OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 24 March 2011 [1]

I — Introduction

1. A Member State which has levied duties contrary to European Union law is, in principle, obliged to reimburse them to the taxable person, as is settled case-law. What has not been clarified, however, is whether, under European Union law, the party which was last to bear the economic burden of charge because it was passed on by the taxable person in the purchase price, for instance, can have a direct claim against the State.

2. The Vestre Landsret (Western Regional Court) requests the Court to clarify this question in the present case. The Landsret has been called upon to rule on actions brought against the Danish Finance Ministry, in which two industrial undertakings claim the reimbursement of tax which Denmark levied on lubricant and hydraulic oils until November 2001 although European Union law provided for an exemption from the harmonised excise duty in the case of minerals oils used for purposes other than as motor fuels or as heating fuels. The oil companies on which this duty was levied had passed it on to the applicants in the purchase price.

II — Legal framework

A — *European Union law*

1. The Excise Directive

3. Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [2] ('the Excise Directive') lays down, according to Article 1(1) thereof, the excise

1 — Original language: German.

2 — OJ 1992 L 76, p. 1.

duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community. Article 1(2) envisages that the particular provisions relating to the structures and rates of duty on products subject to excise duty will be set out in specific directives.

4. Article 3(1) and (2) of the Excise Directive provide that:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.'

2. The Mineral Oil Excise Directive

5. Article 1(1) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils [3] ('the Mineral Oil Excise Directive') requires Member States to impose a harmonised excise duty on mineral oils in accordance with that directive.

6. Article 8(1)(a) and (b), first subparagraph, of the Mineral Oil Excise Directive read as follows:

'1. In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) mineral oils used for purposes other than as motor fuels or as heating fuels;

(b) mineral oils supplied for use as fuels for the purpose of air navigation other than private pleasure flying.'

3 — OJ 1992 L 316, p. 12.

B — *Danish law*

7. In Denmark a duty on lubricant and hydraulic oils was introduced by Law No 1029 of 19 December 1992 on energy duties on mineral oil products ('the DMO Law').

8. Article l(1)(12) of the DMO Law, in the wording as it stood at the time material to the main proceedings, provided that excise duties were to be levied inter alia on lubricant and hydraulic oils ('lubricant oils') at the rate of DKK 1.78 per litre ('lubricant oil duty').

9. The lubricant oil duty was to be paid by the oil companies. When the duty was introduced, the explanatory memorandum on the draft legislation included the following statement:

'The duties can probably be passed on by the oil companies. A large proportion of the oils for which duties have been proposed are used by businesses, for which various opportunities for passing-on exist.'

10. It was further stated in that memorandum that the duties would 'further encourage economising on oil, which will have wide-ranging positive environmental effects'.

11. In response to the Court's judgment in *Braathens* [4] Denmark abolished the lubricant oil tax retroactively from 1 December 2001 by Law No 395 of 6 June 2002. In that judgment the Court had stated, in the context of an environmental protection tax levied in Sweden on fuel consumed in domestic commercial aviation, that Article 8(1)(b) of the Mineral Oil Excise Directive would be rendered entirely ineffective if the Member States were allowed to levy another indirect tax on products which were exempted from harmonised excise duty. Such a tax could not therefore be based on Article 3(2) of the Excise Directive.

12. According to the reference for a preliminary ruling, the Danish Minister for Taxation admitted to the Fiscal Affairs Committee of the Folketing [5] during the reading of the draft legislation that he had no doubts that the lubricant oil duty was contrary to Community law.

13. Following enactment of the Law, the Central Customs and Tax Authority issued a circular containing guidelines for the reimbursement of unduly paid duties (Skatteministeriet Circular No 80 of 15 July 2002 on reimbursement of lubricant oil duties, etc.).

4 — Judgment in Case C-346/97 [1999] ECR I-3419.

5 — Danish Parliament.

With regard to the class of parties entitled to repayment, part 3.1 of the circular states:

'Undertakings entitled to reimbursement are in the first instance those which, after repeal of the Law, may be regarded as entitled to reimbursement. These are undertakings which have paid the duty but have not passed on the duty to the next link in the marketing chain.

The question of other parties so entitled will be decided upon in accordance with the general principles of the law of damages.'

III — Facts of the case and questions referred

14. Danfoss A/S ('Danfoss') manufactures inter alia cooling, heating and industrial automation systems. It uses lubricant oils both in the manufacture of these systems and – to prevent overheating and destruction of rotary and cutting tools – in transmission technology.

15. It purchased the lubricant oils used between 1 January 1995 and 30 November 2001 from various Danish oil companies, which paid lubricant oil duty on them to the Danish State in accordance with the DMO Law.

16. It is not disputed that the oil companies passed on to Danfoss the lubricant oil duty on the lubricant oils which it had purchased. The amount concerned was DKK 6 108 054.

17. Danfoss sold a small amount of the lubricant oils to Sauer-Danfoss ApS ('Sauer-Danfoss'), which similarly used them as an auxiliary product in its production process.

18. In the main proceedings Danfoss stated that the price of the lubricant oils sold on to Sauer-Danfoss included lubricant oil duties totalling DKK 1 686 096. According to Danfoss, the lubricant oil duties – apart from those charged on the lubricant oil sold on to Sauer-Danfoss – were not otherwise passed on to any subsequent link in the marketing chain. The Danish Government contests this.

19. The oil companies have not claimed reimbursement of the lubricant oil duties on the lubricant oils sold to Danfoss.

20. Danfoss and Sauer-Danfoss, on the other hand, have claimed the reimbursement by the tax authorities of DKK 6 108 054 and DKK 1 686 096, respectively.

21. The amount passed on to Sauer-Danfoss is included in the amount claimed by Danfoss. The two undertakings have entered into an agreement whereby, if Danfoss is successful in recovering the full amount from the State, the amount of DKK 1 686 096 will be repaid to Sauer-Danfoss, which will then withdraw its claim for DKK 1 686 096 against the Ministry. Sauer-Danfoss's claim against the Ministry is thus subsidiary to Danfoss's claim.

22. The tax authorities refused to make the reimbursement. The refusal was based on the ground that there was no entitlement to reimbursement because the enterprises had not paid the lubricant oil duties directly to the State, with the result that the claim fell to be assessed in the light of the general Danish law on damages. According to the tax authorities, however, the conditions for a reimbursement are not met.

23. Concerning the basis for liability, the tax authorities stated that, before the *Braathens* judgment, which clarified the relationship between the Excise Directive and the Mineral Oil Duties Directive, the incompatibility of the lubricant oil duty with Community law had not been so clear that levying it might give rise to liability on the part of the State. In the period following that judgment, the loss incurred by a link in the marketing chain below the taxable person could not be regarded as sufficiently proximate, since it could not have been predicted by the State where in the marketing chain the loss would be incurred.

24. Danfoss and Sauer-Danfoss then brought actions against the Skatteministeriet before the Vestre Landsret on 15 March 2005 and 4 May 2005, respectively, claiming the payment of the contentious amounts. The Vestre Landsret decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Community law preclude a Member State from rejecting a claim for reimbursement brought by an undertaking to which excise duty imposed contrary to a directive has been passed on, where such rejection – in circumstances such as those of the present case – is on the ground that it is not the undertaking that paid the duty to the State?

(2) Does Community law preclude a Member State from rejecting a claim for damages brought by an undertaking to which excise duty imposed contrary to a directive has been passed on, where such rejection – in circumstances such as those of the present case – is on the grounds put forward by the Member State (specifically, that the undertaking is not the directly injured party and that there is no direct causal link between any loss and the conduct giving rise to liability)?'

25. Danfoss, Sauer-Danfoss, the Danish, Spanish, Italian, Polish and United Kingdom Governments, and the European Commission participated in the proceedings before the Court.

IV — Appraisal

26. It must first be stated that, in the final analysis, both questions referred seek the same information: do undertakings in Danfoss's and Sauer-Danfoss's situation have a direct claim under European Union law against the State for payment of an amount equivalent to the lubricant oil duty which the State has imposed, contrary to European Union law, on the oil companies and which the latter have passed on to those undertakings? The two questions differ, however, in respect of the basis for the claim. While the first question concerns a claim for reimbursement in the sense of a repayment, the second question concerns a possible claim for damages. The questions must therefore be answered separately.

A — *The first question referred*

27. With its first question the referring court essentially seeks to establish whether, in the event of a Member State imposing a tax contrary to European Union law and of the taxable person passing it on to its customer, the latter can claim its reimbursement directly from the State under European Union law.

28. It has long been settled case-law that Member States must in principle reimburse taxes and other charges which they have levied contrary to European Union law. [6]

29. The Court has consistently held that entitlement to the repayment of charges levied by a Member State in breach of European Union law is a consequence of, and an adjunct to, the rights conferred on individuals by the

6 — See the judgments in Case 68/79 *Just* [1980] ECR 501, paragraphs 25 to 27, Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraphs 22 to 27, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and then explicitly, for example, the judgments in Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 202, and Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, paragraph 45. See, more recently, on this and other aspects, the Opinion of Advocate General Cruz Villalón in Case C-398/09 *Lady & Kid and Others* [2011] ECR I-7375 and the Opinion of Advocate General Mengozzi in Case C-310/09 *Accor* [2011] ECR I-8117, paragraph 53 et seq.

European Union provisions prohibiting such charges. [7]

30. An individual in this sense is, in any case, the taxable person concerned itself. According to settled case-law, the taxable person has in principle, under European Union law, a claim against the State for the repayment of the charge levied contrary to European Union law. [8]

31. The State's obligation to repay the taxable person admits, according to case-law, of only one exception, which is, moreover, to be interpreted strictly: a Member State may refuse to repay a taxable person if it establishes that the charge has been passed on in full to a third party and the taxable person would be unjustifiably enriched by the repayment, an aspect which must also be considered. [9]

32. It has yet to be clarified whether, in a situation where charges are passed on, the claim against the State for repayment now rests not with the taxable person but with the party to whom the charge was passed on and who was unable to pass it on to another party (for the sake of simplicity, 'the final consumer'). Various pointers which help with the answer to this question can, however, be found in case-law.

1. The final consumer's interest in repayment, which is worthy of protection

33. In its judgment in *Comateb and Others* [10] the Court explicitly referred to the possibility of the final consumer obtaining repayment directly from the national authorities of the amount of the charge which he has paid but which was not due. It mentioned that possibility, however, purely as a hypothesis in the event of which the question of reimbursing the taxable person does not, as such, arise. The Court did not comment on whether and in what circumstances the final consumer must have such a direct claim against the State under national or European Union law.

7 — Judgments in *San Giorgio* (cited in footnote 6, paragraph 12), *Comateb and Others* (cited in footnote 6, paragraph 20), *Metallgesellschaft and Others* (cited in footnote 6, paragraph 84), *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraph 202) and *Direct Parcel Distribution Belgium* (cited in footnote 6, paragraph 45).

8 — See the judgments cited in footnote 6, which all concern the situation in which the taxable person himself claims repayment, and the judgments in Case 240/87 *Deville* [1988] ECR 3513, paragraph 11, and C-147/01 *Weber's Wine World* [2003] ECR I-11365, paragraphs 93 to 95.

9 — Judgments in *Just* (cited in footnote 6, paragraph 26), Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, paragraph 33, and *Weber's Wine World* (cited in footnote 8, paragraphs 94 and 102). In his Opinion on *Lady & Kid and Others* (cited in footnote 6) Advocate General Cruz Villalón quite rightly pointed out in paragraphs 34 and 44 that the Court had agreed to an exception of national origin and called for other exceptions to be permitted besides the passing on of charges (paragraph 35 et seq.).

10 — Cited in footnote 6, paragraph 24.

34. The Court pointed out in the same judgment, however, that to repay the taxable person 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*.[11] The Court thus recognised that the charge levied contrary to European Union law may affect economically a party other than the taxable person and that the amount of the charge needs to be returned to the assets of that other party.

35. That need also ensues from the general nature of indirect taxes. They are levied on expenditure or consumption, and the financial burden associated with them can typically be passed on to and is borne by the final consumer.[12] That is also true of the Danish lubricant oil duty here in contention. The explanatory memorandum on the draft legislation concerning the introduction of that duty explicitly point out that it can probably be passed on by the oil companies. The incentive which the Danish State hoped would encourage economising on oil logically presupposes that the duty will be passed on, making the oil more expensive for those who use it.

36. The case-law of the Court, according to which the question whether an indirect tax has or has not been passed on is a question of fact, since the actual question of passing on taxes, either in whole or in part, depends on a number of factors in each commercial transaction,[13] does not question this characteristic of indirect taxes. It merely makes it clear that the State cannot rely on an assumption that the taxable person has passed on such charges in order that it may oppose the taxable person's claim for repayment on the ground that such repayment would result in its unjust enrichment.

37. The final consumer to whom an indirect charge levied contrary to European Union law, such as the Danish lubricant oil duty, has been passed on, is therefore also to be regarded as an individual on whom rights have been conferred by the European Union provisions prohibiting such charges. He, too, must be

11 — Judgment in *Comateb and Others* (cited in footnote 6, paragraph 22; emphasis added).

12 — As also noted by Advocate General Jacobs in his Opinion in Case C-475/03 *Banca populare di Cremona* [2006] ECR I-9373, paragraph 35.

13 — Judgments in Joined Cases 331/85, 376/85 and 378/85 *Les Fils de Jules Bianco and Girard* [1988] ECR 1099, paragraphs 17 and 20, *Comateb and Others* (cited in footnote 6, paragraphs 25 to 27) and *Weber's Wine World and Others* (cited in footnote 8, paragraph 96 et seq.).

able to obtain repayment of the charge passed on to him.

2. Conclusions to be drawn from the need for protection

38. It would be rash, however, immediately to infer from the interest a final consumer – to whom a charge levied contrary to European Union law has been passed on – has in being repaid (an interest which is in need of protection) that he must be entitled, under European Union law, to make a direct claim for repayment against the State, since it must be borne in mind that, unlike the taxable person, who can, logically, apply only to the State, the final consumer can make a claim against the taxable person rather than the State.

39. Thus the Court has ruled in relation to the taxable person that, if the final consumer is able to obtain reimbursement through the taxable person of the amount of the charge passed on to him, that taxable person must in turn be able to obtain reimbursement from the State. [14] If this is the case, passing on the charge does not lead to the taxable person becoming unjustly enriched by a repayment.

14 — Judgment in *Comateb and Others* (cited in footnote 6, paragraph 24).

40. As regards the party opposing the final consumer's claim, the 'consequence of and adjunct to' the rights conferred on the final consumer by European Union law may well differ from those conferred on the taxable person.

41. It therefore needs to be further considered whether it can be inferred from the case-law on the taxable person's claim to reimbursement that such a claim directly against the State can also be conferred on the final consumer. For this, it must first be considered precisely what substance case-law has given to the taxable person's claim to reimbursement.

(a) The practical substance of the taxable person's claim to reimbursement

42. According to case-law, the State must repay to the taxable person not only the tax unduly levied but also amounts paid to the State or retained by it which relate directly to that tax. [15]

15 — The Court includes in this, in particular, the financial disadvantage suffered by the taxable person as a result of the premature levying of a charge about which there can be, as such, no complaint under European Union law, the incompatibility with European Union law thus consisting solely in that premature levying of the charge. In that case, the award of interest represents the reimbursement of that which was improperly paid. See the judgments in *Metallgesellschaft and Others* (cited in footnote 6, paragraphs 87 to 89), *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraph 205), Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 112 and order in Case C-201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I-2875, paragraph 114.

(i) The criterion of inevitable consequence

43. The claim for reimbursement does not, however, extend to any disadvantages which are based on the taxable person's own decisions and do not inevitably result from the action taken by the Member State contrary to European Union law. [16] The criterion of inevitable consequence has remained rather vague in case-law and, as far as can be seen, has hitherto been used only in a very specific tax law context. [17] It clearly serves to enable a distinction to be made between what can be expected from a claim for reimbursement granted pursuant to Union law and what can 'only' be expected from a claim for damages similarly based on European Union law, the latter being subject to more stringent requirements. [18]

(ii) Claim for reimbursement despite the passing on of a charge

44. However, the loss or damage incurred by the taxable person as a result of its passing on of the charge to his customers in the price and suffering a decline in sales due to the increase in price is, according to case-law, at least indirectly covered by the claim for reimbursement. This results from the Court's observations in connection with the aforementioned exception to the State's obligation to make repayment.

45. A Member State can thus resist repayment to the taxable person of a charge levied though not due only where it is established 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. [19] According to case-law, however, the taxable person is not unjustly enriched if it incurs a financial loss due to a decline in sales. [20] The Court has emphasised in this respect that passing on a charge to a third party does not necessarily neutralise the economic effects of the tax on the taxable person. The mere passing on of the charge does not therefore mean that repayment would entail the unjust

16 — Judgments in *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraph 207) and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 15, paragraph 113) and order in *Test Claimants in the CFC and Dividend Group Litigation* (cited in footnote 15, paragraph 115).

17 — Thus neither the reliefs of other tax advantages waived by a resident company in order to be able to offset in full a tax levied unlawfully against an amount due in respect of another tax, nor the loss and damage suffered by resident companies nor the expense incurred by the companies forming that group of undertakings can form the basis of an action under Union law for the reimbursement of the tax unlawfully levied (see the case-law cited in footnote 16).

18 — See the judgment in *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraphs 207 to 209).

19 — Judgments in *Just* (cited in footnote 6, paragraph 26), *Michailidis* (cited in footnote 9, paragraph 33) and *Weber's Wine World and Others* (cited in footnote 8, paragraph 94).

20 — Judgments in *Comateb and Others* (cited in footnote 6, paragraph 29 et seq.), *Michailidis* (cited in footnote 9, paragraph 34 et seq.) and *Weber's Wine World and Others* (cited in footnote 8, paragraphs 95, 98 et seq.).

enrichment of the taxable person and should consequently be refused. [21]

(iii) Conclusions for any claim by the final consumer for reimbursement

46. Before conclusions can be drawn from the above characteristics of the taxable person's entitlement to reimbursement under European Union law for the question whether, in principle, the final consumer, too, can be so entitled, those characteristics must first be appraised critically.

47. It must be observed in this respect that entitlement to reimbursement despite the passing on of the charge is compatible with the 'criterion of inevitable consequence' [22] only if the loss or damage due to a decline in sales is regarded as the inevitable consequence of the levying of the charge by the State, despite the taxable person's intermediate decision to pass on the charge. That seems very much open to question.

48. That view also conflicts with the case-law according to which the question of passing or not passing on an indirect charge is always a question of fact, since the actual passing on in whole or in part depends on several factors in each commercial transaction. [23]

49. The question which therefore necessarily arises is whether entitlement to reimbursement is actually the appropriate basis for settling such a claim for damages. It would seem more logical to compensate for such losses in accordance with the law of State liability, that is to say, in accordance with the rules which the Court has laid down for the liability of the Member States for losses incurred by individuals as a result of infringements of European Union law.

50. The settlement of damages through entitlement to reimbursement also has implications for the question how the economic consequences for the final consumer of the levying of a charge contrary to European Union law can be overcome.

51. If, despite his having passed on the charge levied contrary to European Union law, the taxable person is entitled to reimbursement since the decline in its sales means that it has

21 — See the judgment in *Weber's Wine World and Others* (cited in footnote 8, paragraph 101 et seq.).

22 — See paragraph 43 above.

23 — Judgments in *Les Fils de Jules Bianco and Girard* (cited in footnote 13, paragraphs 17 and 20), *Comateb and Others* (cited in footnote 6, paragraphs 25 to 27) and *Weber's Wine World and Others* (cited in footnote 8, paragraph 96 et seq.).

incurred a financial loss – for the purposes of this example, in the same amount – that entitlement would be fulfilled through repayment by the State and so basically exhausted. In that situation the final consumer could no longer turn to the taxable person with its own request for reimbursement with any hope of success, since what the taxable person has received from the State is actually intended to compensate it for its own loss and to be retained by it. Nor could the taxable person transfer an entitlement to the final consumer unless it was to be granted a new, additional entitlement to reimbursement actually intended to compensate for the charge itself. It would be natural in such a case for the final consumer to address its claim to the State itself.

52. All in all, it is evident that present case-law on the substance of the taxable person's entitlement to reimbursement contains grounds both for and against the possibility of the final consumer, too, having such a direct entitlement to reimbursement.

53. If it is held that the taxable person can be compensated through its entitlement to reimbursement for loss or damage due to a decline in sales, there may be situations like that just described in which the State is the only party against which the final consumer can make a claim. Moreover, to be consistent, it would then have to be accepted that the criterion of inevitable consequence also applied in respect of the diminution of the final consumer's assets. For if the aforementioned loss or damage incurred by the taxable person must, despite its own decision to pass on the charge, be regarded as the inevitable consequence of the levying of the charge by the State, the diminution of the final consumer's assets associated with the passing on of the charge is no less inevitable.

54. If, on the other hand, the real meaning of the criterion of inevitable consequence is applied, the conclusion must be that it is not fulfilled with respect to the final consumer, since the charge is not passed on automatically, but is based ultimately on an entrepreneurial decision taken by the taxable person. In this narrow understanding of the situation the nature of the claim for reimbursement to which the taxable person may be entitled argues against the final consumer being similarly entitled.

55. These opposing grounds lead to the conclusion that no decisive criteria can be derived from current case-law on the substance of the taxable person's entitlement to reimbursement regarding the party from whom

the final consumer must in principle be able to obtain reimbursement. Further pointers are, however, provided by the Court's case-law on the principles of equivalence and effectiveness.

(b) Direct claim against the State on grounds of equivalence and effectiveness

56. According to settled case-law, where European Union law does not lay down rules on the repayment of charges levied contrary to European Union law, it is for the Member States to specify in their national legislation the conditions under which such repayment may be claimed, although they must observe the principles of equivalence and effectiveness. [24] Those conditions must not therefore be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible or excessively difficult the exercise of rights conferred by the European Union legal order. [25]

57. Those conditions concern, above all, the designation of the courts having jurisdiction and the determination of the procedural conditions governing actions at law. [26] However, the Court has also assigned to the Member States the task of laying down at least some of the substantive conditions in this context. [27]

58. Who is to be regarded as the party opposing the claim is a substantive question. In the case of taxable persons the answer is provided by European Union law itself: the party opposing the claim is the State. Nor, in this one-to-one relationship, can anyone else be considered. As for the final consumer, a partial answer is provided by the principles of equivalence and effectiveness, which, as has been noted, also apply to substantive questions.

59. If, as Danfoss and Sauer-Danfoss are evidently arguing, Danish law grants directly to the final consumer to whom a charge levied

24 — Judgments in Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17, and Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 37.

25 — Judgments in *Weber's Wine World and Others* (cited in footnote 8, paragraph 103), *MyTravel* (cited in footnote 24, paragraph 17), *Reemtsma Cigarettenfabriken* (cited in footnote 24, paragraph 37) and *Direct Parcel Distribution Belgium* (cited in footnote 6, paragraph 46).

26 — Judgments in *Just* (cited in footnote 6, paragraph 25), *Metallgesellschaft and Others* (cited in footnote 6, paragraph 85), *Weber's Wine World and Others* (cited in footnote 8, paragraph 103), *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraph 203) and *Direct Parcel Distribution Belgium* (cited in footnote 6, paragraph 46).

