JUDGMENT OF THE COURT
9 February 1994 *

In Case C-119/92,

Commission of the European Communities, represented by Antonio Aresu and Blanca Rodríguez Galindo, members of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs at the Ministry for Foreign Affairs, acting as Agent, assisted by Ivo Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by adopting measures, provisions and practices which hinder the making of customs declarations and accord favourable

* Language of the case: Italian.

treatment without justification to Italian customs forwarding agents, contrary to Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (Official Journal 1977 L 38, p. 1) and Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration (Official Journal 1985 L 350, p. 1), and by approving mandatory, invariable tariffs for the business services of Italian customs forwarding agents, contrary to Articles 9 and 12 of the EEC Treaty, the Italian Republic has failed to fulfil its obligations under Community law,

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida, President of Chamber, C. N. Kakouris, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: M. Darmon,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 June 1993,

on 13 October 1993,

gives the following

Judgment

1 By application of 24 March 1992 lodged at the Court Registry on 13 April 1992, the Commission brought an action under the second paragraph of Article 169 of the EEC Treaty for a declaration that the Italian Republic had failed to fulfil its obligations under Community law by adopting measures, provisions and practices which hinder the making of customs declarations and accord favourable treatment without justification to Italian customs forwarding agents, contrary to Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (hereinafter referred to as 'the transit regulation') and Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration (hereinafter referred to as 'the declaratory regulation'), and by approving mandatory, invariable tariffs for the business services of Italian customs forwarding agents, contrary to Articles 9 and 12 of the EEC Treaty.

2 By virtue of Article 2 of the declaratory regulation, 'the customs declaration may be made by any person able to produce or cause to be produced to the competent customs authority, in accordance with the relevant provisions, the goods in question as well as all documents production of which is stipulated by the provisions governing the customs regime requested for the goods.'

3 Under Article 3 of the regulation,

'1. Where the customs declaration is made in writing, the person referred to in Article 2 may, without prejudice to the other provisions of this article, make the declaration:

(a) in his own name and on his own behalf;

[or]

(b) in the name and on behalf of another person

[direct representation];

or

(c) in his own name but on behalf of another person

[indirect representation].

2. The option of making the declaration referred to in paragraph 1 (c) may be exercised only if the Member States have so provided.

3. Where a Member State authorizes the declaration to be made referred to in paragraph 1 (c), the right

(a) either to make declarations in the name and on behalf of another person,

(b) or to make declarations in their own name but on behalf of another person,

may be limited by that State to persons pursuing the activity of making customs declarations on a self-employed basis, either as their principal occupation or as a secondary activity related to another occupation.'

4 According to Article 6 (a), that regulation does not form an obstacle to provisions of the Member States which, in accordance with Article 3 (3), limit pursuit of the activity of making customs declarations to persons authorized to do so by the competent authorities of the Member State concerned — that is customs forwarding agents — and who have the professional qualifications required and the guarantees deemed necessary for pursuit of the activity. By virtue of Article 6 (b), Member States which provide for the possibility for undertakings to use the services of paid employees specializing in making customs declarations in the name and on behalf of those undertakings may make that possibility conditional on having a suitable professional qualification.

5 The relevant provisions of Italian law are to be found in Presidential Decree No 43 of 23 January 1973, approving the Consolidated text of the legislative provisions in customs matters (GURI, Supplemento Ordinario No 80 of 28 March 1973; hereinafter referred to as 'the Code').

6 With regard to representation of the owners of goods, the first and second paragraphs of Article 40 of the Code provide as follows:

'Where the customs provisions require the owner of the goods to make a declaration, to perform certain specified acts or to comply with special rules and obligations, or where they confer on him the right to exercise certain specified rights, he may act through an agent.

Without prejudice to the provisions of Article 43, authority to represent a person in customs operations may be granted only to a customs forwarding agent whose name appears on the professional register established by Law No 1612 of 22 December 1960.'

7 Next, the first paragraph of Article 43 provides that:

'The owner of goods may authorize a customs forwarding agent whose name does not appear on the professional register to represent him in customs operations provided that agent is one of his employees.'

8 With regard to the customs declaration as such, Article 56 provides that:

'Every customs operation must be preceded by a declaration to be made by the owner of the goods in the form set out in Article 57.

Anyone is to be deemed to be the owner of the goods who presents them for customs clearance or has possession of them at the moment of entry on to 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 operation in question.'

