OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 26 March 1998 *

1. The Corte d'Appello (Court of Appeal) di Venezia (Italy) has submitted a question for a preliminary ruling on the impact of Community law, as interpreted in the case-law of the Court of Justice, on certain conditions for the exercise of the right to recover taxation improperly levied by the Italian Administration. Specifically, this case is concerned with the repayment of sums paid by the plaintiff company in respect of a national tax which was contrary to Community law.

Facts, main proceedings and preliminary questions

2. The plaintiff is a limited liability company which, under Presidential Decree No 641 of 26 October 1972 (hereinafter 'DPR 641/1972'), paid to the Italian Treasury, over a period of years not specified in the order for reference, the sum of LIT 93 000 000 in respect of the annual *tassa di concessione governativa* (administrative charge) for the registration of companies in the register of companies.

3. Following the judgment of the Court of Justice of 20 April 1993 in *Ponente Carni and Cispadana Costruzioni* [1] (hereinafter '*Ponente Carni*'), giving a ruling on a number of questions concerning the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, [2] the Italian legislature abolished the annual charge and reduced to LIT 500 000 the amount of the charge for first registration on the register of companies. [3]

4. For their part, the Italian courts also declared the annual charge to be incompatible with Community law [4] and, consequently, held that the taxes paid in respect of it had been improperly levied.

1 — Joined Cases C-71/91 and C-178/91 [1993] ECR I-1915.

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

3 — The relevant measure was Decree Law No 331 of 30 August 1993, converted into Law No 427 of 29 October 1993.

4 — To that effect, see the judgments of the Corte di Cassazione (First Civil Chamber) of 28 March 1994 (No 2992); of 23 November 1994 (No 9900), and of 23 February 1996 (Nos 4468/96 and 3458/96), the latter having been delivered by the Combined Chambers (Sezioni Unite). Similarly, in the second paragraph of the grounds of judgment No 56 of 24 February 1995, the Corte Costituzionale (Constitutional Court), after outlining the problematical legislative background to the charge, considered that it should be abolished as regards previous years (1993): 'Since the charge was improperly levied by the Italian State, in breach of Article 10 of Directive 69/335/EEC of 17 July 1969, as interpreted by the Court of Justice in its judgment of 20 April 1993 in Joined Cases C-71/91 and C-178/91, the sums paid are recoverable under Community law, which is directly applicable within the Italian legal order'.

* Original language: Spanish.

5. After unsuccessfully calling on the Italian Administration to repay the charges paid but not due, Spac sought from the Tribunale Civile (Civil District Court) di Venezia a judgment requiring the Ministero delle Finanze to repay to it the total amount of those charges, namely LIT 93 000 000.

6. The Tribunale Civile, by judgment of 20 October 1994, upheld the claim, having dismissed an objection from the Administration that the action was time-barred by virtue of the national provision which imposes a time-limit of three years for actions for repayment to be commenced. In the view of the Tribunale Civile, that time-limit does not apply to the present case: the ordinary limitation period of ten years laid down by the Italian Civil Code ought to apply.

7. The Italian tax administration appealed against the judgment given at first instance. The Corte d'Appello di Venezia, the court of competent jurisdiction, decided to seek a preliminary ruling from the Court of Justice on the following question:

'In proceedings before an Italian court for reimbursement of charges paid pursuant to provisions of national law which, in view of the interpretation given by the Court of Justice in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Another* v *Amministrazione delle Finanze dello Stato*, conflict with Article 10 of Council Directive 69/335/EEC of 17 July 1969, is a provision of national law which, by removing such actions from the scope of the ordinary rules governing actions for the recovery of charges unduly paid, and making them subject to special rules governing the reimbursement of charges paid in error, requires that the right of action be exercised within a limitation period running from the time when payment was made rather than from the time when the relevant Community directive was correctly transposed into national law, compatible with the principles laid down in that directive and adopted in its interpretation, and the general principles of Community law upheld by the Court of Justice in Case C-208/90?'

The answer to the question

8. Since this question is analogous to those submitted by the Tribunale Civile di Genova in Case C-231/96 *EDIS*, on which I am delivering my Opinion today, it would have been possible to give this Opinion merely by referring to the text of another. But, since the cases have not been joined and the national court and the parties to the main proceedings are different, I have chosen to repeat at least the same basic considerations in both cases, including if appropriate a special mention of or reference to the Opinion in *EDIS* regarding certain details common to both cases.

9. The question submitted in these proceedings has two aspects:

(a) First, it is concerned with the dual approach whereby ordinary actions for reimbursement of sums paid but not due are subject to a limitation period of ten years, and specific actions for the reimbursement of taxes are subject to a time-limit of three years.

(b) Secondly, a ruling is sought as to the compatibility with Community law of national legislation which, for actions for the reimbursement of taxes paid but not due, sets as the starting date of the three-year time-limit the date of payment of the tax, which fell at a time when the Community directive applicable thereto had not been properly incorporated into national law.

10. Those issues correspond to the second and third questions referred in *EDIS*. However, in view of the way in which the order for reference is framed in this case, what is seen by the Corte di Appello as decisive is not so much the problem of the duality of treatment as that of the commencement of the time-limit before the proper transposition of the directive. Thus, in the abstract, it would be irrelevant whether the time-limit were ten or three years if, in both cases, the application of either period started before the directive was properly transposed.

(i) *The two different sets of rules*

11. The national court seeks to ascertain whether it is permissible, from the Community point of view, for actions for the reimbursement of charges paid in breach of Council Directive 69/335 to be subject to a time-limit of three years reckoned from the date of payment, which differs from the limitation period (ten years) which national law lays down for actions for the recovery of sums unduly paid between individuals.

12. It must be emphasised at the outset that, under Italian law, the time-limit mentioned by the national court affects not only actions for the repayment of taxes incompatible with Community law but also all actions for the repayment of any charge for Government action which was unduly levied, whether the reason for its illegality is attributable to a national or a Community provision.

13. As I pointed out in describing the national legislation applicable to actions for reimburse-

ment of charges paid but not due, [5] the second paragraph of Article 13 of DPR 641/1972 is not confined to charges paid in breach of Community law: on the contrary, it provides that a taxpayer may claim repayment of any charge for Government action paid in error, within a time-limit of three years as from the day of payment. Similar periods are prescribed for actions for reimbursement of other sums levied by customs authorities.

14. Any differing views among legal writers and in the case-law in Italy as to the interpretation of that precept — and more specifically the concept of 'payment under a mistake' — are a matter affecting only domestic law, on which of course the Court of Justice must not express a view. Suffice it to say that the Corte Suprema di Cassazione (Supreme Court of Cassation), in judgment No 3458/96, cited above, considered that the time-limit laid down in the second paragraph of Article 3 of DPR 641/1972 extends to all charges for Government action unduly or mistakenly paid and, therefore, to the charge at issue in these proceedings. [6]

15. Starting from that premiss, I consider that no provision or principle of Community law prevents a national legislature from laying down limitation periods bringing about the extinguishment of rights or time-limits beyond which no action may be brought which differ according to the area of law involved, provided that they are applied without distinction to rights deriving from national provisions and to those deriving from Community provisions.

16. The national legislature is free to impose limitation periods or time-limits in the field of taxation and there is no need for them to coincide with those laid down for other relationships under civil law. No provision or principle of Community law obliges it, for such purposes, to treat tax relationships in the same way as relationships *inter privatos.*

17. Moreover, the Italian legal order sets very different time-limits according to the area of law concerned. Specifically, the general limitation period under ordinary law (ten years) is laid down by Article 2946 of the *Codice Civile* 'except where otherwise provided by law' and there are numerous legal provisions which in fact impose shorter periods for the barring of certain rights or the exercise of certain rights of action. [7]

5 — Point 7 of my Opinion in *EDIS.*

6 — In that respect, see point 12 of my Opinion in *EDIS*, setting out the reasoning of the judgment of the Corte di Cassazione.

7 — In the Italian *Codice Civile* itself, Article 2947 et seq., under the headings 'Short limitation periods' and 'Deemed limitation of actions', governs cases in which the limitation periods are shorter than usual. For example, five years for damages, five years in company matters, one year for transport and insurance contracts, one or three years, as the case may be, in employment relationships, and so on.

18. Like all the Member States that have submitted observations in these proceedings, I see no reason whatever for rejecting the view that a national legislature is entitled to impose for actions to recover tax revenue unduly paid time-limits for commencing proceedings which differ from those applicable to similar actions between private individuals.

19. The legitimacy of such a distinction was, moreover, upheld by the Court of Justice in paragraphs 22 to 25 of its judgment of 27 March 1980 in *Denkavit Italiana*. [8] After recognising that Community law does not necessarily require a uniform rule common to all the Member States relating to formal and substantive conditions for contesting or recovering charges contrary to that law, and that the way in which the problem is dealt with varies from one State to another, and even within a single Member State, depending on the various kinds of taxes or charges involved, the Court of Justice accepted the viability of the two main sets of national rules in this area:

— In certain cases, objections to or claims for the recovery of charges unduly levied are subject, under national law, to specific temporal and formal conditions, both for complaints addressed to the tax authorities and for legal proceedings.

— In other cases, actions for the repayment of charges unduly paid must be brought before the ordinary courts, mainly in the form of claims for the refund of sums paid but not owed. Such actions are available for varying lengths of time, in some cases for the limitation period laid down under the general law.

20. The Court immediately went on to say — reiterating what it held in *Rewe* and *Comet* [9] — that, from the Community point of view, the conditions to be met by the various national systems regarding claims for recovery of charges unduly paid whose illegality derived from Community law were those already mentioned: there should be no discrimination and the rights of action concerned should not be merely illusory. They are the expression, according to the recent judgment of 10 July 1997 in *Palmisani*, [10] of the 'principle of equivalence' (equivalence with the requirements laid down for similar claims of a domestic nature) and of the 'principle of effectiveness' of Community law respectively.

21. In a case similar to this one, the Court of Justice had an opportunity to clarify its earlier doctrine even further in giving a preliminary ruling on a question by which the national court sought 'in substance to ascertain the extent to which it is contrary to the general principles of Community law for national rules to provide for a mandatory time-limit of three years for the submission of all appli-

8 — Case 61/79 [1980] ECR 1205.

9 — Case 33/76 *Rewe* [1976] ECR 1989 and Case 45/76 *Comet* [1976] ECR 2043.

10 — Case C-261/95 [1997] ECR I-4025.

cations for reimbursement of duties unduly paid, where there are no grounds of *force majeure* justifying an exception'.

22. The reply, given in the judgment of 9 September 1989 in *Bessin and Salson*, [11] is perfectly applicable to the present case since the legal situations are patently analogous. The national provisions at issue in that case were those of the French Customs Code, which imposed a time-limit of three years for claims for the recovery of unduly paid import duties: those provisions departed from the general limitation period applicable where no other was specified, under the French Civil Code, to claims for the refund of sums unduly paid.

23. In its ruling on that question, the Court of Justice, after referring to the requirement of non-discriminatory application of national legislation, as compared with proceedings in purely national disputes of the same kind, and stating that such legislation must not make it impossible in practice to exercise the rights conferred by Community law, held that the three-year limitation period reflected 'a legislative choice which does not have the effect of undermining the aforesaid requirement'.

24. Finally, in two judgments of 17 July 1997, *Texaco and Olieselskabet Danmark* [12] and *Haahr Petroleum*, [13] the Court of Justice repeated the same principle, confirming that 'the laying down of reasonable limitation periods, which is an application of the fundamental principle of legal certainty, satisfies the two conditions referred to above and, in particular, cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought'. Consequently, it held that the limitation period of five years applied by Danish law to applications for the reimbursement of national taxes contrary to Community law was compatible with Community law, even where it wholly or partly prevented the requested refund.

25. There would thus be discrimination if the Italian provision barring actions for reimbursement of charges unduly paid laid down different time-limits according to the origin — in national or Community law — of the obligation to repay them. That would be the case if the legally prescribed period for claiming a refund of the charge, on the ground of incompatibility with Community law, were shorter than the legally prescribed period for claiming refund of the same charge on any ground of national law. But since that is not the case and the time-limit laid down by Article 13(2) of DPR 641/1972 applies without distinction to all actions for repayment of the charge, whatever their basis, the answer to

11 — Case 386/87 [1989] ECR 3551, paragraphs 15 to 18.

12 — Joined Cases C-114/95 and C-115/95 [1997] ECR I-4263, paragraphs 45 to 49.

13 — Case C-90/94 [1997] ECR I-4085, paragraphs 46 to 53.

the second question must uphold the compatibility of that provision with Community law.

26. As regards the other aspects of this question which were not directly mentioned by the national court, but by the Commission in its observations, [14] I refer to what I have already said in my Opinion in *EDIS* (points 51 to 65).

(ii) *Time-limit antedating proper transposition of the directive into national law*

27. The national court seeks to determine the compatibility or otherwise with Community law of national legislation which, in relation to actions for the recovery of taxes unduly paid, sets as the starting point of the three-year time-limit the date of payment of the tax, at which time the Community directive applicable to it had not been correctly incorporated into national law.

28. The written observations of the plaintiff, the Commission and various Member States have focused on the impact on this problem of the judgment of the Court of Justice of 25 July 1991 in *Emmott*. [15] In that judgment the Court of Justice stated that 'until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred on him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time'. [16]

29. It is true that the scope of *Emmott* had nevertheless subsequently been cut down by the Court of Justice when it emphasised that the rule in that case can be applied only when the same singular circumstances arise as characterised that case. In its judgments in *Steenhorst-Neerings*, [17] and in *Johnson*, [18] the Court of Justice confirmed that national limitation periods applied to requests for payment of sums owing in respect of social benefits under certain directives, even where the directives in question had not been properly incorporated into national law.

30. While the present case has been pending, the Court of Justice has given judgment in *Haahr Petroleum* and *Texaco and Olie-*

14 — In this case, the Commission merely referred to its observations in *EDIS*.

15 — Case C-208/90 [1991] ECR I-4269.

16 — Paragraph 23.

17 — Case C-338/91 [1993] ECR I-5475.

18 — Case C-410/92 [1994] ECR I-5483.

selskabet Danmark, cited above. In them it again rejected application of the principle laid down in *Emmott*. In both cases a claim for a refund — based on infringement of Article 95 of the Treaty — had been dismissed by the Danish authorities in reliance on a national provision under which legal proceedings to secure the refund of taxes unduly paid becomes barred after a period of five years reckoned from the date of payment. The Court of Justice repeated that, even where that provision wholly or partly prevented the repayment of the taxes in question, its application to those two cases was not contrary to Community law.

31. Finally, two months before the hearing in this case the Court of Justice gave judgment in *Fantask*, [19] which is particularly important in the present context since the factual and legal aspects of that case and this were similar. *Fantask* was concerned with the repayment of sums relating to:

— the same type of national tax (Danish tax on the registration of companies);

— the same type of incompatibility with Community law (specifically, Directive 69/335) of the national provision governing the charge;

— the same barrier of national time-limits or limitation periods (five years, under national legislation, reckoned from the day of payment of the tax).

32. As in this case, in *Fantask* the national court, confronted with a dispute of the kind described, asked the Court of Justice 'whether Community law prevents a Member State from relying on a limitation period under national law to resist actions for the recovery of charges levied in breach of the Directive as long as that Member State has not properly transposed the Directive'. The submissions of the plaintiff companies and of the Commission were also based on the rule in *Emmott*, the application of which was argued against by the Governments that submitted observations.

33. The Court of Justice chose once more to adopt the last-mentioned solution, reiterating the line of reasoning which I have outlined above.

19 — Case C-188/95 [1997] ECR I-6783, paragraphs 42 to 52.

34. First, as a general principle, it pointed out that, in the absence of Community legislation on the matter, it is for the domestic legal order of each Member State to regulate proceedings for the recovery of sums unduly paid, provided that the conditions are not less favourable than those governing similar domestic claims and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

35. Secondly, after emphasising the compatibility with Community law of the setting of reasonable time-limits within which proceedings had to be commenced or else be barred, in the interests of legal certainty which protects both the taxpayer and the Administration, it stressed that it cannot be considered that such time-limits make it virtually impossible or extremely difficult to exercise rights conferred by Community law, even where, by definition, failure to comply with them means that the action will fail wholly or in part. Specifically, the period of five years laid down by Danish law was reasonable and was applied in the same way to actions based on Community law as to those based on domestic law.

36. Thirdly, it again rejected the application to proceedings of this kind of the rule in *Emmott*, the solution adopted in that case being justified by its own special circumstances in which the time-bar had the effect of entirely depriving the plaintiff of any opportunity of asserting her right to equal treatment under a Community directive.

37. Finally, the Court of Justice concluded 'Community law, as it now stands, does not prevent a Member State which has not properly transposed [the directive] from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.'

38. In view of the clarity of the terms used by the Court and of the evident analogy between the factual and legal situations in *Fantask* and this case, the Commission decided, at the hearing, not to adhere to its earlier position and conceded that the question had been definitively settled by the judgment in *Fantask*. The plaintiffs in the main proceedings, on the other hand, endeavoured on the same occasion [20] to highlight differences between Danish and Italian law which made it inappropriate to apply the rule in *Fantask* to the present case.

20 — A joint hearing was held for Case C-231/96 *EDIS*, C-260/96 *SPAC*, C-279/96, *Ansaldo Energia*, C-280/96 *Marine Insurance Consultants*, and C-281/96 *GMB and Others*.

39. In my opinion that endeavour was misconceived. First, because its point of departure was wrong: rather than finding alleged differences between *Fantask* and that case, what it needed to prove was that the situations in *Emmott* and that case were analogous, since the case-law subsequent to *Emmott* had drawn attention to the singularity of the circumstances of that case, which decisively affected the solution adopted. At the hearing the United Kingdom Government stressed in that respect that — among other things — it was Mrs Emmott's own authorities who urged her not to appeal. On the contrary, nothing prevented the Italian companies from exercising their right of appeal against the tax assessments made against them. [21]

40. Second, and regardless of the foregoing point, the alleged differences between one national legislation and another are irrelevant as regards the repercussions for this case of the rule in *Fantask*. Whether the time-limit is of five or of three years and whether it is laid down in a general rule or a special rule applicable to a specific class of taxes and whether or not there has been a change in the case-law on the interpretation of that pre-existing provision, what is important is that the Court of Justice has confirmed that the time-limit — of five or of three years — which can be relied on to resist actions, founded on Community law, for the repayment of taxes improperly levied, may start to run from the time at which they were paid and not from the time at which the State properly transposed the directive into national law.

41. That statement — which, obviously, presupposes the non-existence of provisions of Community law governing the matter and the existence of a national provision which lays down the time-limit on a non-discriminatory basis — is not rendered invalid by the fact that, logically, the expiry of that period prevents repayment of the tax paid. That is an inherent feature of a time-limit of that kind which, inspired by the principle of legal certainty, does not thereby detract from the right to judicial protection: in the period of three years following payment, the possibility of challenging the tax assessment was open to the taxpayers.

42. It might be thought that that solution is not particularly satisfactory from the standpoint of taxpayers who have been obliged to pay a tax contrary to Community law. And that is indeed the case. A possible solution, albeit one not without serious difficulties, would be to establish uniform Community rules on this point, harmonising the various national regimes. Until such legislation exists, it is for the Member States to determine, under the conditions amply described above, the requirements for actions for reimbursement.

21 — EDIS's own counsel made this clear at the hearing when he conceded that, as early as 1989 (and thus not only before judgment was delivered in *Ponente Carni* but even before the request for a preliminary ruling was submitted in that case), another EDIS company linked with his client and certain other Italian companies had taken proceedings to challenge the charge for entry on the register. Although their actions were dismissed, on substantive grounds, it is clear that they were not denied legal protection.

43. It is true that, in the exercise of that power, the Member States — as far as this case is concerned, the Italian Republic — must act in accordance with the requirements of Article 5 of the Treaty. It is also true that some conduct on the part of the Italian authorities regarding repayment of the charge at issue in these proceedings, as described in the submissions of the parties, appears to have placed in the way of actions for reimbursement more obstacles than might reasonably be expected, in the light of that article. [22] But these preliminary-ruling proceedings cannot be converted into infringement proceedings under Article 169 of the Treaty, nor can the fact be overlooked that the official action taken by the Italian Republic has been essentially in conformity with the obligations deriving from the Treaty: its legislative authorities have abolished the national tax which was contrary to Community law and expressly recognised entitlement to reimbursement of it, [23] a right which is also safeguarded by the Italian judicial authorities, albeit subject to the limitations of the domestic provisions on limitation of actions.

Conclusion

44. I therefore propose that the Court of Justice give the following answers to the questions submitted by the Corte d'Appello di Venezia:

(1) Community law does not preclude national law from imposing a time-limit of three years for bringing proceedings against the tax authorities to recover taxes paid but not due even where that time-limit is different from that laid down for recovery of sums paid but not due between individuals, provided that that time-limit applies without distinction to actions for reimbursement based on domestic law and those which derive from the application of Community provisions.

(2) Community law does not preclude application to a claim for reimbursement of a tax which is incompatible with a directive of a national provision under

22 — *Inter alia*, the need to bring legal proceedings in order to secure a right enforceable against the tax authorities, a requirement which may also lead to an unjustified increase in litigation — and, thereby, a delay in the administration of justice — to the detriment of taxpayers.

23 — Article 61 of Decree-Law No 331 of 30 August 1993 lays down the procedure for reimbursement of sums improperly paid in that respect, either by means of an administrative claim (for sums paid in respect of the 1992 tax year) or by a claim for compensation (for those paid in respect of 1993).

which a right of action to bring proceedings for reimbursement of taxes paid but not due is barred on the expiry of three years after payment, even where that provision totally or partially prevents repayment of the taxes concerned.