the Giudice Istruttore (investigating Judge) at the Tribunale Civile e Penale of Turin wrote to the Customs office saying that the report was subject to the "segreto istruttorio" (the secrecy of the investigation) and could not be released. He mentioned however that the Ministry of Finance had joined in the proceedings as "parte civile" (a civil party) and that its interests would be looked after by the Avvocatura dello Stato (Annex 3 to Annex 11 to the Application).

By a telex dated 8 February 1977 the Italian Permanent Representative rejected the Commission's request for a meeting with the Guardia di Finanza (Annex 5 to the Application). The reason given was that the Commission's right to be associated with inspection measures of an administrative nature did not extend to contacts with the "polizia tributaria" or the "polizia giudiziaria" ("fiscal police" or "judicial police"). The activities of such police forces, it was explained, concerned a stage prior to what was described as "the final activity of establishing financial entitlement, as such, within the meaning of the Community legislation".

The Commission wrote again to the Italian Permanent Representative on 22 March 1977 (Annex 6 to the Application), protesting at the rejection of its request and pointing out that, to date, no significant information had been communicated to it. The letter asked for news of the latest developments in the investigation by the Guardia di Finanza and/or that by the Customs service. In particular, the Commission was anxious to know whether any progress had been made in identifying the final destination of the goods and in estimating the amount of customs duties or agricultural levies that had been evaded.

The reply, from the Italian Deputy Permanent Representative was dated 15 July 1977 (Annex 7 to the Application). It contained a good deal of additional information, resulting from the investigation by the Customs service, in particular as to the customs posts through which the importations had been made. The conclusion reached was that, in all, 327 operations, including those covered by the 248 documents previously examined, had taken place. It was mentioned that information about the misuse of the documents had been sent to the Dutch Customs and also to the Procura della Repubblica at Como with a view to proceedings in respect of forgery and smuggling. We were told by the Italian Government that those proceedings were subsequently joined with the proceedings before the Tribubale of Turin arising out of the separate inquiry conducted by the Guardia di Finanza. The letter also referred to the rejection by the investigating Judge at Turin of the local Customs authorities' request for a copy of the Guardia di Finanza's report.

From the point of view of the Commission, an unsatisfactory aspect of

the letter was the doubt expressed as to its right to the information being sought from the Italian authorities. The point made in the telex of 8 February, that there had as yet been no establishment of entitlement "in the acounting sense", was reiterated. The attention of the Commission was also drawn to Article 36 of Regulation No 542/69, the first paragraph of which provides that where, in the course of a Community transport operation " an offence or irregularity has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with its provisions laid down by law, regulation or administrative action, without prejudice to the institution of criminal proceedings". It was said to be impossible for the Customs authorities, both in law and in fact, to obtain any further information for the Commission.

The view of the law put forward on behalf of the Italian Republic was disputed by the Commission. On 1 December 1977, after other approaches made on behalf of the Commission to the Italian authorities had failed, Mr Tugendhat, who was now the Member of the Commission responsible for budgetary matters, wrote to the Italian Permanent Representative setting out the Commission's view of the law and, in effect, threatening proceedings under Article 169 of the Treaty (Annex 8 to the Application).

The Italian Permanent Representative's reply dated 16 December 1977 (Annex 9 to the Application) added nothing to the contents of his letters of 20 December 1976 and 15 July 1977, although predicting (wrongly, as it turned out) that the inquiry undertaken by the investigating Judge at Turin would shortly be completed.

The Commission thereupon decided to initiate proceedings under Article 169. On 19 January 1978 Mr Tugendhat wrote to the Italian Foreign Minister setting out the commission's complaints and inviting the Italian Government to submit its observations (Annex 10 to the Application).

Two specific complaints were made. The first was that officials of the Commission were not permitted to be associated with part of the administrative investigations in question. That must, I think, be a reference to the refusual of a meeting with the Guardia di Finanza. The second complaint concerned the withholding from the Commission of information disclosed by the inquiries that had taken place in Italy since October 1976.

The Italian Government submitted its observations in a long letter dated 2 February 1978 (Annex 11 to the Application). I need not trouble Your Lordships with the details of that letter because the main points made in it were repeated in argument before us on behalf of the Italian Republic. To the letter were annexed copies of four documents, namely the letter of 30 November 1976 from the Director General of Customs and Indirect Taxes to the Dutch Customs, the short report made on 23 November 1976 by the Second in Command of the Guardia di Finanza, the examining Judge's note of 2 February 1977 to the Turin Customs office rejecting its request for a copy of the Guardia di Finanza's report, and an order of the same Judge dated

24 January 1978 rejecting an application by the Italian Ministry of Finance for information. That application had been made expressly in order to enable the Ministry to meet the Commission's requests. It was rejected by the Judge on the ground that all information in his possesion was secret.

