OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 29 September 1987

My Lords,

Article 19 of Italian Decree-Law No 688 of 30 September 1982 (GURI No 270 of 30 September 1982, p. 7072), which was converted into Law No 873 of 27 November 1982 (GURI No 328 of 29 November 1982, p. 8599) provides:

'A person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is entitled to the repayment of the sums paid if he produces documentary evidence establishing that the charge in question has not been passed on in any way whatsoever to other persons, except in cases of substantive error.

The documentary evidence referred to in the preceding paragraph must also be produced if the goods in respect of which payment was made have been transferred after working, processing, assembly, fitting or adaptation.

The goods are presumed to have been transferred in the cases provided for in Article 53 (1) and (2) of Decree No 633 of the President of the Republic of 26 October 1972. The repayment of sums paid as value-added tax continues to be governed solely by the provisions concerning that tax.'

Those provisions are substantially similar to those of Article 10 of the Italian Decree-Law No 430 of 10 July 1982 (GURI No 190 of 13 July 1982, p. 4931), which was at issue in Case 199/82 (*Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595) and which expired because it was not converted into a law. The Court's ruling in Case 199/82 clearly indicated that provisions such as those of the said Article 10 were contrary to Community law.

The Commission wrote to the Italian authorities expressing doubts as to the compatibility with Community law of Article 19 of Decree-Law No 688. The Italian authorities did not answer on the substance but said they were waiting for a judgment of the Italian Constitutional Court. Subsequently, the Commission issued a reasoned opinion under Article 169 but received no substantive answer from the Italian authorities.

On 2 May 1986 the Commission applied to the Court for a declaration that the Italian Republic had failed to fulfil its obligations under Articles 5, 9 *et seq.* and 95 of the EEC Treaty by imposing on the taxpayer the onus of proving that national charges and taxes which were paid, but were not lawfully due because they were contrary to Articles 9, *et seq.* and 95 of the EEC Treaty, had not been passed on to other persons, by

accepting only documentary proof in that regard and by giving retroactive effect to the national provisions concerned. It also asks for a declaration that the Italian Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty and Regulation (EEC) No 1430/79 (Official Journal 1979, L 175, p. 1) by laying down rules governing the repayment of Common Customs Tariff duties and import and export charges under the common agricultural policy.

The Commission contends that Article 19 covers both charges imposed by national legislation and charges imposed by Community legislation (the Common Customs Tariff and agricultural legislation). In relation to charges imposed by national legislation, Article 19 is contrary to Community law, in particular Articles 5, 9 *et seq.* and 95 of the Treaty, because it puts on the taxpayer the burden of proving that the taxes unduly paid were not passed on to other persons and because it accepts only documentary evidence thereof as being sufficient: *San Giorgio*, paragraph 14. Furthermore, Article 19 is retroactive (a point not considered in *San Giorgio*), which aggravates the breach of Community law and makes reimbursement even more difficult because traders could not have foreseen at the time the proof which would be required of them under that provision. As regards charges imposed by Community legislation, Article 19 is an unlawful interference in a sector governed by Community law, in particular Council Regulation No 1430/79.

As regards national taxes charged in breach of Community law, the Italian Government replies that to exclude reimbursement where the charge has been passed on by the taxpayer to other persons is not incompatible with Community law: Case 68/79 (*Just* v *Ministry of Fiscal Affairs* [1980] ECR 501). It accepts following *San Giorgio* that Community law prohibits irrebuttable presumptions as to the passing on of the charge as well as any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of such charges and that the proof of passing on must be supplied by the administration. However, it goes on to suggest that the taxpayer must refute evidence that he has passed on the charge even where that evidence is derived from irrebuttable presumptions that the charge has been passed on. It also contends that it must be possible to verify that the charge has not been passed on in the plaintiff's business records, because oral evidence is unpersuasive and difficult to verify.

