CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF S.A. DANGEVILLE v. FRANCE

(Application no. 36677/97)

JUDGMENT

STRASBOURG

16 April 2002

FINAL

16/07/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of S.A. Dangeville v. France,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr A.B. BAKA, *President*,
Mr J.-P. COSTA,
Mr GAUKUR JÖRUNDSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 September 2000 and 26 March 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36677/97) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French company, S.A. Dangeville ("the applicant company"), on 6 March 1997.

2. The applicant company was represented by Mr D. Garreau, a member of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant company alleged, in particular, that its right to the peaceful enjoyment of its possessions had been infringed and that it had been discriminated against.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 12 September 2000 the Court declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. The applicant company and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Under the General Tax Code as worded until 31 December 1978 the applicant company was liable to value-added tax (VAT) on its commercial activity. It paid a total of 291,816 French francs (FRF) in VAT on its 1978 transactions.

10. Article 13-B-a of the Sixth Directive of the Council of the European Communities dated 17 May 1977 granted an exemption from VAT for "insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents". That provision was to come into force on 1 January 1978.

11. On 30 June 1978 the Ninth Directive of the Council of the European Communities dated 26 June 1978 was notified to the French State. It granted France an extension of time – until 1 January 1979 – in which to implement the provisions of Article 13-B-a of the Sixth Directive of 1977. Since such directives have no retroactive effect, the Sixth Directive ought nonetheless to have been applied from 1 January to 30 June 1978.

12. Relying on the Sixth Directive, the applicant company sought reimbursement of the VAT it had paid for the period from 1 January to 31 December 1978, which it considered had not been due as the Ninth Directive had no retroactive effect. It also brought an action in damages against the State for failing to bring French law into line with the Sixth Directive within the prescribed period, thereby causing it to sustain damage equal to the amount of the VAT paid. It claimed reimbursement of the VAT paid or, failing that, the amount attributable to the period from 1 January 1978 to the date the Sixth Directive had come into force.

13. The Paris Administrative Court dismissed its claims in a judgment of 8 July 1982. It held, *inter alia*, that it was clear from the Treaty of the European Communities that while directives placed an obligation on States to achieve a particular result, the choice of the appropriate means of implementing a directive in domestic law lay within the sole discretion of the national authorities, such that individuals and private bodies could not rely directly on a directive to defeat a provision of domestic law.

14. On 10 June 1982 a claim by another firm of insurance brokers, S.A. Revert et Badelon, for the reimbursement of VAT paid on its

transactions in 1978 was dismissed by the Paris Administrative Court for the same reasons.

15. In a further development, the authorities directed in an administrative circular issued on 2 January 1986:

> "... no further action shall be taken to collect sums remaining due at the date of publication of this circular from insurance brokers who have failed to charge value-added tax on their transactions between 1 January and 30 June 1978 and have received supplementary tax assessments as a result."

16. In a judgment of 19 March 1986 the *Conseil d'Etat* dismissed an appeal by the applicant company. It held that individuals and private bodies were not entitled to rely on the provisions of a European directive that had yet to be transposed into domestic law and declared the action in damages inadmissible, as the applicant company had omitted to apply in the first instance to the tax authorities. The main points in its judgment were as follows.

17. As regards the first head of claim:

> "Article 189 of the Treaty Establishing the European Community of 25 March 1957 makes it clear that, while Council directives are binding upon each member State 'as to the result to be achieved' and while in order to achieve the prescribed results the national authorities are required to adapt the legislation of the member States to comply with the directives addressed to them, it is solely for those authorities to decide how to give effect to the directives in domestic law. Thus, regardless of any instructions they may contain for the member States, directives cannot be pleaded in aid of tax appeals by nationals of those States. It is common ground that appropriate measures to implement the aforementioned Sixth Directive in domestic law had yet to be taken at the time of the relevant reference period for taxation purposes. In these circumstances, the said Directive, which, contrary to what was submitted by the appellant company, does not constitute a regulation within the meaning of the aforementioned Treaty, has in any event no bearing on the application of the preceding statutory provisions, in particular, Article 256 of the General Tax Code ..."

18. As regards the second head of claim:

> "The Administrative Court did not rule on the claim made in the alternative during the course of the proceedings by the company for compensation in the sum of FRF 291,816. That part of the impugned judgment is therefore defective procedurally and must be quashed.
>
> In the present circumstances, an immediate examination and determination of the claim which the court below omitted to decide is called for.
>
> By virtue of the provisions of Article R.89 of the Administrative Courts Code and Article 1 of the decree of 11 January 1965, proceedings may only be brought in the administrative courts by way of an appeal against a decision. S.A. Jacques Dangeville has not produced any decision that shows that the administrative authority refused to pay it the claimed compensation of FRF 291,816; it has not even produced a request to the authority for that amount. Accordingly, in the absence of a prior decision, its claim to compensation is inadmissible ..."

19. As the second claim had been dismissed on procedural grounds owing to the applicant company's failure to apply in the first instance to the tax authorities, the applicant company made a further claim for reparation, this time after following the prescribed procedure. To that end, it had sent the Minister of the Budget a claim for reparation comprising two limbs on 16 March 1987. In the first, it alleged that the State was at fault for failing to transpose the Sixth Directive into domestic law within the prescribed period and for continuing to apply a provision of French law that no longer complied with Community law. In the second, it argued that the State was strictly liable for failing to maintain an equal distribution of public burdens following the issue of the circular of 2 January 1986.

20. The claim was rejected by the Minister. An appeal by the applicant company to the Paris Administrative Court was dismissed on 23 May 1989.

21. In a judgment of 1 July 1992 the Paris Administrative Court of Appeal, sitting as a full court, quashed part of the judgment of the Paris Administrative Court. It held that the State had been at fault and ordered it to pay the applicant company compensation for its loss in the sum of FRF 129,845, being the amount of VAT overpaid, together with compound statutory interest.

22. The main points made by the Administrative Court of Appeal in its judgment were as follows:

> "The principle of State liability:
>
> Under the provisions of the Treaty establishing the European Economic Community, and in particular Article 5 thereof, the French State is required to take all appropriate measures to ensure fulfilment of its obligations under the Treaty. These include an obligation to nullify all the illegal consequences of a violation of Community law either directly or, in default, by providing effective reparation for the resulting damage. It follows that the fact that a taxpayer which alleges that it has been taxed on the basis of a statutory provision that is incompatible with the objectives of a Community directive has first referred the issue of taxation to the tax court, which refused to accept that such incompatibility could serve as a cause of action, cannot by itself render inadmissible a claim made by the taxpayer on the basis of the obligations arising under the aforementioned Treaty for reparation for the damage it has sustained as a result of a failure to transpose the objectives of the directive into domestic law.
>
> By Article 13-B-a of the Sixth Directive of the Council of the European Economic Communities dated 17 May 1977 the legislation of member States was required from 1 January 1978 onwards to exempt from value-added tax insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents. Although the Ninth Directive of 26 June 1978, which was notified to the French State on 30 June 1978, granted France an extension of time – until 1 January 1979 – in which to transpose the provisions of the Sixth Directive, it is construed by the Court of Justice of the European Economic Communities as having no retroactive effect. Thus, the provisions of Article 256 of the General Tax Code as worded prior to 1 January 1979 requiring payment of value-added tax on insurance broking activities of the type carried on by the Jacques Dangeville company were for the period from 1 January to 30 June 1978 incompatible with the objectives set by the Sixth Directive.

