position to present them to the customs but that in this case the owner has to have recourse to a self-employed or employee customs agent cannot constitute a measure having effect equivalent to a quantitative restriction since the other means of making the declaration offer him an effective and reasonable choice allowing him, if he thinks it is in his interest, to avoid having to have recourse to a professional customs agent.

3. The maintenance, without amendment, to the legislation of a Member State of a provision which is incompatible with the Treaty given 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. A Member State which maintains such a provision is therefore failing to fulfil its obligations under the EEC Treaty.

In Case 159/78

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Alberto Prozzillo, acting, as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg

applicant,

v

ITALIAN REPUBLIC, represented by its Ambassador, Adolfo Maresca, assisted by Arturo Marzano, State Advocate, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie Adelaide,

defendant,

APPLICATION for a declaration that the Italian Republic has failed to fulfil its obligations under Articles 30, 34 and 52 of the EEC Treaty by imposing restrictions on representation for customs purposes and by regulating the profession of customs agent in a discriminating manner,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts and procedure

Under Article 56 of the Italian Testo Unico delle Leggi Doganali [Consolidated text of the legislative provisions in customs matters, hereinafter referred to as "the Code"], approved by Decree No 43 of the President of the Republic of 23 January 1973 (Supplemento ordinario alla Gazzetta Ufficiale della Repubblica Italiana of 28 March 1973) the customs declaration for the import or export of goods and other customs transactions must be made by the owner of the goods. The second paragraph of Article 56 provides: "Anyone is deemed to be the owner of the goods who presents them for customs clearance or has possession of them at the moment of entry onto the customs territory or of exit from that territory. This is without prejudice, in every case, to the right of the Customs to ascertain, for all the purposes of the present Code, the identity of the owner of the goods which are the subject of the customs transaction in question". Article 40 of the Code nevertheless allows the owner "to act through an agent" who must necessarily be either a customs agent whose name appears on the professional register established under Statute No 1612 of 22 December 1960 (Gazzetta Ufficiale della Repubblica Italiana of 5 January 1961, No 4) or a customs agent not on the professional register providing that he is an employee of the owner. The name of the employee agent is then entered on an *ad hoc* list kept by the competent local committee of customs agents (Articles 43 and 44 of the Code). The employee agent may act only on the basis and within the limits of the authority granted to him by the owner of the goods (second paragraph of Article 44) and the owner of the goods is responsible for the acts of such agents (third paragraph of Article 43).

Article 47 of the Code requires both kinds of customs agents to be licensed by the Minister of Finance after passing an examination. Save for exceptions which may be recognized for sufficient reasons by the heads of customs districts, a customs agent, whether a professional agent or an employee agent, must have his residence in a commune within the district for which he has been appointed.

Article 48 of the Code stipulates that the licence to act as customs agent shall be granted, subject to the other conditions imposed, only to Italian nationals or to the nationals of foreign countries that grant equal treatment in the matter to Italian citizens.

Statute No 1612 of 22 December 1960 legally recognizes the occupation of customs agent, lays down rules for its exercise and its professional organization.

The Commission, taking the view that Articles 40, 43 and 44 of the Code constitute measures having an effect equivalent to quantitative restrictions, contrary to Articles 30 and 34 of the Treaty and that Article 48 (a) infringes Article 52 of the Treaty, initiated the procedure under Article 169 of the Treaty against the Italian Government and, by letter dated 16 December 1976, invited it to submit its observations.

By letter dated 1 March 1977 the Italian Government challenged the arguments put forward by the Commission and stressed the necessity of regulating the occupation of customs agent.

After taking note of this answer the Commission on 25 January 1978 delivered the reasoned opinion provided for in Article 169 of the Treaty claiming that the Italian Republic

"by not allowing for customs purposes as regards certain transactions the performance of certain duties, the observance of particular rules and the exercise of certain rights, the owner of goods to be represented by any person to whom he has given authority to act in his name and on his behalf and by laying down, in a discriminatory manner on the basis of nationality, conditions for the grant of a licence to act as a customs agent",

has failed to fulfil its obligations under Articles 30, 34 and 52 of the EEC Treaty. The reasoned opinion further invited the Italian Republic to take the measures necessary to conform with the opinion within a month.

