OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 3 June 2003 [1]

I — Introduction

1. In the present infringement proceedings pursuant to Article 226 EC the Commission seeks a declaration from the Court that, by maintaining in force Article 29(2) of Law No 428 of 29 December 1990, which, as interpreted and applied by the administrative and judicial authorities, allows rules of evidence in relation to the repayment of taxes levied in breach of Community provisions which make the exercise of the right to repayment of such taxes impossible or in any event excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty. The Commission considers that this practice is incompatible with the legal principles laid down by the Court of Justice regarding the recovery of sums paid but not due.

2. This also raises the more fundamental question of the consequences which must follow from national case-law which does not comply with the provisions of primary and secondary Community law, as interpreted by the Court of Justice.

3. I should point out that this question has been raised in two other cases presently pending before the Court, albeit from a different point of view. These cases are *Kühne & Heitz* [2] and *Köbler*. [3] In the first case the national court asked whether a national administrative body is required to reopen a decision which has been laid down in law and acquired formal legal force when it is clear from a subsequent judgment of the Court that that decision and the judgment were based on an incorrect interpretation of Community law. The second case concerns whether a Member State is responsible for loss or damage caused to an individual as a result of a judgment of a national supreme court which is contrary to Community law. The present case concerns whether national

1 — Original language: Dutch.

2 — Case C-453/00 *Kühne & Heitz* [2003] ECR I-837.

3 — Advocate General Léger delivered his Opinion in this case on 8 April 2003 (Case C-224/01 *Köbler* [2003] ECR I-10239).

legal practice contrary to Community law can give rise to a declaration that a Member State has failed to fulfil its obligations under Article 226 EC.

II — Relevant Italian law

4. Law No 428 of 29 December 1990 laying down provisions for the fulfilment of obligations deriving from Italy's membership of the European Communities (Community law for 1990, GURI No 10 of 12 January 1991) entered into force on 27 January 1991.

5. Article 29 of Law No 428/1990 lays down rules concerning 'repayment of taxes recognised to be incompatible with the Community rules'. According to paragraphs (1) and (2) of that article:

'1. The five-year time-bar laid down in Article 91 of the Consolidated version of the provisions relating to customs duties, approved by Presidential Decree No 43 of 23 January 1973, shall be deemed to apply to all claims and actions which may be brought for the refund of sums paid in connection with customs operations. That period, and also the limitation period laid down in Article 84 of the same instrument, shall be reduced to three years as from the 90th day following the entry into force of this Law.

2. Customs import duties, manufacturing taxes, consumption taxes, the tax on sugar and State duties levied under national provisions incompatible with Community legislation shall be repaid unless the amount thereof has been passed on to others.

...'.

III — Background to the dispute

6. The rules contained in Article 29(2) of Law No 428/1990 replaced Article 10 of Decree-Law No 430 of 10 July 1982: [4]

'Any person who has paid import duties, manufacturing taxes, consumption taxes or State duties which were not due is not

4 — Law laying down provisions relating to manufacturing taxes, the movement of petroleum products, direct taxes, value-added tax and related charges, GURI No 190 of 13 July 1982.

entitled to the repayment of the sums paid when the charge in question has been passed on in any way whatsoever to other persons, except in cases of substantive error.

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

...'.

7. In the 1980s this provision formed the subject-matter of two judgments of the Court. The *San Giorgio* judgment of 9 November 1983 ruled that a Member State cannot make the repayment of national charges levied contrary to the requirements of Community law conditional upon the production of proof that those charges have not been passed on to other persons if the repayment is subject to rules of evidence which render the exercise of that right virtually impossible or excessively difficult. [5] Following the *San Giorgio* judgment the Commission brought infringement proceedings against the Italian Republic. This resulted in the judgment of 24 March 1988. [6] The Commission's complaints focused on the requirement that documentary evidence alone be admitted to prove that unduly paid national taxes and charges have not been passed on to others. The Court declared that the rules of evidence concerned were contrary to Community law.

8. Article 29 of Law No 428/1990 has also already been the subject of Community case-law. Requests for a preliminary ruling on Article 29(1) and (2) were submitted which resulted in the judgments in *Aprile*, [7] *Dilexport*, [8] and *Grundig Italiana*. [9] All three judgments relate to the time-bar laid down in Article 29(1).

9. The *Dilexport* judgment in particular is important as regards the implementation of Article 29(2) of Law No 428/1990 which is central to these infringement proceedings. After noting that the Italian Government and the national court differ as to the way in which that provision is interpreted by the

5 — Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 13.

6 — Case 104/86 *Commission* v *Italy* [1988] ECR 1799.

7 — Case C-228/96 *Aprile* [1998] ECR I-7141.

8 — Case C-343/96 *Dilexport* [1999] ECR I-579.

9 — Case C-255/00 *Grundig Italiana* [2002] ECR I-8003.

national courts, the Court held as follows as regards the burden of proof:

'52. If, as the national court considers, there is a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff is required to rebut that presumption in order to secure repayment of the charge, the provisions in question must be regarded as contrary to Community law.

53. If, on the other hand, as the Italian Government maintains, it is for the administration to show, by any form of evidence generally accepted by national law, that the charge was passed on to other persons, the provisions in question are not to be considered contrary to Community law.'

The Court concluded that Community law precludes a Member State from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to others, which the plaintiff must show he has satisfied.

IV — Procedure

10. On 17 September 1996 the Commission issued a reasoned opinion. On 4 April it brought proceedings before the Court.

11. The applicant claims that the Court should:

Declare that, by maintaining in force Article 29(2) of Law No 428 of 29 December 1990 which, as interpreted and applied by the administrative and judicial authorities, allows rules of evidence in relation to the passing on of charges levied in breach of Community rules which make exercise of the right to repayment of such charges virtually impossible or, at least, excessively difficult for the taxpayer and as such are incompatible with the legal principle laid down by the Court of Justice regarding the recovery of sums paid but not due, the Italian Republic has failed to fulfil its obligations under the EC Treaty;

Order the Italian Republic to pay the costs.

12. The Italian Republic contends that the Court should dismiss the action and order the Commission to pay the costs.

13. A hearing was held on 2 April 2003. At the request of the Court, the parties considered the extent to which the Commission may base infringement proceedings on judgments of national courts. At this hearing the Italian Government raised a plea of inadmissibility.

V — Pleas in law and main arguments

A — *Complaints raised by the Commission*

14. The Commission objects to the way in which Article 29(2) of Law No 428/1990 is interpreted in the Italian legal order in national case-law and is applied by the tax administration. It claims that this legal practice is inconsistent with the case-law of the Court of Justice concerning the conditions under which a Member State may refuse to repay to a taxpayer charges imposed in breach of Community law.

15. The Commission refers in particular to the Court's case-law in which it ruled that any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of the charges concerned are incompatible with Community law. [10] In particular, this concerns the assumption that there is a presumption that the charge has been passed on to others and the fact that the taxpayer must prove that the charge has not been passed on. Community law precludes a Member State from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to others, which the plaintiff must show he has satisfied. [11] It also refers to the judgment in *Comateb and Others* in which the Court held that the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence. The Court went on to state that in the case of indirect taxes, however, it may not be assumed that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary. [12]

16. The burden of proof concerning the application of Article 29(2) of Law No 428/1990 lies in principle with the administration which must prove that the individual has passed on the tax in question to others. However, Italian case-law allows the proof that the administration must adduce pursuant to Article 29(2) of Law No 428/1990 to show that the individual

10 — *Dilexport*, cited in footnote 8 above, paragraph 48.