Accordingly, contrary to the Administrative Court's decision, the applicant company's claim that the State is liable for the situation that has thus arisen and should be ordered to make good the loss it has sustained as a result of the illegal situation brought about by its being required to pay value-added tax for the above-mentioned period is well-founded.

Damage:

In view of the fact that insurance brokers are remunerated on the basis of a percentage calculated by the insurers of the premiums paid by the latter's customers, the value-added tax paid by the Jacques Dangeville company was not passed on to their customers or invoiced. Thus, the damage for which the company is entitled to claim reparation is equal to the amount of the value-added tax it paid for the period from 1 January to 30 June 1978 and comes to FRF 129,845.86."

23. The tax authorities appealed to the *Conseil d'Etat*.

24. In its pleading lodged on 23 May 1995 the applicant company set out the following ground of defence:

"... in the instant case the rule that taxpayers should bear the tax burden equally has been contravened by the introduction of measures treating people in the same position differently, since a circular dated 2 January 1986 purported to rule that insurance brokers who had not paid VAT on their transactions between 1 January 1978 and 30 June 1978 and had received supplementary tax assessments as a result would no longer be required to pay the sums they continued to owe on that account at the date the circular was published.

This is a particularly clear breach of the rule that public liabilities must be borne equally. It is also unjust, as it resulted in discrimination between persons liable to VAT, with those who have paid the tax being adversely affected and those who refrained from doing so deriving a benefit."

25. By a judgment of 30 October 1996 the *Conseil d'Etat*, sitting as a full court, quashed that judgment and dismissed all the applicant company's claims. It held that the applicant company was not entitled to seek through an action in damages a remedy it had been refused in tax proceedings in a decision that gave rise to an estoppel by record, namely the judgment of 26 February 1986.

26. The essence of the *Conseil d'Etat*'s decision was as follows:

"The documents in the file submitted to the Paris Administrative Court of Appeal show that by a decision of 19 March 1986 the *Conseil d'Etat*, acting in its judicial capacity, dismissed a claim by S.A. Jacques Dangeville seeking reimbursement of value-added tax it had paid for the period from 1 January to 31 December 1978, *inter alia*, on the ground that its liability to that tax had arisen from the application of statutory provisions that were incompatible with the objectives of the Sixth Directive of the Council of the European Communities of 17 May 1977. The claim by S.A. Jacques Dangeville which the Administrative Court of Appeal examined in the impugned judgment was for payment of 'compensation' in an amount equal to the amount of value-added tax that had thus been paid, by way of reparation for the 'damage' which that tax liability had caused the company to sustain, on the ground that that damage was attributable to the French State's delay in transposing the objectives of the Directive into domestic law. It follows that, as submitted by the Minister of the

Budget, the Paris Administrative Court of Appeal erred in law in holding that the fact that the company '[had] first referred the issue of taxation to the tax court' did not render inadmissible a claim for reparation in which the only alleged damage was the damage resulting from the payment of the tax. The Minister of the Budget's application to have the impugned judgment overturned is accordingly founded to the extent that the Administrative Court of Appeal upheld in part the claims made by S.A. Jacques Dangeville in its submissions ..."

27. On the same day the *Conseil d'Etat* delivered judgment on an appeal lodged on 23 August 1982 by S.A. Revert et Badelon against the Paris Administrative Court's judgment of 10 June 1982. The *Conseil d'Etat* did not follow the line it had taken in its judgment of 26 February 1986 in the applicant company's case, but instead declared S.A. Revert et Badelon's appeal on points of law admissible, holding that the company was entitled to rely on the provisions of the Sixth Directive and should be granted a release from the contested tax liability – for which there was no statutory basis as the statutory provisions conflicted with the objectives of the Directive – for the sums erroneously paid for the period from 1 January to 30 June 1978.

28. The Government Commissioner lodged submissions that were common to the applicant company's and S.A. Revert et Badelon's cases. He pointed out that the factual and legal issues in each were identical, saying:

"... [the file in the case of S.A. Revert et Badelon] raises the same issue of law as that decided by this court on 19 March 1986 on the appeal of the Jacques Dangeville company. The period concerned is the same and the applicable instruments identical. The appellant company, which runs the Revert et Badelon firm, has an activity as insurance brokers which is indistinguishable from that of the Dangeville company ..."

29. He added:

"... I invite you to quash the judgment of the Paris Administrative Court of Appeal which upheld the Dangeville company's claims for compensation. It has been that company's misfortune to have its tax claim decided too early. I am conscious that the resulting outcome in its case may appear unjust. I am, however, mindful that upholding the judgment in its favour would mean your making an exception to the principles on which your decision-making process is based that would unreasonably undermine the stability of legal situations created by judicial decision. One isolated case based, moreover, on transitional difficulties, cannot serve to justify making such an exception ..."

30. In finding in favour of S.A. Revert et Badelon in its judgment of 30 October 1996, the *Conseil d'Etat* held as follows:

"Firstly, by virtue of Article 1 of the Sixth Directive of the Council of the European Communities of 17 May 1977 the member States were required to take appropriate measures by no later than 1 January 1978 in order to bring their systems of value-added tax in line with the objectives of the Directive. Although the Ninth Directive of 26 June 1978, which was notified to the French State on 30 June 1978, granted France an extension of time – until 1 January 1979 – in which to transpose the provisions of the Sixth Directive, it is construed by the Court of Justice of the European Economic Communities as having no retroactive effect. Thus, before 30 June 1978 it was unable to afford the French authorities a defence for their failure to enact provisions complying with the objectives of the Sixth Directive on time.

Further, in so far as they make dealings by insurance brokers liable to value-added tax when the remuneration for them does not take the form of commission or brokerage set by statute or regulations, Articles 256 and 261-4-1° of the General Tax Code, which were enacted by the Law of 6 January 1966 and remained in force until amended by the Law of 29 December 1978, are not compatible with the objectives of the provisions of sub-paragraph (a) of Article 13-B of the Sixth Directive, which exempts from value-added tax all insurance and reinsurance transactions performed by insurance brokers or agents. Accordingly, it is to that extent necessary to rule that those provisions of Articles 256 and 261-4-1° were inapplicable for the period from 1 January to 30 June 1978. It follows that the submission by the S.A. Revert et Badelon firm, which carries on an activity as insurance brokers, that there was no basis in law for the demand for it to pay value-added tax on its business dealings during the period from 1 April to 30 June 1978 is well-founded.

