JUDGMENT OF THE COURT (Fifth Chamber)

2 October 2003 *

In Case C-147/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Weber's Wine World Handels-GmbH,

Ernestine Rathgeber,

Karl Schlosser,

Beta-Leasing GmbH

and

Abgabenberufungskommission Wien,

on the interpretation of Article 5 of the EC Treaty (now Article 10 EC) and paragraph 3 of the operative part of the judgment of the Court in Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Schlosser, by T. Jordis, Rechtsanwalt,

— Beta-Leasing, by W. Arnold, Rechtsanwalt,

— the Abgabenberufungskommission Wien, by K. Pauer, acting as Agent,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, with G. De Bellis, avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa and V. Kreuschitz, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Rathgeber, represented by W. Ilgenfritz, Prozeßbevollmächtigter, of Mr Schlosser, represented by T. Jordis and G. Stefan, Rechtsanwalt, of Beta-Leasing GmbH, represented by W. Arnold, of the Abgabenberufungskommission Wien, represented by L. Pramer, Rechtsanwalt, of the Austrian Government, represented by H. Dossi, and of the Commission, represented by E. Traversa and V. Kreuschitz, at the hearing on 12 December 2002,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2003,

gives the following

Judgment

1 By order of 23 March 2001, received at the Court on 2 April 2001, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 5 of the EC Treaty (now Article 10 EC) and of paragraph 3 of the operative part of the judgment of the Court in Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157 ('the *EKW* judgment').

2 That question has been raised in proceedings between Weber's Wine World Handels-GmbH, Ms Rathgeber, Mr Schlosser and Beta-Leasing GmbH ('the claimants in the main proceedings') and the Abgabenberufungskommission Wien (Tax Appeals Commission for the City of Vienna (Austria)) ('the tax authority') concerning the retroactive nature of Article 185 of the Wiener Abgabenordnung ('Vienna Tax Code'; 'the WAO'), which makes a claim for repayment of the duty

on alcoholic beverages declared incompatible with Community law in the *EKW* judgment subject to the condition that the duty has not been passed on to third parties.

Legal framework

Community legislation

3 Article 5 of the Treaty provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

4 Paragraph 3 of the operative part of the *EKW* judgment is worded as follows:

'The provisions of Article 3(2) of [Council] Directive 92/12[/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the

holding, movement and monitoring of such products (OJ 1992 L 76, p. 1)] cannot be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of the present judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent administrative claim.'

National legislation

5 Paragraph 162 of the WAO provides:

'1. The taxable person's tax credits shall be applied in payment of the debts which are due.

2. In so far as the tax credits are not to be applied as provided for in subparagraph 1, they shall be repaid in accordance with the provisions of Paragraph 185.'

6 Under the provisions in force before 2 March 2000, a taxable person could, pursuant to Paragraph 185(1) of the WAO, claim repayment of tax credits not applied in payment of debts which were due. The repayment of such tax credits was not subject to any other precondition.

7 Paragraph 1 of the Law published on 2 March 2000 (LGBl. für Wien No 9/2000, 'the amending act'), amended the WAO by inserting, *inter alia*, subparagraphs 3 and 4 into Paragraph 185 of that code. Furthermore, Paragraph 2 of the

amending act provided that Paragraph 1 thereof was also applicable to tax liabilities which had arisen before promulgation of that act.

8 A new amending act, dated 20 February 2001 (LGBl. für Wien No 7/2001), also supplemented the first sub-subparagraph of Paragraph 185(3) of the WAO.

9 Paragraph 185 of the WAO, as amended by the two abovementioned amending acts, provides:

'(1) The taxable person may apply for the repayment of credits (Paragraph 162(2)). Repayment may also take place of the authority's own motion.

(2) Liabilities to duty whose amount has been determined, and which the taxable person will have to pay not later than three months from the making of the application for repayment, may be set off against the amount of repayment.

(3) No entitlement to repayment exists where the economic burden of the duty was borne by someone other than the taxable person; nor does the reduction of the determination of duty by self-assessment or an assessment decision result in a credit in this respect. Where a duty which has thus been passed on has not yet been paid, the tax authority must prescribe this by a separate decision.

(4) Paragraph 3 is not applicable to taxable persons who are able to rely on the "Anlaßfallwirkung" as regards the tax provisions held by the Verfassungsgerichtshof to be unlawful.'

10 In Austrian law, the 'Anlaßfallwirkung' is applicable, *inter alia*, following a judgment of the Verfassungsgerichtshof declaring a law unconstitutional. In such a situation, the law is not annulled with retroactive effect but, unless the Verfassungsgerichtshof decides otherwise, remains applicable to facts which arose before the declaration of unconstitutionality. However, in the case which gave rise to the examination of constitutionality and also in those pending before the Verfassungsgerichtshof at the time when it began to consider that case, the law in question must no longer be applied.

