JUDGMENT OF THE COURT (Sixth Chamber)

10 September 2002 *

In Joined Cases C-216/99 and C-222/99,

REFERENCES to the Court under Article 234 EC by the Tribunale di Milano (Italy) (C-216/99) and the Corte d'appello di Roma (Italy) (C-222/99) for preliminary rulings in the proceedings pending before those courts between

Riccardo Prisco Srl

and

Amministrazione delle Finanze dello Stato (C-216/99),

and between

Ministero delle Finanze

and

CASER SpA (C-222/99),

* Language of the case: Italian.

on the interpretation of Articles 10 and 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969(II), p. 412) and on the interpretation of Community law on the recovery of sums paid but not due,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, J.-P. Puissochet (Rapporteur), R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Riccardo Prisco Srl, by M. Costanza and A. Bozzi, avvocati,

— CASER SpA, by A. Crosta, A. Bozzi and G. Bozzi, avvocati,

— the Italian Government, by U. Leanza, acting as Agent, assisted by F. Quadri, avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa and H. Michard, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Riccardo Prisco Srl, represented by M. Costanza and A. Bozzi; CASER SpA, represented by A. Bozzi and G. Bozzi; the Italian Government, represented by G. de Bellis, avvocato dello Stato; and the Commission, represented by E. Traversa, at the hearing on 22 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

1 By orders of 15 and 12 May 1999, received at the Court on 7 and 10 June 1999 respectively, the Tribunale di Milano (District Court, Milan) and the Corte d'appello di Roma (Court of Appeal, Rome) each referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 10 and 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969(II), p. 412, 'the Directive') and on the interpretation of Community law on the recovery of sums paid but not due.

2 Those questions were raised in proceedings between Riccardo Prisco Srl ('Prisco') and CASER SpA ('CASER') and the Italian tax authorities concerning the repayment of charges paid by those two companies between 1985 and 1992 and subsequently held to be contrary to Community law.

3 The charges were levied as *tassa di concessione governativa* (administrative charge) for the registration in the register of companies of various documents concerning the existence of companies. The claims for repayment by Prisco and CASER concern charges paid for the registration of the company's instrument of incorporation and its renewal in subsequent years.

4 The conformity with Community law of those charges and the conditions for their repayment has already been the subject of references for preliminary rulings on which the Court has given judgment in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915, Case C-231/96 *Edis* [1998] ECR I-4951, Case C-260/96 *Spac* [1998] ECR I-4997 and Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025.

Background to the disputes and the legal context

5 The administrative charge, levied for registration in the register of commercial companies kept by the registrars of the district courts of the principal documents concerning the existence of companies, was introduced by Decree No 641 of the President of the Republic of 26 October 1972 (GURI No 292 of 11 November 1972, Supplement No 3).

6 The charge was levied on the registration of the following documents: instrument of incorporation, increase of capital, extension of the duration of the company, change in the objects or type of the company, merger, other amendments to the instrument of incorporation, and documents of the company whose registration is compulsory under the Civil Code.

7 The amount of the administrative charge, which was altered on numerous occasions, varied according to the legal form of the companies concerned as regards registration of the instrument of incorporation, but there was a single rate for registration of other documents. Decree-Law No 853 of 19 December 1984 (GURI No 347 of 19 December 1984), converted into law by Law No 17 of 17 February 1985 (GURI No 41 *bis* of 17 February 1985), provided that the administrative charge payable for registration of the instrument of incorporation was also payable on 30 June of each subsequent calendar year.

8 After companies challenged the conformity with Articles 10 and 12 of the Directive of the administrative charge in so far as it related to the registration of the instrument of incorporation and its maintenance in subsequent years, the Court, to which a reference had been made for a preliminary ruling, held in *Ponente Carni* that Article 10 of the Directive is to be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies. The Court also held that Article 12 of the Directive is to be interpreted as meaning that the duties paid by way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for transactions required by law in the public interest such as, for example, the registration of capital companies, and that the amount of such duties, which may vary according to the legal form taken by the company, is to be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis.

9 On a reference for a preliminary ruling from a court of another Member State, the Court held in Case C-188/95 *Fantask and Others* [1997] ECR I-6783 that

Article 12(1)(e) of the Directive is to be interpreted as meaning that, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question; it may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue.

10 Following the *Ponente Carni* judgment, the levying of the administrative charge for registration of the instrument of incorporation and in each subsequent year was held by several national courts to be contrary to Community law, and the Italian authorities adopted Decree-Law No 331 of 30 August 1993 (GURI No 203 of 30 August 1993), converted into law, after amendment, by Law No 427 of 29 October 1993 (GURI No 255 of 29 October 1993). Article 61(1) of that decree-law fixed a single amount of ITL 500 000, whatever the legal form of the company concerned, for the charge due on registration of the instrument of incorporation (the charge was then definitively abolished with effect from 1 January 1998 by Law No 549 of 28 December 1995); it abolished the annual charge for subsequent years and fixed a single amount of ITL 250 000 for the registration of all documents other than the instrument of incorporation.

11 In proceedings following claims for repayment of the charges levied until 1992 for registration of the instrument of incorporation and its maintenance in subsequent years, the Corte suprema di cassazione (Court of Cassation) held, in judgment No 3458 of 23 February 1996, that those repayments were subject to

the time-limit laid down by Article 13(2) of Decree No 641/1972, which provides:

'A taxpayer may claim repayment of charges paid in error within a time-limit of three years from the date of payment or, in the event of rejection of the document subject to the charge, from the date of notification of rejection.'