However, for the period from 1 July to 31 December 1978 the company is not entitled to rely on the incompatibility of Articles 256 and 261-4-1° of the General Tax Code with the objectives of the provisions of sub-paragraph (a) of Article 13-B of the Sixth Directive, as the time-limit by which France was required to bring its legislation into line with that Directive was extended to 1 January 1979 by the Ninth Directive. Subsequently, the applicant company was rightly charged value-added tax for the period from 1 July to 31 December 1978 on the basis of the provisions of Articles 256 and 261-4-1° of the General Tax Code that remained applicable.

It follows from the foregoing that the sole valid submission made by the S.A. Revert et Badelon firm is that the Paris Administrative Court erred in its impugned judgment in dismissing its claim for the periods from 1 to 29 February 1978 and 1 April to 30 June 1978 ..."

II. RELEVANT LAW AND PRACTICE

A. Community law

1. General principles

31. As regards the principle of the "precedence of the Community legal system", see, among other authorities, the following judgments of the Court of Justice of the European Communities (CJEC): Case 6/64, *Costa v. E.N.E.L.* [1964] European Court Reports (ECR) 585 ("By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply"); Case 34/73, *Fratelli Variola Spa v. Amministrazione italiana delle Finanze* [1973] ECR 981; and Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

32. CJEC, Case 26/62, *Van Gend en Loos v. Administratie der Belastingen* [1963] ECR 1:

"Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

33. CJEC, Case 309/85, *Barra v. Belgian State and City of Liège* [1988] ECR 355, paragraphs 17 and 18:

"The right to repayment of amounts charged by a Member State in breach of the rules of Community law is the consequence and complement of the rights conferred on individuals by the Community provisions as interpreted by the Court. Whilst it is true that repayment may be sought only in the framework of the conditions as to both substance and form laid down by the various national laws applicable thereto, the fact nevertheless remains that those conditions may not be so framed as to render virtually impossible the exercise of rights conferred by Community law."

2. The Directives

34. CJEC, Case 8/81, *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraphs 19, 20 and 24:

"Wherever a directive is correctly implemented, its effects extend to individuals through the medium of the implementing measures adopted by the Member State concerned ... However, special problems arise where a Member State has failed to implement a directive correctly and, more particularly, where the provisions of the directive have not been implemented by the end of the period prescribed for that purpose ... A Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails."

35. CJEC, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkorfer and others v. Bundesrepublik Deutschland* [1996] ECR I-4845, paragraph 29:

"Failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury ..."

CJEC, Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italian Republic* [1991] ECR I-5357, paragraph 36:

"A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law."

36. CJEC, Case 188/95, *Fantask and others v. Industriministeriet* [1997] ECR I-6783, paragraphs 42, 48 and 52:

"By its seventh question, the national court essentially asks whether Community law prevents a Member State from relying on a limitation period under national law to resist actions for the recovery of charges levied in breach of the Directive as long as that Member State has not properly transposed the Directive ... The Court has thus acknowledged, in the interests of legal certainty which protects both the taxpayer and

the authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law. Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought (see, in particular, Case 33/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5, Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 17 and 18, and Case 261/95 *Palmisani v. Istituto Nazionale della Previdenza Sociale* [1997] ECR I-0000, paragraph 28) ... The reply to the seventh question must therefore be that Community law, as it now stands, does not prevent a Member State which has not properly transposed the Directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law."

3. Lack of retrospective effect for the Ninth Directive and period of application of the Ninth Directive in 1978

37. CJEC, Case 70/83, *Kloppenburg v. Finanzamt Leer* [1984] ECR 1075, paragraphs 11-14:

It is necessary to emphasise, as the Court has already done on several occasions, that Community legislation must be unequivocal and its application must be predictable for those who are subject to it. Postponement of the date of entry into force of a measure of general application, although the date initially specified has already passed, is in itself liable to undermine that principle. If the purpose of an extension is to deprive individuals of the legal remedies which the first measure has already conferred upon them, such an effect in practice raises the question of the validity of the amending measure.

However, such a question of validity could arise only if the intention to produce the above-mentioned effect were expressly stated in the amending measure. That is not so in the case of the Ninth Directive. The text of that Directive merely extends the period for transposing the Sixth Directive into national law in favour of those Member States which were unable to complete, within the period initially prescribed, the legislative procedure required for amending their legislation on value-added tax. It contains nothing to indicate that the extension alters the position of economic operators in relation to transactions carried out by them prior to the entry into force of the measure altering the period allowed for implementation.

It follows that the Ninth Directive must be interpreted as not having retroactive effect in that regard.

The answer to the question raised should therefore be that in the absence of the implementation of the Sixth Council Directive, 77/388/EEC, of 17 May 1977, on the Harmonisation of the Laws of the Member States relating to Turnover Taxes – Common System of Value-Added Tax; Uniform Basis of Assessment, it was possible for the provision concerning the exemption of the negotiation of credit ... to be relied upon by a credit negotiator in relation to transactions carried out between 1 January and 30 June 1978 ..."

B. Domestic case-law

1. Conseil d'Etat

38. Judicial Assembly, 22 December 1978, *ministre de l'Intérieur v. Cohn-Bendit*, *Recueil Lebon*:

> "... Article 56 of the Treaty establishing the European Economic Community dated 25 March 1957, which does not contain any provision empowering bodies of the European Communities to make regulations on public-policy grounds that are directly applicable in the member States, provides that the coordination of provisions laid down by law or regulation 'providing for special treatment for foreign nationals on grounds of public policy, public security or public health' shall be assured by directives issued by the Council on a proposal from the Commission and after consulting the Assembly. It is clear from Article 189 of the Treaty of 25 March 1957 that while such directives are binding upon each member State 'as to the result to be achieved' and while in order to achieve the prescribed results the national authorities are required to adapt the legislation and regulations of the member States to comply with the directives addressed to them, it is solely for those authorities to determine the form implementation of the directives will take and to decide, subject to supervision by the domestic courts, how to give effect to the directives in domestic law. Thus, regardless of any instructions they may contain for the member States, directives cannot be pleaded in aid of appeals by nationals of those States against individual administrative acts. It follows that Mr Cohn-Bendit's submission to the Paris Administrative Court in support of his application for an order quashing the Minister of the Interior's decision of 2 February 1976, on the ground that it contravened the provisions of the Directive issued on 25 February 1964 by the Council of the European Communities with a view to coordinating, in accordance with the conditions laid down by Article 56 of the Treaty of Rome, the special measures taken to control the movement and residence of aliens on grounds of public policy, public security or public health, is unfounded. Accordingly, in the absence of any contention that the regulatory measures taken by the French Government in order to comply with the directives issued by the Council of the European Communities are unlawful, the decision to be taken on Mr Cohn-Bendit's appeal cannot under any circumstances turn upon the interpretation of the Directive of 25 February 1964. It follows, without there being any need to examine the grounds of the appeal, that the Minister of the Interior's submission is well-founded, namely the Paris Administrative Court erred in its impugned judgment of 21 December 1977 in referring to the Court of Justice of the European Communities the issues concerning the interpretation of that Directive and staying the proceedings pending the Court of Justice's decision ..."

