5. The duty of the authorities of a Member State to repay to taxpayers who apply for such repayment, in accordance with national law, charges or dues which were not payable because they were incompatible with Community law does not constitute an aid within the meaning of Article 92 of the EEC Treaty.

In Case 61/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale Civile e Penale, Milan, for a preliminary ruling in the action pending before that court between

AMMINISTRAZIONE DELLE FINANZE DELLO STATO

and

DENKAVIT ITALIANA S.R.L.

on the interpretation of Articles 13 (2) and 92 of the EEC Treaty with regard to the repayment of sums levied by way of charges having an effect equivalent to customs duties,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Facts and Issues

The facts and the arguments of the parties put forward during the written procedure may be summarized as follows:

### I — Facts and procedure

1. By decision of 3 October 1978, the President of the Tribunale Civile e Penale [Civil and Criminal Court], Milan, ordered the Amministrazione Finanze dello Stato (Italian finance administration) to pay to S.r.l. Denkavit Italiana the sum of Lit 2 783 140 which the latter had previously paid by way of public health charges on the importation of milk and milk products, because that charge was considered to be a charge having an effect equivalent to a customs duty prohibited by Article 12 of the EEC Treaty and Article 22 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176).

2. The Amministrazione Finanze dello Stato appealed against that order to the Tribunale Civile e Penale, Milan, alleging *inter alia* that in the Community legal order the infringement of the prohibition on levying charges having an effect equivalent to customs duties does not automatically give rise to the duty to repay the sums levied, so that in the case in question the claim for repayment should be dismissed.

3. Taking the view that the dispute raised problems of the interpretation of Community law, the Tribunale Civile e Penale, Milan, requested the Court of Justice by order of 1 March 1979 to give a preliminary ruling on the following questions:

"(A) Is the repayment of sums levied by way of customs charges (in the case in point, public health inspection charges) prior to their classification by the Community institutions as charges having an effect equivalent to customs duties, the burden of which has already been passed on in turn to the purchasers of the imported products, compatible with the Community rules, and in particular with the basic intention of Articles 13 (2) and 92 of the EEC Treaty?

(B) Are the Community rules and in particular Articles 13 (2) and 92 of the EEC Treaty opposed to the creation, by the prohibition and abolition of charges having an effect equivalent to customs duties, of a right in favour of individuals to request repayment of sums paid but not owed by them to the State, which for its part the State has illegally levied by way of a charge having equivalent effect, following the abolition of such charges by operation of Community law but prior to their classification by the Community institutions as charges having an effect equivalent to customs duties?"

4. The order for reference was received at the Court on 13 April 1979. Written observations were submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by the defendant in the main action, represented for this purpose by Messrs Giovanni Maria Ubertazzi and Fausto Capelli, Advocates at the Milan Bar, by the Italian Government, represented for this purpose by Mr Adolfo Maresca, Ambassador, assisted by Mr Arturo Marzano, Avvocato dello Stato, by the Danish Government, represented for this purpose by Mr Per Lachmann and by the Commission of the European Communities, represented for this purpose by Mr Sergio Fabro, Member of the Service, acting as Agent.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without there being any need for a preparatory inquiry.

## II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

### *A — Observations submitted by the Italian Government*

Having recalled that the questions submitted to the Court in the order for reference were submitted with the agreement of the parties to the main action, the Government of the Italian Republic refers to the observation which it submitted in Case 66/79 on a question referred to the Court of Justice for a preliminary ruling by the Italian Corte Suprema di Cassazione [Supreme Court of Cassation] in its judgment of 11 January 1979. These observations have been summarized in substance as follows in the section of the judgment entitled "Facts and Issues" in Joined Cases 66, 127 and 128/79 *(Amministrazione delle Finanze dello Stato* v *S.r.l. Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi).*

The questions referred to the Court in Joined Cases 66, 127 and 128/79, like those referred to the Court in Case 61/79, essentially concern the same problem, although they refer to different provisions of the Treaty, in this instance to Article 177 in Joined Cases 66, 127 and 128/79 and to Articles 13 and 92 in Case 61/79, that is, the problem whether a provision of Community law must be applied to events prior to a judgment of the Court of Justice, adhering to the interpretation given by the Court.

The question of principle raised in the two groups of cases in question has already been mentioned in Case 33/76, *REWE-Zentralfinanz eG and REWE-Zentral AG* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, at least as regards the duty to repay sums levied but not owed. In the judgment in the *REWE* Case delivered in 16 December 1976 by the Court it was not however necessary to give a ruling on the question which is expressly put before it in this case.

— The temporal scope of an interpretative judgment

Recalling and criticizing the arguments which had been submitted in Case 33/76, the Italian Government emphasizes in particular that the solution which it put forward arose from the judgment delivered on 8 April 1976 in Case 43/75 (*Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455). In that judgment the Court acknowledged the direct effect of Article 119 of the EEC Treaty but limited its temporal application to the period after the date of its judgment, except as regards those workers who had already brought legal proceedings or made an equivalent claim.

According to the Italian Government, the criteria laid down in the *Defrenne* case are also decisive in cases such as this one. Although the limitation of the direct effect of Article 119 was decided only for reasons of expediency, the acknowledgement of a right to the repayment of sums paid at a time when it was not established that they were charges having an effect equivalent to customs duties but when, on the contrary, it was generally accepted that they were not of that nature, would be incompatible not only with the objectives of Article 13 (2) of the EEC Treaty but also with those of secondary Community law by reason of the additional adverse effect on intra-Community trade which would result from this.

Examining the opinion expressed in particular by the Advocate General in Case 33/76 *(REWE)*, according to which the situation in that case was not comparable to that in the *Defrenne* case, the Italian Government considers that it remains to be considered whether, in view of the discrimination resulting from the various national limitation periods, the same importance should not be attached to the financial burden resulting from the duty of repayment as that attached to the harmful consequences of complete retroactivity in the *Defrenne* case, having regard in particular to the provisions of Article 6 (2) of the Treaty.

Thus it is necessary to examine whether, as a result of a judgment of the Court setting aside an interpretation until then generally accepted, traders are given the right which they had not previously exercised not to pay certain duties and charges. Along the same lines, it is necessary to examine whether in similar circumstances the Member States are given the right to claim sums to which they previously considered they were not entitled when a judgment of the Court shows that in fact those sums were legally payable.

As regards the first case, it might be considered that a solution could easily be found if reference were made to the provisions in each national legal order governing the *condictio indebiti*. This reference to national law would however result in different solutions since the possibility of repayment might even be totally excluded by national legislation, as shown by the judgment of 26 June 1979 (Case 177/78, *Pigs and Bacon Commission* v *McCarren and Company Limited)*.

The solution should therefore be sought within the context of the Community legal order. The repayment of sums levied by way of duties acknowledged to have an effect equivalent to that of customs duties can only be permitted as from the judgment of the Court of Justice in which it was held that the duty levied had an effect equivalent to that of customs duties or, possibly, as from the date of the Commission directive within the meaning of Article 12 (2) of the EEC Treaty.

In support of this argument, the Italian Government claims that the scope of the concept of a charge having an equivalent effect has not been defined by the Treaty. Pursuant to Article 13 (2) of the Treaty, the Member States should have progressively abolished charges having en effect equivalent to customs duties during the transitional period and according to a timetable determined by the Commission by means of directives based on the rules laid down in Article 14 (2) and (3) and directives issued by

the Council pursuant to Article 14 (2). However, it is common knowledge that the Commission specifically determined charges having an equivalent effect initially on the basis of an analytical examination of information supplied by the various Member States in reply to a questionnaire and afterwards on the basis of an independent examination; this work has not yet been completed as regards the six old Member States although the transitional period expired several years ago and it has only just been started as regards the taxation of the new Member States.

With regard to the common agricultural policy, the regulations provided directly that the levying of charges having an equivalent effect was incompatible with the application of the system of levies even before the Commission adopted the first directive on charges having an equivalent effect, dating from 15 October 1963, without supplying accordingly any information or details enabling those charges to be determined.

The Italian Government emphasizes the irresolution of the services of the Commission and the fact that it was necessary for the Court of Justice to specify through a uniform development of its case-law the conditions which had to be satisfied in order for a charge or a duty levied on imports to be acknowledged as having an effect equivalent to customs duties. In these circumstances it is impossible to lay the blame on the Member States for maintaining, until the interpretative judgment, charges having an equivalent effect, otherwise it would be nessessary to consider that every customs official should have independently taken responsibility for deducing the consequences of the direct effect of the prohibition on charges having an equivalent effect before the Commission had even issued the appropriate directives and before the interpretative judgment of the Court.

The Italian Government also maintains that there is a difference between the right of an individual not to pay a charge having an equivalent effect which arises from a directly applicable Community provision and the duty of repayment of the State resulting not from the directly applicable provision but rather from the situation in which it has been found that a State has "failed to fulfil its obligations under the Treaty". It claims that the scope of the concept of a failure to fulfil an obligation in the Community legal order is, by reason of the institutional objectives of the Communities, different from that of the same concept in national law. A State which has failed to fulfil its obligations has not been compelled by the Community institutions to recover the aid or the export refunds granted in breach of Community law. It also argues from Memoradum No 75425312 of the Commission of 30 May 1975 issued as a result of the judgment delivered on 12 November 1974 in Case 34/74 *(Société Roquette Frères* v *French State* [1974] ECR 1217) on the interpretation of Article 4 a (2) of Regulation No 974/71 of the Council. In that memorandum, the Commission took the view that, by reason of the special circumstances of the case, Member States were not under a duty to recover the sums which should not have been paid if the article in question had been interpreted to the effect indicated by the Court. It follows logically that a different criterion cannot be used within the context of the same legal relationship and by reference to the same provision

according to whether certain sums must be recovered or repaid by the national authorities. Thus the duty of repayment should not necessarily be considered as the consequence of the levying of sums not owed.

The Italian Government emphasizes that the solution which it proposes is based on the judgment delivered in Case 43/75 (the *Defrenne* case, quoted above) in which the Court expressly, although by way of exception, makes a distinction between the finding that there has been a failure by a Member State to fulfil its obligations under the Treaty and the duty retroactively to eliminate the harmful effects produced by that failure to fulfil its obligations. The reasons which led the Court to depart from the purely declaratory effect of its judgments, in other words the economic consequences, the conducts of the Member States, the absence of action by the Commission and the incorrect impression of the effect of the applicable Community rules, are also valid as regard charges having an effect equivalent to customs duties and, in general, in the case of sums levied in the basis of a misinterpretation of the Community rules.