11 — *Dilexport*, cited in footnote 8 above, paragraph 52.

12 — Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 25.

has passed on the tax in question to others to be based on a 'simple presumption', [13] thereby rendering the administration's task considerably easier. This system of adducing proof based on a presumption has led de facto to a reversal of the burden of proof.

17. The specific way in which the Italian law is interpreted by the Italian judiciary (and in particular the Corte Suprema di Cassazione (Supreme Court of Cassation)) and applied by the Italian tax service ultimately places on the taxpayer the burden of proving that he did not pass on to his customers the amount of unlawful tax, making it extremely difficult, if not impossible, to secure reimbursement of the taxes. The Italian administration has systematically, since the entry into force of Law No 428/1990, opposed any application for reimbursement based on the illegality, under Community law, of the levy or other charges made in connection with customs operations or consumer taxes. [14] Such conduct clearly conflicts with the Court's case-law cited by the Commission.

18. The Commission separates the case-law of the Corte Suprema di Cassazione concerning the interpretation and application of Article 29(2) of Law No 428/1990 into two groups.

19. In the first group of judgments the presumption is based on the conviction of the court which thus has the character of an assumption (a claim that is accepted without proof). The Commission interprets this technique used by the Corte Suprema di Cassazione as meaning that there is not in fact a simple presumption but a legal presumption based on a generally recognised fact — namely that taxes are passed on to customers — and therefore the burden of proof is systematically placed on the taxpayer.

20. In judgment No 2844 of 29 March 1996 the Corte Suprema di Cassazione based the presumption that the importer

13 — In its application the Commission sets out how the doctrine of 'presumption' is applied in Italian law on evidence. There is a 'simple presumption' — a *'presunzione semplice'* within the meaning of Article 2729 of the Codice Civile — where, on the basis of direct evidence, the *factum probans*, the court arrives at the *factum probandum* through inductive reasoning. Italian case-law assumes that the *factum probans* must be established with absolute certainty and may not be based on presumptions. A 'legal presumption' — a *'presunzione legale'* within the meaning of Article 2728 of the Codice Civile — does not presuppose any reasoning on the part of the court but attaches a legal consequence to a given fact. A distinction must be drawn between this and the system of proof to the contrary — *'prova contraria'*. In the case of a legal presumption proof to the contrary can sometimes not be adduced at all and where it can it is the opposing party which must adduce it. There is then a reversal of the burden of proof. A simple presumption leaves, by nature, less scope for evidence to the contrary. A distinction must be drawn between presumption and established fact *('fatto notorio')*. An established fact is a fully accepted fact that need not be proven.

14 — However, in its reply the Commission acknowledges that this view is too absolute. See point 30 below.

had passed on the charges to its customers in the sales price of the goods on the following factors:

'(a) the importer is not a private individual but a commercial or industrial undertaking;

(b) the undertaking is managed in a normal manner and is solvent; if the undertaking were in difficulty that could justify the presumption that goods were being sold below cost;

(c) the charges concerned are imposed by all Italian customs offices, thereby contributing to the creation of a climate of trust regarding the lawfulness of the charge;

(d) this situation has existed for a long period without being challenged'.

21. In judgment No 9797 of 18 November 1998 the Corte Suprema di Cassazione classified the passing on of taxes as a normal economic act, that is to say an established or generally recognised fact that did not require proof.

22. In the second group of judgments the presumption is linked to a rule of inquiry. These judgments impose on the administration a requirement to submit a number of requisite pieces of evidence. It is thus freed from any further burden of proof and the individual is required to submit certain accounting documents. If the taxpayer is unable to do so it is therefore concluded that the taxes concerned have been passed on. Provision for this 'negative proof to the contrary' is made in Article 116 of the Code of Civil Procedure.

23. In many cases it is impossible or excessively difficult for traders to submit the documents concerned on account of the expiry of the minium statutory retention period of 10 years (Article 2220 of the Italian Code of Civil Procedure). In view of the long duration of reimbursement procedures the retention of documents for longer than 10 years imposes an excessive burden on them inter alia as a result of the high retention costs. This constitutes an additional obstacle to reimbursement.

24. The Commission substantiates the foregoing on the basis of a number of judgments of lower courts. In particular it refers to a judgment of the Tribunale Civile (Civil District Court) di Genova of 12 April 1995 in which the court held that although the burden of proof in relation to the passing on of taxes lies in principle with the tax service, it is also possible to make a simple presumption based on known facts relating to the passing on of taxes, even if only in terms of reasonable probability. In the view

of the court, the fact that the passing on of taxes is a 'trend phenomenon' is also evident from additional factors. In this regard the Tribunale refers to the four factors cited above,[15] which the Corte Suprema di Cassazione uses as criteria. These factors justify the presumption that the charge has been incorporated into the sales prices and is therefore borne by the final consumer. This is a simple presumption which serves to prove the unknown fact that the burden of the charge has been passed on. However, this does not affect the possibility of adducing proof to the contrary even though the burden of proof lies with the importer and not with the tax service.

25. In the view of the Commission this 'trend' in the case-law is still current (in the year 2000) and there are no grounds for assuming that the case-law will be revised.

26. The Commission goes on to state that the reasoning followed results in illogical outcomes. The assumption is that undertakings generally pass on indirect taxes. This premiss is based on the fact that the taxpayer is a commercial undertaking, on the absence of insolvency, and on the fact that the tax was levied by the administration for a particular period in a general and regular manner. However, none of these facts can serve as a basis for the presumption concerned. An undertaking that does not pass on taxes to others is satisfied with less profit but does not necessarily have to be in difficulty. To deduce that taxes are passed on from the absence of insolvency is arbitrary both from a logical and legal point of view. Furthermore, in the Commission's view the modern concept of the market makes it difficult to establish a causal link between the increasing of prices and the passing on of tax.

27. The Commission then argues that it is not only the Italian courts but also the Italian administration that places obstacles in the way of taxpayers recovering unduly paid taxes. In that respect it cites two circulars used by the Ministry of Finances dated 11 March 1994 and 12 April 1995. They show that the tax and customs services must request a copy of the individual's accounts and thus the reimbursement of the charge is clearly linked to the administrative formalities carried out for the benefit of the tax authorities. Both circulars essentially indicate that the passing on of tax to others is established where those taxes are not included in the balance sheet (and marked as undue payments) in the year in which they were paid to the tax administration. Failure to include such an entry shows that the undertaking regards the costs as normal expenses and therefore they were, necessarily, passed on.

15 — See point 20 above.

28. Therefore, the application and interpretation of Article 29(2) of Law No 428/1990 by the Italian administrative and judicial authorities leads to the same result as former Article 19 of Decree-Law No 688 of 1982 [16] by placing entirely on the trader seeking reimbursement the burden of proof that the tax has not been passed on.

29. The Commission points out that the interpretation which it set out was applied in all the judgments in which decisions of the Italian courts were upheld by the Corte Suprema di Cassazione. Where the courts have adopted a correct position concerning the burden of proof, the Corte Suprema di Cassazione has overturned their decisions.

