OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 31 January 2002 [1]

I — Preliminary remarks

1. These two cases are among a series of references for preliminary rulings from Italian courts concerning the repayment of charges for entry on the register of undertakings, levied in violation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [2] (hereinafter: Directive 69/335). The present cases relate more specifically to the determination, with retroactive effect, of a flat-rate sum, a time-limit and an interest rate.

2. Following the judgment of the Court of Justice in Cases C-71/91 and C-178/91, [3] which confirmed that a registration fee levied in Italy was incompatible with Directive 69/335, numerous undertakings requested repayment of the charges they had paid. The undertakings were informed that requests for repayment were subject to a three-year time-limit. Subsequently, several parallel judgments [4] of the Court were delivered concerning the compatibility with Directive 69/335 of both that time-limit and the interest rate. In response to those decisions, rules were adopted which have themselves given rise to this reference for a preliminary ruling.

II — Legislative framework

A — *Community law*

3. The relevant provisions are contained in the — much amended — Directive 69/335.

4. According to the last recital of Directive 69/335:

'Whereas the retention of other indirect taxes with the same characteristics as the

1 — Original language: German.

2 — OJ, English Special Edition, 1969 (II), p. 412.

3 — Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana* [1993] ECR I-1915.

4 — Cases C-231/96 *Edis* v *Ministero delle Finanze* [1998] ECR I-4951, C-260/96 *Ministero delle Finanze* v *Spac* [1998] ECR I-4997 and Joined Cases C-279/96 to C-281/96 *Ansaldo* [1998] ECR I-5025.

capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this Directive and those taxes should therefore be abolished.'

5. According to Article 3(1) of Directive 69/335, capital companies within the meaning of the directive include limited partnerships with share capital (società per azioni and società in accomandita per azioni) and private limited companies (società a responsabilità limitata).

6. Article 4 provides inter alia:

'1. The following transactions shall be subject to capital duty:

(a) the formation of a capital company;

(b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;

(c) an increase in the capital of a capital company by contribution of assets of any kind;

(d) an increase in the assets of a capital company by contributions of assets of any kind, in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;

...

2. The following transactions may be subject to capital duty:

(a) an increase in the capital of a company by capitalisation of profits or of permanent or temporary reserves;

(b) an increase in the assets of a capital company through the provision of services by a member which do not entail an increase in the company's capital, but which result in variation in

the rights in the company or which may increase the value of the company's shares;

(c) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

(d) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital.

3. Formation, within the meaning of paragraph 1(a), shall not include any alteration of the constituent instrument or regulations of a capital company, or in particular:

(a) the conversion of a capital company into a different type of capital company;

(b) the transfer from a Member State to another Member State of the effective centre of management or of the registered office of a company, firm, association or legal person which is considered in both Member States, for the purposes of charging capital duty, as a capital company;

(c) a change in the objects of a capital company;

(d) the extension of the period of existence of a capital company.'

7. Articles 5 and 6 regulate the basis of taxation for the various types of situation described.

8. Article 7, which was amended by Council Directive 85/303/EEC of 10 June 1985,[5] largely provides for exemptions from capital duty.

9. Article 10 of Directive 69/335 provides inter alia:

'Apart from capital duty, Member States shall not charge with regard to companies,

5 — OJ 1985 L 156, p. 23.

firms, associations or legal persons operating for profit, any taxes whatsoever:

...

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form.'

10. In *Ponente Carni*, [6] the Court of Justice interpreted Article 10 as follows:

'Article 10 of Directive 69/335 concerning indirect taxes on the raising of capital, which lists the taxes with the same characteristics as capital duty, collection of which is consequently prohibited, must be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies.'

11. Article 12(1) provides *inter alia*:

'1. Notwithstanding Articles 10 and 11, Member States may charge:

...

(e) duties paid by way of fees or dues;

...'.

12. In *Ponente Carni*, the Court of Justice interpreted Article 12 as follows:

'... Article 12 of the Directive must be interpreted as meaning that duties paid by

6 — Joined Cases C-71/91 and C-178/91, cited in footnote 3 above.

way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for operations required by law in the public interest such as, for example, the registration of capital companies. The amount of such duties, which may vary according to the legal form taken by the company, must be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis.'

13. In its judgment in *Fantask*, [7] the Court defined its interpretation of Article 12 as follows:

'On a proper construction of Article 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as most recently amended by Council Directive 85/303/EEC of 10 June 1985, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount must be increased solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs relating to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registration at issue.'

B — *National law*

1. General development of the legislation

14. Decree No 641 of the Italian Republic of 26 October 1972 [8] (hereinafter: 'Decree No 641/72') introduced a charge for entering certain company transactions, such as company formation and capital increase, on the register of companies.

15. Article 13(2) of Decree No 641 is worded as follows:

'The taxpayer may apply for repayment of charges paid incorrectly within the time-limit of three years reckoned from the day

7 — Case C-188/95 *Fantask* [1997] ECR I-6783.

8 — GURI No 292 of 11 November 1972, Supplement No 3.

of payment or, in the event of refusal of the document in respect of which the charge was payable, from the date of notification of the refusal.'

16. It is clear from the files that the terms 'incorrectly' and 'without legal basis' are construed differently in Italian legal literature and case-law.

17. Article 3 of Decree-Law No 853 of 19 December 1984,[9] converted into a law by Law No 17 of 17 February 1985,[10] established, among other things, an annual charge for maintaining an entry in the register of companies. Following the judgment in *Ponente Carni*, that charge was held to be incompatible with Article 10 of Directive 69/335.

18. In order to ensure that Italian legislation would, in future, be compatible with the principles of Community law laid down in *Ponente Carni*, Article 61 of Decree-Law No 331 of 30 August 1993[11] (hereinafter: Decree No 331/93), subsequently converted into a law by Law No 427 of 29 October 1993,[12] reduced the registration charge to ITL 500 000 for all companies, abolished the annual levy thereof — albeit without retroactive effect — and set the charge for other company transactions requiring registration under the Italian Civil Code at ITL 250 000.

19. Article 3(138) of Law No 549 of 28 December 1995 finally abolished the annual charge in full.

20. Judgments of both the Italian Constitutional Court and the Court of Cassation confirmed that the payments made by Italian companies in the years between 1985 and 1992 were not due.

21. In its judgment No 3458 of 23 February 1996, however, the Italian Court of Cassation ruled that the reimbursement of improperly paid charges was covered by Article 13(2) of Decree No 641/72. According to that provision, only those companies which have applied for a refund within the time-limit fixed by Article 13 of Decree No 641/72 may claim reimbursement of the charge in question which they have paid.

22. Following the judgments of the Court of Justice in *Edis*, *Spac* and

9 — GURI No 347 of 19 December 1984.
10 — GURI No 4a of 17 February 1985.
11 — GURI No 203 of 30 August 1993.
12 — GURI No 255 of 29 October 1993.

