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## Limitation of the Temporal Effects of Judgments of the ECJ

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### 1. Recent Developments: More Attention is Paid to the Case Law of the ECJ on the Limitation of the Temporal Effects of its Judgments

The EC Treaty does not contain any explicit rule about the temporal effects of the judgments the ECJ delivers under Art. 234 EC.<sup>1</sup> This provision gives jurisdiction to the ECJ to give preliminary rulings concerning 'the interpretation of this Treaty, ... the validity and interpretation of acts of the institutions of the Community and of the ECB; ... the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide'. Where such

a question is raised before any court or tribunal of a Member state, that court or tribunal may, or, if there is no judicial remedy under national law against decisions of this court or tribunal, shall, request the ECJ to give a ruling thereon, if it considers that a decision on the question is necessary to enable it to give a judgment. This provision has been understood as saying that it falls within the competence of the ECJ to explain how the Community law rule in question always has to be interpreted. Thus, a judgment of the ECJ provides an interpretation that reaches back to the day when the rule went into force. Thus, ECJ judgments usually have automatic retroactive effects.

However, as early as 1976, the ECJ decided for the first time to limit the temporal effects of one of its judgments.<sup>2</sup> As there is no explicit legal basis at all in the EC Treaty for the ECJ to limit the temporal effects of one of its judgments under Art. 234 EC, the Court itself had to develop the criteria under which it is willing to do so. The Court made it clear right from the beginning of its case law in 1976 that it was only willing to limit the effects of a judgment in exceptional cases. For many years there was not much controversy about the limitation of the temporal effects of ECJ judgments. However, recently governments of Member States have started to realise that ECJ judgments may often have quite dramatic consequences for their legal systems and, even more important for them, for their tax revenues. Thus, governments have started to more frequently demand from the ECJ that it should broaden its approach and limit the temporal effects of its judgments more often. Cases like *Banca di Cremona*<sup>3</sup> or *Meilicke*,<sup>4</sup> in which a large amount of tax revenue was at stake for Member States, have been closely followed by both governments and the business community. Consequently, the temporal effects of ECJ

### Notes

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<sup>1</sup> Kokott and Henze, 'Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen in Steuersachen', *Neue Juristische Wochenschrift* (2006), p. 177 (177) and Stix-Hackl and Hakenberg, *Handbuch zum Verfahren vor dem Europäischen Gerichtshof*, 3rd edition (Vienna: Verlag Österreich, 2005), p. 78 take the position that Art. 231 para. 2 EC has to be applied in an analogous way.

<sup>2</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne* [1976] ECR 455.

<sup>3</sup> ECJ, 3 October 2006, Case C-475/03, *Banca popolare di Cremona* [2006] ECR I-0000.

<sup>4</sup> ECJ, Case C-292/04, *Meilicke and others*.

judgments and its limitations are receiving more attention.<sup>5</sup>

## 2. The Criteria Developed by the ECJ

### A. Rule and Exception

The Court gives the following reasoning why its judgments have in general retroactive effects:<sup>6</sup>

‘It has consistently been held that the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 177 [now Article 234] of the Treaty, gives to a rule of Community law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied ...’

There is not much room for limiting the temporal effects of judgments of the ECJ:<sup>7</sup>

‘It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the opportunity for any person concerned to rely upon the provision as thus interpreted with a view to calling in question legal relationships

established in good faith. Such a restriction may be allowed only by the Court, in the actual judgment ruling upon the interpretation sought ...’ The Court emphasises that the scope for such exceptions to the rule is very limited:<sup>8</sup> ‘In determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision ...’

Advocate General *Stix-Hackl* summarised the case law of the Court in the following way:<sup>9</sup>

‘Such a limitation may only be considered when there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of national rules considered to be validly in force. ... In addition it must be apparent that the individuals and the national authorities have been led into adopting practices which do not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions to which the conduct of other Member States or the Commission may even have contributed.’

### B. Good Faith and Legal Uncertainty

The leading case is *Defrenne*.<sup>10</sup> In this judgment the Court took the position that the Commission has contributed to the uncertainty:<sup>11</sup> ‘The fact that, in spite

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<sup>5</sup> See Thömmes, ‘Effect of ECJ Decisions on Budgets of EU Member States: EC Law Without Mercy?’, *Intertax* (2005), p. 560; Dautzenberg, ‘RIW-Kommentar zu Schlussanträge Rs. Meilicke’, *Recht der internationalen Wirtschaft* (2005), p. 959; Sedemund, ‘Anmerkung zu Schlussanträge Rs. Meilicke’, *Internationales Steuerrecht* (2005), p. 814; Thömmes, ‘Beschränkung der zeitlichen Wirkung der Urteile des EuGH’, *Internationale Wirtschafts-Briefe* (2006), p. 997; Nanetti and Mazzotti, ‘The (un)lawfulness of IRAP in the European legal system: the European Court of Justice’s potential new trends with regard to temporal limitation of its interpretative decision’, *EC Tax Review* (2006), p. 166; Finke, ‘Rückwirkung und Bestandskraft in der Entwicklung der europäischen Rechtsprechung’, *Internationales Steuerrecht* (2006), p. 212; Tsorlinis, ‘Beschränkung der zeitlichen Wirkung von EuGH-Urteilen’, *Österreichisches Anwaltsblatt* (2006), p. 382; Balmes and Ribbrock, ‘Die Schlussanträge in der Rechtssache Meilicke – Vorschlag einer zeitlichen Begrenzung der Wirkung des Urteils ‘auf Zuruf’ der Mitgliedstaaten?’, *Betriebs-Berater* (2006), p. 17; Dörr, ‘Die Schlussanträge in der Rechtssache Meilicke – zeitliche Beschränkung der Urteilswirkungen des EuGH nach dem Motto: Die Kleinen hängt man, die Großen lässt man laufen?!’, *Der Konzern* (2006), p. 59; Seer, ‘The Jurisprudence of the European Court of Justice: Limitation of the Legal Consequences?’, *European Taxation* (2006), p. 470.

<sup>6</sup> ECJ, 27 March 1980, Case 61/79, *Denkavit Italiana* [1980] ECR 1205, Para. 16; ECJ, 27 March 1980, Case 66/79, *Salumi* [1980] ECR 1237, Para. 9; ECJ, 2 February 1988, Case 24/86, *Blaizot* [1988] ECR 379, Para. 27; ECJ, 11 August 1995, Joined Cases C-367/93 to C-377/93, *Rodens and others* [1995] ECR I-02229, Para. 42; ECJ, 15 December 1995, Case C-415/93, *Bosman* [1995] I-04921, Para. 141; ECJ, 13 February 1996, Case C-197/94, *Société Bautiaa* [1996] ECR I-00505, Para. 47; ECJ, 4 May 1999, Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 107; ECJ, 4 October 2001, Case C-294/99, *Atbinaiki Zytbopoia AE* [2001] ECR I-6797, Para. 35; ECJ, 3 October 2002, Case C-347/00, *Barreira Pérez* [2002] ECR I-8191, Para. 44; ECJ, 17 February 2005, Joined Cases C-453/02 and C-462/02, *Linneweber und Akritidis* [2005] ECR I-1131, Para. 41; ECJ, 15 March 2005, Case C-209/03, *Dany Bidar* [2005] ECR I-2119, Para. 66; ECJ, 5 October 2006, Case C-290/05, *Ákos Nádasi* [2006] ECR I-0000, Para. 62.

<sup>7</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 28; ECJ, 16 July 1992, Case C-163/90, *Legros* [1992] ECR I-4625, Para. 30; ECJ, 15 December 1995, Case C-415/93, *Bosman*, Para. 142; ECJ, 4 May 1999, Case C-262/96, *Sürül*, Para. 108; ECJ, 9 March 2000, Case C-437/97, *Evangelischer Krankenhausverein Wien* [2000] ECR I-1157, Para. 57; ECJ, 3 October 2002, Case C-347/00, *Barreira Pérez*, Para. 45; ECJ, 17 February 2005, Joined Cases C-453/02 and C-462/02, *Linneweber und Akritidis*, Para. 42; ECJ, 14 September 2006, Case C-228/05, *Stradasfalti Srl* [2006] I-0000, Para. 72.

<sup>8</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 30; ECJ, 16 July 1992, Case C-163/90, *Legros*, Para. 30; ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 57; ECJ, 14 September 2006, Case C-228/05, *Stradasfalti Srl*, Para. 72.

<sup>9</sup> ECJ, Advocate General Stix-Hackl’s Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Point 38.

<sup>10</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne*.

<sup>11</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne*, Para. 73.

of the warnings given, the commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.' Even the fact the Commission did not initiate proceedings against the Member State could, in the Court's view, establish good faith in the wrong interpretation of the Community law provision at stake. Thus, one can infer from this judgment that it does not require much activity by the Commission to conclude that the Commission contributed to the uncertainty.

However, there are other judgments in which the role of the Commission was more active. In *Blaizot*<sup>12</sup> the Court held that: 'letters sent by the Commission to Belgium in 1984 show that at that time the Commission did not consider the imposition of the supplementary enrolment fee to be contrary to community law. It was not until 25 June 1985, in the course of an informal meeting with officials of the Belgian Education Ministries, that the Commission stated that it had changed its position. Two days later . . . it stated during a meeting of the Education Committee established by the Council that it had not completed its review of the matter; that is to say, it had not yet formed a definite opinion . . . The attitude thus adopted by the Commission might reasonably have led the Authorities concerned in Belgium to consider that the relevant Belgian legislation was in conformity with Community law.' Also, in *EKW*<sup>13</sup> the Court noted 'that the Commission's conduct may have caused the Austrian Government reasonably to believe that the legislation governing the duty on alcoholic beverages was in conformity with Community law.' For Advocate General *Saggio* there was not sufficient evidence to assume that the Commission had misled the Austrian government:<sup>14</sup> 'The assertion that representatives of the Commission, in the course of negotiations for the accession of the Republic of Austria to the Community, stated to or gave it to be understood by the Austrian authorities that the duty at issue was lawful has not been confirmed by the Commission and it finds no echo in the documents before the Court.' However, for the ECJ it was sufficient that: 'the Austrian Government contended, without being challenged on this point, that Commission representatives had assured it, during the negotiations prior to the accession of the Republic of Austria to the European Union, that the beverage duty was compatible with Community law.'<sup>15</sup>

In *Stradasfalti* the Italian government was, in the Court's view, not misled:<sup>16</sup>

'In the present case, although the Commission has supported the Italian authorities in respect of the years at issue in the main proceedings, it is nevertheless clear from the observations submitted to the Court that the VAT Committee has repeatedly pointed out to the Italian Government, since 1980, that the derogation in question could not be justified on the basis of Article 17(7) of the Sixth Directive, and that the more conciliatory attitude adopted by that committee during its meetings of 1999 and 2000 was a result of the Italian authorities' undertaking to re-examine the measure before 1 January 2001 and the possibilities presented at that time by the Commission's proposal to amend the Sixth Directive as regards the right to VAT deduction. . . . Under those circumstances, the Italian authorities could not be unaware that the systematic renewal, since 1979, of a derogating measure which was supposed to be temporary and which could only be justified, under the very wording of Article 17(7) of the Sixth Directive, by 'cyclical economic reasons', was not compatible with that Article. . . . The Italian authorities cannot therefore invoke the existence of legal relationships established in good faith in order to ask the Court to limit the temporal effects of its judgment.'

In *Legros* one cannot deny that the Commission contributed to the legal uncertainty:<sup>17</sup>

'As regards the present case, the particular characteristics of the dock dues and the specific identity of the French overseas departments have created a situation of uncertainty regarding the lawfulness of the charge at issue under Community law. That uncertainty is also reflected by the conduct of the Community institutions in relation to the problem of the dock dues. . . . First, the Commission did not pursue the procedure for establishing a breach of obligations which had been initiated against France in relation to the dock dues. It then proposed to the Council Decision 89/688, which was intended, inter alia, to authorize maintenance of the dock dues on a temporary basis in the context of the aforementioned Poseidom programme. Finally, the third and fourth recitals of the preamble to that decision state that "the dock dues at present constitute a means of support for local production, which has to contend with the problems of remoteness and insularity" and that "they also are a vital instrument of self-reliance and local democracy, the resources of which must constitute a means of economic and

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<sup>12</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 32 et seq.

<sup>13</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 58.

<sup>14</sup> ECJ, Advocate General *Saggio*'s Opinion, 1 July 1999, Case C-437/97, *EKW*, Point 64.

<sup>15</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 56.

<sup>16</sup> ECJ, 14 September 2006, Case C-228/05, *Stradasfalti Srl*, Para. 73-75.

<sup>17</sup> ECJ, 16 July 1992, Case C-163/90, *Legros*, Para. 31-33.

social development of the French overseas departments". . . . Those circumstances could have led the French Republic and the local authorities in the French overseas departments reasonably to consider that the applicable national legislation was in conformity with Community law.<sup>7</sup>

Nevertheless, Commission and Member States can only *contribute to* the legal uncertainty. The ECJ requires the Member State that is asking for the limitation of the temporal effects to put forward arguments why the legal situation had to be considered uncertain. However, it is enough that 'this is the first time that the Court has been called on to interpret' the provision at stake.<sup>18</sup> The Court consistently rejects the assumption of uncertainty if there is already well-established case law on a certain provision of Community law.<sup>19</sup> However, it is also possible that if the case law of the Court itself gives the impression of being contradictory it creates uncertainty.<sup>20</sup> The ECJ's decision in *Bosman* may serve as an example that the explanation why the legal uncertainty-test is met may be rather short:<sup>21</sup> 'In the present case, the specific features of the rules laid down by the sporting associations for transfers of players between clubs of different Member States, together with the fact that the same or similar rules applied to transfers both between clubs belonging to the same national association and between clubs belonging to different national associations within the same Member State, may have caused uncertainty as to whether those rules were compatible with Community law.' The threshold for legal uncertainty is therefore not very high.

### C. Serious Economic Repercussions

From *Defrenne* one can already infer that a risk of serious economic repercussions has to exist if the Court wants to limit the temporal effects of its judgment:<sup>22</sup> 'In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.' However, the Court did not mention how it arrived at these conclusions. Thus, it left open what the

real threshold is in order to assume that the financial situation of undertakings is 'seriously' affected.

While in *Defrenne* private undertakings had to suffer serious economic difficulties, in other cases the governments, although at different levels, were the victims. However, in those judgments the Court did not give a more detailed reasoning either: In *EKW*<sup>23</sup> the Court just stated that not limiting the temporal effects of the judgment 'would retroactively cast into confusion the system whereby Austrian municipalities are financed.' In *Legros*<sup>24</sup> the ECJ held that 'overriding considerations of legal certainty preclude legal relationships whose effects have been exhausted in the past from being called into question when this would retroactively upset the system for financing the local authorities of the French overseas departments.' Similarly, the Court in *Sürül*<sup>25</sup> took the position that 'any reopening of the question of legal relationships which have been definitively determined before the delivery of this judgment . . . would retroactively throw the financing of the social security systems of the Member States into confusion.' In *Blaizot*<sup>26</sup> the ECJ used a similar terminology, again without examining the situation in detail: 'In those circumstances, pressing considerations of legal certainty preclude any reopening of the question of past legal relationships where that would retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities.' The ECJ's judgment in *Bosman*<sup>27</sup> can serve as an example that there are even cases in which the Court does not explicitly examine the issue of possible economic consequences at all. All these judgments have in common that the Court finally limited the temporal effects of its judgment.

In other judgments the ECJ arrived at different results: In *Société Bautiaa* the Court did not accept 'the argument that the French Government would suffer significant financial loss . . . . The financial consequences which might ensue for a government owing to the unlawfulness of a tax or imposition have never in themselves justified limiting the effects of a judgment of the Court . . . . Furthermore, to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which taxpayers have

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- <sup>18</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 29; ECJ, 4 May 1999, Case C-262/96, *Sürül*, Para. 109; ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 58.
- <sup>19</sup> ECJ, 27 March 1980, Case 61/79, *Denkavit Italiana*, Para. 21; ECJ, 28 September 1994, Case C-57/93, *Vroege* [1994] I-04541, Paras. 28-30; ECJ, 11 August 1995, Joined Cases C-367/93 to C-377/93, *Rodgers and others*, Para. 45; ECJ, 15 December 1995, Case C-415/93, *Bosman*, Para. 146; ECJ, 23 May 2000, Case C-104/98, *Johann Buchner* [2000] I-3625, Para. 40.
- <sup>20</sup> ECJ, 4 May 1999, Case C-262/96, *Sürül*, Para. 110.
- <sup>21</sup> ECJ, 15 December 1995, Case C-415/93, *Bosman*, Para. 143.
- <sup>22</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne*, Para. 70.
- <sup>23</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 59.
- <sup>24</sup> ECJ, 16 July 1992, Case C-163/90, *Legros*, Para. 34.
- <sup>25</sup> ECJ, 4 May 1999, Case C-262/96, *Sürül*, Para. 111.
- <sup>26</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 34.
- <sup>27</sup> ECJ, 15 December 1995, Case C-415/93, *Bosman*.

under Community fiscal legislation ...' Since 'the French Government has not shown that, at the time when the registration duty at issue was levied, Community law could reasonably be understood as authorizing the maintenance of that duty', the Court was not willing to limit the temporal effects of its judgments.<sup>28</sup> The fact that this judgment was the first time the ECJ had been called on to interpret this Community provision was not sufficient for assuming legal uncertainty. In *Athinaiki Zythopoiia* the Court rejected the request of the Greek government to limit the temporal effects of the ECJ's judgment on the interpretation of a provision of the Parent-Subsidiary Directive for identical reasons.<sup>29</sup>