On 21 April 1978 the Commission delivered its reasoned Opinion, declaring that the Italian Republic had "failed to fulfil its obligations under Article 5 of the EEC Treaty and Article 14 of Regulation No 2/71 (now Article 18 of Regulation No 2891/77)" (Annex 12 to the Application). The Opinion included a reference to the Italian Government's failure to obtain the documents to which it was entitled as a civil party in the criminal proceedings before the Tribunale of Turin.

That point evoked a response from the Italian Government which agreed, in a letter of 7 June 1978 (Annex 13 to the Application), to obtain the documents and pass them on to the Commission. Following a meeting in Rome between representatives of the two sides on 21 July 1978, the Commission was sent, under cover of a letter of 8 September 1978, documents which had been obtained from the investigating Judge on application by the Avvocatura dello Stato.

By a letter dated 5 October 1978 (Annex 14 to the Application) the Commission acknowledged receipt of the documents and, at the same time, gave the Italian Government until 20 October to provide certain further information. It seems to have sent a reminder on 31 October.

On 7 November 1978 the Italian Permanent Representative wrote to the Commission to say that the Judge in Turin had made it known the previous day that he had completed his investigation and had sent the papers to the "Pubblico Ministero" for its observations. He envisaged making an order (as I understand it, as to whether there should be a prosecution) within a month. The Italian Finance Administration would then, it was said, be able, as a civil party, to obtain, through the Avvocatura dello Stato, the entire file, the secrecy of the investigation being at an end in accordance with the provisions of the "Codice di procedura penale" (the Criminal Procedure Code). The Permanent Representative asked that, in those circumstances, the Commission should reconsider the time limit it had imposed (Annex 15 to the Application).

An application for the information mentioned in the Commission's letter of 5 October was made to the investigating Judge by the Avvocatura dello Stato on 16 December 1978 (Annex 1 to the Defence). On 20 December 1978, the Pubblico Ministero lodged its observations and on the same day the Judge made an order allowing the Avvocatura dello Stato to take a copy of them (Annex 2 to the Defence).

On 22 December 1978, however, the Commission, having seemingly heard nothing more since the Permanent Representative's letter of 7 November, commenced this action.

The deposit of the file by the Judge at the Registry of the Court in Turin was delayed until February 1979. Pending the adoption by the Judge of a decision as to whether there should be any prosecution,

the Avvocatura dello Stato examined the file and applied for the extraction of certain documents that it considered particularly important, including the full report of the Guardia di Finanza. Those documents were sent to the Commission. (They are annexed to the Rejoinder).

We were told at the hearing that the Judge had not yet made an order as to whether there should be any prosecution.

The questions at issue

The leadings raise a number of questions of interpretation of the relevant Community legislation as well as questions of Italian law and of application of the law to the facts. The Court, in its communication to the parties fixing the date for the hearing, asked them to confine their submissions at that hearing to the questions of interpretation of Community legislation, to the exclusion of the question whether the Italian Republic had provided the Commission with all the documents and information that it ought to have done.

I apprehend that, accordingly, Your Lordships will in the first instance deliver an interlocutory judgment ruling on those questions, of which there seem to me to be three:

(1) Whether the Italian Republic is right in contending that it was not open to the Commission under Article 14 of Regulation No 2/71, and is not open to it under Article 18 of Regulation No 2891/77, to request to be associated with inspection measures carried out by a Member State until after that Member State has completed the process of determining the amount of Community revenue due in a given case;

(2) If not, whether the Commission was precluded from exercising its powers under Article 14, and is precluded from exercising its powers under Article 18, if in the Member State concerned responsibility for carrying out or supervising investigations that may result in criminal prosecutions is entrusted to members of the Judiciary; and

(3) Whether the Commission may be prevented from exercising those powers by reason of the fact that in the Member State concerned criminal investigations, whether they be conducted by judicial or by administrative officers, are covered by a rule of secrecy.

The first question

On the first question, it was contended on behalf of the Italian Republic that there are three distinct phases in the procedure laid down by Regulation No 2/71 and Regulation No 2891/77: first, the "establishment" of the resources; secondly, the "making available" of resources that have been established; and thirdly, the carrying out of "inspection measures". On this view, the Commision's role is to collaborate with the appropriate national agencies in checking to see that the operations of establishing own resources and paying them over have been correctly performed. There is no power of investigation under Article 14 or Article 18 prior to the final determination of entitlement (or non-entitlement) in any given case.