The economic consequences result from the simultaneous repayment of sums levied for years without any dispute and in the belief that they had to be paid; that damage is variable and discriminatory according to the limitation periods laid down by each national legal system. The conduct of the Member States and the Commission's lack of action were also decisive, since the sums in question were paid and levied in the general and obvious belief that there was no breach of the Community rules. These arguments are particularly relevant as regards the system of public health inspection dues because of the complexity of the latter. It was not until 1970 when the Community rules on the common organization of the markets in the sector of the various products subject to public health inspections had already been in force several years that the Commission took action against two Member States only; that action had no concrete results for approximately seven years and was only resumed after the various judgments delivered by the Court of Justice.

— Passing on the charge in question

The Italian Government then emphasizes that the repayment of the sums paid to the European Communities or to the Member States as a result of a misinterpretation of the Community rules results in an actual enrichment of the traders concerned or more exactly in a higher and unforeseen profit margin because those traders have obviously passed on the corresponding amounts in the calculation of their production costs.

A *restitutio in integrum* which proves more harmful than the damage for which it is to compensate is also impossible in the light of the Community rules on competition. Repayment would result in substance in an aid to national traders who have passed on to their customers

the burden improperly levied upon them and would cause additional damage to exporters of the other Member States who have already suffered the actual damage of a reduction in their export transactions. According to the Italian government, the retroactive elimination of a difference in treatment which in fact has already irreversibly affected business relationships by making them subject to a system different from that intended by the Community legislature produces an effect contrary to the objectives of the Community provisions, in other words free movement of goods on the Community territory and a system of free competition between the traders concerned. It is therefore necessary to acknowledge the relevance of the principle *cessante ratione legis, cessat et ipsa lex* and not to apply Community provisions which are incompatible with the objectives pursued.

As regards the analogous but converse case in which the misinterpretation of the Community rules has not given rise to the levying of duties which were, on the contrary, payable, it is, according to the Italian Government, certainly more difficult to consider the arguments which it put forward in relation to the first case to be relevant. There is a fundamental difference in that the levying of sums payable which have not however been paid and levied by mistake is in accordance with the function and objectives of the rules interpreted incorrectly and because the administration's mistake constitutes precisely the normal and necessary condition for the claim for additional payment. However, it cannot be excluded *a priori* that the principle of *cessante ratione legis, cessat et ipsa lex* may also be relevant where it is necessary to recover years afterwards and possibly with irreversible damage to those concerned customs duties which should have been levied. Arguments to this effect may be deduced from the above-mentioned memorandum of the Commission and from the provisions of certain proposals for regulations already submitted in this connexion by the Commission. The general belief of traders and of the customs authorities might also be taken into consideration since in this case only the charges considered as payable according to the misinterpretation were taken into consideration by the traders in question for the purposes of passing on the corresponding costs to third parties and of fixing their prices. According to the Italian Government, the principle of the protection of legitimate expectation cannot however justify this solution because, first, the Member States are not under a duty of correct interpretation which is wider than or different from that imposed on any other person to whom the law applies, secondly, it is impossible to envisage any legal duty imposed on the trader concerned to abide by an interpretation, on the assumption that it is incorrect, and, thirdly, the principle of the protection of legitimate expectation cannot be called in aid in relation to the application of provisions which have the same mandatory force as regards both Member States and individuals.

In conclusion, the Italian Government proposes that the Court should rule that in the Community legal order the duty of repayment and the duty to recover sums which have not been levied does

not necessarily correspond to the right not to pay them and to the duty to levy them and that the correct retroactive application of the Community rules cannot be required where a general misinterpretation common to both parties to the legal customs relationship has given rise *medio tempore* to payments not owed or to the failure to levy sums payable, except as from the dates on which the Community rules were interpreted authoritatively and the aspects of the conflict between those rules and the provisions of national law were settled authoritatively.

*B — Observations of the Danish Government*

The Danish Government draws attention to the link between this case and Case 68/79 (the *Just* case) which is also pending before the Court. In the latter case, the question is whether Community law contains rules which may usefully be applied to the repayment of charges levied in breach of Article 95 of the EEC Treaty and whether it is important for the trader to be able to show that he has suffered damage. In this respect the Danish Government observes that Danish law does not provide for special procedural time-limits for repayment whereas, on the other hand, it contains a rule according to which repayment is only permitted with regard to persons who have suffered damage.

The Danish Government considers that Community law intends that it should in principle be possible to claim the repayment of charges levied in breach of Community law. The detailed rules for that possibility, in particular as regards repayment to persons who have not suffered damage because it has been passed down the line, come however within the scope of national law.

*C — Observations of the defendant in the main action (Denkavit Italiana S.r.l.)*

(a) Preliminary observations

The defendant in the main action (Denkavit) recalls first of all that the argument put forward by the Italian authorities has already been put forward in Case 33/76 (the *REWE* case), which gave rise to the judgment of the Court of Justice of 16 December 1976, [1976] ECR 1989. This argument was criticized in the opinion delivered by the Advocate General and rejected by the Court by implication. The facts in Case 33/76 are, moreover, different from those in the present case because in the *REWE* case the action for repayment of sums paid but not owed was out of time pursuant to the rules of national law (German law in that instance), which is not so in this case, to which the rules of Italian law apply in this connexion.

The defendant in the main action also observes, on the one hand, that it is not contested in the present case that the charge in question constitutes a charge having an effect equivalent to customs duties and, on the other, that Article 13 (2) of the EEC Treaty and the provisions of the agricultural regulations on the abolition of charges having an equivalent effect, as regards intra-Community imports, are provisions which are directly applicable by the end of the transitional period at the latest.