30. In its reply, however, the Commission concedes that its initial view that there was a systematic refusal to reimburse unduly paid charges was too absolute. In certain cases the sum had in fact been returned to the individual. The statistics submitted by the Italian Government [17] probably include only limited sums in comparison with the number of cases pending before the courts. Moreover, reimbursements have been made only to large undertakings which have the resources to initiate legal proceedings. In any event, unlawfully levied charges have been reimbursed only in a small number of cases. In the view of the Commission, it is clear from the documents submitted by the Italian Government itself that the tax administration has never reimbursed the taxes in question outside court proceedings. Furthermore, in the list of judgments 'in its favour' cited in its defence the Italian Government omitted to state whether they were final decisions or whether they were subject to appeals in cassation.

31. Furthermore, a precise quantitative evaluation of the statistics did not, in the Commission's view, detract from the significance of its argument.

32. Finally — and also for the sake of completeness — the Commission raises two further points. Firstly, according to the case-law of the Court the exercise of freedoms guaranteed by the EC Treaty cannot be hindered by general prohibitions dictated by the desire to combat abuse of process. Secondly, the Commission refers to two decisions of the Council [18] based on the Sixth VAT Directive which show that the Community legislature considers that

16 — This provision formed the subject-matter of previous infringement proceedings against Italy: Case 104/86 *Commission* v *Italy*, cited in footnote 6 above.

17 — The Italian Government states that in the period from 1992 to the initial months of 2000 an amount of over ITL 120 billion was reimbursed. See point 34 below.

18 — Council Decision of 8 July 1996 authorising the Netherlands to apply a measure derogating from Article 11 of Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (Sixth VAT Directive) (96/432/EC, OJ 1996 L 179) and Council Decision of 19 December 1997 authorising the United Kingdom to extend application of a measure derogating from Article 28e(1) of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (98/23/EC, OJ 1997 L 8).

the burden of proof in relation to incorrect acts by the taxpayer lies with the tax administration and it cannot merely rely on a simple presumption.

B — *Italian Government's defence*

33. The Italian Government notes that the dispute is based on the claim that the exercise of the right to reimbursement pursuant to Article 29(2) of Law No 428/1990 is virtually impossible or excessively difficult.

34. Primarily, it objects to the Commission's contention that the Italian administration systematically opposes applications for reimbursement. It claims that this contention is incorrect and substantiates its view by submitting figures showing the level of reimbursements which had already been submitted to the Commission during the pre-litigation procedure. According to these figures, in the period from 1992-2000 the Italian administration reimbursed over 120 billion lire, exclusive of interest and costs, pursuant to Article 29(2) of Law No 428/90.

35. In the alternative, it states that the arguments which the Commission derives from judicial and administrative practice regarding proof that amounts have been passed on for the purposes of Article 29(2) of Law No 428/1990 are without foundation.

36. To begin with, it notes that the Commission does not dispute that the wording of Article 29(2) is per se compatible with Community law. No legal presumption is laid down in this provision. On the contrary, it is for the administration to prove that the amount concerned has been passed on.

37. The Italian Government does not wish, at least at the moment, to comment on the case-law of the Corte Suprema di Cassazione cited by the Commission. However, it does point out that it is not the Corte Suprema di Cassazione but the court adjudicating on the substance of the case which has to take a final decision on the burden of proof. This is also consistent with Community case-law.[19] Proof based on presumption forms part of the evidence which the court adjudicating on the substance of the case may consider and take into account in its assessment.

38. The only means the administration has of finding proof that an amount has been passed on is for it to examine (or have examined) the accounts of the undertaking concerned. In the view of the Italian Government, the Commission's contention

19 — With reference to *Comateb and Others*, cited in footnote 25 above, paragraph 25: '... Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence...'.

that the court adjudicating on the substance of the case may infer from the failure to submit accounting documents — which the taxpayer justifies by the expiry of the retention period laid down by law — arguments in favour of the administration pursuant to Article 116 of the Code of Civil Procedure is incorrect. [20]

39. The two decisions of the Tribunale di Genova which the Commission cites in its application do not reflect the view of a large number of lower courts. There are many judgments which come to the opposite conclusion and order the administration to reimburse the sums unduly paid. In these cases there is no presumption that an amount has been passed on, no legal presumption, and no presumption based on a generally recognised empirical fact. These judgments specifically rule that the administration failed to prove that the individual had passed on the tax burden. The Italian Government cites 17 judgments in support of its view. They include a judgment of the Corte d'Appello (Court of Appeal) di Genova which dismisses the action brought by the administration because it failed to prove that the tax burden had been passed on without any reference to presumptions or the resultant reversal of the burden of proof.

40. In the view of the Italian Government, the case-law follows a line which is completely opposite to that which the Commission suggests in its application. This is confirmed by the scale of the abovementioned actual reimbursements made by the administration.

41. The Italian Government therefore considers that Article 29(2) of Law No 428/90 is compatible with Community law and imposes on the administration the requirement to prove that the taxpayer seeking reimbursement has passed the charge concerned on to others. It has no means to that end other than the accounts of the individual. It must be clear in particular from the assets in the balance sheet (accounts payable) that the charge concerned has been passed on. If individuals are unable to submit accounts to prove that they have not passed it on, the administration can only initiate legal proceedings to adduce that evidence.

42. This is also the meaning of the two ministerial circulars of 11 March 1994 and 12 April 1995. Contrary to the Commission's contention, the course of action to be taken by the administration in this regard is not contrary to Community law. The law subjects the right to reimbursement to a condition and the administration must prove that this condition has been satisfied before reimbursing the charge.

20 — In that regard the Italian Government refers inter alia to the judgments of the Corte Suprema di Cassazione of 18 November 1994 and 22 April 1998. Where, after filing an application for reimbursement of charges paid but not due, a taxpayer destroys documents and relies on the expiry of the statutory 10-year retention period, such conduct is not compatible with Article 88 of the Code of Civil Procedure, from which the court may derive evidence under Article 116(2) thereof.

43. Finally, the Italian Government is surprised at the fact that the Commission refers to Decisions 96/432/EC and 98/23/EC. That is because it is established that it is possible to show that the charge was passed on 'by any form of evidence generally accepted by national law' and thus in principle also by means of a simple presumption. [21]

VI — Appraisal

44. In this case the Commission contends that the application of generally applicable rules of evidence within the Italian legal order makes it difficult, if not impossible, for taxpayers who have paid charges contrary to Community obligations to recover unduly paid sums. The Commission argues that the way in which at least a large section of the judiciary interprets and applies these rules of evidence is inconsistent with the principles laid down by the Court in this regard and that this situation is attributable to the Italian Republic. As I stated in my introduction, this raises the preliminary question as to the conditions under which national case-law which does not lead to a result in conformity with Community law can provide grounds for declaring that a Member State has failed to fulfil its obligations under the Treaty. I will first consider this question in more general terms and then turn to the contested legal practice in Italy. Before doing so, it is necessary to examine briefly the admissibility of the action.