To make sure that I had correctly understood the point, I asked Counsel for the Italian Republic at the hearing whether it followed that, as regards the

fraudulent operations here in question, the procedure was still only in its first phase. He answered that, in his submission, that was so.

To my mind that answer showed the unreasonableness of the contention. The importations here in question took place in 1974 and 1975, and we are now approaching the end of 1979. If the phases were clearly demarcated in the manner suggested, and the Commission were excluded from all but the final one, not only would the trail leading from Rotterdam to Piedmont be cold indeed, but the Community would have been kept out of its resources for years, before the Commission could take the slightest action. That hardly smacks of the "close cooperation between Member States and the Commission ... enabling the Communities to dispose of their own resources under the best possible conditions" of which the preamble to Regulation No 2891/77 speaks.

Nor does the Italian Republic's contention appear to me compatible with the detailed provisions of the relevant legislation.

According to that contention, the Commission's function amounts to hardly more than that of auditing the accounts of own resources that the Member States are required to keep. That seems to me impossible to reconcile with the wording of Article 6 (2) of the Decision of 21 April 1970. The express saving in that paragraph's opening words (repeated in Article 18 (2) of Regulation No 2891/77) of the powers of the Court of Auditors under Article 206 of the Treaty and of the inspection arrangements made pursuant to Article 209 (c) indicate that something different is meant by the "supervision" over the "collection, the making available to the Commission and the payment" of own resources, for which provision was to be made by the Council.

The true nature of the process of "establishing" the Communities' own resources can be gathered from the detailed provisions of Regulation No 2891/77. It is a continuing process of assessment and revision. Article 2 expressly provides for an establishment to be rectified where necessary. Subsequent Articles provide for a system of monthly statements and annual summaries. Where a Member State delays in making an entry in the Commission's account with its Treasury, it is to pay interest. In my opinion, where, owing to some oversight or to fraud, the national authorities fail to collect items of own resources that are due, the result is not that no "establishment" has taken place in respect of which the Commission can exercise its powers of inspection, but that the Community entitlement in respect of the period in question has been incorrectly established. The Commission can then request inspection measures at once.

The second question

The second question is, I think, more difficult.

The Italian Republic is clearly right in contending that the collaboration between the Commission and national authorities envisaged by Regulation No 2/71 and Regulation No 2891/77 is collaboration in discharging adminis-

trative functions not judicial ones. On the other hand, it would produce a strange result if the extent to which the Commission could be associated with inspection measures in each Member State depended upon whether the investigation of crime (as distinct from the trial of persons accused of crime) was regarded in that State as a judicial function or an administrative one.

There appear in fact to be only four Member States where criminal investigation is treated as a function of the Judiciary. They are, besides Italy, Belgium, France and Luxembourg.

In all other Member States the function is discharged by the police or by officials of specialized departments, such as customs and tax officials. Sometimes the police are answerable to or report to a prosecuting authority, such as the "Stats-advokaten" in Denmark, the "Staats-anwalt" in Germany, the "Director of Public Prosecutions" in England and in Ireland, the "Officier van Justitie" in the Netherlands, and the "Procurator Fiscal" in Scotland. But in no case do they report to a Judge. The judicial function is seen in these Member States as limited:

(1) in appropriate cases, to making, on application, orders interfering with personal liberty or proprietary rights, e.g. orders remanding people in custody or authorizing the issue of search warrants;

(2) in certain cases, to deciding whether the evidence adduced by the prosecution is sufficient to justify the accused being committed for trial (such is the role for instance of the examining Magistrate in England and, as I understand it, of the Rechter-commissaris in the Netherlands); and

(3) in all cases, to trying the accused.

There are thus three possible solutions.

The first is to hold that the application, and hence the effectiveness, of the provisions of the Regulations in question as to inspection measures must be different in the Member States that do and those that do not assign the investigation of crime to the Judiciary. There is however nothing in the Regulations to suggest that such a lack of uniformity in their application was intended by their authors. We were referred on behalf of the Italian Republic to Article 4 (1) of Regulation No 2/71 (corresponding to Article 4 (1) of Regulation No 2891/77). But clearly that requires each Member State to inform the Commission of the names of all its departments and agencies responsible for establishing own resources, whatever their status.