Ansaldo, [13] Article 11 of Law No 448 of 23 December 1998 [14] (hereinafter: 'Law No 448/98') — the article on which this case turns — was finally enacted. According to the said Article 11(1) and (2):

'1. Article 61(1) of Decree-Law No 331 of 30 August 1993, converted, with amendments, into Law No 427 of 29 October 1993, must be interpreted as meaning that the administrative charge for registration of documents on the register of companies referred to in Article 4 of the scale annexed to Decree No 641 of the President of the Republic of 26 October 1972, as amended by the said Article 61, is payable for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991 and 1992, in the sum of ITL 500 000 for registration of the instrument constituting the company and the following annual flat-rate sums for registration of other company documents, for each of the years from 1985 to 1992:

(a) for limited partnerships with share capital ITL 700 000;

(b) for private limited companies ITL 400 000;

(c) for other types of company ITL 90 000.

2. Companies which paid, in the years referred to in paragraph (1), the administrative charge for the entry of documents on the register of companies and the annual charge provided for in Article 3(18) and (19) of Decree-Law No 853, converted, with amendments, into Law No 17 of 17 February 1985, may obtain reimbursement of the difference between the sums paid and the sums payable under paragraph (1) above, provided they submit an application for reimbursement within the time-limits laid down in Article 13 of Decree No 641 of the President of the Republic of 26 October 1972.'

23. Therefore — and with retroactive effect for the period between 1985 and 1992 — that provision, firstly, fixed a standard charge for the registration of constituent instruments and, secondly, provided for an annual flat-rate charge for other transactions, the amount of which depended on the type of company.

2. Provisions on rates of interest

24. Three elements of Italian legislation on interest rates are material to this case: Article 11 of Law No 448/98, Law No 29

13 — See the case-law cited in footnote 4 above.

14 — GURI Supplement No 302 of 29 December 1998.

of 26 January 1961 (hereinafter: 'Law No 29/61') and the Italian Civil Code.

25. Article 11(3) of Law No 448/98 provides:

'3. Interest shall be payable on the sum to be reimbursed at the legally prescribed rate effective at the date of entry into force of this Law, as from the date of submission of the application.'

26. As the Rome Court of Appeal points out in its order for reference, that would mean that an annual rate of interest of 2.5% (the rate applicable on 1 January 1999, the date on which Law No 448/98 entered into force) would be payable on charges paid but not due. That interest rate is, however, substantially lower than the rate applicable pursuant to the — much amended — Law No 29/61 concerning the repayment of charges that were not due.

27. Article 1 of Law No 29/61 provides:

'Interest on sums owed to the State in respect of charges and indirect taxes relating to company transactions shall be payable at the rate of 3% per six-month period, with each complete period of six months being taken into account.'

28. Article 5 of Law No 29/61 provides:

'If an administrative or judicial decision establishes that payments made in respect of charges or indirect taxes for company documents were not due, the taxpayer shall be entitled to interest at the rate laid down in Article 1 above as from the date of submission of the application for repayment.'

29. According to information provided by the Rome Court of Appeal and the Commission, the rates of interest are as follows — taking account of the various adjustments: for 1985 to 1988, 6% per six-month period (that is to say 12% per annum); for 1988 to 1993, 4.5% per six-month period (that is to say 9% per annum), for 1994 to 1996, 3% per six-month period (that is to say 6% per annum); and from 1997 onwards, 2.5% per six-month period (that is to say 5% per annum).

30. Italian civil law also contains provisions on interest rates. Under Article 2033 of the Italian Civil Code for instance, which covers payments that were not due, statutory rates of interest apply from the time an action is brought. The rate of interest is based on Article 1284 of the Civil Code, which has been much amended over the

years. It amounts to 5% per annum for the years 1985 to 1990, 10% per annum for the years 1990-1996, 5% per annum for 1997 and 1998 and 2.5% per annum for 1999.

III — Facts and main proceedings

A — *Case C-216/99*

31. Riccardo Prisco Srl (hereinafter: Prisco) is claiming repayment of the sum improperly levied on it of ITL 18 500 000 in respect of the administration charge as having been received when not due and/or by way of compensation.

32. The Amministrazione delle Finanze dello Stato is asking the court to dismiss claims to the contrary and declare inadmissible and unfounded and therefore reject each and every claim for reimbursement in respect of annual payments or periods to which the three-year time-limit is applicable under Article 13 of Decree No 641/72.

33. The referring court, the Tribunale di Milano (Milan District Court), takes the view that it is not the time-limit under Article 13 but the general time-bar which applies. Retroactively extending Article 13 actually infringes the principle of legal certainty. In addition, the flat-rate charges under Article 11 of Law No 448/98 in respect of documents other than constituent instruments are incompatible with Articles 10 and 12 of Directive 69/335.

34. For undertakings which have already made a flat-rate payment, this represents the doubling of a charge not due. For undertakings which did not seek to have entries made and, therefore, according to the previous legal position, did not have to pay a charge, the new charge represents a charge in return for which the State provides no service.

35. On 15 May 1999, the Milan District Court decided to refer the matter to the Court of Justice for a preliminary ruling.

B — *Case C-222/99*

36. The Tribunale di Roma (Rome District Court) ordered the Ministero delle Finanze to repay to the company C.A.S.E.R SpA (hereinafter: CASER) of Milan, the sum of ITL 78 000 000, together with interest at the legally prescribed rate, from the date on which proceedings were commenced (13 October 1992) to the date when pay-

ment was made in full. The sum to be repaid to CASER had been paid by it over the years 1985 to 1992 in respect of the annual administrative charge for renewal of its entry on the Register of Commercial Companies.

37. The annual renewal charge was ITL 5 million for 1985, 1986 and 1987; ITL 15 million for 1988; and ITL 12 million for 1989, 1990, 1991 and 1992. Those figures were arrived at on the basis of the scale annexed to Decree No 641/1972, as variously amended over the years.

38. The Ministero delle Finanze appealed against that decision before the Corte d'appello di Roma (Rome Court of Appeal), claiming that Article 11 of Law No 448/98 applied. The practical implication of that is to limit CASER's right both to full reimbursement of the charges paid but not due from 1985 to 1992 and to the payment of interest on the sums repaid.

39. In regard to Article 11(1) and (2) of Law No 448/98, CASER pointed out that by passing off its measure as an interpretative provision, the legislature had covertly introduced new rules for previous years (by fixing a flat-rate payment for the annual registration of the various company documents to replace the — now abolished — charge for renewal of registration).

40. Secondly, with respect to Article 11(3) of Law No 448/98, CASER alleges infringement of the prohibition of discrimination under Community law.

41. The Rome Appeal Court points out that Italian national case-law on the interpretation of Article 11 of Law No 448/98 adopts two different approaches. According to one approach, the difficulty of ascertaining the costs of the registration service afforded to the company and the modest amounts imposed on a flat-rate basis by the new law clearly suggest that the charges under the new provisions should be classified as 'fees or dues' and are therefore compatible with Article 12(e) of Directive 69/335. According to the other approach, however, the fact that the costs relate to registration in respect of previous years and are therefore easily determined and that they are not estimated in advance by the State, militates against classifying the new flat-rate charges as fees or dues.

42. The Rome Appeal Court concludes that, although adopted in a spirit of

observance of Community law, the provisions of Article 11 of Law No 448/98 — as they in fact operate in relation to the registration services rendered to companies from 1985 to 1992 — might nevertheless in reality be incompatible with the rules of Community law, as interpreted in the case-law of the Court of Justice. That applies both to the flat-rate charges for initial registration and to the registration of other company transactions, as well as to the legally prescribed interest the State has to pay on repayments to the companies.

