JUDGMENT OF THE COURT
16 DECEMBER 1976 [1]

Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (preliminary ruling requested by the Bundesverwaltungsgericht)

Case 33/76

Summary

1. *Customs duties — Charges having effect equivalent — Abolition — Direct effect — Rights of individuals — Protection by national courts*
(EEC Treaty, Article 13, Regulation No 159/66/EEC, Article 13)

2. *Community law — Direct effect — Rights of individuals — Protection by national courts — Recourse to the courts — National procedural rules — Application*

1. The prohibition laid down in Article 13 of the Treaty and that laid down in Article 13 of Regulation No 159/66/EEC have a direct effect and confer on citizens rights which the national courts are required to protect.
2. In the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect.

In Case 33/76

Reference to the Court under Article 177 of the EEC Treaty by the VIIth Senate of the Bundesverwaltungsgericht for a preliminary ruling in the action pending before that court between

1. REWE-ZENTRALFINANZ EG, Cologne,

2. REWE-ZENTRAL AG, Cologne,

1 — Language of the Case: German.

and

LANDWIRTSCHAFTSKAMMER FÜR DAS SAARLAND, Saarbrücken (Agricultural Chamber for the Saar),

on the interpretation of Articles 5, 9 and 13 (2) of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore (Presidents of Chambers), J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

In 1968 the German companies Rewe-Zentralfinanz eG and Rewe-Zentral AG paid in respect of the import of French apples charges for phyto-sanitary inspection which were found by the judgment of the Court of 11 October 1973 in Case 39/73 [1973] ECR 1039 to be equivalent to customs duties.

In 1973 the said companies applied to the Landwirtschaftskammer für das Saarland to annul the decisions imposing the charges and to refund the amounts paid including interest. This claim was dismissed as inadmissible on the ground that it was out of time under Article 58 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Court). The actions brought by the two companies before the Verwaltungsgericht für das Saarland (Saarland Administrative Court) were dismissed as was the appeal made by them to the Oberverwaltungsgericht (Higher Administrative Court).

Rewe-Zentralfinanz and Rewe-Zentral then appealed to the Bundesverwaltungsgericht (Federal Administrative Court). The latter took the view that the question whether it is possible to rely on an infringement of Community law irrespective of the expiry of time-limits

in general national procedural provisions required the interpretation of the EEC Treaty and by order dated 23 January 1976 stayed the appeal and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Where an administrative body in one State has infringed the prohibition on charges having an effect equivalent to customs duties (Articles 5, 9 and 13 (2) of the EEC Treaty) has the Community citizen concerned a right under Community law
   (a) to the annulment or revocation of the administrative measure;
   (b) and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past?
2. Is this the case at least if the European Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law?
3. If a right to a refund is held to exist under Community law, is interest to be paid on the amount and if so from what date and at what rate?

The order of the VIIth Senate of the Bundesverwaltungsgericht was registered at the Court on 6 April 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the companies Rewe-Zentralfinanz and Rewe-Zentral, by the Commission of the European Communities, by the Government of the Federal Republic of Germany, by the Government of the Italian Republic and by the Government of the United Kingdom.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without a preparatory inquiry.

II — Summary of written observations

The *appellants* first of all say that the courts of the Member States have so far refrained from submitting to the Court of Justice the question whether charges collected contrary to Community law may exceptionally be retained because no claim has been brought within the prescribed period against the decision to impose the charges.

In its judgment of 7 February 1973 in Case 39/72 [1973] ECR 101 the Court stated that an infringement by a Member State of a rule of Community law which is directly applicable could be the basis of possible liability on the part of the State as against the person concerned. Further in the judgment of 12 July 1973 in Case 70/72 [1973] ECR 813 the Court stated that the aim of the Treaty is to achieve the practical elimination of infringements by Member States and the consequences thereof, past and future.

It is true that in the judgment of 22 January 1976 in Case 60/75 [1976] ECR 45 the Court stated that where there has been an infringement of Community law it will be for the State, as regards the injured party, to take the consequences upon itself in the context of the provisions of national law relating to the liability of the State. Nevertheless there can be no question in this case of simply referring a trader affected by an infringement of Article 13 to national remedies relating to administrative liability for the following reasons:

(a) if the effect of the Community rules *per se* is all-embracing and uniform no other provision can apply to the legal consequences arising from their infringement by a Member State. Otherwise traders would be subject to unequal treatment according to the idiosyncrasies of each national legal system;
(b) the requirements of effective legal protection and the logic of the system of the Treaty imply likewise

that directly applicable Community rules should be characterized as rules the infringement of which by Member States gives the individual under Community law rights to have the effects of the administrative act annulled,

(c) if the legal consequences of such an infringement were to become established in accordance with national law they would be annulled only in part: thus under German law on administrative liability (Article 34 of the Grundgesetz (Basic Law)) in conjunction with Article 839 of the Bürgerliches Gesetzbuch (Civil Code) only infringements committed by the administration in the exercise of public authority are covered. Further German law requires a wilful or negligent breach of official duty.

