**exercise of that right virtually impossible, even where the repayment of other taxes, charges or duties levied in breach of national law is subject to the same restrictive conditions.**

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Pescatore Mackenzie Stuart O'Keeffe Due Everling

Delivered in open court in Luxembourg on 9 November 1983.

The Registrar
by order

H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President

# OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 27 SEPTEMBER 1983 [1]

*Mr President,*
*Members of the Court,*

1. This reference for a preliminary ruling relates to a particular aspect of the conditions imposed for the recovery of import duties levied by the national authorities contrary to Community law. According to a series of decisions of the Court, the absence of specific Community rules entitles Member States to lay down the procedures for such recovery. However, that entitlement is subject to limitations which, starting with the judgment in Case 68/79 (*Just* v *Ministry for Fiscal Affairs* [1980] ECR 501), the Court has derived from the principle of non-discrimination and from the obligation to ensure the effective exercise of the right — a right, I emphasize, of Community origin — to obtain repayment. In this case the Court is asked to determine whether those limitations are exceeded by national rules under which repayment is available only to a person who provides documentary proof that he has not passed on the burden of the unduly levied charge to

1 — Translated from the Italian.

purchasers of the goods. The rules in question date back to 1982 and are Italian, but the reply to be given to the national court will also have repercussions in France, where similar rules were adopted two years earlier, immediately after the judgment to which I have just referred was delivered.

I shall summarize the facts. Article 32 of the consolidated version of the health laws contained in Royal Decree No 1265 of 27 July 1934 provided for compulsory health inspections for animals, meat, animal products and offal imported into Italy and for animals exported from Italy. The inspection was subject to the payment by exporters and importers of a fixed charge, the amount of which was prescribed in the scale annexed to the consolidated version (see fourth paragraph of Article 32 thereof). The scale of charges was changed and supplemented on several occasions, on the last occasion by Law No 1239 of 30 December 1970. By judgment No 163 of 19 December 1977, the Italian Constitutional Court held that the sole article of that Law and the whole scale of health inspection charges on products covered by Regulations Nos 804 and 805 of the Council of 27 June 1968 on the common organization of the market in milk and milk products and in beef and veal were unlawful.

Following that judgment, SpA San Giorgio, Latteria Locate Triulzi, of Milan, brought an action before the Tribunale di Trento complaining that between 1974 and 1977 it had paid health inspection charges on imports of dairy products from EEC countries without just cause and seeking an order that the State Finance Administration should repay the amounts in question. By order of 4 June 1982, the President of the Tribunale upheld that claim and ordered the defendant to pay the plaintiff around 65 million lire. The order was made provisionally enforceable. On 16 July 1982, the State Finance Administration lodged an appeal and requested suspension of the provisional enforcement of the order. It relied on Article 10 of Decree-Law No 430 of 10 July 1982, which had come into force in the meantime and prevented repayment where the charge had been passed on to other persons. By order of 23 July 1982, the President suspended enforcement of the order and referred the following questions to the Court under Article 177 of the EEC Treaty:

"1. Would the Court, in order to clarify and, if appropriate supplement its previous decisions, in particular its judgment of 27 March 1980 in Case 61/79 *(Amministrazione delle Finanze dello Stato* v *Denkavit* [1980] ECR 1205) and its judgment of 10 July 1980 in Case 811/79 *(Amministrazione delle Finanze dello Stato* v *MIRECO* [1980] ECR 2559), explain:

(a) Whether a national law which, by way of exception to the general provisions concerning the recovery of undue payments, provides that certain charges (including, in particular, health inspection charges) unduly levied

contrary to certain provisions of Community law, inasmuch as they are charges having an effect equivalent to customs duties, may be repaid only if it is proved that the charges have not been passed on to other persons, but does not subject the repayment of any other tax, charge or duty wrongly levied to the same condition, is to be regarded as discriminatory, contrary to the principles of Community law; and whether it is significant that the charges covered by the above-mentioned provision have been wrongly levied solely inasmuch as their collection conflicts with a rule of Community law;

(b) Whether the requirement of negative documentary proof, the sole condition to which the aforesaid national law subjects the repayment of charges unduly levied, renders 'the exercise of rights which national courts are under a duty to protect virtually impossible'.

2. Would the Court state whether, as from 1 July 1980, the date of the entry into force of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, which, according to the terms of Article 1 (2), applies to customs duties and *charges having equivalent effect*, a Community system was introduced for the first time governing the repayment of charges unduly levied, without however providing for any exception where the charges are passed on to other persons; and whether that system takes precedence over any previous or subsequent national law."

2. Counsel for the Italian Government objects in the first place that the reference for a preliminary ruling is inadmissible. In his opinion, Article 177 of the Treaty is to be construed as meaning that a preliminary ruling by this Court "is conditional upon the making of a final order by a national court"; it follows that "where the order to be given in the main proceedings is not likely to affect the outcome of the case" the "prior solution of a question of Community law" is to be regarded as manifestly irrelevant. According to the Italian Government, this case falls within that category. By virtue of Article 633 *et seq.* of the Italian Code of Civil Procedure, the President of a court before which summary proceedings for the recovery of a debt are brought does not deliver a judgment, that being the responsibility of the full court, but makes an interlocutory order which may not be challenged (a *decreto* or *ordinanza* depending on whether it is adopted before or after an appeal is lodged by the debtor: see Articles 642 and 648 of the Code of Civil Procedure) and, as such, is not in the nature of a decision.

The objection is unfounded. The construction of Article 177 proposed by the Italian Government is unjustifiably restrictive and is at variance with the function which the Treaty attributes to references for a preliminary ruling. The purpose of that procedure is of course to ensure that national courts do not give decisions contrary to Community law: in other words, to ensure that they do not apply national provisions which are incompatible with Community law, thereby disregarding its primacy over national law. And since any decision

given by a judicial authority relating to the legal rights of the parties may involve the application of Community rules, the principles to which I have referred imply that the authority responsible for giving the decision is entitled to submit a request to the Court under Article 177.

