OPINION OF MR ADVOCATE GENERAL DA CRUZ VILACA
delivered on 22 October 1987 *

Mr President,
Members of the Court,

1. The Commission has asked the Court, pursuant to Article 169 of the EEC Treaty, to declare that by restricting by means of various national and regional provisions access to ownership and rental of housing built or renovated with the help of public funds and access to assisted mortgages to Italian citizens, the Italian Republic has introduced and maintained in its legislation discrimination based on nationality which is liable to hinder the right of establishment, the freedom to provide services and the free movement of workers, in breach of the obligations imposed on it by Articles 48, 52, and 59 of the EEC Treaty and Article 9 (1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968.[1]

2. This case has arisen as a result of a complaint submitted to the Commission by a Belgian citizen residing near Bologna where he carried on business (apparently as a self-employed person), after he had been refused on the ground that he was not of Italian nationality a reduced-rate mortgage loan with a view to purchasing a dwelling in the area in which he was living.

3. The Commission examined the Italian legislation as a result of that complaint and concluded that there were grounds for initiating the procedure provided for in Article 169 of the Treaty.

4. The Italian Government endeavoured to forestall the initiation of proceedings before this Court by issuing to the regions and the national housing institutions a circular in which, after acknowledging that the legislation in question did in fact discriminate between Italian citizens and others as regards access to housing, it stated that the national legislation — although still in effect and applicable to nationals of non-member countries — should be read in the light of the Community rules which were directly applicable, so that nationals of other Member States pursuing their main activities in Italy and/or residing there were to be regarded as equivalent to Italian citizens with regard to access to housing constructed by the public sector and access to the advantages connected with State housing subsidies.

5. In the course of the written procedure, the submissions of the parties — whose arguments have been summarized in the Report for the Hearing — centred on two questions:

6. A — Whether it is possible to remedy a failure to fulfil obligations by means of an interpretative circular.

* Translated from the Portuguese.

1 — Official Journal, English Special Edition 1968 (II), p. 475.

7. B — Whether the principle of equal treatment (or non-discrimination) applies, in the field in question, in matters relating to freedom of establishment (Article 52 of the Treaty) and freedom to provide services (Article 59 of the Treaty).

8. As regards employed persons, the Italian Government conceded during the written procedure that the principle of non-discrimination was fully applicable to them, so that in their case it has acknowledged that the Italian legislation does not comply with the provisions contained in Article 48 of the Treaty and Article 9 (1) of Regulation No 1612/68.

9. At the hearing the Commission informed the Court, however, that by means of a Decree of the President of the Council of Ministers of 15 May 1987 Italy had adopted provisions placing Italian citizens and employed persons who are nationals of other Member States and resident in Italy on an equal footing, thus remedying the alleged failure to fulfil its obligations as regards the latter. Consequently, the Commission abandoned that part of the application which concerned such persons, on the ground that the alleged breach of Article 48 of the Treaty and Article 9 (1) of Regulation No 1612/68 had been terminated.

10. That leaves us with the two questions set out under A and B above.

A — Whether a failure to fulfil obligations may be remedied by means of a circular

11. The argument on that question goes, in brief, as follows:

(1) As the Commission pointed out, and the Italian Government impliedly acknowledged in its reply to the supplementary reasoned opinion, the wording of the circular contains a number of ambiguities and inadequacies which prevent it from fulfilling its aim of making the meaning and ambit of the relevant Community law, with all its requirements, plain.

(2) Apart from that, a ministerial circular is an administrative document which is not fully publicized, in particular by means of publication in the official gazette, and although it may be binding on the administrative authorities subject to the superior authority of the author of the circular, it cannot take precedence over the regional legislative powers and be binding on bodies not subordinate to the central administration.

(3) It is well-established in the case-law of this Court[2] that '... the maintenance of a provision incompatible with the Treaty gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law'. In that context, the Court held[3] that 'the incompatibility of national legislation with provisions of the Treaty, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have

2 — Judgment of 25 October 1979 in Case 159/78 *Commission* v *Italy* [1979] ECR 3247, at p. 3264, paragraph 22.

3 — See, most recently, the judgment of 15 October 1986 in Case 168/85 *Commission* v *Italian Republic* [1986] ECR 2945, at p. 2961, paragraphs 13 and 14.

the same legal force as those which must be amended. As the Court has consistently held with regard to the implementation of directives by the Member States, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the . . . fulfilment of obligations under the Treaty.'