27 — Judgments in *Denkavit italiana* (cited in footnote 6, paragraph 22), *San Giorgio* (cited in footnote 7, paragraph 12) and *Metallgesellschaft and Others* (cited in footnote 6, paragraph 86); for the non-contractual liability of the Member States for infringing Union law see also the judgments in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 42 and 43, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27, Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraph 86, and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 31.

contrary to Danish law was passed on a claim for repayment against the State, the principle of equivalence requires that such a claim be granted where charges have been levied contrary to European Union law.

60. If, furthermore, the repayment should be impossible or excessively difficult where the final consumer is referred to the taxable person, the principle of effectiveness may require that the final consumer be permitted to apply directly to the State. This was considered by the Court in its judgment in *Reemtsma* for the event that a provider of services mistakenly charges its customer value added tax, pays that tax to the State and then becomes insolvent. [28] That must most certainly apply where the mistake has been made not by the service provider or seller but by the State itself. In the event of the taxable person's insolvency, the principle of effectiveness may thus require that the final consumer is permitted to claim reimbursement from the State.

61. In that respect the principle of effectiveness also requires that that claim actually be, by its very nature, a restitutionary claim, since it would be made excessively difficult for the final consumer to exercise his rights if he had, for example, to satisfy the more stringent conditions which apply, in accordance with case-law, to claims for damages based on European Union law. [29] Nor is it possible to see why, in such a case, the State should be able to seek refuge behind those more stringent claim conditions. After all, it has still been enriched by the amount of the charge levied contrary to European Union law, and it is solely a question of repaying that amount to the person who was last to bear it economically.

62. If national law grants to the economically burdened final consumer a claim for restitution against neither the State nor the taxable person, it still follows from the principle of effectiveness that at least one of those two claims for repayment must be created, since the principle of effectiveness requires the Member States to provide for the instruments and the detailed procedural rules necessary to enable the final consumer to recover the charge levied contrary to European Union law. [30] Here again, the standard of protection required by European Union law would not be met if the final consumer was

28 — Judgment in *Reemtsma Cigarettenfabiken* (cited in footnote 24, paragraph 41).

29 — See the judgment in *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraphs 207 to 209).

30 — Cf. the judgment in *Reemtsma Cigarettenfabriken* (cited in footnote 24, paragraph 41); see also the second subparagraph of Article 19(1) TEU.

referred to any claims for damages against the State.

63. The interim conclusion that can be drawn is thus that the principles of equivalence and effectiveness may justify a direct claim for repayment by the final consumer against the State.

(c) No further prescriptions in European Union law

64. If a direct claim by the final consumer against the State cannot be inferred from the principles of equivalence and effectiveness, the general rule which should continue to apply is that, where European Union law does not lay down rules on the repayment of charges levied contrary to European Union law, it is for the Member States to specify in their national legislation the conditions under which such repayment may be claimed. [31]

65. In its judgment in *Denkavit italiana* [32] the Court explicitly pointed out that the safeguard of the rights conferred upon individuals by the direct effect of the prohibition to levy certain charges does not necessarily require a uniform rule common to the Member States relating to the formal and substantive conditions to which the recovery of those charges is subject. This is also and most certainly likely to apply where the person to whom a charge levied contrary to European Union law has been passed on by the taxable person is a 'secondary' claimant.

66. It should be borne in mind – as the Court has observed on several occasions – that the repayment of charges paid though not due is settled in different ways in the various Member States, and even within a single Member State, according to the various kinds of taxes or charges in question. While claims for repayment are governed by administrative law in some cases, they are governed by civil law in others and, in particular, by the rules on charges paid but not due. [33] If, except in cases in which the principle of effectiveness requires, [34] those sometimes complex rules were disregarded and the final consumer was granted, under European Union law, a general

31 — See the case-law cited in footnote 24.

32 — Cited in footnote 6, paragraph 22.

33 — See the judgments in *Just* (cited in footnote 6, paragraph 23 et seq.), Case C-228/96 *Aprile* [1998] ECR I-7141 and Case C-30/02 *Recheio - Cash & Carry* [2004] ECR I-6051, paragraph 16.

34 — The principle of equivalence, on the other hand, would not result in a breach of national legislation, but in fact in its application to cases of charges levied contrary to Union law.

claim to repayment directly against the State, without the European Union legislature having been able to establish the legal framework for such a claim in greater detail, more problems might be created than were solved. It is also conceivable that it is far more attractive to the final consumer – especially in the case of minor charges relating to daily life – if he can continue to deal with his contractual partner, rather than having to apply to the State.

67. It should therefore be a matter for national law and, if appropriate, the national courts, to determine whether the party to whom the taxable person has passed on a national charge levied by a Member State in breach of European Union law can claim the repayment of the charge directly from the State or, in principle, only from the taxable person, or whether he may choose in that regard, provided however that the principles of equivalence and effectiveness are observed.

68. This conclusion corresponds, moreover, to the solution found by the Court in *Reemtsma*,[35] where a service provider mistakenly charged its customer value added tax and passed it on to the State. Even though it makes a difference for the State's responsibility whether an undertaking mistakenly invoices its customer for a tax not owed or the State itself has levied, in breach of European Union law, a charge which has been passed on, there is no need for the claim by those economically affected for repayment to be treated differently in law. In both cases it must merely be ensured that the person concerned can obtain reimbursement of the amounts collected by the State contrary to the law, whether directly or indirectly.

69. In the main proceedings, however, it is ultimately for the referring court to consider whether the principle of effectiveness requires that a direct claim for repayment against the State should be considered. The Danish Government, commenting on the legal situation in Denmark, has argued that the final consumer does not have the right to make a direct claim for repayment against the State. Danfoss and Sauer-Danfoss, on the other hand, have argued that, as the charge was passed on, the taxable person, too, has no claim to repayment against the State and, therefore, the final consumer, for his part, has no claim to repayment against the taxable person. If both arguments are correct and the final consumer cannot consequently claim repayment of the charge either directly or indirectly, the exercise of their rights by

35 — Cited in footnote 24, paragraph 37 et seq.

the applicants in the main proceedings would be made excessively difficult if they were referred to the option of obtaining restitution from the oil companies, an option which has yet to be created in law and is currently questionable, and if their actions against the Skatteministeriet were dismissed on that ground.

3. Conclusion

70. The answer to the first question referred must therefore be that it is a matter for national law and, if appropriate, the national courts, to determine whether the party to whom the taxable person has passed on a national charge levied by a Member State in breach of European Union law can claim the repayment of the charge directly from the State or, in principle, only from the taxable person, or whether he may choose in that regard, provided however that the principles of equivalence and effectiveness are observed.

B — *The second question referred*

71. By its second question the referring court essentially seeks to establish whether, in the event of a Member State levying an excise duty contrary to European Union law and of the taxable person passing that duty on to its customer, a claim for damages by that customer against the State may be dismissed on the ground that a direct causal link between the levying of the charge and the loss or damage suffered by the customer is ruled out from the outset.

72. It is settled case-law that a Member State may incur liability for loss caused to individuals as a result of breaches of European Union law for which it can be held responsible. [36]

73. The claim for repayment is subject to three conditions: the rule of European Union law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between that breach and

36 — Judgments in *Francovich and Others* (cited in footnote 27, paragraph 35), Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31, *Danske Slagterier* (cited in footnote 27, paragraph 27), Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 29, Case C-429/09 *Fuss* [2010] ECR I-12167, paragraph 45, and Case C-568/08 *Spijker Infrabouw-De Jonge Konstruktie and Others* [2010] ECR I-12655, paragraph 87.

the loss or damage sustained by those affected. [37] The question referred concerns the third condition.

74. It is, admittedly, in principle, for the national courts to determine whether there is a direct causal link between the State's breach of European Union law and the loss or damage sustained by the individual. [38] The Court may however, on the one hand, in order to give the national court a useful answer, provide it with all the guidance that it deems necessary; [39] what is of concern here, on the other hand, is less a question of fact than one of law. What has to be clarified is namely whether the condition regarding the direct causal link is to be interpreted so narrowly that, as the Danish Government in particular argues, it can be deemed to exist only in the relationship with the taxable person, but not with the person to whom the excise duty levied contrary to European Union law was passed on by the taxable person.

75. It must first be noted that in the present case *causality* as such is beyond question. If the excise duty had not been levied, the applicants in the main action would not have sustained the claimed loss or damage consisting in the charge passed on to them by the oil companies.

76. The *directness* of the causality is not to be understood in an absolute sense: case-law holds that it is enough for it to be 'sufficiently direct'. [40] The Court gave this explanation with a reference to its ruling on the European Union's non-contractual liability, [41] to which essentially the same three conditions apply as to the liability of the Member States for breaches of European Union law. [42] From that case-law it can also be inferred that the criterion of 'sufficient directness' is intended in particular to ensure that compensation is not to be paid for every consequence, however remote. [43] If the concept of directness was not to be overstretched through the placing of the word 'sufficient' before it, it would therefore

37 — Judgments in *Brasserie du Pêcheur and Factortame* (cited in footnote 36, paragraph 65), *Danske Slagterier* (cited in footnote 27, paragraph 20) and *Transportes Urbanos y Servicios Generales* (cited in footnote 36, paragraph 30).

38 — Judgments in *Brasserie du Pêcheur and Factortame* (cited in footnote 36, paragraph 65), Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, paragraph 72, *AGM-COS. MET* (cited in footnote 27, paragraph 83) and *Fuss* (cited in footnote 36, paragraphs 48 and 59).

39 — Judgments in Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 38, and C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 43.

40 — Judgments in *Test Claimants in the FII Group Litigation* (cited in footnote 6, paragraph 218) and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 15, paragraph 122).

41 — Judgment in Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21.

42 — Judgment in *Brasserie du Pêcheur and Factorame* (cited in footnote 36, paragraph 53).

43 — Judgment in *Dumortier and Others* v *Council* (cited in footnote 41, paragraph 21).

be possible simply to refer to a close causal link. The term 'direct causal link' is, however, so firmly established in case-law that I would retain it – in its broad meaning – in the context of the further observations.

77. Referring to the liability principles of Danish law, the Danish Government argues that only 'directly injured parties' can have a claim to repayment, a category which does not include persons to whom a charge levied unduly has been passed on. The loss or damage suffered by such a person depends rather on quite a number of other circumstances, such as the taxable person's and his own price policy, the specific use of the products on which tax has been levied and the competitive situation. Furthermore, the number of the last persons economically burdened can hardly be predicted and is indeterminate.

78. However, such a criterion as the 'directly injured party' has no basis in European Union law. On the contrary, according to settled case-law, the three conditions referred to in paragraph 73 above, including the 'sufficiently direct causal link', suffice to justify a claim by the individual for compensation under European Union law. [44] Only recently has the Court explicitly ruled that the Member States may not impose any additional conditions. [45]

79. The criterion cited by the Danish Government is, in the final analysis, an additional condition, which is, moreover, based on a stricter concept of causality, since it results in the claim to compensation enshrined in European Union law being systematically withheld from those who have had to pay the charge levied contrary to European Union law and thus in their clearly sustaining a loss, without each case being considered on its merits. The full effectiveness of European Union law and the effective protection of rights recognised by European Union law, which is meant to safeguard that claim to compensation, [46] would be seriously impaired by so sweeping a restriction of those possibly entitled to claim.

44 — Judgments in *Francovich and Others* (cited in footnote 27, paragraph 41), *AGM-COS.MET* (cited in footnote 27, paragraph 85) and *Fuss* (cited in footnote 36, paragraph 65).

45 — Judgment in *Fuss* (cited in footnote 36, paragraph 66).

46 — See judgments in *Francovich and Others* (cited in footnote 27, paragraph 33), *Brasserie du Pêcheur and Factortame* (cited in footnote 36, paragraph 52) and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 33.

80. It must also be held that the loss or damage sustained by the final consumer can in no way be regarded as a remote consequence of the levying of the charge. As already observed in the context of the first question referred, since indirect charges are typically not borne economically by the taxable person but by the final consumer, it is the latter who ultimately suffers loss or damage. In essence, one and the same loss is passed on along the marketing chain. The amount remains unchanged and therefore predictable and calculable for the State. Just because the taxable person could have refrained from passing the charge on in the price and the party actually suffering damage did refrain from passing on the charge does not result in the causality of the levying of the charge for the loss or damage being interrupted, nor is such causality thereby automatically deprived of its sufficient directness within the meaning of the case-law.

81. The fact that the number of those who can claim compensation may be indeterminate – at least initially – does not call the possibility of direct causality into question. That an indeterminate number of persons can be considered entitled to compensation cannot preclude the claim for compensation for which European Union law provides.[47] Moreover, although the number of persons actually suffering loss or damage may be even less known in advance than the number of taxable persons, it can similarly be accurately defined from the outset. They are the persons to whom the charge has been passed on and who are unable, for their part, to pass it on to others.

82. A glance at another sphere of European Union liability law also confirms that it does not recognise the limitation to 'directly injured parties' as in Danish law. In its judgment in *Manfredi*,[48] for example, the Court ruled that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and a prohibited agreement or practice.

83. Consequently, where a Member State has levied an excise duty in breach of European Union law and the taxable person has passed that duty on to its customer, a claim for compensation by that customer against the State may not be dismissed on the ground that a direct causal relationship between the levying of the charge and the loss or damage sustained by the customer is ruled out from the outset.

47 — See judgment in *Brasserie du Pêcheur and Factortame* (cited in footnote 36, paragraph 71).

48 — Judgment in Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 61.

V — Conclusion

84. I accordingly consider that the questions referred by the Vestre Landsret should be answered as follows:

'(1) It is a matter for national law and, if appropriate, the national courts, to determine whether the party to whom the taxable person has passed on a national charge levied by a Member State in breach of European Union law can claim the repayment of the charge directly from the State or, in principle, only from the taxable person, or whether he may choose in that regard, provided however that the principles of equivalence and effectiveness are observed.

(2) Where a Member State has levied an excise duty in breach of European Union law and the taxable person has passed that duty on to its customer, a claim for compensation by that customer against the State may not be dismissed on the ground that a direct causal relationship between the levying of the charge and the loss or damage sustained by the customer is ruled out from the outset.'