This Court's views in this regard are consistent. It has on several occasions held that requests for preliminary rulings submitted by Italian courts in connection with summary proceedings are admissible. I refer for example to the judgments of 17 December 1970 in Case 33/70 *(SACE* v *Ministry for Finance* [1970] ECR 1213) of 26 October 1971 in Case 18/71 *(Eunomia* v *Ministry of Education* [1971] ECR 811) and of 14 December 1971 in Case 43/71 *(Politi* v *Ministry for Finance* [1971] ECR 1039).

3. Although they refer to hypothetical national rules and to the compatibility thereof with Community law, both questions — the first openly and the second indirectly — are intended to secure a decision from the Court on the permissibility under Community law of a specific provision of Italian law. That provision defines the limits within which traders may require the State Finance Administration to repay unduly levied customs duties on imports, and other charges.

What is the provision in question? The one now in force is Article 19 of Decree-Law No 688 of 30 September 1982 on urgent revenue measures, which was converted into Law No 873 of 27 November 1982. However, when the order for reference was made, the matter was covered by a provision which differed in form, namely Decree-Law No 430 of 10 July 1982. The first paragraph of Article 10 of Decree-Law No 430 provided as follows:

"A person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is not entitled to the repayment of the sums paid when the charge in question has been passed on in any way whatsoever to other persons, except in cases of substantive error."

The second paragraph went on to state:

"The charge is presumed to have been passed on whenever the goods in respect of which the payment was effected have been transferred, even after processing, transformation, erection, assembly or adaptation, in the absence of documentary proof to the contrary."

However, the decree in question was not converted into a law by Parliament and therefore became void *ab initio* by virtue of the third paragraph of Article 77 of the Italian Constitution. But the Italian Government did not thereupon abandon the introduction of the provisions to which I have just referred. Thus, when Decree-Law No 486 of 31 July 1982 on urgent revenue measures was being converted into a law, it tabled an amendment to Article 1 of the relevant bill, consisting in the introduction of a new article (referred to as "Article 1 — *undecies*" in Atti Senato, VIII Legislatura, No 2000-A, in particular at p. 14) which reiterated the rules in question. But because Decree No 486 was not converted into a law either and

that amendment never came into force, the government was obliged to issue a third decree. It entered into force on 30 September 1982 as Decree-Law No 688 and fared better. It was in fact converted into a law and, as I have stated, is still in force.

Article 19 thereof essentially reproduces the contents of Article 10 of Decree-Law No 430. It is appropriate to quote it verbatim because the similarity is apparent — a fact moreover recognized by counsel for the Italian Government (see observations lodged by the Italian Government on 29 October 1982, particularly at p. 10). The first paragraph provides as follows:

"Any person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is entitled to repayment of the sums paid if he provides documentary proof that the charge in question has not been passed on in any way whatsoever to other persons, except in cases of substantive error."

The next paragraph adds:

"The documentary proof referred to in the preceding paragraph must also be provided when the goods in respect of which the payment was effected have been transferred after processing, transformation, erection, assembly or adaptation."

As is apparent, the first paragraph states positively ("... is entitled to repayment ... if he provides documentary proof") what the first two paragraphs of the earlier provision had stated in the negative (the first paragraph — I repeat — provided that: "... is not entitled to the repayment ... when the charge ... has been ... passed on"; the second added: "... in the absence of documentary proof to the contrary"). However, this artifice does not in any way subtract from, or add to the scope of the provision because there remain unchanged both the presumption of the passing on of the charge to purchasers of the goods and the possibility that the person paying the charge may rebut that presumption by furnishing — albeit only in documentary form — proof to the contrary. The same applies to the second paragraph. That makes clear that the proof in question, which is essential if a refund of the amounts unduly paid is to be obtained, must be provided even when the goods have been disposed of. In other words, if the goods have been sold it is presumed that the charge has been passed on. In short, the new provision corresponds precisely to the second paragraph of Article 10 of Decree-Law No 430.

The fact that the rule in respect of which the national court submitted its questions is not now in force in its original form is irrelevant. It is well known that when giving a preliminary ruling the Court of Justice does not decide whether national law is compatible with Community law. The Court merely interprets the rules and principles of Community law (as well as deciding on the validity of provisions of Community law) whilst the task of deducing whether the provisions of national law to be applied in resolving the case are compatible with Community law is the responsibility of the national courts. Since in this case the questions are general in scope, even though they were occasioned by a specific provision of national law, the request for a preliminary ruling is valid regardless of the

fate of the rule which gave rise to it. It should be added — and this observation seems to me decisive — that Italian law now contains a rule (Article 19 of Decree-Law No 688) equivalent to the one considered by the national court when it made the reference. The interpretation of the principles and rules of Community law which the Court is now called upon to provide will therefore certainly help to determine the outcome of the main proceedings.

4. I shall now consider the questions. I shall deal with the second one first because it relates to the most general of the conditions which, according to previous decisions of the Court, must be fulfilled if national rules governing the repayment of sums unduly paid are to be lawful, namely the absence of relevant Community legislation. Consideration of this question must precede consideration of the first question, for if the answer given to it is affirmative the other question will become irrelevant.

The second question submitted by the President of the Tribunale di Trento seeks to establish whether certain Community legislation — Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties — provides a complete set of rules regarding procedures for the repayment of charges having an effect equivalent to customs duties which have been unduly levied, thus depriving the Member States of any residual legislative power. The national court asks in particular whether, because Regulation No 1430/79 does not in any way restrict the repayment of charges passed on to other persons, it implies that the passing on of the charges cannot extinguish the right in question; and therefore whether, after its entry into force, Member States are entitled to treat their legislation as continuing to have such an effect.

