REPORT OF THE JUDGE-RAPPORTEUR
In Case C-287/91*

I — Facts and procedure

1. The Eighth Council Directive (79/1072/EEC) of 6 December 1979 (OJ 1979 L 331, p. 11), hereinafter referred to as the 'Eighth Directive', lays down the arrangements for the refund of value added tax to taxable persons not established in the territory of the country. Article 7(4) provides that:

'Decisions concerning applications for refund shall be announced within *six months* of the date when the applications, accompanied by all the necessary documents required under this Directive for examination of the application, are submitted to the competent authority ... Refunds shall be made before the end of the abovementioned period, at the applicant's request, in either the Member State of refund or the State in which he is established. In the latter case, the bank charges for the transfer shall be payable by the applicant.'

In order to facilitate the transposition of the new Community provisions into Italian law, Article 11 of the Eighth Directive allowed Italy, until 1 January 1982, to make refunds within an extended period of nine months, so that it could properly organize the department responsible for refunds.

2. The Eight Directive was transposed into the legislation of the Italian Republic by Presidential Decree No 793 of 30 November 1981 (GURI, No 358 of 31 December 1981) which introduced Article 38b into the text of Presidential Decree No 633 of 26 October 1972 (GURI, supplement to No 292 of 11 November 1972), the basic piece of legislation on value added tax.

3. The Commission's departments received numerous complaints from traders in other Member States alleging that there was several years' delay before VAT was refunded and on several occasions the Italian administration was asked by the Commission to comply with the time limits fixed by Community law, but to no avail.

4. The Commission therefore decided to commence proceedings for infringement of the Treaty and accordingly, by a letter of 7 February 1990, the Italian Government was requested pursuant to Article 169 of the EEC Treaty to submit its observations on the matter within one month from the date on which the letter was received.

5. Since it received no reply from the Italian Republic, by letter of 2 July 1990 the Commission delivered a reasoned opinion

* Language of the case: Italian.

pursuant to the second paragraph of Article 169 of the Treaty asking the Italian Republic to comply therewith within one month from the date on which notification was received. The Italian Republic did not reply to the reasoned opinion either and the Commission brought the matter before the Court.

II — Written procedure and forms of order sought

1. The Commission's application was lodged at the Court Registry on 15 November 1991. The written procedure followed the normal course, and the Commission did not lodge a reply.

2. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided not to order a preparatory enquiry or to open the oral procedure in this case, in accordance with Article 44a of the Rules of Procedure.

3. The *Commission* claims that the Court should:

(i) declare that, by allowing the Ministry of Finances systematically to disregard the time-limits for refunds of value added tax to taxable persons not established in the territory of the country, without intervening from the outset to remove the consequent harm to Community law, the Italian Republic has failed to fulfil its obligations under Article 7(4) of the Eighth Council Directive (79/1072/EEC) of 6 December 1979 on arrangements for the refund of value added tax to taxable persons not established in the territory of the country;

(ii) order the Italian Republic to bear the costs.

4. The *Italian Republic* has not disputed the allegation that it has failed to fulfil its obligations.

III — Pleas in law and arguments of the parties

1. The *Commission* points out first of all that, after nearly 11 years and despite the fact that the Eighth Directive has been transposed into Italian law, delays in making VAT refunds have reached 36 months and are lengthening. There is, therefore, a clear case of a breach of Article 7(4) of the Eighth Directive.

The Commission goes on to state that the continuing nature of the infringement and the absence of any reply from the Italian Republic in the course of the infringement proceedings demonstrate a clear intention to disregard the legal values safeguarded by Community law, in particular Articles 5 and 189 of the EEC Treaty.

In this connection the Commission points out that by continuing to be in breach of Article 7 of the Eighth Directive despite transposition of the directive into its legislation, the Italian Government is neglecting to

take into account the requirement referred to in Article 10 of the directive that there should be real compliance with the arrangements for refunds and that it is also failing to fulfil its duty of cooperation under Article 5 of the EEC Treaty.

The Commission also claims that pursuant to the third paragraph of Article 189 of the EEC Treaty directives are binding, as to the result to be achieved, upon each Member State. It is clear that Italy has not obtained the results indicated by the directive since, despite transposition of the directive into its legislation, the delays in making refunds remain abnormally long.

In addition the Commission points out that Article 38b of Presidential Decree No 633 of 26 October 1972 concerning refunds to non-national taxpayers does not provide for default interest to be paid on sums refunded after the expiry of the period of six months laid down in Community legislation, thus exacerbating the situation of the traders concerned who not only have to wait for years for refunds but, at the end of the day, also suffer a loss in real value (loss of profit) on the tax credit because the refund is made at the historic cost.

Lastly the Commission points out that according to the consistent case-law of the Court a Member State fails to fulfil its obligations if, despite correctly transposing a directive, it does not apply its legal content to the facts because of failures of organization or lack of instructions. Furthermore it states that the Court has consistently held that internal difficulties such as lack of staff or the length of checks may never serve as justification for a Member State which has not complied precisely with its obligations under Community law.

In conclusion, the Commission considers that the conduct of the Italian Republic is contrary to Community law, in particular Article 7(4) of the Eighth Directive.

2. The *Italian Government* does not deny the Commission's case. It makes the point, however, that the delay in VAT refunds to non-resident taxpayers is due to organizational problems, not to any express or discriminatory intention. In that connection it indicates that the national administration is making efforts to see that the half-yearly time limits referred to in the Eighth Directive are complied with.

As far as the problem in respect of default interest is concerned, the Italian Government states that this question is also being carefully examined by the authorities responsible, the purpose of their examination being to verify whether the payment of interest to non-residents is permissible on the basis of a broad construction of the provision referred to in Article 38b of Presidential Decree No 633 of 26 October 1972.

M. Díez de Velasco
Judge-Rapporteur