In its judgment of 17 December 1970 in Case 11/70 [1970] ECR 1125 the Court declared that the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. The absolute precedence of Community law likewise extends in particular to national procedure (Case 66/73 [1974] ECR 33 and Case 146/73 [1974] ECR 139). It would be contrary to the nature of the Community system for Member States to be able to take or maintain in force measures likely to compromise the effectiveness of the Treaty. The mandatory nature of the Treaty and measures adopted to implement it cannot vary from one State to another by the effect of internal measures without the functioning of the Community system being impeded and without the attainment of the aims of the Treaty being jeopardized.

It follows that a party has not only a right to the refund of charges exacted contrary to Community law but also to the annulment or setting aside of the decision imposing the charge. According to German national law this annulment or setting aside ot the decision imposing the charge constitutes a condition precedent to the refund of the charges.

With regard to the second question raised by the Bundesverwaltungsgericht it is not permissible to limit the Member States' duty to make a refund to the date on which the Court of Justice declared that the levying of the charge in question was incompatible with Community law. This follows from the fact that in general the Court of Justice does not give a ruling on this matter but, in the procedure under Article 177, on questions of interpretation raised by the national court.

With regard to the third question, since the aim of the Treaty is to achieve the practical elimination of infringements by Member States, the action in Community law for the annulment of the effects of an administrative measure also covers the entitlement of the trader injured to interest, which is only a special application of this action.

The *Commission* stresses that it does not follow from the direct effect of Article 13 (2) of the EEC Treaty that after the contested charge has been levied notwithstanding the prohibition in question the appellants must be recognized as having an independent right of action enabling them to claim the repayment of the said charge independently of any substantive ground in national law. Article 13 (2) was not conceived as authority in Community law for claims for repayment brought by citizens against a Member State. The Court has always recognized that the action for repayment of national or Community charges wrongly levied may be based on the law of the Member State concerned. Thus in Case 13/68 [1968] ECR 453 it was held that in these circumstances 'it is for the national legal system to determine which court or

tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified'. The same is true moreover for actions for compensation under the second paragraph of Article 215 of the EEC Treaty. No doubt the necessity of basing claims for refund on the provisions of national law may make the refund dependent on rules which vary according to the Member States but this position is in accord with the present state of integration with regard to the protection of individual rights. Since the Member States are in principle required to facilitate the exercise of such a right, it can be claimed by a party only to the extent and subject to the conditions laid down by this same national law.

To interpret Article 13 (2) of the Treaty as meaning that it gives an independent substantive right to refund would raise the question of the connexion between such a right based on Community law and those provided for by national laws. To prohibit parties from basing their claims to refund of the provisions of their national law would be contrary to the previous case-law of the Court on the direct effect of Article 13 (2). Further, concurrent actions would constitute an innovation in the sphere of Community law and would lead in practice to the more favourable action prevailing over the other because governed by less strict conditions.

There are in the context of the main action no Community rules on procedure and time-limits which preclude, either expressly or by their nature as provisions having precedence in governing time-limits, the application of national rules of procedure. But to what extent could Article 13 (2) of the Treaty, as a substantive provision of Community law having precedence, prohibit the application of the German Code of administrative procedure? If the effect of the latter were indeed to exclude the repayment after the expiry of a given period, the conditions of admissibility and the time-limits for annulment laid down by it could not be a valid objection to the claim in the main action. In fact the direct effect of Article 13 (2) would mean that the person concerned thus enjoys by means of a Community provision, which by its nature has precedence, an absolute entitlement unlimited in point of time to bring an action for a refund; the full and unconditional assertion of this right, by reason of its proprietary nature, must not be impeded or prevented in fact or in law by any measure or any obstacle relating to the sphere of the States' internal powers. However it is right to object to such a conclusion that in the present situation of the law the uniformity thus achieved in the protection of the rights of individuals with regard to refunds would be nothing other than a refusal to accept any conditions of admissibility and time-limits for bringing actions. Such a general exclusion of any national rule of procedure would be incompatible with the legal principle that the national court gives a decision based on the rules of national procedure even where the plaintiff bases his claims and arguments on Community law.

There is no conflict between Community law and national law since Community law does not claim pre-emincence but recognizes the complementary application of rules of national law or integrates them into its legal system. Such a reference to national law may be indirectly inferred here from the dicta in case-law with regard to direct effect according to which directly applicable provisions give individuals rights 'which national courts must protect'. National courts can do so only by referring to their own rules of procedure, so long as Community law does not itself govern these matters, and thus subject to the conditions on admissibility and the time-limits for bringing actions which they contain. The principle making the protection of parties' rights subject to the

requirements of certainty in legal relations given expression by the German Code of administrative procedure is recognized in the legal systems of all the Member States and likewise recognized to a large extent in the Community legal system. The judgment given in Case 43/75 [1976] ECR 455 has even set specific time-limits in cases where Community law has not expressly prescribed them.

This position is certainly hardly satisfactory since the time-limits laid down by national law vary between 1 month and 30 years (in this respect it may be asked whether each Member State can, in so far as it is concerned, decide which is the right laid down by national law to which such a Community right must be assimilated). But to lay down at a Community level uniform time-limits for the assertion of the rights in question in the main action would lead to taking into consideration all the other claims on Member States based on Community law and involving other spheres of national law.

There is no purpose in the second question since rights to refund are based on Article 13 (2) of the Treaty. At most the Court could give an answer similar to that contained in the judgment in Case 43/75 to which reference has already been made.

The third question has not been settled in Community law and in similar cases the Court has referred to national law. If the main action fails because of German procedural rules there will be no purpose in this question.

The *Government of the Federal Republic of Germany* considers that the absence of Community rules on the organization of administrative procedure or the system of legal protection to which Member States must conform when applying substantive Community law is due to the fact that, apart from the sectors governed directly by the Community and the general task of harmonization given to it, the execution of Community law has been entrusted to the authorities and courts of the Member States. The division of tasks between the Community and the Member States is explained by the fact that the rights of individuals to the annulment or withdrawal of administrative measures or to the refund of sums paid are given concrete form and limited by the national provisions on the subject. The limitation afforded by the national law on procedure to the assertion of Community rights is therefore in the true sense a rule of Community law.

Under German law when an administrative measure can no longer be the subject of a legal action for annulment because it has become definitive it is also as a rule no longer possible to require the authority to withdraw the administrative measure which has become unassailable or to refund the sum paid. This explains why administrative measures which have become unassailable are not affected when the Bundesverfassungsgericht (Federal Constitutional Court) declares that the legal provision on which they are based is unconstitutional.

The fact that therefore the legal position of parties may differ from one Member State to another is only the result of the implementation of Community law by Member States.

The provision in Article 5 of the EEC Treaty referred to in the question certainly requires Member States to adopt appropriate measures in Community matters but it cannot give rights to parties. The same is true of the 'general principles' of Member States with regard to administrative procedure: they do not allow the conclusion either, by analogy with the second paragraph of Article 215 of the Treaty, that there is a Community right to the withdrawal of administrative measures which have become final. In particular it is not proved that the other

Member States, in contrast to the Federal Republic of Germany, generally recognize a right to the withdrawal of administrative measures which have become definitive.

The *Government of the Italian Republic* states that in the absence of Community rules it must necessarily be recognized that the means and conditions for protecting subjective rights which the Community creates in favour of individuals are always governed by the laws of the various Member States.

In fact the order of reference clearly shows that the national court assumes that the sums exacted in contravention of the prohibition on levying charges having equivalent effect must be refunded. It is this assumption which must be examined. Thus it may be asked whether and if so to what extent national administrations are bound to refund sums exacted in contravention of the prohibition on levying charges having an equivalent effect. It is to be observed that the Commission imposes no obligation on Member States to recover from individuals sums paid for aid which has not been authorized or refunds on exports which have exceeded the amount of refunds authorized. Similarly an obligation to reimburse sums paid to individuals as a result of a wrong interpretation of Community rules has been expressly excluded. Accordingly it would seem that the same criterion should apply in the case of the obligation to refund sums wrongly levied in contravention of the prohibition against charges having an effect equivalent to customs duties. This view accords with that adopted by the Court in the aforementioned Case 43/75.

It is not necessary to stress the serious financial consequences which would ensue for the budgets of the various Member States to note that an obligation to refund would give rise to an unjustified discrimination between Member States and Community citizens according to the rules issued by each legal system regarding recovery of customs duties improperly charged.

Moreover refund would lead in practice to an unforeseen increase in the profit margin or in any event in the assets of the dealers concerned since the amounts in question have obviously already been taken into account in determining costs and therefore in the repercussions on purchasers arising from the increase in resultant charges. A refund would lead in practice to an 'aid' benefiting national dealers and to the very sort of change in the market and in the conditions of competition which Community rules are intendent to prevent; above all the result would be a new disadvantage to the exporters of other Member States who have already had to suffer the practical disadvantage arising from the obstacle constituted by the increase in customs duties provided for by the national law of the importing State.

As a result the Italian Government thinks that the direct applicability of Community rules to the prohibition against levying charges having an effect equivalent to customs duties cannot be relied on in respect of sums which have been paid as particular customs duties before these duties have been the subject of a relevant decision intended to establish their nature as charges having an equivalent effect. As regards the specific questions raised by the order of reference a ruling may be given that the exercise of the right to the refund of sums paid as charges having an equivalent effect is governed, just as in the case of submissions of inadmissibility as regards time-limits, estoppel or prescription, by national laws in the same way as national laws determine whether, from which date and at what rate interest may be payable on sums to be refunded to those entitled to them.

The *Government of the United Kingdom* points out that the importance of

time-limits is frequently acknowledged in Community law and that the Court (Second Chamber) stated in Case 79/70 [1971] ECR 689 that they were matters of public policy. It cannot be denied that they may have the effect of limiting substantive rights. The only satisfactory remedy lies in the adoption of Community legislation to harmonize the relevant rules of prescription and limitation. But the invalidation of national time-limits in advance of appropriate Community legislation would create uncertainty and add disproportionately to the complexities of accounting and to the cost of collection borne by national and Community funds.

The answers given by the Court in this case will lay down principles of general application likely to apply equally to any case in which a Community customs duty, an agricultural levy, value-added tax or an excise duty collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action has been collected contrary to the relevant Community provisions.

During the oral procedure which took place on 9 November 1976 the appellants, represented by Dietrich Ehle, Advocate of the Cologne Bar, the Government of the Federal Republic of Germany, represented by its Legal Adviser, Mr Seidel, the Government of the Italian Republic represented by Mr Marzano, Avvocato dello Stato, and the Commission of the European Communities represented by its Legal Adviser, Mr Kalbe, acting as Agent, expanded the arguments which they set out in the written procedure.

The Advocate-General delivered his opinion at the hearing on 30 November 1976.

Law

1 By order dated 23 January 1976, received at the Court Registry on 6 April 1976, the Bundesverwaltungsgericht referred to the Court three questions on Articles 5, 9 and 13 (2) of the EEC Treaty for a preliminary ruling under Article 177 of the EEC Treaty.

2 These questions have arisen in a case relating to the payment in 1968 on the importation by the appellants of French apples of charges for phytosanitary inspection, regarded as equivalent to customs duties by the judgment of the Court of 11 October 1973 in Case 39/73 *(Rewe Zentralfinanz eGmbH* [1973] ECR 1039).

The respondent to the appeal rejected the appellants' claims to have the decisions imposing the charges annulled and the amounts paid refunded (with interest) on the ground that they were inadmissible because the time-limits laid down by Article 58 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Courts) had not been observed.

3 The first question asks whether where an administrative body in a State has infringed the prohibition on charges having an effect equivalent to customs duties (Articles 5, 9 and 13 (2) or the EEC Treaty) the Community citizen concerned has a right under Community law to the annulment or revocation of the administrative measure and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past.

The second question asks whether this is so if the Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law.

The third question asks whether, if a right to refund is held to exist under Community law, interest is to be paid on the amount and if so from what date and at what rate.

The first question

4 Both the respondent and the national court accept that the charges in question had been unlawfully exacted.

Although it has been possible to rely on the direct effect of Article 13 (2) of the EEC Treaty only as from 1 January 1970, the end of the transitional period, it should be stated however that the levying of the said charges was already previously unlawful by virtue of Article 13 (1) of Regulation No 159/66/EEC of the Council of 25 October 1966 (JO 192 of 27 October 1966) which abolished them in respect of fruit and vegetables as from 1 January 1967.

5 The prohibition laid down in Article 13 of the Treaty and that laid down in Article 13 of Regulation No 159/66/EEC have a direct effect and confer on citizens rights which the national courts are required to protect.

Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions

cannot be less favourable than those relating to similar actions of a domestic nature.

Where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.

In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

This is not the case where reasonable periods of limitation of actions are fixed.

The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned.

6 The answer to be given to the first question is therefore that in the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.

The second question

7 The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.

The third question

8 In view of the reply given to the first question the third question does not arise.

Costs

9 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic, the Government of the United Kingdom and the Commission of the European Communities, which have made observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 23 January 1976, hereby rules:

1. **In the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.**

2. **The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.**

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President