(4) In this case, the uncertain legal position resulting from the existence of measures which may be incompatible with the Treaty is aggravated by the fact that a number of different laws, both national and regional, are involved; moreover, as the Commission has pointed out, the adoption of a new discriminatory law in the region of Veneto some months after the circular was issued confirms the circular's lack of sufficient legal authority.

12. If the Italian legislation is held to be incompatible with Community law, it is irrelevant to inquire whether the circular, after its contents have been revised and clarified and subject to official publication, may be — as the Commission appears to believe — a suitable instrument for terminating the infringement 'provisionally', pending the passing of legislation which conforms to the Treaty.

13. It is also irrelevant to distinguish — as the Italian Government suggests — between provisions 'intrinsically and blatantly incompatible with a Community principle or rule' and others, a distinction whose purpose would appear, in any case, difficult to grasp, particularly as regards possible breaches of the principle of non-discrimination laid down in general terms in Article 7 of the Treaty.

14. Having disposed of the question of the circular, it is now necessary to determine whether and to what extent the Italian legislation at issue violates the Community rules governing the right of establishment and freedom to provide services as defined in Articles 52 and 59 of the Treaty.

B — The alleged infringement of Articles 52 and 59 of the Treaty

15. *(a)* The style of the Commission's argument in the written procedure, in particular in the reply (paragraph 9), produces the impression that the application is directed not only against the condition of nationality which appears in the Italian legislation at issue, but also against the conditions regarding residence or principal activity, conditions which are also imposed by the legislation (in particular Decree of the President of the Republic No 1035 of 30 December 1972 [4]) for access to the benefits associated with subsidized housing and which might be regarded as capable of giving rise to indirect discrimination.

16. The conclusions set out in the original application are strictly confined, however, to the express reservation concerning nationality contained in the Italian legislation, and for that reason the subject-matter of the application cannot be extended.

17. I believe some confusion has been caused by the terms in which the discussion concerning — rather surprisingly — the content of the circular issued by the Italian authorities was conducted; but in any case the Commission explained at the hearing

4 — GURI No 58, of 3.3.1973, p. 1331.

that the application was directed solely against the express condition regarding Italian nationality, which was discriminatory in form and incompatible with Article 7 of the Treaty.

18. *(b)* Article 7 of the Treaty prohibits, without prejudice to any special provisions contained therein, 'any discrimination on grounds of nationality', '*within the scope of application of this Treaty*' (the emphasis is mine).

19. The question which thus arises is whether, and to what extent, that condition regarding nationality is liable to create an obstacle to achieving the aims set out in Articles 52 and 59 of the Treaty regarding the right of establishment and the freedom to provide services, and hence to constitute prohibited discrimination.

20. In *Reyners*[5] and *Van Binsbergen*[6] the question of whether Articles 52 and 59 of the Treaty were directly applicable after the end of the transitional period laid down therein was clarified definitively.

21. In defining the ambit of that direct effect the Court distinguished there between the elimination of obstacles to the freedom of establishment and restrictions on the freedom to provide services, on the one hand, and the adoption of measures designed to facilitate the effective exercise of such freedoms on the other.

5 — Judgment of 21 June 1974 in Case 2/74 *Reyners* [1974] ECR 631.

6 — Judgment of 3 December 1974 in Case 33/74 *Van Binsbergen* [1974] ECR 1299.

22. As regards the first, the Court held as follows:

(a) 'In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 . . . imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures' (*Reyners*, paragraph 26), so that the directives referred to in the Chapter on the right of establishment became superfluous from that moment 'with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect' (paragraph 30);

(b) 'The provisions of Article 59, the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period' (*Van Binsbergen*, paragraph 24), which implies in particular '[the abolition of] any discrimination against a person providing a service by reason of his nationality or the fact that he resides in a Member State other than that in which the service is to be provided' (paragraph 27).

23. As regards the second of those aspects, the Court acknowledged that the directives provided for in the Treaty retained a broad sphere of application in the case of measures to be introduced into Member States' legislation in order to *encourage* or *facilitate* the exercise of those freedoms.

24. The borderline between those two aspects thus remains largely to be determined.

25. *Reyners* and *Van Binsbergen* were concerned with the existence of direct restrictions on the exercise of the right of establishment and of the freedom to provide services based on the nationality or the place of residence of the persons concerned.

26. Subsequently, the Court condemned a number of provisions discriminating against self-employed workers by reason of their nationality although the measures in question were not such as to obstruct the right of establishment, but were merely rules the abolition of which would encourage the exercise of that right.