Factual background

The circumstances prevailing at the time of the adoption of the amending act

11 In 1997 the Verwaltungsgerichtshof, in a dispute between the tax authorities and taxable persons concerning the compatibility with Community law of the duty on beverages — and more particularly with the provisions on value added tax, excise duties and State aid —, referred a number of questions to the Court of Justice for a preliminary ruling, which the Court answered in the *EKW* judgment.

12 In his Opinion of 1 July 1999 in *EKW*, Advocate General Saggio proposed that the Court should rule that both Directive 92/12 and the Community rules on State aid precluded the maintenance of the duty on beverages.

13 Furthermore, in examining the Austrian Government's request that the effects of the forthcoming judgment should be limited in time should the Court decide that the duty on beverages was incompatible with Community law, the Advocate General submitted that that request should be refused, since he saw nothing to justify it.

14 That Opinion gave rise to great anxiety among the Austrian local authorities, which feared that they would be compelled to repay very large sums.

15 According to the order for reference, all the Austrian *Länder*, following delivery of Advocate General Saggio's Opinion, amended their tax legislation so that duties levied though not due would not be repaid or set off where they had been passed on to third parties. Those amendments were all introduced following delivery of the Opinion, but, except in one case, before delivery of the *EKW* judgment, although at a time when the date of delivery had already been announced.

16 In the *Land* of Vienna, the amending law was enacted on 2 March 2000, one week before delivery of the *EKW* judgment.

17 At paragraph 2 of the operative part of that judgment, the Court ruled that Article 3(3) of Directive 92/12 does not preclude the maintenance of a tax charged on non-alcoholic beverages and ice cream.

18 At the same paragraph of the operative part, however, the Court ruled that Article 3(2) of Directive 92/12 precludes the maintenance of that tax in so far as it concerns alcoholic beverages.

19 In answer to the Austrian Federal Government, however, which had claimed that a judgment which required reimbursement of the duty on beverages would have serious financial consequences and that, in any event, the taxable persons had passed the duty on to consumers by incorporating the duty in the price of the beverages, the Court, at paragraph 59 of the *EKW* judgment, recognised the existence of 'overriding grounds of legal certainty [which] preclude calling in question legal relations which have exhausted their effects in the past... [since] to do so would retroactively cast into confusion the system whereby Austrian municipalities are financed'.

20 Consequently, at paragraph 3 of the operative part of the *EKW* judgment, the Court limited the temporal effects of the judgment by precluding any possibility of repayment of the duties paid and not challenged before the date of the judgment.

The main proceedings

21 Weber's Wine World Handels-GmbH is a wine dealer, whereas each of the other claimants in the main proceedings operates a restaurant.

22 In those capacities, they were subject, pursuant to the WAO, to the duty on beverages. As this is a 'self-assessed' duty, it is the taxable person who calculates and, not later than the 15th of each month, pays the duty payable for the previous month, without a prior tax notice from the tax authorities. Subsequently, each taxable person sends, not later than 15 February of each year, a tax return in respect of the tax debt for the previous year.

23 The claimants in the main proceedings calculated and paid the duty on alcoholic and non-alcoholic beverages. Subsequently, however, they withdrew their tax declarations, claiming that the duty was unlawful under Community law, and claimed repayment thereof.

24 In 1998, the claimants in the main proceedings applied to the Abgabenbehörde erster Instanz (the authority competent at first instance for collection of duties) for repayment of the duty on beverages in respect of certain periods between 1995 and 1998, on the ground that the duty was contrary to Directive 92/12 and that it had been wrongfully levied.

25 The Abgabenbehörde erster Instanz held that the claimants in the main proceedings were liable to pay the duty on both alcoholic and non-alcoholic beverages and dismissed the claims for repayment, since in its view the sums already paid by the taxable persons corresponded to the amount payable.

26 The claimants in the main proceedings appealed against those decisions to the tax authority, which, by decisions of 6 September 2000, amended the amount of the duty on beverages set at first instance, on the ground that only sales of non-alcoholic beverages should be taxed, in accordance with the *EKW* judgment.

27 However, the tax authority rejected the claims for repayment of the duties already paid, since it took the view that the inquiry had revealed that they had been definitively passed on by the taxable persons to the final consumer.

28 The claimants in the main proceedings appealed to the Verwaltungsgerichtshof against the decisions of 6 December 2000, in so far as they dismissed the claims for repayment of the duty on alcoholic beverages for the period 1995 to 1998.

29 All the claimants in the main proceedings maintain that their right to repayment of the duty on alcoholic beverages levied in breach of Community law has been infringed. In particular, they claim that the new amending act, adopted on 20 February 2001, or after delivery of the *EKW* judgment, infringes the duty of loyal cooperation laid down in Article 5 of the Treaty and that the retroactive nature of Paragraph 185(3) of the WAO constitutes a breach of the principle of protection of legitimate expectations. They all further state that the duty was not passed on to consumers.

30 The tax authority has always taken the opposite point of view to that of the claimants in the main proceedings.

The order for reference and the question for the Court

31 The Verwaltungsgerichtshof considers that the *EKW* judgment places the Republic of Austria under an obligation, derived from the duty of loyal cooperation laid down in Article 5 of the Treaty, to repay the unlawfully levied duty on alcoholic beverages to each taxable person who had initiated legal proceedings or raised an equivalent administrative claim before the date of delivery of that judgment.