9 In addition, Article 47 et seq. of the Code lay down the conditions for qualifying as customs forwarding agents. Under those provisions, the Minister of Finance is to hold examinations leading to the formal licensing of customs forwarding agents, the licence being issued by the Ministry of Finance following consultation of the National Council of Customs Agents.

10 Finally, it is apparent from Articles 11 and 14 of Italian Law No 1612 of 22 December 1960 (GURI No 4 of 5 January 1961) that the scale of charges for the business services of customs forwarding agents are fixed by the National Council of Customs Agents and approved by decree issued by the Ministry of Finance. According to the second paragraph of Article 11 of the above Law, the services of customs forwarding agents may under no circumstances be rendered for a consideration higher or lower than that approved by the National Council.

11 It is apparent from the Commission's application that it is making two distinct sets of complaints against the Italian Government. The first five complaints relate to the incompatibility of certain provisions of the Code with the declaratory and transit regulations and to the way in which those provisions are interpreted and applied by the Italian customs authorities. In its sixth and final complaint, the

Commission seeks a declaration that the business tariffs for the services of customs forwarding agents constitute charges having equivalent effect.

Infringement of the declaratory and transit regulations

12 To begin with, it should be noted that the Italian Government lays emphasis on the fact that the situation has not changed since the judgment in Case 159/78 *Commission* v *Italy* [1979] ECR 3247.

13 In that regard, it is sufficient to state that that judgment relates to an infringement of Articles 30, 34 and 52 of the EEC Treaty, that it is not concerned with the transit regulation and that it predates the declaratory regulation, which was adopted by the Council on 12 December 1985. Hence it is appropriate to reconsider the Italian legislation in the light of the new regulation and the transit regulation.

14 The declaratory regulation, according to the preamble thereto, aims to lay down at Community level the conditions under which a person is authorized to make a customs declaration. Moreover, the regulation itself does not prevent a Member State from maintaining in force rules which limit pursuit of the occupation of making customs declarations, either in the name of another person or in one's own name but on behalf of another person, to customs forwarding agents.

15 Having regard to those considerations, it is necessary to determine whether the national legislation complies with the rules laid down by the regulation.

First complaint

16 In its first complaint, the Commission claims that the Italian Republic has infringed Article 2 of the declaratory regulation by requiring, in the first paragraph of Article 56 of the Code, that the customs declaration be made by the 'owner' of the goods. In the Commission's view, using this form of words may give rise to confusion which is prejudicial to the direct applicability of Article 2 of the declaratory regulation, notwithstanding the legal fiction created by the second paragraph of Article 56 of the Code, according to which any person who presents the goods for customs clearance or has possession of them at the moment of entering on to the customs territory or of exit from that territory is deemed to be the owner.

17 The Commission's argument must be upheld. Contrary to the Italian Government's contention, the Italian legislation may, by having recourse to the concept of 'owner' which is alien to the declaratory regulation, allow doubts to remain as to who is authorized to make the declaration or cause it to be made. According to the Court's consistent case-law (see particularly the judgment in Case 143/83 *Commission* v *Denmark* [1985] ECR 427), the principles of legal certainty and the protection of individuals require, in the areas covered by Community law, an unequivocal wording which gives the persons concerned a clear and precise understanding of their rights and obligations and enables the courts to ensure that those rights and obligations are observed.

18 The first complaint is therefore well founded.

Second complaint

19 In its second complaint, the Commission points out that the Italian legislation limits its representation, for the purposes of making customs declarations, to customs

forwarding agents, without having made express provision, as required in Article 3 (2) of the declaratory regulation, for a person to be able to declare goods in his own name but on behalf of another person. In its view, only by incorporating such authorization into their legislation can Member States restrict one of the two forms of representation referred to in Article 3 (3) to customs forwarding agents.

20 It is necessary, therefore, to examine first of all whether the Italian legislation is in conformity with Article 3 (2) of the declaratory regulation.

21 It is true that, as the Italian Government contends, the Court in its aforesaid judgment in *Commission* v *Italy* (at paragraph 14) mentioned the possibility under Italian law for a person to make a declaration in his own name and on behalf of another person. It must be stated, however, that this judgment merely establishes that the fact that that possibility operates by way of a legal fiction contained in the second paragraph of Article 56 of the Code or by way of the legal concept of 'indirect representation' cannot be regarded as the determining factor in assessing whether it is equivalent to a quantitative restriction on the formalities in question.