27. That was the case in particular in the judgments delivered on 18 June 1985 in Case 197/84 *Steinhauser*[7] and 28 January 1986 in Case 270/83 *Commission* v *France*, concerning financial credits.[8]

28. However, those cases were likewise clearly concerned with conditions relating to the pursuit of an activity, understood, as the Court held in *Steinhauser* (paragraph 16), 'in the broad sense of the term'. In any case, the Court had already held in the first case (*Steinhauser*, paragraph 16) that 'the renting of premises for business purposes *furthers* the pursuit of an occupation and therefore falls within the scope of Article 52 of the EEC Treaty' (the emphasis is mine).

29. A similar conclusion emerges from the judgment in *Segers* of 10 July 1986 (Case 79/85 [1986] ECR 2375), where the Court departed perhaps even a little more from the simple consideration of conditions directly linked to the pursuit of an activity by the person seeking to exercise the right of establishment when it held — relying expressly on the Council's General Programme for the abolition of restrictions on freedom of establishment of 18 June 1961 — that 'the requirement that a company formed in accordance with the law of another Member State must be accorded the same treatment as national companies means that the employees of that company must have the right to be affiliated to a specific social security scheme' and that 'discrimination against employees in connection with social security protection indirectly restricts the freedom of companies of another Member State to establish themselves through an agency, branch or subsidiary in the Member State concerned'.

30. Even earlier, in the judgment of 28 November 1978 in *Choquet*[9] — which concerned a requirement that nationals of other Member States who had been established in the Federal Republic of Germany for more than one year and who held a foreign driving licence must obtain a German driving licence — the Court conceded that a provision of that kind was capable in certain circumstances of prejudicing 'the free exercise [by those affected] of the rights which Articles 48, 52 and 59 of the Treaty guarantee them in connection with the free movement of persons, freedom of establishment and freedom to provide services', and must therefore be considered to contravene Community law (paragraph 8).

31. But it also departed from the conditions linked to the pursuit of an activity in *Mutsch* (judgment of 11 July 1985[10]), when it declared that workers who were nationals of

7 — [1985] ECR 1819.
8 — [1986] ECR 285.
9 — Case 16/78 [1978] ECR 2293, at p. 2303.
10 — Case 137/84 [1985] ECR 2681, at p. 2696.

one Member State and resident in another were 'entitled to require that criminal proceedings against [them] take place in a language other than the language normally used in proceedings before the court which tries [them] if workers who are nationals of the host Member State have that right in the same circumstances' (paragraph 18). Thus the Court expressly extended the application of the rule regarding equal treatment to the domain of the worker's private affairs.

32. That case, however, concerned the position of an employed person and the Court held that such an option came under the heading of a 'social advantage' as described in Article 7 (2) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1] according to which workers who are nationals of other Member States must enjoy, in the host Member State, 'the same social and tax advantages as national workers'. In *Even*, a judgment delivered on 31 May 1979, [11] the Court held that that expression embraced 'all those [advantages] which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory . . . '.

33. That interpretation was based, however, on an express provision in a regulation adopted in order to further the aim of free movement of employed persons, and there is no corresponding provision regarding self-employed workers.

1 — Official Journal, English Special Edition 1968 (II), p. 475.
11 — Case 257/78 [1979] ECR 2019.

34. Consequently, it may be asked whether in the case of the latter workers (established or providing services in another Member State), the right to equal treatment extends to matters not directly connected with the pursuit of the occupation, but relating to private matters (such as, for example, access to housing under special conditions).

35. *(c)* Let us consider first the situation of a worker who has established himself in another Member State (in this case, Italy).

36. In any event, that appears to be the situation which led the Commission to bring proceedings under Article 169 of the Treaty.

37. Let us consider for the present solely the case of persons principally established in Italy.

38. Bear in mind that what is at issue is not the right to acquire or lease property destined for the pursuit of an occupation or merely access to real property, but the conditions of access to subsidized housing and to reduced-rate mortgage loans contained in the Italian legislation. According to the information presented at the hearing, apart from the condition regarding Italian nationality, the legislation in question (in particular Article 2 of Decree of the President of the Republic No 1035/72) lists a number of other conditions for access to housing or to the benefits

connected therewith. In particular, it is necessary to have one's residence or principal activity in the commune where the housing is to be, to have no other real property in the place where the subsidy is being applied for, not to have received public housing aid in any other form and to have a family income lower than a particular amount.