The Italian Government denies that Regulation No 1430/79 is applicable to this case *ratione temporis*. It entered into force — it is pointed out — on 1 July 1980 (see Article 25), whilst the health inspection charges the repayment of which is at issue were claimed by the State Finance Administration and paid by SpA San Giorgio earlier: to be precise, between 1974 and 1977. The objection is well founded. The regulation would be retroactive, so as to cover cases pending if reliance could be placed on the well-known principle whereby supervening procedural rules apply, as from the time they enter into force, both to cases pending and to new proceedings. But that rule is not applicable in this case since, as the Court pointed out in its judgment of 27 May 1982 in Case 113/81 *(Reichelt* v *Hauptzollamt Berlin-Süd* [1982] ECR 1957), Regulation No 1430/79 "... contains a set of rules which form an indivisible whole and the individual [substantive and procedural] provisions of which may not be considered in isolation, with regard to the time at which they take effect". It follows that the regulation cannot affect litigation concerning the repayment of duties levied before its entry into force.

But that is not all. Besides being inapplicable *ratione temporis,* Regulation No 1430/79 is inapplicable to this case *ratione materiae.* In fact, it seems to me, it has no general scope because it merely governs a series of specific cases all of which may be reduced to a calculation error. But even if it were exhaustive and did cover every kind of repayment of charges unduly levied, it would be arbitrary to conclude that, solely because the passing on of charges is not dealt with, the extinction of the right to repayment on that ground is incompatible with Community law. Such a result cannot be arrived at by recourse to rules of interpretation such as the old maxim *ubi lex tacuit noluit.*

5. I shall now consider the first question, which is at the very heart of this dispute. The national court wishes to determine the compatibility or otherwise with Community law of a national provision which:

(a) makes repayment of certain charges levied by the public authorities in breach of Community law (as we know, they are charges having an effect equivalent to customs duties and are therefore prohibited by Article 12 of the EEC Treaty) conditional upon proof that the charges in question have not been passed on to other persons; and

(b) does not make repayment of any other unduly levied tax, charge or duty subject to the same condition.

The national court envisages two respects in which such a provision may be unlawful:

(a) the unjustified discrimination introduced by a system of that kind between taxes, charges and duties which are repayable only if the aforesaid condition is satisfied and those which are repayable without such proof; and

(b) the practical impossibility for traders to exercise their right to repayment as a result of that condition.

It is not by chance that the President of the Tribunale di Trento emphasizes those aspects. As is apparent from the introductory part of Question 1, he has before him the previous decisions of this Court on the repayment of unduly levied charges and in particular the limits imposed by this Court on the power of Member States to regulate the manner in which sums unduly paid to the national authorities are to be recovered. It is therefore upon those decisions that attention should be focused.

The Court considered for the first time in its judgment of 27 February 1980 (in the *Just* case, already cited) how the recovery of import duties levied contrary to Community law may be affected by incorporation of the charge in question into the price and the consequent transfer of that charge to subpurchasers. The case concerned an undertaking operating in Denmark which brought an action against the revenue authorities of that country for recovery of sums paid in respect of excise duty on imported alcoholic beverages, on the ground that

the taxes were contrary to Community law (the case involved the application of Article 95 of the EEC Treaty). In its defence the government stated that under Danish law undertakings had no right to recover taxes unduly paid when they had been incorporated in the price of goods and the charge had thus been passed on to consumers or at least to further links in the economic chain. The purpose of an action for recovery, it pointed out, is to make up for the financial loss suffered by the person who paid the charge unduly; any passing on of the charge, whereby that person cancels out his loss, thus eliminates the very basis of the remedy and therefore precludes any possibility of reliance thereon.

What was the Court's reply? It began by acknowledging that where there are no Community rules regarding the repayment of national charges levied contrary to Community law the Member States have the power to ensure the repayment of such charges in accordance with national law and to lay down the conditions for actions for recovery. But the Court also placed limitations on that power, by stating that such conditions "cannot be less favourable than those relating to similar actions of a domestic nature and must not make it impossible in practice to exercise the rights conferred on individuals by the Community legal system". As I have pointed out, it is because of that statement that the national court considers that there are two respects in which the Italian rules governing actions for the recovery of undue payments may be regarded as contrary to Community law.

With regard to the lawfulness of national rules which provide that unduly levied charges which have been passed on to other persons cannot be recovered, the Court was cautiously open-minded. It held that Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled; thus it does not prevent account being taken of the fact that it has been possible for the burden of such charges to be passed on to other traders or to consumers. Proceeding from a premise which in itself is incontestable (the law does not favour unjust enrichment), the Court acknowledged that in regulating actions for the recovery of undue payment the national legislature may take account of the passing on of charges. But — let me stress — it did so very cautiously. It cannot have been accidental that the statement begins in the negative ("Community law does not prevent"), suggesting exceptional cases rather than standard practice.

This solution was also adopted in the judgment of 27 March 1980 in Case 61/79 *(Denkavit Italiana* [1980] ECR 1205) and in the judgments of 10 July 1980 in Case 811/79 *(Ariete* [1980] ECR 2545) and Case 826/79 *(MIRECO* [1980] ECR 2559).

6. Of the two parts of the first question, it is appropriate to analyse the second first, that is to say the question of the compatibility of national rules for the recovery of unduly levied charges, such as the rules in force in Italy, with the principle whereby Member States may not make the right to recover sums paid in breach of Community rules subject to conditions which render the exercise of that right virtually impossible. This aspect involves a general problem, namely the effect of the passing on of charges (or rather, perhaps, the limits within which that may have an effect) on entitlement to repayment. This part of the question should therefore be considered first. The scope and ramifications of the other part, which suggests that the rule may contain discriminatory elements, are narrower.