Since the Italian Republic did not amend the provisions in question within the period prescribed the Commission brought the matter before the Court of Justice by an application dated 17 July 1978, registered on 26 July 1978.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry but invited the parties to answer certain questions in writing before the oral procedure.

II — Conclusions of the parties

The *Commission* claims that the Court should:

(1) Declare that the Italian Republic

— By not allowing the owner of goods to be represented at the Customs by any person to whom he has given authority to act in his name and on his behalf, but only by a customs agent;

— By laying down in a discriminatory manner on the basis of nationality conditions for the grant of a licence to act as a customs agent;

has failed to fulfil its obligations under Articles 30, 34 and 52 of the EEC Treaty.

(2) The costs are to be paid by the unsuccessful party.

The *Government of the Italian Republic* contends that the Court should reject the Commission's application and order it to bear the costs.

III — Submissions and arguments of the parties during the written procedure

A — Representation at the Customs (Articles 40, 43, 44 and 47 of the Code)

The *Commission* considers that the provisions of Articles 40, 43, 44 and 47 of the Code governing the intervention of customs agents as representatives of the owner are contrary to Articles 30 and 34 of the EEC Treaty.

These provisions prevent the owner of goods from freely choosing a representative to effect customs transactions in his name and on his behalf and require him to have recourse to a customs agent. That obligation to use an agent involves costs which make imports and exports more expensive and constitutes directly or indirectly an actual or potential obstacle to intra-Community trade and by reason of this is a measure having an effect equivalent to a quantitative restriction contrary to Articles 30 and 34 of the EEC Treaty.

The Commission further considers that by requiring the customs agent to reside in a commune within the district in which he is licensed to practise, the fourth paragraph of Article 47 of the Code makes him an agent or representative of the foreign exporter in the territory of the importing Member State within the meaning of Article 2 (3) (g) of Commission Directive No 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17) which, according to that Directive, also constitutes a measure which has an effect equivalent to a quantitative restriction.

The *Italian Government* first of all denies that customs controls and formalities can amount to quantitative restrictions or measures which have an equivalent effect and relies in this respect on the third recital in the preamble to Directive No 70/50 and Article 2 (3) (r) thereof. It further alleges that the Commission's point of view is ambiguous. Whilst recognizing that it is for the Member States to lay down rules regarding customs representation, the Commission requires that this legislative power should be exercised in a manner which would deprive it of any substance. The Italian Government also alleges that the claim

that there are no restrictions on customs representation in seven of the Member States is irrelevant and it further contends that the work of customs agents is regulated in Statute No 1612 of 22 December 1960 and in the Code in a manner appropriate to and consistent with the objectives of the customs union.

In the view of the Italian Government Articles 40, 43 and 44 of the Code cannot be regarded as measures constituting directly or indirectly an actual or potential obstacle to intra-Community trade. The fact that trade between Italy on the one hand and the Member States and non-member countries on the other is continually on the increase confirms this opinion.

It is legally incorrect to say that the use of a customs agent involves additional costs for there are similar costs when the work is done by "employees". Further such costs can be recovered in the price of the imported product and therefore do not fall within Article 2 (3) (d) of Directive No 70/50 which classifies as measures having equivalent effect such as "preclude any increase in the price of the imported product corresponding to the supplementary costs and charges inherent in importation".

Moreover the Italian legislation makes it possible to employ a qualified agent in customs transactions, but it does not make it obligatory for it allows the trader to have recourse to his own employees. The Commission's requirement that it should be possible for the work in question to be carried out not only as provided for in the Italian legislation, on behalf of the owner and in the name of the agent, but also on behalf and in the name of the owner concerned, is not justified by the rule prohibiting measures having an effect equivalent to quantitative restrictions.

Professional, qualified customs agents usually have their own effective organization and enjoy the confidence of the administration which ensures that customs transactions run smoothly.

As regards the residence obligation (fourth paragraph of Article 47 of the Code) the Italian Government observes that the Commission's reference to Article 2 (3) (g) of Directive No 70/50 is based on an incorrect interpretation. That provision refers to measures requiring a foreign exporter to have a representative in the territory of the Member State to which he is exporting and not to the case where the importer has a representative in his own State. As regards freedom of establishment the Italian Government relies on the judgment of the Court of 3 December 1974 in Case 33/74 (*Van Binsbergen* [1974] 2 ECR 1299) in support of its contention that the residence requirement is, by reason of the professional nature of the work done by customs agents, compatible with Articles 59 and 60 of the EEC Treaty.

