OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 11 December 2003 [1]

I — Introduction

1. The Tribunal Tributário de Primeira Instância de Lisboa (Fiscal Court of First Instance, Lisbon) wishes to know whether the legal order of the European Union permits the fixing of a time-limit of 90 days for challenging tax assessments before the Court for Contentious Administrative Proceedings and, consequently, for bringing an action for repayment of taxes paid in infringement of Community law.

2. This incidental question is added to the long list of references for a preliminary ruling concerning the compatibility with Community law of various national rules, specifically those regulating time-limits and methods for bringing legal actions for the repayment of tax contributions paid into the public funds in infringement of Community law.

3. In response to these questions, the Court of Justice has given numerous rulings, creating well-established case-law according to which, in the absence of a Community provision, it is for Member States to regulate the procedures for protecting the rights conferred by the European Union. However, this power is subject to a dual restriction:

— Member States are not authorised to impose a different and less favourable time-limit for bringing actions based on Community law than for bringing claims based on infringements of national law. [2] This is known as the principle of equivalence.

1 — Original language: Spanish.

2 — See Case 33/76 *Rewe* [1976] ECR 1989, point 1 of the operative part, Case 45/76 *Comet* [1976] ECR 2043, operative part; Case C-231/96 *Edis* [1998] ECR I-4951, point 2 of the operative part; Case C-260/96 *Spac* [1998] ECR I-4997, point 1 of the operative part; Case 68/79 *Just* [1980] ECR 501, point 3 of the operative part; Case 61/79 *Denkavit Italiana* [1980] ECR 1205, point 1a of the operative part; Case 811/79 *Ariete* [1980] ECR 2545, operative part; Case 826/79 *Mireco* [1980] ECR 2559, the operative part; C-261/95 *Palmisani* [1997] ECR I-4025, the operative part; Case C-228/96 *Aprile* [1998] ECR I-7141, point 1 of the operative part; and Case C-343/96 *Dilexport* [1999] ECR I-579, point 1 of the operative part. More recent cases are Joined Cases C-216/99 and C-222/99 *Prisco and Caser* [2002] ECR I 6761, point 2 of the operative part; and Case C-147/01 *Weber's Wine and Others* [2003] ECR I-11365, point 3 of the operative part.

— nor may they regulate the procedure in such a way as to render it, in practice, excessively difficult or impossible to bring such actions. This rule is known as the principle of effectiveness of Community law. [3]

4. Earlier case-law supplies the rules that will make it possible to provide the Portuguese national court with the reply it seeks.

II — The facts, the main dispute and the questions referred for a preliminary ruling

5. Recheio — Cash & Carry S.A. ('Recheio') increased its share capital from PTE 100 000 000 to PTE 1 000 000 000 by notarial act of 5 November 1977, which was entered in the Registo Nacional de Pessoas Colectivas (National Register of Legal Persons).

6. On 4 March 1998 that registering body charged Recheio, by way of fees, the sum of PTE 2 251 500, calculated in accordance with the Tabela de emolumentos do Registo Nacional de Pessoas Colectivas (Schedule of Fees of the National Register of Legal Persons).

7. On 11 July 2001 Recheio brought a declaratory action before the Tribunal Tributário de Primeira Instância de Lisboa for an order upholding its right to repayment of the fees unduly charged; the court of its own motion converted the administrative proceedings into an action for review of the lawfulness of the act assessing the fees, considering that to be the procedure best suited to the object pursued.

8. In view of the fact that, on that date, the period for bringing the action had already expired, the Portuguese court stayed proceedings and submitted the following questions to the Court of Justice:

'(1) Is it contrary to Community law for a Member State to fix a limitation period, for actions for repayment of taxes levied in breach of Community law, of 90 days reckoned from the expiry of the period for voluntary payment, so that the exercise of the right to reimbursement is made excessively difficult?

3 — Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12 and the operative part; Case C-212/94 *FMC and Others* [1996] ECR I-389, paragraph 64 and point 4 of the operative part; *Edis*, paragraph 34; *Spac*, paragraph 18; Joined Cases C-279/96 to C-281/96 *Ansaldo Energía and Others* [1998] ECR I-5025, paragraph 16; *Aprile*, paragraph 18; *Dilexport*, paragraph 25; Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33; and *Weber's Wine and Others*, paragraph 103.

(2) If so, what is the minimum period that may be considered compatible with the rule that exercise of that right must not be made excessively difficult?

(3) What are the criteria to be used to fix that period?'