12 In response to references by several Italian courts for preliminary rulings on the compatibility of such a time-limit with Community law, the Court ruled in the *Edis*, *Spac* and *Ansaldo Energia* judgments that the fact that the Court has given a preliminary ruling interpreting a provision of Community law without limiting the temporal effects of its judgment does not affect the right of a Member State to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced. The Court further ruled that Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period allowed is more favourable, provided that that time-limit applies in the same way to actions based on Community law for repayment of such charges as to those based on national law. Finally, the Court ruled that, in circumstances such as those described to it, Community law does not prevent a Member State from resisting actions for repayment of charges levied in breach of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had not yet been properly transposed into national law.

13 In addition, in *Ansaldo Energia*, on the question of the interest payable on such repayments, the Court ruled that Community law does not preclude, in the event of the repayment of charges levied in breach thereof, payment of interest

calculated by methods less favourable than those applicable under the ordinary rules governing actions for the recovery of sums paid but not due between private individuals, provided that those methods apply in the same way to such actions brought under Community law as to those brought under national law.

14 Article 11 of Law No 448 of 29 December 1998, the Finance Law for 1999 (GURI of 29 December 1998, ordinary supplement No 302), the application of which is the subject of the main proceedings, was subsequently adopted to regulate retroactively the question of repayment of the registration charges levied in the period from 1985 to 1992, that is, the period preceding the application of the provisions of Decree-Law No 331/1993 summarised in paragraph 10 above.

15 That article provides:

'1. Article 61(1) of Decree-Law No 331 of 30 August 1993, converted into law, after amendment, by Law No 427 of 29 October 1993, shall be interpreted as meaning that the administrative charge for registrations in the register of companies, referred to in Article 4 of the scale annexed to Decree No 641 of the President of the Republic of 26 October 1972, as amended by the said Article 61, is payable for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991 and 1992 in the sum of ITL 500 000 for registration of the instrument of incorporation and in the following fixed annual sums for registration of other company documents for each of the years 1985 to 1992:

(a) for share companies and partnerships limited by shares, ITL 750 000;

(b) for private limited companies, ITL 400 000;

(c) for other types of company, ITL 90 000.

2. Companies which, in the years indicated in paragraph 1, paid the administrative charge for registration in the register of companies and the annual charge, in accordance with in Article 3(18) and (19) of Decree-Law No 853 of 19 December 1984, converted into law, after amendment, by Law No 17 of 17 February 1985, may obtain repayment of the difference between the sums paid and those due under paragraph 1 above, provided that they have submitted a claim for repayment within the time-limits laid down in Article 13 of Decree No 641 of the President of the Republic of 26 October 1972.

3. Interest shall be payable on the sum to be repaid at the statutory rate in force at the date of entry into force of the present law, as from the date of submission of the claim.

...'

16 Thus, for the period from 1985 to 1992, the administrative charge payable for registration of the instrument of incorporation was fixed retroactively at a single amount of ITL 500 000, whatever the legal form of the company concerned, and was due only once (this also applied from 1993), while the administrative charges payable for registration of other company documents varied according to the legal form of the companies concerned and were combined into a flat-rate annual

payment whatever the number of documents actually registered (this differs from what applied from 1993, since under Decree-Law No 331/1993 each document registered, whatever the legal form of the company concerned, incurs an individual charge of ITL 250 000).

17 Article 11 of Law No 448/1998 also regulates, in paragraphs 2 and 3, the terms of repayment of the charges paid by companies from 1985 to 1992, under the originally applicable provisions of Decree-Law No 853/1984, for the registration of the instrument of incorporation and its maintenance in subsequent years which were, following the *Ponente Carni* judgment, declared by several Italian courts to be incompatible with Articles 10 and 12 of the Directive. It is laid down that the amount of the repayment is to be the difference between the sums due on the basis of the retroactive charges introduced by Article 11(1) of Law No 448/1998 and those paid under the system of administrative charges originally applicable, provided that a claim for repayment is submitted within the time-limit laid down in Article 13(2) of Decree No 641/1972.

18 According to the information provided by the Corte d'appello di Roma, the rate of interest on the repayment from the date of the claim, as fixed in Article 11(3) of Law No 448/1998, is lower than the interest rates applicable to repayments of sums paid but not due to the State in tax matters on the basis of national law and the interest rates applicable in connection with the repayment of sums paid but not due in civil matters.

The main proceedings and the questions referred for preliminary rulings

Case C-216/99

19 The tax authorities pleaded the three-year time-limit mentioned in Article 13 of Decree No 641/1972 against Prisco's claim for reimbursement of the sums it paid

from 1987 to 1992 as charges for registration of the instrument of incorporation and its maintenance in the following years under the system of administrative charges originally applicable.