Its principal line of defence, however, is that by Judgment No 170 of 8 June 1984 the Italian Constitutional Court held that in case of conflict between a directly effective Community provision and an Italian provision, the Italian provision was to be treated as inapplicable, and by Judgment No 113 of 28 April 1985 the same court held that the case-law of the Court of Justice rendered inapplicable any conflicting national provision and that the Court's judgment in *San Giorgio* rendered inapplicable Article 19 which is at issue in the present case. This has been followed by a number of judgments of the Italian Court of Cassation which, applying the principles laid down in *San Giorgio*, held inapplicable the provisions of Article 19. It follows that in practice Article 19 is not being applied in Italy to claims for the reimbursement of national charges raised in breach of Community law.

As regards charges imposed by Community law, the Italian Government asserts that Article 19 has never been applied to a claim for reimbursement. The Ministry of Finance sent out Circular No 5346/IX on 17 November 1982 (GURI No 151 of 2 June 1984, p. 4594) stating that Article 19 applied only to national taxes (excluding VAT) and not to own resources. In any event, the problem was resolved by Judgment No 170/84 of the Constitutional Court, which decided that national provisions contrary to Community law are inapplicable, with the result that the area remains governed solely by Community law.

In *Just* the Court held that specific provisions relating to unjust enrichment and damages for loss of profit in Danish law were compatible with Community law, and in *San Giorgio* the Court accepted that national legal systems are not prevented by Community law from disallowing the repayment of charges which have been unduly levied, where to do so would entail unjust enrichment of the recipient, in particular 'where it is established that the person required to pay such charges has actually passed them on to other persons' (paragraph 13).

On the other hand the rules adopted must not be such as to make it virtually impossible or excessively difficult for repayment to be claimed, in particular by adopting rules of evidence or presumptions which put the burden of proof on the claimant to establish that the charges have not been passed on (paragraph 14).

On the basis of the Court's judgment in *San Giorgio*, it is not possible, in my view, to say that a rule as to unjust enrichment could not be applied at all in the present context, though as Mr Advocate General Mancini was at pains to point out, care has to be taken so as not to allow such rules to be adopted in order to defeat Community law entitlements. The mere fact that, as appears to be the case in Italian law, a long period of limitation enables many claims dating back up to 10 years to be pursued is not in itself a justification for such a rule. The remedy, if remedy be desired, is to shorten the limitation period, though it has to be remembered that those who suffer most from the imposition of an unlawful charge are those whose price competitiveness is thereby reduced.

It is plain that the rules contained in Article 19 which restrict the right to repayment are contrary to Community law as laid down in *San Giorgio* (particularly paragraph 14) both as to the negative burden of proof and as to the requirement of documentary evidence. The retroactivity of the provision, which was not considered in *San Giorgio*, plainly aggravates the breach of Community law, in particular by applying the requirements to transactions which took place at a time when traders could not have known of the evidence which might later be demanded of them.

I think right the Italian Government's concession that the burden of proof lies initially on the administration to show that the charges were passed on and that as a consequence there was unjust enrichment. It cannot, however, be right for the mere assertion by the administration to be sufficient to transfer the burden of proof to the claimant or to raise presumptions, rebuttable or irrebuttable, that there has been a passing-on. If the administration

produces evidence which shows that there has been a passing on then the evidential burden may pass to the claimant to rebut it or to counteract it by showing that even if the charges have been passed on there has been a loss of profit, which means that there has been in whole or in part no unjust enrichment. An absolute rule that such answer must be supported by documentary evidence (as I understand to be contended) would be as restrictive as the rule condemned in paragraph 14 of *San Giorgio*. It is for the national court to decide on the evidence as a whole, be it oral or documentary, whether at the end of the day there has been unjust enrichment.

The question remains whether the Italian Government may rely on the case-law of the Italian Constitutional Court to justify maintaining in force a provision which is plainly contrary to Community law. Under Article 5 of the Treaty, Member States must take all appropriate measures to fulfil the obligations arising out of the Treaty and abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. 'State' in this context means all the organs of the State: executive, legislative and judicial. Without in any way belittling the significance of the Constitutional Court's landmark judgments Nos 170 and 113 (*supra*), it seems to me that the executive and the legislature are under a duty also to bring the national legislation into line with Community law.

The possibility of the administrative authorities continuing to apply Article 19, and the confusion of citizens as to their rights, coupled with the need to litigate, which have been referred to by the Commission, cannot entirely be swept aside. There is no substitute for straightforward application of a clear provision in conformity with Community law. In my view, notwithstanding the national case-law mentioned, the Member State remains under an obligation to bring its legislation into line with Community law (Case 29/84 *Commission* v *Germany*, judgment of 23 May 1985, ECR 1661, paragraph 23), and it is not exempted from that obligation by the direct effect of the relevant Community law (Case 159/78 *Commission* v *Italy* [1979] ECR 3247, paragraph 22).

Accordingly I consider that the Commission is entitled to the declaration claimed as far as national taxes levied in breach of Community law are concerned.

As regards charges imposed by Community law, Council Regulation No 1430/79 is intended to ensure the repayment of Community charges levied but not due and for that purpose lays down a specific procedure (*San Giorgio*, paragraph 21). That regulation applies to the various import and export duties resulting from the implementation of the common agricultural policy and the implementation of the provisions of the Treaty relating to the customs union (the last recital in the preamble to the regulation). 'Import duties' and 'export duties' are defined accordingly in Article 1(2) of the regulation as meaning, on the one hand, customs duties and charges having equivalent effect and, on the other hand, agricultural levies and other import or export charges laid down within the framework of the common agricultural policy or in that of specific arrangements applicable, pursuant to Article 235 of the Treaty, to certain goods resulting from the processing of agricultural products.

Article 19 of the Italian Decree-Law is drafted in general terms and refers in particular to 'import duties' at large. It is thus clear that it purports to cover a field for which Regulation No 1430/79 has already made provision. Under Article 189 of the Treaty a regulation is binding in its entirety and directly applicable, and under Article 5 Member States are required to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. Italy's adoption of Article 19 is a breach of that obligation to the extent to which Article 19 applies to any of the matters covered by Regulation No 1430/79.

The issue of Ministerial Circular No 5346/IX is not sufficient to remedy that breach. It is well established in the Court's case-law that the incompatibility of national legislation with Community law can be definitively removed only by binding internal provisions having the same legal value as those which have to be amended and that administrative practices, which by nature can be changed at the whim of the administration, cannot be regarded as a proper fulfilment of a Member State's Treaty obligations (e. g. Case 168/85 *Commission* v *Italy*, judgment of 15 October 1986, ECR 2945, paragraph 13). That conclusion is not altered by the fact that the circular in question was published in the Official Journal of the Italian Republic. The maintenance in force of Article 19 gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law, and it therefore constitutes a breach of the Italian Republic's obligations under the Treaty (ibid. paragraph 11; see also Case 159/78 *Commission* v *Italy*, paragraph 22).

Finally the fact, if it is a fact, that, following the judgments of the Italian Constitutional Court, the Italian courts will not apply Article 19 and will give preference to Regulation No 1430/79 in case of conflict between the two is not capable of justifying the maintenance in force of Article 19. The right of Community citizens to invoke before national courts directly effective provisions of Community law — whether of the Treaty, of regulations or even of directives — is no more than a minimum guarantee and of itself does not suffice to ensure freer application of Community law. Member States must also make the citizen's legal rights clear by repealing or bringing into line any inconsistent national legislation (Case 159/78 *Commission* v *Italy*, paragraph 22, and Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12, and Case 168/85 *Commission* v *Italy*, paragraph 11). In the light of this established case-law it cannot be maintained, as Italy has sought to do in this case, that the Commission's claim amounts to demanding a national measure to 'receive' directly applicable Community law or that it detracts in any way from the direct applicability of provisions of Community law.

Accordingly in my opinion the Commission is entitled to the declaration which it claims and the Italian Government should pay the costs of this application.