III — Proceedings before the Court of Justice

9. Recheio, the Portuguese Republic and the Commission submitted written observations within the period laid down by Article 20 of the EC Statute of the Court of Justice.

10. At the hearing, which was held on 13 November 2003, oral argument was presented by the representatives of the parties which had participated in the written stage.

IV — The relevant provisions of Portuguese law

11. In Portuguese law administrative acts, which include the charging of taxes, may be void or voidable. They are declared void if they lack any of the essential elements and if the law expressly provides for this type of invalidity. The rest are voidable. [4]

12. Both kinds are revoked by means of administrative actions brought by the holders of individual rights and interests protected by law which have been damaged. [5] There are two ways of contesting an act; an appeal to the administrative body seeking to have the act set aside [6] and an appeal to a higher administrative authority; the latter is optional if it is possible to bring an action for review of the lawfulness of the act and mandatory if it is not. [7] The period allowed for initiating the proceedings is 15 days for the setting aside procedure and 30 for an appeal to a higher administrative authority, or the period allowed for bringing an action for review of lawfulness in the case of a mandatory appeal to a higher administrative authority. [8]

4 — See Articles 133 and 135 of the Código do Procedimento Administrativo, approved by Decree Law 442/91 of 15 November. Under Article 133(2), administrative acts are void if: (a) adopted in misuse of powers; (b) adopted by bodies which are not competent to act; (c) their object is impossible, unintelligible or constitutes a crime; (d) they infringe the essential content of a fundamental right; (e) pronounced under duress; (f) issued without complying with any legal formality; (g) issued by collegiate bodies following vehement discussions or where the quorum or majority required by law have not been observed; (h) they are inconsistent with *res judicata*; or (i) they are the consequence of other acts previously cancelled or revoked

5 — See Articles 158 and 160 of the Código do Procedimento Administrativo.

6 — In Portuguese law, an action brought against the body which issued the contested act is called *reclamação* (see Article 158 (2)(a) of the Código do Procedimento Administrativo).

7 — See Articles 158(2)(b) and 167(1) of the aforementioned legislation.

8 — See Articles 162 and 168 of the Código do Procedimento Administrativo.

13. In the field of taxation, unless expressly provided otherwise, the appeal to a higher administrative authority is optional, within the same 30 day period. [9] There is also an internal appeal, which must be brought within 90 days, although, when it is based on a failure to observe essential procedural formalities or on the non-existence, in whole or in part, of what is to be taxed, it is extended to a year. [10] The decision in an internal appeal may be challenged by an appeal to a higher administrative authority and that decision in turn may be subject to an action for review of its lawfulness. [11]

14. The aim of judicial fiscal proceedings is to ensure the full and effective protection in reasonable time of the rights and interests safeguarded by law in this domain. [12] They permit a response to the assessing of tax [13] by means of claims for annulment of the contested act or a declaration that it is void. [14] They are also the appropriate means of seeking a declaration of the recognition of a right or of a legitimate interest in the tax sphere, [15] if there is no more appropriate way of ensuring its judicial protection. [16]

15. The period allowed for bringing the judicial proceedings is 90 days, calculated from expiry of the period for voluntary payment of the tax debt, unless an internal appeal has been brought, in which case it is reduced to 15 days. A claim based on the invalidity of the assessment may be brought at any time. [17]

16. The action for a declaration must be brought within four years of the date on which the right arose or the person in question became aware of the damage for which protection is sought. [18]

9 — See Articles 66(1) and (2) and 67(1) of the Código do Procedimento Administrativo, approved by Decree Law 433/99 of 26 October.

10 — See Articles 68(1) and 70(1) and (2), in conjunction with Article 102(1), of the Código de Procedimento e de Proceso Tributário.

11 — Articles 76 and 67 of the Código de Procedimento e de Proceso Tributário, the latter in conjunction with Article 167 (1) of the Código do Procedimento Administrativo: if the hierarchical appeal in the field of taxation is always optional, this is because it is provided that administrative acts are open to administrative appeal

12 — See Article 96(1) of the Código de Procedimento e de Processo Tributário and Articles 9 and 95(1) of the Lei Geral Tributária, approved by Decree Law 398/98 of 17 December. These provisions particularise for the tax system the general clause of Article 268(4) of the Constitution of the Portuguese Republic, which 'allows a citizen to bring an action for review of the lawfulness of any administrative act, irrespective of its form, which infringes his rights and interests safeguarded by law'.

13 — See Article 97(1)(a) of the Código de Procedimento e de Processo Tributário and Article 95(2)(a) of the Lei Geral Tributária.