(b) Observations on the substance of the case

According to the defendant in the main action, the arguments put forward by the Italian Government and the reply which

it wishes to be given to the questions submitted to the Court call for two main criticisms. First, this is an attempt to prejudice the direct effect of Article 13 of the Treaty and, secondly, it is a misinterpretation of the scope of Article 92 on aid.

*1. The possible limits of the direct effect of Article 13 of the Treaty*

The point of view put forward by the Italian Government would have the result of limiting the direct effect of Article 13 (2) on the abolition of charges having an equivalent effect during the transitional period and of the analogous provisions of the agricultural regulations. This argument should be firmly rejected for the following reasons:

1. The interpretative judgments of the Court of Justice on the direct effect of the Community provisions abolishing charges having equivalent effect, in particular the judgment of the Court of 14 December 1972 (Case 29/72, *S.p.A. Marimex* v *Italian Finance Administration* [1972] ECR 1309), have always stated that those provisions had direct effect as from the date fixed for the abolition of charges having an equivalent effect even where the pecuniary charge in question has not yet previously been declared illegal by a judgment of the Court on the basis of Article 169 of the Treaty or by a Commission directive adopted on the basis of Article 13 (2) of the Treaty.

2. The Court expressly stated in the judgment of 5 February 1963 (Case 26/62, *Van Gend & Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1) that the fact that Articles 169 and 170 of the EEC Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not deprive individuals of the right to plead the same obligations, should the occasion arise, before a national court.

3. In the judgment in the *REWE* case (quoted above), the Court stated with regard to Article 13 (2) of the Treaty that, applying the principle of co-operation laid down in Article 5 of the Treaty, it was the national courts which were entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Thus the Court intended to permit the application of Article 13 (2) of the Treaty by the national court even before any action which might have been taken by the Community institutions.

Although it follows from the case-law of the Court quoted above that citizens derive from the rules of the Treaty which have direct effect — in the present case Article 13 (2) of the Treaty — rights which the national courts must protect, it is necessary to clarify the content of those rights. This raises the question whether the fact, which is not in dispute, that individuals have the right to oppose any attempt to impose upon them the payment of charges having an effect equivalent to customs duties necessarily implies a personal right for individuals to the repayment of the sums which have been improperly levied.

In this respect the Court laid down in Case 33/76 (the *REWE* case quoted above) two limits to the principle of the power of the national rules to stipulate, in the absence of Community provisions in this connexion, the detailed rules for

the repayment of charges having an equivalent effect which have been improperly levied by the State. On the one hand, the detailed rules laid down on repayment by the national rules cannot be less favourable than those relating to the repayment of sums improperly levied by the State in breach of national legislation. The Italian legal order, providing that the general rule of civil law relating to the recovery of sums improperly levied is applicable, even for the purpose of obtaining from the State the repayment of sums levied by way of tax where there is no power to impose a tax — cannot therefore refuse the repayment of charges having an equivalent effect which have been improperly levied according to Community law.

On the other hand, the detailed rules and time-limits cannot make it impossible in practice to exercise rights which the national courts are under a duty to protect. It follows by an argument *de minori ad majus* based on the judgment in Case 33/76 (the *REWE* case) that any solution which entirely excludes the exercise of those rights is incompatible with Article 13 of the EEC Treaty. The argument put forward by the Commission in Case 33/76, according to which Article 13 (2) is a provision which is insufficient to establish the right of an individual to the repayment of sums which have been improperly levied by the Member States — seems to be incorrect or obsolete.

2. *Article 92 of the Treaty (system of aid)*

The legality of the conduct of a Member State which repays charges having an equivalent effect which have been improperly levied or the existence of a personal right for individuals to obtain that repayment cannot be ruled out by Article 92 of the EEC Treaty. In fact, relying upon the judgment of the Court of 22 March 1977 *Iannelli & Volpi S.p.A.* v *Ditta Paolo Meroni* [1977] ECR 557), the defendant in the main action considers that it is impossible to attribute to Article 92 of the Treaty a meaning contrary to that given to Article 13 (2). Moreover, even if one wished to accept for the moment that the right of an individual to the repayment of charges having an equivalent effect paid but not owed is not based on Article 13 (2) of the EEC Treaty, the illegal levying of a charge having equivalent effect is in any case an event giving rise to the duty of repayment according to the general principles of *condictio indebiti* and of unjust enrichment which are known not only in the Community legal order but constitute general principles common to all the Member States and which, as such, also form an integral part of the Community legal order.

It is clear that the repayment of charges which have been improperly levied cannot constitute an aid within the meaning of Article 92 because that repayment does not involve a reduction in the resources of the State but simply the performance of a Community obligation. Nor does this repayment constitute a benefit for Community importes but merely makes good a loss which those importers suffered at the date of the payment of the charge having an effect equivalent to customs duties which was not owed.

Considering next the arguments based on the fact that traders have passed on to their purchasers the financial burden of the charges having an equivalent effect paid but not owed, the defendant in the main action observes that it is in fact possible for the importer to pass on the financial burden. This fact cannot however prevent that financial burden

from being classified as constituting a charge having equivalent effect. An importer might moreover in his turn have proceedings brought against him by his purchasers within the context of an action for repayment of sums paid but not owed or for unjust enrichment. In fact, in the case of the public health charges applied to the products in question, those charges are only imposed on imported products and an importer cannot therefore pass on that charge except where the price of the product is sufficiently lower than that of the national product.

In conclusion, the defendant in the main action proposes that the Court should reply in the affirmative to the first question and in the negative to the second question.

