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

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

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

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

1 — Translated from the German.

the Community rules, and in particular with the basic intention of Articles 13 (2) and 92 of the EEC Treaty?

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

In regard to these questions my opinion is as follows:

Both questions referred to this Court for a preliminary ruling concern the basic problem upon which I have already expressed my views in my opinion of 4 December 1979 in Case 68/79 *(Hans Just I/S* v *Danish Ministry for Fiscal Affairs),* that whether duties which are paid in accordance with provisions of national law but which are only subsequently declared by the Court of Justice to be incompatible with Community law have to be refunded. Since both questions relate only to different aspects of the problem of the extent to which Community law provides for reimbursement to individuals of charges for public health inspections levied by the Italian finance administration in contravention of Article 13 (2) of the EEC Treaty, I find it convenient to examine both questions together.

In this connexion, it has first to be pointed out that the Court of Justice has already decided in a series of judgments that pecuniary charges levied by way of public health inspections on goods crossing a frontier are to be considered as charges having an effect equivalent to customs duties within the meaning of Article 13 (2) of the EEC Treaty in so far as they do not form part of a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike at the same stage of marketing (see Case 29/72, *S.p.A. Marimex* v *Italian Finance Administration,* judgment of 14 December 1972 [1972] ECR 1309; Case 87/75, *Conceria Daniele Bresciani* v *Amministrazione Italiana delle Finanze,* judgment of 5 February 1976 [1976] ECR 129; Case 35/76, *Simmenthal S.p.A.* v *Italian Minister for Finance,* judgment of 15 December 1976 [1976] ECR 1871; Case 70/77, *Simmenthal S.p.A.* v *Amministrazione delle Finanze dello Stato,* judgment of 28 June 1978 [1978] ECR 1453).

Further, the case-law of the Court has established that the nature of Article 13 (2) of the EEC Treaty is such that, since 1 January 1970 at the latest, it produces direct effects upon the legal relationships between the Member States and their citizens in that it confers on individuals rights which the national courts are bound to protect (cf Case 29/72, *Marimex;* Case 63/74, *W. Cadsky S.p.A.* v *Istituto Nazionale per il Commercio Estero,* judgment of 26 February 1975 [1975] ECR 281; Case 87/75, *Bresciani;* Case 33/76, *REWE-Zentralfinanz eG* v *Landwirtschaftskammer für das Saarland,* judgment of 16 December 1976, [1976] ECR 1989 and Case 45/76, *Comet B.V.* v *Produktschap voor Siergewassen,* judgment of 16 December 1976, [1976] ECR

2043). Closely connected with the far-reaching nature of Community Law thus described is the principle, emphasized in the established case-law of the Court, of its pre-eminence over national law. Thus the Court of Justice has already pointed out in Case 6/64 *(Flaminio Costa* v *ENEL,* judgment of 15 July 1964, [1964] ECR 585) that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question". The judgment of the Court continues by stating that "the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail". This pre-eminence of Community law emphasized by the Court which is ultimately founded on the principle that the Community must be workable and which is reflected in Article 5 of the EEC Treaty, is therefore intended to prevent the application of the Treaty from differing from State to State, in that national law, in so far as incompatible, may no longer be applied by any national institution without there being any need for its formal repeal. In that respect the preliminary rulings of the Court of Justice under Article 177 of the EEC Treaty on the interpretation of that Treaty also have merely declaratory effect. In my opinion the same applies — this much should be said in answer to the Italian Government's objection — as regards judgment of the Court which are delivered in actions for a declaration that a Member State has failed to fulfil its obligations under Articles 169 and 170 of the EEC Treaty in which the Court makes such a declaration. Article 171 of the EEC Treaty, under which a Member State is required to take the necessary measures to comply with the judgment of the Court of Justice, creates no new substantive obligations but merely reinforces the already existing obligation not to apply, or, as the case may be, to repeal, incompatible national law.

As I have already stated in my opinions in Case 77/76 *(Fratelli Cucchi* v *Avez S.p.A.,* judgment of 25 May 1977 [1977] ECR 987) and Case 68/79 *(Just),* it follows further from the meaning and the purpose of direct applicability that, in principle, payments made on the basis of national law which is incompatible with Community law must be refunded. That there is a duty to repay charges levied as part of a national marketing system which is not compatible with Community law was expressly laid down by the Court in its judgment of 26 June 1979 in Case 177/78 *(Pigs and Bacon Commission* v *McCarren and Company Limited)* in which it was stressed that "In principle any trader who is required to pay the levy has ... the right to claim the re-imbursement of that part of the levy which is thus devoted to purposes incompatible with Community law" (cf also the opinion of Mr Advocate General

Warner of 15 May 1979 in that case). Moreover, it appears to me that the Court has already assumed such a right in its judgment of 16 December 1976 in Case 33/76 *(REWE)* in which the court making the reference had asked, by way of a reference for a preliminary ruling, *inter alia* whether, where an administrative body in one State has infringed the prohibition on charges having an effect equivalent to customs duties, the Community citizen concerned had a right under Community law to a refund of the amount paid. As in the present case, the Government of the Italian Republic took, with reference to the same arguments, the view that the reimbursement of customs duties could not be claimed before these duties had been the subject of a relevant decision intended to establish their nature as charges having an effect equivalent to customs duties. Although the Court did not have to deal expressly with the question of repayment because the limitation periods stipulated under national procedural law had expired, it apparently assumed by implication that there was such a duty of repayment in that, in regard to the questions asked, it pointed out that the prohibition laid down in Article 13 of the EEC Treaty has direct effect and confers rights on individual citizens which the national courts are bound to protect.

The latter, as I explained in my opinion in Case 68/79 *(Just)*, with reference to the case-law of the Court of Justice, so long as Community law does not provide any independent rules, may protect these rights only in accordance with their own legal system. As the Italian Government correctly points out, this recourse to national law makes reimbursement dependent upon the differing individual rules of the various Member States, but, as was made clear in Case 177/78 *(Pigs and Bacon Commission)*, corresponds to the present state of integration in the field of the protection of the rights of the individual. That the legal position of the individual may thus differ in the various Member States is simply a consequence of the implementation of Community law by the Member States, which is accepted by the Community legal system. As appears from the judgment of the Court in the *REWE* case, the courts of the Member States must however take heed that the conditions for bringing an action to enforce rights flowing from Community law must not be less favourable than those relating to the enforcement of similar claims arising under national law and, further, the bringing of such an action must not be made impossible in practice.

In the interests of the uniform application of Community law, the Italian Government seeks to infer from the Community legal system further limits to the obligations of the national administrations to repay sums levied in contravention of the prohibition on the application of charges having an effect equivalent to customs duties. It points out that the refund of such payments would lead to an actual enrichment of, or, more precisely, to a higher and unexpected profit margin for the trader concerned since he will obviously have already included the corresponding sums in his calculation of costs and passes them on to purchasers. A refund is, in essence, an "aid" to the domestic trader; retroactive redress for unequal treatment, which has already irreversibly damaged

trading relationships by making them subject to a system different from that intended by the authors of the Treaty, would, in practical terms, lead to just that distortion of conditions of trading and competition which Community law seeks to prevent.

In my opinion those arguments cannot be sustained for the following reasons:

I have already stated that it follows from the direct effect of Community law that payments which have been wrongly levied are, in principle, to be refunded, for otherwise the implementation of Community law might be thwarted by the fact that a Member State levies these charges contrary to the provisions of Community law. This obligation must also apply to payments which were levied in contravention of the prohibition contained in Article 13 (2) of the EEC Treaty. That provision, which provides that charges having an effect equivalent to customs duties on imports, in force between Member States, shall be progressively abolished by them during the transitional period, is, as its position in the Treaty shows, one of the fundamental principles of the Community and plays an essential part in the establishment of the Common Market. As the Court has already repeatedly stated (cf Case 87/75, *Bresciani*; Case 77/72, *Carmine Capolongo* v *Azienda Agricola Maya*, judgment of 19 June 1973 [1973] ECR 611) the justification for this rule is that pecuniary charges of any kind which are based on importation constitute a restriction on the free movement of goods. It therefore follows from the *ratio* of this rule that such wrongfully levied pecuniary charges must, in principle, be repaid, irrespective of whether or not the importer has passed on these indirect charges in the price. If he has succeeded in doing that, the wrongfully levied pecuniary charges fall upon the subsequent purchasers, who may if those charges are repaid perhaps have recourse under national law against the importer for recovery of the charges.

Be that as it may, however, it is very difficult to ascertain whether the importer was in fact able wholly or only partly to pass on the unlawful charges in the price of the goods, since this question depends upon the general state of the market and the particular situation of the undertaking and can only be answered by a consideration of the details of the actual case. In addition it has further and particularly to be borne in mind that the unlawfully levied dues very probably increased the price of the goods thereby affecting adversely the volume of sales with the result that, apart from any loss of interest, the earnings of the importer were diminished by that alone.

Community law provides no rules for such difficult questions, which may only be resolved by the national courts in the light of the actual individual case. In the absence of any such rule of Community law, it must, to my mind, be a matter for the courts of the Member States alone to decide according to their own rules of law whether, and if so to what extent, charges having an effect equivalent to customs duties which were wrongly levied are to be repaid.

It also follows already from the foregoing that the repayment of wrongly paid charges having an effect equivalent to customs duties in consequence of an

obligation of Community law cannot by definition represent an aid which is incompatible with the common market within the meaning of Article 92 of the EEC Treaty. Since all the parties to the proceedings to obtain a preliminary ruling, including the Italian Government, apparently agree on this point I may likewise content myself with a few brief observations.

Article 92 (1) of the EEC Treaty provides that, save as otherwise provided, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. As we have seen, Community law, however, prescribes precisely the refund of wrongly levied charges. Article 92 (1) applies only to aid granted by a Member State or through State resources. It is essential to the concept of an aid, however, that the grant from the State is made for no consideration and gives the beneficiary advantages on the basis of national provisions or rules fixed by the State. The repayment of wrongly paid duties, however, takes place on the basis of a judicial decision in order to reverse a measure which distorts competition and therefore gives, as we have seen, the undertaking concerned no advantage. Since only the amount wrongly charged is repaid, it does not to that extent amount to a distribution of State resources. Nor, since no award of a benefit for no consideration is involved, is the economic situation of undertakings engaged in international trade improved compared with that of their competitors who receive no similar payments, and, accordingly, international competition is not distorted.

The Italian Government further takes the view that, having regard to the criteria contained in the judgment of 8 April 1976 in Case 43/75 *(Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455), the direct effect of Article 13 (2) of the EEC Treaty cannot, by the construction of an inherently pre-eminent ground of claim based on Community law, lead to the party concerned being given an absolute and perpetual right to repayment. In the judgment cited, the Court recognized the direct effect of Article 119 of the EEC Treaty but limited its application to the period after the delivery of the judgment, except as regards those workers who had already brought legal proceedings or made an equivalent claim. The grounds upon which the Court distinguished between a finding that there had been a failure to fulfil an obligation under the Treaty and the affirmation of the existence of an obligation retroactively to remedy the prejudicial effects arising from that failure to fulfil an obligation under the Treaty, namely, the economic consequences, the conduct of the Member States, the absence of action on the part of the Commission, and the mistaken impression of the effect of the relevant rules of Community law, applied also, it was stated, in the field of charges having an effect equivalent to customs duties, especially when payments had been levied on the basis of an erroneous interpretation of Community law.

However, as I have already pointed outin my opinion in Case 68/79 *(Just)* and as was also emphasized by Mr Advocate General Warner in his opinion in Case 33/76 *(REWE)*, the factual context in which wrongfully levied charges are claimed back from Member States is not comparable with that in the *Defrenne* case. Thus the Commission in particular also correctly points out that what was at stake in the *Defrenne* case were essentially the interests of private individuals who were misled both by the conduct of several of the Member States and by the Community institutions and who have arranged their financial affairs accordingly. The point in the present case, however, is simply that duties which should not have been levied are to be refunded. In the *Defrenne* case private employers in particular paid different wages to men and women on the basis of national legislation or collective wage agreements, whereas in the present case the Italian Republic itself promulgated the rules which were incompatible with Community law. There are thus no compelling considerations of legal certainty for restricting the temporal scope of the judgment.

I therefore suggest that the questions should be answered as follows:

It follows from the direct effect of Article 13 (2) of the EEC Treaty that individuals are entitled to repayment of charges having an effect equivalent to customs duties levied in contravention of that provision since 1 January 1970. It is however a matter for the national court to decide whether and to what extent the charges are to be paid, and in thus deciding it may, in accordance with its rules of law, take into account, in particular, the fact that the charge in question may have already been passed on to the purchasers of the imported products. The conditions for the bringing of an action to enforce this right must however not be less favourable than those relating to the enforcement of similar claims arising under national law and, further, the bringing of such an action must not be made impossible in practice.