The Court has made it clear that it does not assume it has an obligation to examine ex officio how severe the economic consequences of its judgments are. On the contrary, the burden of proof is completely with the governments of the Member States: In *Bidar* the Court held that in 'the present case, it suffices to state that the information provided by the United Kingdom, German and Austrian Governments is not capable of supporting their argument that this judgment might, if its effects were not limited in time, entail significant financial consequences for the Member States. The figures referred to by those governments in fact relate also to cases which are not similar to that at issue in the main proceedings'.<sup>30</sup> Thus, it was decisive that the governments did not provide the Court with the figures which were relevant in the Court's view, and the Court, moreover, did not find it necessary to ask the governments to come up with figures that relate to the cases which were relevant in the Court's opinion. In *Stradasfalti* the ECJ argued that 'the Italian Government has not been able to demonstrate the soundness of the calculation which led it to argue before the Court that the present judgment might, if its temporal effects were not limited, entail significant financial consequences'.<sup>31</sup> In *Test Claimants in the FII Group Litigation* the Court took the position that it 'is sufficient to hold ... the United Kingdom Government has put forward an amount which includes the actions brought by the claimants in the main proceedings and which form the subject-matter of each of the questions referred for preliminary ruling, thereby proceeding on the, incorrect, assumption that the Court would answer each of the questions in the manner proposed

by the claimants in the main proceedings. ... In those circumstances, it is not necessary to limit the temporal effects of this judgment'.<sup>32</sup> This reasoning indicates that the Court might have considered limiting the temporal effects if the government had provided the Court with alternative calculations, taking into account that the Court may hold on some questions in the manner proposed by the claimants, and on others differently.

If possible, the Court avoids referring to concrete figures. One exception is the judgment in *Ákos Nádasdi*:<sup>33</sup> 'The Hungarian Government estimated the total amount of revenue from registration duty charged on those vehicles to be around 116 million euros. It acknowledged that not all of that amount would have to be reimbursed, but only the part corresponding to the excess duty charged on those vehicles in light of their depreciation. ... The amount to be reimbursed is not so high that the reimbursement, as such, is likely to have serious economic repercussions of such a kind to justify a limitation of the temporal effect of this judgment.' In *Meilicke* Advocate General *Stix-Hackl* emphasised that the sum of 5 billion 'relates to the potential scale of the financial risks if all of the taxpayers affected by the credit procedure were to lodge appeals'.<sup>34</sup> In her Opinion in *Banca popolare di Cremona* she accepted that the 'amount of tax which may be claimed back has been stated by the Italian Government to be some EUR 120 billion', since 'the figure has not been contested'.<sup>35</sup>

#### D. Legal Consequences

Whenever the ECJ has so far limited the temporal effects of its judgments in the area of indirect taxation and customs duties, it excluded from the direct effects of its judgment claims relating to taxes or custom duties *paid or chargeable* prior to the date of the actual judgment.<sup>36</sup> In judgments relating to transfer fees and enrolment fees, the ECJ limited the temporal effects for claims regarding fees that were *charged* before the actual judgment.<sup>37</sup> In contrast, in its judgments dealing with equal pay for men and women, the limitation of temporal effects affected people *whose claims concerned periods* prior to the date of the respective

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<sup>28</sup> ECJ, 13 February 1996, Case C-197/94, *Société Bautiaa*, Paras. 54 and 55.

<sup>29</sup> ECJ, 4 October 2001, Case C-294/99, *Athinaiki Zythopoiia AE*, Para. 39.

<sup>30</sup> ECJ, 15 March 2005, Case C-209/03, *Dany Bidar*, Para. 70.

<sup>31</sup> ECJ, 14 September 2006, Case C-228/05, *Stradasfalti Srl*, Para. 76.

<sup>32</sup> ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation* [2006] ECR I-0000, Para. 224.

<sup>33</sup> ECJ, 5 October 2006, Case C-290/05, *Ákos Nádasdi*, Paras. 64 and 68.

<sup>34</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Point 63.

<sup>35</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 14 March 2006, Case C-475/03, *Banca popolare di Cremona*, Point 156.

<sup>36</sup> ECJ, 16 July 1992, Case C-163/90, *Legros*, Para. 35; ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 60; ECJ, 9 September 2004, Case C-72/03, *Carbonati Apuani* [2004] ECR I-8027, Para. 39.

<sup>37</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 35; ECJ, 15 December 1995, Case C-415/93, *Bosman*, Para. 145.

judgment.<sup>38</sup> Since the Court has never limited the temporal effects of its judgments in direct taxation so far, one can only speculate which approach the Court would apply in such a case. It would not be surprising if the ECJ were not to refer to the date of payment or to the due date, but to the assessment period that ended before the actual judgment was delivered.<sup>39</sup> One argument for this approach might be that direct tax typically covers a fixed period and that differentiation within that period is not always feasible. Conversely, there are other types of rules in respect of which one might prefer a simple reference to the date of the judgment. If there is e.g. a rule on the taxation of dividends that is contrary to Community law, there does not seem to be a justification for allowing the Member State to benefit from that rule for the rest of the tax year in which the judgment falls.

In *Defrenne*<sup>40</sup> the ECJ decided to limit the temporal effects of its judgment, but not for those who had already taken legal action: 'Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.' In *EKW*<sup>41</sup> the Court took a similar approach: 'It must for that reason be held that the provisions of Article 3(2) of the excise duty directive cannot be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of the present judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent administrative claim.' Whenever the Court has limited the temporal effects of its judgments, the legal position of all taxpayers who had initiated legal proceedings or raised an equivalent claim before the ECJ's ruling was not affected.<sup>42</sup> Therefore, so far the parties involved have not had to fear that the Court would take away their remedies. However, at the hearing in *Test Claimants in the FII Group Litigation* 'the United Kingdom Government requested the Court, if it were to interpret Community law as precluding national legislation such as the legislation at issue in the main proceedings, to limit the temporal effects of its

judgment, even as regards legal proceedings brought before the date on which this judgment is delivered.<sup>43</sup>

In *Legros*<sup>44</sup> the Court excluded those taxpayers who had initiated the domestic court procedure that led to the judgment from the limitation of the temporal effects of the judgment and added one clarification:

'It should therefore be held that neither the provisions of the EEC Treaty relating to charges having equivalent effect to customs duties on imports nor Article 6 of the Agreement between the Community and Sweden may be relied upon in support of claims for refund of charges such as dock dues paid before the date of this judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent claim. ... That limitation of the temporal effects of this judgment does not apply to claims submitted for refunds of such charges which were paid to the competent authorities after the date of the judgment in respect of goods imported into the French overseas department concerned before that date.'

In *Meilicke* Advocate General *Tizzano* pointed out that the scope of the relevant provisions of Community law had become clear from the delivery of the judgment in *Verkooijen*.<sup>45</sup> Therefore, he suggested that the judgment should have retroactive effect to 6 June 2000. It should not be possible to rely on EC incompatibility to claim any tax repayments in respect of dividends that had been received before the date of this judgment; except by claimants who had applied for tax repayments or initiated legal proceedings up to this judgment or up to 11 September 2004, the date on which the announcement of the reference for a preliminary ruling in the present case was published in the *Official Journal of the European Community*, provided that the claims were not barred by the statute of limitations under national law.<sup>46</sup> On the other hand, Advocate General *Stix-Hackl* proposed to the Court that it should not limit the temporal effects of its judgment at all.<sup>47</sup>

In *Banca popolare di Cremona* Advocate General *Jacobs* did not suggest a specific approach. However,

## Notes

<sup>38</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne*, Para. 75; ECJ, 17 May 1990, Case 262/88, *Barber* [1990] ECR I-1889, Para. 45; ECJ, 6 October 1993, Case C-109/91, *Ten Oever* [1993] ECR I-4879, Para. 20; ECJ, 14 December 1993, Case C-110/91, *Moroni* [1993] ECR I-6591, Para. 33.

<sup>39</sup> See also Lindemann and Hackemann, 'Die Rückwirkung von EuGH-Urteilen unter besonderer Betrachtung des 'Marks & Spencer'-Falls', *Internationales Steuerrecht* (2005), p. 786 (p. 788).

<sup>40</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne*, Para. 75.

<sup>41</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 60.

<sup>42</sup> Kokott and Heinze, *Neue Juristische Wochenschrift*, note 1, p. 179; Only in four judgments on the validity of Commission regulations the ECJ did not exclude the parties of the present case: ECJ, 15 October 1980, Case 4/79, *Providence agricole de la Champagne* [1980] ECR 2823; ECJ, 15 October 1980, Case 109/79, *Sàrl Maiseries de Beauce* [1980] ECR 2883; ECJ, 15 October 1980, Case 145/79, *Roquette Frères* [1980] ECR 2917; ECJ, 27 February 1985, Case 112/83, *Produits de Mais* [1985] ECR 719.

<sup>43</sup> ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, Para. 221.

<sup>44</sup> ECJ, 16 July 1992, Case C-163/90, *Legros*, Paras. 35 et seq.

<sup>45</sup> ECJ, Advocate General *Tizzano's* Opinion, 10 November 2005, Case C-292/04, *Meilicke*, Point 64.

<sup>46</sup> *Ibid.*, Point 64.

<sup>47</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Point 68.

he focused on one specific possibility:<sup>48</sup> ‘One such approach might be inspired by that frequently taken by the German Constitutional Court – a finding of incompatibility subject to a future date before which individuals may not rely on the incompatibility in any claims against the State, the date in question being chosen in order to allow sufficient time for new legislation to be enacted.’ Finally, he preferred to propose that ‘for those seeking to rely on the ruling to be given by the Court, its effects should be subject to a temporal limitation, by reference to a date to be fixed by the Court’.<sup>49</sup> In view of the difficulties involved in choosing the appropriate limitation, he pointed out that ‘it may be desirable for the Court to reopen the oral procedure to hear further argument on that point’.<sup>50</sup> In her Opinion in *Banca popolare di Cremona* Advocate General *Stix-Hackl* proposed the following solution:<sup>51</sup> ‘The prohibition in that article may not be relied upon in order to claim reimbursement of IRAP levied in respect of any period of assessment prior to the Court’s judgment, or in respect of the period during which that judgment is delivered, except by persons who initiated legal proceedings or raised an equivalent administrative claim before 17 March 2005, the date on which Advocate General Jacobs delivered his Opinion in the present case.’

### 3. Open Questions

#### **A. Territorial Limitation of Temporal Effects of Judgments?**

It is an important element of the procedure under Art. 234 EC that the ECJ restricts its judgments to the interpretation of Community law. It refrains from taking a position on the interpretation of the domestic provisions whose compliance with Community law is challenged. The domestic court has to phrase the preliminary questions in an abstract way, avoiding reference to domestic law. The ECJ even rephrases preliminary questions if the domestic court fails to restrict its preliminary question to the interpretation of Community law and instead asks whether a certain domestic provision complies with a Community law provision.<sup>52</sup> Therefore, a judgment of the ECJ under Art. 234 EC does not only have to be taken into account by the Member State whose court has put forward the preliminary question. Such a judgment provides for an interpretation of Community law that is relevant for all courts and authorities applying

Community law, irrespective of the Member State where they are located.

Taking this case law as a starting point, one could assume that a decision of the ECJ to limit the temporal effects of a certain judgment has to be applied in all Member States as well. However, in her Opinion in *Banca popolare di Cremona*, Advocate General *Stix-Hackl* explained why she assumes that a limitation of the temporal effects of a judgment of the ECJ can only have limited territorial effects:<sup>53</sup>

‘If a temporal limitation is imposed on the effect of such a ruling, it will be in the interest of the Member State concerned, in order to avoid exceptional disruption. If there is an exception to the limitation it will be granted, by contrast, in the interests of those who, within the Member State, have sought to assert claims in reliance on Community law. . . . Yet a ruling on interpretation has general effect. If the Court rules that a tax having the characteristics of IRAP as described by the referring court is incompatible with the Sixth Directive, that will be true for IRAP and equally true for any other tax having those characteristics in any other Member State. . . . However, any temporal limitation and any exception thereto decided upon by the Court will be based on an assessment of the situation – existence of good faith on the part of the State, risk of serious disruption for the State and need for effective judicial protection of diligent claimants – in Italy, and that assessment might be quite different with regard to another Member State which also applied a tax having the same characteristics. . . . That consideration implies that any limitation should be not only temporal but also, in effect, spatial – a point of some relevance in the present case since it appears from several of the numerous articles which have already appeared in legal and tax journals concerning this case that one or more Member States other than Italy may apply taxes which, at least in the opinion of some authors, share certain characteristics with IRAP. . . . It is not of course possible for the Court to decide in the present case whether a limitation of temporal effect would be appropriate with regard to such other taxes or, if appropriate, what date should apply and what exceptions, if any, should be made. Yet the Court has consistently held that a limitation of temporal effect may be allowed only in the actual judgment ruling upon the interpretation sought, . . . and the decision is particular to the factual context of the preliminary reference.’

#### Notes

<sup>48</sup> ECJ, Advocate General Jacobs’ Opinion, 17 March 2005, Case C-475/03, *Banca popolare di Cremona*, Point 86.

<sup>49</sup> *Ibid.*, Point 90.

<sup>50</sup> *Ibid.*, Point 88.

<sup>51</sup> ECJ, Advocate General *Stix-Hackl*’s Opinion, 14 March 2006, Case C-475/03, *Banca popolare di Cremona*, Point 187.

<sup>52</sup> See ECJ, 15 July 1964, Case 6/64, *Flaminio Costa* [1964] ECR I-00585.

<sup>53</sup> ECJ, Advocate General *Stix-Hackl*’s Opinion, 14 March 2006, Case C-475/03, *Banca popolare di Cremona*, Points 179 et seq.

The reasoning of Advocate General *Stix-Hackl* sounds convincing: Under the ECJ's case law, the factual context of the preliminary reference is decisive. Parts of the factual context may differ from Member State to Member State. However, one should analyse the relevant criteria separately: If legal uncertainty existed because it 'is the first time that the Court has been called on to interpret' the provision at stake or if even the case law of the Court itself created uncertainty, distinguishing between the Member States does not seem to be justified. Moreover, if the conduct of the Commission or of Member States have contributed to legal uncertainty, one may assume that due to the transparency policy of the Commission, statements of the Commission towards a certain Member State are publicly available, so that other Member States may be aware of any communication that took place between the Commission and a Member State. However, different Member States may pay attention to such communications with a different level of intensity. And it should not be forgotten that e.g. in *EKW* it was relevant for the Court that 'the Austrian Government contended, without being challenged on this point, that Commission representatives had assured it, during the negotiations prior to the accession of the Republic of Austria to the European Union, that the beverage duty was compatible with Community law'.<sup>54</sup> One can assume that the governments of other Member States had, if any, just a little information about this kind of communication between Commission and Austrian representatives, which was referred to by the Court. Even more important, the economic consequences, which have become more relevant in recent ECJ case law, differ from Member State to Member State: While these repercussions are more severe for one Member State, they might be less severe for other Member States. Since the ECJ is only prepared to limit the temporal effects of one of its judgments if the economic consequences are severe, a separate analysis for each Member State is necessary. If the Court concludes that the economic repercussions are severe enough in order to limit the temporal effects for one Member State, these findings are not necessarily relevant for other Member States.

It is not completely clear whether the ECJ generally takes the view that its decision to limit the temporal effects of a judgment is only applicable in the Member State whose court has put forward the preliminary question. The ECJ's judgments do not take an explicit position on that issue. E.g., after the ECJ's judgment in

*Barber*,<sup>55</sup> which dealt with a request for a preliminary ruling from a UK court, several courts of other Member States put preliminary questions to the ECJ how this judgment has to be understood. In *Moroni*, an ECJ decision taken upon the request of a German court, on the one hand, the ECJ emphasised in response to the question whether the issue 'presented in the above alternatives as to the effect of Article 119 of the EEC Treaty *ratione temporis* remain, in circumstances such as the present, a matter for the national court to decide', that 'it must be pointed out that only the Court may, exceptionally, limit the possibility for the persons concerned to rely upon the interpretation which it gives of a provision of Community law by way of a preliminary ruling'.<sup>56</sup> On the other hand, the ECJ decided that the 'answer to be given to the third question referred to the Court must therefore be that by virtue of the judgment in Case C-262/88 *Barber* the direct effect of Article 119 of the Treaty may be relied on in order to claim equal treatment in the matter of occupational pensions only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law'.<sup>57</sup> The way this statement is phrased gives the impression that the ECJ is merely interpreting its *Barber* judgment. From this one could infer that the temporal effects of the *Barber* judgment had already been limited for Germany (and other Member States) in the *Barber* judgment, so that the Court did not see a necessity to decide on that question again but could concentrate on clarifying doubts about the interaction of its *Barber* judgment with Community law provisions. However, in *Carbonati Apuani*, the ECJ acknowledged 'that the tax in question – as a tax imposed on the crossing of a territorial boundary within a Member State – must be treated as a charge of the same kind as the dock dues at issue in *Legros and Others*'.<sup>58</sup> Still the Court gave the impression that it found it necessary to decide on the limitation of the temporal effects of its judgment with respect to Italy:<sup>59</sup> 'It may, therefore, be conceded that until 16 July 1992 the Comune di Carrara could reasonably believe that the duty in question was in conformity with Community law. ... The same considerations of legal certainty must therefore apply here and consequently the temporal limitation set by the Court in *Legros and Others* must also be held to apply to claims for refunds of sums levied by way of the tax at issue in the main proceedings.'

## Notes

<sup>54</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 56.

<sup>55</sup> ECJ, 17 May 1990, Case 262/88, *Barber*.

<sup>56</sup> ECJ, 14 December 1993, Case C-110/91, *Moroni*, Para. 7 and 32.

<sup>57</sup> *Ibid.*, Para. 33.

<sup>58</sup> ECJ, 9 September 2004, Case C-72/03, *Carbonati Apuani*, Para. 39.

<sup>59</sup> *Ibid.*, Paras. 39 and 40.

## B. What is the Relevant 'Factual Context' of the Preliminary Reference?

Assuming that the temporal effects of an ECJ judgment may be limited with respect to one or more Member States, it is worth taking a closer look at the relevant factual context. It has already been pointed out that mainly the economic consequences may differ from Member State to Member State. As far as taxes are concerned, the ECJ itself or its Advocates General occasionally refer to the level of government to determine the economic consequences. In *Banca di Cremona* Advocate General *Jacobs* feared that, 'an unlimited temporal effect might 'retroactively cast into confusion the system whereby Italian regions are financed'.<sup>60</sup> In *EKW* the Court referred to the level of government as well.<sup>61</sup> 'In those circumstances, and without there being any need to consider the global amount in question, the absence of proof of payment or the very large number of small transactions concerning small amounts, overriding grounds of legal certainty preclude calling in question legal relations which have exhausted their effects in the past; to do so would retroactively cast into confusion the system whereby Austrian municipalities are financed.' Similar phrases had already been used by the Court in *Blaizot* where the Court held that 'a supplementary enrolment fee charged to students who are nationals of other member states and wish to enrol for such studies constitutes discrimination on grounds of nationality contrary to Article 7 of the eec treaty', but, however, limited the temporal effects of its judgment, since in 'those circumstances, pressing considerations of legal certainty preclude any reopening of the question of past legal relationships where that would retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities'.<sup>62</sup>

Looking at the level of government does not seem to be very satisfactory: Let us assume that two identical taxes in two different Member States are levied, both of them constitute an infringement of Community law and the amount of tax that may be claimed is identical. In case the shortfall in tax revenue has to be borne by the central government, the relative impact on the total budget of this state is less compared to a situation in which the budget of the municipalities is concerned. Thus, it could easily be possible that in the case of a municipality tax the temporal effects of an ECJ judgment are limited by the Court, while in the other case they are not. If the Austrian beverage duty were levied by the central government, the temporal effects of the *EKW* judgment would probably have not been limited by the Court. There is a certain tension

between this case law, on the one hand, and the ECJ's longstanding case law according to which a Member State cannot justify an infringement of Community law by arguing that introducing, modifying and abolishing the domestic provision constituting the infringement is part of provincial or municipal law and therefore not within the competence of the central government or the central legislator,<sup>63</sup> on the other hand. However, focussing on the economic consequences for the Member State can also lead to the result that the temporal effects are dealt with differently, despite the fact that the economic burden of an individual taxpayer is not influenced by the overall shortfall in tax revenue.

The *EKW* judgment is also an example of the fact that merely asking whether the 'system whereby ... municipalities are financed is cast into confusion', is superficial: In Austria every municipality used to have its own beverage duty. Each municipal legislator was competent to decide on the structure of the beverage duty to be levied. The municipal legislators had to meet the criteria imposed by its provincial legislative body, and the provinces had to meet the criteria imposed by the federal legislator. However, both provincial and municipal legislative bodies had sufficient room to decide quite independently on the features of their beverage duties. Even more important, the relevance for the budget of the municipalities did vary. For some municipalities the shortfall in revenues they would have suffered if the ECJ had not limited the temporal effects of its *EKW* judgment would have been dramatic. For other municipalities it would have been much easier to compensate the loss in beverage duty revenues by increasing other duties or taxes and thus creating additional sources of revenues. However, the Court did not examine the situation of each individual municipality separately. Since it is convincing to look at the factual context in each Member State separately in order to determine how severe the economic consequences would be if the temporal effects of a judgment are not limited, it would have been consistent to look separately at the economic consequences of each municipality in the case of a municipality tax as well.

Merely looking at the 'system' as a whole is superficial for another reason as well: In many countries there is a certain degree of interdependence between the different levels of government. In the case of Austria, the other levels of government are obliged to support the municipalities in case they run into financial problems: Their ability to finance their activities has to be considered by the central level, when the legislator decides how to split the tax revenues between the different levels of government. Similarly, as far as it is relevant whether a certain

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<sup>60</sup> ECJ, Advocate General *Jacobs*' Opinion, 17 March 2005, Case C-475/03, *Banca popolare di Cremona*, Point 80.

<sup>61</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 59.

<sup>62</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Paras. 9 and 34.

<sup>63</sup> ECJ, 1 June 1999, Case C-302/97, *Konle* [1999] ECR I-3099, Para. 62; ECJ, 4 July 2000, Case C-424/97, *Haim* [2000] ECR I-5123, Paras. 28 et seq.

judgment of the ECJ would ‘throw the financing of university education into confusion’,<sup>64</sup> one could have expected that the Court would examine if and to what extent central or local governments are responsible for university education and can be made liable for the damages they caused to universities by introducing provisions which constituted an infringement of Community law and endangered the financing of the Belgian university system. This is true in the *Sürül* case as well, where the ECJ reasoned that not limiting the temporal effects of its judgment would ‘retroactively throw the financing of the social security systems of the Member States into confusion’.<sup>65</sup> It would have been more convincing if the Court had examined to what extent the central government of a Member State has a legal or at least a factual obligation to provide additional funds for the social security system of a specific Member State.

### C. How to Determine Severe Economic Consequences?

The analysis of the ECJ case law has shown that the role the criterion of ‘severe economic consequences’ plays in the Court’s case law largely depends on the result of the judgment. If the Court decides not to limit the temporal effects of a judgment, the standards that would have to be met by Member State are so high that it is practically impossible to meet them. Whenever the Court has been willing to limit the temporal effects, it has never spent too much effort in explaining why a certain judgment would lead to severe economic consequences. So far the ECJ has considered these to be severe if any reopening of the question of a past legal relationship ‘would retroactively cast into confusion the system whereby Austrian municipalities are financed’,<sup>66</sup> ‘upset the system for financing the local authorities of the French overseas departments’,<sup>67</sup> ‘would retroactively throw the financing of the social security systems of the Member States into confusion’,<sup>68</sup> ‘would retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities’<sup>69</sup> or ‘might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy’.<sup>70</sup> In these cases neither the Court itself undertook any detailed analysis nor did it require the governments to do so.

However, in sharp contrast to these judgments, other judgments do not leave any doubt that it is exclusively up to the governments of the Member States to provide evidence that limiting the temporal effects of a judgment is necessary to avoid severe economic consequences. The burden of proof is completely on them. They should have the best access to the available data. It is therefore understandable that, as the Opinion of Advocate General *Stix-Hackl* in *Meilicke* illustrates, a government of a Member State loses credibility if, first of all, it submits that the shortfall in tax revenue is much higher and then has to reduce it to 5 billion euro at the first hearing, and then still flagrantly exaggerates it:<sup>71</sup>

‘What is more, the sum referred to by the German Government relates to a four year period (1998-2001), whilst the reference figures relate in each case to one budget year. As expressly confirmed by the German Government at the second hearing, the 5 billion euro relates to the potential scale of the financial risks if all of the taxpayers affected by the credit procedure were to lodge appeals. Although the resulting budget risks arise from a provision which is no longer in force, the German Government has not managed to state, even approximately, – within the relevant review period – how many taxpayers have actually lodged appeals’.

However, the reasoning of the Court in its judgment in *Test Claimants in the FII Group Litigation* illustrates that the Court sometimes goes too far: The Court took the position that it ‘is sufficient to hold ... the United Kingdom Government has put forward an amount which includes the actions brought by the claimants in the main proceedings and which form the subject-matter of each of the questions referred for preliminary ruling, thereby proceeding on the, incorrect, assumption that the Court would answer each of the questions in the manner proposed by the claimants in the main proceedings. ... In those circumstances, it is not necessary to limit the temporal effects of this judgment.’<sup>72</sup> The Court seems to assume that the government, which has to request the limitation of the temporal effects of an expected judgment in advance, has to provide data about the possible economic consequences of every possible outcome of the judgment. It is extremely difficult for a govern-

### Notes

<sup>64</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 34.

<sup>65</sup> ECJ, 4 May 1999, Case C-262/96, *Sürül*, Para. 111.

<sup>66</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 59.

<sup>67</sup> ECJ, 16 July 1992, Case C-163/90, *Legros*, Para. 34.

<sup>68</sup> ECJ, 4 May 1999, Case C-262/96, *Sürül*, Para. 111.

<sup>69</sup> ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 34.

<sup>70</sup> ECJ, 8 April 1976, Case 43-75, *Defrenne*, Para. 70.

<sup>71</sup> ECJ, Advocate General *Stix-Hackl*’s Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Point 63.

<sup>72</sup> ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, Paras. 224 and 225.

ment to fulfil these requirements: Quite often it is impossible to foresee in which manner the Court will answer the questions put to it. One has to bear in mind that the Advocates General and the Court itself not only have the option to answer a question put to them by a domestic court in the affirmative or in the negative, but may come up with a completely different answer, trying to balance different positions, which has neither been expected by the parties nor by anybody else. In theory, there are countless possibilities how the Court could answer such a question. Although in *Marks & Spencer* the limitation of the temporal effects of a judgment was not requested,<sup>73</sup> this case may serve as an illustrative example that an Advocate General and the Court may arrive at unexpected results: Advocate General *Poiares Maduro's* solution, which proposed that the loss utilisation in the Residence State of the parent company has to be made possible if a set of requirements are met,<sup>74</sup> and which was to a large extent adopted by the Court,<sup>75</sup> came as a surprise not only to the parties involved, but also to most observers.<sup>76</sup> In this case the judgment left so many open questions<sup>77</sup> that it would have been impossible to estimate the economic consequences of this judgment for the UK tax authorities, even *after* the judgment.

It has to be admitted that it is not at all easy to determine severe economic consequences. As far as taxes are concerned, the budgetary consequences seem to be very severe. However, it could be viewed as problematic if 'the most serious infringements of Community law would receive more lenient treatment', as Advocate General *Stix-Hackl* put it:<sup>78</sup>

'It is apparent ... that the amount of the financial consequences cannot in itself alone be decisive in relation to the limitation of the temporal effects of a judgment. The risk of serious economic repercussions may not be established solely by reference to figures, but requires an assessment by the Court based upon the submissions of fact of the Member State which made the application. Accordingly, in my view, the Court should resist the temptation to link the degree of severity of the financial repercussions to the level of the possible financial consequences or specific sums of money. Even taking

into account the varying economic strength of the various Member States, I think it is dangerous to proceed in the long term on the basis that specific (even if large) amounts of money imply a risk of serious economic repercussions from the outset. ... This would seem to me to be putting the cart before the horse and could even, in the worst case scenario, lead to a 'threshold value discussion.'

Advocate General *Stix-Hackl* in her Opinion delivered in *Meilicke* takes the position that:

'the shortfall in tax revenue alleged in this connection, amounting to 5 billion euro ... does not suffice in that, whilst it may suggest that serious economic repercussions are to be feared, in itself it is none the less not sufficient proof of them. The sum mentioned ... is arrived at on the basis of a demonstration of the financial budgetary repercussions, which in accordance with established case-law ... does not suffice taken alone as appropriate evidence of a risk of serious economic repercussions. ... Nor does the risk of serious economic repercussions arise from mathematically setting the sum of 5 billion euro against the German budget deficit – and the consequent reduction in the sum available for investments ... the income from corporation tax and other reference figures – since such data (still) make clear the 'purely' financial consequences of the judgment to be delivered.'<sup>79</sup>

However, it is not convincing either that the 'the absence of proof of payment or the very large number of small transactions concerning small amounts' would 'cast into confusion the system whereby ... municipalities are financed', as the Court held in *EKW*.<sup>80</sup> *Vording* and *Lubbers* have correctly pointed out that 'having to make a large number of tiny repayments will create an administrative burden, but no 'confusion'. Apparently, it is also the total amount of repayments that matters.' They concluded that 'the budgetary argument slips in through the back door'.<sup>81</sup> If the numbers of transactions concerned really counted, multinational enterprises would benefit: Since the number of these enterprises is limited, infringements of EC law in the case of tax provisions affecting these taxpayers would not meet this test.<sup>82</sup>

## Notes

<sup>73</sup> However, some authors have mentioned that the limitation of the temporal effects of the judgment were requested in the *Marks & Spencer* case as well, but not given any reference: Lindemann and Hackemann, *Internationales Steuerrecht*, note 39, p. 789.

<sup>74</sup> ECJ, Advocate General *Maduro's* Opinion, 7 April 2005, Case C-446/03, *Marks & Spencer*.

<sup>75</sup> ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer* [2005] ECR I-10837.

<sup>76</sup> Lang, 'The *Marks & Spencer* Case – The Open Issues Following the ECJ's Final Word', *European Taxation* (2006), p. 54 (p. 54).

<sup>77</sup> Lang, *European Taxation*, note 76, p. 54.

<sup>78</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Points 16 and 60.

<sup>79</sup> *Ibid.*, Point 61 et seq.

<sup>80</sup> ECJ, 9 March 2000, Case C-437/97, *EKW*, Para. 59.

<sup>81</sup> *Vording* and *Lubbers*, 'The ECJ, Retrospectivity and the Member States' Tax Revenues', *British Tax Review* (2006), p. 91 (p. 105).

<sup>82</sup> *Vording* and *Lubbers*, *British Tax Review*, note 81, p. 107.

However, Advocate General *Stix-Hackl's* Opinion in *Banca popolare di Cremona* shows that even for her it is nevertheless relevant and decisive if the 'amount of tax which may be claimed back has been stated ... to be some EUR 120 billion'.<sup>83</sup> Thus, finally it is the amount of the shortfall in tax revenue that counts for the purpose of determining the severe economic consequences of a judgment.

However, the amount of the shortfall in tax revenue is very difficult to calculate. One may have doubts whether even governments are always able to provide the Court with a fair estimate. However, one must not forget that a government is of course interested in coming up with a huge amount of shortfall in tax revenue, since the more severe the economic consequences of a judgment are, the easier it is for the government to argue in favour of a limitation of the temporal effects of a judgment. In this respect, the sceptical position taken by Advocate General *Stix-Hackl* in her Opinion in *Meilicke*, which I have already cited, is understandable.<sup>84</sup>

The problem is that there is no party involved in the Court procedure under Art. 234 EC that has an institutional interest in challenging the position of the governments about the amount of shortfalls in tax revenue. One can neither expect the Commission nor from the representatives of the other governments to come up with different figures: The governments of other Member States quite often have an interest in the fact that the Court limits the temporal effects of a judgment because they could benefit from such a decision as well, since such a decision might serve to prejudice similar preliminary rulings that affect them. Even if they do not fear being directly affected by a judgment, from an institutional point of view, they have to have an interest in the fact that a rather low threshold for the limitation of temporal effects of ECJ judgments is going to be developed. Neither governments of other Member States nor the Commission have access to documents that give information about the real loss of revenues which has to be expected. Even the government whose tax revenues are involved might not have the complete picture. They might have to rely on rough estimates on how taxpayers will react, how many assessments are still open or may be reopened if, as a result of a judgment by the Court, a certain domestic tax provision may no longer be applied. Even if they have full information, they might, because of secrecy restrictions, be prevented from sharing their evidence with the other parties in the ECJ procedure.

Most important, not even the taxpayer whose case

led to the ECJ proceedings, has a real interest in challenging the figures provided by his government:<sup>85</sup> If the ECJ decides to limit the temporal effects of the judgment, his or her case is usually excluded from the limitation. Therefore, it does not mean a lot when all the parties involved agree on the sum of the shortfall in tax revenue. Taking this background into account, the description of the common position taken by all parties, which can be read in Advocate General *Stix-Hackl's* Opinion in *Banca Popolare di Cremona*, has to be seen in a different light: 'The amount of tax which may be claimed back has been stated by the Italian Government to be some EUR 120 billion, and that figure has not been contested.'<sup>86</sup> The Advocate General emphasises even that '[t]he Commission also agrees that the criteria are met, and Banca Popolare does not object in principle to the fixing of a temporal limitation.'<sup>87</sup> Banca Popolare's position does not come as a surprise, if one takes into account that the fixing of a temporal limitation would not have any impact on it.

To exclude the taxpayer whose case led to the ECJ procedure from the benefits of a judgment, at least if the temporal effects are limited, would not really solve the problem: Of course, such a taxpayer would be interested in challenging the figures about the possible loss in revenues put forward by the governments. There would be a party in the proceedings, having an institutional interest in minimizing the amount, since a limitation of the temporal effects of a judgment could harm the taxpayer's position. However, the taxpayer does not have access to data allowing him or her to provide evidence if he or she believes that the estimations of the governments are too high. Furthermore, if the taxpayer whose case led to the ECJ proceedings does not benefit from an infringement he or she brings to the attention of the domestic court, he or she would have fewer incentives to do so and to try to persuade the domestic court to request a preliminary ruling from the ECJ. At least in tax law, this incentive seems to have stimulated bringing possible infringements of Community law to the attention of the courts.

#### **D. Request for a Preliminary Ruling on the Limitation of the Temporal Effects of a Judgment?**

In most cases in which the ECJ considered limiting the temporal effects of its judgments, it did so upon the request of governments. The Court emphasised that it

#### **Notes**

<sup>83</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 14 March 2006, Case C-475/03, *Banca popolare di Cremona*, Point 156.

<sup>84</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Point 63.

<sup>85</sup> Cp. Lüdike, 'Zittern vor Sanktionen', *Financial Times Deutschland* (30. 5. 2006); Lang, 'Die Logik eines Ministeriums', *Financial Times Deutschland* (17. 10. 2006).

<sup>86</sup> ECJ, Advocate General *Stix-Hackl's* Opinion, 14 March 2006, Case C-475/03, *Banca popolare di Cremona*, Point 156.

<sup>87</sup> *Ibid.*, Point 154.

is in its exclusive competence to decide on this issue:<sup>88</sup> ‘A restriction of that kind may be permitted only by the Court ...’ Of course, in the absence of Community law the implementation of ECJ judgments depends on domestic procedural law. The Member States can determine the procedural conditions under which citizens may exercise the rights conferred to them by Community law, as long as these domestic provisions are in line with the principles of equivalence and effectiveness. However, further limitations of temporal effects of judgments can only be decided by the Court itself. Therefore, no domestic court has such competence.

However, interestingly enough, the ECJ is also willing to accept preliminary questions put forward by domestic courts asking if a limitation of the temporal effects of the ECJ’s decision is appropriate in case the ECJ takes the view that rules, like the one applicable in the Member State, constitute an infringement of Community law.<sup>89</sup> One may ask if such a request for a preliminary ruling is covered by Art. 234 EC: Where a question of interpretation of Community law ‘is raised before any court or tribunal of a Member State’, that court may, or under certain circumstances, even must bring the matter before the ECJ, ‘if it considers that a decision on the question is necessary to enable it to give judgment’. Firstly, the question whether the temporal effects of a judgment should be limited cannot be ‘raised before’ a domestic court, since only the ECJ itself is competent to decide on this question. Secondly, the decision on the question whether the temporal effects of a judgment should be limited is not a decision on a question that is ‘necessary to enable [the domestic court] to give judgment’: The domestic court is perfectly in a position to give a judgment if the interpretation of the Community law question is clear because the ECJ has already been approached in the case of another Member State, or because the domestic court itself has been provided with a ruling from the ECJ. There is no need to request a ruling from the ECJ on the question if a certain Community law provision has to be applied retroactively: As long as the ECJ has not decided to limit the temporal effects of the application of a Community law provision, the provision has to be applied retroactively. This is the relevant legal situation on which the domestic court has to base its decision. Thus, it is in no way necessary for a domestic court to request the ECJ to deal with the question of limiting the temporal effects of the application of a Community law provision. Therefore, one might conclude that a domestic court of last instance does not infringe its obligations under Art. 234 EC if it does not request a ruling from the ECJ on

the limitation of the temporal effects of a judgment which was requested by a domestic court of another Member State. Going one step further, it seems to be consistent even to take the position that domestic courts are not competent to ask for preliminary ruling on the limitation of the temporal effects of such ECJ judgments: If a decision on the question is not necessary to enable the domestic court to give judgment, the domestic court is not competent to approach the ECJ in this respect at all.

If one takes the position that domestic courts are *not* competent to request preliminary rulings from the ECJ on the limitation of ECJ judgments, an answer to the question if and how the Court can be enabled to limit the temporal effects of its judgments has to be given. As far as the first request for preliminary ruling on the interpretation of a specific Community law provision is concerned, the problem seems to be solvable: The Court is competent to decide on the limitation of the temporal effects of its judgments, with or without being asked by the domestic court whether the requirements are fulfilled. For the ECJ it is sufficient to deal with that issue when a government of a Member State or another party files a request. However, if, once the ECJ has issued its judgment and either limited or not limited the temporal effects of its judgment for the Member States from whose court it got the request for the ruling, courts of other Member States were not allowed to request a ruling on the limitation of the temporal effects of this judgment for their countries, the consequence would be arbitrary: The temporal effects of the judgment in the first Member State might be limited or not limited by the Court, while the interpretation of the Community law provision provided by this judgment had full retroactive effect in all other Member States, even if the economic consequences of this judgment were more severe for these other States.

To avoid such unsatisfactory arbitrary consequences, one might assume that the governments of all Member States are entitled to ask the ECJ for a limitation of the temporal effects of a judgment when the Court is dealing with the request for a preliminary ruling from a domestic court of the Member State where the issue of the interpretation of the Community law provision is raised for the first time. Since all the Member States take part in the Court’s proceedings, it can be expected that they evaluate the possible consequences of an outcome of an ECJ judgment, and, if necessary, ask for a limitation of the temporal effects of this judgment for their laws.

However, the Court seems to have taken a more pragmatic approach: So far, the Court has always

## Notes

<sup>88</sup> ECJ, 27 March 1980, Case 66/79, *Salumi*, Para. 11; ECJ, 17 May 1990, Case 262/88, *Barber*, Para. 41; ECJ, 14 December 1993, Case C-110/91, *Moroni*, Para. 32; ECJ, 15 December 1995, Case C-415/93, *Bosman*, Para. 142.

<sup>89</sup> See ECJ, 27 March 1980, Case 61/79, *Denkavit Italiana*, Para. 2; ECJ, 27 March 1980, Case 66/79, *Salumi*, Para. 7; ECJ, 2 February 1988, Case 24/86, *Blaizot*, Para. 9; ECJ, 17 May 1990, Case 262/88, *Barber*, Para. 7; ECJ, 6 October 1993, Case C-109/91, *Ten Oever*, Para. 5; ECJ, 14 December 1993, Case C-110/91, *Moroni*, Para. 1; ECJ, 28 September 1994, Case C-57/93, *Vroege*, Para. 19; ECJ, 11 August 1995, Joined Cases C-367/93 to C-377/93, *Rodgers and others* Para. 41; ECJ, 19 October 1995, Case C-137/94, *Richardson* [1995] I-03407, Para. 30; ECJ, 15 March 2005, Case C-209/03, *Dany Bidar*, Para. 27.

accepted requests for preliminary rulings from courts of Member States that concern the limitation of the temporal effects of either a judgment the domestic court is asking for at the same time, or a judgment which had already been issued by the Court in the case of another Member State.<sup>90</sup> E.g., in *Carbonati Apuani*, the Court agreed to deal with the request for a preliminary ruling on the limitation of the temporal effect of a certain provision, although the Court indicated that the same provision had already been interpreted in the *Legros* case. The fact that the Italian government had not asked for the limitation of the temporal effect of the Community law provision for Italy when *Legros* was decided was ultimately of no harm for Italy: The ECJ agreed to limit the temporal effects of its judgment in a separate proceeding initiated by an Italian court. In *Ten Oever* and *Moroni* the Member States asked the Court to state the precise scope of the limitation of the effects in time of the *Barber* judgment, which also dealt with the interpretation of Art. 119 EC of the Treaty.<sup>91</sup> In both cases the ECJ decided to limit the temporal effects to periods subsequent to the *Barber* judgment.

On the same lines, General Advocate *Stix-Hackl* proposed to the Court to decide on the temporal limitations in its expected *Meilicke* judgment, although she was well aware of the fact that the substantive Community law issue raised by a German court in *Meilicke* had already been answered in *Manninen*,<sup>92</sup> if not already in *Verkooijen*,<sup>93</sup> and the German government had at that time neither asked for a limitation of the temporal effect of the Court's *Manninen* judgment nor of its *Verkooijen* judgment.<sup>94</sup> However, she explained her reasoning quite clearly:<sup>95</sup>

'In this respect it must be remembered that the Court requires a high degree of similarity between the relevant questions for interpretation, which is the criterion for precluding a limitation of the temporal effects. Thus in *Gravier* ... and *Blaizot* ... the Court was able to discern sufficient differences to differentiate between them. Those differences existed although the same national provision was the reason for both requests for preliminary rulings and hence the questions for interpretation were very similar. ... In view of the complexity of the connections between the respective national tax laws, a point made repeatedly at the second hearing on 30 May 2006, it should really be possible to differentiate between the relevant provisions of various Member States, despite all the apparent common ground. However taking such an approach could entail an excessively

detailed analysis ... Further it should not be forgotten that even the same national court to whom a previous preliminary ruling has been addressed can seek a ruling from the Court again before the main proceedings are decided. ... Since it is justifiable for a – further – question to be referred if the national court refers a fresh question of law to the Court, or if it submits new considerations which might lead the Court to give a different answer to a question submitted earlier. ... In that light the German Government should also be given the opportunity to put before the Court aspects of the law not considered in *Verkooijen* and *Manninen* with regard to the question of the temporal limitation of the effects of a judgment. ... In that connection particular consideration must be given to the fact that the uncertain or unresolved outcome of proceedings for a preliminary ruling on a new legal question makes it difficult for Member States to assess the significance of the proceedings concerned for their own legal system sufficiently exactly and at the right time. ... This applies especially to the prior conditions for an order limiting the temporal effects of a judgment to be explained in more detail below. Thus, in the present case the German Government should, in the proceedings in the *Verkooijen* case – or in the proceedings in the *Manninen* case – for instance have clarified whether the interpretation of Community law in each case would create the risk of serious economic repercussions for it. In view of the fact that until the delivery of the judgment in the *Verkooijen* case the question of the interpretation of Community law in relation to national tax credit procedures had not been definitively dealt with and the specific question of a system of tax credits was not clarified at all until *Manninen*, which give the most extensive clarification to date, it hardly appears possible to make such an assessment in advance. ... On the other hand an – ultimately purely preventive – routine application by Member States for the limitation of the temporal effects of a judgment on interpretation which is to be delivered might not be desirable in from the point of view of procedural economy, as was quite rightly argued by the Member States at the hearing on 30 May 2006. Then of course the Court would have to consider the necessarily abstract observations of all of the Member States applying on the potential implications of the judgment for each of them. ... In the light of the foregoing the German Government's application to limit the temporal effects cannot be regarded as belated in my opinion.'

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<sup>90</sup> See for examples, Kokott and Heinze, *Neue Juristische Wochenschrift*, note 1, p. 181.

<sup>91</sup> ECJ, 17 May 1990, Case 262/88, *Barber*; ECJ, 6 October 1993, Case C-109/91, *Ten Oever*; ECJ, 14 December 1993, Case C-110/91, *Moroni*.

<sup>92</sup> ECJ, 7 September 2004, Case C-319/02, *Manninen* [2004] ECR I-7477.

<sup>93</sup> ECJ, 6 June 2000, C-35/98, *Verkooijen* [2000] ECR I-4071.

<sup>94</sup> ECJ, Advocate General Stix-Hackl's Opinion, 5 October 2006, Case C-292/04, *Meilicke*, Point 24.

<sup>95</sup> *Ibid.*, Points 21-28.

In her Opinion, Advocate General *Stix-Hackl* does not make a sharp distinction between the peculiarities of the specific case and general considerations. When she points out that it might not be desirable from the point of view of procedural economy that in every future court proceeding the governments of all the other Member States might feel the need to file a request to the Court to limit the temporal effects of its judgment for their taxes as well, this consideration is general and not linked to the specific circumstances of this case.

However, if one assumes that a domestic court of a Member State may ask for a preliminary ruling on the temporal effects of an ECJ judgment which had been issued previously at the request of a domestic court of another Member State, the question arises under which circumstances a court of last instance is obliged to ask for such a ruling. According to ECJ case law, if ‘the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved’, the domestic court may refrain from submitting the question to the ECJ and take upon itself the responsibility for resolving it:<sup>96</sup> ‘Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice.’ Having this standard in mind, one may even reverse the above-mentioned question and ask if there are any situations in which a domestic court may refrain from approaching the ECJ in order to give the Court the opportunity to limit the temporal effects of a judgment in respect of another Member State. It might be difficult for the domestic court to decide if the Commission has contributed to the uncertainty of the interpretation of a certain Community law provision, since the domestic court may be unaware of correspondence and other types of communication that took place between its government and the Commission. Moreover, it might be almost impossible for the domestic court to evaluate how severe the economic consequences of a judgment of the Court might be for the Member State, one of its provinces or municipalities or the ‘education system’, the ‘social security system’ or any other ‘system’ the ECJ might refer to in the future. One must not forget that there is no guarantee that the government of the Member State is a party to the domestic court proceedings. Thus, the domestic court might not be able to examine these questions properly. Whenever doubts remain with a domestic court of last instance whether the ECJ would limit the temporal effects, the domestic court is obliged to submit the issue to the ECJ.

However, even if a domestic court assumes that the need for limiting the temporal effects is ‘so obvious as

to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved’ and if it is ‘convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice’, the domestic court is not allowed to refrain from submitting the question to the ECJ: The Court has emphasised that it is in its exclusive competence to decide on the limitation of the temporal effects of its judgments.<sup>97</sup>

One could therefore even challenge the position that a domestic court may refrain from submitting the question of temporal limitation of one of its judgment to the ECJ, if it arrives at the conclusion that there are no reasonable doubts that the Court will not limit these effects: If a domestic court decides not to submit this issue to the ECJ, ultimately it is the domestic court itself that takes this decision, since the result is that the temporal effects of the judgment are not limited. This could be viewed as constituting interference with the competence of the ECJ. Consequently, one would have to assume that even a lower domestic court is obliged to submit such a question to the ECJ, in order to avoid the domestic court abrogating the competence of the ECJ. However, drawing that conclusion would go one step too far: Firstly, an administrative body which does not qualify as a court or as a tribunal under Art. 234 EC may never request a preliminary ruling from the Court; however, it may have to decide on Community law issues as well. Secondly, in 1982, the ECJ had confirmed its already established case law, by recalling that:

‘in its judgment of 27 March 1963 in joined cases 28 to 30/62 (*Da Costa v Nederlandse Belastingadministratie* (1963) ecr 31) the Court ruled that: “Although the third paragraph of Article 177 [now Art. 234 EC] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law . . . to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 [now Art. 234 EC] already given by the court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.” . . . The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177 [now Art. 234 EC], may be produced where previous decisions of the court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.”<sup>98</sup>

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<sup>96</sup> ECJ, 6 October 1982, Case 231/81, *CILFIT* [1982] ECR 3415, Para. 14 et seq.; ECJ, 4 November 1997, Case C-337/96, *Parfums Christian Dior* [1997] ECR I-6013, Para. 29; ECJ, 17 May 2001, Case C-340/99, *TNT Traco* [2001] I-4109, Paras. 26 and 35; ECJ, 15 September 2005, Case C-495/03, *Intermodal Transports* [2005] ECR I-8151, Para. 33; ECJ, 6 December 2005, Case C-461/03, *Gaston Schul Douane-expediteur* [2005] ECR I-10513, Para. 16.

<sup>97</sup> ECJ, 17 May 1990, Case 262/88, *Barber*, Para. 41.

<sup>98</sup> ECJ, 6 October 1982, Case 231/81, *CILFIT*, Paras. 13 and 14.

This statement would be meaningless if the the ECJ's case law on the limitations of the temporal effects of its judgment, which has been developed since 1976, had the consequence that even when an interpretation by the Court under Art. 234 EC (Art. 177 EC Treaty) already exists, the domestic courts were in every case obliged to refer the case to the ECJ.

#### 4. Conclusion

The ECJ's case law on the limitation of the temporal effects of its judgments raises a lot of problems: Many problems originate from the fact that this case law has been developed by the Court, without having any explicit legal basis in the Treaty. For this reason, it is not at all clear who may request such a limitation. The Court takes a pragmatic approach and is willing to deal with such an issue both upon the request of a government and another party involved in court proceedings, and upon the request of a domestic court for a preliminary ruling.

Most existing case law on the limitations of temporal effects of judgments has not been developed in the field of taxation. The case law is not completely consistent and one gets the impression that the standards the Court applies depend on the result the Court wants to achieve in the individual case: If the ECJ agrees to limit the temporal effects of one of its judgments, the level of uncertainty that is required is not very high and it is sufficient that the Court concludes, without having undertaken any detailed analysis, that the risk of severe economic repercussions cannot be excluded. However, if the Court is willing to achieve a different result, it holds that the answer to the interpretation issue it has to solve is clear, and, as far as the severe economic consequences are concerned, shifts the burden of proof to the governments to an extent whereby it is almost or completely impossible for them to establish the required evidence. The overall

impression is that the Court disguises an almost completely political decision as a mere legal decision.

Those judgments in particular where the Court did not apply high standards and where it was willing to limit the temporal effects of a judgment have created high expectations on the part of the Member States. However, if the Court continues to focus on the severity of the economic consequences, the result will be very unsatisfactory. It is impossible to develop a clear line of reasoning and there will always be tensions between different judgments. Since there are no precise estimates about the predicted loss of revenues, each decision will appear to be arbitrary. Furthermore, it is not satisfactory for a legal culture if severe infringements of Community law can more easily justify limitations of the temporal effects of judgments than less severe infringements. Therefore, the Court should be very careful in limiting the temporal effects of its judgments. The fact that the Member States might experience severe consequences in the case of an infringement of Community law is their most effective motivation to watch closely whether their rules comply with Community law.<sup>99</sup> Particularly in tax cases, Member States deserve to have the ECJ apply a high standard and that it should not be willing to accept a limitation of the temporal effects of its judgments easily, since only the Member States themselves suffer from the fact that their law constituted an infringement of Community law; in cases like *Defrenne*, in contrast, it is private undertakings that are not responsible for the breach of Community law who are the victims. However, it must be admitted that ECJ case law in direct taxation is not always consistent and thus is not sufficiently predictable.<sup>100</sup> In such cases applying a judgment retroactively might create windfall profits for the taxpayers rather than lead to 'learning effects' for the Member States.<sup>101</sup> Thus, the more consistent the Court's case law, the lesser the need to limit the temporal effects of the judgments.

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<sup>99</sup> Vogel, 'Der EuGH und die direkten Steuern', *Steuer und Wirtschaft* (2005), p. 373 (p. 377).

<sup>100</sup> See in more detail Lang, 'Direct Taxation: Is the ECJ Heading in a New Direction?', *European Taxation* (2006), p. 421 et seq.

<sup>101</sup> Vording and Lubbers, *British Tax Review*, note 81, p. 111.

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