39. Judicial Assembly, 20 October 1989, *Nicolo*, *Recueil Lebon*, p. 190:

> "By section 4 of Law no. 77-729 of 7 July 1977 governing the Election of the Representatives of the Assembly of the European Communities 'the territory of the Republic forms a single constituency' for the purposes of the election of the French representatives to the European Parliament. By virtue of that statutory provision, taken together with Articles 2 and 72 of the Constitution of 4 October 1958, which lay down that the overseas *départements* and territories are integral parts of the French Republic, those *départements* and territories are necessarily included in the single constituency within which the election of representatives to the European Parliament takes place. Article 227-1 of the Treaty of 25 March 1957 establishing the European Economic Community provides: 'This Treaty shall apply to the French Republic.' The

aforesaid rules set out in the Law of 7 July 1977 are not incompatible with the clear provisions of the aforementioned Article 227-1 of the Treaty of Rome ...”

40. Judicial Assembly, 28 February 1992, *S.A. Rothmans International France et S.A. Philip Morris France*, *Recueil Lebon*, p. 20:

“Article 37 of the Treaty establishing the European Economic Community provides: 'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.' Article 5-1 of the Directive of the Council of the European Communities dated 19 December 1972, which was issued with a view to implementing those provisions with regard to manufactured tobacco and the provisions of Article 30 of the Treaty, which prohibits quantitative restrictions and all measures having equivalent effect, provides: 'Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. This provision may not, however, hinder implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices.' As the Court of Justice of the European Communities ruled in finding infringements in its judgments of 21 June 1983 and 13 July 1988, the only provisions whose application is reserved by Article 5-1 of the Directive are provisions of national legislation of a general nature that are intended to curb increases in prices. The aforementioned provisions of section 6 of the Law of 24 May 1976 confer on the government a special power to fix the price of tobacco imported from member States of the European Community, independently of the application of the national legislation regarding the control of price levels. They thus enable the government to fix the sale price of imported tobacco in conditions that were not contemplated by Article 5-1 of the Directive of 19 December 1972 and are incompatible with the objectives set out in that Directive. It follows from this that Article 10 of the decree of 31 December 1976 referred to above, which was issued on the basis of section 6 of the Law of 24 May 1976, which must be regarded as inapplicable, is itself devoid of statutory basis. In view of the foregoing, the Minister of the Economy, Finance and the Budget was not entitled in law tacitly to reject the applications by the companies Rothmans International France and Philip Morris France for permission to raise the price of products they imported or distributed as wholesalers by fifty centimes on 1 September 1983. Accordingly, the said decisions must be quashed ...”

2. Court of Cassation

41. Mixed Division, 24 May 1975, *Administration des douanes v. Société des cafés Jacques Vabre, Sarl J. Weigel et Cie*, (Court of Cassation, Bulletin no. 4):

“... the Treaty of 25 March 1957, which, by virtue of Article [55] of the Constitution, ranks above legislation, establishes a separate branch of law which is integrated into the legal systems of the member States. Owing to that special characteristic, the branch of law set up by the Treaty is directly applicable to nationals of those States and binding on their courts ... Accordingly, the Court of Appeal's decision that Article 95 of the Treaty should be applied in the instant case, to the exclusion of Article 265 of the Customs Code, even though the latter provision is the more recent, was correct and not beyond the Court of Appeal's powers ...

Since, in the Community legal system, infringements by member States of the European Economic Community of their obligations under the Treaty of 25 March 1957 are actionable under Article 170 of the said Treaty, the plea of lack of reciprocity is not available in the domestic courts ...”

3. Legal theory

42. Extracts from *Institutions administratives – Droit administratif*, by Georges Dupuis and Marie-José Guédon, published by Armand Colin, Paris, 1986, pp. 87-88:

“The Court of Cassation drew the logical conclusions from the fact that the two legal systems are superimposed: in the event of a conflict between a statute and a Community norm, only the latter is applicable, even if it is prior in time. Consequently, French courts will refuse to apply French law if it is contrary to European law. In other words, they carry out a form of verification of the compatibility of the statute with Community law that is very similar to a review of constitutionality. Basically, the reasoning of the Court of Cassation extends the principle established by Article 55 of the Constitution that international treaties take precedence over statutes. The Court of Cassation relies on two series of arguments: firstly, implicit in the initial treaties is a move towards abandonment of sovereignty by the States and the creation of genuine *supra-sovereignty* in favour of the Community bodies. Secondly, since the national courts are responsible for applying the provisions emanating from that *supra-sovereignty* directly, they cannot give precedence to domestic law as, in this system, it is necessarily *infra-sovereign* (Court of Cassation, *Société des cafés Jacques Vabre*, 24 May 1975 ...).

The *Conseil d'Etat* rejects such reasoning (*Conseil d'Etat*, 1 March 1968, *Syndicat général des fabricants de semoule de France* ...; *Conseil d'Etat*, 22 December 1978, *ministre de l'Intérieur v. Cohn-Bendit* ...). It has shown itself to be 'essentially a national jurisdiction, which is persuaded of the excellence of the national system and has resolved to act as the guardian of national legality' (C.-A. Colliard, *Le juge administratif français et le droit communautaire, Mélanges offerts à Marcel Waline*, LGDJ, Paris, 1974, p. 187; Bruno Genevois '*Le Conseil d'Etat et l'ordre juridique communautaire*', EDCE [Studies and documents of the *Conseil d'Etat*], 1979-1980, p. 73; Reports and Studies Committee of the *Conseil d'Etat*, '*Droit communautaire et droit français*', EDCE, 1981-1982, p. 215), notably in two ways. Firstly, it has proscribed all verification of the compatibility of legislation with Community law: according to a Government Commissioner, the administrative courts 'may not criticise or disregard a statute, even on the ground that it violates international law or, more particularly, Community law'. Secondly, on a more specific point, the *Conseil d'Etat* has chosen not to follow the case-law of the Court of Justice of the European Communities that has blurred the distinction between regulations and directives... The *Conseil d'Etat* affirms, on the contrary, [that] 'regardless of any instructions they may contain' [directives] cannot be pleaded in aid of an application for review of an individual act. Directives do, however, impose an obligation on the national authorities to adapt their legislation and regulations so as to comply with the directive (see *Cohn-Bendit*, cited above). Consequently, nationals of member States may challenge the validity of domestic regulatory measures by reference to the Community directives which they purport to implement or which they disregard.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

43. The applicant company alleged a violation of its right of property set out in the second sentence of the first paragraph of Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Existence of possessions within the meaning of Article 1 of Protocol No. 1

44. The applicant company submitted that it held a definite, immediately payable debt that could be assimilated to an asset as that term was used in *Van Marle and Others v. the Netherlands* (judgment of 26 June 1986, Series A no. 101, p. 13, § 41), since it had paid the tax as a result of a situation which the Administrative Court of Appeal and the Government Commissioner in the *Conseil d'Etat* considered to be unlawful. It also had a legitimate expectation of recovering its debt. From 1 January to 30 June 1978 the French value-added tax (VAT) legislation had contravened Community law as set out in Article 13-B-a of the Sixth Directive of 17 May 1977. The applicant company pointed out that the administrative circular of 2 January 1986 had been issued before the *Conseil d'Etat*'s judgment of 19 March 1986 dismissing its appeal. It had therefore been on the basis of that administrative circular that its second appeal, alleging both fault on the part of the State for failing to transpose the Sixth Directive into domestic law and strict State liability for failing to maintain equality between public burdens, had been lodged.

When it lodged its second appeal it therefore had a legitimate expectation within the meaning of the Court's judgment in *Pressos Compania Naviera S.A. and Others v. Belgium* (judgment of 20 November 1995, Series A no. 332) that its claim would be upheld, as a result of the issue of the administrative circular and the consequences it entailed. In addition, the administrative courts did accept jurisdiction to verify the compatibility of international and French norms, as the new precedent laid down in 1996 in

S.A. Revert et Badelon did no more than to apply a line of authorities that dated back to 1989 to tax proceedings (*Conseil d'Etat*, 20 October 1989, *Nicolo*, *Recueil* 190). The *Conseil d'Etat* had in several earlier decisions held that the State's responsibility was engaged in the event of a violation of Community law, in particular, if it was at fault for allowing an illegal situation to develop through the incompatibility of a domestic measure with a community directive (Judicial Assembly of the *Conseil d'Etat*, 28 February 1992, *Arizona Tobacco Products and S.A. Philip Morris France*). It followed that the judgment of the Administrative Court of Appeal was not an isolated authority and, indeed, it was only overturned by the *Conseil d'Etat* on procedural grounds based on the "classification of proceedings" rule (*principe de la distinction des contentieux*) .

The applicant company added that at the time its claim for compensation was lodged the classification of proceedings rule was only relative in scope, since as long ago as 1963 the *Conseil d'Etat* had declared, in a case in which the legal causes of action were identical, that a claim for compensation based on the illegality of an act was admissible, even though an application to have the act set aside as being *ultra vires* had previously been dismissed (*Conseil d'Etat*, 3 May 1963, *Alaux*, *Recueil* 261).

Lastly, since the implementation of the administrative circular of 1986 had created a difference in treatment between taxpayers of the same category, it afforded at minimum a basis on which the applicant company could lay claim to its debt by a second application for compensation (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment of 23 October 1997, *Reports of Judgments and Decisions* 1997-VII). By exempting from liability those companies which had not paid the VAT, the tax authorities had acknowledged that they were under no obligation to pay it under domestic law and had thereby acknowledged their error.

45. The Government contended that the applicant company had not shown that it had had a legitimate expectation that could be regarded as a possession within the meaning of Article 1 of Protocol No. 1 when it issued its second action (see *Pressos Compania Naviera S.A. and Others*, cited above). There were two primary reasons why the applicant company's new appeal could not succeed. Firstly, its action had been brought on the basis that the tax authorities had been at fault in imposing the tax, whereas the existence of any such fault was necessarily excluded by the *Conseil d'Etat*'s ruling in its judgment on the first appeal that the tax in issue had been lawfully levied. As regards the Paris Administrative Court of Appeal's judgment of 1 July 1992 allowing the applicant company's appeal, the Government argued that it was not in line with the case-law at the time the second appeal was lodged. Secondly, the Government referred to the "classification of remedies" rule (*règle de la distinction des voies de recours*), which, as the *Conseil d'Etat* had held in its judgment of

30 October 1996, precluded the applicant company from successfully bringing an action in tort after failing in its tax appeal.

46. The Court notes that, by requiring payment of VAT on transactions negotiated by insurance brokers during the period from 1 January to 30 June 1978, the French legislation was incompatible with the provisions of Article 13-B-a of the Sixth Directive of the Council of the European Communities of 17 May 1977, which was directly applicable from 1 January 1978 for the period concerned. This is apparent from the Sixth and Ninth Directives, the relevant case-law of the Court of Justice of the European Communities (CJEC – see paragraphs 31-37 above), the administrative circular of 2 January 1986 (see paragraph 15 above) and the terms of the *Conseil d'Etat*'s judgment of 30 October 1996 in *S.A. Revert et Badelon* (see paragraph 30 above). However, it is common ground that, even though it carried on business as insurance brokers, the applicant company paid VAT for the period from 1 January to 30 June 1978. Indeed, the Administrative Court of Appeal found in favour of the applicant company on 1 July 1992 in the second set of proceedings.

The Court further notes that since its judgment in *Nicolo* of 20 October 1989 the *Conseil d'Etat* has been willing to verify the compatibility of French norms with international norms (see paragraph 39 above). Furthermore, the *Conseil d'Etat* had already held in a previous case before ruling on the applicant company's second appeal that the State was liable for a violation of Community law owing to the incompatibility of a domestic measure (see paragraph 40 above).

47. As to the "the classification of remedies" rule relied on by the Government, the Court notes that right from its first appeal the applicant company's claim was based on a Community norm that was perfectly clear, precise and directly applicable. That right did not disappear with the *Conseil d'Etat*'s judgment of 1986 and, consequently, survived during the second set of proceedings. Further, the Court reiterates that the fact that the *Conseil d'Etat* relied on a long-standing principle cannot by itself justify a failure to comply with the present requirements of European law (see, *mutatis mutandis*, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, p. 19, § 36). It points out in that connection that the Convention is a living instrument that must be interpreted in the light of present-day conditions and the notions currently prevailing in democratic States (see, among other authorities, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 28). The procedural rule regarding the "classification of proceedings" cannot therefore cause a substantive right created by the Sixth Directive to disappear.

48. In the light of the foregoing, the Court finds that the applicant company had a valid claim against the State when it lodged its two appeals for the VAT paid in error for the period from 1 January to 30 June 1978. A claim of that nature "constituted an asset" and therefore amounted to a

"possession" within the meaning of the first sentence of Article 1 of Protocol No. 1, which was accordingly applicable in the present case (see, among other authorities, *Pressos Compania Naviera S.A. and Others*, cited above, p. 21, § 31).

In any event, the Court considers that the applicant company had at least a legitimate expectation of being able to obtain the reimbursement of the disputed sum (see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51).

B. Whether there was an interference and the applicable rule

49. Under the Court's case-law, Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 24, § 61; *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 46-47, § 55, and p. 49, § 62; *Pressos Compania Naviera S.A. and Others*, cited above, pp. 21-22, § 33; and *Phocas v. France*, judgment of 23 April 1996, *Reports* 1996-II, pp. 541-42, § 51).

50. The *Conseil d'Etat*'s judgment of 30 October 1996 deprived the applicant company of its right to have its claim for reimbursement of the amount it had overpaid in VAT examined. The Court further notes that in its first judgment of 26 February 1986 the *Conseil d'Etat* refused to uphold the applicant company's claim, notwithstanding the provisions of the Sixth Directive and of the administrative circular of 2 January 1986 which exempted insurance brokers from the obligation to pay VAT for the period from 1 January to 30 June 1978. In that connection, it is noteworthy that the administrative circular concerned only taxpayers who had received a supplementary tax assessment for failing to pay the VAT in issue. Those decisions entailed an interference with the right which the applicant company was entitled to assert under Community law and the applicable administrative circular for the reimbursement of debt and, consequently, with the right of all persons, and in particular the applicant company, to the peaceful enjoyment of their possessions.

51. The Court notes that the applicant company complained that it had been deprived of its possessions within the meaning of the second sentence of the first paragraph of Article 1. It is true that an interference with the exercise of claims against the State may constitute such a deprivation of possessions (see *Pressos Compania Naviera S.A. and Others* cited above, p. 22, § 34). However, as regards the payment of a tax, a more natural approach might be to examine the complaints from the angle of a control of the use of property in the general interest "to secure the payment of taxes", which falls within the rule in the second paragraph of Article 1 (see *Building Societies*, cited above, p. 2353, § 79).

The Court considers it unnecessary to decide this issue, since the two rules are not "distinct" in the sense of being unconnected, are only concerned with particular instances of interference with the right to peaceful enjoyment of property and must, accordingly, be construed in the light of the principle enunciated in the first sentence of the first paragraph. The Court will therefore examine the interference in the light of the first sentence of the first paragraph of Article 1.

C. Whether the interference was justified

52. For the purposes of the first sentence of the first paragraph, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Sporrong and Lönnroth*, cited above, p. 26, § 69).

1. The general interest

53. The applicant company rejected the Government's submission that the requirement of lawfulness had been complied with, contending that it was contrary to that requirement to allow the "classification of proceedings" rule to prevail over the rule that Community directives enjoyed primacy. It submitted in particular that the "classification of proceedings" rule and the estoppel by record relied on by the Government were only relative in scope, as had being confirmed by recent decisions of the *Conseil d'Etat* and the CJEC. It should therefore have been allowed to assert the rights it held by virtue of a Community directive. Since it had been prevented from obtaining satisfaction from the tax courts when the first judgment was delivered in 1986, it had been obliged to issue a second set of proceedings for compensation in order to obtain satisfaction.

54. The Government argued that even assuming, purely for the sake of argument, that the applicant company had been deprived of a legitimate expectation by the decisions of the domestic courts, those decisions complied with the lawfulness requirement and constituted a proportionate measure taken in the public interest. As regards compliance with the

lawfulness requirement, the Government said in particular that the claim had been dismissed on the basis of established jurisprudential principles applicable to both private and public law. In ruling that the applicant company's claim was estopped *per rem judicatam* as a result of its first judgment of 1986, the *Conseil d'Etat* had applied the "classification of remedies" rule, which prevented a party from bringing an action under the general law of tort for a remedy it had been refused under a special procedure. The justification for the rule lay in the need to ensure compliance with special rules applicable to contentious proceedings, or at least to prevent their being circumvented in a way that rendered them meaningless. Without such a rule, there was a risk of identical situations been treated differently and of a direct breach of the *res judicata* rule. Lastly, with regard to the compatibility of the "classification of remedies" rule with Community law, the Government argued that the decision of the CJEC in *Emmott* (C-208/90, *Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-4269) was no longer good law, as, since its *Fantask* decision of 2 December 1997 (C-188/95, *Fantask and others v. Industriministeriet* [1997] ECR I-6783), the CJEC now accepted that, subject to certain conditions, it was for the domestic legal system of each member State to lay down the detailed procedural rules for actions seeking the recovery of sums wrongly paid. The "classification of remedies" rule was not, therefore, at variance with the CJEC's case-law.

The Government also maintained that the administrative circular took the general interest into account and answered the need to ensure the primacy of Community law.

55. The Court considers that the administrative circular of 2 January 1986 was intended to bring domestic law into line with the relevant provisions of the Sixth Directive of 1977. That, in the Court's view, is clearly a legitimate objective consistent with Article 1 of Protocol No. 1.

56. With regard to the judgments of the *Conseil d'Etat*, the Court notes that the Government's case is based on the application of an established jurisprudential principle, namely the "classification of remedies" or "classification of proceedings" rule. The rule prevents a claim being brought under the general law of tort for a remedy that has previously been refused in a special form of action. According to the Government, the *Conseil d'Etat* had merely applied that rule when it held that the first judgment of 1986 gave rise to an estoppel by record.

With regard to the argument concerning the application of the "classification of remedies" rule, the Court need only refer to its preceding observations (see paragraph 47 above) and sees no reason to adopt a different approach when assessing the "general interest". Furthermore, in the circumstances of the present case the *Conseil d'Etat*'s particularly strict interpretation of that procedural rule deprived the applicant company of the sole domestic procedure that was capable of affording it a sufficient remedy

to ensure compliance with the provisions of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Miragall Escolano and Others v. Spain*, nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, § 38, ECHR 2000-I).

The Court can discern no other reason that could serve to justify on general-interest grounds the *Conseil d'Etat*'s refusal to give effect to a directly applicable provision of Community law. As to the CJEC's *Fantask* judgment cited by the Government (see paragraph 54 above), the Court fails to see why it should offer any justification either, since it deals with time-limits for appeals and reliance on limitation periods under national law to resist actions for repayment of charges when they become payable, and not, as in the instant case, a refusal to take the right to reimbursement itself into account (see paragraph 36 above).

57. In any event, the Court notes that the interference resulted not from any legislative intervention, but on the contrary from the legislature's failure to bring the domestic law into line with a Community directive, such that the relevant administrative courts were forced to rule on that issue. The Court can but note that charging VAT on the activities of insurance brokers for the period from 1 January to 30 June 1978 contravened Article 13-B-a of the Sixth Directive of the Council of European Communities of 17 May 1977. The French authorities sought to render French law compliant by issuing the administrative circular of 2 January 1986. In its judgment of 19 March 1986, the *Conseil d'Etat* likewise failed to have due regard to the effects of the incompatibility of French law with Community law, notwithstanding the applicant company's failure to draw its attention to that point. The Court further notes that the *Conseil d'Etat*'s case-law regarding verification of the conformity of national law with international law has substantially evolved since 1989 (see paragraphs 39-40 above) and that the applicant company successfully appealed to the Paris Administrative Court of Appeal (see paragraphs 21-22 above).