39. The representative of the Italian Republic explained that the system in question was for the benefit of citizens and families of low income, who are to be given access to housing near their place of work; such payments are covered by State budgetary resources, enabling the State to assist the lowest income categories for whom it is most difficult to resolve the difficulty of finding housing on the open market.

40. That circumstance naturally makes it a sensitive area of social policy for the central State or the regions, involving considerations of a financial nature which naturally require a certain degree of caution.

41. Conversely, it is that circumstance which enables us to establish the necessary link with problems relating to the right of establishment.

42. It is in fact an area which, in view of the conditions which are imposed, can only affect, in the case of self-employed workers, business enterprises of small, or at most medium size, that is to say, mostly individual or family businesses.

43. For such people setting up a business generally coincides with their access to employment as self-employed persons.

44. For such businesses the separation between professional activities and living conditions of a personal or family nature, in particular housing conditions, is not at all clear-cut. The social and economic position of persons pursuing such an occupation is similar to that of employed persons and that is why the representative of the Italian Government submitted at the hearing that they could be assimilated.

45. Naturally, that does not apply in the case of owners of large companies, who would in any case find it very difficult to fulfil the other requirements imposed by Italian legislation for access to social housing — those being conditions which in themselves are not discriminatory because they apply to all interested persons, whether Italian or not.

46. Just as the Court held in *Mutsch* (paragraph 16), that 'the right to use his own language in proceedings before the courts of the Member State in which he resides, under the same conditions as national workers, plays an important rôle in the integration of a migrant worker and his family into the host country, and thus in achieving the objective of free movement for workers', it must likewise be conceded that the possibility of obtaining subsidized housing on the same conditions as those guaranteed to nationals contributes significantly to the integration of self-employed workers and their families into the host country, thereby assisting, particularly in such cases, the achievement of freedom of establishment in the common market.

47. Recognition of that entitlement may even be the factor on which the continuance of the establishment depends, as was proved by the example given at the hearing on which the representative of the Italian Republic was asked to give his comments. Access to particularly favourable conditions of subsidized housing may well be, at a time when economic difficulties force the small businessman to reduce his costs drastically, the last recourse he may have in order to keep his head above the water and to ensure that his small business can survive until market conditions improve.

48. The fact is that his personal and business affairs are so closely linked that in such circumstances any factor which affects the first is liable to directly affect the future of his establishment.

49. The requirement of nationality in order to have access to social housing thus means that Italian citizens may make use of this 'safety valve', whereas it is not available to citizens from other Member States who may, for that reason, if they are unable to bear the cost of their previous family abode, be obliged to close down and even return to their country of origin. Yet these are workers already integrated into the social and economic life of the host country, in which they are pursuing an activity which gives them rights and obligations (principally taxation) on the same footing as Italian citizens. As the Court held in *Reyners*, the effective exercise of the freedom of establishment is also linked to the need to '(assist) economic and social interpenetration within the Community in the sphere of activities as self-employed persons' (paragraph 21), which is essential to the achievement of a true 'citizens' Europe'.

50. When this ultimate possibility was presented to the representative of the Italian Government he conceded, at the hearing, that his government had no 'objection in principle' to the Commission's argument as regards the right of establishment where the latter was the principal establishment, objecting only to the extension of that argument to secondary establishments and the provision of services and to its application to other fundamental conditions for access to subsidized housing.

51. I consider, therefore, that I am justified in suggesting that the Court uphold the application in that respect, on the ground that the requirement of Italian nationality for access to subsidized housing contained in the national legislation at issue is in breach of the rules governing freedom of establishment contained in Article 52 of the EEC Treaty.

52. In my view, that is the only way in which, within the scope of the Treaty, the requirements devolving from the fundamental principle of non-discrimination or equal treatment set out in Article 7 may be fulfilled. As the Court declared in *Mutsch* (paragraph 12), 'that provision must be applied in every respect and in all circum-

stances governed by Community law to any person established in a Member State'.

53. In *Mutsch* (as the Court stated, in paragraph 14 of the decision, *after* enunciating that principle) the connection with Community law was established by reference to Articles 48 and 49 of the Treaty and to the provisions of secondary law adopted in order to implement them; in this case, the connection results from the application of Article 52 of the Treaty. [12]

54. Let us not forget, too, that the EEC Treaty includes among the fundamental principles on which the Community is based the freedom of establishment, a fundamental freedom on a par with the free movement of persons and the freedom to provide services, which are guaranteed by Articles 3 (c), 48, 52 and 59 of the Treaty. [13] The Court has held that Article 52 is 'one of the fundamental provisions of the Community'. [14]

55. The Court has interpreted those fundamental provisions and the requirements flowing from them broadly, as is shown by the cases I have cited. [15]

56. Any derogations from or resrictions of those freedoms have, by contrast, been construed by the Court very strictly. [16]

57. It is also noteworthy that the advantages we are considering here — although they are not really 'rights generally linked to activity as a self-employed person' — are all facilities of the kind expressly provided for in the General Programme for the abolition of restrictions on freedom of establishment, [17] Title III 'Restrictions', and therefore fall within the general scope of the activities mentioned therein:

'A — . . .