A — *Admissibility*

45. At the hearing the Italian Government disputed the admissibility of the infringement proceedings brought by the Commission. In its view, (erroneous) court judgments in individual cases cannot serve as a basis for infringement proceedings under Article 226 EC. It considers that such action is possible only where there is established, uniform and consolidated case-law of national courts whose judgments are not amenable to appeal or appeal in cassation and with which other courts must comply. In Italy this is referred to as *'diritto vivente'*. Since the Commission has failed to show that there is such established and uniform case-law *('diritto vivente')* concerning the subject-matter of the dispute in the Italian legal order, the Italian Government considers that the infringement proceedings brought by the Commission should be declared inadmissible.

46. By this contention, the Italian Government appears to claim that the Commission has not defined adequately the subject-matter of the dispute or that it has changed the complaints raised against the Italian Republic in comparison with the reasoned opinion. In this regard I should first point out that the question as to the conditions under which national case-law can provide grounds for declaring that a Member State has failed to fulfil its obligations under the

21 — In this regard the Italian Government refers to *Dilexport*, cited in footnote 8 above, paragraph 53, and to the Opinion of Advocate General Ruiz-Jarabo Colomer in the same case, points 47 to 49.

Treaty was raised by the Court during the preparations for the hearing and therefore there has been no change in the complaints raised by the Commission. However, this notwithstanding, I consider that this question relates to the substance of the action and not the definition of the dispute. The subject-matter of the proceedings brought by the Commission is set out precisely both in its reasoned opinion and its application and therefore the Italian Government had adequate opportunity to prepare its defence.

47. Therefore, the Italian Government's plea of inadmissibility raised against the infringement proceedings brought by the Commission should be dismissed.

B — *Substance*

1. Breach of Treaty obligations by national case-law

(a) The principle

48. The question whether it is possible for the Commission to bring infringement proceedings against a Member State on account of national court judgments contrary to Community law has been raised in academic legal writings for many years and, in principle, been answered in the affirmative. [22] As the Commission observed at the hearing, the European Parliament also drew attention to this problem as early as 1967. However, until recently the Court of Justice has had no opportunity to comment specifically on this matter but, as stated above, there are now three cases pending before the Court, including the present case, which in different ways raise the question of the consequences of national case-law contrary to Community law.

49. In his recent Opinion in one of these cases, namely *Köbler*, [23] Advocate General Léger has already examined this matter in detail. Although this case concerns the related, but different, matter of the liability of a Member State for a judgment of a supreme national court contrary to Community law, his analysis is also relevant to the present infringement proceedings. Since I endorse his analysis relating to the liability of a Member State for such case-law, which is embedded entirely in estab-

22 — See, for example, Von der Groeben, Thiesing, Ehlermann (editor), *Kommentar zum EU-/EG-Vertrag*, 5th edition, Nomos-Verlag 1997, p. 4/518; Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd edition (edited and revised by L.W. Gormley), London, The Hague, Boston, p. 459; H.A.H. Audretsch, *Supervision in European Community Law*, North-Holland, 2nd edition, 1986, p. 100-105.

23 — Opinion of 8 April 2003, cited in footnote 3 above.

lished basic principles of Community law laid down by the Court, below I will merely touch upon certain elements in so far as they are of particular relevance to the present infringement proceedings.

50. It should be stated in advance that the Member States must be regarded as entities as regards fulfilment of Community obligations. The Member State as such must ensure that the result sought by the relevant provisions of the Treaty or of secondary law is attained in the national legal order. The obligations on the Member States devolve upon the States as such and 'the liability of a Member State under Article 226 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'. [24]

51. Moreover, the fact that the obligations lie with the State as an entity was emphasised clearly by the Court in its judgment in *Brasserie du Pêcheur and Factortame*. [25] The principal issue in that case was whether a breach of the Treaty by the national legislature rendered the Member State liable for the loss or damage caused by it. In its answer to this question the Court commented in such general terms that it also relates implicitly to the breach of Community law by the judiciary. After finding that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty, it ruled that this principle holds good for any case in which a Member State acts in breach of Community law, 'whatever be the organ of the State whose act or omission was responsible for the breach'. [26]

52. To support its finding further, the Court noted, following Advocate General Tesauro, that in international law too the State as an entity is responsible for the breach of obligations 'irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals'. [27] The Court refers specifically to the legislature on account of the particular situation underlying that case. However, it is clear that the principle also relates to the judiciary.

24 — Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15. The failure to fulfil obligations related to the fact that Belgium could not plead that, despite introducing a draft law to that end, it was unable to eliminate tax discrimination owing to the dissolution of the national parliament. See also Case 93/71 *Leonesio* [1972] ECR 287, paragraphs 22 and 23.

25 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

26 — Cited in footnote 25 above, paragraphs 31 and 32 of the judgment.

27 — Cited in footnote 25 above, paragraph 34 of the judgment.

53. The principle that the Member State must, from the Community point of view, be regarded as an entity also underlies the Court's established case-law that a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify a breach of Community law. [28] This aspect was also referred to in *Brasserie du Pêcheur and Factortame* in which the Court held that, in view of the fundamental requirement that Community law be uniformly applied, 'the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities'. [29]

54. I also refer to the Court's case-law concerning the organs of the Member States which have to comply with these directives and which, if they fail to do so, can have proceedings brought against them by individuals. In respect of such situations the Court has ruled that individuals may rely on the relevant directive against the State or 'organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service'. [30]

55. Although these principles were laid down in different contexts, they all proceed from the same basic idea, that is to say that the Member State is responsible as an entity for fulfilling Community obligations and that it is responsible for any omission whatever be the organ which defaults within the internal State organisation, including the judiciary. The Member State must, as an independent entity, ensure that the result sought by the relevant Community rules is attained within the national legal order. This is also a consequence of the principle of sincere cooperation enshrined in Article 10 EC.

56. I should add that the independence of the judiciary does not preclude a declaration that the Treaty has been infringed as a result of national case-law contrary to Community law. This independence essentially means that the courts must settle specific disputes without external influence, in particular from other organs of the State. However, in other respects the judiciary functions as part of the apparatus of State within the bounds laid down by the national constitution and national legislation. Where national legislation permits an interpretation by the courts that is at

28 — Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 13; Case C-274/98 *Commission* v *Spain* [2000] ECR I-2823, paragraph 19; and Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923, paragraph 34. See also Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 24.

29 — Paragraph 33 of the judgment.

30 — Case C-188/89 *Foster and Others* v *British Gas* [1990] ECR I-3313, paragraph 18, and Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraph 46.

odds with Community obligations, an adjustment can and must be made by amending the legislation concerned. From a Community point of view, the national legal order must, in other words, ensure as a whole that Community law is implemented and all organs of the State are required, within their powers, actively to contribute thereto, if necessary by taking corrective action in relation to other organs of State. Such action by a national legislature does not affect the independence of the judiciary.

57. Moreover, the adjustment outlined above in connection with case-law contrary to Community law should be made only in exceptional cases. It is precisely the national courts that play a central role in implementing Community law in the national legal order by examining and correcting acts of the national legislature and administration. [31] This is a function which courts of all levels within national judicial systems have performed since the entry into force of the treaties establishing the European Communities in cooperation with the Court of Justice as part of the preliminary ruling procedure. Through such cooperation the national courts have made a vital contribution to the development and implementation of Community law.