32 It considers, however, that the fact that repayment of the duty is made subject to its not having been passed on to third parties is not contrary to Community law.

33 On the other hand, the national court is uncertain as to the compatibility with Community law of the retroactive nature conferred on Paragraph 185(3) of the WAO, since, according to paragraph 3 of the operative part of the *EKW* judgment, any taxable person who before 9 March 2000 had lodged an administrative complaint in respect of the duty on alcoholic beverages should have his claim granted, whereas, under the amending act, the objection might be raised that the economic burden of the duty was borne by the third parties.

34 In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Article 10 EC (formerly Article 5 of the EC Treaty) and point 3 of the operative part of the [*EKW*] judgment..., according to which Article 3(2) of Directive 92/12/EEC may not be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of that judgment, except by claimants who before that date initiated legal proceedings or raised an equivalent administrative claim, preclude the application of the provision, created by the amendment to the Wiener Abgabenordnung (Vienna Tax Code, WAO) of 2 March 2000, LGBl. No 9/2000, and *applicable also to tax liabilities which arose before promulgation of that amendment*, in Article 185(3) of the WAO, under which there is no claim to repayment where the economic burden of the duty was borne by a person other than the taxable person?'

The question referred to the Court

Observations submitted to the Court

35 The claimants in the main proceedings begin by referring to the Court's case-law on the obligation placed on Member States to repay taxies levied in breach of the provisions of Community law.

36 Thus, where the Court declares that Community law precludes the maintenance of a national tax, it follows, according to a consistent line of decisions, that the Member State concerned is under an obligation, under Article 5 of the Treaty, to repay to the individual the tax which has been levied though not due.

37 However, in the absence of Community rules on recovery of national taxes which have been levied though not due, it is for the internal legal order of the Member States to designate the competent courts and to lay down the procedural rules of judicial proceedings designed to ensure the protection of the rights which individuals derive from Community law.

38 For reasons of legal certainty, the Member States are in principle permitted to limit, at national level, the repayment of taxes which have been levied though not due. Such restrictions should, however, satisfy the principle of equivalence, which requires that the national provisions apply in the same way to purely domestic cases and to those arising under Community law, and to the principle of effectiveness, which requires that the exercise of the rights conferred by the Community legal order is not rendered impossible in practice or excessively difficult.

39 Furthermore, the claimants in the main proceedings recognise that a Member State may refuse to repay taxes levied in breach of Community law in so far as they have been passed on to other persons by the taxable person and the latter would thereby be unjustly enriched, which it is for the national authority to establish.

40 However, the claimants in the main proceedings claim that the Court has held in a number of judgments that Community law precludes a national legislature, subsequent to a judgment of the Court, from adopting procedural rules which specifically reduce the possibilities for the taxable person of bringing proceedings for recovery of taxes which were levied though not due. Such rules constitute a breach of the prohibition, deriving from Article 5 of the Treaty, on frustrating Community law (Case 199/92 *San Giorgio* [1983] ECR 3595, paragraph 14; Case 240/87 *Deville* [1988] ECR 3513, paragraph 13; Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 16; and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 39).

41 According to the claimants in the main proceedings, Paragraph 185(3) of the WAO, read with Paragraph 2 of the amending act, does not fulfil the requirements laid down by the Court in its decisions on the recovery of sums levied but not due.

42 The condition that the tax has not been passed on laid down in Article 185(3) of the WAO infringes both the principles of equivalence and effectiveness and the prohibition on frustrating Community law which derives from Article 5 of the Treaty.

43 First, it is contrary to the obligation of cooperation deriving from Article 5 of the Treaty because, although it is formulated in general terms, in practice it is aimed at only a small number of indirect taxes which, on the basis of the internal division of powers, are levied by the *Länder* and the municipalities and, consequently, what is essentially concerned is the duty on alcoholic beverages held to be contrary to Community law.

44 Next, the retroactive effect conferred on Paragraph 185(3) of the WAO by Paragraph 2 of the amending act, provided that the tax has not been passed on, is contrary to the principle of effectiveness because it is difficult to establish after the event that the duty on alcoholic beverages was not passed on to the final consumer.

45 Last, as Beta-Leasing GmbH claimed at the hearing, Austrian law is also contrary to the principle of equivalence, since the WAO provides at Paragraph 185(4) that subparagraph 3 of that paragraph is not to apply where it is possible to rely on the 'Anlaßfallwirkung' and that a taxable person may obtain repayment of the amount paid by way of duty levied on the basis of tax provisions which have been declared unconstitutional by the Verfassungsgerichtshof. On the other hand, there is no equivalent provision for repayment of a duty levied on the basis of national provisions which have been held to be contrary to Community law by decision of the Court of Justice, since such repayment is conditional upon the economic burden of the duty not having been passed on to third parties, in application of Paragraph 185(3) of the WAO. Consequently, there are two types of taxpayers in Austria: those entitled to repayment of a tax which has been levied though not due, provided that certain conditions are satisfied, including the condition that the tax has not been passed on to third parties, and those able to rely on a precedent in the form of a declaration by the Verfassungsgerichtshof that a tax provision is unconstitutional.