The second possibility is to hold that the investigation of crime is, in no Member State, a process with which the Commission may be associated; in other words, that the participation of the Commission in any inspection measures must be halted as soon as those measures involve the investigation of crime. There again there is nothing in the Regulations to suggest that such was the intention. We were told of a declaration which, it was said, had been made in the Council at the time of the adoption of Regulation No 165/74, to the effect that inspection

measures could never apply to proceedings relating to fraud. No copy of any document recording such a declaration was produced, nor indeed would it make any difference if it had: declarations made in the Council cannot affect the interpretation of acts of the Council, as Mr Advocate General Reischl reminded us recently in his Opinion in Case 166/78 *Italy* v *Council* (13 June 1979, not yet reported) citing Case 38/69 *Commission* v *Italy* [1970] 1 ECR 47. In truth to exclude the Commission from all investigations of crime would to be exclude it from concern with the more serious cases, which would be a strange intention to attribute to the authors of the Regulations.

There remains the third possibility, which is to hold that the relevant dividing line is between persons discharging strictly judicial functions and those discharging investigatory functions, rather than between persons having judicial status and those not having it; to hold, in other words, that the investigation of crime, even by a judge, is not a process from which the Commission is excluded. Startling though that solution may appear to some, it is, in my opinion, the least objectionable of the three.

The third question

I turn to the final question, on the secrecy of criminal investigations.

It was admitted on behalf of the Italian Republic that the Italian rule about that was not of constitutional inspiration, nor was it concerned with the security of the State. It was simply the Italian way of giving effect to the practical need, in any criminal investigation, to avoid disclosures, particularly to suspects, that might jeopardize the success of the investigation and also to prevent harm to the reputations of people who might turn out to be innocent. We were reminded that, in this very case, Italian customs officials were implicated in the frauds.

The rules designed to secure the confidentiality of criminal investigations vary considerably from Member State to Member State. I have, after some hesitation, come to the conclusion that no useful purpose would be served by my taking up Your Lordships' time with a review of them. Suffice it to say that the Italian rule seems to be among the most rigid, although we were told of relaxations of it that have been enacted recently; and also that, here again, if each Member State were entitled to invoke its own internal rules so as to limit the Commission's powers of inspection, the scope of those powers in practice would differ widely from one Member State to another. Nor is it necessary to rely on the internal rules of Member States to avoid improper disclosures by Members of the Commission or their officials. Quite apart from the specific provisions of Article 5 of Regulation No 165/74, a general obligation of secrecy is imposed on them by Article 214 of the Treaty.

No difficulty is, in my opinion, caused by the provision in Article 3 (1) (a) of

Regulation No 165/74 that Commission officials should conduct themselves during inspections "in a manner compatible with the rules and usages prescribed for officials of the Member States with which they are associated". There can be no breach of that rule in a Commission official asking for access to information that is available to an official of a Member State with which he is associated. Where, as here, an investigation is carried out by a Judge, there is no breach of the rule in the Commission asking for information available to the Judge, even if that information may not be made available to local customs officers.

In my opinion, therefore, national rules on the confidentiality of criminal investigations may not be invoked so as to prevent the Commission from becoming fully associated with the investigations in the manner prescribed by Article 14 of Regulation No 2/71 or Article 18 of Regulation No 2891/77.

Conclusion

In the result, I am of the opinion that Your Lordships should rule on the questions of interpretation of Community legislation that have arisen in these proceedings as follows:

(1) The Commission was not precluded from requesting under Article 14 of Regulation No 2/71, and is not precluded from requesting under Article 18 of Regulation No 2891/77, to be associated with inspection measures carried out by a Member State before that Member State has completed the entire process of determining the amount of Community revenue due in a given case.

(2) The prosecution of persons for offences connected with the establishment or making available of own resources falls within the exclusive competence of the Member States. On the other hand, the fact that investigations that may result in criminal prosecutions are entrusted in some of the Member States to members of the Judiciary does not prevent the Commission from being associated with such investigations, in accordance with Article 14 of Regulation No 2/71 and Article 18 of Regulation No 2891/77.

(3) Where criminal investigations are covered in a Member State by a rule of secrecy, that rule may not be invoked to prevent the Commission from exercising its powers under Article 14 of Regulation No 2/71 or Article 18 of Regulation No 2891/77.

Should Your Lordships share my views, it will be appropriate, I think, to invite the parties to present further argument, in the light of Your Lordships' rulings, on the question whether the Italian Republic was in fact in breach of its obligations under the Decision of 21 April 1970 and the Regulations. The order as to costs should then await the final outcome of the proceedings.