22 In this case, on the other hand, the point is not to examine the legislation in question from the point of view of Articles 30 and 34 of the Treaty, but to verify its conformity with Article 3 (2) of the declaratory regulation.

23 That provision lays down that the option of making the declaration in one's own name and on behalf of another person may be exercised only if the Member States have so provided.

24 It is necessary to point out that, according to Article 3 (3) of the declaratory regulation, a Member State is entitled to restrict one of the two forms of representation

referred to in Article 3 (1) to customs forwarding agents only if it has authorized representation in one's own name and on behalf of another person.

25 Since the second paragraph of Article 40 and the first paragraph of Article 43 of the Code limit representation to customs forwarding agents, the Italian legislation should have clearly and unequivocally authorized representation in one's own name but on behalf of another person.

26 Nor is that condition met by the legal fiction as set out in the second paragraph of Article 56 of the Code. As stated in paragraph 17 above, recourse to the concept of 'owner' allows doubts to remain as to who is authorized to make the declaration or cause it to be made.

27 It therefore follows, without there being any need to examine whether the allegations referred to by the Commission in support of its argument can be taken into consideration, that the second complaint is well founded.

Third complaint

28 In its third complaint, the Commission considers that the Code discriminates between legal and natural persons in that legal persons are not entitled to make declarations in their own name and on their own behalf. Since they can act, so far as concerns relations with third parties, only where they are represented by natural persons, the Commission's claim is that, under the Italian system, they are obliged to have recourse to the business services of customs agents.

29 In that regard, it must be stated that representation of a legal person by persons lawfully empowered for that purpose differs from the kind of representation provided for in the Code. A company which acts in its own name and on its own behalf must of necessity do so through the intermediary of a natural person. This type of representation must not be confused with representation for customs purposes.

30 Since the Code would not appear to prevent a company from acting in its own name and on its own behalf through a natural person acting as its legal representative, the Commission's third complaint must be rejected.

Fourth complaint

31 The Commission's fourth complaint relates to the fact that Article 47 et seq. of the Code impose the same qualifying conditions on paid employees as on self-employed persons in this field. In its view, the conditions imposed on paid employees go beyond the mere recognition of a suitable professional qualification as provided for in Article 6 (b) of the declaratory regulation. That interpretation is not contested by the Italian Government, although that Government adds that reliability and aptitude are assessed in the same way for both categories of persons.

32 According to Article 6 of the declaratory regulation, self-employed persons may be authorized to make customs declarations only where they possess the professional qualifications required and are able to provide the guarantees deemed necessary, whereas the only criterion so far as paid employees are concerned is recognition of a suitable qualification.

33 It follows that the manner in which the professional qualification is acquired is subject to two distinct sets of rules and that this distinction must be made in the Member States' legislation.

34 Consequently, by making self-employed persons and paid employees subject to the same qualifying conditions, the Italian Republic has failed to fulfil its obligations under Article 6 of the declaratory regulation.

Fifth complaint

35 The fifth complaint concerns customs declarations under the transit procedure as defined in the transit regulation. By virtue of Article 12 (3) of that regulation, a transit declaration may be signed by the principal or his authorized agent and presented at an office of departure. According to the Commission, the Italian customs authorities refuse to register that type of declaration on the ground that only Italian customs forwarding agents may complete such formalities.

36 In its reply, the Commission substantiates its plea, pointing out that the second paragraph of Article 238 of the Code places Community transit on the same footing as the customs operations provided for in Article 55. The Commission claims that the latter provision which, for all customs operations, refers to the customs declaration provided for in Article 56, makes it clear that transit operations fall within the general customs declaration procedure and hence within the scope of customs representation. It follows that recourse to customs forwarding agents is obligatory, even for transit operations.

37 The first point that must be made is that, according to consistent case-law, it is for the Commission itself to adduce evidence of the alleged infringement (see the judgment in Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, at paragraph 6).

38 In this instance, the Commission relied in its reasoned opinion on a complaint made by a certain undertaking and on confirmation by the German Minister for Economic Affairs that the difficulties experienced by that undertaking had also been encountered by others. In its application, the Commission goes on to report 'numerous complaints' without furnishing any proof in that regard. Since those complaints were not communicated to the Italian Government, which claims to have no knowledge of their content, they cannot be taken into consideration by the Court.