46 The claimants in the main proceedings further submit that, according to the Court's case-law, it is not permissible to place on the taxable person the burden of establishing that the tax was not passed on to the final consumer.

47 They maintain that the obligation for the competent authority to proceed of its own motion, which is provided for in Austrian law, does not release the claimant from the obligation to cooperate in establishing the facts (judgment of the Verwaltungsgerichtshof of 21 October 1987, 87/01/0137). Even though the Austrian administrative procedure does not expressly place taxable persons under

a formal obligation to cooperate in the investigation, the fact remains that, within the framework of the unrestricted power to assess the evidence which is conferred on the tax authority, the latter is free — if the claimant does not cooperate, or does not sufficiently cooperate, in the investigation — to draw inferences from such conduct, even though they may be unfavourable to the claimant.

48 The claimants in the main proceedings observe that in its decisions of 6 September 2000 the tax authority found it established that the duty on alcoholic beverages had been passed on to the final consumers, being of the view that 'according to the undisputed findings of fact made by the appellate body, the price of alcoholic beverages also includes the duty on beverages, so that the economic burden of the duty on beverages was borne by the final consumer'.

49 The claimants in the main proceedings maintain that the mere fact that their prices included the duty on alcoholic beverages does not permit the conclusion that the duty was passed on to the final consumer. In reality, such a conclusion is a mere presumption, which in practice requires the taxable person himself to establish that the duty was not passed on.

50 As regards unjust enrichment, the claimants in the main proceedings observe that, according to the consistent case-law of the Court, the right to refuse to repay a duty levied in breach of Community law depends not only on proof that the entire burden of the duty was actually borne by a person other than the taxable person but also on the condition that repayment of the duty entails unjust enrichment of the taxable person.

51 In the present case, the claimants in the main proceedings contend that they themselves bore the duty on alcoholic beverages.

52 In that regard, although it is true in principle that the duty on alcoholic beverages must be borne by the final consumer because the law provides that it is to be passed on, in practice, however, for reasons relating to competition, it is only in rare cases that Austrian undertakings are able to pass the duty on to the consumer.

53 In most cases, the duty reduces the profit margin of the undertaking liable for the duty and is therefore de facto borne by that undertaking. Statistical studies show that in Europe the Republic of Austria is the State in which beverages bear the highest duty.

54 The claimants in the main proceedings conclude that, in order to attain normal profitability on the market, the price of beverages in Austria should be increased at least by the amount corresponding to the proportion of the duty on alcoholic beverages. In fact, only undertakings with the greatest number of customers are able to charge such prices. On the other hand, the great majority of undertakings — including the claimants in the main proceedings — do not pass the duty on to the final customers.

55 That fact is borne out by the annual studies commissioned by the Wirtschaftskammer Österreich (Economic Chamber of Austria), entitled 'Betriebskennzahlen des Österreichischen Gastgewerbes' ('data relating to the Austrian catering sector'). In 1994, virtually all Austrian catering undertakings made a loss. Their situation has continued to deteriorate. Since then, those undertakings have been constantly overburdened with debt owing to competitive pressure and the need to respond to the demands of the market.

56 The claimants in the main proceedings also state that in November 2000 the Österreisches Institut für Wirtschaftsforschung (Austrian Institute for Economic Research), at the request of the Austrian Finance Ministry, carried out a

macroeconomic study into the question of passing on the costs of the duty on beverages in the hotel, cafe and restaurant sector. That study did not make it possible to provide general answers to the question of the passing on of the duty on beverages to the final consumer in that sector. It contains no specific answer to the question of the passing on of that duty to the final consumer. The authors of the study observed, in particular, that the question whether, and to what extent, the duty was actually passed on depends on a whole series of factors, including elasticity between prices and assets and also the services concerned, changes in the level of prices and actual demand, market structure and the intensity of competition.

57 Consequently, according to the claimants in the main proceedings, the question of unjust enrichment can only be answered on a case-by-case basis, following a specific investigation.

58 Beta-Leasing GmbH also emphasises that, in so far as the duty was actually passed on, it is the consumers that bore the burden of the duty on alcoholic beverages. However, neither the legal order of the *Land* of Vienna nor that of the Republic of Austria in general offers consumers the possibility of claiming, in the context of the taxation procedure, that a duty thus passed on is unlawful.

59 Accordingly, if the taxable person were refused repayment of the duty on alcoholic beverages on the ground that he has passed it on to the final consumer, it would ultimately be the municipality concerned that would benefit from unjust enrichment. The municipalities' argument thus amounts to claiming unjust enrichment in favour of the creditors of the duty (the municipalities themselves), while maintaining that the person owing the duty must not benefit from such enrichment. Beta-Leasing GmbH asks what justification there is for the fact that unjust enrichment should be denied the person owing the duty, whereas it is acceptable in the case of the person to whom the duty is owed, a fortiori since it is the latter that adopted the unlawful provision.

