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## Unjust enrichment claim of national authorities restricted

ECJ Judgment C-398/09 *Lady & Kid* of 6 September 2011

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This article discusses the ECJ judgment in *case C-398/09 Lady & Kid*. The principle of unjust enrichment has its roots in private law. In this case it is applied in a public law context to the advantage of the Danish government. Under the existing jurisprudence of the ECJ, a Member State can apply its own national principle of unjust enrichment within the requirements of equivalence and effectiveness in order to refuse the reimbursement of a tax levied contrary to Union law. It is remarkable that in the *Lady & Kid case* the ECJ does not mention these requirements explicitly. This could be an illustration of the increasing convergence between the European and national unjust enrichment theory within the scope of Union law. The ECJ clearly indicates how unjust enrichment must be understood in national procedures in order to limit its use by the government to the disadvantage of citizens. Unjust enrichment must be interpreted narrowly and only the direct passing on of tax unlawfully levied can constitute an exception to the subjective right of reimbursement of unduly levied tax.

### Introduction

Unjust enrichment is a concept that has its origin in private law. It could be defined as a principle that states that when a person obtains unjustified enrichment causing loss to another, this person is forced to reverse the enrichment.<sup>1</sup> The principle of unjust enrichment can be found in the legal orders of several Member States and at the Union level.<sup>2</sup> However, unjust enrichment traditionally does not fall under the scope of EU legislation. It is mainly developed and demarcated in EU case law. Unjust enrichment is also applied in a public law context,<sup>3</sup> for example in reimbursement proceedings of taxes or charges levied in breach of Union law and recovery proceedings of unlawful European subsidies and state aid. In the absence of full Europeanisation such proceedings mainly take place at the national level (indirect application of Union law). Citizens or Member States can thus invoke their national principle of unjust enrichment in a national procedure against recovery or reimbursement. *Lady & Kid* reveals that unjust enrichment must be defined in a rather narrow sense when it is used by the government to the disadvantage of its citizens in order to refuse the reimbursement of taxes or charges levied in breach of Union law.

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<sup>1</sup> <http://www.sgecc.net>. The Study Group on a European Civil Code published 'The Principles of European Unjustified Enrichment law' where enrichment is described in a rather broad sense (f.ex. transferable and non-transferable enrichment, disadvantage, etc.).

<sup>2</sup> See J. Gordley, *Foundations of Private law: Property, Tort, Contract, Unjust Enrichment* (Oxford 2007); V. Sagaert, 'Unjust enrichment and change of position' [2004] *MJ* 159-186; J.M. Smits, 'The principle of Unjust enrichment and Formation of contract: the Importance of a Hidden Policy Factor' [2006] *ERPL* 423-435 and S. Swann & C. von Bar, *Principles of European law, Unjustified enrichment* (Oxford 2010).

<sup>3</sup> See R. Williams, *Unjust enrichment and Public Law, A Comparative study of England, France and the EU* (Oxford, 2010).

## **The facts of the case *Lady & Kid***

By law of 18 December 1987, the Danish Government introduced a business tax known as the employment market contribution ('the Ambi'). The rate of the Ambi was fixed at 2.5% and was charged on the imported goods' full sale price upon first sale in Denmark. In return for the introduction of the Ambi, a couple of social charges on employers which had to be paid by Danish enterprises had been abolished. The purpose of this measure was to stimulate employment without having an impact on the public finances by eliminating the link between the contributions paid and the number of employees. Importing enterprises contested the legality of the tax before the Danish Eastern Regional Court (Østre Landsret) and this Court made a preliminary reference to the ECJ on the compatibility of the measure with EU law. By the judgment in the case *C-200/90 Dansk Denkavit and Poulsen Trading*<sup>4</sup> the Court held that the Ambi was incompatible with EU law in particular with Article 33 of the Sixth Council Directive.<sup>5</sup> Consequently, the Danish government enacted in May 1992 a law that laid down the arrangements for reimbursement of the Ambi unlawfully levied. However, the law laid down some restrictions to the reimbursement in Articles 1 and 2:

Article 1: 'It shall be decided according to the general rules of Danish law whether, and in the particular case, to what extent there is a claim for reimbursement or compensation in connection with the amounts which have been paid into the State Treasury pursuant to Law No 840 of 18 December 1987 on the employment market contribution, as amended.'

Article 2: '... (2) The amount claimed shall be specified and reasons shall be given therefore, and it shall be accompanied by documentation which makes it possible to assess in detail whether the party subject to the contribution has suffered a loss.'

The Law of 1992 was supplemented by Bulletin No 122 of July 1996, which laid down the conditions to be met by the enterprises that sought reimbursement. In particular, the enterprises must have saved less in employer social security contributions than they had paid by way of the Ambi even if there has been no price increases. The four applicants in the case *Lady & Kid* all four of whom were active in retail trade had asked for repayment of the Ambi. Their applications for reimbursement had been rejected on the ground that they had saved more money during the period that they had to pay the Ambi because of the fact that the abolished employer social security contributions exceeded the Ambi paid. The enterprises had thus been able to fully cover the Ambi paid.

The applicants then sought annulment of these decisions and the Eastern Regional Court again decided to make a preliminary reference to the ECJ on the compatibility of the Danish rules regarding reimbursement of the Ambi with Union Law. The main question was whether unjust enrichment could follow from a saving made as a result of the concomitant

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<sup>4</sup> Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217.

<sup>5</sup> Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, *OJ* 1988 L 145, p. 1.

abolition of other levies charged on a different basis, in the case that the taxpayer had not altered its sale prices.

### **The Advocate General's Opinion**

The Advocate General Cruz Villalón stated that the entitlement to reimbursement of sums levied by Member States in breach of Union law<sup>6</sup> is based on the rule of direct effect,<sup>7</sup> in particular it is a consequence of the rights conferred on individuals by Union provisions prohibiting such charges. It is however for the national Courts and tribunals to ensure the legal protection that individuals derive from the direct effect of Union law (para 22 & 23).<sup>8</sup> Some case law of the ECJ confirmed that national law is not only applicable to the formal conditions of repayment but must also be applied to matters concerning time-limits, limitation periods and lapse of rights, interests and other matters regarding the repayment of sums unduly paid.<sup>9</sup> However, national legislatures must respect the principles of equivalence and effectiveness (para 24 to 27).

Concerning unjust enrichment as ground for an exception to repayment of sums unduly paid, the AG referred to former case law. The ECJ stated in the case *Just* that when the burden of the charge levied but not due has been borne not to the trader but by the purchaser to whom the cost has been passed on, repayment of the trader would amount to unjust enrichment.<sup>10</sup> A large number of judgments confirmed and refined - on the ground of the principle of effectiveness - this case law (para 29 to 34).<sup>11</sup>

According to the AG, passing on of the burden of the charge to third parties and unjust enrichment are not separate cumulative requirements. However, this idea has become widespread because of the wording of certain judgments as if it were cumulative conditions.<sup>12</sup> Unjust enrichment is a ground for the exception on the right of reimbursement of such charges and passing on is one of its possible and most typical manifestations.<sup>13</sup> According to the AG, the inclusion of the tax in the sale price (thus passing on) is not necessarily the only defense to the repayment of sums unduly paid. Decisive is whether the repayment may actually give rise to unjust enrichment, because the tax has ultimately been paid by the buyer of the goods or because of other circumstances (para 40). Consequently, the repayment of tax may not give rise to unjust enrichment, even though the tax has been passed on, and, conversely, it may give rise to unjust enrichment even when passing on has not occurred (para 41).

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<sup>6</sup> Case 6/60 *Humblet/Belgium* [1960] ECR 559.

<sup>7</sup> Case 33/76 *Rewe* [1977] ECR 1989, para 5; Case 45/76 *Comet* [1976] ECR 2043, para 12 & 13 and Case 240/87 *Deville* [1988] ECR 3513, para 11.

<sup>8</sup> See f.ex. Case 199/82 *San Giorgio* [1983] ECR 3595, para 12 and Case C-188/95 *Fantask and Others* [1997] ECR I-6783, para 38.

<sup>9</sup> F. ex. Case 130/79 *Express Dairy Foods* [1980] ECR 1887, para 11 and Case 811/79 *Ariete* [1980] ECR 2545, para 9.

<sup>10</sup> Case 68/79 *Just* [1980] ECR 501.

<sup>11</sup> F. ex. Case 61/79 *Denkavit Italiana* [1980] ECR 1205, para 26; Joined Cases 142/80 & 143/80 *Essevi & Salengo* [1981] ECR 1413, para 35 and Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165, para 21.

<sup>12</sup> Case C-147/01 *Weber's Wine World* [2003] ECR I-11365, para 94.

<sup>13</sup> Opinion A-G Cruz Villalón in Case *Lady & Kid*, para 38.

Being an exception to the general rule, refusal to reimburse sums unduly paid must be interpreted narrowly but this may not lead to a result whereby national regulations, which contemplate situations based on unjust enrichment other than passing on, are rejected (para 43). In the *Lady & Kid* case the tax found to be unlawful is just one part of a package of national legislation that must be considered as a whole. According to the AG the exception of direct passing on does not provide a satisfactory response to this unprecedented case with special characteristics. For this particular case an *ad hoc* solution is needed (para 46 et seq.).

The AG considered ‘offsetting’ as a possible exception (as an alternative to passing on) to the entitlement to repayment. The AG referred to the cases *Pigs and Bacon Commission* (a year before *Just*) and case *Apple and Pear Development Council* where the ECJ stated that unlawful tax can possibly be ‘offset’ when the same person receives other economic advantages. It was up to the national court to assess whether the taxpayer’s debt could be ‘offset’ against other sums which had been paid.<sup>14</sup> The application of offsetting is subject to several conditions. First, the parallel abolition of a lawful charge that is relied on must have a direct relationship of cause and effect with the charge held to be unlawful; second there must be a sufficient correlation between the group of persons benefiting from the abolition of the charges and the group of persons liable to pay the new charge and third the saving made must be quantifiable without too much severity, as the amount of the charge paid must, similarly, be quantifiable (para 57-75). According to the AG, Union law does not preclude a Member State from refusing to repay a tax levied in breach of Union law if the State can prove the offsetting and the fulfillment of the conditions mentioned above.

### **Unjust enrichment according to the Court of Justice**

The Grand Chamber did not follow the lead of the Advocate General. The Court reiterated its standard jurisprudence concerning the right to a refund of charges levied in a Member State in breach of Union law. It stated that this right is the consequence and complement of the rights conferred on individuals by provisions of Union law prohibiting such charges. Member States are in principle obliged to repay charges levied in breach of Union law (para 17).<sup>15</sup>

There is an exception to the principle of reimbursement of taxes incompatible with Union law namely where the repayment of a tax wrongly paid would entail unjust enrichment of the persons concerned. Unjust enrichment in its strict sense implies that the person required to repay taxes, charges or duties levied in breach of Union law has actually passed them on to other persons.<sup>16</sup> In that case, repaying the trader would mean paying him twice over because he already received the amount of the charge from the purchaser to whom the cost has been passed on (para 18 and 19).

However, the Court continues and states explicitly that the refusal to reimburse a tax levied on the sale of goods is a ‘limitation of a subjective right derived from the legal order of the European Union’. By consequence it must be interpreted ‘narrowly’ and only the direct

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<sup>14</sup> Case 177/78 *Pigs & Bacon Commission* [1979] ECR 2161.

<sup>15</sup> Case 199/82 *San Giorgio* [1983] ECR 3595, para 12; Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, para 30; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, para 35 and Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, para 45.

<sup>16</sup> Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165, para 21.

passing on of the tax wrongly levied on the purchases constitutes an exception to the right to reimbursement of tax levied in breach of Union law, and even the ‘sole exception’ (para 20).

The Court also reiterated its findings in *Comateb, Weber’s Wine World and Michailidis* that passing on to third parties does not necessarily entail unjust enrichment.<sup>17</sup> In particular where the charge is entirely incorporated in the price but the taxable person suffers as a result of a fall in the volume of his sales (para 21).

The Court held that:

‘22. Similarly, the Member State may not reject an application for reimbursement of an unlawful tax on the ground that the amount of that tax has been set off by the abolition of a lawful levy of an equivalent amount.

23. Although reimbursement of an unlawful levy to a trader who has passed on the amount to his customers can, in the conditions set out above, lead to unjust enrichment, that is not so in the case of an alleged abolition of other taxes in relation to the introduction of a tax contrary to European Union law.

24. That abolition falls within the ambit of choices made by the State in the field of taxation which express its general policy in economic and social matters. Such a choice can easily have the most diverse of consequences which, disregarding the potential difficulties in ascertaining whether and, if so, to what extent one tax has, in reality, purely and simply replaced another, preclude the reimbursement of an unlawful tax in such a context’s being regarded as giving rise to unjust enrichment.’

The Court referred to two Courts judgments *McCarren* and *Apple Pear Development Council*<sup>18</sup> wherein was stated that the national court, applying its national law, could take into consideration possible methods of refusing reimbursement of an unlawful tax other than passing on. However, in the present judgment, the Court made clear that unjust enrichment understood as the direct passing on of the tax wrongly levied to the purchaser is the sole exception to the right of reimbursement of tax levied in breach of Union law.

The Court concluded (para 26):

‘(...) Consequently, European Union law precludes a Member State from refusing reimbursement of a tax wrongfully levied on the ground that the amounts wrongly paid by the taxpayer have been set off by a saving made as a result of the concomitant abolition of other levies, since such a set-off cannot be regarded, from the point of view of European Union law, as an unjust enrichment as regards that tax.’

## Case analysis

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<sup>17</sup> Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165, para 29 to 32; Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, para 34 and 35 and Case C-147/01 *Weber’s Wine World* [2003] ECR I-11365, para 98 and 99.

<sup>18</sup> Case 177/78 *McCarren* [1979] ECR 2161, para 25 and Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083, para 41.

More than thirty years ago in the (Danish) *Just* case<sup>19</sup> the ECJ opened up the possibility of refusing the repayment of an unlawfully levied tax in circumstances in which such repayment would entail the unjust enrichment of the person seeking repayment. This ECJ judgment has been seriously criticised.<sup>20</sup> Many cases followed but up until now they were all cases where the cause of the unjust enrichment was that the unlawful charge has actually been passed on. The *Lady & Kid* case does not concern the direct passing on of an unlawfully levied tax. In this case the tax held to be unlawful is part of a legislative package by the (Danish) Member State and is 'offset' by the abolition of other lawful taxes.

The phenomenon of disputing charges, which have been unlawfully levied is settled in the Member States in different ways. In certain Member States, claims of this type are subject to specific procedural conditions and certain time-limits under the law with regard to complaints submitted to the tax authorities and to legal proceedings for them. In many Member States, citizens cannot claim the repayment of unduly paid taxes after a certain time has expired. It is in this context that the ECJ in 1976 – in the cases *Rewe* and *Comet* – stated that there is nothing in European law that prevents a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with European law from being confronted with the defense that a prescription term set by national law has expired. In other words, it is compatible with European law to lay down reasonable national time limits in the interests of legal certainty, which protects both the tax-payer and the tax-authorities.<sup>21</sup>

In other legal systems – such as the Danish – claims for repayment of unduly paid charges must be brought to the ordinary courts by means of a claim for the refunding of sums paid but not owed. In Denmark, the action for recovery of the sums paid but not owed is subject in principle to a term of five years.<sup>22</sup>

Due to the fact that there are no common European rules regarding the repayment of wrongfully levied taxes, the repayment can only be sought within the framework of substantive and formal conditions laid down in national laws (indirect application of Union law). In the absence of European rules on recovery of national taxes levied in breach of Union law, it is thus for the national legal order to designate the competent court and to lay down and apply the procedural rules of judicial proceedings to ensure the protection of rights which individuals derive from Union law.<sup>23</sup> Member States have in principle the obligation on the ground of the principle of loyal cooperation – laid down in Article 4, Para 3, TEU – to repay to the individual the tax which has been levied though not due.

However, Union law does not as such prevent a national legal system – for reasons of legal certainty – to disallow repayment of unduly paid charges where the reimbursement would entail unjust enrichment of the recipients. Already in the early 1980s, the ECJ recognised – in the case *Just* – that the use of a national principle of unjust enrichment in

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<sup>19</sup> Case 68/79 *Hans Just* [1980] ECR 501.