43. In the light of the principles established in paragraphs 42 and 43 of the judgment in *Ponente Carni*, the Rome Appeal Court considers that Article 11(1) of Law No 448/98 could be deemed to be incompatible with Community law because there is no prior calculation to determine the actual cost components of the individual registration operations; that calculation is not intrinsically difficult, since the various cost elements to be included (number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction and so on) were to be calculated not in relation to an — objectively uncertain — estimate for the future, but in relation to the past, namely the period 1985 to 1992 and were, therefore, clearly identifiable costs.

44. As regards the interest on the repayments to the companies, the Rome Appeal Court draws attention to the differing Italian case-law on the interpretation of Article 11(3) of Law No 448/98. The Rome Appeal Court also compares the rates of interest under Law No 29/61 and those which flow from Article 2033 of the Italian Civil Code.

45. On 12 May 1999, the Rome Appeal Court decided to refer the matter to the Court of Justice for a preliminary ruling.

IV — The questions referred

46. In Case C-216/99, the Milan District Court is asking the Court of Justice to answer the following questions:

'1. Do the principles of legal certainty and the protection of individuals — which, according to the judgment of the Court of Justice of 21 June 1988 in Case 257/86 [15] and in other judgments, require that, in areas covered by Community law, the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable the

15 — [1988] ECR 3249.

national courts to ensure that those rights and obligations are observed — and the Community principle of proportionality preclude a Member State from relying on national rules setting a peremptory time-limit, such as those deriving from the combined provisions of the second paragraph of Article 11(2) of Law No 448 of 23 December 1998 and Article 13 of Presidential Decree No 641/1972, regard being had to the fact that the said Article 11 retroactively extended to taxes paid but not due the three-year time-limit which, however, in the abovementioned second paragraph of Article 13 — on the basis of the true meaning of the words used in context — was expressly limited solely to the case of 'repayment of charges paid by mistake' so as to induce not only the interested parties but also all the trial judges to interpret it in that manner? In short, does the principle of legal certainty allow the national court to apply — both now and then — a time-limit based on a provision which, having regard to the ordinary meaning of the words, does not apply to the case before it?

2. Must the provisions of Articles 10 and 12(1)(e) of Council Directive 69/335/EEC[16] be interpreted as preventing the introduction of national legislation, like that introduced by the Italian legislature in the form of Article 11(1) and (2) of Law No 448/1998, which — *ex post facto* — reduces refunds in respect of amounts paid but not due by way of annual charge on a flat-rate basis for entry on the register of undertakings (at that time document registries) of company documents in respect of each of which the company had already paid a sum provided for by the national legislation? In short, is it permitted — in the light of the abovementioned directive — for the national legislature to duplicate, *ex post facto* by means of what purports to be an interpretative law, levies which have already been paid?'

47. In Case C-222/99, the Rome Court of Appeal is asking the Court to answer the following questions:

'1. For the purposes of an action brought by a company before the Italian courts for the reimbursement of the *tassa di concessione governativa* (administrative charge) paid from 1985 to 1992 under laws conflicting with Article 10 of Council Directive 69/335/EEC[17] of 17 July 1969 concerning indirect taxes on the raising of capital (see the judgment of 20 April 1993 in Joined Cases C-71/91 and C-178/91),[18] may Article 11(1) of Law No 448 of 23 December 1998 which retroactively lays down the single charge of ITL 500 000 for registration of the instrument constituting a company and various flat-

16 — OJ, English Special Edition, 1969 (II), p. 412.

17 — OJ, English Special Edition, 1969 (II), p. 412.

18 — Cited in footnote 3 above.

rate charges for the registration of other company documents (varying from ITL 750 000 to ITL 90 000 depending on the kind of company) be considered compatible with the principles of Community law and with the interpretation of the said directive given by the Court of Justice in its judgment in Joined Cases C-71/91 and C-178/91?

The foregoing question is asked in the light of the fact that the abovementioned provision (Article 11 of Law No 448 of 1998), although, because the amounts concerned are objectively modest and the reference *ex novo* to the registration of company documents was, it seems, intended to refer to flat-rate figures apparently commensurate with the cost of the service (being duties paid by way of fees or dues: Article 12(1)(e) of Directive 69/335), was in fact adopted without any previous determination or calculation of the costs of the service rendered to the companies (costs which are easily determinable, because they relate to past years, on the basis of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction), without there being any significant link between the amounts levied and the service actually received by the companies which had in fact paid a charge for registration and for annual renewal thereof and not for the registration of company documents on a flat-rate basis).

2. Regardless of whether the amounts levied by the Italian State under Article 11(1) of Law No 448 of 1998 rank as duties paid by way of fees or dues, is the legally prescribed interest payable by the State — in addition to the reimbursements to the companies — with effect, as specifically indicated in Article 11(3), from the date of submission of the application for reimbursement and at an annual rate of 2.5%, which is lower than the annual rates laid down generally for tax paid but not due by Articles 1 and 5 of Law No 29 of 29 January 1961 (and successive provisions) or, for other sums paid but not due, by Article 2033 of the Civil Code, compatible with the principle of equivalence between the two systems (domestic and Community) of law as regards the protection of individuals' rights and/or with the principle of effective exercise of the rights conferred by Community law — both principles having been upheld repeatedly by the Court of Justice in its judgments of 15 September 1998 in Case C-260/96 *Spac*, Case C-231/96 *Edis* and Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo*?'

V — Admissibility of the questions referred

48. The questions referred turn in their different ways on the compatibility of national law with Community law. In that connection, it should be pointed out that,

in the context of proceedings brought under Article 234 EC, the Court of Justice does not have jurisdiction to give a ruling on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it. [19]

VI — The interpretation of Articles 10 and 12 of Directive 69/335

49. The first question referred by the Rome Court of Appeal in Case C-222/99 and the second question from the Milan District Court in Case C-216/99 concern the interpretation of Articles 10 and 12 of Directive 69/335 in terms of the compatibility of the flat-rate charge laid down in Article 11(1) of Law No 448/98.

A — *Submissions of the parties*

50. *Prisco* and *CASER* first submit that, as regards the period of time material to this case (1985 to 1992), the companies had to pay a series of charges, including the so-called 'diritti di cancelleria' (registry fees), and had to do so every time they wanted to have a company document to which the Italian Civil Code applied entered on the Register of Companies. In their view, the charge at issue is additional to the capital duty provided for in Articles 2 to 9 of Directive 69/335 and the duties in the nature of fees or dues permitted under Article 12(1)(e) of the directive, and actually covers the same company documents and registrations.

51. As regards the administrative charge for registering the formation of a company, Prisco and CASER submit that the registry fees cover the cost of the registration service. In that connection, they submit a calculation designed to prove that the sum of ITL 8 000, charged during the period 1985 to 1992, was sufficient to cover the administrative costs.

52. In the alternative, Prisco and CASER submit that before the charge for registering a company was determined, the costs of the services provided for the registration of a document of that nature between 1985 and 1992 ought to have been calculated. Prisco and CASER consider the figure of ITL 500 000 to be far too high, the sum of ITL 8 000 in respect of registry fees being in itself adequate. They further emphasise that in its judgment in *Fantask*, the Court held that the assessment of the cost can only be on a flat-rate basis and must be fixed taking

19 — See Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 48 and Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22.

account, in particular, of the number and qualification of the officials, the time taken by them and the various material costs necessary for carrying out the transaction. Those principles were not observed in this case. Moreover, the charges at issue are the same — albeit at a reduced level — as the charges the Court held to be incompatible with Community law in *Ponente Carni*.