60 The tax authority does not agree with that interpretation. It maintains that the condition placed by Paragraph 185(3) of the WAO on repayment of a tax levied though not due seeks to prevent persons entitled to claim repayment under domestic law from being enriched owing to particular circumstances related to the fiscal techniques associated with indirect taxation in the city of Vienna. The taxes at issue in the present case are duties in which the person paying the tax and the taxable person are two separate persons. The taxable person is the trader who supplies taxable services, whereas the amount of such taxes is in general levied on the recipients of those services. The Court approved that interpretation at paragraphs 22 to 24 of its judgment in Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165.

61 It follows that repayment of the amount passed on is no longer required where the taxable person is not required to repay to the purchaser the sums corresponding to the amount of the tax which he has passed on to the latter.

62 On that point, the tax authority claims that under the Austrian legal order the purchaser cannot claim repayment of those sums directly from the national authorities. In the case of the duty on alcoholic beverages, repayment to consumers of the amounts they have paid is precluded in practice, owing to the time which has elapsed, the large number of transactions involved, evidential difficulties or other matters.

63 Consequently, the tax authority maintains that Paragraph 185(3) of the WAO is not inconsistent with paragraph 3 of the operative part of the *EKW* judgment but, on the contrary, it is consistent with what was held by the Court, since it provides that unjust enrichment of the trader in the form of repayment to him of the duty which he has paid is precluded when the legal relationship, which constitutes the taxable event, between the consumer who has borne the economic burden of the duty on beverages and the trader who has paid it has already exhausted its effects and when the consumer can no longer take action against the trader with a view to obtaining repayment of the duty he has borne.

64 Nor, in the tax authority's submission, does a comparative examination of what may be the legally protected expectation of the taxable persons that the duty on alcoholic beverages would be repaid unconditionally and the legally protected expectation of the municipalities that the duty was compatible with Community law permit the conclusion that Paragraph 185(3) of the WAO infringes the obligation of loyal cooperation laid down in Article 5 of the Treaty.

65 Last, the tax authority contends that neither Community law nor the principles of a State subject to the rule of law and the protection of legitimate expectations imply that a taxable person is to be enriched by repayment of a tax. Where the tax is passed on to third parties, reimbursement will necessarily entail unjust enrichment of the trader.

66 The Austrian and Italian Governments put forward an argument similar to the tax authority's and submit that Paragraph 185 of the WAO satisfied the conditions laid down by the Court in respect of recovery of the sums levied but not due.

67 First, that provision is not concerned solely with rights to repayment based on Community law but governs both those rights and rights based on domestic law and thus has regard to the principle of equivalence.

68 The governments further claim that Paragraph 185(3) of the WAO does not make it impossible or excessively difficult in practice for the claimants to exercise the right to repayment based on Community law. Thus, Paragraph 185 of the WAO contains no specific provision relating to the burden of proof or to the permissible means of proof. The general rules of procedure are therefore applicable. They are based on the principle of investigation on the authority's own motion.

69 The Austrian Government maintains that, owing to that principle, the burden of proving that the duty has been passed on and that there has been unjust enrichment is borne by the competent fiscal services. The taxable persons are under a duty only to cooperate in establishing the facts. Thus, at the request of the fiscal services, they must provide clarification and additional information concerning their returns and prove that they are accurate, although the WAO is satisfied with the balance of probabilities when, in the light of the circumstances, such proof cannot reasonable be demanded. A reversal of the burden of proof to the detriment of the taxable person is therefore precluded.

70 Furthermore, the WAO authorises all modes of proof. The claimants may therefore in principle put forward all the arguments, of law and of fact, from which it might be concluded that the duty has not been passed on or that it is probable that it was not passed on. Nor, in that regard, has any reversal of the burden of proof or any general presumption been applied.

71 The Austrian Government further submits that Paragraph 185(4) of the WAO, which precludes the application of subparagraph 3 of that paragraph to claims for repayment of duties which the Verfassungsgerichtshof has held to be unconstitutional, does not infringe the principle of equivalence. First, judgments of the Court do not have the same effects as judgments of the Verfassungsgericht declaring a law unconstitutional, since the former have a general effect which also applies *ex tunc*, whereas the latter have only *ex nunc* effect.

72 Last, the cases in which a claimant may invoke the benefit of the 'Anlaßfallwirkung', and therefore obtain repayment of an unconstitutional tax even where it has been passed on to third parties, are very rare and purely marginal. That situation is therefore in no way comparable with the consequences associated with a judgment of the Court in which it is held that Community law precludes the maintenance of a national tax.

73 The Commission submits that while it is true that repayment of a tax levied in breach of Community law can be effected only within the framework of the substantive and procedural conditions fixed by the various national laws on the matter, the fact remains that these conditions cannot be less favourable than those governing similar domestic claims and that they cannot be arranged in such a way as to render the exercise of the rights conferred by the Community legal order impossible or excessively difficult (Case C-62/93 *BP Supergas* [1995] ECR I-1883; Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 19 and 34; and *Dilexport*, cited above, paragraph 25).