<sup>20</sup> See f.ex. F. Hubeau, 'La répétition de l'indu en droit communautaire' [1981] *Revue trimestrielle de droit européen* 448.

<sup>21</sup> Case 33/76 *Rewe* [1977] ECR 1989, para 6; Case 45/76 *Comet* [1976] ECR 2043 and Case 68/79 *Hans Just* [1980] ECR 501.

<sup>22</sup> Case 68/79 *Hans Just* [1980] ECR 501, para 24. See e.g. J. Schwarze, *European administrative law* (London 2006) 922.

<sup>23</sup> See f.ex. Case C-147/01 *Weber's Wine World* [2003] ECR I-11365, para 37.

order to refuse the reimbursement of unduly paid charges was not in breach of Union law.<sup>24</sup> National laws that prevent the reimbursement of charges in breach of Union law in the case that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchaser cannot in principle be regarded as contrary to Union law.<sup>25</sup>

Whilst in principle the ECJ recognises national procedural autonomy, it restrains the latter by the European requirements of equivalence and effectiveness.<sup>26</sup> In earlier cases – for example *Weber's Wine World*<sup>27</sup> – the ECJ mentions these requirements explicitly. National conditions concerning repayment of charges contrary to Union law may not be less favourable than those relating to similar claims regarding national charges (equivalence). National rules and practices cannot hinder the full application of Union law by making the repayment of unlawful charges practically impossible or extremely difficult (effectiveness).<sup>28</sup> It is for the national court to determine whether the procedural rule at issue is in breach of the principle of effectiveness<sup>29</sup> taking into account principles as legal certainty (incl. unjust enrichment), rights of defense or the proper conduct of the procedure (*rule of reason*).<sup>30</sup>

It is remarkable that in the *Lady & Kid case* the ECJ did not explicitly refer to the procedural autonomy or to the principles of equivalence and effectiveness. In particular it is not very clear whether the ECJ wants the European principle of unjust enrichment or rather the national principle of unjust enrichment within European boundaries to be applied. This could be an apparition of the blurring boundary between direct and indirect application of Union law. The words of the AG Cruz Villalón can substantiate this statement. He stated in his opinion that the exception relating to passing on and unjust enrichment was, although adopted by the ECJ, originally a national rule. If Member States decide to apply the exception they must in doing so observe the conditions laid down by Union case law (para 44).

One could say that the European and national principles are ‘converging’ within the scope of European law. This phenomenon could yet be noted in recovery proceedings in other domains (e.g. European subsidies).<sup>31</sup> The ECJ seems to no longer worry about national procedural autonomy, direct or indirect application and thus application of a European or a national principle within European requirements. The ECJ simply defines a principle of legal certainty in a way which guarantees that European law is fully applied.

The judgment of *Lady and Kid* confirms earlier case law<sup>32</sup> which states that repayment of tax levied by a Member State contrary to the rules of Union law is a consequence of, and

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<sup>24</sup> Case 68/79 *Hans Just* [1980] ECR 501.

<sup>25</sup> Case 68/79, *Hans Just* [1980] ECR 501 and Case 199/82 *San Giorgio* [1983] ECR 3595.

<sup>26</sup> See J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) 40-49.

<sup>27</sup> Case C-147/01, *Weber's Wine World* [2003] ECR I-11365.

<sup>28</sup> Case 33/76 *Rewe* [1980] ECR 1989; Case 45/76 *Comet* [1976] ECR 2043; Case 61/79 *Denkavit* [1980] ECR 1205 and Case 199/82 *San Giorgio* [1983] ECR 3595.

<sup>29</sup> Case 240/87 *Deville* [1988] ECR 3513.

<sup>30</sup> Case C-312/93 *Peterbroeck* [1995] ECR I-4599; Joined Cases C-430/93 & C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705 and Joined Cases C-222/05 to C-225/05 *Van der Weerd* [2007] ECR I-4233.

<sup>31</sup> Case C-185/06 *ROM-projecten* [2007] ECR I-5103 and Joined Cases C-383/06 – C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561. See also Case C-508/03 *Commission/United Kingdom* [2006] ECR I-3969 (planning permission).

<sup>32</sup> Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165, para 20; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727, para 84; Case C-147/01 *Weber's Wine World* [2003] ECR I-



an adjunct to the rights conferred on individuals by Union provisions prohibiting discriminatory application of internal taxes or charges having an effect equivalent to customs duties.<sup>33</sup> Due to the fact that unjust enrichment is a limitation of a subjective right derived from the Union legal order, it is understandable that the Court wishes to construe this exception narrowly.

Union law does not in principle prohibit the use of national principles by national authorities to the disadvantage of their citizens. However, the case *Lady & Kid* shows that the ECJ does not want – without stating this explicitly – an unrestricted use of it by the national governments. The ECJ emphasises that unjust enrichment in its strict sense – namely the direct passing on – is the one and only exception to the obligation of repayment. Every other broader explanation of unjust enrichment used in the advantage of the government must thus be rejected. While the prohibition of the use of national principles by the national authorities is a step too far the ECJ feels somehow uncomfortable with regard to the use of principles by governments against citizens. Putting a burden on citizens on the ground of a legal principle without having a written legal basis is a delicate situation, especially regarding the area of taxation.

In former case law the ECJ has stated several times that the passing on depends on various factors in a specific commercial transaction that could differ from other transactions in other contexts. It was the task of the national courts to determine if a passing on was at stake in a concrete case.<sup>34</sup> Where older jurisprudence left the door open for a national court to take unjust enrichment to have occurred in ways other than the incorporation of the charge into the price and thus direct passing on, the door is now completely shut. It is remarkable that the ECJ waived possible exceptions, other than direct passing on, without much scrutiny while the AG stated that the existing case law allows the exception to the entitlement to repayment to be extended to circumstances other than passing on (for example offsetting).

In the *Accor* case, the ECJ repeats what it has stated in *Lady and Kid*, namely that the right to a refund of charges levied in a Member State in breach of Union law is the consequence and complement of the right of individuals on the ground of Union law and that therefore a Member State must in principle repay unlawfully levied charges.<sup>35</sup> Unjust enrichment – if it is understood as the direct passing on of charges by the taxable person to the purchaser – could, however, be a limit to repayment.<sup>36</sup> An advance payment by a parent company when distributing dividends and not a charge levied on the sale of goods, does not by itself lead to the passing on of the advance payment to the purchaser. The ECJ is thus very clear in its case law concerning unjust enrichment. If there is no proof of direct passing on, the Member State cannot refuse the reimbursement of unduly paid taxes. Mitigation or reduction of the initial loss is thus not enough.

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11365, para 93; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para 202 and Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, para 30.

<sup>33</sup> Case 199/82, *San Giorgio* [1983] ECR 3595, para 12 and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727, para 84.

<sup>34</sup> Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165 and Case C-147/01 *Weber's Wine World* [2003] ECR I-11365.

<sup>35</sup> Case C-310/09 *Accor SA* [2011] ECR 0000, para 71.

<sup>36</sup> ECJ C-310/09 *Accor SA* [2011] ECR 0000, para 72-74.

Future case law will show if the ECJ's strict approach concerning unjust enrichment in (national) tax cases will have consequences for the unjust enrichment theory in other domains; for example regarding the non-contractual liability of the Union.<sup>37</sup>

### **Conclusion**

The conclusion must be that unjust enrichment, as an exception to the right to the repayment of taxes and charges paid in breach of Union law, can only be successfully applied when the burden of the charge has been passed on to third parties. Although the repayment takes place under national procedures and national law, the ECJ set limits on the national court's discretion. This it can justify as the guardian of subjective rights derived from Union law. Although governments can use their national principles to the disadvantage of citizens, the ECJ restricts this use in a serious way. The ECJ did not mention procedural autonomy or the European requirements of equivalence and effectiveness. This approach could be an apparition of the increasing convergence between the European and national unjust enrichment theory within the scope of Union law.

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<sup>37</sup> F.ex. Case T-333/03 *Masdar* [2006] ECR II-4377 & Case C-47/07 P *Masdar* [2008] ECR I-9761.