

Press and Information Division

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Opinion of Advocate General L. A. Geelhoed in Case C-129/00

Commission v Italy

ADVOCATE GENERAL GEELHOED IS OF THE OPINION THAT ITALIAN PRACTICE AND CASE-LAW CONCERNING REPAYMENT OF CHARGES LEVIED IN BREACH OF COMMUNITY LAW IS NOT IN CONFORMITY WITH COMMUNITY LAW.

The Italian rules of evidence which are based on a presumption that charges have been passed on and that repayment entails unjustified enrichment must be further elaborated.

The Commission has brought proceedings before the Court of Justice against Italy on the basis of the fact that the application of generally applicable rules of evidence within the Italian legal order renders it difficult, not to say impossible, for taxable persons who have paid levies contravening mandatory rules of Community law to recover such unduly paid amounts. Those rules of evidence are interpreted by the Italian judicial authorities and applied by the Italian tax authorities in such a way as to require taxable persons to provide negative evidence to the contrary, that is to say that they have not passed on the unlawful charges to their customers.

Advocate General Geelhoed has today delivered his Opinion in this case.

Opinions of the Advocates General are not binding on the Court. It is the function of the Advocates General, acting in complete independence, to propose a legal solution in cases before the Court.

A Member State must ensure that the objective pursued by Community law is attained in the national legal order, irrespective of which State agency by its acts or omissions has occasioned the failure in that regard. In this case the distinct question arises as to whether national case-law may constitute a ground for establishing a Treaty infringement. The Advocate General is of the opinion that this is possible in certain circumstances. In this

regard he points out that such a finding does not impinge on the independence of the judiciary.

Circumstances under which national case-law may form the basis for a finding of a Treaty infringement:

(1) Status of the judicial decisions concerned

Contrary national decisions by the highest courts, which, within the national legal order, are to be regarded as binding on the lower courts, may undermine the effectiveness of the Community provision concerned within the Member State or lead to undesirable consequences for competition within the internal market or for interstate commerce.

(2) Structural nature of the failure to observe Community obligations

Where there is a trend in national case-law which runs counter to Community obligations or where such case-law has been maintained for a long period of time or a new development is upheld on appeal and/or on an appeal in cassation, the failure to observe Community obligations may be presumed to be structural.

(3) Effect of national decisions on attainment of the objective

If national decisions entail that persons who derive rights from Community law in the relevant Member State have to operate under different conditions than competitors or (legal) persons in comparable circumstances elsewhere in the Community, that clearly impinges on the uniformity of Community law, undermines effectiveness and disregards the rights of citizens.

Basic principles in regard to recovery of levies paid in breach of Community law

In accordance with the Court's settled case-law, a Member State is in principle obliged to repay to taxable persons levies imposed in breach of Community law. There is however one exception: a Member State may resist a request for repayment of unduly paid amounts where it is established that the charge has been borne in its entirety by another person and repayment would constitute unjust enrichment.

It is clear that the trader concerned suffers loss as a result of the unlawfully imposed levy. Even though he may pass on the levy in whole or in part, depending on the price elasticity of demand, it cannot be inferred therefrom that the financial burden has been transferred. The financial burden to be borne by the trader is always greater than the amount of the levy itself. The trader's loss is not represented merely by a reduction in turnover and profit but also for example by a restriction in the commercial margin of manoeuvre whereby the trader's ability to adjust his marketing strategy is restricted.

Advocate General Geelhoed is of the opinion that the national tax authorities must show that the financial burden on the trader has been neutralised in order to be able to resist repayment. In any event a thorough economic analysis of the market is necessary in that connection and a mere accounting investigation by the national authorities is not sufficient. There is therefore a heavy burden of proof on the administration.

The Italian provision in question is couched in strictly neutral terms and contains no elements previously held by the Court to conflict with Community obligations. In the Advocate General's view, none the less, by its vagueness it has allowed a legal practice to subsist or to develop which is not in accordance with the Court's case-law.

Advocate General Geelhoed notes that this is a legal practice of some years' standing which is of a structural nature. That is apparent above all from the fact that the Italian Supreme Court has upheld that evidence may be adduced on the basis of presumptions and that there may be an inference in favour of passing on where the taxable person cannot produce the requisite documentary evidence. Where the lower courts find in accordance with the requirements of Community provisions, their decisions in that connection can be set aside on appeal. The structural nature may also be inferred from the policy followed by the authorities in that regard. Moreover, that legal practice also has a direct effect on the competitive position of participants in the internal market where financial claims are concerned.

Advocate General Geelhoed concludes that Italy has failed to fulfil its obligations under the EC Treaty by making it impossible or extremely difficult for taxable persons to exercise their right to recovery of charges imposed in breach of Community law.

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*For the full text of the Opinion, please consult our internet page
www.curia.eu.int
at approximately 3 pm today.*

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