74 The Commission further submits that paragraph 11 of *Deville*, cited above, appears to tie the existence of a right to reimbursement of a tax which is inconsistent with Community law to the condition that the taxable person is unable to pass that tax on to others.

75 Accordingly, in the Commission's submission, there is nothing in Community law to prevent the national courts from taking account, under their national law, of the fact that the charges levied though not due have been incorporated in the prices of the undertaking responsible for paying the duty and passed on to the purchasers (Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 35; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099; *Dilexport*, cited above, paragraph 47; and Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 20).

76 The Commission observes, however, that Community law precludes a Member State from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to third parties, which the claimant must show he has satisfied (*Dilexport*, cited above, paragraph 54).

77 It points out, however, that the Verwaltungsgerichtshof does not expressly consider that point in the account of the substantive conditions of the reference, but merely states that, in view of the existing procedural guarantees, it cannot be said that Paragraph 185(3) of the WAO makes the exercise of the right to repayment a priori excessively difficult or even impossible. The Commission emphasises, however, that that national provision contains no special rule relating to the burden of proof and that the general rules of procedure applicable are based on the principle of investigation on the authority's own motion.

78 In the absence of any express finding that national procedural law places the burden of proving that the tax has been passed on to the tax authority, the Commission concludes that there may be certain lacunae in that regard. Consequently, it proposes that the Court should shed some light on the matter in its judgment, with reference to its relevant case-law and, in particular, to paragraph 54 of *Dilexport*.

79 The Commission also shares the view of Advocate General Saggio in *EKW* that the tax authority may reject claims for repayment of taxes levied though not due only if it proves that the claimants have actually been enriched.

80 It maintains that it is impossible to assert that the price of the product without the duty on alcoholic beverages would have been less than the price including the duty or, a fortiori, that the difference between the two prices would always correspond to the amount of the duty. Besides, the enrichment of the dealer might not always correspond precisely with the amount of the duty, since the increase in the price dictated by the need to offset the higher charge resulting from the duty may lead to a reduction in the volume of sales and of profits. Also, in some border areas, the price increased by the duty may lead to a reduction in the volume of sales of Austrian retailers capable of adversely affecting profits. In this case, it is impossible to assert that the enrichment resulting from repayment would correspond precisely to the amount of the duty paid. On the contrary, the

assessment of any enrichment must take account of a reduction in profits attributable to the duty.

81 In the Commission's view, these aspects should have been taken into account in the decisions of 6 September 2000 and an automatic rejection of the claims for reimbursement of all the duty paid cannot be accepted. The Commission points out, however, that the order for reference makes no mention of the existence of that differentiated treatment of claims for reimbursement or of relevant rules in terms of procedure and method of calculation.

82 At the hearing, the Commission argued that the WAO does not observe the principle of equivalence, since it deals differently with claims for repayment based on Community law and those based on a judgment of the Verfassungsgerichtshof declaring a law unconstitutional, to the detriment of the former.

83 Thus, taxable persons who are able to rely on the 'Anlaßfallwirkung' are not made subject, in order to obtain repayment of a duty levied in breach of the Austrian Constitution, to the condition that they themselves have borne the economic burden of the duty. Paragraph 185(4) of the WAO precludes the application of subparagraph 4 of that paragraph in such a situation.

84 On the other hand, no effect comparable to the 'Anlaßfallwirkung' is recognised in the case of judgments of the Court holding that Community law precludes the maintenance of a national tax. This results in discriminatory treatment which is unfavourable for individuals where they exercise, under Community law, their right to repayment of a tax levied though not due.

85 In that regard, the Commission rejects the Austrian Government's argument that cases in which the 'Anlaßfallwirkung' is applicable are marginal. It contends, on the contrary, that the 'Anlaßfallwirkung' produces its effects in a great many practical cases and, moreover, that the limited number of cases of application of the 'Anlaßfallwirkung' cannot suffice to prevent a breach of the principle of equivalence.

Response of the Court

Article 10 EC

86 The Court has already held that a national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were levied though not due under that legislation (see *Deville*, paragraph 13; *Dilexport*, paragraphs 38 and 39; and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 36).

87 It is clear from those judgments that a State may not adopt provisions making repayment of a tax held to be contrary to Community law by a judgment of the Court or whose incompatibility is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question (*Edis*, cited above, paragraph 24).

88 As regards the duty on alcoholic beverages, it should be borne in mind that the Court held at paragraph 50 of the *EKW* judgment that Article 3(2) of Directive 92/12 precludes the maintenance of that duty.