It further notes that the domestic authorities appear to have had difficulty in comprehending Community law, a fact that is, incidentally, confirmed by the *Conseil d'Etat*'s reference in its *S.A. Revert et Badelon* decision to "... [the] failure [of the French authorities] to enact provisions that were consistent with the objectives of the Sixth Directive on time". Thus, the administrative circular bringing French law into line with the Sixth Directive was not issued until 2 January 1986, that is to say more than seven years after the Ninth Directive was notified to the French State (see paragraph 11 above), and in any event concerned only those taxpayers who had refused to the pay the VAT concerned. It is true that the Government have explained that by not referring to the case of taxpayers who had already paid the VAT, the administrative circular left open the possibility of a court action for reimbursement. However, the *Conseil d'Etat* did not share that view, as it dismissed the applicant company's first appeal more than two

and a half months after the administrative circular was issued. Lastly, the Court notes that the Court of Cassation – the highest ranking judicial court – has for its part already accepted that it has jurisdiction to verify whether a domestic norm is consistent with international law (see paragraph 41 above). In the Court's view, the applicant company cannot be required to suffer the consequences of the difficulties that were encountered in assimilating Community law or of the divergences between the various national authorities.

58. In the light of the foregoing, the Court finds that the interference with the applicant company's right to the peaceful enjoyment of its possessions was not required in the general interest.

2. Whether a fair balance was struck between the competing interests

59. The applicant company said that there was no justification for the interference with its right to the peaceful enjoyment of its possessions, as the judgment dismissing its appeal in 1986 had been preceded by the administrative circular of 2 January 1986, which itself did no more than conform to the requirements of the Sixth Directive of 1977. Nor was the interference justified by the 1996 judgment, as the *Conseil d'Etat* had dismissed the applicant company's second appeal merely on the grounds that it was inadmissible, without ruling on the merits. The applicant company submitted that no estoppel by record had arisen, since there had been no identity of subject matter between its actions for restitution of the VAT and in tort: the former was based on the failure to transpose the Sixth Directive within the prescribed period, while the latter concerned the application of invalid statutory provisions.

The applicant company also explained that it was prevented by law from effecting a set-off between VAT and employment tax and that three expert witnesses had attested that it could not pass on to its customers the VAT it had paid.

The applicant company observed that, contrary to Article 1 of Protocol No. 1 and the Court's case-law, it had ultimately been deprived of any compensation from the French authorities, as it had been its misfortune to have its tax appeal heard prematurely and to be denied the guarantees enjoyed by S.A. Revert et Badelon. It therefore contended that it had been a victim of the difficulties caused by the *Conseil d'Etat*'s case-law, which it said constituted an “individual and excessive burden” such that “the fair balance which should [have been] struck between the protection of the right of property and the requirements of the general interest [had been] upset” (see *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296).

60. As to whether the restriction on the applicant company's rights struck a fair balance between the competing interests, the Government said, *inter alia*, that the *Conseil d'Etat* had stood by its established principles for two reasons. Firstly, the fact that the applicant company had restricted its

action to a tax appeal had not deprived it of the possibility of asserting its rights. Secondly, to have made an exception would have meant unreasonably undermining the principle of legal certainty. Lastly, the Government noted that, since the applicant company had shown that the "classification of remedies" principle was relative in its effects, in particular owing to the requirement for identity of subject matter, it could have taken that factor into account when preparing its second appeal and based its claim not on the VAT paid, an issue that had been dealt with in 1986, but on the commercial and financial damage actually sustained. Thus, the inadmissibility of the applicant company's appeal was the result of its choice of cause of action and had by no means been inevitable.

The administrative circular was based on an objective difference in the situation of the companies concerned. Furthermore, it had not placed exempted companies in a radically different situation from those that were not: companies such as the applicant company that had been charged VAT could deduct the VAT they had paid and pass it on to their customers, notably by increasing the prices they invoiced for their services. While it was true that the exempted companies had the benefit of the unpaid VAT, the corollary of that was that they could not pass it on to their customers. The complaint was therefore in any event manifestly ill-founded.

61. The Court finds that in the instant case the interference with the applicant company's right to the peaceful enjoyment of its "possessions" was disproportionate. Both the negation of the applicant company's claim against the State and the absence of domestic procedures affording a sufficient remedy to ensure the protection of the applicant company's right to the peaceful enjoyment of its possessions upset the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, *mutatis mutandis*, *Phocas*, cited above, pp. 544-45, § 60).

D. Conclusion

62. Consequently, there has been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

63. The applicant company alleged a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

64. The applicant company submitted that by adopting the administrative circular abandoning proceedings against companies that had not paid the VAT, the authorities had been guilty of discrimination by giving those who had defaulted on their tax an advantage over law-abiding taxpayers; that discrimination had been compounded by the authorities' failure to take action to refund the sums which the law-abiding taxpayers had paid in error.

It pointed out that in *National & Provincial Building Society*, the Court held that there had been no violation after noting that the applicant building societies had failed to take proceedings challenging the regulations in issue and were accordingly not in the same situation as that of the Woolwich Building Society. It noted that although in *Fredin v. Sweden* the Court had found no violation of Article 14, on the ground that different classes of complainants could be created (judgment of 18 February 1991, Series A no. 192), it had ruled that a distinction made to the detriment of persons whose situations were similar was discriminatory (see *Darby v. Sweden*, judgment of 23 October 1990, Series A no. 187). In the instant case, the applicant company said that it was in an identical situation to all those companies carrying on business as insurance brokers who had not paid VAT for 1978 by the time the administrative circular was issued on 2 January 1986. The difference in treatment was directly attributable to the administrative circular, which excluded from its ambit only those businesses that had paid VAT voluntarily. While it was true that the latter were entitled to request a refund of the VAT, the *Conseil d'Etat* had dismissed the applicant company's claim for such a refund. In practice, an application for judicial review of the administrative circular, which as a regulatory circular was in any event not amenable to such review, would have had no effect.

The applicant company argued that the administrative circular did not pursue a legitimate aim and that the means used were not reasonably proportionate to the aim pursued. If the purpose of the administrative circular had been to transpose the Sixth Directive of 1977 into domestic law, there was no justification for the difference in treatment between the companies concerned by the Sixth Directive. Those companies that had voluntarily paid the VAT, even though it had been levied unlawfully, had not received any benefit in exchange.

Lastly, the applicant company contended that it had received less favourable treatment than S.A. Revert et Badelon. Both companies had paid the same tax, made an initial claim for a refund, appealed to the administrative court and, following the dismissal of their claims, lodged almost simultaneous appeals to the *Conseil d'Etat* in 1982. The *Conseil*

d'Etat had dismissed the applicant company's appeal in 1986, whereas S.A. Revert et Badelon's appeal papers had been lost and consideration of the appeal consequently delayed until it was set down for hearing at the same session as the applicant company's second appeal. The *Conseil d'Etat* reached different decisions in the two cases, notwithstanding the fact that the legal position of the two companies was identical, the sole difference being that S.A. Revert et Badelon's case file had been mislaid by the *Conseil d'Etat* for several years. The appeal by S.A. Revert et Badelon was not heard until ten years after the applicant company's and it benefited from favourable developments in the case-law.

65. The Government considered that neither the decisions of the *Conseil d'Etat* nor the administrative circular adopted on 2 January 1986 by the tax authorities amounted to discrimination. The decisions in the applicant company's case and in *S.A. Revert et Badelon* did not concern the same issue of law or appellants in identical situations. The European Court of Human Rights had held that there could be no discrimination unless the difference in treatment concerned persons in identical situations (see *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, and *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112). The Government noted that the appeals lodged concurrently with the applicant company's first appeal had likewise been dismissed. Nonetheless, the Government accepted that the 1986 decisions of the *Conseil d'Etat* on the applicant company's appeal and its decision on Revert et Badelon's appeal were at variance. The reason for the difference was that the *Conseil d'Etat*, which in this instance had identical arguments before it, decided in the second case – which, ten years after the first, raised the same question of law – to depart from its previous case-law. Changes in the case-law, which by definition entailed a conflict between decisions delivered before and after the change, could not be regarded as violating Article 14. For them to be regarded otherwise would be contrary to the Court's traditional interpretation of the provisions of Article 14 (see *Case relating to certain aspects of the laws on the use of languages in education in Belgium* (merits), judgment of 23 July 1968, Series A no. 6).

The Government said that the indisputable effect of the administrative circular of 2 January 1986 was to put the applicant company in an ostensibly less favourable position than that of the companies referred to in the circular. As the "*Belgian linguistic*" case showed, the Court took into consideration the extent of the difference in treatment and whether it was proportionate to the situation of the persons concerned. The States thus enjoyed a margin of appreciation that varied according to the circumstances, the domain and the background (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98). In the instant case the administrative circular had been issued because of the primacy of

the Community norm, in accordance with an undertaking given to the Commission of the Communities. The circular was therefore in the public interest and satisfied an existing legal obligation, but without depriving the companies concerned of their prospects of recovering the tax in the pending legal proceedings. Furthermore, the difference in treatment was based on an objective difference in the situation of the companies concerned. Some of the companies had decided not to seek a refund of the tax, while others had made an application to the courts for a refund which, in view of the genuine doubt as to the validity of the tax liability, the authorities had, as in the instant case, quite legitimately left for the courts to decide in the proceedings that were pending at that stage. Lastly, the authorities had logically enough, in view of the high degree of uncertainty over their outcome, chosen not to issue proceedings against those companies that had simply refrained from paying the tax. The Government noted that the Court had recognised that it was legitimate for public authorities to treat companies differently, depending on whether or not the company concerned had chosen to bring proceedings (see *National & Provincial Building Society*, cited above).

Lastly, the Government argued that the difference in treatment had to be put into perspective, since companies which, like the applicant company, had paid the VAT had enjoyed an exemption from employment tax and had been able to pass on all or part of the VAT to their customers, unlike the companies that had not paid the VAT.

66. In the light of its finding in paragraphs 61 and 62 above, the Court considers that no separate examination of this complaint is necessary.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

68. The applicant company sought payment of the sum of 291,816 French francs (FRF), being the amount of VAT it had paid for the year 1978. As regards the Government's argument that it would have had to pay employment tax had it enjoyed an exemption from VAT, the applicant company referred to the relevant provisions of the Code of Tax Procedure, which precluded any set-off between employment tax and VAT. As to the possibility of passing the VAT on to its customers, it produced, *inter alia*,

three witness statements that showed that brokers' remuneration took the form of commission paid directly and exclusively by the insurance companies without any payment on the part of the insured, such that VAT that had been paid could not be passed on.

69. The Government submitted that any damage to which the applicant company might be entitled was not the sum it had paid in VAT for 1978 but that sum less both the employment tax it would have had to pay had it enjoyed an exemption from VAT and the amount of VAT it had passed on to customers in its price lists. The Government added that they were unable to state the exact amount of employment tax concerned, since the events in issue had taken place more than twenty years ago and the tax authorities had not retained the tax returns and other documents necessary to perform a calculation.

70. The Court finds that while the applicant company may have sustained non-pecuniary damage, the present judgment provides sufficient compensation for it. However, as regards pecuniary damage, in view of the violation which the Court has found of Article 1 of Protocol No. 1, the most suitable form of reparation would be reimbursement of the VAT that was unduly paid for the period from 1 January to 30 June 1978. As to the sums which the Government say should have been deducted from the VAT paid for 1978, the Court notes, firstly, that it has not been clearly demonstrated that employment tax would have been payable and, in any event, it is now impossible to calculate the amount. Secondly, the applicant company has produced witness statements that show that, owing to the nature of its activity, it could not pass on the VAT to its customers (see also, on this point, paragraphs 22 and 69 above). Above all, the Court observes that it has not been alleged, still less demonstrated (see paragraph 69 above), that such amounts were claimed from S.A. Revert et Badelon by way of set-off after its successful appeal to the *Conseil d'Etat*. Nor is there any reference in the *Conseil d'Etat*'s judgment to any obligation to deduct certain sums from the amount of the VAT that was to be refunded. The applicant company has furnished documents showing that the amount of VAT for the period in issue (taking into account the fact that there was a one month's gap before it received commission on the premiums enacted by the insurance companies) comes to FRF 142,568.09, that is to say 21,734.49 euros (EUR). In the light of the foregoing, the Court awards that sum to the applicant company for pecuniary damage.

B. Costs and expenses

71. The applicant company sought payment of FRF 139,000 net of tax, that is to say EUR 21,190,41, for the costs and expenses it had incurred in the Administrative Court, the Paris Administrative Court of Appeal, the *Conseil d'Etat* and the European Court of Human Rights.

72. The Government contended that those amounts were excessive, since the decisions which the applicant company alleged were at the origin of its loss, namely the decisions delivered by the *Conseil d'Etat* as a final court of appeal and the administrative circular of 2 January 1986, had at no stage been contested before the domestic courts. Accordingly, only the costs incurred before the Convention institutions could, subject to being proved, be taken into account.

73. The Court points out that it has already ruled in its decision of 12 September 2000 that the applicant company has satisfied the rule on the exhaustion of domestic remedies, notably as regards any need to appeal against the administrative circular itself. As a subsidiary consideration, the Court has found no statutory provision of domestic law that would allow a decision delivered by the *Conseil d'Etat* as a final court of appeal to be challenged. It cannot, therefore, be contended that the applicant company has failed to refer its complaints to the relevant courts. On the contrary, in its second appeal, it expressly sought an order for the reimbursement of the overpaid VAT and, accordingly, reparation from the domestic courts for the complaint it has made to the Court.

As regards the amount of the applicant company's claim, the Court finds that it has been substantiated by Mr Garreau, who defended the applicant company's interests before the Court, the Administrative Court, the Administrative Court of Appeal and the *Conseil d'Etat*. Accordingly, the Court awards the applicant company EUR 21,190.41 for costs and expenses.

C. Default interest

74. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

2. *Holds* that no separate examination of the complaint of a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 is necessary;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;

4. *Holds*

(a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 21,734.49 (twenty-one thousand seven hundred and thirty-four euros forty-nine cents) in respect of pecuniary damage;

(ii) EUR 21,190.41 (twenty-one thousand one hundred and ninety euros forty-one cents) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate of 4.26% per annum;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 16 April 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA.
President