58. Within the system of judicial review the EC Treaty provides for a particular role for the national supreme courts. In view of their responsibility to monitor the uniform interpretation of the law, including Community law, within the national legal order, Article 234 EC imposes on them an obligation to refer to the Court of Justice questions concerning the interpretation of Community provisions or the validity of the acts of Community institutions. The possibility of derogating therefrom in cases in which there is an *'acte clair'* is subject to strict conditions. [32] This obligation on the supreme national court is intended to avoid differences in the way in which Community law is applied within the Member States by enabling the Court of Justice to provide a uniform and binding interpretation of the Community provisions concerned for the Community as a whole. It is thereby guaranteed that the conditions under which individuals perform their activities, at least in so far as those conditions are determined by Community law, are as similar as possible.

31 — Advocate General Léger gave extensive consideration to this matter in the Opinion of 8 April 2003 in Case C-224/01 *Köbler*, cited on several occasions above, points 53 to 76.

32 — See Case 283/81 *CILFIT and Lanificio di Gavardo* [1982] ECR 3415, paragraphs 14 to 20.

59. Precisely in connection with this pivotal role of the supreme national courts in the correct application of Community law within national legal orders, it is extremely important that they recognise and apply the obligations on the Member States under Community law. This does not alter the fact that the lower national courts also bear responsibility for the full implementation and correct application of Community law even though their judgments can be varied within the national legal system. Through the basic principles of the direct effect of the appropriate provisions of the EC Treaty and secondary law, the primacy of Community law over contrary national law, the liability of the Member State — under certain conditions — for failure to fulfil Community obligations, and the obligation to interpret national law in the light of the relevant provisions of Community law, the national courts ensure that individuals can invoke the rights which they enjoy under Community law. They thus form both a safeguard and a counterweight within a Member State in the event that other organs of State fail to fulfil obligations under the Treaty.

60. Incorrect interpretation and application of Community law by national courts has the effect that individuals are denied enjoyment of their rights under Community law and that rules and practices incompatible with Community law are able to remain in place. This in turn can have an effect on the position of natural and legal persons in the internal market and thus lead to distortions in trade. Therefore, from the perspective of the uniform application of Community law a Member State cannot be immune from infringement proceedings where the failure to fulfil Community obligations is attributable to an erroneous interpretation and application of Community law by national courts.

61. It follows from the foregoing that national case-law that is not compatible with the provisions or principles of Community law can provide grounds for bringing infringement proceedings under Article 226 EC. However, this finding does not mean to say that any judicial error is sufficient in this regard. Consequently, it is necessary to specify the circumstances under which such action can and cannot be appropriate.

(b) The conditions

62. Various points of reference can be used in the search for criteria for a declaration that national case-law inconsistent with Community law can provide grounds for

declaring that the Member State concerned has infringed the Treaty.

63. The status of the court judgments concerned can be examined as a first point of reference. The purpose of Article 234 EC provides an indication in this regard. Whereas this provision imposes on the supreme courts an obligation to refer matters in the cases set out therein, the lower courts have a power to refer matters. This structure is based on the idea that individual judgments of lower national courts in which Community law is applied incorrectly can be corrected within the national judicial hierarchy. However, even where this does not occur, an individual incorrect judgment of a lower court does not necessarily result in the undermining of the practical effect of the provision of Community law concerned or undesirable consequences for competition within the internal market or for inter-State trade. At the other end of the spectrum, such consequences are probable if there is contrary national case-law of the supreme national court from which the lower courts will derive guidance within the national legal system. Such effects can arise also where there is disagreement within the national judiciary. Moreover, it should not be ruled out that where, in structural terms, lower courts interpret and apply certain parts of Community law incorrectly, this can have the effect of discouraging individuals from bringing an action or lodging an appeal. In spite of the somewhat lower status of such case-law in the national legal order, such a situation might be regarded as grounds for a declaration that the Treaty has been infringed.

64. In my view, it is also relevant as to whether or not the failure to fulfil Community obligations by the national courts constitutes a structural phenomenon. Is it an incidental or isolated case or can it be said precisely that it is a trend in national case-law which is at odds with Community obligations in a particular respect? In this regard it will also be relevant whether it constitutes a new development or case-law that has been maintained over a longer period. In the former case it is possible to envisage that the national legal system has an opportunity to correct itself before it is possible to speak of a breach of the Treaty. If such a development is confirmed in an appeal and/or an appeal in cassation, in which case whether or not the legal issue in question has been referred to the Court of Justice by way of an order for reference can also be relevant, it may be concluded that it constitutes a structural phenomenon.

65. The third, and in my view most important, point of reference as regards the possibility of declaring that the Treaty has been infringed in connection with national court judgments which fail to fulfil Community obligations has already been covered by the first point. This concerns the effect of those national judgments on attaining the objective of the Community rule in question. Where national judgments have the effect that economic operators in the Member State concerned have to operate under different conditions from com-

petitors or (legal) persons in comparable circumstances elsewhere in the Community, this clearly impinges on the unity of Community law, undermines the practical effect of that law, and disregards the rights of individuals. Where it is found that such harmful effects occur as a consequence of the case-law concerned, it should be declared that the Treaty has been infringed.

66. An objection which could be raised to the declaration that the Treaty has been infringed in connection with incorrect national case-law is that the possibilities open to a Member State to end the breach concerned under Article 228(1) EC are limited. According to this argument, the adoption of measures to implement the judgment of the Court in question is limited by the principle of the independence of the judiciary. As I stated above,[33] it is not inconsistent with the independence of the judiciary for the national legislature to make corrections by adapting or clarifying national legislation which is either not interpreted and applied in conformity with Community obligations or is incorrectly disapplied. Where this is not done, a declaration that the Treaty has been infringed in connection with unlawful case-law can also be used as the basis for an action for damages against the Member State concerned. This is essentially the matter at issue in the case of *Köbler* referred to on several occasions above.

33 — See point 56 above.

67. As is evident from the foregoing, I consider that a declaration that a Member State has failed to fulfil its obligations under the Treaty, where this stems from the failure to fulfil Community obligations by national courts, will always turn on various factors, including the structural nature of the incorrect national case-law, the effect and status of the judgments concerned within the national legal order, and the effect of this case-law on attaining the objective of the Community provisions in question. It is in this context that I will assess the action that the Commission has brought against the Italian Republic in connection with the rules of evidence concerning the passing on of the burden of charges paid in breach of Community law.

2. Basic principles relating to the recovery of charges paid in breach of Community law

(a) Reimbursement, passing on and unjust enrichment

68. It is a general legal principle that an individual on whom the authorities have incorrectly imposed a pecuniary charge has the right to recover the sums paid. Taxes can be imposed only where they are founded on a sound legal basis. Where no

such basis exists, the charge is *a fortiori* unlawful and must be reimbursed.

69. This principle is also accepted in the Community legal order. According to the Court's established case-law, entitlement to the repayment of charges imposed by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges. The Member State is therefore in principle required to repay charges levied in breach of Community law. [34]

70. Apart from the obvious rule that anything that has been paid unduly or levied unlawfully must be reimbursed as soon as possible, this consequence also follows from the economic need to remedy the distortion to competition caused by the imposition of an unlawful charge.