20 In those circumstances, the Tribunale di Milano, before which the dispute had been brought, referred the following questions to the Court for a preliminary ruling:

'1. Do the principles of legal certainty and the protection of individuals — which, according to the judgment of the Court of Justice of 21 June 1988 in Case 257/86 [*Commission* v *Italy* [1988] ECR 3249] and other judgments, require that, in areas covered by Community law, the Member States' legislation should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable the national courts to ensure that those rights and obligations are observed — and the Community principle of proportionality preclude a Member State from pleading national rules on time-limits such as those deriving from the provisions of Article 11(2) of Law No 448 of 23 December 1998 in conjunction with Article 13(2) of Decree of the President of the Republic No 641/1972, regard being had to the fact that the said Article 11 retroactively extended to taxes paid but not due the three-year time-limit which, however, in the said Article 13(2) — on the basis of the true meaning of the words used in context — was expressly limited solely to the case of "repayment of charges paid in error" so as to induce not only the interested parties but also all the trial judges to interpret it in that manner? In short, does the principle of legal certainty allow the national court to apply — *a posteriori* — a time-limit based on a provision which, having regard to the ordinary meaning of the words, does not apply to the case before it?

2. Must the provisions of Articles 10 and 12(1)(e) of Council Directive 69/335/EEC be interpreted as preventing the introduction of national legislation such as that introduced by the Italian legislature in Article 11(1)

and (2) of Law No 448/1998, which — *a posteriori* — reduces the amounts to be repaid as having been paid but not due by way of annual charge on an arbitrary flat-rate basis for registration in the register of companies (kept at that time by court registries) of company documents for each of which each company has already paid a sum provided for by the national legislation? In short, is it permitted — in the light of that directive — for the national legislature to duplicate, *a posteriori* by means of what purports to be an interpretative law, charges which have already been paid?'

Case C-222/99

21 CASER obtained from the Tribunale di Roma (District Court, Rome) a judgment, published on 4 February 1995, ordering the tax authorities to repay the sum of ITL 78 000 000, plus statutory interest from the date of bringing the action, corresponding to the charges it had paid from 1985 to 1992 under the system of administrative charges originally applicable, for the maintenance of the registration of its instrument of incorporation.

22 The tax authorities appealed to the Corte d'appello di Roma, and relied before that court on the retroactive provisions of Article 11 of Law No 448/1998, both to reduce the principal sum to be repaid (by deducting the retrospective flat-rate annual charges due for the registration from 1985 to 1992 of documents other than the instrument of incorporation) and to apply a lower rate of interest than that allowed by the court at first instance.

23 In those circumstances, the Corte d'appello di Roma referred the following questions to the Court for a preliminary ruling:

'1. For the purposes of an action brought by a company before the Italian courts for repayment of the administrative charge paid from 1985 to 1992 under laws conflicting with Article 10 of Council Directive 69/335/EEC of 17 July 1969 (see the judgment of 20 April 1993 in Joined Cases C-71/91 and C-178/91 [*Ponente Carni*]), may Article 11(1) of Law No 448 of 23 December 1998 which retroactively lays down the single charge of ITL 500 000 for registration of the instrument of incorporation and various flat-rate charges for the registration of other company documents (varying from ITL 750 000 to ITL 90 000 depending on the kind of company) be considered compatible with the principles of Community law and with the interpretation of the said directive given by the Court of Justice in its judgment in Joined Cases C-71/91 and C-178/91?

This is asked in the light of the fact that the abovementioned provision (Article 11(1) of Law No 448 of 1998), while apparently — in view of the objectively modest sums and the reference *ex novo* to the registration of company documents — intended to refer to flat-rate figures apparently commensurate with the cost of the service (that is, duties paid by way of fees or dues: Article 12(1)(e) of Directive 69/335), was in fact adopted without any previous determination or calculation of the costs of the service rendered to the companies (costs which are easily ascertainable, because they relate to past years, on the basis of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction), and without there being any visible connection between the amounts levied and the service actually received at the time by the companies, which had in fact paid a charge for registration and for annual renewal thereof and not for the registration of company documents on a flat-rate basis.

2. Regardless of whether the amounts levied by the Italian State under Article 11(1) of Law No 448 of 1998 rank as duties paid by way of fees

or dues, is the statutory interest payable by the State — in addition to the repayments to the companies — with effect, as specifically indicated in Article 11(3), from the date of submission of the claim for repayment and at an annual rate equivalent to 2.5%, that is, lower than the annual rates laid down generally for tax paid but not due by Articles 1 and 5 of Law No 29 of 29 January 1961 (and successive provisions) or, for other sums paid but not due, by Article 2033 of the Civil Code, compatible with the principle of equivalence between the two legal orders (domestic and Community) as regards the protection of individuals' rights and/or with the principle of effective exercise of the rights conferred by Community law — both principles having been upheld repeatedly by the Court of Justice in its judgments of 15 September 1998 in Case C-260/96 *Spac*, Case C-231/96 *Edis* and Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia*?'

24 By order of the President of the Court of 17 September 2001, Cases C-216/99 and C-222/99 were joined for the purposes of the oral procedure and the judgment.

25 By application lodged at the Court Registry on 23 April 2002, Prisco and CASER sought for the oral procedure, which had been closed on 31 January 2002 with the delivery of the Advocate General's Opinion, to be reopened.

26 The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Joined Cases C-270/97 and C-271/97 *Deutsche Post* v *Sievers and Schrage* [2000] ECR I-929, paragraph 30).

27 In support of their request, Prisco and CASER refer, as a new fact, to the making by the Corte costituzionale (Constitutional Court) on 10 April 2002 of an order, No 113/2002, following a referral to that court by the Tribunale di Firenze (District Court, Florence) for an assessment of the conformity with the Italian constitution of Article 13(2) of Decree No 641/1972.