Replying first of all to the preliminary observations made by the Italian Government the *Commission* observes that the reference made to the third recital in the preamble to Directive No 70/50 is irrelevant. That recital, which states that "the formalities to which imports are subject do not as a general rule have an effect equivalent to that of quantitative restrictions", refers to the

work of State departments and not provisions which govern the representation of individuals. Moreover the Court has recognized that certain import formalities (Case 35/76 *Simmenthal* [1976] 2 ECR 1871) and export formalities (Case 53/76 *Bouhelier* [1977] 1 ECR 197) are measures having an equivalent effect. Moreover the Commission does not share the opinion that professional rules for agents necessarily involve an increase in the costs for those who do not have recourse to the services of an agent. It also challenges the contention in relation to the advantages for traders in having specialized agents. It further challenges the relevance of the statistics referred to by the Italian Government since a potential restriction is sufficient in itself to make the rules in question contrary to the Treaty.

Regarding the argument based on Article 2 (3) (d) of Directive No 70/50 the Commission in reply argues that even if the additional costs resulting from the provisions in question can be passed on in the price of the imported product the national products benefit therefrom.

In answer to the argument of the Italian Government that the owner of goods may be represented by anyone he likes provided that the agent is entitled to act on behalf of the owner, but in his own name, the Commission, while recognizing the right of national legislatures to adopt rules relating to agency (or representation) maintains that the system of indirect representation [rappresentanza indiretta] laid down by the Italian legislation gives rise to difficulties and costs which are an obstacle to free movement of goods.

In its rejoinder the *Italian Government* considers that the expression "the formalities to which imports are subject" has a much wider meaning than the Commission recognizes and it considers that the references to the above-mentioned Cases Nos 35/76, the *Simmenthal* case, and 53/76, the *Bouhelier* case, are irrelevant.

As regards the arguments about the increased costs and the specialization of agents the Italian Government takes the view that it is precisely because of the professional standards required of agents that strict checking can be avoided to the advantage of free movement of goods whereas such checking is necessary when a nonqualified agent deals with customs formalities.

Further the Italian Government considers that the Commission's arguments in relation to its requirement that customs representation by agents should be allowed regardless of the agent's qualifications are irrelevant and it repeats that administrative practice allows any owner of goods to have recourse for customs formalities to any person of his choice provided that such agent assumes responsibility for his declarations *vis-à-vis* the administration.

The Italian Government challenges the view of the Commission that the

experience in seven Member States shows that it is not necessary that the person making the declaration should guarantee the correct payment of the duties and that therefore the rules should be similar in all Member States. It argues that the Commission has forgotten that there are fewer customs officials in Italy than in the other Member States and that the Italian officials are personally liable for any failure to collect the duties. Regarding professional qualifications the Italian Government observes, finally, that the Commission would like everybody to be able to carry out customs transactions in the name and on behalf of other traders, but the Commission itself has laid down, for example in Articles 3 and 10 of Regulation No 1226/71 of the Commission of 11 June 1971 (Official Journal, English Special Edition 1971 (II), p. 365) on simplification of the formalities to be carried out at offices of departure and destination in respect of goods transported under the Community transit procedure, that "the customs authorities may withhold authorization from persons not providing the guarantee they consider necessary." Similar rules are included in Council Directives Nos 74/561 and 74/562 of 12 November 1974 on admission to the occupation of road haulage and passenger transport operators in national and international transport operations (Official Journal No L 308 of 1974, p. 18 and p. 23).

B — The reciprocity clause regarding the nationality of agents (Article 48 (a) of the Code)

The *Commission* considers that Article 48 (a) of the Code providing that the licence to act as customs agent shall be granted to nationals of a foreign State only if that State grants equal treatment in the matter to Italian citizens is contrary to Article 52 of the EEC Treaty abolishing all restrictions on freedom of establishment by the end of the transitional period. According to the judgment of the court of 21 June 1974 (Case 2/74, *Reyners* [1974] 1 ECR 631) that provision is directly applicable despite the possible absence, in a particular sphere, of the directives provided for in Articles 54 (2) and 57 (1) of the Treaty. Even if in practice the Italian authorities apply Article 48 (a) in accordance with the requirements of the Treaty, the wording of that article ought nevertheless to be amended.

The *Italian Government* states that the condition of reciprocity concerns only nationals of non-member countries and that it intends to introduce legislation to amend the article in question. It observes nevertheless that there can be no doubt in the circumstances that the condition of reciprocity relates only to nationals of non-member countries and considers that if the position were different all Member States would be under an "obligation", in spite of the direct application of Community rules, to amend numerous national provisions which include a condition requiring persons to hold the nationality of that State.

The parties submitted their oral observations at the hearing on 19 June 1979.

The Advocate General delivered his opinion at the sitting on 11 July 1979.

Decision

1 By application dated 17 July 1978 the Commission brought an action before the Court under Article 169 of the EEC Treaty seeking a declaration that the Italian Republic

"— By not allowing the owner of goods to be represented at the Customs by any person to whom he has given authority to act in his name and on his behalf, but only by a customs agent;

— By laying down in a discriminatory manner on the basis of nationality conditions for the grant of a licence to act as a customs agent"

has failed to fulfil its obligations under Articles 30, 34 and 52 of the EEC Treaty.

2 It is clear both from the letter sent on 16 December 1976 by the Commission to the Italian Government and from the reasoned opinion delivered on 25 January 1978 that the complaints of the Commission concern Articles 40, 43, 44, 47 and 48 (a) of the Testo Unico delle disposizioni legislative in materia doganale [Consolidated text of the legislative provisions in customs matters, hereinafter referred to as "the Code"], approved by Decree No 43 of the President of the Republic of 23 January 1973 (Supplemento ordinario alla Gazzetta Ufficiale della Repubblica Italiana, No 80 of 28 March 1973).

According to the Commission Articles 40, 43, 44 and 47 of the Code concerning the representation of owners of goods for the purposes of customs declarations prevent the owner of imported or exported goods from freely choosing an agent to handle customs matters in his name and on his behalf and force him to seek the services of a customs agent. Those services involve costs which make imports and exports more expensive. The result is that those provisions constitute an obstacle, directly or indirectly, actually or potentially, to intra-Community trade and by reason of this a measure having effect equivalent to a quantitative restriction contrary to Articles 30 and 34 of the Treaty.

As regards Article 48 (a) of the Code which provides among other conditions that the licence to act as customs agent is to be granted only to Italian nationals or nationals of foreign countries that grant equal treatment in the

matter to Italian citizens, the Commission takes the view that this provision, in so far as it applies to nationals of the other Member States, is incompatible with Article 52 of the Treaty on freedom of establishment.

3 In the view of the Government of the Italian Republic these complaints result from a misunderstanding on the part of the Commission of the provisions in question as interpreted and applied by the Italian authorities. The Commission has, in particular, not viewed the Italian system of customs declaration as a whole and its assessment does not take account of the other provisions, in particular Articles 56 and 57 of the Code which complement the provisions challenged by it and which form with them a whole. These provisions considered as a whole reveal, according to the Italian government, that the complaint abourt the Italian system of customs declaration is unfounded.

A — Summary of the Italian system of customs declaration

4 Having regard to those arguments it is necessary, before ruling on the complaints of the Commission, to consider the Italian legislation on the matter.

5 The provisions to be taken into account are part of Title II of the Code. This Title comprises three chapters, the first on "liability for customs duties", the second, containing the provisions in question, concerns "the representation of the owners of goods" in customs transactions and the third which is headed "Control Procedure" ["Procedura di accertamento"] and comprises *inter alia* Articles 56 and 57. The basic provision is Article 56 (1) which reads "Every customs transaction must be preceded by a declaration to be made by the owner of the goods in the form set out in Article 57." The other provisions whose scope is at issue concern the question who can make this declaration when it is not made by the owner himself. In this respect two sets of provisions must be taken into account, on the one hand, Articles 40, 43, 44 and 47 of the Code and on the other, the second paragraph of Article 56 of the Code.

