OPINION OF ADVOCATE GENERAL TESAURO

delivered on 27 June 1996 *

1. The 27 references for preliminary rulings from the Tribunal d'Instance (District Court), Paris, concerning 27 cases pending before that court, all involving the same question, provide the Court of Justice with an opportunity to enlarge upon some aspects of its case-law concerning the reimbursement of sums unduly paid, especially as regards the scope and effect of the criterion of passing on of the right of individuals to obtain reimbursement of charges unduly levied by the State.

The national court asks the Court of Justice whether the fact that a Member State refuses to reimburse a charge levied in breach of Community law, on the ground that the charge has been passed on to the purchaser, may be regarded as making it virtually impossible or excessively difficult to obtain reimbursement, even though it is the Member State's own legislation which requires the undertaking to incorporate that charge into the cost price of the goods sold.

2. The charge at issue is not unfamiliar to the Court of Justice: it consists in what are known as 'dock dues', a financial charge levied in the French overseas departments on goods brought into those territories, regardless of their provenance and origin, which may be another Community Member State, a third country or even a region of France.

It will be remembered that in *Legros* [1] the Court of Justice deemed the dock dues to be a charge having equivalent effect to a customs duty (paragraphs 10 to 18). However, the effects of that judgment were limited in time (paragraphs 28 to 36), with the result that the incompatibility of those dock dues with the Treaty could not and still cannot be relied upon to support applications for the reimbursement of dues paid before that judgment was delivered, except in the case of those parties which had initiated legal proceedings or raised an equivalent claim before that date.

3. In the subsequent *Lancry* judgment, [2] the Court of Justice ruled, first, that dock dues, including those levied on goods originating in and coming from other regions of the same State, were incompatible with the Treaty, and, secondly, that Council Decision

* Original language: Italian.

1 — Case C-163/90 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625.

2 — Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* v *Direction Générale des Douanes* [1994] ECR I-3957.

89/688/EEC [3] — adopted before the *Legros* judgment — was invalid in so far as it authorized France to maintain the system of dock dues up to 31 December 1992.

The Court of Justice did not, however, accept the French Government's request that the effects of the judgment should be limited in time. On that point it ruled that: 'after 16 July 1992, the date of the *Legros* judgment, the French Government could not reasonably have continued to believe that the relevant national legislation was in conformity with Community law. Moreover, the interests of the local authorities are adequately protected by the temporal limitation set by the Court in *Legros*. There is therefore no need to limit the temporal effects of this judgment'. [4]

4. In other words, the limitation in time laid down in *Legros* applies also to claims for the reimbursement of the sums levied by way of dock dues between the entry into force of the decision of 22 December 1989 and 16 July 1992, the date on which that judgment was delivered. However, even where they were levied after that date, it must be possible for traders to obtain reimbursement of dues paid — provided, of course, the conditions for reimbursement are met.

3 — Council Decision of 22 December 1989 concerning the dock dues in the French overseas departments (OJ 1989 L 399, p. 46).

4 — Paragraph 45.

The disputes that have given rise to these proceedings relate in fact to the reimbursement of dock dues levied after 16 July 1992; the competent national customs authority has refused to make reimbursement on the basis of the relevant provisions of national law, and it is therefore appropriate to describe them here.

5. Article 352a of the Customs Code, as amended by Article 24-II of the Law of 30 December 1986, provides that 'where a person has paid domestic duties or charges, levied in accordance with the procedures laid down by this Code, when those duties or charges were not due, that person may obtain reimbursement of such duties or charges, provided that they have not been passed on to the purchaser'.

For the purposes of this case, Article 1 of the Law of 2 July 1963, as amended by Article 32 of the Regulation of 1 December 1986, was also relevant. It provides for penalties (fines ranging from FF 5 000 to FF 100 000) for selling a product at a price lower than the actual purchase price. The actual purchase price is defined as 'the price shown on the purchase invoice, with the addition of turnover tax, specific taxes on that sale and, where relevant, the cost of transport'. That means that sales at a loss are prohibited and, consequently, that goods cannot be sold at a price lower than the cost price.

6. I come now to the facts of the case. Comateb and the other plaintiffs in the main proceedings are all companies that have paid dock dues on goods brought into Guadeloupe and coming from other Member States or another part of French territory. Following the *Lancry* judgment, they applied for reimbursement of the sums unduly paid to the customs authority between 17 July and 31 December 1992. The director of the customs authority contends that the dock dues at issue cannot be reimbursed, in accordance with Article 352a of the Customs Code, because they have been passed on to the purchaser.

Called upon to resolve that dispute, the Tribunal d'Instance, Paris, deemed it necessary to refer to the Court of Justice a question for a preliminary ruling relating to each of the cases pending before it. It asks essentially whether the refusal to reimburse a charge levied in breach of Community law, on the ground that the charge has been passed on to the purchaser of the goods, even though it is the Member State's own legislation which requires undertakings to incorporate the charge into the cost price of the goods sold, must be deemed to make it virtually impossible or excessively difficult to obtain reimbursement.

7. It is helpful to make clear at this point that in the order for reference the national court states categorically that 'the dock dues at issue were passed on to the purchasers'. It also points out in that connection that the undertakings themselves have not disputed that the dock dues were in fact passed on to the purchasers of the goods.

The fact that French law requires the taxpayer to incorporate the charge in dispute in the purchase price of the materials needed for its business, and therefore subsequently in the cost price of the goods sold, in fact implies, in the view of the referring court, that that law 'provides for dock dues to be levied by way of input tax, without any possibility of subsequent deduction since, unlike VAT, they are not separately itemized on invoices, and requires them to be passed on, which requirement the fiscal authorities rely upon in challenging reimbursement'. The national court thus concludes that 'French legislation has apparently established a system whereby dock dues are to be passed on, and therefore not reimbursed'.

8. Putting the issue in those terms, that is to say assuming that the charge levied in breach of Community law has subsequently been passed on, means that it remains to be established whether the fact that the charge was passed on extinguishes the right to reimbursement of the sums unduly paid or whether, bearing in mind the particular features of this case, such a system is incompatible with Community law simply because it makes it virtually impossible to obtain reimbursement of sums unduly levied by the authorities.

The French Government and the Commission, however, submitted in their observations — and confirmed at the hearing — that the obligation to incorporate the dock dues into the cost price does not in fact imply, or at any rate does not necessarily imply, that they have actually been passed on to the purchasers of the goods. [5] That is essentially because an undertaking might well choose, for reasons of marketing strategy, to reduce its profit margin rather than pass on the charge.

That interpretation is doubtless reasonable in theory but is clearly impracticable, because it assumes a distinction that is impossible to establish. How, in fact, can a distinction be made, within the single payment made by the third party, between the amount representing to costs and expenses and the amount of the importer's profit? In addition, given that it is common ground in this case that the cost price of the product at issue (statutorily) incorporates the dock dues and that the selling price is made up of the cost price plus the importer's profit, how is it to be established whether the importer has sought to bear the cost of the dues at issue in whole or in part, by cutting his own profit margin?

9. If we are to be at all realistic, we have, in fact, to recognize from the outset that the approach advocated by the Commission and the French Government is not viable. The prohibition on selling at a loss imposed by French law makes it quite clear that the selling price of a product also incorporates of necessity the cost of the dock dues, in the same way as all the other costs. It follows that any attempt to analyse the tactic of individual traders in an effort to ascertain whether they intended to cut profits or pass on in full the charge unduly levied is a laborious and pointless exercise.

Nor do I consider practical the possibility — also suggested by the Commission — that, in order to ascertain whether the charge was passed on, the national court should use an expert to establish whether the profit margin of the individual trader accords with what is considered a normal profit margin (and this prompts the question whether we mean normal as compared with the average profit made by other traders in the same sector or normal in the sense of not being excessive?). Clearly, in a market economy, profit depends on variable factors; establishing whether or not it is *normal* proves nothing, and certainly not whether or not the charges have been passed on.

The truth is that such an approach, far from proving whether or not charges have been passed on, is more likely to render nugatory the right to reimbursement of a charge unduly levied by the authorities.

5 — In fact, at the hearing, the undertakings themselves claimed, albeit for different reasons, that passing on the dock dues to the purchasers of the goods could not be considered an automatic consequence of incorporating into the cost price a sum equivalent to the dock dues.

10. In the circumstances, it seems to me that the statement by the national court that 'it is common ground that the dock dues in dispute have been passed on to purchasers' is not only based on the legal aspects of the case but also takes account of the *de facto* situation which occurs whenever the duty or charge unduly levied is an indirect tax on the transfer of goods: it is impossible to distinguish between costs and profit within a product's selling price. Even if the trader intended to cut his profit margin, the fact remains that the selling price also includes the charge unduly levied by the authorities.

Based on that finding, there do not seem to me to be many possible solutions: either we consider that the charge in question was passed on, a 'probability' in the sense that it is by definition incorporated in the selling price, or we accept that it is impossible either for the authorities to prove that the charge has been passed on or for the importer to prove that it has not, so that it will be necessary to opt in favour of one or the other. Making such a choice in favour of the authorities will mean assuming that the charge has been passed on so that the right to reimbursement of the charge unduly levied is rendered nugatory; if, however, it is made in favour of the importer, it will mean that the importer is always and in all circumstances entitled to reimbursement of the sum unduly paid. In both cases the conclusion will be the same: in reality, the fact of passing on does not — nor should it — have any effect on reimbursement.

To return to the instant case, I consider that the Court of Justice cannot disregard the assessments of fact and law made by the referring court in reaching the conclusion that the charge in question was passed on to the purchasers of the goods; those assessments are, furthermore, set out cogently and comprehensively in the order for reference. The starting point for my analysis is therefore that the charge was passed on to purchasers and not, as suggested by the Commission, that the incorporation of a sum equivalent to the dock dues in the cost price does not prove that the dock dues were actually passed on. Furthermore, in terms of the first conclusion I reached, according to which it would not be possible — at any rate not in a situation of this kind — to *prove* whether or not the charge had been passed on, the issue would not be significantly different even if the Commission's point of view were to be adopted.

11. Having said that, I consider it useful first and foremost to draw attention to the case-law of the Court of Justice concerning the reimbursement of sums unduly paid and to begin by pointing out that 'entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an equivalent effect to customs duties or, as the case may be, the discriminatory application of internal taxes'. [6]

6 — Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12.

The right to reimbursement of sums unduly levied by the authorities is therefore rooted in the direct effect of the relevant provisions of Community law and the effectiveness of the protection of the legal positions created by those provisions. It is quite clear that that protection would not be effective if a judgment declaring a charge to be unlawful because it was levied in breach of a Community rule having direct effect were not accompanied by the possibility for individuals to obtain reimbursement.

12. I would then point out that in accordance with consistent case-law, in the absence of specific (harmonized) Community rules governing the issue, the right to reimbursement must be exercised before the national courts — which 'are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law' [7] — in accordance with the procedures laid down under domestic legislation. The latter may not, however, 'be less favourable than those governing the same right of action on an internal matter' or be such as to make it 'impossible ... to exercise rights which the national courts have a duty to protect'. [8]

That being so, if the reimbursement of charges paid in breach of Community law is justified by the need for rules having direct effect to be effective and if the rules and procedures provided for by domestic law in this area may not have the effect of rendering virtually impossible (exercise of) the right accorded by a Community rule, it may be inferred that anyone claiming reimbursement must prove that the charge is unlawful and that he has paid it, and nothing more. The Court of Justice has recognized in its decisions, however, that Community law does not prevent national legal systems refusing reimbursement of charges unduly levied where this involves unjust enrichment of the recipient, especially 'where it is *established* that the person required to pay such charges has actually passed them on to other persons'. [9] A further condition is thus imposed on those seeking reimbursement: proof that the charge has not been passed on.

13. It was in *Just* [10] that the Court of Justice first ruled that Community law 'does not require an order for the recovery of charges improperly made to be granted in conditions which involve the unjust enrichment of those entitled' and that that 'does not prevent the fact that the burden of the charges ... may have been passed on to other traders or to consumers from being taken into consideration'.

7 — Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* [1976] ECR 2043, paragraph 12.

8 — *Rewe*, cited above, paragraph 5; *Comet*, cited above, paragraphs 13 and 16. As we know, those general principles were confirmed in all subsequent judgments concerning the reimbursement of sums unduly paid (Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 25; Case 811/79 *Ariete* [1980] ECR 2545, paragraph 12; Case 826/79 *Mireco* [1980] ECR 2559, paragraph 13; *San Giorgio*, cited above, paragraph 12; Joined Cases 331/85, 376/85 and 378/85 *Bianco* [1988] ECR 1099, paragraph 12; Case 104/86 *Commission v Italy* [1988] ECR 1799, paragraph 7), and they now constitute the consistent case-law of the Court of Justice (see, most recently, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 31).

9 — *San Giorgio* (cited in footnote 6), paragraph 13; my emphasis.

10 — Case 68/79 (cited in footnote 8), paragraphs 26 and 27.

In order better to understand the reasons that brought the Court of Justice to that conclusion, I consider it worth pointing out that, in that case, the Court of Justice was asked, among other things, to rule on the compatibility with Community law of the Danish courts' practice of taking into account, in claims for the reimbursement of charges paid but unduly levied, the fact that the charges had been incorporated into the price of the goods and passed on to purchasers. That practice is based on a judgment of the Højesteret (Supreme Court) of 1952 [11] in which that court refused the reimbursement requested by a milling undertaking on the ground that the charge unduly levied had been passed on to bread purchasers; that was demonstrated by the fact that the price of that product was fixed by the authorities which had increased it — following the introduction of the charge subsequently declared unlawful — by a sum equivalent to the charge in question.

14. The fact that the sum unduly paid could not be reimbursed, confirmed by the Danish court, was therefore linked to the particular circumstance that this was a selling price fixed by the authorities and that that price had been increased by a sum equivalent to the (unlawful) charge whose reimbursement was being sought. The situation in *Just* was quite different; none the less, as we have seen, the Court of Justice has generally accepted that Community law does not prevent the possibility that a charge has been passed on to third-party purchasers from being taken into account for the purposes of reimbursement of sums unduly paid.

11 — See UfR 1952, 974 H.

It is specifically from that point of view that the *Just* judgment has been greatly criticized by academic writers. [12] Not only have they pointed out that a possibility which was available exclusively under the Danish legal system, and then only in exceptional and well-defined circumstances, had been set up as a principle, [13] they have also denied that the passing on, if it occurs, results in unjust enrichment of the trader having paid the charge unduly levied, or in any event, that it may be deemed such as to negate the purpose of reimbursing the sum unduly paid. In particular, it has been pointed out that 's'il y a enrichissement sans cause, c'est plutôt au bénéfice de l'autorité publique (*accipiens*) qui a perçu la taxe illicite, puisque la base légale sur laquelle la perception a été effectuée est mise postérieurement à néant, ce qui lui fait perdre toute cause'. [14]

15. I shall consider that aspect further later in my Opinion. What has to be borne in mind at this stage is that subsequent case-law, while confirming that the Member States are empowered to refuse to reimburse charges unduly levied where this would

12 — See, *inter alia*, Hubeau: 'La répétition de l'indu en droit communautaire', in *Revue trimestrielle de droit européen*, 1981, p. 442 et seq; Waelbroeck: 'La garantie du respect du droit communautaire par les États membres. Les actions au niveau national', in *Cahiers de droit européen*, 1985, p. 37 et seq.

13 — Two points have in fact to be made here; firstly, with the exception of the Danish legal system, the effect on third parties had not previously been considered capable of extinguishing the right to reimbursement of sums unduly paid in any of the national legal systems, the provisions containing a rule to that effect being adopted, in France and Italy for example, only after the *Just* judgment; furthermore, the case-law of the Danish Højesteret was actually moving in a different direction: if the price of a product subject to tax was not fixed by the public authorities but determined by the market, there was no reason, according to that case-law, to take the view that the price had been increased in order to offset the tax, so that the applicant was entitled to repayment (judgment of 28 May 1965, Case II 214/1964, U 1965, 492 H).

14 — Hubeau, op. cit., p. 451.

result in the unjust enrichment of the recipients, has provided important clarification of the procedures for proving that the cost has been passed on, thereby reducing considerably in practice the impact on the right to reimbursement of sums unduly paid.

16. The decisions to which I have just referred make it plain, on the one hand, that if the importer has to prove that he did not pass on the charge before his claim can be deemed admissible, the result may be to make reimbursement impossible in practice; and on the other hand that it may also prove necessary in consequence to reverse the burden of proof. In other words, the Court of Justice has recognized that, in certain cases, in particular in a market economy based on freedom of competition, it may be for the authorities to prove that the charge has actually been passed on and not for the importer to prove that he has not passed the charge on to the purchasers of the products.

The Court of Justice in fact ruled in the *San Giorgio* judgment that 'any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence'. [15] In that same judgment, the Court of Justice went on to rule that 'in a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal charge imposed on an importer has actually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot be systematically held responsible'. [16]

Subsequently, in *Bianco and Girard*, the Court of Justice rejected the argument that in a regulated price economy in which traders have no discretion as to whether they pass on the charge to purchasers, it would be compatible with Community law to place the burden of proof on the traders. After establishing the premiss that the principles laid down in *San Giorgio* do not apply solely to the circumstances that arise in a market economy, the Court of Justice pointed out in fact that even if it is more or less probable, depending on the nature of the market, that the charge has been passed on, the fact remains that 'the numerous factors which determine commercial strategy vary from one case to another so that *it is virtually impossible to determine how they each affect the passing on of the charge*'. [17]

15 — Case 199/82, cited above at footnote 6, paragraph 14.

16 — Paragraph 15.

17 — Joined Cases 331/85, 376/85 and 378/85, cited above at footnote 8, paragraph 20; my emphasis.

17. It is true that in the same judgment, having stated that it cannot be accepted that, with regard to indirect taxes, there is 'a presumption that they have been passed on and that it is for the taxpayer to prove the contrary', the Court of Justice nevertheless intimated that 'this in no way prejudges the solution of the specific problem that arises as regards the burden of proof where the taxpayer has been obliged to pass on a charge by the relevant legislation itself'. [18]

Unless we take the view that the Court of Justice has left the question open, that statement would appear to indicate that if national law itself requires the importer to pass on a charge, which is essentially the situation in this case, the burden of proof continues to rest with the importer. [19] It then follows — I would go so far as to say more or less inevitably — that the importer in question would, in any event, be unable to obtain reimbursement of the charges unduly levied by the authorities.

18. What conclusions may be drawn from the case-law I have cited so far? It is abundantly clear — as my analysis shows — that the effect of passing on, as described in *Just*, has been considerably scaled down in the subsequent case-law. It does not seem to me to be going too far to say that placing the emphasis on the element of uncertainty that accompanies passing on, [20] as well as on the variable nature of the different factors that influence commercial strategy, so that 'it becomes virtually impossible' to establish its actual influence on passing on, [21] is tantamount to recognizing that establishing whether or not passing on has actually taken place is practically impossible. As I have already mentioned (see paragraphs 9 and 10 above), this applies both to the trader who has paid the sum unduly and the authorities themselves.

Viewed in those terms, reversing the burden of proof from the importer to the authorities, as indicated by the Court of Justice, is actually a means of preventing the right to reimbursement of a sum unduly paid being rendered negatory. In terms of the burden of proof, the decision to give the taxpayer priority over the authorities means that, where it is impossible for the authorities to prove that the sum has in fact been passed on, the taxpayer will always be entitled to reimbursement of any sum unduly paid; that is confirmed by the decisions of the national courts delivered in application of the case-law of the Court of Justice described above.

18 — Ibidem, paragraph 17.

19 — The interpretation would in no way affect situations of the kind resolved in Denmark by the Højesteret in its 1952 judgment which, as I have already pointed out, certainly influenced the Court of Justice's judgment in the *Just* case.

20 — See, in particular, the *San Giorgio* judgment, cited above at footnote 6, paragraph 15, and the *Bianco and Girard* judgment, cited above at footnote 8, paragraph 17.

21 — *Bianco and Girard*, cited above, paragraph 20.

19. Can we infer from that that, although constantly reaffirmed in the case-law on the subject, the significance accorded to passing on and the principle of unjust enrichment has been scaled down to such an extent that it no longer has any practical impact for the purposes of reimbursement of sums unduly paid? The answer has to be in the negative. There remains, of course, the situation where it is the law of the Member State itself which requires the importer to pass on the unlawful charge, a state of affairs central to this case. As I have already said, the case-law itself seems to rule out the possibility of reversing the burden of proof in a case of this type, so that although he has unduly paid a charge, the trader can have no right to reimbursement of the charge unduly paid. [22]

My main point in this connection is that the approach of the Court of Justice ought, in my view, to be followed, in the sense that, in a situation of that nature, it must be assumed that the charge has in fact been passed on so that there would be no point in reversing the burden of proof. In such circumstances the authorities are, in any event, able to prove that the charge was indeed passed on, [23] as indicated, moreover, by the referring court in this case.

20. It must be accepted, in fact, that in such a case the problem certainly cannot be resolved by checking to ascertain whether the charge was in fact passed on, as suggested by the Commission. The issue has nothing to do with establishing on whom the burden of proof lies or ascertaining whether the requirements regarding evidence make it impossible in practice to obtain reimbursement. The issue is far more fundamental: we have in fact to decide whether the passing on of dock dues — as a consequence of a requirement laid down by domestic legislation itself — is to be regarded as making it impossible to obtain reimbursement and, consequently, to establish whether, for that very reason, domestic legislation which has that effect is incompatible with Community law. In the final analysis, it is a matter of deciding whether passing on the charge to third parties actually results in unjust enrichment of the trader and whether, in consequence or in any event, it is such as to cause to be extinguished the obligation for sums unduly levied by the authorities to be repaid.

22 — It seems useful at this point to bear in mind that, in a similar case, but one which concerned an application for the reimbursement of sums paid on the basis of invalid Community regulations, the Court of Justice ruled, in a judgment of 13 May 1981, that the existence of 'a scheme specially designed with a view to spreading the effects of a measure of economic policy destroys the basis of an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone. *In this regard it does not matter whether the operator has actually passed on the charge or whether he decided not to do so for reasons connected with the financial policy of his undertakings*' (Case 66/80 *International Chemical Corporation* [1981] ECR 1191, paragraph 24; my emphasis). It is therefore sufficient that the Community rules in question should be designed in such a way as to permit (it is not even necessary that they should require) the charge at issue to be passed on, for reimbursement of the sums unduly paid to be refused. As I have no reason to believe that traders enjoy different protection according to whether their application for reimbursement of sums unduly paid is linked to domestic or Community taxes, I am inclined to the view that, in so far as it is incompatible with the *San Giorgio* and *Bianco* judgments, that decision is now obsolete. Were that not so, it goes without saying that detailed review of this issue would at least be required.

23 — In that case, for instance, the customs authorities had only to check that the applicant undertakings had in fact included a sum equal to that of the dock due in the cost price, as required under the domestic rules in force and that, as stated by the undertakings themselves, the selling price was then determined by adding a profit margin to the cost price.

Let me first point out that while the selling price of a given product is certainly determined in such a way as to cover the relevant costs, it is also (and more especially) influenced by market trends, so that it would be simplistic to imagine it to be made up merely of the sum of the costs involved plus the desired profit margin. It follows that it is not possible to isolate a specific element, relate it solely to the amount of the charge unduly paid and, thereby, extinguish the right to reimbursement of the sums unduly paid. In those circumstances, there seems to me to be no doubt whatsoever that it is impossible to show that the financial loss sustained by the party that has paid the unlawful charge has been offset by incorporating that charge in the price of the product in question. In point of fact, it is plain, indeed abundantly plain in my view, that it can be positively established that the sum has been passed on to a third party only if supply is elastic and demand rigid, something that does not happen in the real economy. Those involved in administering the law have also to take account of this fundamental reality and draw the rational consequences.

21. More generally, even if an individual trader may, on occasion, profit from the reimbursement of a charge that has been unduly paid, which he has passed on in part or in whole, we have also to consider whether in such circumstances it is reasonable to apply the concept of unjust enrichment. The answer is that it is not — simply in terms of the general theory of the law: I do not in fact believe it can be right to describe as unjust enrichment the profit derived by an individual from the reimbursement of a charge unduly required and levied by the authorities. More especially, I do not believe that the State, which itself has actually obtained unjust enrichment by levying — for years, even — an unlawful charge, may then specifically rely on a principle of that kind to refuse to repay the sums unduly paid. [24]

Moreover, were we to accept that a Member State may refuse to repay a sum unduly paid on the ground that it has been passed on, even though domestic law itself requires that it be passed on, it might well happen that the State in question would refrain from complying promptly with the judgment of the Court of Justice declaring the charge to be illegal, precisely because it would not in any case be required to repay the sums unduly paid. That would be an advantage that I consider frankly excessive.

22. All in all, it seems to me that, at least in a case such as this, reimbursement of the sum unduly paid simply offsets what one might call *unjust impoverishment* of the trader who has paid the authorities charges that were not properly due. It does not matter that he has passed them on to the purchaser (as required under the domestic legislation itself) as presumably he was then obliged to reduce his profit margin or accept a reduction in the volume of his sales. In any event, I have absolutely no doubt that if it is necessary to choose between the authorities of a Member State which have for years violated Community law and a taxpayer who has paid to

24 — See on that point, the Opinion of Advocate General Mancini in the abovementioned *San Giorgio* judgment ([1983] ECR 3616 and more especially 3627), as well as point 14 and footnote 14 of this Opinion.

those authorities charges that were not properly due, it is certainly not the taxpayer who should be penalized.

Moreover, it must be very clear that the alternative solution would have the effect of rendering nugatory a legal position guaranteed to the individual by Community law, and this would genuinely undermine the protection to be afforded by the courts of that legal position. That is no small matter.

23. One last point. As we know, a recent decision has acknowledged that the State is required to make reparation to individuals who have suffered damage as a result of a breach of a right directly conferred by a Community rule, where that breach is the result of a violation of that rule attributable to the State in question. On that occasion, the Court of Justice stated, in particular, that 'in that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained'. [25]

It may very well happen, as I said earlier, that the individual sustains damage precisely as a result of passing on the charge levied by the authorities in breach of Community law, in the sense that the increase in the product price — if that is considered to represent passing on the charge to the third parties that have purchased it — may result in a reduction in the volume of sales. In such circumstances, the individual could usefully bring an action for damages against the State to obtain reparation for the damage he has sustained as a result of the charge levied in breach of Community law.

The objection could be raised here that the possibility I have just described removes the risk, mentioned earlier, of the individual being refused the full and effective protection to which he is entitled. I wonder, however, whether it would not be a great deal simpler — and not only for the trader concerned — to recognize that the latter is entitled to reimbursement of the sum unduly paid.

24. That is precisely the outcome that has also to be guaranteed to the plaintiffs in the main proceedings. If the Court of Justice wishes to achieve that outcome, as I would propose it should, it seems to me that it has two options. The first is to reply to the national court that domestic legislation framed in such a way as to require that charges be passed on to third parties who have purchased the goods has the effect of making it virtually impossible to obtain reimbursement of the charges unduly levied by the authorities and is therefore incompatible with Community law. The second, more radical, solution consists in ruling that passing on the charge to third parties that have purchased the goods does not, in any event, extinguish the right of the individual to obtain reimbursement of the sum unduly paid.

25 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 22.

In the light of the precedents set by case-law in this area, however, I have to point out that the first solution also has the result, albeit less obviously, of depriving the criterion of passing on of any purpose or practical effect: either the authorities are not able to prove that passing on actually occurred (given the reversal of the burden of proof decided upon in *San Giorgio* and in *Bianco and Girard*) or the legislation which requires passing on — and which therefore reflects the only situation in which the authorities are able to prove that passing on took place — is deemed to be such as to make the right to reimbursement a virtual impossibility. The result is the same: the individual is always, and in all circumstances, entitled to reimbursement of the charges levied by the State in breach of Community law.

In those circumstances, I can only propose to the Court of Justice the most obvious solution: that it rule explicitly that passing on the charge to third parties that have purchased the goods in no way affects the right of the individual to reimbursement of the sums unduly paid. Not only does that solution cause less uncertainty between traders and those who interpret the law, it better reflects economic reality.

25. I therefore propose that the Court of Justice give the following answer to the question submitted by the Tribunal d'Instance, Paris:

The fact that a charge levied in breach of Community law has been passed on to third parties that have purchased the goods does not extinguish the right of the individual to reimbursement of the sums unduly levied by the authorities.