

Passing-On Unlawful Charges: Still No Small Matter

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This contribution focuses on the so-called passing-on problem in actions for repayment of charges levied by Member States in breach of EU law. 'Passing-on' occurs when the economic burden of a charge levied from a business is passed on to burden that business' customers, and possibly even further down the supply chain. The main issues at stake in the passing-on problem are whether actual or possible passing-on should be relevant to the amount repayable, and whether (and against whom) downstream claimants should be able to bring an action in respect of an economic burden passed on to them. Using examples from their home jurisdictions Sweden and Norway, the authors demonstrate that the passing-on problem is a multi-million euro issue which remains governed by diverging national laws, albeit subject to some restrictions developed by the Court of Justice in the absence of EU harmonization. With a view to safeguarding legal certainty, the effective protection of EU law rights, and the elimination of random discrepancies among national rules that are crucial to the proper functioning of the internal market, the authors call for EU harmonization of the legal issues triggered by passing-on. To that end, the authors present two alternative models for harmonization.

Keywords: EU law; harmonization of national laws; restitution; repayment of charges; passing-on; tax law

1 INTRODUCTION

It was twenty years ago today ... In this journal, in 1998, Andrea Biondi and Lindsay Johnson called upon the EU institutions to create a uniform action for restitution where a charge has been levied in breach of EU law. They stressed that this is no small matter, and it still isn't, but nevertheless their cry has gone unheard.¹ Much is to be said for such a uniform action. Moreover, it could be argued that certain new trends in EU case law suggest that a horizontal restitutionary action should be available to claimants whose EU law rights have been

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¹ Andrea Biondi & Lindsay Johnson, *The Right to Recovery of Charges Levied in Breach of Community Law: No Small Matter*, 4(3) Eur. Pub. L. 313 (1998).

infringed by another private individual.² The issue of restitution in EU law has consequently gained further importance. In this article, we revisit the topic of Biondi's and Johnson's contribution; the repayment of charges levied by a Member State in breach of EU law. We will however be more specific, focusing on an aspect of such repayment that has recently been harmonized in a different context but not in the context of unlawfully levied charges, namely, the passing-on of such charges down the supply chain, and the legal consequences of such passing-on.

EU law discussions on passing-on in the context of repayment of unlawful charges date back to the *Just* case of 1979.³ The circumstances in *Just* may also serve as an illustration of the passing-on issue: Hans Just I/S (Just), a Danish company, imported wine and spirits into Denmark. Under Danish law, aquavit (in large domestic production in Denmark) was taxed at a lower rate than other spirits. Just brought an action against the Danish Ministry of Fiscal Affairs claiming repayment of the sums it had been compelled to pay at a rate higher than that for aquavit. Just argued that the higher tax levied on imported spirits other than aquavit were contrary to Article 95 of the EEC Treaty (now 110 TFEU), an argument which was confirmed by the Court of Justice in separate proceedings.⁴ Focus in the *Just* proceedings therefore turned to the estimation of the harm suffered by Just. This aspect was brought before the Court of Justice in a request for a preliminary ruling, and in the course of proceedings the Danish government made use of the so-called defence of passing-on: The government argued that Just had sold its products at prices that covered its costs and the disputed charges, and included a normal profit margin. Thus, the government argued, the charges had in reality been paid by the consumers and Just had suffered no damage. Refunding the charges would therefore, the government concluded, amount to an unjust enrichment of Just. The government further argued that the Ministry might face claims from those who had ultimately borne the burden of the tax. If repayment was made to Just there was therefore a risk that the Ministry of Fiscal Affairs would be held liable to repay the same amount twice.

As is apparent from this short summary of *Just*, the Danish government used a combination of fact assertions and policy arguments to persuade the Court of Justice to recognize that passing-on was legally relevant to the position of Just and that passing-on had occurred. The argument was that the amount of repayment should be decreased to the extent that the charge had been passed on, and that it had been passed on in its entirety (hence a decrease to zero). This

² E.g. case C-555/07 *Küçükdeveci* [2010] ECR I-365 para. 51, case C-441/14 *Dansk Industri on behalf of Ajos* EU:C:2016:278 para. 35, and case C-122/17 *Smith v. Meade* EU:C:2018:631 paras 41–46, in which the 'exclusionary effect' of EU law is stressed. On the implications of this case law to the possibility of horizontal restitution see Magnus Strand, *The Passing-On Problem in Damages and Restitution under EU Law*, paras 8.038–8.040 (Edward Elgar Publishing 2017).

³ Case 68/79 *Hans Just* [1980] ECR 501.

⁴ Case 171/78 *Commission v. Denmark* [1980] ECR 447.

is known as the defence of passing-on, in which the phenomenon of passing-on of a charge down the supply chain is used as a defence to a claim. Passing-on can however also be invoked in support of a claim. In *Danfoss*, downstream claimants brought an action for recovery of charges unlawfully levied from their suppliers and passed on to them.⁵ The existence of passing-on was consequently a fact to be proven in support of the claim, not in defence against the claim. The underlying presupposition in all passing-on discussions is that an economic burden can sometimes be passed on, in whole or in part, down the supply chain. Consequently an unlawful charge will first burden the payer of the charge, and then be passed on to burden downstream claimants: customers of the payer of the charge, and the customers of those customers, all the way down to the final consumer. Passing-on is therefore not a single and coherent legal problem but a set of factual circumstances which triggers a number of legal problems, for which, collectively, the ‘passing-on problem’ may be used as shorthand.⁶ The legal problems entailed include who among the parties involved should be able to sue whom, how far down the supply chain it is reasonable to trace the passing-on of an unlawful charge, whether or not to take passing-on into account in the estimation of repayment, and how to prove the existence and extent of passing-on.

The trick in any passing-on situation is basically how to balance and reallocate the losses and gains that an unlawful charge will have caused along the supply chain as equitably as possible. To the extent that a perfect rebalancing is not possible there are various suggestions in the debate on passing-on as to what imperfections are preferable to others.⁷ In addition to this issue, any loss suffered through reductions in sales caused by price increases corresponding to the unlawful charge will need to be compensated. Unsurprisingly, national courts and legislators have chosen different approaches to these challenges. The defence of passing-on has been rejected for the purposes of antitrust law in the United States of America,⁸ for the purposes of restitution under an unlawful contract in the United Kingdom,⁹ and for the purposes of tax law in Australia¹⁰ and Sweden.¹¹ By contrast, the defence of passing-on has been recognized for the purposes of EU competition law

⁵ Case C-94/10 *Danfoss* [2011] ECR I-9963.

⁶ For a detailed discussion of the scope of the passing-on problem and the various interests involved see Strand *supra* n. 2, Ch. 1. On the adequacy of the concept of ‘passing-on’ in restitution see Peter Birks, *Unjust Enrichment*, 219–21 (OUP 2005) and Michael Rush, *The Defence of Passing On*, 11–17 (Hart Publishing 2006).

⁷ See s. 6.2 below for a presentation of our policy suggestions.

⁸ *Hanover Shoe Inc v. United Shoe Machinery Corp*, 392 US 481 (1968).

⁹ *Kleinwort Benson v. Birmingham City Council* [1997] QB 380.

¹⁰ *Commissioner State Revenue (Victoria) v. Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) and *Roxborough v. Rothmans Pall Mall* (2001) 208 CLR 516 (HCA).

¹¹ RÅ 2002 ref. 108.

under Directive 2014/104¹² and for the purposes of statutory tax law in the United Kingdom.¹³ The Supreme Court of Canada first recognized the defence for the purposes of tax law, but then it had a change of heart and rejected it.¹⁴ The flip side of the defence of passing-on is the matter of whether downstream claimants should be able to bring an action. In American federal antitrust law, the Supreme Court has taken the view that downstream claimants should be barred from bringing an action against the infringer, for the same reasons that prompted it to reject the defence of passing-on.¹⁵ By contrast, Directive 2014/104 on EU competition damages requires for downstream claimants to be granted access to an action for damages against the infringer.¹⁶

As will be further explained below, the Court of Justice has largely left it to the national legal systems of the Member States to find proper solutions to the passing-on problem in the repayment of charges. It has nevertheless scrutinized the national approaches with increasing stringency.¹⁷ Its role is slightly different from that of national courts, as its primary concern is to decide whether and to what extent EU law should intervene into the choices made by the Member States, which is essentially an exercise in the balancing of powers.¹⁸ In other words, what should be the scope of EU law intervention against Member State autonomy in the enforcement of EU law?

However, the Court recognized quite early that the laws of the Member States on issues pertaining to the repayment of charges levied in breach of EU law in general, and to passing-on in particular, differed to a point of blatant injustice. Consequently the Court made an unusual statement on the need for harmonization, calling the lack of Community legislation ‘regrettable’.¹⁹ Nevertheless the EU

¹² Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 Arts 12–13.

¹³ E.g. in the Value Added Tax Act 1994 s. 80(3). See further Birks *supra* n. 6, at 230–32. The English system in European context and with comparative outlooks is the topic of *Restitution of Overpaid Tax* (Elliott, Häcker & Mitchell eds, Hart Publishing 2013). For a presentation of English and Commonwealth law on the defence of passing-on in particular, see Rush *supra* n. 6. See also Alison Jones, *Restitution and European Community Law* (Mansfield Press 2000).

¹⁴ Upheld in *Air Canada v. British Columbia* [1989] 1 SCR 1161, rejected in *Kingstreet Investments Ltd v. New Brunswick (State Finance)* [2007] 1 SCR 3 (SCC).

¹⁵ *Illinois Brick Co et al. v. Illinois et al.* 431 US 720 (1977). This precedent has remained controversial, see Antitrust Modernization Commission, *Report and Recommendations* (2007), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (last accessed 19 Feb. 2019).

¹⁶ Directive 2014/104/EU, *supra* n. 12, Art. 14.

¹⁷ Recent case law includes case C-398/09 *Lady & Kid* [2011] ECR I-7375 para. 20; case C-464/14 *SECIL* EU:C:2016:896 para. 165; case C-191/12 *Alakor* EU:C:2013:315 and case C-331/13 *Nicola* EU:C:2014:2285. For further details see Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* 532 (J T Nowak ed., OUP 2014), and Strand *supra* n. 2, paras 5.164–5.178.

¹⁸ The Court of Justice however is in the same position as national courts in the context of damages actions under Art. 340(2) TFEU. See further s. 5.2 and Strand, *supra* n. 2, paras 3.084–3.111.

¹⁹ Case 130/79 *Express Dairy Foods* [1980] ECR 1887 para. 12.

legislator has not been keen to intervene, most probably by reason of the political sensitivity of fiscal matters. By contrast, as noted above, the approach to be taken to the problem of passing-on was recently harmonized for the purposes of competition law damages in Directive 2014/104.²⁰

In this article we revisit the urgency of the repayment of charges levied by Member States in breach of EU law, and passing-on rules in particular. We will present recent Scandinavian case law, illustrating that even very similar legal systems may come to very different conclusions when confronted with the passing-on problem. We will argue that the EU legislature should intervene to harmonize the action for restitution of charges levied by Member States in breach of EU law, or at least to harmonize those aspects that concern the problem of passing-on. For clarity, the amounts at stake in restitution of unlawful charges can be quite significant. The recent Scandinavian cases analysed in this article include repayments of VAT by Swedish authorities to an amount of approx. SEK 3,300,000,000 (some EUR 340,000,000) in one single instance of erroneously levied VAT.²¹ It consequently deserves to be repeated that this is no small matter.

2 THE EU LAW BACKGROUND

As we have seen, the legal consequences of the passing-on of charges levied in breach of EU law were first brought to the attention of the Court of Justice in *Just*. In this section we will offer a summary of the case law thus far, beginning with the defence of passing-on and then continuing to the position of the Court with regard to downstream claimants.

2.1 EU CASE LAW ON THE DEFENCE OF PASSING-ON

The Court of Justice has consistently held that EU law neither prevents nor requires national courts to take into account, in accordance with their national law, the fact that the burden of charges unlawfully levied may have been passed on.²² This point of departure must be kept in mind, as it is sometimes erroneously submitted that EU law requires that Member States consider passing-on in their assessment of an amount of unlawful charges to be repaid.²³ The case law on actions for repayment from Member States instead shows that even though the

²⁰ Directive 2014/104, *supra* n. 12. On the transposition of this directive into the national laws of the Member States, see *EU Competition Litigation: Transposition and first experiences of the new regime* (Magnus Strand, Vladimir Bastidas Venegas & Marios C Iacovides eds, Hart Publishing 2019).

²¹ Stig von Bahr, *Tryckerimonsen – kunde eländet ha undvikits?*, *Skattenytt* 95 (2016).

²² *Just*, *supra* n. 3, para. 26; case 61/79 *Denkavit Italiana* [1980] ECR 1205 para. 31.

²³ E.g. von Bahr, *supra* n. 21, at 102–04.

Court of Justice will tolerate that a defence of passing-on is available before national courts, the Court has been clear that this defence should be successful if, and only if, it is established before the national court that two criteria have been met:

- (1) The charge must have been borne, in whole or in part, by someone other than the claimant; and
- (2) reimbursement of the charge to the claimant must constitute unjust enrichment of the claimant.²⁴

Under the first criterion the Court of Justice has held that the actual passing-on of charges levied contrary to EU law, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts.²⁵ Where only a portion of the charge has been passed on, the corresponding reduction of the amount repayable should (although this is subject also to the second criterion) consequently be equivalent to the portion passed on.²⁶ Conversely, if no portion of the charge has been passed on, a defence of passing-on should be dismissed on the facts.²⁷ The Court has moreover struck down a number of presumptions and 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, placing the onus of proving the existence and extent of passing-on on the Member States.²⁸

As mentioned in the introduction, the general idea of passing-on entails that any extra charges imposed by Member States are included in the selling prices of the payer and thus passed on when the goods at issue are sold. Obviously, however, this might also cause a reduction in sales. These so-called turnover losses may be relevant to the assessment of the repayable amount.²⁹ In *Comateb* the Court further specified that reduced sales caused by the increase of selling prices resulting from an unlawful charge might exclude, in whole or in part, any unjust enrichment of the taxpayer which would otherwise have been caused by reimbursement.³⁰ The meaning of the second criterion above is accordingly that the Member State must not only demonstrate passing-on as such but also that

²⁴ See e.g. joined cases C-192/95 to 218/95 *Comateb* [1997] ECR I-165 paras 27–29; joined cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145 paras 33–35; and case C-147/01 *Weber's Wine World* [2003] ECR I-11365 paras 94–102.

²⁵ Joined cases 331/85, 376/85 and 378/85 *Bianco* [1988] ECR 1099 para. 17.

²⁶ *Comateb*, *supra* n. 24, para. 28.

²⁷ *Ibid.*, para. 27.

²⁸ E.g. case 199/82 *San Giorgio* [1983] ECR 3595 paras 14 and 17. Such presumptions cannot even be upheld where national law makes it an obligation for taxpayers to pass on the burden of a charge; *Comateb*, *supra* n. 24, para. 26.

²⁹ *Just*, *supra* n. 3, para. 26.

³⁰ *Comateb*, *supra* n. 24, para. 32.

reimbursement would constitute an unjust enrichment of the claimant. The Court of Justice has further held that to reach the conclusion that repayment would lead to unjust enrichment it is necessary to carry out an economic analysis in which all the relevant circumstances are taken into account.³¹ The Court of Justice has not explicitly ruled that the burden of proof with regard to the criterion of unjust enrichment is on the Member State, but the general tendency of the case law does point in that direction.³²

2.2 EU CASE LAW ON DOWNSTREAM CLAIMANTS

The flip side of passing-on is the issue of whether downstream claimants should be able to bring an action to cover their losses caused by an unlawful charge levied by a Member State, and if so, against whom. This issue was brought before the Court of Justice in *Danfoss*. The Court was quite clear that the right to reimbursement by reason of the levying of charges in breach of EU law does indeed extend to downstream claimants, but would not go so far as to hold that EU law requires for that right to be enforceable against the Member State. The Court of Justice was in fact neutral to the form of redress available and to against whom such redress was available.³³ This implies that if downstream claimants are able to find reimbursement from their supplier rather than from the Member State, this would satisfy the Court of Justice.³⁴ The Court nonetheless stipulated two requirements to be met in order for it to be possible for a Member State, having levied an unlawful charge, to oppose a claim for reimbursement brought by a downstream claimant. First, the claimant must be able on the basis of national law to bring a civil action against its supplier (normally the party who had first paid the unlawful charge) for recovery of the sum unduly paid. Second, it must not be virtually impossible or excessively difficult for the downstream claimant to obtain reimbursement in this way. The Court interestingly offered the example that it might be impossible for a downstream claimant to obtain reimbursement from its supplier if the latter was insolvent.³⁵ The Court did not however clarify whether downstream claimants have the onus of proving that they have exhausted their possibilities to obtain reimbursement from suppliers before bringing an action against the Member State.

³¹ *Weber's Wine World*, *supra* n. 24, para. 100.

³² See e.g. *Weber's Wine World*, *supra* n. 24, para. 117 and para. 4 of the Operative Part; and *Michailidis*, *supra* n. 24, para. 38.

³³ *Danfoss*, *supra* n. 5, para. 23.

³⁴ Cf the mirror image version of this argument in the Swedish case law presented in s. 3.

³⁵ *Danfoss*, *supra* n. 5, at Operative part para. 1 and para. 28. This point is discussed in Strand, *supra* n. 2, paras 2.059–2.060. *Danfoss* is further discussed e.g. in paras 5.029–5.050.

Against this background we will now proceed to assess case law on the passing-on problem from our home jurisdictions: Sweden and Norway. The legal systems of our countries have very much in common and there has been an endeavour for Scandinavian unity in private law, which is not to say that there are not significant differences. The differences we have found in regard to case law on passing-on serve to illustrate that even courts in very similar legal systems tend to find different solutions to the legal issues triggered by passing-on.

3 SWEDISH CASE LAW

Until recently, passing-on was a fairly unknown concept to Swedish lawyers. The defence of passing-on was tried by fiscal authorities in a case on the repayment of excessive alcohol taxes in the 1990s, but to no avail: The Supreme Administrative Court simply held that the defence had no basis in the applicable statutory law.³⁶ More recently however a complex passing-on situation arose in Sweden that concerned overpaid VAT on printing services.

The Court of Justice ruled in *Graphic Procédé* that reprographic activities have the characteristics of a supply of goods to the extent that they are limited to mere reproduction of documents on materials, but must be classified however as a 'supply of services' where it is clear that they involve additional services liable to be predominant in relation to the supply of goods.³⁷ By reason of this ruling, Swedish fiscal authorities reclassified certain reprographic activities, for the purposes of VAT, with the effect that the VAT payable for such services was lowered from 25% to 6%. Consequently the overpaid 19% – a total amount of approximately SEK 3,300,000,000 – was repaid to print shops. However, the fiscal authorities also made consequential corrections to deductions previously granted to those who had bought reproductions from the print shops, in effect charging them the 19% that had erroneously been deducted. Unsurprisingly, many resisted.

The issue of whether it was possible to make such corrections found its way to the Swedish Supreme Administrative Court in 2014,³⁸ which ruled in favour of the fiscal authorities. The Supreme Administrative Court held that the corrections had been made in accordance with applicable statutory law on VAT, and that the corrections were not manifestly unreasonable since, in the view of the Supreme Administrative Court, it should not be impossible or excessively difficult for the purchasers to reclaim the amounts of overpaid VAT from the print shops.

³⁶ RÅ 2002 ref 108.

³⁷ Case C-88/09 *Graphic Procédé* [2010] ECR I-1049, Operative part.

³⁸ HFD 2014 ref 14.

The situation created by reason of this ruling was a somewhat atypical passing-on situation. In EU case law the legal issue has mostly been to what extent a tax authority can resist repayment of overpaid charges to a direct taxpayer. In the Swedish print shop cases, the fiscal authority never hesitated to repay the overpaid VAT, but compensated itself by reclaiming the amounts from the next level of the supply chain, under the presupposition that the downstream parties could in turn reclaim from the print shops and that neutrality would thus be restored. If this turned out to be possible, all would be well. If not, the solution chosen would be manifestly unjust to the downstream parties who would then be carrying the full economic burden of a mistake made by State authorities. In recognition of this risk for injustice the fiscal authorities granted downstream parties a term of respite with the payment of sums erroneously deduced for VAT until their position against the print shops had been clarified.³⁹

Luckily, the prophecy that the erroneously levied VAT could successfully be reclaimed from the print shops eventually fulfilled itself. The issue of reclaims from the print shops was brought before the Swedish Supreme Court (not the same as the Supreme Administrative Court) and assessed as a *condictio indebiti* action.⁴⁰ The defendant print shop argued change of position, in Swedish law meaning that it had received and spent the amount (or irrevocably adapted itself to its receipt of the amount) in good faith and should therefore be relieved from repayment under the main rule on *condictio indebiti*. The Supreme Court however dismissed this argument and held that a recipient of a repayment of overpaid VAT could not, in the event of such repayment and irrespective of the effluxion of time, reasonably expect to keep the amount repaid at the expense of indirect payers at the next level of the supply chain. Therefore the Supreme Court concluded that the reclaim should be upheld.⁴¹ In conclusion, the neutrality intended in the VAT system was restored. Unfortunately not all involved in the Swedish print shop cases have been able to benefit from the equitable solution found, as a number of actions brought by customers against print shops were settled before the *condictio indebiti* ruling of the Supreme Court was delivered.

The relativity of Swedish equity is further illustrated by a currently pending case on repayment of VAT erroneously levied on certain postal services in Sweden.⁴² This time no repayment has been made to, or requested by, the direct taxpayers (companies in the Posten group) but an action for repayment has been

³⁹ Björn Westberg, *HD klargör om den s.k. tryckerimomsen*, Karnov Nyheter 2016-01-25, referring to Swedish fiscal authority (Skatteverket) communication 2015-03-30, dnr 131 166415/111.

⁴⁰ NJA 2015 s. 1072.

⁴¹ In a later case, NJA 2016 s. 799, the Supreme Court confirmed its ruling and added that interest was payable on the amounts reclaimed.

⁴² See case C-114/14 *Commission v. Sweden* EU:C:2015:249.

brought by one of the final payers, Nordea, which is one of the leading banks in Scandinavia. The situation in this case is thus reminiscent of *Danfoss* rather than of *Just*. Nordea has brought an action against the State for the recovery of approximately EUR 50,000,000 paid for undue VAT on postal services. The defendant, the Swedish Justitiekanslern (Chancellor of Justice) resists repayment.⁴³

4 NORWEGIAN CASE LAW

In 2008, the Norwegian Supreme Court for the first time ruled on the availability of the defence of passing-on in a case concerning repayment of unlawful aviation charges. The 2008 case concerned repayment of seat fees, that were found to be contrary to EU/EEA law, to KLM Royal Dutch Airlines. The Court of Appeal had acknowledged the defence of passing-on and hence allowed for the deduction of approximately NOK 11,000,000 (EUR 1,200,000), which amounted to approximately 35% of the charges paid by KLM to the Norwegian state. On appeal the Norwegian Supreme Court upheld the ruling of the Court of Appeal with regard to the availability of the defence of passing-on.

In its judgment, the Supreme Court recognized the fact that the legal basis for a defence of passing-on cannot be found in EU law but has to be found in national law, and furthermore:

*Even though EU law does not offer a legal basis for such a defence, the fact that EU law acknowledges national rules on the defence of passing-on has considerable interest, since this acknowledgement is an expression of a weighting of the conflicting interests.*⁴⁴

The Supreme Court thus stressed that EU law acknowledges national rules on the defence of passing-on, while it did not stress that EU law neither prevents nor requires national rules on passing-on. The argumentation might imply that the Supreme Court treated the position taken by the Court of Justice as an argument in favour of acknowledging the defence of passing-on in national law. It is, however, quite clear that the Court of Justice has never intended its position to constitute such an argument.⁴⁵

Be this as it may, the Supreme Court recognized, for the purposes of Norwegian law, the defence of passing-on as a valid defence in cases concerning charges levied but

⁴³ Since Nordea is not the direct taxpayer it chose to bring its claim against the Justitiekanslern, which is an agent of the Swedish government the tasks of which includes to represent the State in legal disputes. By mid-Sept. 2017 Justitiekanslern had received specified claims by reason of erroneously levied VAT on postal services at an aggregate amount of approx. EUR 115'000'000, including the Nordea claim. Several claims were as yet unspecified, however, and could be foreseen to be specified in the future at amounts of EUR 10'000'000–50'000'000. We wish to thank Kristoffer Kågström at Justitiekanslern for assisting with these estimates. Obviously these are no small matters.

⁴⁴ Retstidende 2008.738 para. 35.

⁴⁵ Cf text accompanying n. 23 *supra*.

not due. As a point of departure for the analysis the Supreme Court underlined that KLM's claim for repayment was based on the rules on *condictio indebiti* but expressed doubts as to whether the rules on *condictio indebiti* were the correct legal basis for deciding on the availability of the defence of passing-on under Norwegian law. The Supreme Court nonetheless concluded that this issue had to be 'decided based on what is equitable in light of such considerations that traditionally have been relevant in *condictio indebiti* assessments'.⁴⁶ The Supreme Court argued that the question of whether or not deductions should be made should be resolved on the basis of an equity test similar to that which applied to the question of repayment as such, citing *inter alia* Danish law and underlining the close historical relationship between Norwegian law and Danish law.⁴⁷

The Supreme Court then turned to examine the pros and cons of allowing deductions by reason of passing-on from the amount repayable. With regard to arguments in favour of deduction, the Supreme Court took the view that KLM had not really gotten poorer by paying to the State, since the 'true payers' were KLM's customers, at least to the extent the charges had been passed on. The Supreme Court further held that the fact that the payments had been included in the regular State finances weighed heavily in favour of deductions:

*... it seems less appropriate that (KLM) gain – as the case may be – a substantial unjust enrichment, compared with the State being put in the same position in a case where the enrichment is due to third persons – who are often the true payers of the charges – not pursuing their claims for repayment.*⁴⁸

With regard to arguments against deduction, KLM had submitted that allowing deduction on the basis of passing-on would create incentive on the part of the State to maintain unlawful charges. The Supreme Court dismissed this argument as unrealistic, but held also that 'the recipient's bad faith cannot have any particular weight in the assessment of whether or not there is to be made deduction on the basis of passing-on'.⁴⁹ The Supreme Court offered no further explanation but

⁴⁶ Retstidende 2008.738 para. 42. It is interesting to note that this analysis and the conclusion reached by the Supreme Court seem to be general, which would mean that, under the precedence of this judgment, the defence of passing-on is generally available under Norwegian law, i.e. not only available in cases concerning repayment of unlawful taxes and charges.

⁴⁷ On the importance of Danish law to the general approach to passing-on chosen by the Court of Justice for the purposes of EU law on repayment of unlawful charges, and on the ambiguity and scarcity of the Danish case law that had such a profound impact, see Karen Dykjær-Hansen, *Restitution af beløb opkrævet med urette*, Ugeskrift for Retsvæsen B 407 (1994).

⁴⁸ Retstidende 2008.738 para. 57. A similar argument has been made by The American Law Institute in its Restatement (Third) of Restitution and Unjust Enrichment § 64 (2011) (Passing on; Rights of Third Persons). Under Subs. (1)(b) the recipient of a payment not due may argue the defence of passing-on if 'restitution to the claimant would not facilitate recovery by the persons ultimately entitled to relief'. By contrast, where restitution by the recipient to the claimant (direct payer) would facilitate a recovery by the indirect payer, the defence of passing-on will be denied. See further Comment b, at 506.

⁴⁹ Retstidende 2008.738 para. 48.

seemingly took the view that even if the State received money in bad faith it would be more equitable for the State to gain an unjust enrichment than for KLM to do so.⁵⁰

The Supreme Court was more concerned with the difficulties connected with establishing with sufficient certainty if and to what extent the charges had been passed on, and to establish whether or not the claimant had suffered any losses as a consequence of its endeavour to pass the charges on to its customers. The argument was, however, also dismissed:

*Nonetheless my conclusion is that this argument is not decisive against a solution that entails that the repayment is confined to KLM's net loss ... In this regard I emphasize that these types of assessments do not differ in principle from similar assessments in tort law, and that other jurisdictions – amongst other Denmark – practice such a solution. A decisive condition for this conclusion is that it is for the State to prove that the charges have been passed on and that there is no other loss ...*⁵¹

The Supreme Court also considered the possibility of claims from KLM's customers. It stated firstly that if deduction was made and KLM 'later on gives passengers refund for charges paid, then the company will be able to claim the refunds repaid by the State on the basis of the State's obligation to repay'.⁵² Secondly, the Supreme Court stated that 'if the company has to accept deduction on the basis of passing on', then KLM's customers 'will be able to claim the State directly'.⁵³ The Supreme Court did not explain what would be the legal basis of such a claim for repayment. Perhaps this *dictum* itself was considered sufficient legal basis.

5 ANALYSIS OF THE SWEDISH AND NORWEGIAN CASE LAW

5.1 DIVERGENT BUT EU-COMPATIBLE SOLUTIONS

Swedish and Norwegian lawyers, as well as their Danish, Finnish and Icelandic colleagues, share a long tradition of Nordic cooperation in legislation and a common heritage that includes being inspired by each other's solutions to

⁵⁰ By contrast, according to Restatement (Third) of Restitution and Unjust Enrichment § 64(1) (n. 48) the defence is available to 'an innocent recipient' only. Under Comment a it is stressed that 'restitution from an innocent recipient may not be the source of profit to the claimant'.

⁵¹ Retstidende 2008.738 para. 54.

⁵² *Ibid.*, para. 50. It seemed of no importance to the Supreme Court whether such a refund was based on legal obligation or on free will by the company giving the refund. Notice however that this holding by the Norwegian Supreme Court echoes a holding of the Court of Justice in *Comateb*, *supra* n. 24, para. 24.

⁵³ Retstidende 2008.738 para. 50. This is compatible with the holdings of the Court of Justice in *Danfoss*, *supra* n. 5, Operative part para. 1 and para. 28, although it is to be noted that Norwegian law, as expressed in this *dictum*, seems much more generous towards downstream claimants than the Danish rules at issue in *Danfoss*.

specific legal problems. The reference, noted above, by the Norwegian Supreme Court to Danish law on passing-on is a good example of how Nordic courts will seek inspiration from their neighbours when domestic legal sources have been exhausted. The same comparative method, drawing from findings throughout the region, is likewise used by Nordic legal scholars, to which we can both testify. This is not to say that differences in the detailed legal rules of our jurisdictions are uncommon – indeed, they are quite common, and perhaps increasingly so. And yet it should be safe to say that it is usually less problematic to pick up a solution to a specific legal problem from one of the Nordic countries and implement it in another, as the general systematic contexts stem very much from common heritage, than it is to implement a solution handed down from the EU legislature, which is (and strives to be) more or less detached from legal culture.⁵⁴

In view of this Nordic context it is striking to notice the fundamentally diverging approaches of the Swedish and Norwegian fiscal authorities in the case law presented above. While the Swedish fiscal authorities repaid the erroneously exacted sums of VAT in the print shop cases, without any deduction by reason of (real or possible) passing-on, the Norwegian authorities resisted repayment in the KLM case – following the example of their Danish counterpart in *Just*. Moreover, the Swedish Justitiekanslern has resisted repayment of erroneously exacted sums of VAT to indirect payers in the pending postal services case – following the Danish example in *Danfoss*.

Notwithstanding the divergences between the approaches chosen, we submit that they are all compatible with EU law as it now stands. This may seem surprising, but offers an illustration of the aforementioned fact that the Court of Justice still leaves the Member States a rather wide margin of discretion to design their own approach to passing-on in this context. In the Swedish print shop cases the defence of passing-on was never used,⁵⁵ making it unnecessary to scrutinize the Swedish judgments in that part. Further, the downstream claimants were offered an effective way to remedy their losses, and therefore

⁵⁴ For a critique of EU harmonization at the expense of national and regional legal cultures, see e.g. Michel Legrand, *Antivonbar*, 1 J. Comp. L. 13 (2006). On the complexities of transposing directives into national law see e.g. Magnus Strand, 'Managing Transposition and Avoiding Fragmentation: The Example of Limitation Periods and Interest' in Strand, Bastidas Venegas & Iacovides, *supra* n. 20.

⁵⁵ Notice that this situation is such that there should be considerable room for a defence of passing-on under EU law, as it was undisputable that the VAT had been passed on and as the erroneous percentage of VAT was exacted from all print shops in Sweden. The only possible problem would be if customers had to some extent abandoned Swedish print shops and sought foreign suppliers, as then it would be possible that Swedish print shops had suffered turnover losses that precluded unjust enrichment in the event of repayment. The approach chosen by the fiscal authorities made such argumentation (and evidence) unnecessary.

subsidiary liability for Sweden was not triggered.⁵⁶ By contrast, in the Norwegian KLM case the Supreme Court accepted the defence of passing-on at law and upheld it on the facts of the case.⁵⁷ Nevertheless the Supreme Court did stress that it was for the State to prove that passing-on had occurred, and that there was no other loss sustained by reclaiming traders that would remain uncompensated by reason of deduction of amounts passed on from the repayable amount.⁵⁸ Such a position seems to us to be compatible with the case law of the Court of Justice.

There may however be a problem in the pending postal services case in Sweden. The case law of the Court of Justice with regard to indirect taxpayers shows – notwithstanding its relative scarcity – that a Member State can oppose a claim for repayment of sums unduly paid, brought by the indirect taxpayer directly against the State, only if the indirect taxpayer is able to bring a civil action against its supplier (here the provider of postal services) for recovery of the sum unduly paid. Second, it must not be virtually impossible or excessively difficult for the indirect taxpayer to obtain reimbursement from its supplier.⁵⁹ However, as indicated above, the Court of Justice has yet to clarify whether or not indirect taxpayers must first exhaust their possibilities to obtain reimbursement from their supplier before bringing an action against the Member State. In the Swedish postal services case this may cause a problem for the indirect taxpayers that have brought actions against Justitiekanslern. It would be no surprise if Justitiekanslern would reject all such claims with reference to the *condictio indebiti* action acknowledged by the Swedish Supreme Court in the print shop cases, that is, to argue that Nordea and other similar claimants must first exhaust their possibilities to reclaim from the Posten companies.⁶⁰ The Swedish State would thus wish to sit back while the indirect taxpayers battle the companies in the Posten group that have provided the postal services at issue, waiting to see who are successful and then dealing with repayment claims coming either from Posten group companies who have been held liable under the *condictio indebiti* or from indirect taxpayers who have been unsuccessful for reasons that might trigger direct liability for the state.

⁵⁶ See *Danfoss*, *supra* n. 5, Operative part para. 1 and para. 28. See further n. 35 and the accompanying text.

⁵⁷ The Supreme Court did not assess the precise extent of passing-on, as the Court of Appeal (lagmannsretten) had made a final such assessment; i.e. that assessment was not, as such, under appeal.

⁵⁸ Retstidende 2008.738 para. 54.

⁵⁹ *Danfoss*, *supra* n. 5, Operative part para. 1 and para. 28. This point is discussed in Strand, *supra* n. 2, paras 2.059–2.060. *Danfoss* is further discussed e.g. in paras 5.029–5.050. EU case law on VAT and the passing-on problem includes case C-35/05 *Reemtsma* [2007] ECR I-2425 and case C-566/07 *Stadeco* [2009] ECR I-5295, but *Danfoss* offers a better parallel situation to the postal services case than any of those cases.

⁶⁰ Justitiekanslern has indeed argued in the pending postal services case that Nordea must instead seek repayment from its suppliers of postal services; statement of Justitiekanslern to Stockholm City Court 12 Sept. 2014, paras 36–40. This statement predates NJA 2015 s. 1072 (see n. 40 and accompanying text).

Such a strategy seems compatible with EU law as it now stands, but it is not quite certain that it is compatible with Swedish law. The judgment of the Swedish Supreme Court acknowledging the availability of a *condictio indebiti* for indirect taxpayers against direct taxpayers is not entirely equivalent to the situation in the postal services case. In the print shop cases the State had repaid the erroneously levied VAT to the direct taxpayers, and the main reason for the Swedish Supreme Court to hold that the direct taxpayers were, in turn, liable to repay the equivalent amount to the indirect taxpayers by way of a *condictio indebiti* was that the direct taxpayers could not, in the event of such a repayment, reasonably expect to keep the amount repaid at the expense of indirect payers. By contrast, in the postal services case, there has been no repayment to the direct taxpayers. It is uncertain whether the Swedish version of *condictio indebiti* would require, where indirect taxpayers reclaim from a direct taxpayer, that the State has first repaid the erroneously levied sum to the direct taxpayer. If Swedish courts should find that there is such a criterion, the action will fail, and the strategy of Justitiekanslern will no longer be compatible with *Danfoss*.

Of course this strategy also includes a risk that one of the Swedish courts adjudicating claims made directly against Justitiekanslern will make a reference to the Court of Justice in Luxembourg for a preliminary ruling on the issue of whether indirect taxpayers must indeed first exhaust their possibilities to obtain reimbursement from their supplier of postal services before bringing an action against the Member State. This remains to be seen. Experience shows that Swedish courts are comparatively reluctant to make references to Luxembourg.⁶¹ Consequently, if there is a Swedish law solution which is compatible with EU law, such as the one outlined just above, it may very well be that Swedish courts will opt for that solution in order to eliminate the need for a preliminary ruling.

5.2 A COMPARISON WITH OTHER EU SOLUTIONS

The Court of Justice has been confronted with the problem of passing-on in several contexts, not only in actions for repayment of unlawful charges levied by Member States but also in damages actions against the EU institutions under Article (now) 340(2) TFEU and in damages actions brought by reason of an infringement of competition law. The case law concerning damages from EU institutions is somewhat dated, the latest judgment being delivered in 1984.⁶² In

⁶¹ Ulf Bernitz, *Europarättens genomslag* (Norstedts Juridik 2012) Ch. 5.

⁶² The cases at issue are first and foremost the so-called gritz and quellmehl cases: Case 238/78 *Ireks-Arkady* [1979] ECR 2955; joined cases 241, 242, 245 to 250/78 *DGV* [1979] ECR 3017; joined cases 261 and 262/78 *Interquell Stärke-Chemie* [1979] ECR 3045; and joined cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier frères* [1979] ECR 3091; case 256/81 *Pauls Agriculture* [1983] ECR 1707; and joined

these cases the Court of Justice accepted a defence of passing-on for the purposes of damages under Article (now) 340(2) TFEU, but placed the burden of proving passing-on on the Council and the Commission.⁶³ The defendants were not able to meet that burden of proof in any of the cases. Notably, the Court of Justice held in several of these cases that the defence of passing-on should not be dismissed as unfounded ‘in the context of an action for damages’.⁶⁴ By contrast, the Court has gradually taken a more restrictive view to the defence of passing-on in the context of repayment of undue taxes and charges levied by Member States.⁶⁵

Similarly, the EU legislature has endorsed the defence of passing-on in a directive, adopted in 2014, which harmonizes many aspects of damages actions brought by reason of an infringement of competition law. Without going too far into details, the rules of the directive (which should now be implemented in the Member States) stipulate that an award of damages for harm incurred in the form of an overcharge is to be reduced to the extent that such an overcharge has been passed on down the supply chain, but also that the ‘burden of proving that the overcharge was passed on shall be on the defendant’.⁶⁶ It is further stipulated that indirect purchasers of ‘goods or services that were the object of the infringement of competition law, or ... goods or services derived from or containing them’ must always be welcome to bring an action in respect of the portion of harm passed on to them, irrespective of how far down the supply chain they are positioned.⁶⁷ The directive thus strives for an optimal reparative solution.⁶⁸

Although the approaches chosen for the purposes of these different fields of EU law are basically compatible with each other, it is important to notice the fundamental difference in how the EU law level relates to the national law level in the three relevant contexts. The dynamic of this interaction is decisive to the approach chosen in EU law. In damages actions under Article 340(2) TFEU this is not an issue at all, as the action falls under the exclusive jurisdiction of the Court of Justice of the European Union and is governed by EU law only. In competition damages there has been harmonization of passing-on related issues, and future case law will by and large be focused on details of how to interpret the rules stipulated. With regard to the repayment of unlawful charges however, there has been no

cases 256, 257, 265, 267/80, 5 and 51/81 and 282/82 *Bira Wührer* [1984] ECR 3693. For an analysis of this case law see Bernard Rudden & William Bishop, *Gritz and Quellmehl: Pass It On*, 6 Eur. L. Rev. 243 (1981); or Strand *supra* n. 2, paras 3.099–3.111.

⁶³ Most clearly so in *Bira Wührer*, *supra* n. 62, para. 28.

⁶⁴ *Ireks-Arkady*, *supra* n. 62, para. 14; *Interquell Stärke-Chemie*, *supra* n. 62, para. 17; and *Dumortier frères*, *supra* n. 62, para. 15.

⁶⁵ See n. 17 and the accompanying text.

⁶⁶ Directive 2014/104/EU, *supra* n. 12, Art. 13.

⁶⁷ *Ibid.*, Art. 14.

⁶⁸ See further Strand, *supra* n. 2, Ch 7 and 9.

harmonization, and the development of case law has always proceeded from the basic concern of safeguarding rights conferred on individuals by EU law. Therefore the Court of Justice has not been interpreting any particular EU law stance on passing-on in this context, but has instead been scrutinizing the compatibility of national law with EU law principles of effective judicial protection of individual rights. Consequently the question has not been what EU law on passing-on should be in this context, but whether or not EU law tolerates the applicable national law on passing-on. This leaves room for significant variation under the national laws of the Member States, room enough to allow both the Swedish approach in the print shop cases and the Norwegian approach in the KLM case to be compatible with EU law even though, in substance, they are diametrically opposed. This gives rise to unequal treatment of litigants on the internal market, ultimately distorting competition on the internal market in a manner which must strike litigants as blatantly unfair. Moreover, in systems where the law on passing-on is uncertain there will inevitably be significant legal uncertainty. Unfairness and uncertainty in multi-million proceedings are no small matters – on the contrary, they threaten public trust in the EU legal system as a whole.⁶⁹

6 THE OPTION TO HARMONIZE

6.1 THE CASE FOR HARMONIZATION AS SUCH

As is apparent from the discussion above, the so-called ‘playing field’ with regard to repayment of charges levied in breach of EU law cannot be described as anywhere near level, even when comparing legal systems that share a common legal heritage. In their contribution to this journal, Biondi and Johnson also stressed that:

*... individual rights and the uniform application of EC law could only be achieved by recognizing that, once a charge has been declared contrary to EC law, the individual is entitled to reimbursement of the sum unduly paid without any ‘possibility for domestic legislation to introduce any kind of exception.’*⁷⁰

Biondi and Johnson concluded that a uniform action for restitution ‘would provide legal certainty and ensure the effective protection of a Community right’.⁷¹ It can be

⁶⁹ For clarity, we do not argue that national divergences in the public or private enforcement of EU law are never warranted under any circumstances. We argue only that harmonization is warranted in respect of passing-on issues in the repayment of charges levied in breach of EU law. On this delicate balance of powers between the EU and its Member States, and the Member States of the EEA, see e.g. Walter van Gerven, *Of Rights, Remedies and Procedures*, 37 Com. Mkt. L. Rev. 501, 504–05 (2000); and Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004).

⁷⁰ Biondi & Johnson, *supra* n. 1, at 319.

⁷¹ *Ibid.*, at 321.

added that a uniform action would also help ensuring equal treatment in passing-on issues across EU and EEA jurisdictions, to the benefit of fair competition on the internal market. Admittedly, the case law of the Court of Justice does offer a certain ad hoc ‘case law harmonization’ of the action for restitution of charges levied in breach of EU law. Nevertheless even the basic criteria for the action under EU law remain uncertain today, almost forty years after the Court of Justice itself called for harmonization in *Express Dairy Foods*.⁷²

It was mentioned above that Directive 2014/104 includes a rather detailed harmonization of passing-on issues for the purposes of competition damages actions. In the preamble to the directive it is in particular noticed that ‘[t]here are marked differences between the rules in the Member States’, causing legal uncertainty and ineffectiveness in the protection of individual rights. Thus, ‘the discrepancies between the national rules lead to an uneven playing field’ which ‘may result not only in a competitive advantage for some undertakings (...) but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively’.⁷³ These reasons, it is submitted, are equally valid for restitution of charges levied in breach of EU law.

Nonetheless, what we ask for here is comparatively little: That the legal problems arising from the problem of passing-on should be harmonized, to the benefit of legal certainty for any and all who find themselves in the unenviable situation of reclaiming a charge unlawfully levied from them. We focus on this not only because we believe this should be the least politically controversial aspect of the restitutionary action, but also because we believe it to be the aspect which is most decisive to the incentive to bring an action. Where claimants risk prolonged quarrelling over passing-on issues they will be less inclined to pursue their claim. It is consequently submitted that the EU legislature should move to harmonize the legal issues arising from passing-on in the context of restitution from a Member State.

6.2 SUBSTANTIVE SUGGESTIONS FOR FUTURE HARMONIZATION

This brings us on to the issue of what solutions we would prefer in the event of a harmonization of passing-on issues in restitution from a Member State. Since the case law on passing-on has been developed under the EU law principles of equivalence and effectiveness, which apply to national conditions for the exercise

⁷² See n. 19 and the accompanying text. For an attempt to identify the applicable criteria see Magnus Strand, *EU Law Restitution Revisited: In Search of Lost Criteria*, 1(2) Mkt. & Comp. L. Rev. 101 (2017).

⁷³ Directive 2014/104/EU, *supra* n. 12, recitals 7 and 8.

of remedies in the absence of EU harmonization,⁷⁴ the EU legislature is free to overrule this case law and find other solutions.

In Directive 2014/104 on competition damages the compensatory principle is repeated in various ways in many provisions, for example in Article 12(2) where it is stated that ‘Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level’. Furthermore, in European private law compensatory damages are, as a rule, reduced to the extent that the claimant has or should have been able to mitigate the harm incurred.⁷⁵ Against this background it makes perfect sense to compensate for – and only for – harm finally sustained by the claimant, reducing the award to the extent that harm has been passed on. In case law under Article (now) 340(2) TFEU the Court of Justice has gone even further, holding that there should be reduction not only insofar as loss has actually been passed on, but also insofar as it could have been passed on.⁷⁶

In this connection we would like to refer back to the distinctiveness of damages and restitution, mentioned above. In our view this is crucial. Indeed, the Court of Justice itself has held that the defence of passing-on should not be dismissed as unfounded ‘in the context of an action for damages’.⁷⁷ By comparison, it makes less sense in restitution to consider the real or possible passing-on of a charge levied unlawfully. Compensatory damages compensate for harm incurred by the claimant, but restitution is, by contrast, the reversal of a transfer of wealth.⁷⁸ This difference has profound repercussions for the choice of a proper approach to passing-on issues. The pressing question, therefore, is just how far passing-on should be considered in the context of restitution.

Contemplating this issue we have arrived at two alternative models for substantive harmonization of passing-on issues in restitution from a Member State. The first model stays relatively close to the present case law, but is ultimately inspired by US case law on passing-on in the context of repayment of charges

⁷⁴ This limitation of the applicability of the EU law principles of equivalence and effectiveness was established from the first case law on them; see case 33/76 *Rewe* [1976] ECR 1989 para. 5; and case 45/76 *Comet* [1976] ECR 2043 paras 12–16.

⁷⁵ See e.g. joined cases C-104/89 and C-37/90 *Mulder* [1992] ECR I-3061 para. 33; § 839(3) BGB (German Civil Code); and Harvey McGregor, *McGregor on Damages* 236 (Sweet & Maxwell 2009).

⁷⁶ *Ireks-Arkady*, *supra* n. 62, paras 13–14; *DGV*, *supra* n. 62, paras 14–15; *Interquell Stärke-Chemie*, *supra* n. 62, paras 16–17; *Dumortier frères*, *supra* n. 62, paras 14–15.

⁷⁷ *Ireks-Arkady*, *supra* n. 62, para. 14; *Interquell Stärke-Chemie*, *supra* n. 62, para. 17; and *Dumortier frères*, *supra* n. 62, para. 15.

⁷⁸ See e.g. *Cases, Materials and Texts on Unjustified Enrichment* 1–3 (Jack Beatson and Eltjo Schrage eds, Hart Publishing, 2003). In competition damages under EU law, Directive 2014/104/EU (n. 12) strives for compensatory damages only and in fact to eliminate all other purposes of damages; see in particular Arts 3 and 12. For an introduction to the complex varieties in the purpose of damages awards, that must be overlooked here, see *Cases, Materials and Texts on National, Supranational and International Tort Law* s. 8.1 (van Gerven, Lever & Larouche eds, Hart Publishing 2000).

levied but not due. The second model departs more markedly with the case law, drawing from European traditions of restitution law in which passing-on seems by and large to be rejected. We wish to point out, however, that both suggestions underline the need for the Member State to actually repay a charge or tax levied in breach of EU law. Also, in both models, it has been a point of departure that enrichment of the direct payer is preferable to enrichment of the Member State, in order to maintain the restitutionary essence of the remedy.⁷⁹ Hence we suggest that there should be little or no room for the defence of passing-on.

For clarity, we do not intend here to submit any fully developed models for legislation, but only the main components of our suggestions.

6.2[a] *Suggested Model 1*

Our first model emphasizes redistributive justice, by an attempt to encourage distribution of the restitutionary award to the persons who have actually paid the charge or tax at issue and, as the case may be, hence have a claim for recovery. The suggestion opens up for the Member State to invoke the defence of passing-on if, and only if, this clearly facilitates such distribution to indirect payers that actually have a claim for recovery.

This model is inspired by, but is by no means identical with, the solution opted for by the American Law Institute in § 64 of its Restatement (Third) of Restitution and Unjust Enrichment.⁸⁰ The inspiration lies in the focus on redistributive justice and the investigation of how this might best be achieved. The main difference is that, pursuant to § 64 of the Restatement, the defence of passing-on is available if restitution to the direct payer would *not* facilitate recovery by the indirect payers, whereas our suggestion is that the defence is available only if the Member State is able to prove that its retaining of the money will clearly facilitate the accomplishment of redistributive justice. This difference might be explained by our view that enrichment of the direct payer is preferable to enrichment of the Member State.

Our first model's main components are as follows:

⁷⁹ It has famously been stressed by Francis Hubeau, *La répétition de l'indu en droit communautaire*, 17 *Revue Trimestrielle de Droit Européen* 442, 451 (1981), 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 effectué est mise postérieurement à néant, ce qui lui fait perdre toute cause.' See also *San Giorgio*, *supra* n. 28, Opinion of AG Mancini para. 7 for convincing argumentation on this point. We see less need to deter Member States from breaches of EU law, as this interest should be safeguarded under Arts 258 and 259 TFEU; see further Strand, *supra* n. 2, paras 9.045–9.048.

⁸⁰ Cf. Restatement (Third) of Restitution and Unjust Enrichment, *supra* n. 48.

- (1) Make it a legal obligation for Member States to repay the entire amount of a charge or tax levied in breach of EU law to the direct payer of the charge or tax at issue.
- (2) However, allow Member States to invoke the defence of passing-on if and to the extent this (a) clearly facilitates recovery by indirect payers that are entitled to recovery pursuant to 4 below, and (b) the direct payer would be unjustly enriched by reimbursement from the Member State.
- (3) Put the burden of proving the existence and extent of passing-on as well as 2(a) and 2(b) on the Member State.
- (4) Give indirect payers a right to recovery directly from the Member State by subrogation, if and in so far as the indirect payer has a claim for recovery from a direct payer who has a claim for recovery from the Member State according to section 1 above.

Under this model, if an indirect payer has no claim for recovery from the direct payer, for instance because the indirect payer paid a lump sum and thereby accepted the price paid as the market price, the defence of passing-on should not be available to the Member State. By contrast, if there are indirect payers who are entitled to recovery from the direct payer, this model is designed to ensure that these indirect payers (ultimately the end payers) receive adequate reimbursement. Whether or not indirect payers are thus entitled will ultimately depend on the contract between the direct payer and indirect payer and private law rules such as *condictio indebiti*.⁸¹

Notwithstanding the acknowledgement of the need for distribution down the supply chain, this model does not deviate from our point of departure, i.e. that enrichment of the direct payer is preferable to enrichment of the Member State. Consequently the defence of passing-on is recognized only in so far as the Member State is able to prove that its retaining of the money clearly facilitates reimbursement of the end payers.

6.2[b] *Suggested Model 2*

Our second model for substantive harmonization of passing-on issues draws from European restitution law in altogether rejecting the defence of passing-on for the purposes of restitution. From such a point of departure it can be argued for a number of reasons that the logic of damages should never have been allowed to spill over into restitution of charges levied in breach of EU law. Firstly, passing-on in restitution

⁸¹ Cf. NJA 2015 s. 1072, summarized in s. 3.

should have been distinguished because consideration of passing-on does not seem to have been considered in any Member State before *Just*, a ruling which was probably misguided with regard to the actual content of Danish law.⁸² Once the Court of Justice had opted for a non-interventionist approach to national rules on passing-on however, Member States promptly adopted such rules.⁸³ Secondly, passing-on in restitution should have been distinguished because the situation of downstream claimants is utterly difficult, and is likely to remain utterly difficult. In *Danfoss*, the Court of Justice opened a door for downstream claimants leapfrogging their suppliers to claim directly from the State. This was arguably an inevitable consequence of earlier case law in which the Court accepted the defence of passing-on. However, the Swedish print shop cases and pending postal service case clearly demonstrate that there are many and difficult issues with regard to downstream claimants that remain unsolved. The general problem underlying these issues, from the European perspective, is that it is counter-intuitive in restitution law to allow leapfrogging in situations such as those caused by passing-on, since the concept of restitution presupposes a direct transaction from the claimant to the defendant.⁸⁴ Thirdly, passing-on in restitution should have been distinguished because consideration of passing-on continues to be alien to private law restitution in the Member States, underlining the lack of legitimacy of the concept in restitution from Member States. Indeed, the Draft Common Frame of Reference (or DCFR, which may be called the pinnacle of European private law efforts) dismisses the defence of passing-on in its Article VII. – 3:102(2), which reads:

*In determining whether and to what extent a person sustains a disadvantage, no regard is to be had to any enrichment which that person obtains in exchange for or after the disadvantage.*⁸⁵

Likewise, in German law financial loss on the behalf of the claimant is irrelevant.⁸⁶ In English law the defence of passing-on has been rejected at common law but, most likely thanks to *Just*, it has been made available under statutory law on the recovery of undue tax payments.⁸⁷

⁸² Dykjæer-Hansen, *supra* n. 47.

⁸³ On this 'Pandora's box' effect of *Just*, see *San Giorgio*, *supra* n. 28, Opinion of AG Mancini paras 8–9; *Comateb*, *supra* n. 24, Opinion of AG Tesouro para. 14; Peter Oliver, *Enforcing Community Rights in the English Courts*, 50 Mod. L. Rev. 881, 890 (1987); and Jones *supra* n. 13, at 89.

⁸⁴ See *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition* vol 4, 4036 and 4039–042 (von Bar & Clive eds, Sellier European Law Publishers 2009). This does not contradict that under certain circumstances an indirect taxpayer might enter into the legal position of the direct taxpayer by subrogation, e.g. when direct taxpayers have assigned their claim to the indirect taxpayer. For an EU law example, albeit concerning damages under Article (now) 340(2) TFEU, see *Birra Wührer*, *supra* n. 62.

⁸⁵ DCFR *supra* n. 84, vol 4, 4003.

⁸⁶ Gerhard Dannemann, *The German Law of Unjustified Enrichment and Restitution* 103 (OUP 2009).

⁸⁷ For an in-depth study of English case law and statutory law see Rush, *supra* n. 6, Ch 3–4. See also Birks, *supra* n. 6, at 219–21, 230–32; and Andrew Burrows, *The Law of Restitution* 614–18 (OUP 2011).

Against this background, one might prefer a harmonization of the laws of the Member States with regard to passing-on issues in restitution of charges levied in breach of EU law which is neither in the form of a reaffirmation of the case law of the Court of Justice, nor drafted to be inspired by the rules in Directive 2014/104 or the American Restatement. Instead, it would be suggested for the EU legislature to opt for an approach which is consistent with the general principles of restitution law that are derived from the common legal heritage of the Member States:

- (1) Make it a legal obligation for Member States to repay the entire amount of a charge or tax levied in breach of EU law to the direct payer of the charge or tax at issue.
- (2) Make the direct payer subsequently liable to distribute such portions of the award to their customers, i.e. the next level of the supply chain, that correspond to the amount passed on to them. However, leave it for the indirect payers to bring the action, in reliance on them to do so when their case (and therefore their incentive) is strong enough. Successful indirect payers should then in turn be liable to distribute to the third level, and so on as long as passing-on can be proven.
- (3) Do not allow leapfrogging claims unless called for by very particular circumstances, e.g. in order to circumvent insolvent parties in the supply chain.
- (4) Allow parties at every level of the supply chain to bring damages actions against the Member State in respect of harm incurred in the form of reduced sales caused by the original unlawful charge.
- (5) In legal proceedings, place the burden of proving relevant facts, such as the existence and extent of passing-on, on the parties relying on those facts.

This suggestion avoids the usual pitfalls associated with passing-on (such as multiple liability or lack of liability for Member States), and it respects the traditional differences between restitutionary awards and damages awards. Further, the estimation of restitutionary awards would not need to encompass losses better covered by damages. In sum this suggestion fits the traditional distinctions of European private law well, and could serve public restitution equally well.

6.2[c] *Comparing the Suggested Models*

It was stressed at the beginning of this section 6.2 that the EU legislature is free to find a suitable approach to the passing-on problem, unfettered by the case law of

the Court of Justice, which has been developed in the absence of harmonization. It was also underlined that the pressing question in any harmonization is to what extent actual or possible passing-on of unlawful charges should be considered relevant in restitution.

In both our models we suggest for passing-on to be considered only in limited ways. We would allow a defence of passing-on only in the first model and then only in circumstances where it makes better sense to transfer the right to repayment to the indirect taxpayer by subrogation. Such circumstances will admittedly be scarce, and would have to be identified by reference to the contract between the direct payer and indirect payer or private law rules such as *condictio indebiti*.⁸⁸ Furthermore, it would nonetheless be necessary for the defendant Member State to also establish that repayment to the direct payer would constitute an unjust enrichment of the latter, just as in the existing case law of the Court of Justice. In the second model the problem is dealt with more radically, by denying a defence of passing-on altogether. Under that model, indirect payers need to protect their own interests by bringing an action against successful repayment claimants at the supply chain level immediately above their own. This second model consequently promotes sequences of redistribution from the top down, but nevertheless maintains a window of opportunity for indirect taxpayers to bring a direct action against the Member State where quite particular circumstances might make it inequitable to deny that possibility – for instance where the direct taxpayer has become insolvent.

Under the second model we also distinguish turnover losses caused by the unlawful charge from the loss directly caused by the charge, and suggest for the former to be covered by a right to damages rather than restitution. By contrast, under the first model an approach which is the same as the one chosen by the Court of Justice would apply. Thus, the assessment of whether turnover losses have been suffered is part and parcel of an overall assessment of whether repayment can give rise to an unjust enrichment of the claimant.

We believe that the choice between these two models is largely a matter of taste. Perhaps the most important factor to be taken into account when deciding which model should be preferred is how efficiently they could work in judicial practice. Any conclusions in that regard could be drawn only after a comparative odyssey into the procedural systems of the Member States which is far beyond the scope of this contribution. Consequently ...

⁸⁸ Cf. NJA 2015 s. 1072, summarized in s. 3.

7 SUMMARY AND CONCLUSIONS

... it's getting very near the end. We hope to have shown that, in the EU and EEA, the passing-on problem remains governed by diverging national laws, albeit subject to a number of restrictions developed by the Court of Justice in the absence of EU harmonization. In their 1998 contribution, Biondi and Johnson called for a uniform action for restitution under EU law in order to 'provide legal certainty and ensure the effective protection of [EU law rights]'.⁸⁹ We call here only for harmonization in respect of the passing-on problem. As explained by the Commission with regard to passing-on in competition damages, 'discrepancies between the national rules lead to an uneven playing field' which 'may result not only in a competitive advantage for some undertakings (...) but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively'.⁹⁰

Therefore we have presented two alternative models for harmonization. By contrast to passing-on in damages remedies of various guises, we have endeavoured to demonstrate that it makes less sense to consider any actual or possible passing-on in restitution. Therefore, we have suggested that passing-on should be relevant only if the rights of indirect taxpayers can be better protected if a defence of passing-on is allowed against direct taxpayers – or, alternatively, should not be relevant at all.

As long as the Member States are more interested in protecting their public purses than in safeguarding redistributive justice in EU law, however, it may be that attempts to harmonize the approach to passing-on issues in repayment of charges levied in breach of EU law will never make it past the Council. If so, we hope that at least the Court of Justice can be inspired by our suggestions in future case law. In any event, we hope you have enjoyed the show.

⁸⁹ Biondi & Johnson, *supra* n. 1, at 321.

⁹⁰ Directive 2014/104/EU, *supra* n. 12, recitals 7 and 8.