(a) to enter into contracts, in particular contracts for . . . tenancies, . . . and to enjoy all rights arising under such contracts;

. . .

(d) to acquire, use or dispose of movable or immovable property or rights therein;

. . .

(f) to borrow, and in particular to have access to the various forms of credit;

(g) to receive aids granted by the State, whether direct or indirect.'

58. I am therefore of the opinion that — even bearing in mind the level of integration already achieved in the common market, in particular as regards freedom of establishment — this small extra step in the line of case-law already laid down by the Court should be made.

59. *(d)* By contrast, I do not consider that the Italian legislation prejudices either the right of establishment where the establishment is a secondary one, or the freedom to provide services.

60. In neither case is there a permanent or a stable link between the self-employed

12 — See also the judgment of 13 February 1985 in Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593, at pp. 611, 612, paragraphs 15, 25 and 26.

13 — See judgment of 7 February 1979 in Case 115/78 *Knoors* [1979] ECR 399, at p. 409, paragraph 19.

14 — *Segers*, paragraph 12.

15 — See also the judgment of 4 April 1974 in Case 167/73 *Commission* v *France* [1974] ECR 359, at p. 359, paragraph 17 *et seq*; judgment of 13 July 1983 in Case 152/82 *Forcheri* [1983] ECR 2323, at p. 2335, paragraph 11.

16 — See, for instance, *Reyners*, on the interpretation of the first paragraph of Article 55, paragraph 33 *et seq.*, in particular paragraph 43; judgment of 17 December 1980 in Case 149/79 *Commission* v *Belgium* ECR 3881, at pp. 3903-4, paragraphs 19 and 22.

17 — Official Journal, English Special Edition, Second Series No IX, p. 7.

worker and the place where he pursues his activities, which would constitute a sufficient relationship between those activities and the conditions for access to housing or at least enable one to conclude that the requirements governing access to housing were liable to give rise to actual discrimination against such a worker compared with nationals.

61. In view of the manner in which the Treaty refers, in Articles 52 and 59 respectively, to the right of establishment and the freedom to provide services, I consider it important from the legal point of view to distinguish in a case like this between the right of establishment where that establishment is the principal one, on the one hand, and the same right where the establishment is a secondary one and the freedom to provide services, on the other, since they rely on different premises.

62. The first sentence in the first paragraph of Article 52 covers simply 'restrictions on the freedom of establishment of *nationals of a Member State in the territory of another Member State*', whereas the second sentence refers, more specifically, to 'restrictions on the setting up of agencies, branches or subsidiaries by *nationals of any Member State established in the territory of any Member State* (my emphasis), whether the same as that of the secondary establishment or a different one. [18]

18 — The Portuguese version of the Treaty in this instance appears to me to be unfortunate, its terms being more restrictive than those of the other language versions: 'nacionais de um Estado-membro estabelecidos no território de *outro* Estado-membro', which does not correspond precisely to 'ressortissants d'un Etat membre établis sur le territoire *d'un* Etat membre'(French version), 'cittadini do uno Stato membro stabiliti sul territorio *di uno* Stato membro'(Italian version) or 'nationals of any Member State established in the territory of *any* Member State'(English version). The Portuguese version could give the impression that the right to a secondary establishment in another Member State is not available to a national of a Member State established in his own country of origin.

63. Article 59 provides for the abolition of restrictions on the freedom to provide services in the Community 'in respect of nationals of Member States who are *established in a State of the Community other than that of the person for whom the services are intended*' (my emphasis).

64. What is at issue in this case is recognition of entitlement to a social advantage which is designed to resolve a problem of a personal and family nature which presupposes long-term integration in the economic and social life of the area in which the housing is situated.

65. Consequently, exclusion from such an advantage is in no way incompatible with the exercise by nationals of other Member States of the right to open an agency, branch or subsidiary in Italy or to go there at more or less regular intervals to provide services, whilst maintaining their main centre of activity in another Member State or even — in the first case — in another region in Italy.

