On those grounds,

THE COURT (Fourth Chamber)

in answer to the question referred to it by the Corte d'Appello, Catania, by order of 18 June 1982, hereby rules:

According to the existing Community customs provisions the removal by third parties of goods subject to customs duty, even through no fault of the taxable person, does not extinguish the obligation to pay duty on them.

O'Keeffe Pescatore

Bosco Koopmans Bahlmann

Delivered in open court in Luxembourg on 5 October 1983.

J. A. Pompe
Deputy Registrar

A. O'Keeffe
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 6 JULY 1983 [1]

Mr President,
Members of the Court,

1. This reference for a preliminary ruling concerns Community customs provisions. The point at issue is whether, under those provisions, the fact that goods subject to customs duty are removed by a third party, through no fault of the taxable person, extinguishes the fiscal obligation on the ground that the impossibility of fulfilling that obligation is attributable to a case of *force majeure.*

1 — Translated from the Italian.

The facts may be summarized as follows. In November 1978, alcohol and foreign manufactured tobacco belonging to Mellina Agosta Srl were removed by unknown persons from a warehouse situated within the customs zone of the port of Catania and managed by Esercizio Magazzini Generali SpA. The police authorities ascertained that the thieves had entered by forcing a metal sliding door fitted with two locks. One of the keys to the locks was kept by the company which managed the warehouse and the other by the customs authorities of the port. Subsequently, in January 1979, the Catania customs authorities requested Magazzini Generali and Mellina Agosta to pay approximately LIT 78 000 000 in respect of duty and value-added tax on the stolen goods, in addition, of course, to the legally prescribed interest and costs.

Magazzini Generali lodged an administrative appeal through official channels against that request. It was however rejected and, in June 1979, the customs authorities served an order on that company and Mellina Agosta for payment of the above-mentioned sum. At that point, the two companies brought separate actions before the Tribunale di Catania [Catania District Court]. By judgments delivered in 1981, that court held that the sum was not payable and ordered the administration to pay the costs incurred by the plaintiffs. The administration lodged an appeal and in the course of those proceedings, by two separate orders dated 18 June 1982, the court of second instance stayed the proceedings in the two prallel cases and, under Article 177 of the EEC Treaty, requested the Court of Justice to give a preliminary ruling on the question: "Whether the removal of goods subject to customs duties, carried out in the manner indicated above or, in more general and abstract terms, by methods which assimilate such removal to a case of *force majeure* by virtue of ordinary legal principles, may fall within the concept of *force majeure* as formulated in the Community customs provisions".

By order of 19 January 1983 this Court decided to join the two cases for the purposes of the oral procedure and judgment, on the ground that the parties thereto and the subject-matter thereof were connected.

2. For a better understanding of the question, I think it is appropriate to refer to the Italian customs provisions which were considered in the main action. It was the compatibility of those provisions with the Community legislation which seemed doubtful to the national court.

According to Article 36 of the Consolidated Customs Laws, approved by Decree No 43 of the President of the Republic of 23 January 1973 (Gazzetta Ufficiale [Italian official Gazette] 1973, No 80), "In the case of goods on which customs duty is payable, the event giving rise to the fiscal obligation is constituted ... by their release for consumption in the customs territory". The same text also provides that "goods ... shall be regarded as having been definitively released for consumption [if they have been] unlawfully removed without compliance with customs obligations of [if] in any event they have not been presented within the prescribed periods for customs inspection and control or ... not ... recovered for the purposes of the above-mentioned operations ...". However — and this is the aspect which is of significance in these proceedings — according to Article 37 of the Consolidated Customs Laws, the event giving rise to the fiscal obligation is deemed not to have occurred "when the taxable person establishes that the failure

to fulfil his customs obligations or the failure to present all or part of the goods for customs clearance or for customs inspection or control ... is due to the loss or destruction of the goods through unforeseeable circumstances or through *force majeure* or as a result of events attributable to the minor negligence of a third party or the taxable person himself".

The latter provision has given rise to difficulties of interpretation, in particular as regards the meaning of the word "loss". The financial administration claims that it refers to the "dispersion" (dispersione) of the goods so that they cannot be usefully recovered by anyone. On the other hand, the respondents maintain that the word has a wider scope and covers the non-availability of the goods as a result of the fact that they are lost and are no longer in the possession of the taxable person. The difference between the two views has important practical implications. Suffice it to say that if the second view is accepted, the theft of goods by a third party without negligence on the part of the taxable person represents a "loss" within the meaning of Article 37 and therfore entails the extinguishment of the fiscal debt. Moreover that view was expressed by the Corte di Cassazione [Court of Cassation] in judgments Nos 6148 of 22 December 1978 and 431 of 18 January 1980.

The problem was definitively resolved by Law No 891 of 22 December 1980, (Gazzetta Ufficiale No 355 of 30 December 1980). That Law provides that "the word 'loss' ... in Article 37 of the Consolidated Customs Laws ... must be interpreted as meaning 'dispersion' (dispersione) and not 'removal' (sottrazione della disponibilità) of a product". It adds that the above clarification does not amend Article 37 but merely provides an authentic interpretation (which is therefore effective *ex tunc* rather than *ex nunc*). Naturally, the Corte di Cassazione adapted its view in conformity with the intervention of the legislature. Thus in its judgment No 5769 of 31 October 1981 it recognized that "by express wish [of the legislature] theft has never been included in the concept of 'loss' in the said Article 37".

3. Let us now consider the Community provisions on customs duties which define the cases in which the customs debt is extinguished for reasons not attributable to the taxable person. Indeed, the Italian legislation must be viewed in the light of those provisions in order to determine whether it is compatible.

In that context, Council Directive 69/74/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs warehousing procedure (Official Journal, English Special Edition 1969 (I), p. 82) should be considered first of all. Article 11 provides that "The depositor and warehouse keeper must be able to enjoy complete exemption from customs duties, charges having equivalent effect and agricultural levies in respect of losses occurring during the storage period and attributable to fortuitous events, *force majeure* or causes inherent in the nature of the goods". That provision, therefore, links the exemption (or rather the extinguishment of the customs debt) to only two categories of cause: on the one hand the *vis* or the *casus* and, on the other, the nature of the goods (as in the case of perishable foodstuffs or products

which as a result of their dispersion may no longer be used — an example would be fuel oil spilt onto the road when the tank containing it bursts).

That does not, however, deal with the case of theft. The formula employed by the Community legislature does not make it clear whether the "loss" as a result of *force majeure* relates solely to the destruction of the goods or whether it includes their removal from the importer's possession. It therefore seems to recognize both possibilities. However the fact that Article 11 (3) excludes from the concept of loss "unauthorized removal of goods" would seem to suggest a more restrictive interpretation inasmuch as it provides that for such cases customs duties are to be levied on the basis of the rates applicable on the date of removal. The Italian Government in its defence, correctly, does not suggest that by adopting that line the directive ultimately equates unauthorized removal to release for consumption. It is clear that unauthorized removal is not necessarily equivalent to removal by a third party. Nevertheless the wide scope of the formula and in particular the choice of the adjective ("unauthorized" [irregolare] means essentially an action which is contrary to the rules) suggests that such equivalence was contemplated by the legislature.

However any doubt which might remain is removed by examination of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (Official Journal 1977, L 38, p. 1). Article 34 thereof provides that "... the principal shall be exempted by the competent authorities of the Member States from payment of duties and other charges in the case of: (a) goods which have been destroyed as a result of *force majeure* or unavoidable accident duly proven; or (b) (officially recognized shortages) arising from the nature of the goods". Clearly theft is not covered by either (a) or (b). Thus it gives rise to no exemption from liability. That did not happen by chance. The rule is evidently founded on the principle that the customs debt is conditional on the entry of the goods into the economic circuit. If they are destroyed or deteriorate totally they cannot be marketed and are therefore exempted from the debt. That does not apply to theft, which renders the goods unusable only for the owner and, for that reason, the debt subsists.

4. Moreover, Council Directive 79/623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal 1979, L 179, p. 31) adopts the same approach. Article 4 thereof provides that "... no customs debt on importation shall be deemed to be incurred in respect of specific goods: (a) where the person concerned proves ... that the non-fulfilment of the obligations ... results from the total destruction or irretrievable loss of the said goods by reason of the nature of the goods themselves or because of unforeseeable circumstances or *force majeure* ...". It is in my view clear that in this case also only events which are capable of rendering the goods unusable not only for the owner but for *anyone* may be regarded as extinguishing the debt. Moreover the preamble to the directive shows that that interpretative approach is correct. The ninth recital thereof states that "the reasons for this extinction must

be based on the recorded fact that the goods have not been used for the economic purpose which justified the application of import or export duties".

Further confirmation of that interpretation is provided by the Kyoto Convention on the Simplification and Harmonization of Customs Procedures of 18 March 1975, to which the Community is a party by virtue of Council Decision 75/199/EEC of 18 March 1975 (Official Journal 1975, L 100, p. 1). With reference to the present proceedings Article 22 of Annex E 3 is significant inasmuch as it provides that: "Warehoused goods destroyed or irrevocably lost by accident or *force majeure* shall not be subjected to import duties and taxes . . .".

Within the Community system, the extinction of the customs debt is ultimately attributed to the loss of the goods which is seen as a purely objective fact. The important consideration is that the goods have become unusable for the economic purpose for which they are intended; what happens to the relationship between the goods and the person possessing them is of no significance whatsoever. In other words, theft — the event to which the national court refers in its orders — is not one of the events which extinguishes the customs debt according to Community law.

5. In the light of that conclusion, I do not think that any useful purpose would be served by examining the Community concept of *force majeure* as requested by the Catania court. If there is no possibility of the "subjective" loss of the goods liable to customs duty being regarded as equivalent to the destruction or dispersion thereof as far as extinguishment of the customs debt is concerned, there is no reason to go on to examine the causes of such events or, in that context, to consider whether the concept of *force majeure* includes theft. It follows that the answer to be given to the question submitted by the Italian court should be worded accordingly. On the basis set out above, the answer should concentrate solely on the causes of extinguishment of the customs debt connected with the "objective" loss of the goods. To go any further would be inappropriate.

6. In view of all the above-mentioned considerations, I propose that the Court reply to the question submitted by the Corte d'Appello [Appeal Court], Catania, in the proceedings between the finance administration of the Italian Republic and Mellina Agosta Srl and Esercizio Magazzini Generali SpA, by two orders dated 18 June 1982, as follows:

"According to the existing Community customs provisions, the removal, by a third party and through no fault of the taxable person, of goods subject to customs duties does not extinguish the obligation to pay duty on them."