53. In relation to the annual flat-rate charge for the registration of documents other than the constituent instrument, Prisco and CASER cite the Court's judgment in *Denkavit International*,[20] according to which Article 10(c) of Directive 69/335 prohibits charges imposed because of formalities connected with a company's legal form, that is to say on account of the instrument employed for raising capital.

54. In the view of Prisco and CASER, there is no doubt that the charges for the registration of documents other than the constituent instrument are connected to the legal form of the company in question. Furthermore, it cannot be inferred from Article 10(c) of Directive 69/335, which relates to registration or any other formality required before the commencement of business, that charges payable in respect of the registration of documents other than the constituent instrument, are not encompassed by the prohibition that provision lays down. For instance, the Court recognised in *Fantask* that the formalities covered by Article 10(c) are not simply all those formalities with which companies have to comply because they are required before commencement of their business but also those necessary for carrying on that business. In addition, Prisco and CASER contend that the flat-rate charge with retroactive effect for the registration of procedures other than the formation of a capital company for the years 1985 to 1992 cannot be considered to be a duty paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335 because that charge was intended to be levied without any registration actually taking place during those years, and the related costs were already covered by the registry fees. Companies which had in fact to register company documents other than their constituent instrument during the period in question had actually to pay for that registration three times over in the form of: the administrative charge initially imposed, the registry fees and the flat-rate charge with retroactive effect.

55. Should the Court rank the flat-rate charge as a duty paid by way of fees or dues, Prisco and CASER emphasise that the

20 — See Case C-2/94 [1996] ECR I-2827.

amount of the charge was established without determining or calculating in advance the costs of the services provided, as the Rome Court of Appeal also pointed out.

56. The *Italian Government* first submits that in *Ponente Carni*, the Court made clear that charges in the nature of a duty paid by way of fees or dues within the meaning of Article 12(1)(e) of Directive 69/335 include only those charges the amount of which is calculated on the basis of the costs of the service rendered and may not be calculated on the basis of all the [running and capital] costs of the department responsible. On that basis, the Italian courts declared the system initially applicable from 1985 to 1992 to be incompatible with Community law.

57. The Italian Government takes the view that the new, retroactive system, which was introduced to prevent no refund being payable in respect of registrations during the period 1985 to 1992, is consistent with the principles laid down in *Ponente Carni*. In the first place, the application of the current system does not result in a doubling of the charge for the same service. Secondly, the annual flat-rate charge with retroactive effect for the registration of company documents other than the constituent instrument is not payable in a respect of a given year if, during the course of that year, such registrations have actually been made. Thirdly, Directive 69/335 does not require that the flat-rate charge should accurately reflect the costs actually incurred by an administration for the service rendered to a particular company. A requirement of that nature would in fact militate against the possibility of flat-rate charges, though these were accepted by the Court in *Ponente Carni* and *Fantask*. In this case, the amount of charges required is appropriate and reflects the average of the charges levied in other Member States in relation to formalities of this nature.

58. In response to a written question from the Court, the Italian Government stated that the registry fees were used to meet the administrative costs of registering company transactions.

59. The Italian Government further submits that any undertaking which paid charges between 1985 and 1992 for the registration of documents other than its constituent instrument is entitled to a refund.

60. In the oral procedure, the Italian Government cited a judgment of the Italian Court of Cassation, according to which the

flat-rate charge is payable only when transactions have actually taken place. Finally, the Italian Government contests the Commission's view that only the registry fees are permissible. The Italian Government sees no reason why only the charge paid first should be allowable, particularly where it accounts for only a fraction of the amount stipulated in Article 11 of Law No 448/98.

61. As regards the charge with retroactive effect for registering a company's incorporation, the *Commission* contends that there is no doubt that it is covered by the prohibition under Article 10(c) of Directive 69/335, save where it is justified under Article 12(1)(e).

62. In that connection, the Commission notes in its written observations that a Member State meets the requirements only if the charges are proportionate. On the basis of a comparative study of registration fees in the 12 Member States, which was prepared in conjunction with the *Ponente Carni* case and subsequently updated, the Commission contends, in its written observations, that the sum of ITL 500 000 required for registration of the constituent instrument, as stipulated in Article 11 of Law No 448/98 for the years 1985 to 1992, is proportionate. Consequently, in its written observations, the Commission concludes that the charge with retroactive effect for registering the constituent instrument is not contrary to Directive 69/335.

63. In the oral procedure, however, the Commission focused on what it describes as the principle of the prohibition of paying twice over for the same service. That principle, evolved in the Court's case-law [21] in relation to charges with the same effect under Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 and 25 EC) can be applied *mutatis mutandis* to issues raised by the charges in question in this case.

64. Furthermore, in the Commission's view, the Court of Justice should provide the national court with the criteria that will enable it to decide which of the three charges paid by the undertaking (the registry fees, the administrative charge or the flat-rate charge with retroactive effect) constitute the consideration and thus the only permissible charge. The comparative study is, therefore, no longer relevant.

65. Consequently, in the oral procedure, the Commission amended its suggested reply to the effect that, in its view, only the registry fees were permissible, and Article 11(1) of Law No 448/98 was not compatible with Article 10(c) of Directive 69/335 because it required a second pay-

21 — See Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575.

ment for the same service, namely the registration of the constituent instrument, which was in itself unlawful. Whether a charge is permissible does not depend on it having been the first to be paid.

66. In relation to the annual flat-rate charge for transactions other than the formation of a company, the Commission largely adduces the same arguments as Prisco and CASER, namely that this charge also falls within the scope of Article 10(c) of Directive 69/335 and cannot benefit from the derogation for charges in the nature of a duty paid by way of fees or dues within the meaning of Article 12(1)(e). In that context, the Commission stresses that the effect of the system could be that a company might have to pay the charges without using any service or have to pay a charge two or three times over for the same service. That was a consequence of the charge being automatically payable, even if no document were registered in the relevant year, as a result of the existence of the registry fees and the fact that, even under the original system, prescribed charges might have been paid.

B — *Analysis*

67. In relation to the provisions of Article 11 of Law No 448/98, which have given rise to the main proceedings, a distinction has to be made between the registration of a constituent instrument, such as the articles of association of a company, and the registration of other company documents.

1. Registering the constituent instrument

68. The first point to be considered is whether the flat-rate charge provided for in Article 11 of Law No 448/98 constitutes a tax within the meaning of Directive 69/335. It has then to be established whether that charge is caught by the prohibition under Article 10 of the directive or covered by the derogation under Article 12(1)(e), that is to say it has to be considered to be in the nature of a duty paid by way of fees or dues.

(a) Prohibition in principle

69. Article 10(a) of Directive 69/335 bars the Member States from levying taxes or charges other than capital duty on the transactions referred to in Article 4 thereof.