But some clarification is necessary first. As I have already pointed out, the limitation on the Member States' powers of intervention (powers which exist only in so far as appropriate legislation has not been adopted on the basis of Article 235 of the Treaty) derives from the fact that the right to repayment of sums levied contrary to Community law is of Community origin and is therefore safeguarded by Community law. The consequence is clear: a State which exercises its residual and temporary power to regulate actions for the recovery of undue payments by laying down conditions which *prima facie* respect the right to repayment but in reality are likely to defeat it negates a subjective right founded on Community law; in other words it achieves a result which, by reason of the primacy of Community law over national law, is manifestly unacceptable.

Let us consider therefore whether national rules such as those laid down in Article 19 of Decree-Law No 688 actually make it impossible in practice for the persons concerned to recover unduly levied charges; and let us ask in the first place what, apart from the requirement of proof, is the central feature of those rules. What truly new feature is introduced into Italian law by Article 19? In my opinion, it creates a further way of extinguishing the revenue authority's obligation to refund the undue charge to the person who paid it. The undue payment, it is true, remains the "fact" which gives rise to entitlement to the refund. But if subsequently the person who made the payment passes on all or part of the burden to third parties, his right is extinguished to the extent whether total or partial to which the charge is passed on. Thus, in particular cases, the rules depart from the general provisions of Article 2033 *et seq.* of the Italian Civil Code.

According to the plaintiff company, those rules nullify the right to repayment for reasons deriving from the very nature of the passing on of the charge: in the great majority of cases it is impossible for either the person who paid the charge or the revenue authority to demonstrate that the financial loss indisputably suffered in every case by the person paying the unduly levied charge is offset by the incorporation of that charge in the price of the goods in question.

Why is it impossible? Because, says the plaintiff, the price is subject to innumerable market forces which can be identified only in very approximate terms. It is not therefore permissible to take only one of the factors, in isolation from the others, and treat it as the sole cause of a specific portion of the price. It is never — or almost never — permissible to state that a given portion of the price is due solely to the payment of a charge of the same amount. In those circumstances, to impose upon the person who paid the charge the burden of proving that it has not been passed on and to make the repayment of unduly paid charges conditional upon such proof is tantamount to repudiating the right to repayment.

This criticism is largely well founded. In the opinion which I delivered on 23 March 1983 in Case 256/81, *(Pauls Agriculture* v *Council* [1983] ECR 1723), I made a similar criticism, albeit with regard to the non-contractual liability of the Community. There I stated: "When undertakings fix prices they do not ... take into account only their own costs and the profits which they desire; their behaviour is determined by the conditions on the market. If the market situation enables the price to be set at a certain level without affecting the volume of sales, the undertaking will fix upon that level and not on others ...". The Commission now takes the same view. At the hearing, the Commission's representative stated: "The passing on of a charge ... is an economic fact dependent upon numerous variables ... In order to be certain that charges were passed on, supply would have to be elastic and demand would have to be ... rigid, but I believe that the only product for which both those conditions are fulfilled is salt ... Where those conditions are not fulfilled, the situation is particularly uncertain and therefore proof of the passing on of the charge is difficult." To put it more directly, to raise the passing on of charges to the status of a legal rule is possible but only if it is not forgotten that the rule is fragile and can be applied only within very clearly defined limits.

Naturally, the representative of the Italian Government takes a different view. He stated that it is possible, on the basis of ordinary commercial documentation (invoices, correspondence and so forth), to establish what portion of the price is attributable to the charge unduly levied and thus to eliminate the right to repayment. But he did not say a single word about the crucial matter of the process of price formation and the infinite number of variables involved therein. This leaves intact therefore the argument that in view of the nature of the market it is usually impossible to isolate any portion of the price and link it causally to a particular cost. Moreover, in my opinion, that argument is irrefutable. And who indeed can say that, if the importer had been released from the burden of the unlawful charge, he would not have applied the same price and sold the same quantity of goods? Had that been the case, he would have obtained

higher profits than those he managed to earn whilst subject to the tax. And it is on this hazardous and unpredictable basis, rather than by reference to the relative simplicity af accounting records, that Article 19 requires the person who paid the charges to furnish proof that they were not passed on. But, as I have said, counsel for the Italian Government makes no reference to those uncertainties. The fact is that his view simplifies in the extreme an exceedingly complex question; and a sign of the desire for simplification lies in the very emphasis which is placed on the informative value of ordinary commercial documentation.

Let me say that that value is slight. Documents regarding costs throw some light on the profits of the entrepreneur; but to believe that they make it possible to identify all the factors on the basis of which the price is determined is ingenuous, if only because most of those factors are extraneous to the entrepreneur. It suffices to bear in mind — even though the observation may be banal — that, in a market subject to competition, the price of a particular item is affected by the production costs of all the other undertakings operating in the same sector and in particular those of the (marginal) undertakings whose costs are higher. Can all this be proved? And can it be translated into quantities and figures? I doubt it. Certainly, it is not possible to do so by producing the records which every undertaking is obliged to keep in accordance with Article 2214 *et seq.* of the Italian Civil Code. However, that is what the Italian legislation requires. Can it then be denied that that legislation calls for proof of a diabolically high standard? No it cannot: and counsel for the Italian Government implicitly conceded that point when he stated at the hearing that in 99 % of cases the person paying the charges is not in a position to furnish such proof because the charges have been passed on. To acknowledge entitlement to repayment (as required by Community law) and then to admit that in 99 % of cases that right cannot be exercised is, to say the least, a fine example of conflict between words and deeds.

7. In maintaining that Article 19 is compatible with Community law, counsel for the Italian Government placed much emphasis on the reasoning which is said to justify it. It must be borne in mind, he asserts, that in the great majority of cases (virtually whenever goods are transferred to third parties), the importer passes on to his successors-in-title the burden represented by payment of the unduly levied charge, so that he is not prejudiced thereby and suffers no damage. The damage is suffered by the third party or, in general, by the consumer who pays a higher price for the goods. If the importer were allowed to recover whatever he had paid unduly he would be assured of a twofold benefit: that deriving from incorporation of the charge in the price and the benefit of reimbursement of the charge by the administration. For their part, consumers would be forced to make a twofold payment: once in order to pay the higher price for the goods and on a second occasion, as taxpayers, to provide the administration with the funds necessary

to make the repayment to the importers. By providing that entitlement to any repayment is extinguished if the charges are passed on, Article 19 has the merit of preventing such perverse effects.

I concede that that argument is ingenious: however, it is not convincing. In the first place, it does not defeat the criticism levelled by those who consider it impossible to prove the link between tax and price. Furthermore, it is not correct that Article 19 confines itself to redressing unfair imbalances which may arise from the application of the general law. There is an instance of unjust enrichment — the only one in this case which may be mentioned without fear of denial — which the rule not only tolerates, but actually promotes: namely the unjust enrichment of the State which unlawfully levies a tax and does not reimburse the person who paid it.

It is true that at the hearing counsel for the Italian Government stated that third parties purchasing the goods may bring an action against the State for unjust enrichment. However, he admitted this reluctantly — the admission was dragged out of him by specific questions put by the Court. And it is easy to see why. It is difficult to imagine a proposition which is more implausible in practice and more venturesome in theory. It is absurd to think of a mass of consumers who, in a system in which the class action is unknown, would bring an action against the State in order to recover minimal amounts. And regard should be had to the basis of an action to establish unjust enrichment. In systems of law deriving from Roman law, such an action is based on the impoverishment of A. and on the causal link between the damage suffered by him and the *locupletatio* of B. In this case, A. is a gentleman who, making a free choice, purchases on the open market a particular item at the price fixed by B. and regarded as appropriate by A.: can we truly regard him as impoverished by the fact that that price is perhaps a little higher — though to what extent no one can say — than it would have been if the authorities had not unduly levied a tax upon the importation of the goods in question? And as far as the causal link is concerned, how can it be considered relevant in the light of all the movements of the goods between the time of importation and the offer for sale to the consumer? Admittedly the causality may be indirect. But no one accepts that it may be remote: and here it is remote, extremely remote when the imported product is processed or used for the manufacture of another product.

Article 19, therefore, crystallizes the State's advantageous position. The solution is a curious one, even in terms of equity. I would point out that, with respect to actions for the recovery of undue payment and in accordance with the Roman tradition, the Italian Civil Code favours the position of the person who receives the undue payment only in the case of an immoral transaction — and, let it be emphasized, only one which is immoral on both sides, because where the person who made the payment had no part in the immorality he may as a rule recover the amount unduly paid.

But in this case the party protected is the State Finance Administration, which claimed a payment contrary to Community law, and the party who bears sacrifice is the importer, who paid because he was unable to avoid so doing and then, using his entrepreneurial imagination and talent, succeeded in earning a profit notwithstanding the undue payment and greater cost imposed upon him. How can any other inference be drawn than that Article 19 goes further than the *par causa turpitudinis* rule? Let me make one thing clear: by saying this I do not imply that when it levies a charge unduly the State Finance Administration is acting in an immoral fashion. I merely wish to draw attention to the fact that it is not reasonable to reward a contravener of the law and at the same time punish a person who willy-nilly is the victim of the contravention.

The idea that the object of a provision whereby the passing on of charges extinguishes the right of recovery is to protect consumers does not seem to me, all things considered, to be an appropriate basis for establishing that rules such as those enacted in Italy are in conformity with Community law. If in fact the protection is directed towards the subpurchaser of the imported product, then it is illusory because it has been seen that, at least in Italy, he has no remedy enabling him to recover the part of the price paid in excess. If it is assumed that those intended to benefit are the citizens who, as taxpayers, would bear the greater burden imposed on the public finances by the obligation to reimburse importers, it is difficult not to take the view that the protection is without foundation. The taxpayers' interest in that respect seems to me to be of very little substance; and in any case it does not override the requirement, emphatically recognized by the Court, that national rules must guarantee the effective exercise of the right to repayment.

The truth therefore is different and may be expressed in the statement that in Article 19 the consumer has the function of a fig-leaf. This is proved by its wording: it recognizes the right to repayment (in line with Article 13 (v) of the French Finance Law for 1981, No 80/194 of 30 December 1980) when the undue payment is attributable to a substantive error. It is not in fact apparent why in that event — and only in that event — consumers do not deserve to be protected. The Italian Government defends itself by saying that, in determining the price of the goods, the importer cannot take into account mistakes made by the State Finance Administration; it may therefore be assumed that he does not pass on to his subpurchasers duties calculated incorrectly.

That objection is however far from convincing. It is based on the assumption that the importer does not keep the goods in his warehouse before selling them to third parties and that the charges equivalent to customs duties on those goods are levied belatedly by the State Finance Administration. This, however, is a pipe-dream. In the real world things may happen differently: even when the undue payment is the result of a substantive error on the part of the authorities, the importer may become aware of it in time to take it into account when fixing his prices; in which case — I repeat — why ignore grounds which in any other case would lead to consumers being protected?

Whoever is convinced, as I am, that those grounds are nothing but a pretext knows that the exception under discussion here has a cause and that that cause is to be sought in Regulation No 1430/79. As I have already said, that regulation lays down the rules for repayment in a number of cases which are all ultimately ascribable to a substantive error. It is therefore reasonable to suppose that, following in the footsteps of its French counterpart, the Italian legislature considered it prudent to exclude cases governed by the Community regulation from the rules on undue payments, thus avoiding the introduction of any rules likely to appear contrary to that regulation in the event of its being regarded as dealing exhaustively with the matter in question.

8. I have stated that the passing on of charges is not generally relevant because of the innumerable variables which affect price formation in a free market and because of the consequent impossibility of definitively relating any part of the price exclusively to a certain cost. I have not however ruled out — and, what is more important, the Court did not rule out in the *Just* case — the possibility that in a limited number of cases the passing on of charges may be adopted by national rules as a factor whereby the right to repayment under Community law is extinguished. Let us attempt to identify those cases.

I shall begin by distinguishing between the price determined by market forces and the price fixed by the public authorities. In the first case, the passing on of charges is apparent, and may therefore be presumed by the legislature, only where two conditions are satisfied, namely that supply is elastic and demand is rigid. As was observed by the person appearing for the Commission, however, that is a "text-book" case and therefore devoid of economic relevance. More important, although likewise of limited scope, is the second case, in which the authorities not only fix the price but also incorporate the tax in the price which they impose. This is proved by the very process whereby the concept of the passing on of charges — which was developed as part of financial theory and therefore in a special perspective — was received into the realm of law and applied to relations between civil parties.

So far as I am aware, the first authority within the legal systems of the Member States which attributed legal significance to the passing on of charges was the Danish Højesteret in a judgment in 1952 (UfR 1952, 974 H). A milling undertaking had requested the exchequer to refund to it a tax which it regarded as unlawful and had paid in connection with the purchase of a consignment of grain. The court recognized that there was no basis for the tax but refused to order repayment, observing that the loss deriving from the unlawful levying of the tax had been passed on to the purchasers of the bread. The price of bread was in fact fixed by the authorities and the same authorities had increased it after introducing the tax by an amount equal to the tax. Thirteen years later the Højesteret

repeated its view, but in the converse case: it held that when the price of a product subject to a tax is determined by market forces and there is no reason to believe that it has been increased in such a way as to offset the tax, the applicant is entitled to repayment (judgment of 28 May 1965, in Case II 214/1964, U 1965, 492 H).

These are eloquent statements, the second no less so than the first. They confirm that extinction of the right to repayment as a result of the passing on of charges is permissible only marginally and almost never in those cases where the price is determined by market forces. In my opinion, the previous judgments of this Court should be construed in the same way. And if that is so, there is no doubt that rules by virtue of which repayment is always, or almost always, conditional upon proof that the charges have not been passed on deprive the person who paid the charges of his right in that respect: and Community law is thereby infringed, if only because, as I have said, that right is rooted in Community law and cannot be cancelled, even indirectly, by a national provision.

9. But there is more. A brief comparative examination of the various national laws shows that, as a legal concept, the passing on of charges was unknown until the Court gave judgment in *Just.* An exception is provided by the Danish cases, which, however, attach significance to it only within the very strict limits which I have just mentioned. A third judgment of the Højesteret (9 April 1970, Case I 55/1968, U 1970, 437 H), which concerns a completely different situation from that covered by the French and Italian laws, cannot be invoked against those limits. That judgment in fact places the burden of proving that the charges were not passed on upon the plaintiff — however, in that case, the plaintiff was not the person who paid the charges but a third party claiming through him.

South of Denmark, however, the passing on of charges is taboo — at least, it was until 1980. As far as the courts are concerned that taboo still remains, even after the *Just* judgment. Take Italy for example. *Just* has influenced a number of courts of first and second instance (Tribunale di Trento, 17 October 1981, *Dukcevich* v *Amministrazione Finanze,* and 18 February 1982, *Amministrazione Finanze* v *Marimex;* Corte d'Appello, Turin, 15 October 1980, *Amministrazione Finanze* v *CONAL);* but it has not influenced the Italian Court of Cassation, which takes the opposite view. That view is expressed particularly forcefully in its judgment No 4682 of 21 July 1981 *(Ministero delle Finanze* v *MIRECO).* MIRECO sought repayment by the exchequer of unduly levied import duties and the defendant contended that they were not recoverable since the burden had been passed on when the goods subject to the tax were sold. The court rejected that defence, observing *inter alia* that: "It is well established that under national law a case of undue payment arises only if two conditions are satisfied ... the existence of a payment and the fact that it should not ... have been made. It is irrelevant ... whether by reason of the subsequent repayment the

person concerned merely makes up for the loss suffered ... or is enriched (having already transferred the burden of the loss to third parties ...)."

To complete the picture, I would add that two courts (the Tribunale di Trieste, by order of 26 January 1983 in *SpA BECA* v *Amministrazione delle Finanze* and the Corte d'Appello, Milan, by order of 15 February 1983 in *Amministrazione delle Finanze* v *SpA BAX)* have recently raised the question of the constitutionality of Article 19 on the ground that:

(a) that it encroaches upon the rights of the defence because of its retroactive effect;

(b) that it conflicts with Community law (under Article 11 of the Constitution internal rules which conflict with Community requirements are regarded as unlawful); and

(c) that it infringes the principle of equality laid down in Article 3 of the Constitution.

With regard to this case, two passages in the order of the Milan court are particularly significant. To attach importance to the passing on of a tax burden is, the first passage reads, "a device for removing the right to reclaim the sums unduly paid in every case". The documentary proof of the passing on, adds the second passage, presupposes that there is a "way of distinguishing that part of the single payment made by the third party which corresponds to costs and expenses and the part which relates to the importer's profit; but such a distinction is impossible".

Similar dicta are to be found in certain French decisions. Thus, in its judgment of 16 December 1980 *(Administration des Douanes* v *Société Les Fils de Henri Ramel,* Dalloz 1981, p. 380), the Cour de Cassation refused to say that the passing on of an unduly paid tax — levied in particular on the import of Italian wines — extinguished the right of recovery, placing reliance upon the civil-law rule to the effect that entitlement to repayment is not conditional upon the suffering of a loss by the person who pays the tax; and the Conseil d'Etat has adopted the same approach regarding unduly paid value-added tax.

In Germany, the problem has aroused so little attention that it has given rise to no judicial decisions; but German legislation (see in particular Paragraph 37 (2) of the Abgabenordnung) provides that entitlement to repayment may not be made dependent on whether or not an undue charge is passed on. The same applies in Belgium: Articles 1376 and 1377 of the Civil Code, which apply *inter alia* to fiscal matters, certainly do not allow the passing on of charges to affect in any way the claim vested in the person who paid them. In the Netherlands, there is no legislation or case-law upon which a different view could be based; whereas in the United Kingdom the only authority is an Australian judgment *(Mason* v *The State of New South Wales* [1959] 102 C.L.R. 105) which, *inter alia,* firmly rejects extinction of the right to repayment as a consequence of passing on.

On the basis of the foregoing information, it requires only a short step to

say that, with the exception of Denmark, passing on is alien to the legal experience of the Member States. And a permissive attitude with regard to alien concepts must not be allowed. To accept them is lawful, but they must be looked upon with caution and their limits must be precisely defined. The interpretation which I have proposed and which excludes general application of the principle in question seems therefore to me to be reasonable. I am persuaded, I repeat, not by the intrinsic iniquity of such a principle or its inherent illogicality but by the impossibility of proving in an acceptable way that it works, in other words, of establishing, except in certain limited cases, that it is consonant with the requirement of legal certainty.

I am aware that, particularly in times of economic crisis, to satisfy requests for repayment may place the authorities in a difficult position. But this is not a problem which can be resolved by nullifying, by a stroke of the pen, claims vested in importers (and, what is worse, doing so while proceedings are pending before a national court, so as to make the decision therein inevitably favourable to the exchequer). There are other ways of dealing with this problem which are less radical and more consonant both with Community law and with the legitimate interests of traders: for example, prescribing reasonably short limitation periods for the exercise of the right to repayment. This has been done in Germany and the Community legislature itself chose to follow that course in adopting Regulation No 1430/79. The period laid down therein for submission to the national authorities of applications for repayment varies between three months and one year. Is that still too long? Let it be shortened. It must in any event be recognized what a difference there is between that period and the 10 years provided for by Italian law with regard to most undue payments.

10. A last observation — but one of great importance — is suggested to me by the problem which the President of the Tribunale di Trento raises in the second part of the first question. I have said that to impose upon the person who paid the charges the burden of proving that they have not been passed on amounts in 99 % of cases to rendering irreversible the unjustified advantage accruing to the State. Consider the risk which such a rule may entail for the customs union and for Community policies, in particular the commercial and agricultural policies. That risk has a name: paralysis. How is it possible to prevent the Member States — in their certainty that they will not have to refund the amounts unduly levied — from continuing to levy charges having an effect equivalent to customs duties notwithstanding the Community prohibitions? Who could prevent them from so doing if entrepreneurs were deprived of any judicial means of stopping such a practice and if the Commission's hands were tied as a result of recognition that that practice was permissible under Community law?

These possibilities are extremely serious and, what is more important, they are credible in the present period of resurgent protectionism. The European Parliament has become aware of this. This may be seen from the resolution on the responsibility of the Member States for the application of and compliance with Community law, adopted on 9 February 1983: "... in cases where the

European Court of Justice has declared certain taxes or levies incompatible with the Treaty, the subsequent introduction of a provision under national law limiting the right to recover the illegally levied taxes or levies, thereby enabling Member States wrongfully to retain the benefit of the illegal tax or levy, is incompatible with the spirit of the Community and should be abrogated" (Official Journal 1983, C 68, p. 33, at paragraph 7).

11. In the other part of the first question the national court asks the Court of Justice to rule on the compatibility with Community law of national provisions which: (a) make entitlement to repayment conditional upon proof that the charges have not been passed on to other persons, in the case of charges levied contrary to Community law; and (b) do not apply the same conditions to the repayment of any other tax or charge levied unduly but not in breach of those rules.

As I have already said, the Court has expressed its view on this matter in *Just* and in a number of subsequent judgments; it held that the conditions for the exercise of the right to repayment provided for by national law may not "be less favourable than those relating to similar actions of a domestic nature". It would be easy to remind the national court of those words and to infer from them that to isolate a set of charges characterized by a certain connection with Community law and to impose in respect thereof more onerous conditions regarding the recovery of amounts unduly paid constitutes unjustified discrimination between the persons subject to those taxes and the persons subject to other taxes which, although similar, have no connection with the Community. The national court would not however be satisfied with that. It seeks clarification of the previous decisions of this Court; that is to say, it wishes to know how the words "similar actions of a domestic nature" are to be read. In what circumstances can it be said that similarity exists and that therefore different treatment is prohibited?

The question calls for a more thorough analysis of Article 19 and specifically of the "import duties, manufacturing taxes, taxes on consumption or State taxes" which are subject to the conditions imposed by that article. What is the specific meaning of those expressions? I can say immediately that in Italian tax language all taxes finally borne by the consumer are taxes on consumption; but I would add that the taxable person is not usually the consumer, but someone else who is identified by a certain relationship with the goods before they become the property of the consumer. There are therefore several kinds of taxes on consumption depending on the time at which they arise. Thus, if a tax is levied on goods when they are produced, we speak of a *manufacturing tax;* if it is levied when goods are brought into the territory of the State or leave it or pass

through it we have a *customs duty;* if it is levied as a percentage of the turnover of any taxable person it is called *value-added tax.*

For its part, in reply to questions put by the Court, the Italian Government stated that customs duties include duties in the strict sense, levies provided for by Community law, monopoly dues, frontier surcharges and any other frontier charge payable to the State. It further stated that *State taxes* are to be taken to mean the taxes commonly referred to as manufacturing taxes and that taxes on consumption may be assimilated to the latter.