28 The referral by the Tribunale di Firenze thus related to one of the national provisions at issue in the first question referred to the Court by the Tribunale di Milano in Case C-216/99. However, it is apparent that the order of the Corte costituzionale dismisses the referral by the Tribunale di Firenze as manifestly inadmissible on the ground that Article 13(2) of Decree No 641/1972 does not apply directly and specifically to the dispute before that court, the provision directly applicable thereto being, according to the Corte costituzionale, Article 11(2) of Law No 448/1988. The order of the Corte costituzionale does not deal with the substance of Article 13(2) of Decree No 641/1972 and does not therefore alter the presentation of the national legal framework as it appears from the procedure followed in the main proceedings.

29 Consequently, the order of the Corte costituzionale cannot be regarded as a new fact with respect to the questions submitted to the Court justifying reopening the oral procedure, and the request by Prisco and CASER must be dismissed.

30 The questions submitted by the two national courts relate essentially to three aspects.

31 First, the courts wish to obtain an interpretation of Community law to enable them to rule on the compatibility with Articles 10 and 12 of the Directive of the retroactive charges introduced by Article 11(1) of Law No 448/1998 to cover, for

the years 1985 to 1992, registration of the instrument of incorporation and other company documents, in particular in so far as those charges are deducted from the repayments of the charges paid under the originally applicable provisions of Decree-Law No 853/1984 (second question of the Tribunale di Milano and first question of the Corte d'appello di Roma).

32 Second, the Tribunale di Milano, by its first question, asks as to the compatibility with Community law of the three-year time-limit which the tax authorities apply, under Article 11(2) of Law No 448/1998 in conjunction with Article 13 of Decree No 641/1972, to claims for repayment of the charges paid under the originally applicable provisions of Decree-Law No 853/1984.

33 Third, the Corte d'appello di Roma, by its second question, asks as to the compatibility with Community law of the interest rate determined under Article 11(3) of Law No 448/1998 for repayment of the charges paid under the originally applicable provisions of Decree-Law No 853/1984.

The retroactive charges deducted from the repayments claimed

Observations submitted to the Court

34 Prisco and CASER submit, to begin with, that for the period from 1985 to 1992 at issue in the main proceedings, companies were already charged capital duty and also paid 'registry fees' and, in some cases, stamp duties paid by way of fees

or dues on each occasion that they had a document or event registered pursuant to the Civil Code. The administrative charges were thus additional to the capital duty, referred to in Article 2 to 9 of the Directive, and to charges by way of fees or duties, specifically permitted by Article 12(1)(e) of the Directive, for the same operations or registrations.

35 With respect, first, to the retroactive administrative charge for registration of the instrument of incorporation, Prisco and CASER submit that remuneration of the service provided for registration has already been covered by the registry fees. They put forward a calculation to show that the sum of ITL 8 000 demanded from 1985 to 1992 as registry fees easily covered the registries' costs. Consequently, according to Prisco and CASER, the charge for registration of the instrument of incorporation is contrary in any event to Articles 10 and 12 of the Directive, since it amounts to paying twice for the same service.

36 In the alternative, Prisco and CASER contend that, before fixing the amount of the retroactive charge for registration of the instrument of incorporation, the costs of the service provided from 1985 to 1992 for registration of such a document should have been determined. They contend that the amount of ITL 500 000 is too high since the ITL 8 000 charged as registry fees already suffices. They say that it is not necessary to bring the sums due up to date, since both the registry fees and the administrative charges payable under the originally applicable provisions were paid to the authorities at the time. Finally, observing that the Court held in *Fantask* that a flat-rate charge must be reasonable, taking into account in particular the number and qualification of the officials involved, the time they take and the various material costs necessary for carrying out the transaction, Prisco and CASER submit that there is no reason to suppose that such principles were complied with in the main proceedings. Consequently, the charge at issue is not a duty paid by way of fees or dues and is contrary to Articles 10 and 12 of the Directive.

37 With respect, second, to the retroactive annual flat-rate charge for registration of documents other than the instrument of incorporation, Prisco and CASER point out that in Case C-2/94 *Denkavit Internationaal and Others* [1996] ECR I-2827 the Court interpreted Article 10(c) of the Directive as being intended to prevent taxes which, although not imposed on capital contributions as such, are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital.

38 According to Prisco and CASER, it is beyond doubt that the charges for registration of company documents other than the instrument of incorporation relate to a formality connected with the legal form of the companies in question. Moreover, it cannot be argued that, because Article 10(c) of the Directive refers to 'registration or any other formality required before the commencement of business', the administrative charges payable for registration of documents other than the instrument of incorporation are not caught by the prohibition laid down in that provision. The Court explained in *Fantask* that the formalities referred to in that provision are all those with which companies are required to comply in order not only to commence their business but also to carry it on.

39 Prisco and CASER submit that the retroactive flat-rate charge for registration of documents other than the instrument of incorporation during the years 1985 to 1992 cannot be regarded as a duty paid by way of fees or dues permitted by Article 12(1)(e) of the Directive, since that charge is levied even if, in the particular case, there were in fact no registrations during the years in question, and the costs incurred have in any event already been covered by the registry fees. Prisco and CASER also submit that companies which actually had documents other than the instrument of incorporation registered during the years 1985 to 1992 could have to pay three times for the registration: once as the administrative charges originally applicable, once as registry fees, and once as the retroactive flat-rate charge.