70. In analysing Article 11 of Law No 448/98 in the light of Community law, it should be noted that the flat-rate charge

provided for therein has to be paid by companies which, among other things, have their articles of association entered on the register of companies. It is therefore a charge for registration levied by the State on a transaction covered by Article 4(1)(a) of Directive 69/335, with the proceeds going to the State. [22] The charge has therefore to be classified as a tax within the meaning of the directive.

71. In its judgment in *Ponente Carni*, the Court held that 'it follows that the various charges and duties levied for the registration of a capital company fall within the scope of the abovementioned provisions and are, in principle, prohibited, subject to the derogating provisions of Article 12.' [23]

(b) Derogation: charges paid by way of fees or dues

72. According to the Court's case-law, [24] the charges paid by way of fees or dues exempted under Article 12(1)(e) of Directive 69/335 differ from the taxes and charges prohibited under Article 10 in that the level of the former is calculated on the basis of the cost of the service rendered.

73. There has to be a link between the amount of the charge and the actual costs of the service provided. According to the relevant case-law, the charge must be based on 'the costs of the transaction for which it constitutes the consideration' and not 'all the operational and capital costs incurred by the office responsible for that transaction.'

74. Since there are many instances in which it is difficult to determine the cost of a transaction — the registration of a company, for example — case-law [25] permits a flat-rate assessment of the costs. According to case-law, those costs 'must be determined in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out that transaction.'

75. According to the judgment in *Fantask*, [26] in determining the charge by reference to the costs of the service rendered —

22 — For the relevant criteria, see Case C-206/99 *SONAE* [2001] ECR I-4679, paragraph 25.

23 — Joined Cases C-71/91 and C-178/91 (cited in footnote 3 above, paragraph 30).

24 — See Joined Cases C-71/91 and C-178/91 (cited in footnote 3 above, paragraphs 41 and 42) as well as Case C-206/99 (cited in footnote 22, paragraph 32).

25 — See Case C-206/99 (cited in footnote 22 above, paragraph 33) as well as Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 27).

26 — Case C-188/95 (cited in footnote 7, paragraph 30).

the only method the Court permits for determining a duty paid by way of fees or dues within the meaning of Directive 69/335 — Member States are entitled to take account not only of the material and salary costs which are directly related to carrying out the registrations in respect of which they are incurred, but also of the proportion of the overheads of the competent authority which can be attributed to those registrations.

76. In that connection, it is first necessary to analyse the Commission's view that only the registry fees are permitted. If the Commission is referring here to the case-law on what it terms the prohibition on paying twice over, that case-law merely indicates that a Member State may not require multiple payments for the same service.

77. Contrary to the Commission's view, however, the case-law on charges with equivalent effect does not suggest that the payment must consist of a single charge.

78. The judgment in Case C-209/89, which the Commission cites, actually suggests that the Member States may make more detailed arrangements.

79. For example, the Court identified an infringement of Community law in the fact that 'the total payment demanded from the undertakings concerned may exceed, at times by a considerable amount, the total cost which, according to the Italian Government, the service provided entails for the State's finances.' [27]

80. The total payment demanded has thus to be taken into account. And that may also be the product of several charges.

81. That finding confirms another judgment cited by the Commission. In *Immobiliare SIF* the Court had — analogously — to consider whether several registration charges were compatible with Article 12(1) of Directive 69/335 and it concluded that 'Article 12 of the Directive authorises the Member States... to charge... taxes such as the registration charge, the mortgage registration fee and the Land registry fee, provided such taxes do not exceed those applicable to like transactions...'. [28]

82. Nor does Directive 69/335 suggest that only a single charge may be levied. Article 12(1) of the directive does not lay

27 — See Case C-209/89 (cited in footnote 21 above, paragraph 14).

28 — See Case C-42/96 *Immobiliare SIF* [1997] ECR I-7089, paragraph 38.

down further requirements in relation to the type of charges it permits; in particular, it does not enter into detail as to the form of those charges. Since this is a directive, it is for the Member States to decide how they are going to levy those charges. Consequently, the directive in no way requires the Member States to levy a single charge.

83. According to the case-law on Directive 69/335, which has a bearing on this case, the crucial yardstick is and remains the principle that the amount of a charge as such (even if it consists of several charges) must mirror actual costs. That also applies to the case-law the Commission cites in relation to charges with the same effect. According to that case-law also, the crucial element is the 'actual cost of the operation in question.' [29]

84. It is necessary to establish whether 'the Italian rules at issue lead, in certain cases, to the imposition of an amount disproportionate to the service rendered to traders, in that it entails the levying of as many charges as there are undertakings involved and the charge payable by them, therefore, exceeds the actual cost of the inspections.' [30]

29 — Case C-209/89 (cited in footnote 21 above), paragraph 13.
30 — Case C-209/89 (cited in footnote 21 above), paragraph 16.

85. Consequently, it is necessary to determine whether the total amount of all prescribed charges is below that critical threshold. Only the amount of the charges in excess of that threshold is incompatible with Community law.

86. That being so, given that they amount to only ITL 8 000, it appears doubtful whether the registry fees cover the costs of all the services for which a Member State may demand payment.

87. Recognised methods of cost accounting should be used to establish whether the amount of ITL 500 000 laid down in Article 11(1) of Law No 448/98 meets those requirements.

2. Registering other company transactions

88. As Prisco, CASER and the Commission rightly submit, it is necessary to begin by considering whether the annual flat-rate charge for registering other company transactions provided for in Article 11(1) of Law No 448/98 fundamentally meets the requirements of Directive 69/335, and not only whether the amount of the charge is justified.

89. It is therefore necessary to consider whether the flat-rate charge is caught by the prohibition under Directive 69/335. According to Article 10(c), apart from capital duty, Member States are not to charge any taxes whatsoever in respect of 'any other formality... to which a company may be subject by reason of its capital form'. That prohibition therefore applies to the levying of charges on account of the 'instrument employed for raising capital.' [31]

90. The annual flat-rate charge provided for in Article 11(1) of Law No 448/98 is a charge levied by reason of the 'legal form' of the company concerned, since the transactions which trigger the charge can occur only in companies with a specific legal form.

91. Also prohibited, according to the Court's case-law, [32] are charges levied for maintaining the entry on a register and which relate therefore to a company's continued existence.

92. Although the wording of Article 10(c) of Directive 69/335 covers only 'registration or any other formality required before the commencement of business', the Court's case-law establishes a similar prohibition in relation to charges for registration which 'are necessary for the carrying on of that business.' [33] That case-law, which relates to capital increases, can be applied to other company transactions.

93. In that context, it makes no difference that the flat-rate charge for other company transactions is levied annually. According to the judgment in *Ponente Carni*, charges levied annually are also encompassed by the prohibition under Article 10 of Directive 69/335. [34]

94. A rule such as that under Article 11(1) of Law No 448/98 constitutes a charge of that type on registrations 'necessary for the carrying on of that business', and is therefore covered by the prohibition under Article 10(c) of Directive 69/335.

95. That type of charge would, however, be permitted if it met the requirements of the derogation provided for in Article 12(1)(e) of Directive 69/335.

31 — See Case C-113/99 *Herta Schmid* [2001] ECR I-471, paragraph 21, as well as Cases C-2/94 (cited in footnote 20), paragraph 23 and C-188/95 (cited in footnote 7 above), paragraph 21.

32 — In connection with that type of charge and identifying it, see Case C-2/94 (cited in footnote 20 above), paragraph 27.