According to the Italian Government the principle of non-discrimination enunciated by the Court in *Just* is to be interpreted restrictively. It asserts that that principle is not applicable to national legislation laying down different rules for specific tax sectors, but only to legislation whose provisions regarding entitlement to repayment of domestic taxes are different from those regarding levies connected with the Community system *within the same sector.* Article 19 covers an entire sector, that is to say a homogeneous category of fiscal levies, and does so in an indisputably uniform manner. To describe it as discriminatory is therefore impossible.

But this argument is not convincing either. I would point out in the first place that the prohibition of discrimination is a general principle of Community law and therefore any weakening of that principle by the imposition of limits must be approached with great caution. It seems to me that to subdivide the tax system into a number of sectors — perhaps rather small sectors — and then to confine the applicability of that principle within each of those sectors amounts not just to weakening the principle but comes close to destroying it. Moreover, I do not see why entitlement to repayment of a manufacturing tax should be subject to rules different from those governing any other tax, particularly indirect taxes. I therefore share the Commission's view, which departs to a certain extent from the view expressed in the observations lodged on 6 October 1982, to the effect that, if it is wished "to exclude with certainty any discrimination between imported products and domestic products, it will be necessary to deal in the same way with all or ... most indirect taxes" (document lodged on 20 May 1983, p. 3, paragraph 3).

What is to be said at this stage of Article 19 or, rather, of a rule modelled on that article? In the first place, that it does not group together a number of taxes so wide and homogeneous as to justify a derogation from the prohibition of discrimination. In fact, it leaves out of account not only the recovery of amounts unduly paid as a result of a substantive error on the part of the authorities but also numerous indirect taxes and, amongst taxes on consumption, value-added tax and export duties. Those exclusions are not based on the economic function of the taxes in question but on the most disparate extraneous factors. It is clear for example that VAT and amounts unduly paid as a result of an error are excluded only

because they are covered by Community rules.

And that is not all. The Commission's representative drew attention to the fact that Article 19 concerns "a set of taxes comprising predominantly import duties", so that "serious doubts must be entertained as to [its] conformity with the requirement of non-discrimination". Once more, I share the Commission's view. In fact the Italian interpretation of *Just* might well be correct; but if the common feature of the tax sector for which internal legislation lays down different rules is the Community origin of the right to repayment, the effects of that interpretation will be reversed when applied by its proponent: that is to say, the legislation will be seen manifestly to conflict with the tenet which the Court expounded in *Just*.

I do not think it is appropriate for me to make any further observations on how the principle of non-discrimination should operate. It will be for the national court to interpret the national legislation and to determine whether, and if so to what extent, that legislation breaches the principle in the sense which I have just explained.

12. At the hearing counsel for San Giorgio and the Commission's representative observed on several occasions that the requirement of proof laid down in Article 19 is also contrary to Community law because it infringes the right to a fair hearing. To require an importer to produce *exclusively documentary* evidence regarding situations which occurred before the rule came into force — they say — makes it unjustifiably difficult for him to prove that the charge was not passed on. It is to be presumed in fact that until the new conditions came into force importers did not worry (having no reason to do so) about arming themselves with the documentary evidence now called for.

The national court did not raise that problem directly. But because the parties have discussed it in such detail, I do not think that I can do otherwise than consider it. I shall say therefore that the criticism is well founded. There is nothing to prohibit the legislature from limiting the ordinary means of proof and determining that certain claims are to be substantiated only by means of documents; but it is not lawful for this to be done retroactively. San Giorgio and the Commission have rightly drawn attention to the enormous difficulties which such a method entails for the traders concerned. And a further observation may be made. According to a rule with strong historical roots which has been adopted by all legal systems, it is for the plaintiff to prove the facts on which his claim is based and for the defendant, who pleads that those facts add up to nothing or that the right in question has lapsed, to prove the facts on which his objection is based. In this case, on the contrary, the person paying the charges is obliged to furnish negative proof. Such a requirement is not intrinsically unlawful; but it is certainly doubly anomalous and, together with the retroactive effect of the rule imposing it, it totally deprives the person in question of any opportunity to defend himself.

Counsel for the Italian Government objects that the Civil Code obliges undertakings to maintain accounting records and for that reason those concerned ought to have at their disposal the necessary documentation merely as a result of having complied with provisions which have been in force since 1942. But this argument is untenable for at least two reasons:

(a) because the problem was raised — and it could not be otherwise — in general terms and it is not therefore possible to resolve it by reference to specific provisions of a particular legal system; and

(b) because in any case the records envisaged by Italian law concern the business of the undertaking and not the market situation, whereas, as I have said, it is in that area that the rules at issue call upon the person paying the charges to provide evidence.

13. In view of all the foregoing considerations, I suggest that the Court should answer as follows the questions submitted by the President of the Tribunale di Trento by an order of 23 July 1982 in proceedings brought by SpA San Giorgio, Latteria Locate Triulzi, against the State Finance Administration of the Italian Republic:

(a) Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties is to be interpreted as meaning that Member States are not precluded from enacting legal provisions — with respect either to cases of repayment contemplated in that regulation or to other cases — whereby the passing on of a tax burden to other persons in the economic chain extinguishes the right to repayment.

(b) National legislation which makes the repayment of specified charges unduly imposed by the administrative authorities in breach of Community law (for example, charges having an effect equivalent to customs duties) conditional upon the production of proof — whether or not exclusively documentary — that the charges in question have not been passed on to other persons is incompatible with Community law if the price of the product to which the said charges relate is determined by market forces, because it renders the exercise of the right to repayment, which is based on Community law, virtually impossible.

(c) National legislation laying down the special requirements of proof mentioned in paragraph (b) only for taxes levied contrary to Community law and not extending the same conditions to any other unduly levied tax, charge or duty is incompatible with Community law because it entails a breach of the principle of non-discrimination. Such incompatibility arises whenever the range of taxes in question, the repayment of which is governed by different rules and which include wholly or in part charges levied contrary to Community law, is not sufficiently broad: for example, when it does not include all or most indirect charges.