89 It should also be borne in mind that Paragraph 185 of the WAO, in the version prior to the amending act, did not make claims for repayment of duties levied though not due subject to any particular condition. It is also established that the introduction, in Paragraph 185 of the WAO, of a provision which became subparagraph 3 of that paragraph, was preceded by much debate in the Parliament of the *Land* of Vienna, during which reference was made to the Opinion of Advocate General Saggio in *EKW* and also to the disastrous consequences for the finances of the Austrian municipalities which would result from a judgment of the Court declaring the duty on beverages incompatible with Community law. Furthermore, the WAO was amended one week before that judgment was delivered.

90 It follows from all those circumstances that the purpose of inserting subparagraph 3 into Paragraph 185 of the WAO was to preclude the effects of the *EKW* judgment, should the duty on alcoholic beverages be deemed contrary to Community law and should that judgment not limit its temporal effects.

91 However, those circumstances do not in themselves suffice to establish whether Paragraph 185(3) of the WAO seeks specifically to reduce the possibilities of bringing proceedings for repayment of the duty on alcoholic drinks which has been levied though not due. The Verwaltungsgerichtshof emphasises in its order for reference that the WAO does not refer solely to repayment of duties which were levied in breach of Community law. Furthermore, the parties to the main proceedings, the Austrian and Italian Governments and the Commission have submitted different arguments in that regard. However, it is not for the Court to resolve a dispute relating exclusively to the interpretation of national law: that task is solely a matter for the national court.

92 It must be concluded on this point, therefore, that the adoption by a Member State of rules which retroactively restrict the right to repayment of a sum levied but not due, in order to forestall the possible effects of a judgment of the Court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to Article 10 EC only in so far as it is aimed specifically at that duty, a point which falls to be determined by

the national court. Accordingly, the fact that such a measure has retroactive effect does not in itself amount to an infringement of Community law, where the measure is not aimed specifically at the duty which formed the subject-matter of a judgment of the Court.

The relationship between the passing-on of the duty on alcoholic beverages and unjust enrichment

93 The Court has consistently held that individuals are entitled to obtain repayment of charges levied in a Member State in breach of Community provisions. That right is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court. The Member State in question is therefore required, in principle, to repay charges levied in breach of Community law (see, in particular, *Comateb and Others*, cited above, paragraph 20; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84; and *Marks & Spencer*, paragraph 30).

94 According to the case-law, there is only one exception to that obligation to make repayment. A Member State may resist repayment to the trader of a charge levied though not due only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter. It follows that, if the burden of the charge has been passed on only in part, the national authorities are required to repay the amount not passed on (see to that effect, in particular, *Comateb and Others*, paragraphs 27 and 28).

95 As that exception is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in

particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person.

96 Thus, at paragraph 17 of *Bianco and Girard*, cited above, the Court held, in particular, that even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court, which is free to assess the evidence adduced before it.

97 The Court stated at paragraph 20 of *Bianco and Girard* that it is quite probable, depending on the nature of the market, that the charge has been passed on. However, the numerous factors which determine commercial strategy vary from one case to another so that it is virtually impossible to determine how they each affect the passing on of the charge.

98 The Court has also held that, even where it is established that the burden of the charge levied though not due has been passed on in whole or in part to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment (see *Comateb and Others*, paragraph 29, and Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 34).

99 Even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales (see *Comateb and Others*, paragraph 30, and *Michaïlidis*, paragraph 35).

100 Accordingly, the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due from the aspect of Community law entails for a taxable person can be established only following an economic analysis in which all the relevant circumstances are taken into account.

101 Consequently, Community law precludes a Member State from refusing to repay to a trader a charge levied in breach of Community law on the sole ground that the charge was included in that trader's retail selling price and thus passed on to third parties, which necessarily means that repayment of the charge would entail unjust enrichment of the trader.

102 It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse — a point which falls to be determined by the national court — repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established.

The principles of equivalence and effectiveness

103 It has consistently been held that in the absence of Community rules on the recovery of national charges levied though not due, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing such actions for repayment, provided, however, that they are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of

rights conferred by the Community legal order (principle of effectiveness) (see, in particular, *Metallgesellschaft and Others*, paragraph 85, and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33).

— Principle of equivalence

104 First of all, the principle of equivalence prohibits a Member State from laying down less favourable procedural rules for claims for repayment of a charge contrary to Community law which are based on Community law than those applicable to similar domestic proceedings.

105 With more particular regard to the WAO, it follows from the actual wording of Paragraph 185 that that paragraph provides for a derogation for certain claims for recovery of sums levied but not due based on national law.

106 Paragraph 185(4) of the WAO provides that subparagraph 3 of that paragraph does not apply to persons who can rely on the effects of the 'Anlaßfallwirkung', although that provision fails to specify the rules or conditions applicable to actions for repayment of a charge levied though not due by claimants who can rely on the precedent of a judgment of the Verfassungsgerichtshof declaring that a national provision is contrary to the Constitution.

107 The principle of equivalence precludes the application of national provisions which allow taxable persons to obtain repayment of a charge levied though not due only where those provisions lay down more advantageous conditions where the claim for repayment is based on a declaration of unconstitutionality by a

national court than those applicable to traders who, following a judgment of the Court, seek repayment of a charge levied in breach of Community law.