39 So far as concerns the treatment of Community transit as equivalent to the customs operations referred to in Article 55 of the Code, it should be noted, as the Advocate General has pointed out in his Opinion, that, according to the second paragraph of Article 238 of the Italian legislation, such treatment concerns only the penalties and all other matters which are not provided for or regulated by the relevant Community regulations.

40 As Article 238 refers back to Article 55 of the Code only in respect of situations which are not governed by Community regulations, Community transit operations do not fall within the Code's general procedure for customs declarations, but are directly covered by the procedure of the transit regulation itself.

41 The fifth complaint must therefore be rejected.

Infringement of Articles 9 and 12 of the Treaty

42 The Commission takes the view that the tariffs of customs forwarding agents which are fixed by the National Council of Customs Agents, whose functions are governed by the Law of 22 December 1960, and which are approved by decree of the Minister of Finance, constitute charges having equivalent effect to customs

duties within the meaning of Articles 9 and 12 of the Treaty in that they are obligatory and no derogation may be made from their minimum levels. In that regard, the Commission claims that customs forwarding agents enjoy a virtual monopoly in making declarations.

43 Articles 9, 12 and 13 of the Treaty prohibit customs duties on imports and all charges having equivalent effect in trade between Member States.

44 According to consistent case-law (see, in particular, the judgment in Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575), the justification for the prohibition of charges having equivalent effect to customs duties lies in the fact that pecuniary charges imposed on goods by reason of, or in connection with, the crossing of a frontier are an obstacle to the free movement of goods. Accordingly, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even though it is not levied by the State. The charge falls outside that definition if it constitutes the consideration for a service actually rendered to traders and is of an amount commensurate with that service.

45 Consequently it is necessary to examine whether the tariffs in question constitute a pecuniary charge which is imposed unilaterally on any person who wishes to make a customs declaration, in such a way as to be levied on goods by reason of the fact that they cross a frontier.

46 In that regard, it must be pointed out that in its reply to questions put by the Court, the Commission explained that the declarations made by paid employees or by public servants are to be regarded as having been made by customs forwarding agents in the broad sense, given that, by virtue of the required level of specialization and the nature of their work, such persons may be treated as customs forwarding agents by occupation. In its reply to a question put by the Court at the

hearing, the Commission nonetheless agreed that those persons, who make 22% of all declarations, are not subject to the business tariff. It follows that an importer does have a genuine choice in that he is not obliged to have recourse to a forwarding agent by occupation, and that consequently the tariff is not binding on anyone who wishes to make a customs declaration.

47 That being so, the tariffs at issue cannot be regarded as charges having equivalent effect within the meaning of Articles 9 and 12 of the Treaty. Therefore no infringement has been established in that respect.

48 It follows from the foregoing that the Italian Republic has failed to fulfil its obligations under Articles 2 and 3 of Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration, in so far as it has maintained in its legislation the requirement that it is for the owner to make that declaration and has restricted representation to customs forwarding agents, without making clear provision for the option of making a declaration in one's own name and on behalf of another person. The Italian Republic has also failed to fulfil its obligations under Article 6 of that regulation by requiring paid employees responsible for making customs declarations to have the same qualifications as self-employed persons in that field.

49 The remainder of the application must be dismissed.

Costs

50 Under Article 69 (3) of the Rules of Procedure, the Court may order that the parties bear their own costs if each party succeeds on some and fails on other heads.

As each party has failed on more than one head, the Italian Republic and the Commission must bear their own costs.

On those grounds,

THE COURT

hereby:

1) Declares that the Italian Republic has failed to fulfil its obligations under Articles 2 and 3 of Council Regulation (EEC) No 3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration in so far as it has maintained in its legislation the requirement that it is for the owner to make that declaration and has restricted representation to customs forwarding agents, without making clear provision for the option of making a declaration in one's own name and on behalf of another person. The Italian Republic has also failed to fulfil its obligations under Article 6 of that regulation by requiring paid employees responsible for making customs declarations to have the same qualifications as self-employed persons in that field;

2) Dismisses the remainder of the application;

3) Orders the parties to bear their own costs.

Due Moitinho de Almeida Kakouris Schockweiler

Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 9 February 1994.

J.-G. Giraud — O. Due

Registrar — President