The first and second paragraphs of Article 40 provide:

"Where customs provisions require the owner of goods to make any declaration, to perform any act or to comply with any rules or obligations, or where they confer on him any rights, he may act through an agent.

Without prejudice to the provisions of Article 43, authority to represent a person in customs transactions may be granted only to a customs agent whose name appears on the professional register established under the Statute of 22 December 1960, No 1612."

Under the first paragraph of Article 43,

"Authority to represent the owner of goods in customs transactions may also be granted to a customs agent whose name does not appear on the professional register if he is an employee of the owner".

Article 44 requires the names of such employee agents, in contrast to the independent agents referred to in the second paragraph of Article 40, to be entered on a special list compiled and kept up to date by the competent local committee of professional agents and employee agents may conduct customs operations only on the basis and within the limits of the authority granted to them by the owner of the goods who remains liable for their acts.

Article 47 provides that customs agents have to be licensed by the Minister of Finance. Agents may effect customs operations only in respect of offices in a particular customs district shown in the licence and unless otherwise authorized for sufficient reason must have their residence in a commune in the district for which they have been appointed.

The second paragraph of Article 56 provides:

"Anyone is deemed to be the owner of the goods who presents them for customs clearance or has possession of them at the moment of entry onto the customs territory or exit from that territory. This is without prejudice, in every case, to the right of the Customs to ascertain, for all the purposes of the present Code, the identity of the owner of the goods which are the subject of the customs transaction in question."

Article 57 states the information which the customs declaration must contain, in particular "the first name, surname and address of the declarant, as well as of the owner of the goods who may be represented by him."

Finally Article 48 (a), which is alleged to infringe Article 52 of the Treaty, provides.

"A licence to act as customs agent shall be granted to natural persons who satisfy the following conditions:

(a) They must be Italian nationals or nationals of a foreign country that grants equal treatment in the matter to Italian nationals."

B — The alleged infringment of the prohibition on measures having effect equivalent to quantitative restrictions (Articles 30 and 34 of the Treaty)

6 Although the reasoned opinion and the application do not say so expressly, their wording and the reference to Articles 30 and 34 of the Treaty show that the Commission's allegations concern the conditions for complying with customs formalities at the frontiers in intra-Community trade. Customs formalities at the external frontiers of the Community concerning goods coming from or intended for non-member countries are not at issue.

7 As regards intra-Community trade, since all customs duties on imports and exports and all charges having equivalent effect and all quantitative restrictions on imports and exports and measures having equivalent effect had to be abolished, pursuant to Title I of the Treaty, by the end of the transitional period at the latest, it should be emphasized that customs controls properly so-called have lost their *raison d'être* as regards such trade. Frontier controls remain justified only in so far as they are necessary either for the implementation of the exceptions to free movement referred to in Article 36 of the Treaty; or for the levying of internal taxation within the meaning of Article 95 of the Treaty when the crossing of the frontier may legitimately be assimilated to the situation which, in the case of domestic goods, gives rise to the levying of the tax; or for transit controls; or finally when they are essential in order to obtain reasonably complete and accurate

information on movement of goods within the Community. These residuary controls must nevertheless be reduced as far as possible so that trade between Member States can take place in conditions as close as possible to those prevalent on a domestic market.

8 The Commission's complaints must be considered in the light of the above-mentioned principles which govern the free movement of goods as a foundation of the Common Market although account must also be taken of the powers of Member States as regards their customs laws in so far as they have not been harmonized or replaced by Community provisions and account must also be taken of the differences which result from the particularities of those laws provided that they do not unnecessarily impede the free movement of goods by making requirements which are unnecessary for attaining the aim in view which in the present case is the correct implementation of residuary controls or operations.

9 In this respect it is right to observe that in order to achieve that aim the Commission, on 19 January 1979, submitted to the Council a proposal for a regulation "defining the conditions under which a person may be permitted to make a customs declaration" (Official Journal No C 29, p. 3), which is to enter into force on 1 January 1980, and Article 3 of which is intended to make the Member States, as regards customs declarations, adopt the rules which the Commission complains the Italian Government did not include in its legislation.