*D — Observations of the Commission*

— The direct effect of Article 13 (2) of the Treaty and its effects

Relying upon the opinion of the Advocate General in Case 33/76 (the *REWE* case) which gave rise to the judgment of 16 December 1976, [1976] ECR 1989, the Commission considers that it is impossible to compare a situation such as that in Case 43/75 (the *Defrenne* case, quoted above), which involves fundamental interests of private individuals misled by the attitude both of the various Member States and of the Community institutions and whose financial resources may be limited, with the situation forming the subject-matter of this case which, on the contrary, involves the public administration of a Member State. Moreover it is superfluous to ask whether the right to the repayment of sums paid by way of charges having an equivalent effect may be envisaged *after* the judgment of the Court of Justice but *before* the directive adopted by the Commission under Article 13 (2) of the Treaty. In fact in the present case the Court has already established on the one hand that it is a charge having an equivalent effect and on the other that Article 13 (2) of the Treaty is directly applicable as from the end of the transitional period. After 1 January 1970 it was therefore no longer necessary to have recourse to a directive for the purpose of fixing the timetable for the abolition of charges having an equivalent effect.

— The problem relating to the possibility of the trader's having passed on to his purchasers the financial burden formed by the charge having equivalent effect

Relying upon the judgment in Case 33/76 (the *REWE* case, quoted above), the Commission considers that in the absence of specific Community provisions and apart from the discrimination which may arise therefrom by virtue of the difference in the national legal systems, the detailed rules for the bringing of legal proceedings and in any case the time-limits for bringing such proceedings are governed by the provisions of national law. An examination of the present situation in the various Member States shows that the repayment of sums paid but not owed is automatic in all those States with the exeption of Denmark, where it is possible for reasons of natural justice and legal certainty to set up against the party claiming repayment of the sum in question the duty to show that he has not passed on that sum.

Examining the argument based on the distortion and discrimination which result from the differences between the national legal systems, the Commission observes that the Court has already taken stock of that problem in the judgment in Case 33/76 (the *REWE* case). It held that in the absence of Community rules on that subject, it is for the domestic legal system of each Member State to determine the pro-

cedural conditions governing actions at law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The Commission therefore concludes that the repayment of sums paid but not owed is automatic except in rare cases in which, for obvious reasons of natural justice and legal certainty, limits are imposed on repayment. In cases in which, like this one, those reasons do not occur, the repayment of the sums paid by way of charges having an equivalent effect should not be subject to any conditions.

— Article 92 of the Treaty

According to the Italian Government, the repayment of sums improperly levied by the State would give rise to an adverse effect on the market and on competition in that reimbursement of a trader who has already passed on the charge to consumers constitutes an aid which is not authorized by the Treaty.

Analysing the concept of aid, the Commission considers, on the contrary, that that reimbursement does not come within the scope of Article 92 of the Treaty. The Court specified in the judgment of 23 February 1961 (Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the European Coal and Steel Community* [1961] ECR 1) that the concept of aid is wider than that of a subsidy in that it embraces not only positive benefits in cash or in kind but also all interventions which, in various forms, mitigate the charges in the budget of the undertaking which it should in principle bear. According to the Commission, this case-law implies that the State must voluntarily pay the aid in question by means of public funds. In this case, however, the State is compelled by the decision of a court to reimburse a tax which has been improperly levied.

In conclusion, the Commission considers that it is necessary to reply as follows to the questions referred to the Court by the Tribunale Civile e Penale, Milan:

"The Community rules, in particular Article 13 (2) of the EEC Treaty, establish the right of individuals to obtain the repayment of sums improperly levied by way of charges having an equivalent effect (in this case public health inspection charges) after the abolition of those charges pursuant to Community law, also with regard to the period prior to the interpretative judgment of the Court of Justice in this connexion. Even if the amount of the charges in question has already been passed on to the purchasers of the imported products at the time, the fact of repaying the sums to persons who paid them but did not owe them is not incompatible with Community law and in particular does not constitute an aid within the meaning of Article 92 of the Treaty."

## III — Oral procedure

At the hearing on 25 October 1979 the Italian Government, represented by A. Marzano, Avvocato dello Stato, the defendant in the main action, represented by G. M. Ubertazzi, assisted by F. Capelli, both of the Milan Bar, and the Commission of the European Communities, represented by S. Fabro, a member of its Legal Department, presented oral argument.

The Advocate General delivered his opinion on 9 January 1980.

## Decision

1 By order of 1 March 1979, which was received at the Court Registry on 13 April 1979, the Tribunale Civile e Penale, Milan, referred to the Court under Article 177 of the EEC Treaty two questions on the interpretation of Articles 13 (2) and 92 of the EEC Treaty in relation to the right for taxpayers to obtain a refund of national charges incompatible with Community law which they have previously paid.

2 These questions are worded as follows:

"(A) Is the repayment of sums levied by way of customs charges (in the case in point, public health inspection charges) prior to their classification by the Community institutions as charges having an effect equivalent to customs duties, the burden of which has already been passed on in turn to the purchasers of the imported products, compatible with the Community rules, and in particular with the basic intention of Articles 13 (2) and 92 of the EEC Treaty?

(B) Are the Community rules and in particular Articles 13 (2) and 92 of the EEC Treaty opposed to the creation, by the prohibition and abolition of charges having an effect equivalent to customs duties, of a right in favour of individuals to request repayment of sums paid but not owed by them to the State, which for its part the State has illegally levied by way of a charge having equivalent effect, following the abolition of such charges by operation of Community law but prior to their classification by the Community institutions as charges having an effect equivalent to customs duties?"

3 They were raised during proceedings brought in 1978 between Denkavit Italiana S.r.l. and the Italian Finance Administration with regard to a sum of Lit 2 783 140 paid by that undertaking between 1971 and 1974 by way of public health inspection charges in accordance with Article 32 of the Testo Unico No 1265 of 27 July 1934 on public health legislation (Supplemento Ordinanza alla Gazzetta Ufficiale of 9 August 1934, No 186).

4 In essence they concern the existence and scope of the duty of Member States which have levied national charges or dues which have subsequently been held to be incompatible with Community law to refund them at the request of the taxpayer.

5 In its written observations, the Italian Government emphasizes the serious financial difficulties for the Member States which would arise from the duty to repay traders national charges and dues which have been levied and paid in the common belief that they were in accordance with Community law when, after a period of sometimes several years, an interpretation of Community law given by the Court of Justice under Article 177 of the Treaty shows the authorities and the national courts an incompatible feature which was not evident and prompts them, by virtue of the fact that Community law takes precedence, to refuse to apply the national provisions in question.

6 This is particularly so as regards a large number of charges, in particular public health inspection charges, which are levied at frontiers and whose effect equivalent to that of a customs duty prohibited by the Treaty has only gradually become clear within the context of the interpretation of that concept given by the Court of Justice. The Commission itself has realized that periods considerably longer than those originally provided for, in other words the end of the transitional period, were required for the purpose of bringing to light more than 500 types of due and ascertaining whether or not they were in the nature of charges having an effect equivalent to customs duties.

7 The Italian Government also insists on the considerable differences which exist between the Member States as regards the conditions in which actions may be brought contesting taxation which has been unlawfully claimed or levied or for the recovery of duties paid but not owed. It claims that these differences are such that in their turn they lead to "a situation of imbalance" which is to the disadvantage of traders and completely analagous to that which had been created by the improper levying of those sums.

8 The Italian Government observes, finally, that the charges which were improperly levied have, by their very nature, been passed on in the prices by the traders who paid them so that they have ultimately been borne by the final consumer. To repay them to traders would constitute an unjust enrichment and would in fact result in an aid.

9 These considerations lead the Italian Government to the conclusion that it is necessary to recognize the existence of a general principle of Community law according to which the refunding of sums levied by way of duties which have been held to have an effect equivalent to customs duties may only be permitted with regard to amounts which have been levied after the judgment of the Court of Justice which has classified the type of charge in question as a charge having equivalent effect. The need for a principle of that nature has moreover, it claims, been recognized by the Court of Justice in its judgment of 8 April 1976 in Case 43/75 *(Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455); the result thereof is to consider that the right of individuals not to pay the charge having equivalent effect and the duty of the Member State which has failed to fulfil its obligations under the Treaty to refund that charge after it has been levied do not necessarily correspond.

10 According to Denkavit Italiana S.r.l., on the other hand, the direct effect of the prohibition on the levying of charges having an effect equivalent to customs duties laid down in Article 13 (2) of the Treaty means that this effect, together with the rights flowing therefrom for individuals, operates from the date laid down in that provision for the abolition of those charges whatever, moreover, the date on which it is or has been found by a court of law that the charge in question is incompatible with Community law, whether by the Court of Justice within the context of a procedure for a declaration that a Member State has failed to fulfil its obligations under the Treaty within the meaning of Article 169 of the Treaty or by the national courts as the result of an interpretation under Article 177 of the scope of the Community provision in question. This direct effect actually has more radical consequences in that any provision of national law which precludes or limits the enforcement of rights given to subjects by virtue of directly applicable provisions of Community law must itself be considered to be incompatible with the Community provision in question.

11 The questions which have been raised and which are closely inter-related concern the scope of two provisions of the Treaty, Article 13 (2) and Article 92. They ask what the effect of those provisions is on the right of subjects to claim the repayment of national charges and on the related duty of Member States to repay them if two conditions laid down by the national court have been fulfilled together or separately, in other words: (a) where the fact that those national charges are in the nature of charges having an effect equivalent to customs duties on imports and are consequently incompatible with the prohibition laid down in Article 13 (2) has been established, after the end of the transitional period, only as a result of an interpretation given by the Court of Justice under Article 177 of the Treaty and (b) where the trader who paid those charges has transferred the burden thereof to the purchasers of the imported products.

12 Before examining the reply which must be given to the questions asked it is necessary to point out that the Court of Justice ruling under Article 177 of the EEC Treaty does not hold that a given national charge is incompatible with Community law or that there is a corresponding prohibition on levying that charge in a particular case. Within the context of the judicial co-operation established by that provision it is for the national courts, applying the fundamental rule that Community law takes precedence, to uphold the rights of subjects based, under the Treaty itself, on the direct effect of the prohibition on charges having an effect equivalent to customs duties when disputes are brought before them by those concerned. It is necessary to reply to the questions asked taking that fact into account.

## Article 13 (2) of the Treaty

13 Article 13 (2) of the Treaty provides as follows: "Charges having an effect equivalent to customs duties on imports, in force between Member States, shall be progressively abolished by them during the transitional period. The Commission shall determine by means of directives the timetable for such abolition. It shall be guided by the rules contained in Article 14 (2) and (3) and by the directives issued by the Council pursuant to Article 14 (2)".

14 According to the consistent case-law of the Court expressed in particular in its judgments of 19 June 1973 (Case 77/72, *Carmine Capolongo* v *Azienda Agricola Maya* [1973] ECR 611), 18 June 1975 (Case 94/74, *Industria Gomma Articoli Vari, IGAV,* v *Ente Nazionale per la Cellulosa e per la Carta, ENCC,* [1975] ECR 699) and 5 February 1976 (Case 87/75, *Conceria,*

*Daniele Bresciani* v *Amministrazione Italiana delle Finanze* [1976] ECR 129), Article 13 (2) comprises a clear and precise prohibition, as from the end of the transitional period at the latest, in other words as from 1 January 1970, and for all charges having an effect equivalent to customs duties, on the collecting of the said charges, which prohibition lends itself, by its very nature, to producing direct effects in the legal relations between Member States and their subjects. As the Court stated in its judgment of 9 March 1978 in Case 106/77, *Amministrazione delle Finanze dello Stato* v *Simmenthal S.p.A.* [1978] ECR 629 to 643, rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.

15 Article 177 of the Treaty provides that the Court of Justice shall have jurisdiction to give preliminary rulings, in particular, concerning the interpretation of the Treaty and of acts of the institutions. The purpose of that jurisdiction is to ensure the uniform interpretation and application of Community law, and in particular the provisions which have direct effect, through the national courts.

16 The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied.

17 As the Court recognized in its judgment of 8 April 1976 in Case 43/75, *Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455, it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships.

18 Such a restriction may, however, be allowed only in the actual judgment ruling upon the interpretation sought. The fundamental need for a general and uniform application of Community law implies that it is for the Court of Justice alone to decide upon the temporal restrictions to be placed on the interpretation which it lays down.

19 The conditions necessary for such restrictions are not fulfilled when the action brought before the national court follows from the prohibition on levying national charges having an effect equivalent to customs duties on imports since the Court of Justice recognized the general scope of that prohibition and its absolute nature as long ago as 1962, in other words before the end of the transitional period, in its judgment of 14 December 1962 in Joined Cases 2 and 3/62, *Commission of the European Economic Community* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1962] ECR 425. In that judgment, the Court stated as follows: "The concept of 'a charge having equivalent effect' to a customs duty, far from being an exception to the general rule prohibiting customs duties, is on the contrary necessarily complementary to it and enables that prohibition to be made effective".

20 In the same way, in its judgment of 16 June 1966 in Joined Cases 52 and 55/65, *Federal Republic of Germany* v *Commission of the European Communities* [1966] ECR 159, the Court rejected the argument that administrative dues may escape the concept of charge having an equivalent effect because they represent the consideration for a specific service provided by the administration. In its judgment of 10 December 1968 in Case 7/68, *Commission of the European Communities* v *Italian Republic* [1968] ECR 423, the Court confirmed that interpretation with regard to charges on Italian works of art and, in its judgment of 1 July 1969 in Case 24/68, *Commission of the European Communities* v *Italian Republic* [1969] ECR 193, with regard to statistical levies. Finally, in its judgment of the same date in Joined Cases 2 and 3/69, *Sociaal Fonds voor de Diamantarbeiders* v *S.A. Ch. Brachfeld and Sons and Chougol Diamond Co.* [1969] ECR 211, the Court stated that the concept of a charge having equivalent effect referred to in Articles 9 and 12 of the EEC Treaty includes any pecuniary charge, other than a customs duty in the strict sense, imposed on goods circulating within the Community by reason of the fact that they cross a frontier, in so far as such charges are permitted by a specific provision of the Treaty without it being necessary moreover to take into account the fact that the charge in question had social security objectives.

21 It follows from this settled case-law that both the Member States and the traders concerned were, since before the end of the transitional period, in other words before the date on which the prohibition was generally and unconditionally effective under Article 13 (2) of the EEC Treaty, sufficiently informed of the scope of that prohibition for it to have been unnecessary to restrict its scope, in any case as regards the period after 1 January 1970.

22 It is necessary however to observe that where the consequence of a rule of Community law, such as Article 13 (2) of the Treaty, is to prohibit, with the effects described above, the levying of national charges or dues, the safeguard of the rights conferred upon subjects by the direct effect of such a prohibition does not necessarily require a uniform rule common to the Member States relating to the formal and substantive conditions to which the contesting or recovery of those charges is subject.

23 A comparison of the national systems shows that the problem of disputing charges which have been unlawfully claimed or the refunding of charges paid but not owed is settled in the various Member States, and even within a single Member State, according to the various kinds of taxes or charges in question. In certain cases, objections or claims of this type are subject to specific procedural conditions and time-limits under the law with regard both to complaints submitted to the tax authorities and to legal proceedings. It was with a view to the operation of such remedies that, in its judgments in the *REWE* and *Comet* cases of 16 December 1976 (Cases 33 and 45/76, [1976] ECR 1989 and 2043 respectively), the Court held that it was compatible with Community law to lay down reasonable limitation periods in the interests of legal certainty which protects both the taxpayer and the administration concerned.

24 In other cases, claims for repayment of charges which were paid but not owed must be brought before the ordinary courts, mainly in the form of claims for the refunding of sums paid but not owed. Such actions are available for varying lengths of time, in some cases for the limitation period laid down under the general law, with the result that Member States involved may be faced with a heavy accumulation of claims when certain national tax provisions have been found to be incompatible with the requirements of Community law.

25 It follows from the judgments of 16 December 1976 in the *REWE* and *Comet* cases, *supra*, that, applying the principle of co-operation laid down in Article 5 of the EEC Treaty, it is the courts of the Member States which are entrusted with ensuring the legal protection which subjects derive from the direct effect to the provisions of Community law. In the absence of Community rules concerning the contesting or the recovery of national charges which have been unlawfully demanded or wrongfully levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and that under no circumstances may they be so adapted as to make it impossible in practice to exercise the rights which the national courts are bound to protect.

26 It should be specified in this connexion that the protection of rights guaranteed in the matter by the Community legal order does not require the grant of an order for the recovery of charges improperly levied granted in conditions such as would involve an unjustified enrichment of those entitled. There is therefore nothing, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers.

27 The Italian Government has drawn attention to the limits which may lawfully be imposed on the exercise of the right to contest unlawful taxation or to claim repayment thereof and to the distinction which is made in this respect by national legislation between the conditions relating to the refusal to pay a tax or to contesting the levying thereof and those relating to the recovery of taxes which have already been paid previously. These considerations must however, as national taxation is involved, and in the present state of Community law, be achieved within the context of national legislation in view of the limits mentioned above.

28 It is therefore necessary to give the following replies to the questions on the interpretation of Article 13 (2):

(a) The direct effect of Article 13 (2) of the EEC Treaty implies that, from the end of the transitional period, applications directed against national charges having an effect equivalent to customs duties or claims for repayment of such charges may, according to the circumstances, be brought before the authorities and courts of Member States, even in respect of the period before that classification of those charges follows from an interpretation given by the Court of Justice under Article 177 of the Treaty;

(b) It is however for the legal order of each Member State to lay down the conditions in which taxpayers may contest that taxation or claim repayment thereof, provided that those conditions are no less favourable than the conditions relating to similar applications of a domestic nature and that they do not make it impossible in practice to exercise the rights conferred by the Community legal order;

(c) There is nothing from the point of view of Community law to prevent national courts from taking account, in accordance with their national law, of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to purchasers.

## Article 92 of the Treaty

29 By referring in its questions to Article 92 of the Treaty, the national court asks in substance whether the passing on by traders of national charges improperly levied in the conditions described by that court should not be considered to be an aid within the meaning of Article 92 of the Treaty and therefore incompatible with Community law.

30 Under Article 92 (1), "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in as far as it affects trade between Member States, be incompatible with the Common Market".

31 This provision thus refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give, by unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought. It does not apply to a duty to pay or repay sums which are caused by the fact that those sums were not payable by the person who paid them. It follows from this that a national tax system which enables the taxpayer to contest or claim repayment of tax does not constitute an aid within the meaning of Article 92 of the Treaty. Whether or not it is possible to recover tax because of that fact depends in fact upon the characteristics of the national legislation on the recovery of sums paid but not owed, in particular in the tax field.

32 It is therefore necessary to reply to the questions on the interpretation of Article 92 of the Treaty that the duty of the authorities of a Member State to repay to taxpayers who apply for such repayment, in accordance with national law, charges or dues which were not payable because they were incompatible with Community law does not constitute an aid within the meaning of Article 92 of the EEC Treaty.

## Costs

33 The costs incurred by the Danish and Italian Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since the proceedings are, so far as the parties in the main action are concerned, in the nature of a step in the action before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale Civile e Penale, Milan, by order of 1 March 1979, which was entered on the Court Register on 13 April 1979, hereby rules:

1. (a) **The direct effect of Article 13 (2) of the EEC Treaty implies that, from the end of the transitional period, applications directed against national charges having an effect equivalent to customs duties or claims for repayment of such charges may, according to the circumstances, be brought before the authorities and courts of the Member States, even in respect of the period before that classification of those charges follows from an interpretation given by the Court of Justice under Article 177 of the Treaty.**

(b) **It is for the legal order of each Member State to lay down the conditions in which taxpayers may contest that taxation or claim repayment thereof, provided that those conditions are no less favourable than the conditions relating to similar applications of a domestic nature and that they do not make it impossible in practice to exercise the rights conferred by the Community legal order.**

(c) **There is nothing from the point of view of Community law to prevent national courts from taking account, in accordance with their national law, of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to purchasers.**

**2. The duty of the authorities of a Member State to repay to taxpayers who apply for such repayment, in accordance with national law, charges or dues which were not payable because they were incompatible with Community law does not constitute an aid within the meaning of Article 92 of the EEC Treaty.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

## OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 9 JANUARY 1980 [1]

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

By order of 3 October 1978 the President of the Tribunale Civile e Penale [Civil and Criminal Court], Milan, ordered the plaintiff in the main action to reimburse to the defendant the sum of Lit 2 783 140 which the latter had paid during the years 1971 to 1974 by way of public health charges on the importation of milk and milk products and thus as prohibited charges having an effect equivalent to customs duties. The plaintiff raised an objection to that provisional order on the ground that infringement of the prohibition on the levying of charges having an effect equivalent to customs duties did not automatically give rise to an obligation to repay the sums levied. Thereupon the First Civil Chamber of the Tribunale Civile e Penale, Milan, requested the Court of Justice by order of 1 March 1979 (2 April 1979) to give a preliminary ruling on the following questions:

"A. Is the repayment of sums levied by way of customs charges (in the case in point, public health inspection charges) prior to their classification by the Community institutions as charges having an effect equivalent to customs duties, the burden of which has already been passed on in turn to the purchasers of the imported products, compatible with

1 — Translated from the German.