40 Should the Court consider that the retroactive flat-rate charge is nevertheless capable of being a duty paid by way of fees or dues, Prisco and CASER submit that its amount was fixed without any prior determination or calculation of the costs of the service rendered to the companies, as the Corte d'appello di Roma pointed out.

41 The Italian Government submits, first, that in *Ponente Carni* the Court held that the duties paid by way of fees or dues permitted by Article 12(1)(e) of the Directive cover only payments collected on registration or annually, the amount of which is calculated on the basis of the cost of the service rendered, and that that payment cannot be calculated on the basis of all the costs of the administrative department concerned. The Italian courts accordingly declared that the administrative charge system originally applied from 1985 to 1992 was contrary to Community law.

42 According to the Italian Government, the new system introduced retroactively to avoid no remuneration being paid for the registration services rendered from 1985 to 1992 do, on the other hand, comply with the principles set out in *Ponente Carni*. First, no double charging of fees for the same service arises from the system. In particular, if some offices charged from 1985 to 1992 individual administrative charges for the registration of documents other than the instrument of incorporation, that was due to an incorrect interpretation of Decree-Law No 853/1984. Those registrations were covered by the charge levied at that time on 30 June each year. Second, the retroactive flat-rate annual charge for registration of documents other than the instrument of incorporation is payable in respect of a year only if such registrations have actually been made during that year. Third, the Directive does not require a correlation between the flat-rate amount charged and the actual cost to the authorities of providing the specific service rendered to a company. To require such a correlation would

amount to ruling out the possibility of fixing flat-rate charges, although that possibility was accepted by the Court in *Ponente Carni* and *Fantask*. In the present case, the amount of the charges is reasonable and within the range of charges applied in other Member States for similar formalities.

43 As regards the retroactive charge for registration of the instrument of incorporation, the Commission contends that there is no doubt that that charge, the continuity of which with the previous charge is apparent from the reference to Decree No 641/1972 in Article 11 of Law No 448/1998, falls within the prohibition laid down in Article 10(c) of the Directive, unless it is justified under Article 12(1)(e) of the Directive.

44 The Commission contends that a Member State complies with the conditions necessary for the charges in question to be duties paid by way of fees or dues if their amount is 'reasonable'. In its written observations, relying on a comparative study of registration charges in twelve Member States which it carried out in connection with the *Ponente Carni* case and has since updated, it submitted that the amount of ITL 500 000 charged under Article 11 of Law No 448/1998 for registration of the instrument of incorporation for the years 1985 to 1992 was reasonable. It observed that, at the present rate of exchange between the euro and the lira, the average amount of the charges levied by those twelve Member States in 1991 was ITL 314 000 and that, taking into account the eight years which had since passed and the inevitable differences in average costs between States, the amount of ITL 500 000 charged in 1999 did not appear excessive.

45 At the hearing, however, the Commission stated that it had received information that registry fees had also been collected for registration of the instrument of incorporation from 1985 to 1992. Consequently, even if the administrative charges originally paid for that registration and its maintenance in subsequent years were repaid, the application of the new retroactive charge meant the operation being taxed twice. In the Commission's view, the exception to the prohibition of charges for duties paid by way of fees or dues, in Article 12(1)(e) of

the Directive, only makes sense if one charge only is levied to pay for a service. In a situation where two or more charges are levied in connection with the provision of one service, only the charge specifically levied at the time when the service is rendered by the authorities who provide it can be a duty paid by way of fees or dues. In the present case, only the registry fees collected between 1985 and 1992 were such duties and could be justified by Article 12(1)(e) of the Directive, whatever the amount of the new retroactive charge may be.

46 As regards the new retroactive annual flat-rate charge payable for registration of documents other than the instrument of incorporation, the Commission considers essentially, for the same reasons as Prisco and CASER, that that charge also falls within Article 10(c) of the Directive and cannot benefit from the exception for duties paid by way of fees or dues in Article 12(1)(e). It submits that, having regard to the automatic nature of the payment of that charge, even if no documents were registered during the year, the existence of the registry fees and the fact that charges were already paid if a registration was made under the administrative charge system originally in force, the new retroactive system may result in a company having to pay charges in the absence of any service, or indeed to pay two or even three times for the same service.

Findings of the Court

47 The Court will start by examining whether charges such as those at issue, introduced by Article 11(1) of Law No 448/1998, fall within one of the prohibitions in Article 10 of the Directive. It is not disputed that the charges do not constitute capital duty.

48 Article 10 of the Directive, read in the light of the last recital in its preamble, prohibits in particular indirect taxes with the same characteristics as capital duty. The taxes thus referred to include any which are payable in respect of the formation of a capital company or an increase in its capital (Article 10(a)) or in respect of registration or any other formality required before the commencement of business to which a company may be subject by reason of its legal form (Article 10(c)). The latter prohibition is justified by the fact that, although the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the Directive (*Denkavit Internationaal*, paragraph 23, and *Fantask*, paragraph 21).

49 In the present case, in so far as the charge for registration of the instrument of incorporation is paid on the registration of new companies, it is directly referred to in the prohibition laid down by Article 10(c) of the Directive. A similar conclusion must also be reached where charges are payable on the registration of other company documents, since they too are imposed on account of a formality connected with the legal form of the companies in question. While registration of those documents does not formally amount to a procedure which is required before a capital company commences business, it is none the less necessary for the carrying on of that business (see, to that effect, *Fantask*, paragraph 22).

50 It must therefore be examined whether charges such as those at issue in the main proceedings may come under the exception for duties paid by way of fees or dues under Article 12(1)(e) of the Directive.

51 The distinction between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter cover only payments collected on registration of company documents whose amount is calculated on the basis of

the cost of the service rendered. A payment the amount of which had no link with the cost of the particular service or was calculated not on the basis of the cost of the transaction for which it is consideration but on the basis of all the running and capital costs of the department responsible for that transaction would have to be regarded as a tax falling solely under the prohibition of Article 10 of the Directive (*Ponente Carni*, paragraphs 41 and 42, and *Fantask*, paragraph 27).

52 As regards the retroactive annual flat-rate administrative charges payable for registration of documents other than the instrument of incorporation, introduced by Article 11 of Law No 448/1998, it is apparent that, if those charges are levied over and above the administrative charges already paid during the years 1985 to 1992 for registration of the same documents under the system originally applicable and, having regard in particular to the time-limit under Article 13 of Decree No 641/1972, the companies concerned cannot obtain reimbursement of the latter charges, the Italian authorities have already, in respect of the registration of those documents, levied similar charges purporting to pay for the service rendered. In such circumstances, without its being necessary to examine whether the cost of registration of those documents has also already been covered by the registry fees, the flat-rate charges cannot be regarded as duties paid by way of fees or dues.

53 A fortiori, the retroactive annual flat-rate administrative charges cannot be paid by way of fees or dues if they relate to years in which there were no registrations of documents other than the instrument of incorporation.

54 As regards the retroactive administrative charge for registration of the instrument of incorporation, likewise introduced by Article 11 of Law No 448/1998, the same reasoning as in paragraph 52 above applies with respect to companies which have already paid an administrative charge for registration of the instrument of incorporation between 1985 and 1992 and, having regard in particular to the time-limit following from paragraph 2 of that article and Article 13 of Decree No 641/1972, cannot claim repayment of that charge.

55 With respect to companies which can claim repayment of the administrative charges already paid between 1985 and 1992 for registration of the instrument of incorporation or of other documents, it is for the national courts to ascertain whether or not the new retroactive charges introduced for those operations are paid by way of fees or dues, taking into account the principles referred to in paragraphs 8 and 9 above.

56 They would of course not be paid by way of fees or dues if it were clear that the registry fees also paid for those operations already covered the entire costs of the service rendered. However, contrary to the Commission's submissions at the hearing, in the absence of harmonisation of the methods of collecting duties paid by way of fees or dues, the Member States are free to collect several payments in parallel for the service rendered, as long as the total does not exceed the actual cost of providing it (see, to that effect, with reference to charges payable for customs formalities, Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575, paragraph 10). Consequently, the mere fact that registry fees are charged in parallel in respect of the same registrations as those for which retroactive administrative charges are levied does not suffice to show that the latter are not duties paid by way of fees or dues permitted by Article 12(1)(e) of the Directive.

57 The answer to the second question of the Tribunale di Milano and the first question of the Corte d'appello di Roma must therefore be that Article 10 of the Directive is to be interpreted as prohibiting, subject to the exceptions in Article 12 of the Directive, retroactive charges for the registration of company documents in the register of companies where they do not constitute capital duty permitted by the Directive. Article 12(1)(e) of the Directive must be interpreted as meaning that such retroactive charges do not constitute duties paid by way of fees or dues permitted by that provision where the registrations in the register of companies for which they are charged have already given rise to charges for which the retroactive charges are intended to be a substitute but which are not

reimbursed to those who have paid them. Otherwise, for such retroactive charges to constitute duties paid by way of fees or dues permitted by Article 12(1)(e) of the Directive, their amounts, which may vary according to the legal form of the company, must be calculated solely on the basis of the cost of the formalities in question, although they may also cover the costs of minor operations carried out free of charge, and must take account of any other charges paid in parallel which are also intended to pay for the same service rendered. In calculating those amounts, a Member State is entitled to take into account all the costs linked with the registration operations, including the share of overheads attributable to them. A Member State also has the option of introducing flat-rate charges and setting their amounts for an indeterminate period, as long as it ensures at regular intervals that those amounts still do not exceed the average cost of the operations concerned.

The time-limit

Observations submitted to the Court

58 Prisco concludes from the judgments in Case 309/85 *Barra and Others* [1988] ECR 355 and Case 240/87 *Deville* [1988] ECR 3513 that a Member State may not adopt provisions making repayment of a tax held to be contrary to Community law by a judgment of the Court, or whose incompatibility with Community law is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question.

59 Prisco submits that the provisions of Article 13 of Decree No 641/1972, considered by the Court in *Edis*, both predated the *Ponente Carni* judgment

and did not relate specifically to the charges at issue, so that the Court held that that principle did not apply. However, Article 11 of Law No 448/1998, at issue in the main proceedings, was later than *Ponente Carni* and related specifically to the charges which were held to be incompatible with Community law following that judgment. That article no longer allowed the national courts to interpret Article 13 of Decree No 641/1972 as applying only to charges paid as a result of a material error, and not to charges whose repayment is sought on the ground of incompatibility with Community law. Consequently, the principle of equivalence referred to in *Barra* and *Deville* was not complied with by Article 11 of Law No 448/1998.