71. According to the case-law of the Court, there is a single exception to the rule that sums unduly paid must be reimbursed. A Member State may reject an application for repayment of a charge imposed in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment. If the burden of the charge has been passed on only in part, it is for the national authorities to repay the trader the amount not passed on. [35]

72. Since this case relates to the curtailment of a subjective right conferred by Community law, this exception must be interpreted strictly. A strict interpretation is required in particular on account of the fact that the taxpayer has not necessarily neutralised the economic burden of the charge merely by passing it on to the customers. In particular, it is especially difficult to establish the extent to which the charge has been passed on to the customers in part or in whole. This can be illustrated by a large number of observations from a micro-economic analysis.

73. It will first be necessary to examine whether a charge which increases prices is actually passed on in the price of a product. The fact that the price of the product is increased does not automatically mean that the price increase is directly connected with the charge imposed. In the light of the dynamic of market conditions and prices it is by no means certain as to what effect a

34 — See the judgments in *San Giorgio*, cited in footnote 5, paragraph 12; *Comateb*, cited in footnote 12, paragraph 20, and *Dilexport*, cited in footnote 8, paragraph 23; and also the more recent judgments of 8 March 2001 in Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Hoechst* [2001] ECR I-1727, paragraph 84, and of 11 July 2002, *Marks & Spencer*, cited in footnote 28, paragraph 30.

35 — Inter alia *Comateb*, cited in footnote 12 above, paragraphs 27 and 28.

charge will have on the level of a price. Prices of products are not static. In general producers regularly adjust their prices depending on the circumstances of the market. With the exception of the cost price, a trader will base his pricing policy inter alia on factors such as expectations concerning the development of the market and the position of a particular product on the market. A charge increasing the cost price is only one of the factors in determining the price.

74. Therefore, in a dynamic market environment it will often be difficult to demonstrate a direct link between a charge increasing the cost price and the price. However, in a case in which it is possible to do so, this still does not mean that the taxpayer is compensated fully for the extra costs of the charge. In other words, passing on the charge is different from passing on the economic loss or damage caused to the trader as a consequence of the unlawfully imposed charge.

75. The degree to which amounts are passed on depends primarily on the price elasticity of demand. Only in the — extreme — event that the price elasticity of demand amounts to zero, as is sometimes the case in respect of basic necessities, will it be possible to pass on the charge to the customer in full by means of a price increase. In that case the increase in the retail price has no effect on sales. In all other cases there will be at most partial passing on of amounts. This means that partial passing on of amounts will be the rule rather than the exception.

76. In the case of the vast majority of products demand is more or less price elastic. The trader can indeed pass on the charge in part but it cannot thereby be concluded that the economic burden is passed on. In this situation the trader still sustains unavoidable loss or damage as a result of the unlawfully imposed charge. This loss or damage is caused firstly by a drop in the volume of sales and thus in profit as a consequence of the price rise and secondly by the part of the charge which he has to absorb himself. [36]

77. Another form of loss or damage stems from a reduction in the profit margin available to the trader since part thereof is 'used up' by the passing on of the charge. As a result the trader's options for adapting his marketing strategy are limited. If a price increase had been commercially attractive and possible under the given market conditions the trader could even have increased

36 — See, to this effect, also the Opinion of Advocate General Jacobs of 20 March 2003 in Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, point 48.

his retail price had the charge not been imposed.

78. These considerations lead me to the conclusion that it will be virtually impossible to demonstrate the degree to which the economic burden resulting from the charge has been passed on. In order to do so it is necessary to conduct a thorough analysis of the market, taking into account a large number of variables such as the structure of the market concerned (more or fewer providers) and the availability of possible substitutes for the product affected by the charge. Account must also be taken of the fact that market conditions are dynamic in nature and that prices fluctuate according to changes in supply and demand. This makes it particularly difficult to establish what effect a charge has on the level of the retail price. In order to establish that effect it would ultimately be necessary to establish how the prices and the sales would have developed if no charge had been imposed.

79. The fact that the causal link between recovery and enrichment is relative where an amount is passed on is also clear from the opposite situation, that is to say that it cannot be ruled out that the economic operator concerned will likewise be able to pass on the 'advantage' of recovered charges to the final consumer by using the recovery to reduce prices with a view to maintaining or strengthening his market position.

80. In these circumstances it is clear that where a provision such as Article 29(2) of Law No 428/1990 uses the passing on of the charge as a sole criterion for concluding that there has been unjust enrichment in the case of reimbursement, this does not reflect the economic reality.

81. The foregoing also has consequences for adducing evidence. This must be aimed at establishing a large number of economic indicators from which it can ultimately be deduced that the recovery of the charges concerned would lead to unjust enrichment. It is obvious that such an analysis cannot be expected from the producer. In any event I note that it is insufficient merely to examine the accounts to prove that an amount has been passed on and that there has been the alleged enrichment resulting therefrom. This is also the conclusion dictated by the case-law of the Court.

82. The foregoing makes it clear that the passing on of the economic damage or loss caused by a charge is not automatic and that even where the charge is passed on reimbursement by no means always results in enrichment. In this respect I am also pleased to refer to Advocate General Tesauro's Opinion in *Comateb* in which he states that 'even if an individual trader may, on occasion, profit from the reimbursement of a charge that has been unduly paid, which he has passed on in part or in whole, we have also to consider whether in such circumstances it is reasonable to apply

the concept of unjust enrichment. The answer is that it is not — simply in terms of the general theory of the law: I do not in fact believe it can be right to describe as unjust enrichment the profit derived by an individual from the reimbursement of a charge unduly required and levied by the authorities. More especially, I do not believe that the State, which itself has actually obtained unjust enrichment by levying — for years, even — an unlawful charge, may then specifically rely on a principle of that kind to refuse to repay the sums unduly paid.' [37]

83. Therefore, in the light of the economic principles set out above, it will not be possible to establish whether and to what extent there has been enrichment as a consequence of the recovery of charges paid but not due until a thorough economic analysis has been made of the market concerned. This brings me to the principles concerning the recovery of charges unduly paid laid down in its case-law which has been repeatedly confirmed since the *San Giorgio* judgment.

(b) Principles concerning the recovery of charges unduly paid

84. In the light of the foregoing findings, national rules which subject the recovery of charges unduly paid to conditions must satisfy strict requirements. The sole condition that it has been established that the amount concerned has not been passed on is clearly not sufficient. Instead, the rules concerned should be aimed at preventing the recovery actually leading to unjust enrichment of the economic operator, [38] that is to say that he enjoys an advantage to which he should not be entitled as a rational operator.

85. The fact that this latter aspect is central to the case is also evident from the Court's established case-law on this subject. According to this case-law, '[i]t is... for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment'. [39] Recovery may be refused only where it is established that the charge

37 — Opinion in *Comateb*, cited in footnote 12 above, point 21. See, to the same effect, also Advocate General Mancini in his Opinion, cited in footnote 5 above, point 7.

38 — See, again, Advocate General Jacobs in his Opinion cited in footnote 36 above, paragraph 49.

39 — Inter alia, *Comateb*, cited in footnote 12 above, paragraphs 21 and 23.

has been borne in whole or in part by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment. [40] Therefore, the Court makes an assessment in two stages: first the question of the passing on of the amount and then the question of unjust enrichment.