108 In must therefore be concluded on this point that, in so far as the principle of equivalence precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law, it is for the national court to ascertain, on the basis of a comprehensive assessment of national law, whether it is actually the case that only claimants who bring proceedings based on domestic constitutional law may rely on the 'Anlaßfallwirkung' and that the rules governing repayment of charges held to be incompatible with domestic constitutional law are more favourable than those applicable to actions relating to taxes held to be contrary to Community law.

— Principle of effectiveness

109 Second, as regards compliance with the principle of effectiveness, it must be borne in mind that, in principle, a trader who has paid a charge levied though not due is entitled to repayment of the amount paid (see, in particular, *Comateb and Others*, paragraph 20) and that the tax authority may refuse to repay such a charge only if repayment entails unjust enrichment of the trader.

110 It is clear from the case-law of the Court (see, in particular, *San Giorgio*, paragraph 14; *Dilexport*, paragraphs 48, 52 and 54; and *Michaïlidis*, paragraphs 36 and 37) that the authority cannot merely establish that the charge was passed on to third parties and presume from that fact alone, or from the fact that the

national legislation requires that the charge be incorporated in the selling price to consumers, that the economic burden which the charge represented for the taxable person is neutralised and that, consequently, repayment would automatically entail unjust enrichment of the trader.

111 The Court has also consistently held that national rules which place on the taxable person the burden of proving that the charge was not passed on to third parties, which amounts to requiring negative proof, or which establish a presumption that the charge has been passed on to third parties, are not consistent with Community law (see, in particular, *San Giorgio*, paragraph 14; *Dilexport*, paragraph 54; and *Michaïlidis*, paragraphs 36 to 38).

112 In that regard, the national court states that the WAO contains no special provision governing the division of the burden of proving that the taxable person has passed the charge on to third parties and that repayment of the charge levied though not due would entail his unjust enrichment.

113 Although the tax authority and the Austrian Government contend that the burden of proof is wholly borne by the national authority, it is also apparent from the order for reference that the tax authority concluded that the economic burden of the duty on alcoholic beverages had not been borne by the claimants in the main proceedings simply because the price invoiced to consumers of those beverages included that duty. That approach might constitute a presumption that the duty has been passed on to third parties, and also of unjust enrichment of the taxable persons, of such a kind as to render repayment of the duty levied though not due impossible or at least excessively difficult, which is contrary to Community law.

114 It is for the national court to determine whether, in the absence of a statutory presumption, the tax authority's practice has the effect of establishing such a presumption of unjust enrichment.

115 It is true that in the case of a 'self-assessed' charge, proof that the charge has actually been passed on to third parties cannot be adduced without the cooperation of the taxable person concerned. In that regard, the tax authorities may demand access to the supporting documents which the taxable person was required to keep under the rules of national law.

116 It is also for the national court to determine to what extent the cooperation required on the part of taxable persons in establishing that the economic burden of the duty on alcoholic beverages was not passed on amounts in practice to establishing a presumption that the duty was passed on, unless the taxable persons rebut such a presumption by adducing evidence to the contrary.

117 It follows from the foregoing that the principle of effectiveness referred to at paragraph 103 of this judgment precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties.

118 The answer to the question referred by the national court must therefore be that:

— the adoption by a Member State of rules, such as the WAO, fixing more restrictive procedural rules for recovery of sums levied but not due, in order

to forestall the possible effects of a judgment of the Court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to Article 5 of the Treaty only in so far as it is aimed specifically at that duty, a point which falls to be determined by the national court;

— the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse — a point which falls to be determined by the national court — repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the taxable person be established;

— the principle of equivalence precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law. It is for the national court to ascertain, on the basis of a comprehensive assessment of national law, whether it is actually the case that only claimants who bring proceedings based on domestic constitutional law may rely on the 'Anlaßfallwirkung' and that the rules governing repayment of charges held to be incompatible with domestic constitutional law are more favourable than those applicable to actions relating to taxes held to be contrary to Community law;

— the principle of effectiveness precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties.

Costs

119 The costs incurred by the Austrian and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Verwaltungsgerichtshof by order of 23 March 2001, hereby rules:

1. The adoption by a Member State of rules, such as the Wiener Abgabenordnung, fixing more restrictive procedural rules on recovery of sums levied but not due, in order to forestall the possible effects of a judgment of the Court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to Article 5 of the EC Treaty (now Article 10 EC) only in so far as it is aimed specifically at that duty, a point which falls to be determined by the national court.

2. The rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse — a point which falls to be determined by the national court —

repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the taxable person be established.

3. The principle of equivalence precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law. It is for the national court to ascertain, on the basis of a comprehensive assessment of national law, whether it is actually the case that only claimants who bring proceedings based on domestic constitutional law may rely on the 'Anlaßfallwirkung' and that the rules governing repayment of charges held to be incompatible with domestic constitutional law are more favourable than those applicable to actions relating to taxes held to be contrary to Community law.

4. The principle of effectiveness precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties.

Wathelet Timmermans La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber