JUDGMENT OF THE COURT
24 March 1988 *

In Case 104/86

Commission of the European Communities, represented by its Legal Adviser, Giuliano Marenco, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Franco Favara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that by making the repayment of national taxes levied in breach of Community law virtually impossible or excessively difficult and by adopting legislation on the repayment of duties provided for under Community law, the Italian Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: G. Bosco, President of Chamber, acting for the President, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: Sir Gordon Slynn
Registrar: B. Pastor, Administrator

* Language of the Case: Italian.

having regard to the Report for the Hearing and further to the hearing on 25 June 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 September 1987,

gives the following

Judgment

1 By application lodged at the Court Registry on 2 May 1986, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that:

(a) by imposing on the taxpayer the onus of proving that national charges and taxes which were unduly paid, as they were contrary to Articles 9 *et seq.* and 95 of the EEC Treaty, have not been passed on to other persons, by accepting only documentary proof in that regard and by giving retroactive effect to the national provisions concerned, the Italian Republic has failed to fulfil its obligations under Articles 5, 9 *et seq.* and 95 of the EEC Treaty;

(b) by laying down rules governing the repayment of Common Customs Tariff duties and import and export charges under the common agricultural policy, the Italian Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty and Council Regulation (EEC) No 1430/79 of 2 July 1979 (Official Journal 1979, L 175, p. 1).

2 After the close of the oral procedure, the Commission informed the Court, by a letter received at the Court Registry on 8 February 1988, that it was withdrawing

the second head of its application. However, it stated that it was maintaining all the other claims set out in its application, including the claim that the defendant should pay the costs.

3 The Court asked the Italian Republic to submit its observations concerning the withdrawal of part of the application and, by telex message of 18 February 1988, the Italian Republic signified its agreement to the Commission's partial withdrawal and stated that as far as the part of the proceedings not affected by the withdrawal was concerned it maintained all the arguments put forward in the rejoinder, including those which had prompted the Commission to withdraw part of its application. Consequently, it is necessary to consider only the first complaint in the application.

4 Reference is made to the Report for the Hearing for the provisions of national law and Community law at issue and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 The Commission submits that Article 19 of Decree-Law No 688 of 30 September 1982 (GURI No 270 of 30 September 1982), converted into Law No 873 of 27 November 1982 (GURI No 328 of 29 November 1982) imposes on the taxpayer the burden of proving that he has not passed on to other persons taxes unduly paid and excludes any means of proof other than documentary evidence. Furthermore, in the Commission's view, the fact that Article 19 is retroactive aggravates the situation of interested taxpayers as far as the period prior to its entry into force is concerned. By imposing in this manner evidential requirements which are virtually impossible to discharge, that provision of national law is contrary to Community law and in particular to Articles 9 *et seq.* and 95 of the EEC Treaty.

6 As the Court has already held (see the judgment of 27 February 1980 in Case 68/79 *Just* v *Danish Ministry of Fiscal Affairs* [1980] ECR 501), in the absence of Community rules concerning the refunding of national charges which have been levied in breach of Community law, it is for the Member States to ensure the repayment of such charges in accordance with the provisions of their internal law. Furthermore, Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve an unjust enrichment of those entitled. Thus it does not prevent the fact that the burden of such charges may have been passed on to other traders or to consumers from being taken into consideration.

7 Lastly, as the Court held in the judgment of 9 November 1983 (Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595), with regard to Article 19 of the very Decree-Law at issue in this case, any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law is incompatible with Community law; that is particularly so in the case of presumptions or rules of evidence intended to place on the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence.

8 The Italian Government does not dispute the above principles from the Court's case-law. However, it considers that the provisions of Article 19 of Decree-Law No 688 do not preclude the effectiveness of those principles in the Italian national legal order.

9 In that regard, the Italian Government contends that owing to two recent judgments of the Italian Constitutional Court the provision at issue cannot have effects contrary to the rules of Community law. In the first of those judgments (No 170) of 8 June 1984 the Constitutional Court held that, in view of the primacy and the direct application of Community law, national courts might regard as inapplicable a national law which was contrary to a rule of Community law. In the second judgment (No 113) of 23 April 1985, which was concerned with an issue of constitutionality concerning Article 19 of the very Decree-Law at issue in this case, the Constitutional Court extended that principle to cover rules arising from interpretative judgments of the Court of Justice. The Italian Government points out that those judgments of the Constitutional Court have brought about a radical innovation in the Italian domestic legal order, as a result of which Article 19 of the Decree-Law at issue in this case has been held to be inapplicable by national courts, including the Italian Court of Cassation (judgment No 5129 of 18 October 1985), on the ground that it was incompatible with Community legislation. Because of that innovation any national law amending Article 19 be incapable of adding anything further, constituting a species of 'reception', which would be both otiose and contrary to the principle of the direct applicability of Community law.

10 The Italian Government further observes that the provision at issue is compatible with the rules of Community law and the Court's case-law inasmuch as the onus

of proving that the tax has actually been passed on still has to be borne by the national administration. The traders concerned have the burden only of proving their own assertions that the tax has not been passed on, which can be proved by means of the records which every undertaking must necessarily keep.

11 The Italian Government's arguments cannot be accepted. The disputed Italian legislative provision obliges traders to prove a negative, inasmuch as, in the face of mere allegations by the administration, they must prove that they have not passed on the unduly paid tax to other parties, what is more by means of documentary evidence only. Such a provision is contrary to the rules of Community law as developed in the Court's case-law.

12 Despite the abovementioned judgments relied on by the Italian Government, and even though it must be acknowledged that the development of the case-law of the Italian Constitutional Court does have the effect of facilitating the application of the principles of the direct effect and primacy of Community law in the domestic legal order, it must be observed that the contested provision is still part of national law. As the Court has held on a number of occasions, the primacy and direct effect of the provisions of Community law do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law, since the maintenance of such provisions gives rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law.

13 In the light of the above considerations it must be held that by imposing on the taxpayer, under Article 19 of Decree-Law No 688 of 30 September 1982, converted into Law No 873 of 27 November 1982, the burden of proving by documentary evidence alone that the national taxes and charges in respect of which he is seeking repayment on the ground that they were unduly paid, as they were contrary to Articles 9 *et seq.* and 95 of the EEC Treaty, have not been passed on to other persons and by giving that provision retroactive effect, the Italian Republic has failed to fulfil its obligations under Articles 5, 9 *et seq.* and 95 of the Treaty.

Costs

14 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has been unsuccessful in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by imposing on the taxpayer, under Article 19 of Decree-Law No 688 of 30 September 1982, converted into Law No 873 of 27 November 1982, the burden of proving by documentary evidence alone that the national taxes and charges in respect of which he is seeking repayment on the ground that they were unduly paid, as they were contrary to Articles 9 *et seq.* and 95 of the EEC Treaty, have not been passed on to other persons and by giving retroactive effect to that provision, the Italian Republic has failed to fulfil its obligations under Articles 5, 9 *et seq.* and 95 of the EEC Treaty;

(2) Orders the Italian Republic to pay the costs.

Bosco Koopmans Everling Bahlmann

Galmot Kakouris Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 24 March 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President