86. The rules on the basis of which the unjust enrichment must be proven must, in the absence of Community rules in this regard, be laid down by the Member States. Although the effect of this is that the conditions under which individuals in the various Member States can recover undue amounts differ, the national rules must, according to the Court's established case-law, satisfy two basic requirements. On the one hand, the rules concerned must not be less favourable than those governing similar domestic actions (principle of equivalence). On the other, they must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [41]

87. The objective of this case-law is to afford individuals, in the absence of Community rules in this regard, effective legal protection against the national administration in exercising the rights conferred on them by Community law and more generally to safeguard the practical effect of Community law. The Member States must therefore remove obstacles of a procedural nature which could undermine this objective.

88. In principle, to recover amounts unduly paid it should be sufficient for the person concerned to prove that he has in fact paid a pecuniary charge and that the charge was unlawful. However, because it is permitted, by way of exception, that recovery be refused where it could lead to unjust enrichment, which would be the case if the economic burden were passed on to others in whole or in part, the question arises as to how and by whom it must be proven that the recovery would in fact result in enrichment.

89. In view of the observations that I have made above regarding the way in which economic operators can decide whether or not to include a charge in their retail price and the fact that the question of possible enrichment in the case of recovery turns thereon, it is clear that there is a heavy

40 — See Joined Cases C-441/98 and C-442/98 *Michaïlidis* v *IKA* [2000] ECR I-7145, paragraph 33.

41 — *Dilexport*, cited in footnote 8 above, paragraph 25.

burden of proof in this case. Since it is particularly difficult to adduce this proof in practice, it is natural for a national administration to resort to proof of enrichment based on the presumption that a charge has been passed on and consequently to leave it to the taxpayer to adduce proof to the contrary that he has not passed on the charge. However, such an approach is inconsistent with the principles which the Court has laid down and confirmed in a steady series of judgments.

90. It is a basic assumption that a person who has paid an undue charge to the national tax administration has a right to recover that sum. [42] Where a national administration wishes to rely on the exception relating to prevention of enrichment, it is clearly for it to show that recovery would have this effect. In other words, the burden of proof regarding unjust enrichment lies entirely with the national administration. [43]

91. In the present case the national administration has acted in breach of its Community obligations by imposing a charge that was inconsistent with the relevant provisions of the EC Treaty (either Article 23 EC or Article 90 EC). Where a taxpayer who, as a consequence of this unlawful action, has a right to recover what he has paid unduly, is nevertheless placed in a situation in which he must first prove that he has not found compensation elsewhere, this results in an unacceptable advantage being given to the party to which the problem is attributable.

92. In my view, the Court expressed this idea in the *San Giorgio* judgment in which it held: '[i]n a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal charge imposed on an importer has actually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot be systematically held responsible'. [44]

93. It is clear from the Court's case-law, which I have cited above, that it is necessary to prove that the recovery would in fact lead to enrichment. Therefore, it cannot be sufficient to show that an amount has been passed on and thus to conclude that the economic burden has been neutralised and therefore recovery would lead to enrichment. In this regard the Court has also acknowledged that, in addition to the direct effects of the charge, a trader will also sustain economic loss or damage in

42 — Inter alia, *San Giorgio*, cited in footnote 5 above, paragraph 12, and *Comateb*, cited in footnote 12 above, paragraph 20.

43 — *Dilexport*, cited in footnote 8 above, paragraph 53.

44 — Cited in footnote 5 above, paragraph 15.

another respect and the national court must take account thereof in its assessment.

94. For example, in *Comateb* and *Michaïlidis* the Court held that even where it is established that the burden of the charge unduly paid has been passed on in whole or in part to others, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment. The national court which has to assess a claim for repayment may take into consideration the damage which an economic operator might have suffered because the unlawful charge led to a fall in imports from [45] or exports to [46] other Member States.

95. Moreover, in the judgment in *Bianco and Girard* the Court rightly pointed to the complexity of the economic reality which exists in establishing whether or not there has been enrichment. In this judgment the Court held 'that, even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts'. The Court went on to observe that 'it is quite probable, depending on the nature of the market, that the charge has been passed on. However, the numerous factors which determine commercial strategy vary from one case to another so that it is virtually impossible to determine how they each affect the passing on of the charge.' [47]

96. As regards evidence, the Court has repeatedly held that any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons. The same applies to special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence. [48] The Court has

45 — *Comateb*, cited in footnote 12 above, paragraph 30.

46 — *Michaïlidis*, cited in footnote 40 above, paragraph 35.

47 — Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraphs 17 and 20.

48 — *San Giorgio*, cited in footnote 5 above, paragraph 14, and *Dilexport*, cited in footnote 8 above, paragraph 48. An example of such a rule which placed the burden of proof to the contrary on the taxpayer was the forerunner of the law that is central to this case. In Case 104/86 *Commission* v *Italy*, cited in footnote 6 above, the Court declared that this rule was contrary to the Treaty.

also repeatedly ruled that in the case of indirect taxes there is no presumption that they have been passed on and that it is for the taxpayer to prove the contrary. [49]

97. Moreover, it follows from the fact that it is not permitted to make a legal presumption that an amount has been passed on that it is necessary to determine, in the light of the facts of each case, whether reimbursement to the trader would result in unjust enrichment. [50] Furthermore, it is for the national administration to show the extent to which there has been enrichment, in which case partial recovery might be sufficient.

98. Moreover, these basic assumptions relating to the adducing of proof by the administration do not mean that no cooperation whatsoever could be demanded from the taxpayer. In particular, it could be demanded that he submit the documents necessary to assess his situation. Nevertheless, it is still for the administration to show conclusively that an amount has been passed on and to such an extent that recovery would in fact lead to unjust enrichment. [51] Under no circumstances may the taxpayer's cooperation result in a shift in the burden of proof.

99. It follows from the foregoing that the Member States have an obligation to achieve a result which consists, in respect of the recovery of charges imposed in breach of Community law, in organising their legal system in such a way that, if they wish to rely on the exception relating to unjust enrichment to resist a claim for recovery, the following conditions are satisfied:

— the burden of proof lies entirely with the administration;

— the administration must show that recovery would in fact result in enrichment;

— proof may not be based on a presumption that the charge has been passed on;

— it cannot be demanded that the taxpayer adduce proof to the contrary that the charge has not been passed on;

49 — *Bianco and Girard*, cited in footnote 47 above, paragraph 17, and *Comateb*, cited in footnote 12 above, paragraph 25.

50 — See, *Michaïlidis*, cited in footnote 40 above, paragraph 32.

51 — See, to this effect, also Advocate General Jacobs in his Opinion cited in footnote 36 above, paragraphs 59 and 60.

— it can, however, be demanded that the taxpayer cooperate for the purposes of the proof to be adduced by the administration.

100. To that I add the following:

— a mere examination of the accounts cannot suffice to prove enrichment;

— enrichment must be proven on the basis of a through economic analysis of the market concerned.

101. This brings me to the actual subject-matter of the present infringement proceedings, namely the question whether Article 29(2) of Law No 428/1990, as interpreted by the national courts and applied by the Italian tax administration, satisfies the abovementioned conditions and whether national legal practice displays such features that it can provide grounds for declaring that the Italian Republic has failed to fulfil its obligations under the EC Treaty.

3. Italian legal practice

102. Article 29(2) of Law No 428/1990 is worded in such a way that it cannot be regarded as contrary to Community law. The wording is completely neutral and contains no element which the Court has previously ruled as in breach of Community obligations such as the possibility of presuming that an amount has been passed on, the taxpayer's obligation to adduce proof to the contrary that he has not passed on an amount or limitations regarding the form of the evidence to be adduced.

103. However, as the Commission has stated and, in my opinion, conclusively shown, this provision is, precisely on account of its vagueness, worded in such broad terms that it has left scope for maintaining or developing a legal practice that is not consistent with the principles that the Court has laid down in its case-law since *San Giorgio*.

104. In particular, the Commission has cited a number of judgments of the Corte Suprema di Cassazione which show that this supreme Italian court considers that it is permissible to conclude that an amount has been passed on on the basis of a presumption. For example, it refers to a judgment based on the generally accepted fact that undertakings systematically pass

on the charges concerned to their customers. [52] It has also referred to a judgment which states that it cannot be concluded that the amount has not been passed on on the basis of the four factors referred to above, namely (a) that the taxpayer is an undertaking, (b) that it is not insolvent, thereby justifying the presumption that goods are being sold below cost, (c) that all Italian customs offices impose the charges concerned and (d) that this situation has existed for a long period without being challenged. [53] These factors were essentially reproduced in a judgment of the Tribunale di Genova. [54]

105. Furthermore, the Commission has referred to other cases in which it was demanded that the individual submit accounting documents for the purpose of establishing whether or not the charge had been passed on. If the individual is unable to do so, for example because the statutory retention period of 10 years has expired, it can consequently be deduced that the charge has been passed on. [55] In that case the individual failed to adduce the proof to the contrary that the charge had not been passed on. In this connection the Commission cited a judgment of the Corte d'Appello di Torino which refused to accept this type of proof. This judgment was also overturned by the Corte Suprema di Cassazione on account of the evidence-related difficulties facing the administration as a result thereof.

106. In addition to this trend in Italian case-law, the policy laid down by the Italian tax administration in certain administrative circulars also creates problems for taxpayers in recovering amounts unduly paid. In order to be eligible for recovery, it should be clear from the accounts of the undertaking concerned that the charge has been included not as a cost item but as an asset. If this has not been done, it is assumed that the charge has been passed on.

107. In response to the complaints raised by the Commission, the Italian Government stated that there are also various judgments of Italian courts to the opposite effect. In these cases it was not presumed that the charge had been passed on and the courts concerned found in each specific case that the administration had not adduced proof that the charge had been passed on and the claim for recovery was granted. In this connection the Italian Government has submitted statistics showing that over 120 billion Italian lire have been reimbursed to taxpayers since 1992.

108. The Italian Government has also pointed out that the role of the Corte Suprema di Cassazione is limited, as

52 — Judgment 3006 of 12 March 1993 of the first chamber of the Corte Suprema di Cassazione.

53 — Judgment 2844 of 28 March 1996 of the first chamber of the Corte Suprema di Cassazione.

54 — Judgment of 12 April 1995.

55 — Judgments 9797 of 18 November 1994 and 2369 of 12 April 1984 of the Corte Suprema di Cassazione.

regards the law on evidence, to laying down general principles and that it is for the lower court to evaluate the evidence adduced in each case in the context of establishing the facts.

109. As regards the policy pursued by the administration, the Italian Government notes that the requirement to submit accounting documents is justified because as far as it is concerned it is the only conceivable proof that an amount has been passed on.

110. Even though a considerable proportion of Italian legal practice is consistent with the Community principles concerning the recovery of taxes unduly paid, the fact remains that another substantial proportion of that legal practice is not consistent with these principles. In any event the repeatedly cited examples from Italian case-law clearly show that there is disagreement within Italian legal practice as to the interpretation to be placed on Article 29(2) of Law No 428/1990. [56]

111. The cases in which there has been reimbursement of unduly paid taxes also related, according to the Commission, to large undertakings which had the resources to fund frequently protracted procedures for recovery. This would imply that it is primarily the small and medium-sized undertakings that have been less successful in their requests for recovery.

112. The foregoing leads me to conclude that the achievement of the result set out in points 99 and 100 of this Opinion is not sufficiently safeguarded within the Italian legal order. The Commission has shown that in many cases proof based on presumption is accepted and the approach adopted by various courts in many cases leads to the burden being placed on the taxpayer to adduce evidence that he has not passed on the charge concerned. Even though there are cases in which amounts paid but not owed have been recovered in conformity with Community law, it is clear that such an outcome is not guaranteed in all cases. In addition, I should also note that this is a practice of many years' standing. [57] Furthermore, this practice is based on the presumption that the passing on of an amount implies unjust enrichment, whereas this consequence must precisely be shown separately.

56 — In *Dilexport*, cited in footnote 8 above, the Court also noted the existence of this disagreement, although in that case it was a difference of opinion between the Italian Government and the national court (see paragraph 50 of the judgment).

57 — See, in this respect, my Opinion in Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923 in which I noted that the Italian Government had an obligation to achieve a result consisting in ending a situation of discrimination against foreign-language assistants from other Member States which had already existed for many years.

113. In these circumstances I take the view that it is made excessively difficult for taxpayers to exercise their rights under Community law and I consider that the legal practice in Italy concerning the recovery of charges contrary to Community law is inconsistent with the principle of effectiveness, as laid down in detail in the case-law of the Court.

114. In addition to my statements in points 62 to 67 of this Opinion, I also note that the legal practice described in this case is also structural in nature. This is clear primarily from the fact that the adducing of evidence on the basis of presumptions and the deduction that a charge has been passed on where the taxpayer is unable to submit the documents requested are endorsed by the supreme Italian court. Even if the lower courts give judgments in conformity with Community obligations, these judgments can be overturned in cassation proceedings. The structural nature is also evident from the policy pursued by the administration in this regard.

115. Furthermore, this practice has the effect that the practical effect of the Treaty provisions concerned and the principles that the Court has laid down in this regard are undermined. In particular where economic operators have pecuniary claims, any infringement of their rights under Community law has a direct effect on their competitive position on the market. Those concerned must be sure that they can, in the same way as their competitors in other Member States and within the bounds laid down by the Court, rely on the recovery of charges that a Member State has imposed on them in breach of Community law. The need for uniform interpretation and application of Community law is founded on the concern that economic operators should, as far as possible, be faced with the same market conditions in so far as they are determined by the authorities.

116. Although Article 29(2) of Law No 428/1990, as stated above, is prima facie compatible with Community law, this provision does allow, by failing to lay down detailed rules on the adducing of proof, the result sought by Community law not to be achieved where it is applied in practice. In the light thereof I take the view that the legal practice in Italy concerning the application of Article 29(2) of Law No 428/1990 is of such a structural nature and has such detrimental effects on the practical effect of Community law that it is possible to declare that, by maintaining this provision in force, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

VII — Conclusion

117. In the light of the foregoing considerations, I therefore propose that the Court:

(a) declare that, by maintaining in force Article 29(2) of Law No 428 of 29 December 1990 which, as interpreted and applied by the administrative and judicial authorities, allows rules of evidence in relation to the passing on of charges levied in breach of Community rules which make exercise of the right to repayment of such charges virtually impossible or, at least, excessively difficult for the taxpayer and as such are incompatible with the legal principle laid down by the Court of Justice regarding the recovery of sums paid but not due, the Italian Republic has failed to fulfil its obligations under the EC Treaty;

(b) order the Italian Republic to pay the costs.