# OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN
delivered on 7 December 2010[1]

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## I — Introduction

1. Thirty years after the judgment in *Just*,[2] when the Court of Justice opened up the possibility of disapplying the entitlement to repayment of taxes unlawfully levied by a Member State, a Danish court has again referred for a preliminary ruling several questions focusing on the criteria for assessing the passing on exception and unjust enrichment in general.

2. The decision in *Just*, partly misunderstood and frequently criticised,[3] and the copious case-law following from it, have stated that repayment of an unlawfully levied tax may be refused only in circumstances in which such repayment would entail the unjust enrichment of the person seeking the repayment.

3. To date, the Court of Justice has dealt only with cases in which the cause of the unjust enrichment was that the unlawful tax had actually been 'passed on'. However, in the case now before the Court of Justice, the context is appreciably different, not to say completely new, for the tax held to be unlawful is part of a legislative package introduced by a Member State and has features which make it virtually inseparable from other legal provisions introduced at the same time. In this case the national tax held to be unlawful came into force at the same time as the abolition of a

2 — Case 68/79 *Just* [1980] ECR 501.

3 — See, for example, Hubeau, F., 'La répétition de l'indu en droit communautaire', *Revue trimestrielle de droit européen*, 1981, p. 448.

large number of social security contributions, the persons subject to the tax and the persons benefiting from the abolition being approximately the same.

4. Largely for this reason, and despite the efforts of the parties intervening in this case and of the referring court itself, it is very difficult to connect the circumstances of this case with the concept of the tax being 'passed on'. I shall therefore propose that the Court of Justice should build upon its case-law regarding unjust enrichment in order to go beyond the restriction of unjust enrichment simply to cases of 'passing on' and to allow it to be extended in certain circumstances to cases where the new tax is 'offset' by the abolition of other lawful taxes.

5. The reference also comprises a second set of questions which introduce further problems by suggesting that, as a consequence of this legislative reform as a whole, a situation of discrimination was brought about that specifically prejudiced undertakings engaging predominantly in importing as against those that predominantly marketed non-imported products.

## II — The legal framework

6. By Law No 840 of 18 December 1987 Denmark introduced, with effect from 1 January 1988, an indirect tax known as 'the employment market contribution' (hereinafter referred to by its Danish acronym, 'AMBI'), which was calculated on the same basis as VAT. Unlike VAT, however, in the specific case of imported products, this tax was not payable upon [importation], but was charged on such goods' full sale price upon first sale in Denmark. Furthermore, there was no requirement that the contribution be indicated separately on the invoice.

7. As mentioned above, in parallel with the introduction of the AMBI, the Danish legislature abolished a number of employers' social security contributions, which were costing undertakings roughly DKK 10 200 per full-time employee. This reform removed the link between the employer's social security contributions and the number of employees, whilst also having the purpose of improving the competitiveness of Danish undertakings.

8. The AMBI was abolished with effect from 1 January 1992 by Law No 891 of 21 December 1991. The employment market contribution was therefore charged to Danish undertakings for a period of four years.

9. Two importers, Dansk Denkavit ApS and P. Poulsen Trading ApS, had challenged the legality of the AMBI, arguing that it was contrary to Article 33 of the Sixth Directive [4] and to Article 9 and Article 95 EC and claiming reimbursement of the sums paid. During these proceedings, the Østre Landsret (Eastern regional court) (Denmark) referred to the Court of Justice a number of questions for a preliminary ruling, to which a partial reply was given in Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217. That judgment held, in particular, that Article 33 of the Sixth Directive precluded the introduction or maintenance of a fiscal levy which (like the employment market contribution):

— was paid both on activities subject to VAT and on other industrial or commercial activities which consisted in the supply of services for consideration;

— was charged, in the case of undertakings which were taxable persons for VAT purposes, on the same basis of assessment as that used for VAT, in other words as a percentage of the volume of sales after deduction of purchases;

— unlike VAT, was not paid on importation, but was charged on the full sale price of imported goods at the first sale in the Member State concerned;

— unlike VAT, did not have to be indicated separately on invoices; and

— was charged alongside VAT.

10. In the light of the foregoing, the Court of Justice took the view that there was no need to deal with the remaining questions raised by the Østre Landsret. In brief, these concerned the compatibility of the tax scheme in question with the prohibition of charges having an equivalent effect to customs duties contained in Article 9 EC et seq. (the third question) and with the prohibition of discriminatory domestic taxation contained in Article 95 EC (the fourth question).

11. The following year the Court of Justice confirmed this judgment in the context of an action for failure to fulfil obligations brought by the Commission against Denmark, based exclusively on infringement of Article 33 of

4 — 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 (OJ 1977 L 145, p. 1).

the Sixth Directive (Case C-234/91 *Commission* v *Denmark* [1993] ECR I-6273).

12. In order to comply with the first of these judgments, Denmark enacted Law No 389 of 20 May 1992 on the legal scheme for the reimbursement of unlawfully levied AMBI, Order No 645 of 30 June 1996 on procedures and documentation for the submission of claims for reimbursement of the AMBI, and Bulletin No 122 of 10 July 1996 laying down guidelines for the administrative treatment of such claims.

13. Bulletin No 122, which was in force at the time the claims for reimbursement with which this case is concerned were processed, [5] provided as follows at paragraph 4.2:

'In order for the reimbursement to take place in accordance with the judgments, the following circumstances must apply in relation to an import business:

— the undertaking must have been in genuine competition with Danish producers of equivalent goods;

— the undertaking must have saved less in employers' social security contributions, etc., than it has paid in employment market contributions;

— the undertaking's competitive position must have worsened as a result of the restructuring, in that labour-intensive Danish products were involved, so that the Danish undertaking saved more in employers' social security contributions than the importer did on competing products;

— the Danish competitors must have saved substantially more in employers' social security contributions than they have paid in employment market contributions;

— the competitive deterioration must be significant;

— the employment market contribution must not have been passed on through price increases.

Reimbursement may also be granted where exceptional circumstances have cancelled out the usual price mechanisms. …'

14. The Danish Government stated in its observations that the Commission was consulted during the process of drafting all the

5 — It was repealed with effect from 2 January 2007.

legislation on the repayment of the AMBI. As the representative of the Commission was able to confirm at the hearing, this dialogue would have made it possible in 1998 for other proceedings for failure to comply with an obligation which had been started against Denmark (apparently concerning procedures for the repayment of AMBI) to be at first provisionally suspended and then definitively discontinued in 2006.

15. A large number of claims for reimbursement of AMBI have been processed to date by the Danish tax authorities pursuant to this legislation (more than 27 000, according to the Danish Government). The file shows that more than 70 % of undertakings making such claims obtained total or partial repayment of the AMBI paid.

## III — The main proceedings and the questions referred for a preliminary ruling

16. The four applicants [6] in the proceedings now before the Østre Landsret are all undertakings involved in retail sales through department stores, shops and mail order businesses, and as such subject to the AMBI. When this was declared unlawful, they sought repayment of the amounts unduly paid. The Skatteministeriet (Danish Ministry of Fiscal Affairs) refused those applications, arguing that during the period that the AMBI was in force, the saving arising as a result of the abolition of the employers' social security contributions was greater for such undertakings than the AMBI paid over the same period.

17. When actions were brought contesting these administrative decisions, the Københavns Byret (Copenhagen City Court) (Denmark) found in favour of the Skatteministeriet in a decision of 16 December 2002. The companies in question appealed against this decision to the Østre Landsret.

18. In view of the fact that, to enable it to give judgment in these appeals, it must make a finding regarding the requirements of European Union law on national legislation concerning the repayment of levies charged in contravention of it, the Østre Landsret has referred the following questions to the Court of Justice for a preliminary ruling: [7]

'(1) Is the Court's judgment of 14 January 1997 in Joined Cases C-192/95 to C-218/95 *Comateb and Others* to be interpreted as meaning that the passing on of an unlawful levy on a product presupposes that the levy is passed on to the buyer of the product in the individual

6 — Lady & Kid A/S, Direct Nyt ApS, A/S Harald Nyborg Isenkram- og Sportsforretning, and KID-Holding A/S.

7 — The order for reference of these questions was challenged before the Højesteret (Danish Supreme Court), which, by an order of 11 February 2010, dismissed the application (Sag 344/2009), relying on the judgment of the Court of Justice in Case C-210/06 *Cartesio* [2008] ECR I-9641, and in the light of the Danish procedural system.

transaction, or may the passing on in the prices also take place in the prices of other products in completely different transactions, either before or after the relevant sale of products, for example, with the result that an overall assessment is made of the passing on over a four-year period involving a large number of product groups, including both imported and non-imported products?

(2) Is the Community law concept of "passing on" to be understood as meaning that an unlawful levy on a sale of products may be regarded as passed on only if the price of the product is higher than that price which applied immediately before the levy was introduced, or may the levy also be regarded as passed on where the undertaking subject to the levy, at the same time as the introduction of the unlawful levy, saved on other levies charged on other bases, and the undertaking therefore maintained its prices unchanged?

(3) Is the Community law concept of "unjust enrichment" to be understood as meaning that the reimbursement of an unlawful levy on a sale of products may be regarded as giving rise to unjust enrichment, where the undertaking, before or after the sale of the taxable product, has made a saving as a result of the abolition of other levies charged on other bases, if it is assumed that that abolition of other levies also benefits other undertakings, including undertakings which did not pay the unlawful levy or only paid it to a lesser extent?

(4) If it is assumed that an unlawful levy, as a result of its structure, has had the effect that proportionately more has been paid in levies by undertakings which imported products than by undertakings which to a greater extent purchased domestic products, and, at the same time as the unlawful levy was introduced, another lawful levy charged on another basis was abolished, which proportionately affected both undertakings to the same extent, irrespective of the composition of the undertaking's purchases, then guidance is sought on the following:

(i) whether Community law allows for whole or partial refusal to reimburse the unlawful levy to an undertaking which imports products on grounds of passing on and unjust enrichment, in so far as the refusal leads to a situation where the undertaking, as a result of having paid relatively more of

the unlawful levy than a corresponding undertaking which purchased equivalent goods domestically, will thereby, all other things being equal, be placed in a worse position as a result of the tax restructuring and the refusal to reimburse than corresponding undertakings which to a greater extent purchased domestic goods;

(ii) whether the reimbursement of the unlawful levy in the relevant situation may conceptually give rise to "unjust enrichment" and may therefore be refused, if the reimbursement – even if the levy is regarded as having been passed on – is necessary in order to achieve a situation in which the effect of the tax restructuring, after any reimbursement, all other things being equal, remains the same for undertakings which imported products as for undertakings which purchased domestic products;

(iii) whether refusal to reimburse in such a situation, which leads to undertakings which to a greater extent purchased domestic products and thus obtained an advantage in relation to undertakings which to a greater extent imported products, is otherwise contrary to Community law, including the principle of equal treatment; and

(iv) whether the answer to question 3 means that it is not justified to refuse reimbursement of an unlawfully charged levy on grounds of unjust enrichment, to the extent that such reimbursement merely cancels out the advantage for those undertakings which purchased domestic products in relation to undertakings which to a greater extent imported products.'

## IV — The procedure before the Court of Justice

19. The request for a preliminary ruling was lodged at the Registry of the Court of Justice on 14 October 2009.

20. The Danish Government and the Commission have submitted written observations, and the four applicant companies (Lady & Kid A/S, Direct Nyt ApS, A/S Harald Nyborg Isenkram- og Sportsforretning and KID-Holding A/S) have done so in a joint submission.

21. At the hearing on 28 September 2010, oral arguments were presented by the representatives of those companies (jointly), the Skatteministeriet and the Kingdom of Denmark and the Commission.

## V — Case-law on repayment of sums unduly paid

### A — *Entitlement to repayment of sums unduly paid*

22. Since 1960, the Court of Justice has affirmed the entitlement to reimbursement of sums levied by a Member State in breach of European Union law. [8] Copious subsequent case-law has confirmed this principle, on the basis of the rule of direct effect. [9] In short, the entitlement to recover taxes levied in breach of European Union law is a consequence of, and an adjunct to, the rights conferred on individuals by the provisions prohibiting such taxes. [10]

23. However, if entitlement to repayment arises directly from European Union law, the procedure for making a claim, on the other hand, falls within the realm of national law. [11] As a matter of fact, the case-law has stated that, in accordance with the principle of cooperation, it is for the courts and tribunals of the Member States to ensure the legal protection that individuals derive from the direct effect of EU law. Thus, it has been consistently held that, in the absence of EU rules on the recovery of national charges levied though not due, 'it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing such actions for repayment'. [12]

24. In some judgments, [13] the Court of Justice extends the role of the national legislature not

8 — Case 6/60 *Humblet* v *Belgium* [1960] ECR 559, particularly p. 569.

9 — Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 and 13; Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 12; Case 811/79 *Ariete* [1980] ECR 2545, paragraphs 9, 12 and 14; Case 826/79 *Mireco* [1980] ECR 2559, paragraph 10; and Case 240/87 *Deville* [1988] ECR 3513, paragraph 11.

10 — Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 38; and Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165, paragraph 20.

11 — Spitzer, J.-P., 'La responsabilité indirecte de l'État pour violation du Droit communautaire: la répétition de l'indu', *La protection juridictionnelle des droits dans le système communautaire*, Bruylant, Brussels, 1997.

12 — Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraph 11; *Rewe*, paragraph 5; *Comet*, paragraphs 12 and 13; Case 265/78 *Ferwerda* [1980] ECR 617, paragraph 10; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; *Fantask*, paragraph 39; Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 33; and Case C-147/01 *Weber's Wine World* [2003] ECR I-11365, paragraph 103.

13 — For example, Case 130/79 *Express Dairy Foods* [1980] ECR 1887, paragraph 11; *San Giorgio*, paragraph 12; and *Ariete*, paragraph 9.

only to the formal conditions of repayment, but also to its substantive requirements. In particular, the case-law has confirmed that national law must be applied to matters concerning time-limits for bringing appeals, limitation periods and lapse of rights, the payment of interest and any other matters ancillary to the repayment of sums unduly paid. [14]

25. The Danish Government has even used the case-law's referral back to national law to call into question whether it is appropriate for the Court of Justice to be involved in this area and has, in any event, based its application to have the case assigned to the Grand Chamber on it. More specifically, the government in question takes the view that, in accordance with the case-law to date, it falls exclusively to the European Union legislature or, failing this, to the legislature of each Member State, to lay down the procedural and substantive rules for dealing with claims for repayment and that these substantive rules cannot be created by case-law.

26. In my opinion, there is no doubt that the Court of Justice has jurisdiction to make rulings on such matters. It is true that, in the judgments abovementioned, the Court has imposed limits on its own powers to intervene in this area, but this is not an absolute limitation, for the referral back to national law falls within the setting of certain mandatory rules.

27. On the one hand, national legislatures must at all times respect the principles of equivalence and effectiveness. Thus, the repayment of sums unduly paid may not be subject to requirements – of form or of substance – less favourable than those governing similar domestic actions, and may not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. [15]

28. On the other hand, it has been stated in case-law that it is possible to disapply the rule that sums unduly paid must be repaid.

B — *The passing on exception, based on unjust enrichment*

29. In 1980, case-law introduced an important limitation of the entitlement to repayment of sums unduly paid. In fact, taking as a basis the notion of a tax's being passed on and that of unjust enrichment, the Court of Justice stated in *Just* that EU law 'does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled', and that consequently 'the

14 — *Express Dairy Foods*, paragraphs 11 and 17.

15 — See the cases cited in the previous footnote.

fact that the burden of the charges which have been unlawfully levied may have been passed on to other traders or to consumers' can be taken into account. [16]

30. In such cases, the case-law takes the view that 'the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received [from the purchaser] would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge'. It is for the national courts 'to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment'. [17] Amongst the 'facts' to be taken into account is the damage that the trader may have suffered 'as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales'. [18]

31. In *Just* a reply was given to a question referred, also by a Danish court, asking if it was valid to use the passing on exception, applied in certain cases by Danish case-law, to refuse claims for repayment of taxes that were contrary to Community law. By answering in the affirmative, the Court of Justice indirectly confirmed that national law could govern substantive aspects of the repayment.

C — *Subsequent developments*

32. Copious subsequent case-law has confirmed the statements made in *Just*, [19] while introducing certain important refinements relating to the circumstances in which it applies. The aim of these clarifications was to prevent the principle of the autonomy of national law giving rise to significant differences that might jeopardise the functioning of essential aspects of the European Union.

33. For example, under the principle of effectiveness, any method of proof required by the national legal systems that makes it virtually impossible or excessively difficult

16 — *Just*, paragraphs 26 and 27.

17 — *Comateb*, paragraphs 22 and 23.

18 — *Comateb*, paragraph 31. In the same vein, see *Just*, paragraph 26.

19 — *Denkavit Italiana*, paragraph 26; *Express Dairy Foods*, paragraph 13; *Ariete*, paragraph 17; *Mireco*, paragraph 16; Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 35; *Comateb*, paragraph 21 et seq.

to secure the repayment is deemed incompatible with EU law. [20] In the case of indirect taxes that have been found to be contrary to EU law, repayment cannot be refused on the grounds of a presumption that the tax has been passed on, always placing the burden of proof on the taxpayer, and the existence of a legal duty to incorporate the tax in the price does not mean that it can be assumed that the whole of the tax charge has been passed on. Whether or not an indirect tax has actually been passed on is a question of fact which it is for the national court to assess. [21]

34. Thus, the Court of Justice has articulated its own interpretation of the concepts of passing on and unjust enrichment, turning this exception to the repayment of sums unduly paid into a rule of EU law and adopting as its own what was originally no more than a rule of national law. Its involvement in this area to date has however been called 'minimalist,' [22] owing to the traditional procedural (and substantive) autonomy of the Member States in this field.

20 — *San Giorgio*, paragraph 14.

21 — Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 17; and *Comateb*, paragraph 25.

22 — Hubeau, F., op. cit., p. 448.

## VI — Analysis of the questions referred

### A — *The second question referred: 'offsetting' as an alternative to passing on*

35. The second question will be addressed first, as it is of a preliminary nature in relation to the remaining questions raised.

#### 1. Unjust enrichment as grounds for the exception to repayment of sums unduly paid

36. Most of the cases coming before the Court of Justice to date fit comfortably within a model in which passing on is the key factor in justifying a refusal to repay, although there may in turn be exceptions to this refusal if circumstances prevail which mean that, even though passing on has occurred, repayment would not give rise to unjust enrichment. [23]

23 — In particular where, as a consequence of the passing on and the resulting price increase, the sales of the taxable person have declined.

37. A large number of judgments have been given against this type of background involving passing on and the idea has become widespread that passing on and unjust enrichment are two cumulative requirements which constitute the grounds for the only possible exception to the entitlement to repayment of sums unduly paid under EU law. [24]

38. In my view, however, passing on and unjust enrichment are not two separate requirements for refusing to repay sums unduly paid. In reality, unjust enrichment is the only ground for the exception, and passing on one of its possible manifestations, albeit that it emerges as one of the most typical. This explains the fact that the case-law in turn allows a limit to the exception (or an 'exception to the exception') when, even though passing on has been established, repayment does not give rise to unjust enrichment because of other circumstances (such as a parallel loss of competitiveness, for example).

39. In effect, the case-law has made the object of preventing the unjust enrichment of the person claiming repayment the ultimate raison d'être of the exception to the principle of repayment of sums unduly paid. [25]

40. The inclusion of the tax in the sale price is not, therefore, the sole and absolute criterion for the exception to repayment; the determining factor is whether the repayment may actually give rise to unjust enrichment, be it because the tax has ultimately been paid by the buyer of the goods, or due to other circumstances. In other words, the unjust

24 — The wording of certain judgments is particularly categorical. For example, paragraph 94 of the judgment in *Weber's Wine World* provides as follows: '… there is only one exception to that obligation to make repayment. A Member State may resist repayment to the trader of a charge levied though not due only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter'. Commenting on this judgment, Simon, D. picks up the same idea, stating that 'by making the conditions cumulative, the Court of Justice lets it be understood that passing on "does not necessarily cancel out the economic effects of the tax on the taxable person"' (Simon, D., *Europe*, December 2003, comm. 378).

25 — This basis emerges clearly from paragraph 26 of the judgment in *Just*: '… the protection of rights guaranteed in the matter by Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled. There is nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers.' The use of the word 'therefore' in this paragraph seems to me to be very telling for the present purposes, as it indicates that what precedes it (the unjust enrichment exception) is the reason for what follows (the passing on exception). The Court of Justice used the same terms in its judgment in *Denkavit Italiana*, at paragraph 26. In both cases, the operative part of the judgment refers only to the fact of the passing on, but an analysis of the reasoning points to the conclusion that the exception is framed in more general terms. The idea also emerges clearly in *Comateb* at paragraph 22; Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145 at paragraph 31, and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 at paragraph 30.

enrichment is not merely the grounds for the exception, it is the exception itself. [26]

41. Therefore, it is possible for repayment of tax not to give rise to unjust enrichment, even though the tax has been passed on, and, conversely, it may give rise to unjust enrichment even when passing on has not occurred.

42. It follows that passing on of the tax does not necessarily have to be the only exception to the repayment of sums unduly paid.

43. Obviously, being an exception to the general rule, refusal to reimburse sums unduly paid must be strictly interpreted. Nevertheless, this may not lead to a result whereby national regulations which contemplate situations other than passing on but are as legitimate, because based on an equally unjust enrichment of the person concerned, are ignored.

44. Moreover, it must not be forgotten that this exception, although adopted by the Court of Justice, was originally a national rule. It is not, therefore, an unalterable rule, exclusive to EU law and mandatory for all the Member States. As indicated above, it is for the Member States to lay down the formal and substantive requirements for repayment. If they decide to apply the exception relating to passing on and unjust enrichment, they must in doing so observe the conditions laid down by EU case-law, but there is nothing to prevent their formulating a different exception, on whose compatibility with EU law the Court of Justice may one day rule.

2. The special characteristics of this case and the need of an ad hoc solution

45. The questions referred by the Østre Landsret attempt to fit the special circumstances of this case within the usual concepts of passing on and unjust enrichment. In short, the Danish court asks whether, in a case such as this, the two requirements which until now the case-law has regarded as essential for a refusal to repay the AMBI have been met: firstly, has there been passing on and, secondly, if the tax were repaid, would other circumstances lead to an unjust enrichment of the undertakings paying the tax.

26 — These grounds for the exception have frequently been called into question by academic writers and by certain Advocates General. Briefly, the theory is that if the basis of the entitlement to repayment of an unlawful tax is the desire to prevent the 'unjust enrichment' of the levying Member State, it would be presumptuous, to say the least, to limit this entitlement precisely so as to prevent the unjust enrichment of the taxpayer (to this effect, see Hubeau, F., op. cit., p. 449; Berlin, D., 'Chronique de jurisprudence fiscale européenne', *Revue trimestrielle de Droit européen*, 1997, p. 167; and the Opinion of Advocate General Tesauro in *Comateb*, delivered on 27 June 1996). Notwithstanding that some of these criticisms may in theory be apposite, the fact is that the unjust enrichment exception to the entitlement to repayment is now firmly established in the case-law.

46. In the case of the AMBI, however, it would seem essential to provide an ad hoc answer, as called for by the case-law to date. This is because, as has already been mentioned, this is a more or less unprecedented situation with very special characteristics, in that the tax found to be unlawful is just one part of a package of legislation which must be considered as a whole.

47. Thus, the second of the questions referred becomes central to the debate. Essentially, it raises the issue whether passing on can be considered to have taken place when the amount of the unlawful tax has been 'offset' by a parallel saving, arising from the same legislative reform, even if it does not actually translate into a price increase. Obviously, my suggested answer to this second question implies a reformulation of the wording of this question which, apart from that, is by its nature preliminary to the other questions.

3. 'Passing on' does not provide a satisfactory response to the present situation

48. As with many other cases brought before the Court of Justice in the past, the AMBI too was an indirect tax, very similar to VAT. Whether it was actually passed on or not, however, is far from evident, due to two factors. First, because the different components of the legislative reform may cancel each other out, making it possible to avoid a price increase. Then, from a formal point of view, because the AMBI, unlike VAT, was not separately indicated in the invoices. [27]

49. The Danish Government suggests that, nevertheless, in this case 'passing on' has taken place because the AMBI would have 'replaced' the social security contributions which were simultaneously abolished as a component of the price of the product, and, precisely for this reason, the price could remain unchanged (and in that sense, the AMBI could be said to have been 'passed on'). As for the other aspect, the absence of a breakdown showing the AMBI in the invoice would not, in its view, constitute a serious obstacle to finding that passing on had taken place, for such a finding could be made comprehensively for all the prices of the products of the undertakings affected during the whole period for which the tax was in force.

27 — In contrast with the situation vis-à-vis VAT, passing on does not seem to have been an essential component of the structure of the AMBI. Although, like VAT, it is chargeable at the various different stages of bringing a product to the market, and there may be a tendency for each taxpayer to pass it on to the next link in the economic chain, the essential passing on which is characteristic of VAT (which is collected fractionally but is intended to be borne only by the final consumer) is not present here.

50. It is clear that the approach taken by the Danish Government distorts the usual concept of 'passing on' a tax to the point where it is unrecognisable and, on any view, it is not the meaning given in the case-law.

51. Technically, passing on is defined as the means by which the tax burden can be transferred to the final taxpayer, making the tax neutral for the individual or undertaking initially paying it, who or which then passes it on and is merely a stage in the collection process. [28] This transfer of the tax burden usually happens through the sale price, either by being merged into it or by means of a breakdown, as is the case with VAT; in either case, it should be possible to detect the introduction of the tax in the evolution of the price. In cases where it is not clear that the tax burden has been wholly passed on to a third party, as seems mainly to have been the case with the AMBI, it is, to say the least, difficult to conclude that there has been a true 'passing on'.

52. In addition to this, evidential problems could arise from the 'replacement passing on' approach supported by the Danish Government. The length of time in question, the variety of products involved and the difference in the degree to which, according to the applicants, the two taxes were charged on imported and domestic products, lead to an element of doubt, to say the least, regarding whether such matters can be adequately proved.

53. It is true that the case-law has repeatedly declared that passing on 'depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts', and that 'it is a question of fact to be determined by the national court'. [29] It would be possible to conclude from this that, depending on the circumstances in each case, the national court may take passing on to have occurred in ways other than the incorporation of the tax into the price. In the judgments cited, however, this comment was merely intended to make it clear that an indirect tax should not automatically be assumed to have been passed on.

54. Yet this flexible approach to the concept of 'passing on' must at some point reach its limits. It seems to me that, despite this assertion in the case-law, it is excessively artificial to maintain that the mere 'replacement' of the cost of social security contributions by a newly created tax, when the same person is liable to pay them but they are different in

28 — See, for example, Pérez Royo, F., *Curso de Derecho Tributario. Parte Especial*, fourth edition, Tecnos, 2010, p. 741.

29 — *Bianco and Girard*, paragraph 17; *Comateb*, paragraph 25; and *Weber's Wine World*, paragraph 96.

concept and degree, is sufficient for the new tax to be considered to have been passed on.

55. Of course, this would not justify reaching the conclusion that, despite everything, there has not been some degree of 'passing on' in the usual sense, but would merely exclude the possibility of proving it in the absence of information other than that relating to the offsetting. In such circumstances there would be a danger of setting up a 'presumption of passing on' prohibited by case-law.

56. It is in these circumstances that the alternative presents itself of asking whether, as no passing on in the usual sense has taken place, this may be a case of 'other' circumstances which can as well be brought back to the notion of 'unjust enrichment'. This would be the case in relation to 'offsetting', the subject-matter of the second question, which occurs earlier than passing on, both chronologically and in terms of function.

4. 'Offsetting' as a possible exception to the entitlement to repayment

57. As a matter of fact, however, this 'offsetting' fits naturally into the logic of unjust enrichment which, in my opinion, is the true basis of all the Court of Justice's case-law relating to the exception to the entitlement to repayment of sums unduly paid.

58. I think, then, that in this case the Court of Justice ought to go beyond the literal terms of the questions raised by the Østre Landsret, which might oblige it to strain the standard definition of passing on in order to force it artificially, and I think also unnecessarily, into a factual situation that does not fit its fundamental characteristics.

59. I say unnecessarily because, in my opinion, existing case-law in the area allows the exception to the entitlement to repayment to be extended to circumstances other than those where the tax in question is 'passed on', but in which, nevertheless, there may be unjust enrichment in the event that the unlawful tax is reimbursed. Such would be the case of the 'offsetting' alleged in the present proceedings.

60. The idea of offsetting is not completely new to the case-law, having made its appearance even before *Just* made the exception to the entitlement to repayment on grounds of passing on and unjust enrichment widely accepted.

61. Only a year before *Just*, the judgment in *Pigs and Bacon Commission* [30] stated that an

30 — Case 177/78 *Pigs and Bacon Commission* [1979] ECR 2161.

unlawful tax can potentially be 'offset' when the same person receives other economic advantages. The question, referred in this case by the High Court of Ireland, concerned a public body, known as the 'Pigs and Bacon Commission', which charged a levy on all bacon producers and granted certain bonuses only to those effecting their exports through the intermediary of the Pigs and Bacon Commission.

62. The judgment in question held that a system such as that established in Ireland infringes the rules relating to the free movement of goods and the common organisation of the market in pigmeat in two separate ways: on the one hand, because it distorts competition by the grant of export bonuses; and, on the other hand, because it inflicts a financial disadvantage on any producer who effects export sales directly without using the services of this public body (because the producer is compelled to pay the levy but is not entitled to any bonus). [31] Being destined for purposes incompatible with the requirements of the Treaty, the tax in question could not lawfully be imposed on the producers.

63. As it had done in its earlier case-law, the Court of Justice referred back to the national court the task of assessing 'whether and to what extent' the levy should be reimbursed to the traders who had paid it. Particularly relevant for the present purposes is the fact that the Court, in view of the circumstances of the case, held that it was for the national court to assess 'whether and to what extent' the taxpayer's debt could be 'set off' against other amounts which had been paid by way of export bonuses. [32]

64. Admittedly, the circumstances of the *Pigs and Bacon Commission* case are not identical to those in the case to which this Opinion relates. There, set-off was necessary because the producers were entitled to repayment of the levy but, at the same time, they would have had to repay the unlawful bonuses.

65. Shortly afterwards, however, there arose the opportunity for the case-law to apply this 'offsetting' notion again in a context where there were no direct subsidies: the *Apple and Pear Development Council* judgment, concerning the British body of that name, confirmed that it is for the national court to determine 'whether and to what extent' a tax whose purpose is to finance a body whose activities are partially contrary to Community law must be refunded, and 'whether and to

31 — *Pigs and Bacon Commission*, paragraphs 19 and 20.

32 — *Pigs and Bacon* Commission, paragraph 25. The italics are mine.

what extent' such entitlement to a refund 'is offset by the advantages accruing directly to the person concerned as a result of the activities of the said body'.[33]

66. It could therefore be said that already underlying the judgments referred to is the idea of preventing unjust enrichment of the taxpayer as a result of the repayment of an unlawfully charged levy. Furthermore, the idea arises independently of the traditional concept of passing on which, from *Just* onwards, was to dominate the Court's assessment of whether or not the exception to the repayment of sums unduly paid should be applied.

67. In my opinion, the two judgments referred to demonstrate that entitlement to repayment of sums unduly paid may be subject to exceptions, in particular circumstances other than passing on, resulting from other advantages that the person may have been granted by the authority for whose benefit the unlawful tax was levied.[34] The ultimate conclusion is that the fact that a tax has been passed on does not constitute the only possible means of refusing repayment, which may be based on a possible unjust enrichment arising out of a parallel saving.[35]

5. Conditions in which 'offsetting' may have potential similar to that of 'passing on'

68. It is important to state at the outset that this exception to the entitlement to repayment of sums unduly paid may be applied only on strict conditions.

69. First of all, in order to avoid possible fraud or ad hoc solutions created by the Member States, the parallel abolition of lawful taxes that is relied on must have an immediate relationship of cause and effect with the tax held to be unlawful.

70. A legal measure more or less beneficial to the person paying the tax that happens to coincide approximately in terms of date with the unlawful tax will therefore not suffice. The parallel saving capable of giving rise to unjust enrichment must be indissolubly linked, from the start, to the creation of the unlawful tax.

33 — Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083, paragraphs 40 and 41.

34 — To this effect, some academic writers capture the idea that the entitlement to repayment of sums unduly paid is an entitlement capable of being offset. See, for example, Martínez-Carrasco Pignatelli, J.M., *La devolución de lo indebido tributario en el Derecho comunitario*, Septem Ediciones, Oviedo, 2003, paragraph 294; and De Wolf, M., *Souveraineté fiscale et principe de non discrimination dans la jurisprudence de la Cour de Justice des Communautés européennes et de la Cour suprême des États-Unis*, Bruylant, Brussels-LGDJ, Paris, 2005, p. 416.

35 — Furthermore, 'offsetting' as an exception to the duty to repay sums unduly paid does not attract some of the criticism made of 'passing on,' for, unlike the latter, with setting off there are no other parties on whom the burden of the unlawful tax may eventually fall.

71. This requirement is evident in view of the judgment in *Deville* which, in referring to the principle of effectiveness as a limit to the application of the passing on theory, emphasises that 'a national legislature may not, *subsequent to a judgment of the Court* from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were wrongly levied under that legislation.' [36] The justification for a refusal to repay cannot, therefore, be introduced after the tax has been declared unlawful.

72. In the case of the AMBI, the connection with the abolition of the social security contributions was argued before the Court of Justice in the proceedings which culminated in the *Dansk Denkavit* judgment (at paragraph 3), and has not been directly called into question in the present proceedings. In any event, there is nothing to prevent the national court's requiring stricter proof on this point if it considers it desirable. [37]

73. Secondly, the situation must be one where there is sufficient correlation between the group of persons benefiting from the abolition of the taxes and the group of persons liable to pay the new tax.

74. Thirdly, the saving made must be quantifiable without too much difficulty, as the amount of tax paid must, similarly, be quantifiable, in order to provide grounds for the 'offsetting' argument.

75. Finally, it should be pointed out that the national court hearing the case must assess, on a case by case basis and in the light of the evidence adduced by the national authorities, whether there is an 'offsetting' of the unlawful tax which might justify refusing or reducing the amount of its repayment. In other words, the burden of proof of any unjust enrichment arising from an 'offsetting' of the unlawful tax falls on the Member State. [38] If this were not the case, this would amount to applying a presumption, expressly prohibited

36 — Case 240/87 *Deville* [1988] ECR 3513, paragraph 13 (emphasis added). See also Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 16; and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 38. To the same effect the European Parliament Resolution of 9 February 1983 on the responsibility of the Member States for the application of and compliance with Community law stated that 'in cases where the European Court of Justice has declared certain taxes or levies incompatible with the Treaty, the subsequent introduction of a provision under national law limiting the right to recover the illegally levied taxes or levies, thereby enabling Member States wrongfully to retain the benefit of the illegal tax or levy, is incompatible with the spirit of the Community and should be abrogated' (OJ 1983 C 68, p. 32).

37 — For example, the statement of the Danish Government mentions that the preparatory acts for the law introducing the AMBI contain a reference to this effect.

38 — Obviously, this is without prejudice to the ability of claimants to submit whatever documentation they consider necessary, which may also be taken into account by the national court (see, to this effect, *Michaïlidis*, at paragraph 41).

by the case-law for making it 'virtually impossible or excessively difficult to secure the repayment.' [39]

manner, the further question whether any difference in treatment on the part of the legislative reform as a whole (benefiting one type of undertaking more than others) constitutes an additional factor to be considered when assessing whether or not there is unjust enrichment, for the purposes of deciding whether the AMBI should be repaid.

6. Conclusion

76. In the light of all the above, it is my view that the answer to the second question referred should be that EU law does not preclude a Member State from refusing to repay a tax unduly levied when it is in a position to prove that the amounts unduly levied can be regarded as offset by a simultaneous and corresponding reduction in other charges from which the same taxable persons actually benefited, provided that there is a direct relationship of cause and effect between the creation of one charge and the removal of the other.

78. In accordance with the *Weber's Wine World* decision, the national court's assessment of the existence and the degree of unjust enrichment which repayment of a charge levied though not due entails for a taxable person can be carried out only 'following an economic analysis in which all the relevant circumstances are taken into account.' [40]

79. Until now, the case-law has linked this economic analysis to evidence that the taxpayer has not experienced a fall in the volume of sales, in the case of very elastic demand, as a consequence of the passing on of the unlawful tax and the resulting increase in prices.

B — *The third and fourth questions referred*

77. Put succinctly, the third and fourth questions raise, in a somewhat convoluted

80. In the present case, however, this economic analysis will have to assess the additional, and equally important, factor mentioned in the third and fourth questions referred by the Østre Landsret.

39 — *Bianco and Girard*, paragraph 17; *Comateb*, paragraph 25; and *San Giorgio*, paragraph 14.

40 — Paragraph 100.

81. As a matter of fact, the Østre Landsret has built these two questions upon the foundations of a basic opening hypothesis: that the AMBI was payable to a proportionately greater extent by importing undertakings than by undertakings that mainly purchased national products, whereas the social security contributions abolished proportionately affected 'both types of undertakings to the same extent, irrespective of the composition of the undertaking's purchases'.

82. However, the parties to the main proceedings and the Commission differ widely in their views on both the scope of the questions raised by the Landsret and the facts on which the latter has based its questions.

83. On the one hand, the applicants take it as an established fact that undertakings that are mainly importers paid much more to the tax authorities by way of AMBI than was paid by undertakings whose supplies consisted mainly of domestic products. The difference was due to the fact that, in contrast to the position vis-à-vis VAT in the case of intra-Community sales, the AMBI was not collected at the time of importation, but at the time of the first sale within Denmark of the imported goods, and the importer, unlike the national producer, could not therefore deduct the value of the imported products from the taxable value for the purposes of calculating the AMBI.

84. The Danish Government emphatically denies that the AMBI affects Danish products and imported products to differing degrees, stating that it was not the AMBI, but 'the abolition of the social security contributions – whose legality was not in question – which reduced the cost of production in Denmark and, consequently, benefited products manufactured in Denmark'.

85. The Commission, aligning itself with the Danish Government on this point, explained at the hearing that the reason why some undertakings had paid proportionately more AMBI than others is that, in the case of Danish products, the tax burden was distributed over successive links in the commercial chain, whereas in the case of imported products, all the AMBI was collected at the time of the first sale within Denmark. In the Commission's view, this does not mean that imported products are taxed more than domestic products, only that importing undertakings paid higher amounts. However, this factor does not indicate that there is a 'discrimination issue', for the rules on repayment of the tax are the same for all undertakings, irrespective of the amount of AMBI they may have unduly paid. Thus, the Commission focuses the reply to the last two questions exclusively on the question of whether the repayment mechanism as such is discriminatory.

86. At this point, it is important to mention that the potentially discriminatory nature of the AMBI within the meaning of Article 110 TFEU [41] has not been raised in these proceedings, unlike the situation in the case of the question which gave rise to the *Dansk Denkavit and Poulsen Trading* judgment, which also started out as a reference for a preliminary ruling by the Østre Landsret. That judgment, however, confined itself to stating that a tax such as the AMBI infringed Article 33 of the Sixth Directive because it was similar to VAT, but, as it took the view that it was no longer necessary to do so, did not make a ruling as to whether it was discriminatory in nature (and therefore contrary to what was formerly Article 95 EC), which was a question which had also been raised. [42] Furthermore, the Commission commenced various infringement proceedings against Denmark in relation to this tax reform, but only one of these (that relating to infringement of Article 33 of the Sixth Directive) came before the Court of Justice, culminating in a judgment establishing an infringement.

87. In making this further reference for a preliminary ruling, the Danish court, while still refraining from expressly raising the question of the discriminatory nature of the AMBI, has once again held it up for the scrutiny of the Court of Justice, using the indirect route of the rules on repayment of sums unduly paid.

88. At the hearing, the Danish Government emphasised the dangers of 'answering a question that has not been asked by the Landsret', by which it probably meant the undesirability of raising once again the issue of the discriminatory nature of the tax.

41 — Formerly Article 95 EC and then Article 90 EC. According to the case-law, this provision prohibits any taxation system which, directly or indirectly, disadvantages imported products in comparison with domestic products, whether because the imported product alone is taxed, or because it is subject to higher taxes or because the conditions for its payment or calculation are less favourable. Case 57/65 *Lütticke* [1966] ECR 205; Case 127/75 *Bobie Getränkevertrieb* [1976] ECR 1079; Case 21/79 *Commission* v *Italy* [1980] ECR 1; Case 55/79 *Commission* v *Ireland* [1980] ECR 481; Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265; Case 277/83 *Commission* v *Italy* [1985] ECR 2049; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085; Case C-213/96 *Outokumpu* [1998] ECR I-1777; Case C-68/96 *Grundig Italiana* [1998] ECR I-3775; Case C-302/00 *Commission* v *France* [2002] ECR I-2055; Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487, paragraph 54; Joined Cases C-290/05 and C-333/05 *Németh* [2006] ECR I-10115; and Case C-313/05 *Brzeziński* [2007] ECR I-513. In particular, the Court of Justice has held that this provision is infringed 'where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation's being imposed on the imported product'. Case 45/75 *Rewe* [1976] ECR 181, paragraph 15; Case 55/79 *Commission* v *Ireland* [1980] ECR 481, paragraph 8; Case C-153/89 *Commission* v *Belgium* [1991] ECR I-3171, paragraph 12; Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141, paragraph 20; Case C-327/90 *Commission* v *Greece* [1992] ECR I-3033, paragraph 12; and Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 20.

42 — In his Opinion in this case, delivered on 30 January 1992, Advocate General Tesauro did address this point, although only to refer it back to the national court to 'ascertain … whether the rules governing the contested levy are such as to preclude discrimination against imported products in all cases'. In this regard, Advocate General Tesauro notes that, according to the case-law, a tax system may be considered compatible with Article 95 EC (Article 110 TFEU) only if it is established that its structure is such as to preclude discrimination against imported products in any circumstances whatsoever. In any event, where the detailed rules of application are not transparent, it is for the State which established the system to demonstrate that it does not have discriminatory effect in any circumstances (point 11 of the Opinion).

89. In my view, the issue that the Østre Landsret has put before us in this case is not whether the legislative reform as a whole was discriminatory, nor, as the Commission maintains, whether the repayment mechanism as such involves discrimination. The point is that, essentially, the Østre Landsret simply asks whether the effects of the legislative reform, which may or may not be proportionately more beneficial to undertakings with a lower volume of imported products in comparison with undertakings mainly engaged in importing, should be a factor to be taken into account when calculating the amount of AMBI paid to be refunded and avoiding a situation of unjust enrichment.

90. It is not difficult to reach an affirmative answer to this question. As has already been noted, unjust enrichment has always taken the form of an exception to the duty of the state to repay sums unduly paid, and the passing on of a tax has become, since 1980, the most typical case of unjust enrichment. However, being an exception, it must be interpreted restrictively. Thus, when, despite passing on's having taken place, price rises result in an undertaking's losing competitiveness, this situation must be taken into account and may even make the exception inapplicable if it is shown that, in the circumstances of the case, repayment would not give rise to unjust enrichment. [43]

91. In the present case, the applicants do not argue a loss of competitiveness in the terms described above, but that there has been a relative improvement in the position of their competitors as a result of the proportionately lower business and tax costs imposed on them by the reform. In spite of this difference, the logic is basically the same in both cases and the response must, therefore, be the same too.

92. I have already had occasion to explain how the exception to the entitlement to repayment in a case of passing on is in turn limited when the passing on gives rise to a loss of competitiveness of the undertaking in question which means that, if the repayment occurs, unjust enrichment can be ruled out. Similarly, then, the application of the exception relating to the 'offsetting' of the unlawful tax must also be limited when the legislative reform in question has benefited competitor undertakings proportionately more, giving rise to a loss of competitiveness of the undertaking in question which is also capable of ruling out the unjust enrichment of such undertaking, in whole or in part, if the tax is repaid. In such cases, if 'unjust enrichment' applies, this reinstates the entitlement to repayment, to the appropriate extent, in order to counteract this possible difference in treatment.

43 — *Comateb*, paragraph 31; and *Just*, paragraph 26.

93. Evidently, this fine-tuning depends on how the effects of the legislative reform in question are evaluated from this perspective, which is a matter for the national court alone to decide.

97. Strangely, both the Danish Government and the applicants rely on paragraph 25 of the judgment in *Comateb*, referred to above, which states that passing on 'depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts'.

C — *The first question referred*

94. The proposed answer to the second question would in effect make it unnecessary to answer the first question raised by the Østre Landsret, which relates to whether any passing on of the AMBI should be assessed individually overall.

98. The Danish Government takes the view that this reference to the context of each commercial transaction allows an overall assessment of the passing on to be made where prices have also been determined overall. By contrast, the applicants consider that this reference [44] actually requires an examination of how the price has evolved in each transaction, each sale, and that it is not possible to carry out an overall assessment based on the idea that the passing on of the contributions that were abolished was simply replaced by the passing on of the AMBI, given that the social security contributions abolished affected imported and non-imported products equally, whereas the AMBI taxed the former proportionately more.

95. Nevertheless, in view of the fact that, as I have already indicated, it cannot be ruled out that some aspects of 'passing on' in the usual sense of the phrase have been present, I will examine the first question referred.

96. The Danish court asks whether, in order to conclude that passing on has taken place, it is sufficient to make an overall assessment of the transactions carried out by the taxpayer over a period of four years and involving a large number of products, or whether it is necessary to make an individual assessment of the relevant transaction in each case.

99. In my view, the reference in *Comateb* to the circumstances of each transaction must be interpreted more as a degree of relaxation of the definition of passing on than as a reference to a strictly individualised assessment

44 — Together with certain expressions used in the case-law, such as passing on 'to the purchaser', 'to the final consumer', etc.

of passing on, that is product by product and sale by sale.

100. As I have previously indicated, this flexible approach to passing on is not absolute, and it is subject to certain limits: and in particular, to limits which arise out of the very definition of 'passing on'.

101. For this reason, the type of assessment of passing on which, judging by the terms of the first question, the Danish authorities may be carrying out, goes far beyond the limits of the definition in that it incorporates information relating to an excessively long period (four years) and involving 'a large number of products' and even 'completely different transactions, either before or after the relevant sale'.

102. However broad the definition of the 'context' and the 'factors in each commercial transaction' referred to in paragraph 25 of the *Comateb* judgment, it would be unlikely to cover situations such as those contemplated in the first question referred. At most it might permit an assessment by product groups or groups of transactions which are linked in some way, and over shorter periods, but the argument that prices are determined in the aggregate, for all the undertaking's transactions, over a period of four years would seem untenable.

103. The principle that the evidence must be freely evaluated by the national court does not, in my opinion, undermine this conclusion. On this point, it should be noted that, '[a]lthough the question whether a tax has been passed on is a question of fact falling within the jurisdiction of the national court', and despite the fact that it is for that court alone to evaluate the evidence to that effect, 'the rules of evidence [for passing on] must not have the effect of making it virtually impossible or excessively difficult to secure repayment of a charge' levied in breach of EU law. [45]

104. Quite apart from the circumstances of this case, an overall assessment of widely differing transactions, involving completely different products and over a period of four years could make it impossible for the taxpayer to adduce the evidence required in order to refute the conclusion that the tax was passed on.

45 — *Michaïlidis*, paragraph 40.

## VII — Conclusion

105. Consequently, I suggest that the Court of Justice should reply to the questions referred by the Østre Landsret as follows:

(1) European Union law does not preclude an exception to the repayment of an unlawful levy in circumstances in which such a levy may have been offset as a result of the simultaneous abolition of other, equally quantifiable, lawful taxes, with the result that otherwise a situation of unjust enrichment would arise. It will be for the national court to assess whether, in the light of the evidence adduced by the national authorities, on which the burden of proof rests, such circumstances are present.

(2) When it is established that there is a difference in treatment to the detriment of a particular group of undertakings, this constitutes a factor to be evaluated by the national court for the purposes of deciding whether or not it is appropriate to repay the unlawful tax.

(3) The judgment of the Court of Justice in Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165 cannot be interpreted as meaning that the passing on in the prices may take place by the passing on in the prices of other products in completely different transactions, either before or after the relevant sale of products, for example, with the result that an overall assessment is made of the passing on over a four-year period involving a large number of product groups, including both imported and non-imported products.