14 — Article 101(a) of the Lei Geral Tributária and Article 97(1)(a) of the Código de Procedimento e de Processo Tributário.

15 — Article 101(b) of the Lei Geral Tributária and Article 97(1)(h) of the Código de Procedimento e de Processo Tributário.

16 — See Article 145(3) of the Código de Procedimento e de Processo Tributário.

17 — See Article 102(1)(a), (2) and (3) of the Código de Procedimento e de ProcessoTributário.

18 — See Article 145(2) of the Código de Procedimento e de Processo Tributário.

V — Analysis of the question referred for a preliminary ruling

A — *Delimitation of the subject-matter of the action*

17. It is not disputed that the fees charged to Recheio by the Registo Nacional de Pessoas Colectivas are a tax contrary to Community law or that the company has a right to bring the actions appropriate under national law. [19]

18. The doubt harboured by the Tribunal de Primeira Instância de Lisboa is whether Community law approves a time-limit of 90 days for bringing a legal action for repayment of the amounts unduly paid by way of taxes which, like the charge levied on Recheio, are incompatible with the internal legal order.

19. The Portuguese court has no doubt that that time-limit is in keeping with the principle of equivalence. This is expressed in the order for reference, which states that 'the appeal procedure is applicable to any acts levying tax dues, whether they are based on Community or domestic legislation', [20] so that the questions it raises refer exclusively to the principle of effectiveness, to which it alludes in the final sentence of the first question when it seeks to clarify whether, by the fixing of a period of 90 days, 'the exercise of the right to reimbursement is made excessively difficult'.

20. Thus, the laudable effort made by Recheio in its written observations to show that the time-limit granted by Portuguese procedural law infringes the principle of equivalence is made in vain since, once the national court, after interpreting its legal code, has accepted that the period is applic-

19 — See Case C-134/99 *IGI* [2000] ECR I-7717, the operative part of which is as follows:

'1. Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as meaning that charges, such as those at issue in the main proceedings, which are levied for entering an increase in the share capital of a capital company in a national register of legal persons constitute a tax for the purposes of the directive.

2. Charges payable for entering an increase in the share capital of a capital company in a national register of legal persons are, where they amount to a tax for the purposes of Directive 69/335, as amended by Directive 85/303, in principle prohibited under Article 10(c) thereof.

3. Fees or dues within the meaning of Article 12(1)(e) of Directive 69/335, as amended by Directive 85/303, do not cover charges levied for entering an increase in the share capital of a capital company in a national register of legal persons, such as the charges at issue in the main proceedings, the amount of which increases in direct proportion to the share capital raised and in respect of which there is no upper limit.

4. Article 10 of Directive 69/335, as amended by Directive 85/303, creates rights on which individuals may rely in proceedings before the national courts.'

20 — See point (p). The Portuguese Government makes the same statement in point 26 of its written observations.

able to all kinds of actions, the Court of Justice has nothing to say on the matter. [21]

21. The compatibility of the period in question with Community law must be analysed solely in relation to the principle of effectiveness and, even at this stage, it is necessary to avoid considering the existence of an alternative remedy — the action for a declaration — available for four years, or the fact that, when the ground of the claim is nullity ipso jure, there is no time-limit for bringing it. It is for the national court to decide whether such an action is appropriate if the Court of Justice should rule that a procedural rule like that contained in Article 102(1) of the Código de Procedimento e de Processo Tributário is contrary to Community law. [22] Similarly, it falls to the Portuguese courts to determine the nature of the defect affecting the assessment to tax which is the subject of the main proceedings and, in consequence, whether it should be contested within 90 days or at any other time.

22. In short, the Court of Justice has to settle the specific question raised by the Portuguese court, irrespective of whether Recheio's claim might be brought through other channels with longer limitation periods.

B — *Consideration of the time-limit of 90 days in the light of the principle of effectiveness*

1. This is the responsibility of the national courts

23. From the point of view of the principle of effectiveness, the Court of Justice has on

21 — The points made by Recheio concerning the action for unconstitutionality (paragraph 92 et seq. of its written observations) are superfluous because, although a declaration that the rules governing a tax such as that in the main proceedings are unconstitutional may insofar as they may have retroactive effect entail the invalidity of the acts issued to implement them, regardless of the restrictions imposed by the Constitutional Court concerning the time prior to its ruling (see Article 282 of the Constitution of the Portuguese Republic), that consequence has nothing to do with being able to bring an appeal against a tax levy without being subject to a time-limit. A declaration that a law is unconstitutional establishes that the acts issued to implement it are void, so that, if the Constitutional Court does not limit the scope of the 'judgment, the parties concerned may appeal against those acts without being subject to any time-limit, in accordance with Article 102(3) of the Código de Procedimento e de Processo Tributário; but the same happens with acts which infringe Community law, if the infringement causes invalidity. In other words, whether there is a time-limit of 90 days or no time-limit for contesting an administrative act is not determined by the sector of the legal system in which the infringement occurs but by the nature of the irregularity which affects it.

22 — In any event, Portuguese law maintains that the appropriate way to assert claims such as that brought by Recheio is by judicial proceedings, as is evidenced by the fact that the company brought a declaratory action which the national court converted into an action for judicial review.

rare occasions given a direct ruling on specific limitation or extinction periods, laid down in the legal systems of the Member States, for bringing actions for the repayment of sums paid into public funds in infringement of Community law. Its allusions are clothed in abstraction. Thus, in *Rewe* and *Comet*, it merely stated that the fixing of time-limits for bringing actions, a clear application of the principle of legal certainty, would infringe Community law if it made it in practice impossible to exercise the rights; this is not the case where 'reasonable periods of limitation' are fixed. [23] In cases in which it has examined specific time-limits, it has used the principle of equivalence as a guideline for comparison: the judgments in *Edis*, *Spac* and *Prisco and Caser*, all three cited above, acknowledge that the law of the European Union does not preclude a limitation period of three years, provided it is applied indiscriminately to all claims for repayment, irrespective of whether they are based on national or Community law. [24] When it has analysed the move from one limitation period to a shorter one, it has done so in the light only of the aforementioned principle: the judgment in *Aprile* states that Community law does not preclude the application of a national provision which ... imposes a special time-limit of five, and subsequently three, years, instead of the ordinary limitation period of 10 years. [25]

24. It is true that in the grounds for the judgments in *Edis* and *Spac* it is accepted that 'a time-limit of three years under national law, reckoned from the date of the contested payments, appears reasonable', and that therefore Community law does not prohibit a Member State from relying on it. [26] However, leaving aside the fact that these are obiter dicta which are not reflected in the judgments, they are tautological statements, lacking any reasoning whatsoever, in which no explanation is given of the basis for determining that a period of that length complies with the principle of effectiveness. For the Court of Justice, Community law allows reasonable time-limits and a time-limit of three years is reasonable, with no further explanation.

25. It has followed the same approach when considering whether certain time-limits laid down in the laws of the Member States for bringing actions based on Community law are compatible with the principle of effectiveness. The judgment in *Bassin et Salson* [27] decided that Community law does not preclude provisions of a Member State establishing a mandatory limitation period of three years for the submission of all applications for the repayment of duties unduly levied. [28] This decision is based on the notion that proceedings are acceptable

23 — See paragraph 5, in fine, of *Rewe* and paragraphs 16 to 18 of *Comet*. Paragraph 23 of *Denkavit Italiana* may also be consulted.

24 — See their respective operative parts (point 2 in *Edis*, point 1 in *Spac*, and point 2 in *Prisco and Caser*).

25 — See point 1 of its operative part.

26 — See paragraphs 35, in fine, and 44 of *Edis*, and paragraphs 19, in fine, and 27 of *Spac*.

27 — Case 386/87 [1989] ECR 3551.

28 — Point 2 of the operative part of *Bassin et Salson*.

which do not, in practice, prevent the exercise of the rights conferred by Community law, so that a three year limitation period '[reflects] a legislative choice which does not have the effect of undermining the aforesaid requirement'. [29]

26. Similarly, the judgment in *Haahr Petroleum* [30] reiterates that Community law does not preclude a limitation period of five years because it is a period which 'must be considered to be reasonable'. [31]

27. Just once, the Court has endeavoured to express more thoroughly the reasons for its decision: the judgment in *Grundig Italiana*, in which case I delivered my Opinion on 14 March 2002, ruled that to fix a transitional period of 90 days for the substitution of a limitation period of three years for one of five or ten years was not in keeping with Community law, adding that, in order to observe the principle of effectiveness, that period must be sufficient still to allow taxpayers a reasonable opportunity of asserting their rights to recovery if, because of the introduction of the new rules, they would already be out of time, so that they may prepare their action without haste and without being harried by the obligation to act with urgency disproportionate to the period originally allowed. [32] Immediately after, it added that a period of 90 days is inadequate, because, if an initial period of five years is taken as a reference, taxpayers whose rights accrued approximately three years earlier have to act within three months when they thought that they still had almost two years more; [33] it ends by considering reasonable a minimum transitional period of six months. [34]

28. The position adopted by the Court has a simple explanation: when time-limits for initiating proceedings are calculated in years, it is obvious that they will permit the effective exercise of the rights recognised by Community law, for which reason no further justification is required. On the other hand, when the periods are shorter, reckoned in months or days, the assessment of their utility is less clear, and so reasons are called for.

29. However, as I pointed out in the opinion in *Grundig Italiana*, it is not for the Court of Justice to make that evaluation since, with obvious exceptions, [35] it must be made by the

29 — Paragraphs 16 and 17 of the judgment referred to in footnote 27.

30 — Case C-90/94 [1997] ECR I-4085.

31 — Paragraph 49 of *Haahr Petroleum*.

32 — Paragraph 38 of *Grundig Italiana*, cited in footnote 3 of this opinion.

33 — Paragraph 39 of *Grundig Italiana*.

34 — Paragraph 40 of *Grundig Italiana*.

35 — Such as time-limits of a year.

national court. [36] In order to determine whether or not a specific time-limit complies with the principle of effectiveness, it is necessary to evaluate 'all the factual and legal requirements, both procedural and substantive, which the domestic legal order imposes for the bringing of actions for recovery. Only with that overview, which the national courts alone have, it is possible to give a definitive answer'. [37]

30. The Court of Justice has taken this view on some occasions, since, according to the judgment in *Dilexport*, it falls to the national court to decide whether, in practice, the detailed rules which apply make it impossible or excessively difficult to exercise the rights conferred by Community law; [38] a reference which includes the time-limit for bringing the action, which is the first act taken under those detailed rules.

31. It is possible that in *Grundig Italiana* there was enough information for the Court of Justice to venture to make that evaluation, in view of the fact that the limitation period was reduced from five years to three, so that taxpayers whose rights had accrued approximately three years earlier were compelled to act within three months when they thought that almost two years were still available. [39] However, the approach taken in that matter does not appear to concern all the national legal systems, but only the Italian, for it was only the Italian procedural requirements that were evaluated, so that the preliminary ruling wanted the general and objective orientation which is essential if it is to fulfil its fundamental role of ensuring the uniform interpretation of Community law, being transformed into an exegesis *uti singulis*, relating to one legal system in particular.

32. The fact is that, as the Court of Justice has itself often acknowledged, the procedure for appealing against taxes unlawfully levied and that for claiming repayment of taxes paid though not due take different forms in the various Member States. Consequently, it is difficult to assess in the abstract whether a transitional period of 90 days, such as that contemplated in *Grundig Italiana*, complies with the principle of effectiveness, because, in order to come to a decision, it is necessary to evaluate, as well as its duration, many other circumstances such as the following, which are given as examples, without claiming the list to be exhaustive: whether a person may represent himself or whether a lawyer must represent him; whether, in order to bring legal proceedings before the courts, the applicant may appear on his own behalf or whether he needs to grant a power of representation; in this latter case, whether this must be done before a public official;

36 — Point 27 of that Opinion

37 — Point 27, *in fine*, of my opinion in *Grundig Italiana*.

38 — See paragraph 32, *in fine*, of *Dilexport*, cited in footnote 2 of this opinion

39 — Paragraph 39 of *Grundig Italiana*

whether, in the case of legal persons, a specific resolution must be adopted in order to bring proceedings, taking into account, where appropriate, the time-limits, conditions and forms existing for that purpose; whether a precondition is the lodging of a complaint with the competent authority; whether such a complaint has suspensory effect; whether the public authorities have to be informed of the intention to bring legal proceedings. The list of determining factors could be extended, by weighing up their difficulty and cost in each State.

33. Against this diversity and other special features which those who move in the area of comparative European law can easily imagine, Community law has to set the protection of the rights it confers on individuals, [40] requiring that national procedural rules applicable to their protection should not be less favourable than those applicable to similar national actions and that in practice it should not be impossible or excessively difficult to exercise such rights. [41]

34. For these reasons, as I have already explained in the Opinion in *Grundig Italiana*, the indefinite legal concept of a 'reasonable period', which the Community case-law mentions as a condition of compliance with the principle of effectiveness, must be defined by the national courts, except in extreme cases in which, because it is obviously adequate or because it it unquestionably too short, the assessment does not require the specific conditions of each national system to be considered, so that there is no objection to the Court of Justice's doing so.

35. It does not therefore appear consistent for the judgment in *Grundig Italiana*, having declared a specific period to be inadequate, to determine the minimum period deemed adequate to ensure the effective exercise of actions based on Community law, assuming duties of the legislature; whether the Community or the Italian legislature is not clear. Furthermore, that judgment does not give reasons for choosing a period of six months or for describing it as adequate. It merely states that the period enables 'normally diligent taxpayers [to] familiarise themselves with the new regime and prepare and commence proceedings in circumstances which do not compromise their chances of success'. [42] Why is a period of three months not appropriate but one of six months is? The judgment in *Grundig Italiana* is thus shown to be the result of arbitrariness and a misunderstanding of the preliminary ruling procedure. Under Article 234 EC, it falls to

40 — It is to be borne in mind that, according to the case-law of the Court of Justice, entitlement to the recovery of sums levied in breach of the law of the European Union is a consequence of, and an adjunct to, the rights conferred on individuals by the relevant Community provisions as interpreted by the Court itself. A Member State is therefore required to repay charges levied in breach of that law (see inter alia Case C-188/95 *Fantask* [1997] ECR I-6783, paragraph 38, and *Dilexport*, paragraph 23; reference may also be made to Joined Cases C-10/97 to C-22/97 *IN.CO.GE'90 and Others* [1998] ECR I-6307, paragraph 24).

41 — See the judgments cited in footnotes 2 and 3.

42 — Paragraph 40 of *Grundig Italiana*, cited repeatedly above.

the Court of Justice to give the definitive interpretation of Community law and provide national courts with precise guidelines for applying it, but it is by no means empowered to become involved in the latter legal operation, lest it undermine the foundations of that instrument of collaboration between courts, which requires scrupulous observance of the scope of their respective jurisdictions. [43] In fact, by making pronouncements of this kind, the Court of Justice behaves as in a direct action and assumes, regardless of the rules of the Treaty, unlimited jurisdiction which seriously affects the absolute jurisdiction of the national court to settle the main action. [44] The system under Article 234 EC rests on the difference between integration and application of the rules, and allows the legitimate authority of the national court to be reconciled with the necessary uniformity of Community law, as was pointed out years ago by Robert Lecourt. [45] The performance of this task requires meticulous observance of the division of powers. [46] Admittedly, there is a very fine distinction between interpretation and application, because it is difficult to interpret a rule without applying it or to apply it without interpreting it, but the Court of Justice must avoid taking the place of the national court and must restrict itself, within the limits set in the order for reference, to providing specific replies. [47] Ami Barav [48] has recognised that, in spite of the Court of Justice's solemn statements regarding the jurisdiction of the national court, the reality is very different. [49]

36. For those reasons, I suggest that the Court of Justice reply to the Tribunal Tributário de Primeira Instância de Lisboa

43 — Case 93/78 *Lothar Mattheus* [1978] ECR 2203, paragraph 5. In the opinion, Advocate General Mayras pointed out that the Court of Justice may base its jurisdiction to give preliminary rulings only on the specific conditions under which Article 177 of the EC Treaty grants it that jurisdiction (p. 2212).

44 — In the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239 the Court of Justice persisted in the same error. With regard to the financial liability of Member States for damage caused to individuals by infringements of Community law stemming from a decision of a national court, it listed the requirements and conditions which must be present for that liability to be incurred (paragraph 59), but, after acknowledging that it is for the national courts to apply them (paragraph 100), invaded a territory which is forbidden to it, embarking on an exercise outside its jurisdiction (paragraph 101 et seq.). In an appeal, the Court of Justice made a similar error in Case C-383/99 P *Proctor & Gamble* [2001] ECR I-6251, known as the '*Baby dry* judgment', in which it also exceeded its jurisdiction, as I had occasion to point out, for the first time, in the opinion I delivered in Case C-363/99 *KPN* (see, in particular, point 68), in which a ruling has not yet been given.

45 — Lecourt, R., in *Le juge devant la Marché Commun*, Ed. Institut Universitaire des Hautes Études Internationales, Geneva, 1970, p. 50.

46 — Lagrange, M.: 'L'action préjudicielle dans le droit interne des États membres et en droit communautaire', *Revue trimestrielle de droit européen*, 1974, p. 268.

47 — De Richemont, J.: *L'integration du droit communautaire dans l'ordre juridique interne*, Ed. Librairie du Journal des Notaires et des Avocats, Paris, 1975, p. 41 et seq.

48 — Barav, A.: 'Le renvoi préjudiciel communautaire', *Justice. Revue Générale de Droit Processuel*, No 6, p. 14.

49 — Recently, Barav, A., 'Transmutations Préjudicielles', in the group work *Une communauté de droit, Fests fûr Gil Carlos Rodriguez Iglesias*, ED. BWV Berliner Wissenschafts verlag, Berlin 2003, p. 622, has reiterated that 'la coopération entre les juridictions nationales de la Cour de Justice dans le cadre de la procédure préjudicielle est articulée autour d'une repartition "impérative" de fonctions dont le respect mutuel constitue la sève'.

in the terms already used by the Commission in its written observations, stating:

— it is contrary to Community law, particularly the principle that it must be effective, for provisions of a Member State, in respect of actions for the repayment of taxes levied in breach of that law, to fix a limitation period which makes it in practice extremely difficult to exercise the right to repayment; and

— it falls to the national court to determine, assessing all the matters of law and of fact, both procedural and substantive, that relate to the bringing of the action, whether the period laid down by national law is reasonable and guarantees that principle.

2. In the alternative

37. If the Court of Justice should find it necessary to rule on the claim in the main proceedings, by considering the relevance of a definite and specific time-limit, such as that of 90 days laid down in Article 102(1) of the Código de Procedimento e de Processo Tributário, it seems appropriate to consider, in the light of the factual circumstances of the case and of the inevitably fragmentary knowledge of the Portuguese legal system, according to the parameters provided by the order for reference, that the aforementioned period would be reasonable and would have allowed Recheio to exercise its rights with every guarantee of effectiveness.

38. Article 102(1)(a) indicates as the dies a quo for the calculation the day after the day on which the period of voluntary payment of the charge expired; as a general rule, that period lasts for 30 days from the date of notification of the assessment to tax. [50] In the main proceedings, the contested assessment to tax was imposed on 4 March 1998 so that, in principle, the period for voluntary payment ended on about [51] 15 April 1998; the company therefore had until about 19 August to initiate the proceedings for review of the lawfulness of the act. [52]

39. A period which, in actual fact, is almost five and a half months long (from the day of notification of the contested assessment to tax until the day on which the period for bringing the judicial appeal ended), does not render difficult or hinder the effective exercise of the rights discussed in the main proceedings.

50 — See Article 85(2) of the Código de Procedimento e de Processo Tributário.

51 — There is no record of the holidays in Portugal around that time.

52 — For calculation of the periods see Article 72 of the Código do Procedimento Administrativo, Article 20 of the Código de Procedimento e de Processo Tributário and Article 279 of the Portuguese Civil Code.

40. First, it were well to remember that, according to the case-law of the Court of Justice,[53] it is not contrary to Community law for a Member State to resist actions for repayment of charges levied in infringement 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 though, at that date, the directive in question had not yet been properly transposed into national law.[54] As I have already pointed out in the opinion delivered in the *Edis* case,[55] this solution, which seeks to balance the effectiveness of the right to legal protection and the principle of legal certainty, is not wholly satisfactory for taxpayers who are obliged to pay a tax contrary to Community law. However, until there are uniform rules on this point, it is for the Member State to determine, in the conditions amply described above, the requirements for actions for repayment.[56]

41. And in that search for a balance between the rights of taxpayers and the general interest, which prevents administrative decisions from remaining indefinitely under the sword of Damocles of a possible judicial challenge, the introduction of a time-limit for bringing the administrative proceedings on the conditions envisaged by Portuguese procedural law deserves to be described as reasonable. It provides time, after learning of the assessment to tax, sufficient to adopt the decision to contest the latter, to gather all the factual and legal information necessary to do so and to prepare an adequate case.[57] If the rules of other Member States on the matter are analysed, it will be found that they all provide for periods of a similar duration,[58] which operate in the respective legal systems

53 — See the operative parts of the judgments in *Fantask and Others*, *Edis*, *Ansaldo* and *Spac*.

54 — Only the judgment in Case C-208/90 *Emmott* [1991] ECR I-4269 maintained the opposite view although other later judgments have abandoned it (those cited in the previous footnote, Case C-338/91 *Steenhorst Neerings* [1993] ECR I-5475 and Case C-410/92 *Johnson* [1994] ECR I-5483) justifying it on the grounds of the particularities of the facts with which it was dealing.

55 — See paragraph 81 of my opinion in *Edis*

56 — In any event, Portuguese procedural law offers an additional remedy, the declaratory action, which has a four year limitation period and may be used if it is the most appropriate means of ensuring full and effective protection (see Article 145 of the Código de Procedimento e de Processo Tributário). However, the Tribunal Tributário de Primeira Instância did not consider this procedure appropriate for bringing Recheio's claim (see point (1) of the order for reference).

57 — Article 108(1) of the Código de Procedimento e de Processo Tributário provides that 'the appeal is brought by petition to the competent court or tribunal, identifying the contested act and the body which adopted it and setting out the facts and legal reasons on which the claim is based'.

58 — In Spanish law that period is, in principle, two months (Article 46(1) of Law 29/1998 of 13 July, governing Administrative Jurisdiction), as in the French system (Article 1 of Decree 65/29 of 11 January 1965, concerning the time-limits for bringing administrative proceedings). Belgian law establishes a time-limit of 60 days (Article 3(2) of the Lois coordonnees sur le Conseil d'État), as does Italian law, for bringing an action in respect of tax matters (Article 21(1) of Decree Law 546 of 31 December 1992 concerning, 'Disposizioni sul processo tributario in attuazione della delega al Governo contenutta nell'art. 30 della lege 30 dicembre 1991, n. 413). In the Germal legal code the period is of one month (Article 74 of the Verwaltungsgerichtsordnung (VwGO) of 21 January 1960 Law concerning Administrative Jurisdiction). The dies a quo for calculating those time-limits is the day following publication or notification of the contested act or, if appropriate, the judgment dismissing the earlier administrative action

without raising doubts as to their suitability for obtaining judicial protection.

42. Furthermore, it is indisputable that actions based on national law deserve to be subject to the same rules regarding time-limits for bringing proceedings as those based on Community law since, from the point of view of principles, it is impossible to maintain otherwise.

43. The fact that the authorities enjoy longer periods for exercising their powers in tax matters [59] is not an indication that the period of 90 days granted to taxpayers for bringing an action for judicial review disregards the rule of effectiveness of Community law. First, because the principles and objectives governing each are quite different, the evaluation of the adequacy of the period is independent of the fact that the authorities have longer periods in which to act. Secondly, because in this field the requirement of equality does not operate, it is clear that public authorities and citizens do not have to be subject to the same time-limits. The extinction of the right to make assessments to tax and the time-barring of tax debts meet criteria very different from those which govern the application of specific periods for the bringing of judicial proceedings by citizens. Recheio makes commendable efforts in its arguments in its written observations, but it confuses different legal concepts, such as extinction and limitation, sowing confusion in its reasoning when it conceals the fact that the Portuguese Authority may revoke valid acts creating or altering rights and interests protected by law only insofar as they produce adverse effects for their addressees, [60] and that invalid acts must be revoked within the period prescribed for bringing the respective legal action. [61]

59 — The right to claim tax expires after four years and tax debts lapse after eight years; on the other hand, the Authority has four years for reviewing on its own initiative acts issued in this field (Articles 45, 48 and 78 of the Lei Geral Tributária, respectively).

60 — See Article 140 of the Código de Procedimento Administrativo, which applies also to the Código de Procedimento e de Processo Tributário (Article 2(d) of the latter Code).

61 — See Article 141 of the Código de Procedimento Administrativo. Article 78 of the Lei Geral Tributária, to which Recheio alludes in its written observations, which makes review of a tax act at the request of the interested party subject to the time-limit laid down for bringing the administrative appeal, while the Authority has four years, applies only to reviews for the addressee of the act (Lima Guerreiro, A. *Lei Geral Tributária, Anotada*, Editora Rei dos Libros, Lisbon, 2001, p. 343).

VI — Conclusion

44. In the light of the foregoing considerations, I propose that the Court of Justice should answer the questions submitted by the Tribunal Tributário de Primeira Instância as follows:

It is contrary to Community law, particularly the principle that it must be effective, for provisions of a Member State, in respect of actions for the repayment of taxes levied in breach of that law, to fix a limitation period which makes it in practice extremely difficult to exercise the right to repayment.

It falls to the national court to determine, assessing all the matters of law and of fact, both procedural and substantive, that relate to the bringing of the action, whether the period laid down by national law is reasonable and guarantees that principle.

45. In the alternative, if it is considered necessary to assess the application of Community law, notwithstanding the content of Article 234 EC, to the facts in the main proceedings, I propose that the Court should state that:

It is not contrary to Community law for a period such as that at issue in the main proceedings to be fixed for bringing actions for repayment of taxes levied in breach of Community law, provided that that period applies also to claims for repayment based on national law.