10 The Commission puts forward three grounds of complaint:

(a) First it complains that the legislation in question unnecessarily requires traders to have recourse to licensed customs agents to carry out customs formalities whereas in its view it ought to be possible for such formalities to be carried out by anyone appointed by the owner acting in his name and on his behalf. This requirement unnecessarily adds to costs and is an obstacle to trade;

(b) Secondly it alleges even if the second paragraph of Article 56 of the Code has to be interpreted as allowing the owner of goods to appoint persons other than professional agents or employees to make the declaration for him, such persons could not act in the name and on behalf of the owner but only in their own name and on their own responsibility which means that that solution is hardly practical;

(c) Finally it takes the view that by requiring the customs agent to have a residence in a commune in the district in which he is authorized to act, the fourth paragraph of Article 47 gives him the status of agent or representative in the territory of the importing Member State whereas the requirement of such representative is expressly classified by Article 2 (3) (g) of Directive No 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17) as a measure having an effect equivalent to a quantitative restriction.

11 Consideration of the rules relating to customs declarations as laid down by all the provisions contained in Articles 40, 43, 44 47 and 56 of the Code show that the Commission is correct in stating that they do not allow the owner of goods "to be represented at the customs by any person of his choice whom he has authorized to act in his name and on his behalf" but on the other hand the claim that the owner can be represented only by a customs agent does not take full account of the actual scope of the provisions in question if the words "be represented only" are understood as meaning that if the owner of the goods does not make the customs declaration himself, he can appoint only a customs agent to carry out that formality for him.

12 Regarding the declaration to be made the second paragraph of Article 56 provides "anyone is deemed to be the owner of the goods who presents them for customs clearance or has possession of them at the moment of entry onto the customs territory or of exit from that territory . . .". Both during the administrative stage of the proceedings and during the written and oral procedure before the Court the Italian Government formally stated, without being contradicted on this point by the Commission, that that provision should be interpreted and in fact was applied by the competent Italian authorities as meaning that the owner of the goods who does not make the declaration himself may, apart from the possibility of having recourse to an independent agent or employee agent, authorize anyone to make the declaration provided anly that such person presents the goods to the customs

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

13 The Italian Government also stated that the administrative practice is, nevertheless, to examine the declaration more thoroughly when it is made by the owner or by those who are treated as such than when it is made by a professional agent, whether self-employed or employed, by reason of the qualifications required of such agents.

14 Having due regard to those statements the Court finds that the interpretation of the provisions in question is compatible with their wording. It follows that several possibilities are open to the owner of goods for having the customs declaration made by a third party without being required, as the Commission maintains, to have recourse to an agent. The fact that this possibility operates by way of the legal fiction contained in the second paragraph of Article 56 of the Code and treats as owner the person who presents the goods or makes the declaration in his capacity as having possession of them or by way of the legal concept of "indirect agent", whereby the declarant acts on behalf of the owner but in his own name and is jointly liable with the owner rather than acting under the authority conferred on him by the owner, cannot be regarded as decisive in determining whether the requirements in question are equivalent to a quantitative restriction. The fact that the owner cannot employ an agent who neither has possession of the goods nor is in a position to present them to the customs but that in this case the owner has to have recourse to a self-employed or employee customs agent cannot constitute a

measure having effect equivalent to a quantitative restriction since the other means of making the declaration offer him an effective and reasonable choice allowing him, if he thinks it is in his interest, to avoid having to have recourse to a professional customs agent.

15 In the second place the Commission claims, however, that the fact that when the declarants other than the owner himself are not customs agents they can make the declaration only in their own name and not as agents of the owner they are consequently jointly and severally liable with the owner of the goods for the duties and penalties whereas on the one hand the personal liability of independent carriers is only ancillary and limited to the payment of excess duties (Article 41 of the Code) and the owner of the goods is liable for the acts of an employee-agent representing him also amounts to a measure having effect equivalent to a quantitative restriction. In the view of the Commission third parties appointed by the owner of the goods to carry out customs formalities ought to be able to act in his name and on his behalf without incurring personal liability *vis-à-vis* the authorities providing they keep within the limits of their authority. Any additional obligation is an excessive hindrance to free movement of goods.

16 Disregarding the fact that this aspect of the Italian legislation was not considered in the reasoned opinion or in the application, at least not express terms, it is not possible to consider the distinction made by the national authorities between the rules governing the liability of members of a regulated profession which is subject to the requirements of professional competence and the rules governing the liability of declarants who do not meet such conditions as going beyond what a government may consider as justified in the interests of ensuring compliance with the requirements of customs declarations. Moreover the Commission has not shown how this distinction is capable of constituting even potentially an obstacle to the free movement of goods.

17 Finally the Commission claims that the basic obligation which the fourth paragraph of Article 47 of the Code imposes on the customs agent to reside in a commune "included in the district for which he has been appointed"

makes him "an agent or representative in the territory of the importing Member State" whereas Article 2 (3) (g) of Directive No 70/50 of 22 December 1969 treats the requirement of such a representative as a measure having effect equivalent to a quantitative restriction.

18 That argument cannot be accepted. Without it being necessary to interpret the provision in question of Directive No 70/50 and to decide whether it in fact covers a residence requirement imposed by national law where professional customs agents carry out customs formalities on behalf of third parties, it suffices to observe that this factor should perhaps be taken into account only if it were shown, as the Commission maintains, that importers or exporters had no other choice than to have recourse to professional customs agents. Consideration of the provisions in question in the Code nevertheless show that, although they do not have complete freedom in the choice of third parties whom they may wish to appoint to make the customs declaration, traders have a reasonable and sufficient choice so that there can be no complaint that there is a measure having effect equivalent to a quantitative restriction.

19 It follows from the above that the complaints of the Commission on the basis of Articles 30 and 34 of the EEC Treaty cannot be upheld.

C — The infringement of Article 52 of the Treaty

20 The Commission considers that Article 48 (a) of the Code infringes Article 52 of the Treaty which provides that freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

21 The Italian Government challenges that view and contends that the condition of reciprocity mentioned in Article 48 necessarily refers only to nationals of non-member countries and certainly not to those of other Member States. The legal principle that the particular rule, in the present case Article 52 of the Treaty, takes precedence over a general rule, in the present case

Article 48 of the Code, leaves no doubt in this respect. It is obvious that no condition of reciprocity can be contemplated as regards the provision of services in the relations between Member States and there is no doubt in this respect in the minds of the traders concerned.

Moreover the Commission has recognized that the way Italy applies Article 48 (a) of the Code complies with the Treaty. The Italian Government adds "it has moreover been stated in the answer to the reasoned opinion that nevertheless legislative measures will be adopted to clarify the matter accordingly".

22 The view of the Italian Government cannot be accepted. Although it is clear that in this context Article 52 of the Treaty is directly applicable within the Italian legal order, nevertheless account must be taken of the fact that, as the Court has recognized in its judgment of 4 April 1974 (Case 167/73 *Commission* v *French Republic* [1974] I ECR 359), 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. The maintenance unamended of the provision in question thus constitutes an obstacle to freedom of establishment. Moreover the Italian Government has recognized the need to put an end to that uncertainty by undertaking, in its letter of 24 April 1978 in answer to the reasoned opinion, "to ensure that legislative measures are taken as speedily as possible to clarify the matter as required", but it has not yet fulfilled that undertaking.

23 It follows from the aforementioned considerations that there must be a finding that by maintaining unamended the wording of Article 48 (a) of the Code without making an exception, as regards the condition of reciprocity, in favour of the nationals of other Member States, the Italian Republic has failed to fulfil its obligations under Article 52 of the EEC Treaty, but that the other claims must be dismissed.

Costs

24 Under Article 69 (3) of the Rules of Procedure, where each party succeeds on some and fails on other heads the Court may order that the parties bear their own costs. Since both the Commission and the Italian Republic have each failed on one head, the parties must bear their own costs.

On those grounds,

THE COURT,

hereby:

1. **Declares that by maintaining unamended the wording of Article 48 (a) of the Testo Unico delle disposizioni legislative in materia doganale, approved by Decree No 43 of the President of the Republic of 23 January 1973, without making an exception, as regards the condition of reciprocity, in favour of nationals of other Member States, the Italian Republic has failed to fulfil its obligations under Article 52 of the EEC Treaty;**

2. **Dismisses the other claims;**

3. **Order the parties to bear their own costs.**

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Bosco

Delivered in open court in Luxembourg on 25 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President