33 — See Case C-188/95 (cited in footnote 7 above), paragraph 22.

34 — See Joined Cases C-71/91 and C-178/91 (cited in footnote 3 above), paragraph 31.

96. In that connection, it seems appropriate to demonstrate this by reference to the two possible types of case: companies which had company transactions subject to registration registered between 1985 and 1992 and companies which did not. Under Article 11(1) of Law No 448/98, the charge is to be levied in both cases.

97. Those companies which had entries made in the register between 1985 and 1992 had to pay a charge according to the legal position that applied at the time. In addition, they had to pay the so-called registry fees.

98. Were those companies to have also to pay the flat-rate charge provided for in Article 11(1) of Law No 448/98, and to have to do so for each year, they would have been required to pay three times over for registering the same transactions.

99. While those companies which did not have transactions registered between 1985 and 1992 did not have to pay a charge under the earlier national legislation, they are required to pay the flat-rate charge on the basis of Article 11(1) of Law No 448/98. That charge would therefore be payable if no transactions were registered, that is to say even if no service were rendered.

100. Since absolutely no registration formalities were undertaken in relation to companies which did not have transactions registered, the authorities could not actually incur any costs, but, according to the Court's case-law, [35] that is a prerequisite for the levying of a charge. Consequently, in that type of case, there is neither a service to the individual [36] nor is there a particular [37] service within the meaning of the case-law, for which this could be a consideration.

101. The crucial factor in relation to companies which had transactions registered is whether the various charges levied are in the nature of a consideration. Only one consideration may be demanded for one and the same service. Although that payment could take the form of several charges, they must relate to one service and their amount must be proportionate to that service.

102. That is not the case. The annual flat-rate charge provided for in Article 11(1) of Law No 448/98 largely corresponds to the charge previously declared to be contrary to Community law in *Ponente Carni* and cannot be con-

35 — See Case C-188/95 (cited in footnote 7 above), paragraph 31; Case C-134/99 (cited in footnote 25 above), paragraph 31; and Case C-206/99 (cited in footnote 22 above), paragraph 34.

36 — See Joined Cases C-71/91 and C-178/91 (cited in footnote 3 above), paragraph 37.

37 — See Joined Cases C-71/91 and C-178/91 (cited in footnote 3 above), paragraph 42 and Case C-188/95 (cited in footnote 7 above), paragraph 27.

sidered to be a duty 'paid by way of fees or dues' within the meaning of Article 12(1)(e) of Directive 69/335.

103. Since the flat-rate charge provided for in Article 11(1) of Law No 448/98 is contrary to Community law, there can be no question of a reduction in the amount to be refunded to the companies concerned.

3. Conclusion

104. Articles 10(c) and 12(1)(e) of Directive 69/335 have to be interpreted as meaning that they do not prevent the determination with retroactive effect of a charge for registering a company's constituent instrument on the register of companies, if the amount of that charge is calculated by reference to the costs of registration, which may be determined on a flat-rate basis.

105. Articles 10(c) and 12(1)(e) of Directive 69/335 have to be interpreted as meaning that they preclude a rule such as that question in the main proceedings concerning the determination with retroactive effect of a flat-rate annual charge for the registration of other company transactions, if that charge is unrelated to the amount of the costs.

VII — The time-limit

106. The first question referred by the Milan District Court in Case C-216/99 concerns the compatibility with Community law of the three-year time-limit laid down in Article 11(2) of Law No 448/98 and Article 13 of Decree No 641/72.

A — *Submissions of the parties*

107. *Prisco* points out that in its decision in *Edis* the Court made a distinction between the circumstances of that case and the circumstances underlying the judgments in *Barra*[38] and *Deville*.[39] Prisco infers from the latter two judgments that a Member State may not enact legislation which makes the repayment of a charge, which has been found to be contrary to Commu-

38 — Case 309/85 [1988] ECR 355.
39 — Case 240/87 [1988] ECR 3513.

nity law in a judgment of the Court, dependent on conditions peculiar to that charge and which are less favourable that the conditions of repayment which would apply in the absence of that legislation.

108. Prisco stresses that the provisions of Article 13 of Decree No 641/72, which the Court examined in *Edis*, existed prior to the judgment in *Ponente Carni* and are not specific to the taxes at issue, so that the abovementioned principle does not apply.

109. However, Article 11 of Law No 448/98 was enacted after the judgment in *Ponente Carni*. That provision applies particularly to taxes which have to be deemed to be contrary to Community law in the light of that judgment. In addition, Article 11 of Law No 448/98 prevents the national courts from interpreting Article 13 of Decree No 641/72 as meaning that the latter provision catches only taxes which were paid as a result of a material error but not taxes for which reimbursement is demanded on the ground that they are incompatible with Community law. To that extent, Article 11(2) of Law No 448/98 changes the legal position by explicitly endorsing an interpretation of the law expounded in several examples of Italian case-law and legal writing. In addition, Article 11 sets out less favourable conditions for the compensation it provides for than does the Italian Civil Code.

110. It follows that Article 11 of Law No 448/98 fails to observe the principle of equivalence addressed in the cases of *Barra* and *Deville*. In addition, the provision fails to respect the principles of legal certainty, legitimate expectation and proportionality, particularly given that it has retroactive effect. Moreover, at the time the provision was adopted, the three-year time-limit, which has to be taken into account, had long expired in relation to the taxes most recently paid in 1992 the reimbursement of which is claimed.

111. Prisco further contends that in order to ascertain whether the Italian provisions are compatible with Community law, it is essential that they first be interpreted. Finally, Prisco challenged the assertion that the present case does not evince any new factors as compared with *Fantask*, *Edis* and *Ansaldo*.

112. The *Italian Government* contends that Article 11 of Law No 448/98 has certainly not extended the applicability of the time-limit to cases concerning the reimbursement of the charges listed in that same Article 11. In its view, the three-year time-limit actually arises out of Article 13 of Decree No 641/72, as interpreted by the Italian Court of Cassation. The Italian Government points out that the legal scope of the provision is a matter of national law over which the Court does not have jurisdiction. It further underlines that the situation in the instant case mirrors the

situation the Court analysed in *Edis*, *Spac* and *Ansaldo*, and concluded that Community law does not prevent a Member State from imposing a three-year time-limit on claims for the reimbursement of a charge levied contrary to Community law which departs from the general rule applying to claims for repayment between private individuals. The principles of equivalence and effectiveness have, however, to be safeguarded.

113. The *Commission* submits that the question of a possible failure to observe the principles of legal certainty and the protection of the individual actually arises in relation to Article 13 of Decree No 641/72 rather than Article 11 of Law No 448/98, and that this is an issue of national rather than Community law.

114. The following principles concerning the procedures for reimbursing charges contrary to Community law emerge from the judgments in *Edis*, *Aprile*[40] and *Dil-export*.[41] The Member States may not apply provisions which they adopted after the Court of Justice held the taxes to be incompatible with Community law if the provisions in question apply exclusively to those taxes and, in addition, are less favourable to taxpayers than the rules which would apply in the absence of those provisions.

115. The Commission assumes that the first two of the above conditions are met. Whether the third is met depends on the interpretation of Article 13 of Decree No 641/72. If the three-year time-limit under Article 13 of Decree No 641/72 also applies to the reimbursement of taxes which have been levied illegally, Article 11 of Law No 448/98 has not introduced any new factor and cannot therefore be held to be incompatible with Community law. If, however, Article 13 of Decree No 641/72 catches only taxes paid in error, Article 11 of Law No 448/98 is incompatible with Community law. The solution therefore depends on the interpretation of national law, over which the Court of Justice does not have jurisdiction.

B — *Analysis*

116. As the Commission correctly points out, the answer to the question referred depends on how Article 11(2) of Law No 448/98 is to be construed. As that

40 — Case C-228/96 [1998] ECR I-7141.
41 — Case C-343/96 [1999] ECR I-579.

provision crucially refers to Article 13 of Decree No 641/72, it is the interpretation of the latter article which is decisive.

1. Requirements of Community law in relation to the admissibility of time-limits

117. Before analysing the provision of Italian legislation at issue, it is first necessary to identify the criterion governing the compatibility of national legislation with Community law.

118. The relevant requirements of Community law are to be found in the Court's case-law in *Deville*, *Edis*, *Aprile* and *Dilexport*.

119. In the first place, the principle that emerges from case-law relates only to those national provisions drawn up after the Court had handed down a judgment that national provisions previously enacted were contrary to Community law;[42] it does not, therefore, encompass provisions which were already in force at the time of the judgment.

120. Secondly, the case-law which has a bearing on this case relates solely to provisions which refer specifically to those charges which were held to be contrary to Community law in a judgment of the Court.[43]

121. Thirdly, that case-law concerns only those provisions which lay down less favourable conditions for reimbursement than the national rules which would apply if they did not exist.[44]

122. Those principles are the practical embodiments of the general principle that it is for national law to guarantee the effectiveness of claims for repayment. According to the abovementioned case-law, that guarantee is absent if the provision introduced after judgment had been delivered and laying down the time-limit actually has retroactive effect.[45]

123. As Prisco and the Commission correctly point out, Article 11(2) of Law No 448/98 in any event meets the first two conditions of the abovementioned case-law. Firstly, this is a provision adopted after judgment had been delivered in

42 — See Case 240/87 (cited in footnote 39 above), paragraph 13; Case C-228/96 (cited in footnote 40 above), paragraph 25; Case C-231/96 (cited in footnote 4 above) paragraph 23; and Case C-343/96 (cited in footnote 41 above), paragraph 38.

43 — See Case 240/87 (cited in footnote 39 above), paragraph 13; Case C-228/96 (cited in footnote 40 above), paragraph 25; Case C-231/96 (cited in footnote 4 above), paragraph 23; and Case C-343/96 (cited in footnote 41 above), paragraph 38.

44 — See Case 240/87 (cited in footnote 39 above), paragraphs 17 and 18; Case C-228/96 (cited in footnote 40 above), paragraph 26; Case C-231/96 (cited in footnote 4 above), paragraph 24; and Case C-343/96 (cited in footnote 41 above), paragraph 39.

45 — See Case C-228/96 (cited in footnote 40), paragraph 28 and Case C-343/96 (cited in footnote 41), paragraph 42.

Ponente Carni, that is to say after 20 April 1993. Secondly, it relates in terms of both description and content specifically to the administrative charges which formed the subject-matter of the judgment in *Ponente Carni*, and were held to be contrary to Community law.

124. To ascertain whether the third condition is met, however, it is necessary to compare the legal position before the entry into force of Law No 448/98 and the legal position consequent on the introduction of Article 11(2) thereof. More particularly, it has to be established whether the three-year time-limit under Article 11(2) of Law No 448/98 or Article 13 of Decree No 641/72 is applicable, or whether, for example, the ten-year time-limit under general civil law, namely Article 2946 of the Italian Civil Code, applies.

125. As the Commission correctly points out, this requires an interpretation of provisions of national law. According to the Court's own case-law, [46] the Court does not have jurisdiction to interpret provisions of national law. It is the responsibility of the national court to construe national law and interpret it in the light of the criteria furnished by the Court.

46 — See Case 240/87 (cited in footnote 39 above), paragraph 17 and Joined Cases C-52/99 and C-53/99 *Camarotto and Vignone* [2001] ECR I-1395. See also, however, Case C-88/999 *Roquettes Frères* [2000] ECR I-10465, paragraph 32, in which the Court in fact ruled that a specific national procedural rule failed to meet a condition established under case-law.

2. Conclusion

126. Community law does not prohibit a Member State from adopting, after a the Court has handed down a ruling that a charge is incompatible with Community law, provisions under which the conditions governing the reimbursement of the charge are less favourable than would have been the case without those provisions, provided that amendment is not specific to the charge in question and the new provisions do not, in practice, make it impossible or excessively difficult to exercise the right to repayment.

VIII — The methods of calculating the interest

127. The second question referred by the Rome Court of Appeal concerns the compatibility with Community law of the methods of calculating the interest set out in Article 11(3) of Law No 448/98.

A — *Submissions of the parties*

128. *CASER* first points out that Law No 29/61 generally governs the rate of

interest applicable to charges and indirect taxes which taxpayers pay late or which the State has to refund. CASER points out that, calculated from the time the application for repayment was made, the interest payable under that Law, in the circumstances of this case, would be ITL 30 810 000. That is a higher sum than would be produced if Article 11(3) of Law No 448/98 were applied (ITL 17 550 000). The interest payable if the rules of the Italian Civil Code were applied, calculated solely from the date the claim was lodged with the court, would also be higher (ITL 40 950 000). The differences in those amounts clearly show that Article 11(3) of Law No 448/98 fails to observe the principle of equivalence.

129. CASER stresses that this case differs from the *Ansaldo* case. *Ansaldo* turned on whether Community law precluded a rule which set different rates of interest in relation to charges than did civil law. But the issue in this case is that differing rates of interest apply within the sphere of fiscal legislation. The less favourable rate of interest set — with retroactive effect, moreover — is specifically directed towards the kind of charges which were held to be contrary to Community law in the judgment in *Ponente Carni*.

130. The *Italian Government* points out that, in *Ansaldo*, the Court recognised that a Member State could not be required to extend the favourable national rules on reimbursement to all claims for the repayment of charges and dues levied in breach of Community law. Moreover, the principle of equivalence was guaranteed in that Article 11(3) of Law No 448/98 applied the rate of interest not only to cases involving the refund of the administrative charge but to all applications for reimbursement, including those based on national law.

131. The *Commission* points out that, in contrast to the *Ansaldo* case, it is explicitly clear from the wording of the provision at issue that it specifically applies only to the reimbursement of the particular administrative charge which was held to be incompatible with Community law, and not to the many other administrative charges.

132. The Commission concludes from the fact that the rate of interest applicable under Article 11(3) of Law No 448/98 is lower than the rate of interest under Law No 29/61 that the principle of equivalence has not been guaranteed. The same is true if

the rate of interest which would apply under civil law is used by way of comparison.

B — *Analysis*

133. It is first necessary to identify the principles evolved in the Court's case-law in relation to the arrangements for the payment of interest. Thereafter, provisions of the type at issue in the main proceedings must be analysed in the light of those principles.

1. Principles

134. I should first draw attention to the general principle of settled case-law according to which 'in the absence of Community rules governing the refund of national taxes levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).' [47]

135. According to the abovementioned case-law, that applies also to 'all ancillary questions relating to the reimbursement of charges improperly levied such as the payment of interest, including the rate of interest and the date from which it must be calculated.' [48]

136. In relation to the principle of equivalence, the Court further ruled in *Edis* that the observance of the principle implies 'that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and those alleging infringements of national law with respect to the same kinds of charges or dues.' [49]

2. Analysis of the rules on methods of calculation

137. As CASER and the Commission have correctly pointed out, a rule such as

47 — See Joined Cases C-397/98 and C-410/98 (*Metallgesellschaft and Hoechst* [2001] ECR I-1727), paragraph 85, C-231/96 (cited in footnote 4 above), paragraphs 19 and 34; C-260/96 (cited in footnote 4 above), paragraph 18; C-228/96 (cited in footnote 40 above), paragraph 18; and Case C-343/96 (cited in footnote 41 above), paragraph 25.

48 — See Joined Cases C-397/98 and C-410/98 (cited in footnote 47 above), paragraph 86; Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 11 and 12; and Case 130/79 *Express Dairy Foods* [1980] ECR 1887, paragraphs 16 and 17.

49 — See Case C-231/96 (cited in footnote 4 above), paragraph 36.

Article 11(3) of Law No 448/98 governs the reimbursement of an individual charge, namely the administrative charge which has been held to be contrary to Community law. [50] That rule was in fact introduced specifically in relation to the charges which are contrary to Community law. [51]

138. The methods of calculating interest on the sum to be reimbursed under Article 11(3) of Law No 448/98 must now be compared with the methods which would apply in the absence of that provision.

139. Article 11(3) of Law No 448/98 provides that interest is to be payable from the time a claim is lodged with the courts. It also fixes the rate of interest applicable by referring to the legally prescribed rate of interest applicable at the time that Law entered into force. That rate of interest amounts to 2.5% per annum.

(a) Comparison with Law No 29/61

140. The provisions of Law No 29/61 are the first point of comparison. Under Article 5 of that Law, interest is payable from the date the application for repayment was made and not just from the time a claim was lodged with the courts. Secondly, a comparison of the rates of interest shows that the — much amended — rate of interest laid down in Law No 29/61 was clearly higher than the rate of interest payable under Article 11(3) of Law No 448/98, at least from 1985 to 1999. [52]

141. The methods of calculation under Article 11(3) of Law No 448/98 are therefore less favourable than those applicable under Law No 29/61.

(b) Comparison with the provisions of the Italian Civil Code

142. If the legal relationship between the taxpayers, that is the companies, and the financial authorities were classified not as a fiscal but as a civil law matter, [53] the provisions of the Italian Civil Code, namely Articles 1284 and 2033, would apply. A

50 — The rule in question therefore differs from the rule which was the subject-matter of the judgments in Case C-343/96 (cited in footnote 41 above), paragraph 29 and Case C-228/96 (cited in footnote 40 above), paragraph 22.

51 — See also Alessandro Voglino, 'La lesione di diritto alla ripetizione dell'indebita "tassa sulle società" nelle più recenti interpretazioni della giurisprudenza e nell'ultimo abuso del legislatore nazionale', *Bolletino Tributario 5*, 1999, 381 (393).

52 — For the rates of interest, see the section above on the law applicable.

53 — As regards the authority of the Member States to classify legal relationships, see Joined Cases C-10/97 to C-22/97 *IN.CO.GE'90 and Others* [1998] ECR I-6307, paragraphs 26 and 29.

comparison of those rules, particularly the interest rates,[54] with the provisions of Article 11(3) of Law No 448/98, clearly shows that the latter set lower rates of interest.

143. The methods of calculation under Article 11(3) of Law No 448/98 are therefore less favourable than under the Italian Civil Code.

(c) Conclusion to be drawn from those comparisons

144. It is thus established that Community law does not prevent a Member State from adopting rules which stipulate methods of calculating interest on the reimbursement of charges improperly levied that are less favourable than those which apply to the reimbursement of sums improperly paid by private individuals, provided those methods apply to claims before the courts regardless of whether they are founded on national or Community law. The situation would be different only if those methods of calculation applied exclusively to judicial claims for the reimbursement of taxes or charges founded on Community law.[55]

145. It should be pointed out for the sake of completeness that the principle of equivalence 'cannot be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law.'[56]

146. For the purposes of this case, that means that, as is clear from the above comparison, Article 11(3) of Law No 448/98 infringes the principle of equivalence and is therefore inapplicable. As a result, Community law therefore takes its place. However, since there are no corresponding provisions of Community law, national law applies, namely those provisions governing the calculation of interest which meet the requirements of Community law.[57]

3. Conclusion

147. Community law, in particular the principles of equivalence and effectiveness, prevents a Member State from adopting

54 — For the rates of interest, see the section above on the law applicable.

55 — See Case C-231/96 (cited in footnote 4 above), paragraph 37; Joined Cases C-279/96 to C-281/96 (cited in footnote 4), paragraph 30; and Case C-343/96 (cited in footnote 41 above), paragraph 28.

56 — See Case C-231/96 (cited in footnote 4 above), paragraph 36.

57 — See Allan F Tathan, 'Restitution of charges and dues levied by the public administration in breach of European Community Law: a comparative analysis', *European Law Review* 1994, 146 (162), in which the author takes the view that Article 2033 of the Italian Civil Code applies.

rules which stipulate methods of calculating interest that are less favourable in relation to the reimbursement of charges which a Member State has levied in breach of Community law, than, first, the methods of calculation that apply to judicial claims for the reimbursement of comparable charges and taxes which are based on national law, and, second, the methods of calculation that apply to judicial claims for the reimbursement of improperly paid sums which are based on domestic civil law.

IX — Conclusion

148. In the light of the foregoing I propose that the Court give the following answers to the national courts' questions:

(1) The reply to the second question referred in Case C-216/99 and the first question referred in Case C-222/99 should be that Article 10(c) and Article 12(1)(e) of Directive 69/335 should be interpreted as meaning that:

— they do not preclude the determination with retroactive effect of a charge for registering the constituent instrument on the Register of Companies if the amount of that charge is calculated by reference to the costs of registration, which may be assessed on a flat-rate basis, and

— they preclude a rule such as the rule in the main proceedings concerning the determination with retroactive effect of a flat-rate annual charge for registering other company transactions, if that charge is not based on the actual costs.

(2) The reply to the first question referred in Case C-216/99 should be that Community law does not preclude a Member State from adopting, after the Court has handed down judgments declaring charges to be contrary to Community law, provisions fixing conditions for the repayment of those charges which are less favourable than would pertain if those provisions did not exist, provided this change does not refer specifically to the charges in question and the new provisions do not make it impossible or excessively difficult to exercise the right to repayment.

(3) The reply to the second question in Case C-222/99 should be that Community law, in particular the principles of equivalence and effectiveness, precludes a Member State from adopting rules on the calculation of interest which are less favourable in regard to the repayment of charges which a Member State has levied in violation of Community law than

— first, the methods of calculation that apply to judicial claims for the reimbursement of comparable charges and taxes, which are based on national law, and

— second, the methods of calculation that apply to judicial claims for the reimbursement of improperly paid sums, which are based on domestic civil law.