66. In the absence of harmonization in this area at Community level Italy cannot be asked to give access to subsidized housing to all citizens from other Member States who exercise or seek to exercise in Italy any of those rights. Such a requirement would be foreign to the social aims of the subsidized housing scheme financed out of public funds laid down in the legislation at issue.

67. If that requirement was imposed, it would result in more favourable conditions being imposed on nationals of other

Member States than on Italian citizens who are not entitled to subsidized housing because they have no permanent residence or principal activity in the place where the housing is available.

68. The Court has held [19] that 'Article 52 is intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as a self-employed person receive the same treatment as nationals of that State and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality'. In those circumstances, 'freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down by the legislation of the country of establishment for its own nationals'. It was clear from the second paragraph of Article 52 and from its context, the Court held (as regards the activity at issue in that case, but in terms which may be applied generally), that provided that such equality of treatment was respected, each Member State was, in the absence of Community rules in the area, free to lay down rules for its own territory governing the activities covered by the exercise of the right of establishment.

69. Similarly, the third paragraph of Article 60 provides that 'the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*' (the emphasis is mine).

19 — Judgment of 12 February 1987 in Case 221/85 *Commission* v *Belgium* [1987] ECR 719, paragraphs 9 and 10.

70. The conditions imposed in this case are certainly not conditions which are neutral on the face of it but result in discrimination based on nationality or create an unreasonable obstacle to the exercise of the relevant rights.

71. If that is the case as regards conditions directly connected with the pursuit of activities, it cannot be said, for a number of reasons, of conditions relating to the private sphere of the individual.

72. To extend to secondary establishments and the provision of services the requirement of entitlement to subsidized housing might even, as Italy pointed out, go beyond the conditions laid down in Regulation No 1612/68 in the case of employed persons, as set out in Article 9 (2) of the regulation.

73. In view of the nature of the rights which we are discussing reference to Italian nationality as a condition for access to housing is, in principle, not liable to have any practical effect as regards the citizens of other Member States.

74. It is therefore not surprising that the Commission conceded at the hearing that the situation was considerably more delicate in those respects than as regards principal establishments, although it emphasized that it would be useful to ascertain, in each individual case, whether there was a link between the provision of services and the need for housing — something which I consider quite unjustified.

75. In that context it would be more logical, in any case, to consider special cases which might arise in connection with

secondary establishments, where perhaps the person might wish to transfer his residence to the place of that establishment: however, in view of the nature of the housing in question and the other conditions governing access to it (family income, etc.) I consider that, in principle, the legislation in question cannot apply where there is more than one establishment.

76. Moreover, in the case of a secondary establishment it is quite possible that in most cases the situation to be considered in connection with the exercise of that right, that is, the management of the establishment (which is the only context in which there may be a long-term personal link of the kind which may raise the question of access to subsidized housing) will be rather that of a paid worker, which is governed by different Treaty provisions.

77. It is thus not at all certain that the Italian legislation may be regarded, in that respect, as contrary to Community law.

78. It would be different if the Italian legislation introduced discrimination against nationals of other Member States as regards access to housing changing hands on the open market; however, that is not the case in these proceedings, so that it is not necessary to consider that possibility.

79. In any case, the restriction is not one which obstructs the effective exercise of the right of establishment if there is another establishment in another Member State, because the doctrine set out in the judgment in *Klopp*,[20] based on the general principles set out in the second sentence of the first paragraph of Article 52 (see, in particular, the closing words of paragraph 20 of that decision) does not apply.

C — Conclusion

80. In the light of what I have said it remains for me to propose that the Court declare that the Italian Republic has failed to fulfil its obligations under the second sentence of the first paragraph of Article 52 of the EEC Treaty by maintaining in force provisions which make access by self-employed workers to ownership and rental of housing constructed or renovated with the aid of public funds, and access to reduced-rate mortgages, subject to possession of Italian nationality. I consider that the remainder of the application should be rejected.

81. In the light of that, and also because the Commission abandoned its argument regarding the incompatibility of the Italian legislation with Article 48 of the Treaty as a result of the conduct of the Italian Republic, which did not adopt the necessary national measures until after this application had been brought — I consider that the costs should be apportioned between the parties in accordance with Article 69 (3) of the Rules of Procedure.

20 — Judgment of 12 July 1984 in Case 157/83 *Ordre des avocats au barreau de Paris* v *Onno Klopp* [1984] ECR 2971, at p. 2990.