60 That provision furthermore infringed the principles of legal certainty, protection of legitimate expectations, and proportionality, having regard in particular to the fact that it was retroactive and that, at the time of its adoption, the time-limit of three years it applied had long since expired since the payment in 1992 of the last charges whose repayment is sought.

61 The Italian Government submits that Article 11 of Law No 448/1998 did not extend the scope of the three-year time-limit to the cases of repayment of charges referred to in that article. According to the Government, Article 13 of Decree No 641/1972, as interpreted by the Corte suprema di cassazione in judgment No 3458/1996, already entailed applying such a period to claims for the repayment of administrative charges based on non-compliance with Community law. The Government adds that in any event the question of the scope of Article 13 of Decree No 641/1972 is a pure question of national law which is not for the Court to rule on, and that the situation is still the same as that considered by the Court in the *Edis*, *Spac* and *Ansaldo Energia* cases, in which it held that Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a three-year time-limit under national law, by way of derogation from the more favourable ordinary rules governing actions between private individuals for the recovery of sums paid but not due, provided that that time-limit applies in the

same way to actions based on Community law for repayment of such charges as to those based on national law (principle of equivalence) and provided that they do not render practically impossible or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

62 The Commission contends that the question raised by the national court of observance of the principles of legal certainty and protection of individuals arises with respect to Article 13 of Decree No 641/1972, as interpreted by the Corte suprema di cassazione in judgment No 3458/1996, rather than with respect to Article 11 of Law No 448/1998, and that this is a question more of Italian law than Community law.

63 On this point, the Commission deduces from *Edis*, Case C-228/96 *Aprile* [1998] ECR I-7141 and Case C-343/96 *Dilexport* [1999] ECR I-579 the following principles concerning rules for repayment of taxes contrary to Community law. Member States may not retain rules adopted after a judgment of the Court establishing the incompatibility with Community law of those taxes which apply exclusively to them and are less favourable to the taxpayers than those which would otherwise have applied.

64 The Commission submits that in the main proceedings the first two conditions are satisfied. However, whether the third is satisfied is linked with the interpretation of Article 13 of Decree No 641/1972: if the three-year time-limit laid down by that article already applied to claims for repayment of charges unlawfully levied, Article 11 of Law No 448/1998 made no change and could not be held to be contrary to Community law. If, on the other hand, Article 13 of Decree No 641/1972 applied only to claims for repayment of charges paid as a result of material errors, the opposite conclusion would apply. The answer thus depends on the interpretation of the national provisions, which the Court cannot itself perform.

Findings of the Court

65 The application of Article 13 of Decree No 641/1972 to claims for repayment of the charges declared contrary to Community law following the *Ponente Carni* judgment was already at issue in *Edis*. The Court observed, first, that the interpretation of Article 13 of Decree No 641/1972 given by the Corte suprema di cassazione in judgment No 3458/1996 related to a national provision which had been in force for several years when judgment was delivered in *Ponente Carni* and, second, that that provision was concerned not only with repayment of the charge at issue in that judgment but also with that of all registration charges levied by the Italian Government. The Court concluded that its findings in *Barra* and *Deville* did not apply (*Edis*, paragraph 25).

66 The Court then said that, according to information provided by the Italian Government and not disputed, a time-limit similar to that at issue applied also to actions for repayment of certain indirect taxes, and that it did not appear from the wording of Article 13 of Decree No 641/1972 that it applied only to actions based on Community law. The Court also said that it was clear from the case-law of the Corte suprema di cassazione that the time-limits relating to taxes applied also to actions for repayment of charges or dues levied under laws that had been declared incompatible with the Italian constitution (*Edis*, paragraph 38).

67 In those circumstances, the Court held that Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period

allowed is more favourable, provided that that time-limit applies in the same way to actions based on Community law for repayment of such charges as to those based on national law (*Edis*, paragraph 39).

68 With respect to Article 11(2) of Law No 448/1998, it must be stated that that provision does no more than refer to the provisions of Article 13 of Decree No 641/1972, as analysed by the Court in *Edis*, and does not alter their scope. Moreover, no new factor arising from the present proceedings requires the Court to differ from the assessment it made in that judgment.

69 In particular, a provision such as Article 11(2) of Law No 448/1998 does not render practically impossible or excessively difficult the exercise of rights conferred by Community law, in so far as compliance with the three-year time-limit it refers to in order to define the conditions governing repayment of charges paid between 1985 and 1992 is assessed at the time of lodging the claim for reimbursement, not the date of adoption of that provision in 1998. Such a provision, although formally retroactive, cannot in any event be contrary to the principles of legal certainty, protection of legitimate expectations and proportionality, in that it does not itself alter the scope of the rules which already applied before it was enacted.

70 The answer to the national court's question must therefore be the same as in *Edis*, namely that Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period allowed is more favourable, provided that that time-limit applies in the same way to actions based on Community law for repayment of such charges as to those based on national law.

The rules for calculating interest on repayments

Observations submitted to the Court

71 CASER states that Law No 29 of 25 January 1961 (GURI No 53 of 1 March 1961), as amended, regulates generally the interest rates applicable, whether for the benefit of the State or of taxpayers, to sums due as indirect turnover taxes and charges in the event of late payment by taxpayers or repayment of sums wrongfully levied by the State. CASER submits that, applying that law, the interest which should be paid it as from its claim for repayment (ITL 30 810 000 on 30 June 1999) is greater than the interest under Article 11(3) of Law No 448/1998 (ITL 17 550 000). The same applies if the statutory interest prescribed by Article 1284 of the Civil Code for repayment of all sums wrongly paid as from the date of bringing proceedings is applied (ITL 40 950 000). The differences between the amounts payable as interest of various kinds show plainly that Article 11(3) of Law No 448/1998 does not comply with the principle of equivalence.

72 CASER points out that the situation now before the Court differs from that in *Ansaldo Energia*. The question in that case was whether Community law precludes the fixing of different interest rates in tax cases from those in civil cases. In the main proceedings, however, the issue is the fixing of different interest rates in tax cases, with the less favourable rate, which was moreover fixed retroactively, applying specifically to repayment of the charges declared contrary to Community law following the *Ponente Carni* judgment.

73 The Italian Government notes that in *Ansaldo Energia* the Court stated that a Member State cannot be required to extend its most favourable national rules on repayment to all claims for the repayment of charges or duties levied in breach of Community law. Moreover, as Article 11(3) of Law No 448/1998 did not reserve the rate it lays down, 2.5% (the statutory rate at the date of entry into force of that law), solely to cases involving repayment of the administrative charges levied in breach of Community law but applied it to all possible cases of claims for repayment relating to those amounts and to those based on national law, the principle of equivalence is also complied with.

74 The Commission points out that, contrary to the position in the *Ansaldo Energia* case, it is clear from the actual wording of Article 11 that it applies only to the reimbursement of particular charges which were held to be contrary to Community law, but not to the many other governmental administrative charges, which themselves form part of the broader category of indirect taxes other than turnover taxes.

75 Observing, moreover, that the rate of interest applicable under Article 11(3) of Law No 448/1998 is lower, taking the periods in question as a whole, than the rate of interest applicable to tax debts under Law No 29/1961, the Commission concludes that the principle of equivalence is not complied with. The same would apply if the reference taken were the statutory interest rate applicable during the same periods to civil debts, in the event of reclassification of the legal relations between the tax authorities and the companies which paid the administrative charges at issue, following the declaration of the incompatibility of those charges with Community law.

Findings of the Court

76 The Court observed in paragraph 29 of *Ansaldo Energia* that national rules on repayment comply with the principle of equivalence if they apply without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues, but that that principle cannot be interpreted as requiring a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law. The Court concluded, in paragraph 30 of that judgment, that Community law does not preclude a Member State from laying down, with respect to interest, methods of calculation for repayment of charges improperly levied which are less favourable than those applicable to actions between private individuals for the recovery of sums paid but not due, provided that the methods in question apply without distinction to actions based on Community law and to those based on national law.

77 However, as the Court also held, a Member State may not adopt provisions making repayment of a tax held to be contrary to Community law by a judgment of the Court, or whose incompatibility with Community law is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question (see *Edis*, paragraph 24, *Aprile*, paragraph 26, and *Dilexport*, paragraph 39).

78 It appears that in the circumstances at issue in the main proceedings, which differ on this point from those in the *Ansaldo Energia* case, the rules for calculating interest laid down in Article 11(3) of Law No 448/1998, which relate specifically

to the administrative charges for registration in the register of companies and the annual payment for its maintenance in subsequent years which were declared contrary to Community law following the *Ponente Carni* judgment, are less favourable that the rules applicable to repayment of other tax debts, including repayment of other administrative charges of the same kind. In such circumstances, the presence of which is for the national court to ascertain, legislation such as that at issue in the main proceedings would be contrary to Community law and should be disapplied and replaced by the provisions on interest applicable to repayments of other administrative charges of the same kind.

79 The answer to the national court must therefore be that Community law precludes the adoption by a Member State of provisions making repayment of a tax held to be contrary to Community law by a judgment of the Court, or whose incompatibility with Community law is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question.

Costs

80 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunale di Milano by order of 15 May 1999 and by the Corte d'appello di Roma by order of 12 May 1999, hereby rules:

1. Article 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as prohibiting, subject to the exceptions in Article 12 of that directive, retroactive charges for the registration of company documents in the register of companies where they do not constitute capital duty permitted by that directive. Article 12(1)(e) of Directive 69/335 must be interpreted as meaning that such retroactive charges do not constitute duties paid by way of fees or dues permitted by that provision where the registrations in the register of companies for which they are charged have already given rise to charges for which the retroactive charges are intended to be a substitute but which are not reimbursed to those who have paid them. Otherwise, for such retroactive charges to constitute duties paid by way of fees or dues permitted by Article 12(1)(e) of Directive 69/335, their amounts, which may vary according to the legal form of the company, must be calculated solely on the basis of the cost of the formalities in question, although they may also cover the costs of minor operations carried out free of charge, and must take account of any other charges paid in parallel which are also intended to pay for the same service rendered. In calculating those amounts, a Member State is entitled to take into account all the costs linked with the registration operations, including the share of overheads attributable to them. A Member

State also has the option of introducing flat-rate charges and setting their amounts for an indeterminate period, as long as it ensures at regular intervals that those amounts still do not exceed the average cost of the operations concerned.

2. Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period allowed is more favourable, provided that that time-limit applies in the same way to actions based on Community law for repayment of such charges as to those based on national law.

3. Community law precludes the adoption by a Member State of provisions making repayment of a tax held to be contrary to Community law by a judgment of the Court, or whose incompatibility with Community law is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question.

Macken Puissochet Schintgen

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 10 September 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber