

Legal Remedies in European Tax Law

Ubi ius, ibi remedium. Nevertheless, the topic of legal remedies has so far been significantly underexposed within the academic tax community. In *Legal Remedies in European Tax Law* 38 experts from 16 countries fill this gap with their reports and commentaries, which combine the theory on and practice of legal remedies in a single source. Procedural and substantive issues of European tax law are analysed together, with a view to achieving an effective protection of taxpayers' rights at the national and European level, thus making this book an essential tool for practising tax lawyers and academics who consider the legal instruments provided by European law to be an essential instrument to prevent or solve controversies on cross-border tax issues.

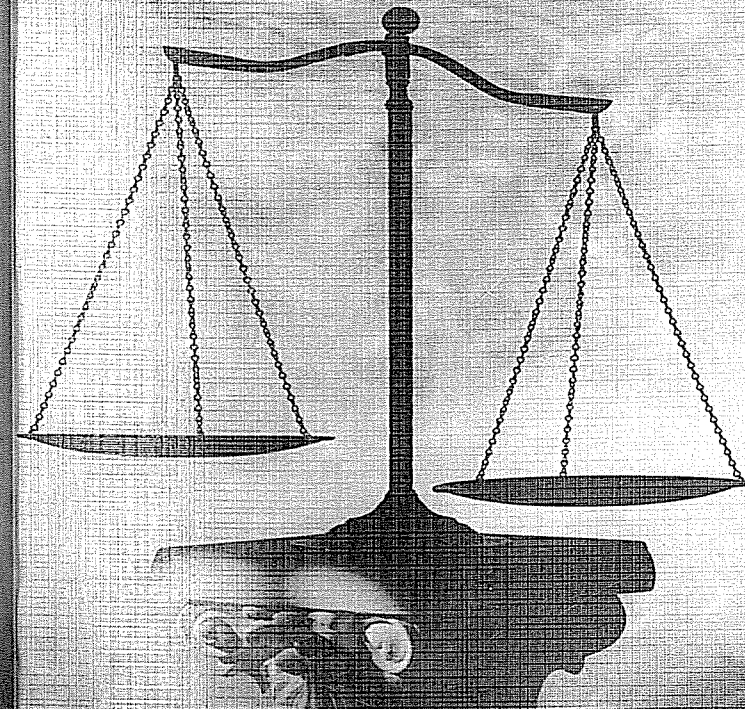
The book includes a general report drafted by the editor and is divided into eight parts, focusing on (i) reconciliatory interpretation and the direct effect of EC decisions, (ii) legal protection of taxpayers in preliminary ruling procedures, (iii) legal remedies and infringement procedures, (iv) direct action: State aids, (v) liability for damages in European law and taxation, (vi) hindrances in the access to justice and the right to free-standing action, (vii) forum shopping: differences in statutes of limitation and in action before civil courts (for damages) and tax courts (for appealing a tax audit), and (viii) legal remedies for an effective protection of taxpayers in the presence of non-appealable acts or decisions infringing European law.

The book is the outcome of the 3rd annual conference of GREIT (Group for Research on European International Taxation), and follows up the analysis of European law issues for the tax community in *Towards a Homogeneous EC Direct Tax Law* and *The Acte Clair in EC Direct Tax Law*, both of which are published by IBFD.

Contributors: Kristiina Alma, Fabrizio Amatucci, Robert Attard, Philip Baker, Stefania Bariatti, Cecile Brokelind, Kelly Coutinho, Daniel Deak, Ana Paula Dourado, Karsten Engsig Sørensen, Carlo Garbarino, Bruno Gencarelli, Daniel Guzmán, Marjaana Helminen, Mariassunta Imbrenda, Michael Lang, Agostino Ennio La Scala, Raymond Luja, Richard Lyal, Georgios Matsos, Katerina Perrou, Pasquale Pistone, Franco Roccatagliata, Pierpaolo Rossi-Maccanico, Daniel Sarmiento, Mario Tenore, Francesco Tesoro, Edoardo Traversa, Enrico Traversa, Matthias Valta, Stefanie Valta, Servaas van Thiel, Frans Vanistendael, Danil Vinnitskiy, Peter Wattel, Dennis Weber, Adam Zalasinski, Nataša Zunić-Kovacević.

IBFD

Edited by Pasquale Pistone
Legal Remedies in European Tax Law



Legal Remedies in European Tax Law

Edited by Pasquale Pistone

IBFD

Legal Remedies in European Tax Law

Edited by
Pasquale Pistone

This book is based on the reports presented at an international conference held in Cetara-Salerno on 12 and 13 June 2008. The conference was organized with the financial support of the Austrian Research Fund (FWF) and also included among the sponsors Loyens & Loeff, the II University of Naples and the University of Salerno.



IBFD

Visitors' address:

H.J.E. Wenckebachweg 210
1096 AS Amsterdam
The Netherlands

Postal address:

P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100

Fax: 31-20-622 8658

www.ibfd.org

© 2009 by the authors

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on IBFD's part. In no event shall IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

Where photocopying of parts of this publication is permitted under Art. 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and Art. 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (Art. 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 978-90-8722-065-5

NUR 826

Table of Contents

Preface	xxiii
List of Abbreviations	xxvii
Chapter 0. The General Report	1
<i>Pasquale Pistone</i>	
0.1. The general debate on legal remedies in European tax law and the need for a follow-up in the field of cross-border taxation	1
0.2. Methodological questions and critical overview	7
0.2.1. Part one – Reconciliatory interpretation and the direct effect of decisions by the ECJ	7
0.2.2. Legal protection of taxpayers in the framework of preliminary ruling procedures	12
0.2.3. Legal remedies and infringement procedures	14
0.2.4. Direct action: State aids and the European Court of First Instance	15
0.2.5. The liability for damages	17
0.2.6. Hindrances in access to justice and the right to free-standing action	19
0.2.7. Forum shopping: Differences in statutes of limitation and in action before civil courts (for damages) and tax courts (for appealing a tax audit)	20
0.2.8. Legal remedies for an effective protection of taxpayers in the presence of non-appealable acts or decisions infringing European law	23
Part One Reconciliatory Interpretation and the Direct Effect of Decisions	
Chapter 1. The Scope for “Consistent Interpretation” in the Area of Dividend Taxation	27
<i>Mario Tenore</i>	
1.1. Introduction	27

1.2.	The borders of consistent interpretation	28
1.2.1.	Definition and legal basis	28
1.2.2.	<i>Direct effect v. consistent interpretation</i>	31
1.3.	Consistent interpretation: A multi-level concept	33
1.3.1.	Consistent interpretation of national law provisions with the EC Treaty	33
1.4.	Consistent interpretation in the area of the cross-border taxation of dividends	37
1.4.1.	The principle of consistent interpretation and the Parent-Subsidiary Directive	37
1.4.2.	Is there a principle of consistent interpretation for EC soft tax law?	41

Chapter 2. Some Remarks on the Application of Community Law, Its Legal Effects and the Relationship between These Concepts 45

Dennis Weber

2.1.	Introduction	45
2.2.	Direct applicability of Community law	45
2.3.	Primacy of Community law	46
2.4.	Direct effect of Community law	46
2.4.1.	Unconditional	47
2.4.2.	Sufficiently precise	50
2.4.3.	Horizontal and vertical direct effect	50
2.4.4.	Inverse direct effect	52
2.5.	Legality review	53
2.5.1.	Conditions	53
2.5.2.	Case law with respect to legality review	54
2.6.	Legal consequences of the applicability of Community law	56
2.6.1.	“Exclusion” effect and “substitution” effect	56
2.6.1.1.	How does the application of Community law take place?	57
2.6.1.2.	National legislation is set aside only to the extent it is in conflict with Community law	58
2.6.2.	Consistent interpretation	60
2.6.2.1.	Conditions for applicability	60
2.6.2.2.	National case law on interpretation in conformity with Community law	61
2.6.3.	Specific problems in application	63

2.6.3.1.	Application in the legality review	63
2.6.3.1.1.	The <i>Brinkmann</i> decision	63
2.6.3.2.	Asymmetrical and/or selective reliance on Community law	66
2.6.3.2.1.	Netherlands case law concerning a selective reliance on Community law	66

Chapter 3. The European Commission’s Soft-Law Approach and Its Possible Impact on EC Tax Law Interpretation 69

Franco Roccatagliata

3.1.	Introduction	69
3.2.	The non-binding instruments of the European Commission and the other EU institutions	69
3.3.	EC tax policy and soft law	75
3.4.	Impact of the EC soft law on ECJ decisions	77
3.5.	Impact of the EC soft law on the national court decisions	79
3.6.	Limits of the soft-law approach	83
3.7.	Conclusions	84

Comments and Notes
on Part One

Chapter 4. Interpreting European Law in National Courts: Treating in the Limits of the Possible, or of the Impossible? 91

Daniel Sarmiento

Part Two
Legal Protection of Taxpayers
in Preliminary Ruling Procedures

Chapter 5. The Failure to Reply a Specific Question Posed by the National Court: A Case of Lack of Legal Protection at the Level of the European Court of Justice 97

Carlo Garbarino

5.1.	The preliminary ruling procedure as a set of interlocked questions and answers	97
------	--	----

5.2.	Situations of lack of legal protection at the European and national level	99
5.3.	Cases of lack of legal protection at the European level	102
5.3.1.	The most-favoured-nation principle	102
5.3.2.	The elimination of double taxation	104
5.3.3.	The cross-border exercise of a fundamental freedom for economic purposes	106
Chapter 6. Enhancing Taxpayers' Community Rights: A Tax Board for Advance Rulings in EC Tax Law at the ECJ?		
	<i>Cécile Brokelind</i>	111
6.1.	Background: Welcome to the real world...	111
6.2.	Why does the preliminary ruling procedure not work and why does it not offer taxpayers effective legal protection?	113
6.2.1.	Problems at the level of national courts	114
6.2.2.	Problems at the level of the ECJ	115
6.2.3.	Problems in enforcing the court's rulings	116
6.3.	What can be done? Comitology?	117
6.3.1.	Substantive changes	118
6.3.2.	Procedural changes	118
6.4.	The Swedish Board for Advance Rulings as a source of inspiration	120
6.5.	Evaluation and recommendations	123
Chapter 7. Law and Facts and the Interpretative Jurisdiction of the ECJ in Preliminary Rulings in Direct Tax Matters		
	<i>Adam Zalasinski</i>	125
7.1.	Introduction	125
7.2.	Reference from a national court	126
7.2.1.	The stage at which to submit a question for a preliminary ruling	126
7.2.2.	The content of the order for reference	127
7.3.	The structure of preliminary ruling procedures	128
7.4.	The importance of law and facts within the preliminary ruling procedures	129
7.4.1.	General remarks	129
7.4.2.	Questions arising in disputes concerning the principles of secondary legislation	129

7.4.3.	Questions arising in disputes concerning the principles of primary legislation	132
7.4.4.	Law and facts and the purpose of the hearing in direct tax preliminary rulings	136
7.5.	Conclusions	137
Chapter 8. The Legal Protection of Taxpayers in the Framework of Preliminary Questions		
	<i>Ana Paula Dourado</i>	139
8.1.	Introduction	139
8.2.	The interpretation by national courts	140
8.2.1.	Role of national courts in applying Art. 234 of the EC Treaty	140
8.2.2.	The possibility for a lower court in a Member State to interact directly with the ECJ	144
8.2.3.	The role of the ECJ when applying Art. 234 of the EC Treaty	145
8.3.	The principles of national procedural autonomy and effective judicial protection	148
8.4.	Cases involving indirect taxation issues and direct taxation issues	151
Comments and Notes on Part Two		
Chapter 9A. Legal Protection of Taxpayers and Preliminary Ruling Procedures: Experience of the Russian Federation		
	<i>Danil V. Vinnitskiy</i>	155
Chapter 9B. Reconciliatory Interpretation and the Direct Effect of Decisions: The Way beyond Preliminary Ruling Procedures		
	<i>Daniel Déak</i>	159
9B.1.	Introduction	159
9B.2.	Direct effect, legality review, exclusion and substitution effect, consistent interpretation	160
9B.3.	Extension of the principle of equivalence to direct tax cases	162

9B.4. Application of the principle of proportionality to direct taxes	163
9B.5. Application of the principle of effectiveness to direct taxes: A micro-perspective on the approximation of national tax laws	164
9B.6. Concluding remarks	164

Part Three
Legal Remedies
and Infringement Procedures

Chapter 10. Outline of the Infringement Procedure and Its Relationship with Preliminary Interpretation Proceedings	169
---	-----

Stefania Bariatti

10.1. Introduction	169
10.2. Pre-litigation procedure	171
10.2.1. The letter of formal notice	171
10.2.2. The reasoned opinion	172
10.3. The litigation stage before the ECJ – Art. 226 (2) of the EC Treaty	173
10.4. The consequences of infringement procedures	173
10.5. Action under Art. 228 of the EC Treaty	174
10.6. Relationship between infringement procedures and preliminary rulings	175

Chapter 11. A European Tax Ombudsman?	179
--	-----

Kristiina Äimä

11.1. Scope	179
11.2. The Ombudsman institution in a nutshell	180
11.3. The European Ombudsman	181
11.4. The example of Finland	183
11.5. The Tax Ombudsman institution in selected countries	185
11.5.1. Australia	185
11.5.2. Canada	186
11.5.3. India	187
11.5.4. Spain	187
11.5.5. The United Kingdom	188
11.5.6. The United States	188
11.6. Introducing a European Tax Ombudsman	189

Chapter 12. Ensuring the Effective Primacy of European Law beyond Preliminary Ruling Procedures: Some Thoughts on Strengthening the Function of Letters of Complaint and Infringement Procedures in the Field of Direct Taxes	191
--	-----

Pasquale Pistone

12.1. The lack of an effective and homogeneous protection under European law in the field of taxation	191
12.2. Ensuring the effective protection of taxpayers' rights outside the framework of preliminary ruling procedures: Some thoughts on the legal instruments	196
12.3. The letter of complaint	197
12.4. Selected issues on effective protection during infringement procedures in the field of direct taxation	204
12.4.1. The interpretation of national law in the framework of infringement procedures	205
12.4.2. The discretionary powers in starting infringement procedures and during the procedure itself	205
12.5. Conclusions	214

Comments and Notes
on Part Three

Chapter 13. On a European Tax Ombudsman	219
--	-----

Marjaana Helminen

Part Four
Direct Action:
State Aids

Chapter 14. The Point on Selectivity in State Aid Review of Business Tax Measures	223
--	-----

Pierpaolo Rossi-Maccanico

14.1. The specificity of the notion of fiscal aid in State aid review	223
14.2. International and national scopes in examining fiscal aids	224

14.3. Justification by the nature or general scheme of the system	227
14.4. Selective and general tax measures	228
14.5. Diverging views	229
14.6. A scheme summarizing State aid review of tax measures	232
Chapter 15. The Standing of Third Parties in State Aid Cases: Recent Developments in the Case Law of the ECJ	235
<i>Bruno Gencarelli</i>	
15.1. The locus standi of third parties in the case law of European Courts	235
15.2. The <i>Sniace</i> and <i>Lenzing</i> judgments	239
Chapter 16. Reduced Effectiveness of Legal Protection of Taxpayers against Tax Measures Constituting State Aids	245
<i>Fabrizio Amatucci</i>	
16.1. Derogation from the principle of Community loyalty between national courts and Community institutions and reduced protection of taxpayers' rights	245
16.2. Effect of the Commission decision concerning State aids and constraints with respect to the national courts	247
16.3. The problem of the overcoming of national judgments in the case of State aids recovery	248
16.4. Different types of taxpayers' protection against State aids decisions	249
16.5. The recent re-evaluation of the role of national courts and the risk of postponing justice	250
Chapter 17. Legal Protection of the Diligent Recipient of Fiscal State Aid	253
<i>Raymond H.C. Luja</i>	
17.1. Introduction	253
17.2. The frustration of being (or becoming) a diligent businessman	255
17.3. In need of notification	256
17.4. Potential solutions	258
17.4.1. Lack of access	258

17.4.2. Alternative I: The Commission	259
17.4.3. Alternative II: The European courts	261
17.4.4. Alternative III: The national courts	262
17.4.5. Alternative IV: Doing nothing?	263
17.5. Concluding remarks	264
Comments and Notes on Part Four	
Chapter 18A. Reflections on the Inconsistent Role of Competition in State Aids Rules	267
<i>Frans Vanistendael</i>	
Chapter 18B. Selectivity as a Criterion to Determine Whether a Tax Measure Constitutes State Aid	269
<i>Michael Lang</i>	
Part Five Liability for Damages in European Law and Taxation	
Chapter 19. Publication of Income Data and Privacy from a Perspective of Private Law	273
<i>Mariassunta Imbrenda</i>	
19.1. The role of information in administrative action	273
19.2. The processing of personal data	274
19.3. The relativity of the concept of privacy	275
19.4. The case of dissemination of Italian taxpayers' data on the internet	276
Chapter 20. Fundamental Aspects of the Liability of a Member State for Damages in Respect of Unlawful Tax Provisions	279
<i>Richard Lyal</i>	
20.1. The consequences of the unlawful tax provisions under European law	279
20.2. The principles of equivalence and effectiveness	280

20.3. Consequential losses	282
20.4. Remedies in the tax context	285
Chapter 21. Refund of Taxes and Charges Collected Contrary to Community Law	287
<i>Servaas van Thiel</i>	
21.1. Starting point	287
21.2. The principles	291
21.2.1. General	291
21.2.2. The principle of good faith cooperation	292
21.2.3. The principle of effectiveness	299
21.3. The operational guidelines: Principles of equivalence and effectiveness	301
21.4. Remedies, including the right to refund of national taxes or charges collected contrary to Community law	305
21.4.1. General	305
21.4.2. The right to refund of taxes	306
21.4.3. <i>The right to refund of illegally collected taxes v. the right to claim damages</i>	313
21.5. Summary	319

Comments and Notes
on Part Five

Chapter 22A. Protection of the Taxpayer in Relation to Fiscal Penalties in the Case Law of the European Court of Justice	325
<i>Enrico Traversa</i>	
22A.1. Introduction	325
22A.2. Discriminatory penalties	325
22A.3. Unreasonable penalties: Refusal to apply a compulsory exemption	326
22A.4. Unreasonable penalties: Restrictions on the right to deduct VAT	327
22A.5. Excessive penalties	328
Chapter 22B. Promoting Private Enforcement in Tax Matters	331
<i>Karsten Engsig Sørensen</i>	

Part Six	
Hindrances in Access to Justice and the Right to Free Standing Action	
Chapter 23. Hitchhiking to Luxembourg: Indirect Actions against Normative Acts after <i>Jégo Quéré</i> and <i>Unibet</i>	337
<i>Stefanie Valta</i>	
23.1. Introduction	337
23.2. <i>Unibet</i> : Facts and questions in law	337
23.3. Parallel legal questions in the <i>Jégo Quéré</i> and <i>Unión de Pequeños Agricultores</i> cases	339
23.3.1. Starting point: <i>Plaumann</i> formula	339
23.3.2. Rethinking the concept of “individually concerned”: Creation of a residual free-standing action in the case of ineffectiveness of national proceedings?	342
23.3.3. Actions for damages	344
23.3.4. Residual competence: Duty to place oneself in illegality to seek for judicial protection?	345
23.4. Clarification on the notion of effectiveness in the <i>Unibet</i> case	347
23.4.1. Duty to create legal remedies not provided in national procedural law	348
23.4.2. Preconditions of this duty	348
23.4.3. Damages claims: Obligation to review	349
23.4.3.1. Possible non-review of the contested norm	349
23.4.3.2. Waiting for damages?	351
23.4.3.3. Relation to the judicial review against administrative acts	352
23.4.4. Right not to be placed in illegality	353
23.5. Repercussions on the judicial protection against Community regulations	355
23.5.1. Effectiveness of indirect routes	356
23.5.2. Right not to be placed in illegality	357
23.5.3. Opening the discussion on the Community jurisdiction’s residual competence?	358
23.5.4. Action for damages in relation to an objection of illegality	359
23.5.4.1. No general duty to review the legality of a Community regulation in damages proceedings	360
23.5.4.2. Exception: Non-referral of national courts	362
23.6. Conclusions	363

Chapter 24. Judicial Cooperation and Taxpayer Protection. The Effective Implementation of ECJ Preliminary Rulings: The Example of Case C-234/01 "Gerritse"	365
<i>Matthias Valta</i>	
24.1. Introduction	365
24.2. Material aspects	366
24.2.1. Scope of application of a fundamental freedom	366
24.2.2. Infringements by discrimination	367
24.2.2.1. Basic exemption	367
24.2.2.2. Taking into account of business and non-personal private expenses	367
24.2.2.3. Tax rate	368
24.2.2.4. Withholding taxation at source	368
24.3. Justifications	368
24.3.1. Taking into account of business and non-personal private expenses	368
24.3.2. Tax rate	370
24.3.3. Withholding taxation at source	370
24.3.4. Results	371
24.4. The judicial procedures	371
24.4.1. The German Regional Tax Court (1999–2003)	372
24.4.1.1. Referral to the ECJ (2001)	372
24.4.1.2. The Opinion of Advocate General Léger (2003)	372
24.4.1.3. The <i>Gerritse</i> decision of the ECJ (2003)	375
24.4.1.4. The final decision of the Regional Tax Court (2003)	377
24.4.2. The counter-reaction by the German Federal Ministry of Finance (2003)	379
24.4.3. The infringement procedure: Letter of formal notice (2004)	380
24.4.4. Appeal to the Federal Tax Court (2003–2007)	381
24.4.4.1. Stay of the procedure due to the ECJ decision on <i>Scorpio</i> (2004–2006)	381
24.4.4.2. The final decision of the Federal Tax Court (2007)	382
24.4.5. The German Constitutional Court (2007)	383
24.4.6. The infringement procedure: Reasoned opinions (2007 and 2008)	383
24.4.6.1. The circular to implement the <i>Scorpio</i> decision (2007)	384

24.4.6.2. Non-cooperation in the issue of future tax deduction at source	385
24.4.6.3. The wording of the law unchanged for six years	385
24.4.7. The 2009 Law Reform and the closing of the infringement procedure (May 2009)	385
24.5. Concluding observations	386
24.5.1. The protagonists and their interaction	386
24.5.1.1. The taxpayer and his attorneys: Establishing a leading case	386
24.5.1.2. The Regional Tax Court: Empowered and daring	387
24.5.1.3. The ECJ: Not extracting all the issues	388
24.5.1.4. The Federal Tax Court: Reserved implementation by command	388
24.5.1.5. The German government and the tax administration: Politically ordered deferment?	388
24.5.1.6. The German legislator: No independent role alongside the bureaucracy?	389
24.5.2. The procedural tension in Art. 234 (1) (a) of the EC Treaty	389
24.5.2.1. From the case: The reformulation and extraction of preliminary questions	391
24.5.2.2. Beyond the case: Obiter dicta	392
24.5.2.3. Back to the case: A margin of implementation?	392
24.5.3. Conclusion: The ECJ's powers are not to be underestimated	393
Comments and Notes on Part Six	
Chapter 25. Some Remarks on the Hindrances in Access to Justice and the Right to Free-Standing Action in European Tax Law	397
<i>Edoardo Traversa</i>	
25.1. Procedural aspects and the effectiveness of rights in the Community legal order	397

25.2. The obligation of Member States to provide effective legal remedies	398
25.3. The duty of Member States to timely implement ECJ decisions	399
Part Seven	
Forum Shopping:	
Differences in Statutes of Limitation and in Action before Civil Courts (for Damages) and Tax Courts (for Appealing a Tax Audit)	
Chapter 26. Time Limits, Legal Protection and their Extension	403
<i>Katerina Perrou</i>	
26.1. Introduction	403
26.2. Direct applicability of EC Treaty freedoms in the field of direct taxation	403
26.3. The principle of effectiveness in Community law	406
26.4. The principle of effective judicial protection	407
26.5. Possible limitations to the principle of effectiveness: National procedural autonomy	408
26.6. National remedies for the repayment of taxes	411
26.6.1. The use of alternative remedies (damages)	412
26.6.2. The use of the remedy provided already (refund of taxes unduly paid)	412
26.7. National limitation periods under the scrutiny of the ECJ	415
26.8. The principle of legal certainty and national limitation periods	422
26.9. Possible counter-arguments	425
26.9.1. Excusable error	425
26.9.2. Settled practice	426
26.9.3. The taxpayer never complained	426
26.9.4. The taxpayer had a duty to mitigate its exposure	427
26.9.5. Res judicata or finality of court decisions and administrative acts	428
26.9.6. National procedural autonomy v. principle of effectiveness	430
26.9.7. Legal certainty supersedes effectiveness of Community law	430

26.9.8. Budgetary certainty	431
26.10. Final remarks	433
Chapter 27. Issues in Remedying Tax Overpaid by Virtue of Illegality: A Case Study of the UK	435
<i>Kelly Coutinho</i>	
27.1. Introduction	435
27.2. Remedies	436
27.3. The development of UK case law	439
27.4. Jurisdiction	442
27.5. Why a taxpayer should have a choice of forum	444
27.6. Challenging law through the tax return	444
27.7. The High Court v. the Special Commissioners	445
27.8. Conclusion	447
Chapter 28. "Forum Shopping" in EC Tax Law Matters in the Light of the Principle of Legal Certainty	449
<i>Georgios Matsos</i>	
28.1. Is EC law "normal" law?	449
28.1.1. The institutional character of EC law	449
28.1.2. <i>Juristenrecht</i> : The missing core of EC law	453
28.2. Principles: <i>Legal certainty v. rule of law</i>	456
28.3. Examination of the ECJ case law	460
28.4. Conclusion	467
Chapter 29. Forum Shopping with the ECJ	469
<i>Peter J. Wattel</i>	
29.1. Introduction: Access to court; different time limits for appeal and for repayment/damages	469
29.2. The <i>Metallgesellschaft</i> and <i>Thin Cap</i> cases	470
29.3. Incompatibility with <i>Arcor and i-21</i> , <i>Deggendorf</i> , <i>AssiDomän Kraft</i> and <i>Unibet</i>	472
29.4. Consequences: Forum shopping possibilities; double standards	474
29.5. Illustration: The <i>N. v. Inspecteur</i> case (exit tax) is turning into a national time limits case	475
29.6. Postscript: Two recent judgments	477

29.6.1. <i>Danske Slagterier v. Deutschland</i>	477
29.6.2. <i>N. v. Inspector</i> : National follow-up	479
Chapter 30. On Forum Shopping through the ECJ and the Need for <i>Juristenrecht</i>	481
<i>Nataša Žunić-Kovačević</i>	
30.1. A new form of forum shopping	481
30.2. Forum shopping through <i>Richterrecht</i>	483
Part Eight	
Legal Remedies for an Effective Protection of Taxpayers in the Presence of Non-Appealable Acts or Decisions Infringing European Law	
Chapter 31. The European Convention on Human Rights, a Tool to Ensure the Efficiency of EC Law	487
<i>Daniel Gutmann</i>	
31.1. Introduction	487
31.2. The setting	488
31.3. The actors	488
31.4. The strategies	489
31.5. The moral of the story	491
Chapter 32. The Taxpayer's Human Rights in the Examination of the European Court of Human Rights	495
<i>Agostino Ennio La Scala</i>	
32.1. The traditional non-application of the European Convention on Human Rights to taxation	495
32.2. The reasons for a full extension of the ECHR's principles to taxation	497
32.3. Towards a revision of the ECtHR's case law?	500
32.4. The different approach of the European Court of Justice to ensure the protection of taxpayers' rights	501
32.5. The critical equilibrium between protection of taxpayers' rights and the Revenue interest	503

Chapter 33. The EU Prohibition of Abuse of Law and the Limits of the Principle of "External" Res Judicata in Conflict with European Law	507
<i>Francesco Tesauro</i>	
33.1. An order for reference by the Italian Supreme Court	507
33.2. Some short remarks on abuse in European (tax) law	507
33.3. Abusive practices and the prohibition of abuse of law	508
33.4. The Italian Supreme Court and the ECJ case law on abuse	509
33.5. Facts, law, concepts and precedents of the <i>Fallimento Olimpiclub</i> case	510
33.6. Possible future developments for res judicata in Italian and European tax law?	513
Chapter 34. Revoking the Irrevocable: The Need to Give Taxpayers an Effective Protection of Rights Granted by the EC Treaty Even in the Case of Final Non-Appealable Acts	515
<i>Robert Attard</i>	
34.1. Three fundamental principles	515
34.2. Never say never	516
34.2.1. The <i>Köbler</i> case	516
34.2.2. The <i>Kühne & Heitz</i> case	521
34.2.3. The <i>i-21 and Arcor</i> joined cases	523
34.2.4. Too little too late?	525
34.3. A case for lateral thinking	525
34.3.1. Retrial	526
34.3.2. Self-correction procedures (the Italian <i>autotutela</i> , or <i>Chi fad da sé fa per tre</i>)	527
34.3.3. Fundamental human rights: The most effective remedy?	528
34.4. The relevance of the ECHR to final non-appealable acts	529
34.4.1. Art. 1 of the First Protocol of the ECHR (Right to property)	530
34.4.2. Art. 6 ECHR (Fair hearing)	532
34.4.3. The right to an effective remedy and the right to freedom of movement: The case <i>Riener v. Bulgaria</i>	533

Table of Contents

34.4.4. Protection from discrimination, a matter of <i>Convergenza Parallela</i>	535
34.5. Conclusion	537
Chapter 35. Some Comments on European Tax Law and Human Rights	539
<i>Philip Baker</i>	
List of Authors	541

Preface

Until now the topic of legal remedies in European direct tax law has been significantly underexposed within the academic tax community.

This book aims at filling this gap with the contributions of almost 40 academic experts from 16 countries, providing a written forum that combines the typical approaches to European tax law with a general vision on European law, and puts together theory and practice, but also includes contributions on selected relevant issues arising in the protection of taxpayers' rights.

The book was drafted on the basis of a conference held in Cetara-Salerno in June 2008 and contains an updated and revised version of the 26 reports presented at that conference, together with some brief commentaries drafted by other experts.

The selection of this topic was decided in common by the members of the Group of Research on European International Taxation (*GREIT*)¹ within its area of research activity that aims at developing a common methodology for interpreting and applying European law in the field of taxation, thus taking into account the peculiar issues that may arise in this context and that nevertheless do not deprive European law of its general features, including the need to secure an effective supremacy over national law. The activity and projects carried out within this research group aim at making European law better known and understood within the international tax community, but also at introducing general European law experts to the field of direct taxation. In both cases GREIT works to overcome a certain reluctance to study such issues that has grown in both circles over the past decade; this reluctance is possibly due to the frantic development experienced by European direct tax law through the roughly 140 decisions of the European Court of Justice. Above all, GREIT believes that such activity is essential to protect the rule of law within a system that requires by its own structure a shared application at different levels of government. And my personal hope, considering the importance that relations with third countries have in my own line of research, is that the development of European tax law may be better predictable and understood not just within the Internal Market, but also outside it.

1. www.greit-tax.eu. GREIT was founded in 2006 by Cécile Brokelind, Ana Paula Dourado, Pasquale Pistone and Dennis Weber.

arising in disputes before them. In these disputes taxpayers challenge the legality of tax authorities' decisions (directly) and the EC compliance of the statutory basis for such decisions (indirectly).

The ECJ gives an interpretation of EC law, which is not abstract, but conversely is drafted in order to answer the preliminary question, which is drafted to seek guidance on whether EC law precludes introducing and maintaining in force certain precisely described legal provisions.

As was discussed in Section 7.4., the law and facts of the domestic dispute, which are given in the order for reference, serve various purposes in the judicial reasoning of the ECJ. Furthermore, the relevance of the facts and the law is different in cases concerning the interpretation of principles of "positive" and "negative" integration. However, these factors serve the same purpose. Both the law and the facts of the domestic dispute are used as the interpretative material for interpretation of EC law by the ECJ.

It must be noted that the court uses such interpretative materials in rather a dynamic way. The facts and the law are additionally clarified and interpreted in the hearings. Moreover, the order for reference should include all relevant domestic case law and official interpretations. Such a dynamic approach is designed to better serve the purpose of the preliminary ruling procedures in tax cases, which is to assist domestic courts with the interpretation of EC law in individual cases.³¹⁵ It must be borne in mind that the direct tax disputes before domestic courts may imply at least indirectly a review of the EC compliance of the statutory basis for tax decisions. Therefore, the preliminary rulings in tax cases may give the impression of the trial of domestic law accused of infringing EC law.

315. The tax specialization of the judges is not discussed here.

Chapter 8

The Legal Protection of Taxpayers in the Framework of Preliminary Questions

Ana Paula Dourado

8.1. Introduction

It results from the previous conferences of GREIT, respectively, and from their subsequently published papers,^{316,317} that the preliminary ruling procedure does not totally guarantee the legal protection of taxpayers. Much of this unsatisfactory protection arguably results from the *CILFIT*³¹⁸ doctrine (or the *acte clair* doctrine), which allows national courts of last instance under Art. 234 (3) of the EC Treaty, to decide cases on direct taxation that involve interpretation of EC law without referring them to the ECJ for a preliminary ruling.

I have claimed, in contrast, that the advantages of the *CILFIT* doctrine overcome the disadvantages if the following conditions are met: if national courts comply with Art. 10 of the EC Treaty when applying the *CILFIT* criteria and last instance courts justify non-referrals; if the ECJ develops second and third-level principles when applying the fundamental freedoms to direct tax issues, so that legal vagueness progressively decreases; if it pays due attention to the coherence of its rulings or expressly justifies changes in its case law.³¹⁹ In spite of some inconsistency in the case law (let me mention recent cases, such as *Columbus Container* and *Truck Center*), the direct tax issues in respect of which there is settled case law or where it is being developed (for instance, on cross-border losses the court discusses the criteria put forward in *Marks & Spencer*), confirm this optimistic reading of *CILFIT*.

316. Brokelind, C. (ed.), *Towards a Homogeneous Direct Tax Law, An Assessment of the Member States' Responses to the ECJ's Case Law*, IBFD, Amsterdam, 2007.

317. Dourado, A.P., da Palma Borges, R. (eds.), *The Acte clair in EC Direct Tax Law*, IBFD, Amsterdam, 2008.

318. ECJ, decision 6 October 1982, case 283/81, *CILFIT Srl and Gavardo SpA*.

319. Dourado, A.P., "Is it *acte clair*? General report on the role played by *CILFIT* in direct taxation", in *The Acte clair...*, *cit.*, at 24-25, 67.

Moreover, as Advocate General Poiares Maduro wrote in his preface to *The Acte clair in Direct Tax Issues*, “in the face of a future important rise in litigation, there will be no alternative, particularly with the current judicial architecture, to an increased, de facto or de jure, decentralization of Community law interpretation (and not simple application) in national courts. If, as it is stated in the introduction to this book, the strict distinction between interpretation (a task of the ECJ) and application (a task of national courts) of Community rules has always been partially artificial, it will increasingly be challenged by the increase in Community law-related litigation”.³²⁰

In order to understand the degree of legal protection in the framework of the preliminary ruling, the following aspects and distinctions are to be considered, because they raise different problems: the interpretation of Art. 234 of the EC Treaty by national courts on the one hand; and the interpretation of Art. 234 of the EC Treaty by the European Court of Justice (hereinafter: ECJ or Court), on the other hand; the principles of national procedural autonomy and effective judicial protection; cases involving indirect taxation issues, on the one hand, and direct taxation issues, on the other (the degree of legal protection is not the same when we compare the situation in both fields). In direct taxation issues, cases involving interpretation of the EC Treaty and cases involving the interpretation of directives do not seem to be treated the same way, either.

Since the preliminary rulings mechanism and the meaning and scope of *acte clair* in direct taxation issues was the subject of the Lisbon Conference mentioned above, most of the assertions made below are handled in a more detailed way in the book *Acte clair in EC Direct Tax Law*, namely in my general report to the book.

8.2. The interpretation by national courts

8.2.1. Role of national courts in applying Art. 234 of the EC Treaty

National courts are EC law courts and therefore have to interpret and apply EC law together with the ECJ. This fact simultaneously strengthens and weakens the legal protection of taxpayers. On the one hand, it gives a broader protection to taxpayers, because national courts can immediately

320. Poiares Maduro, M., Preface to *The Acte clair in EC Direct Tax Issues*, *cit.*, at 2.

apply EC law. Besides, in the case of an ECJ preliminary ruling, its multi-lateral effect (as results from the doctrine of precedent created by *Da Costa* and *CILFIT*) means that national courts are obliged to apply the decisions of the ECJ on the compatibility of other Member State's legislation with EC law, if they have to rule on the compatibility of a similar national legislation with EC Law. As the contributions by Brokelind,³²¹ Kofler,³²² Sousa da Câmara,³²³ and Weber/Davits³²⁴ published in *The Acte clair in EC Direct Tax Law* illustrate, national courts are slowly but increasingly directly applying ECJ case law without referring cases to the ECJ.

The weak part of this procedure results from the fact that the preliminary ruling mechanism and the role of the ECJ as the court that assures the uniform interpretation of EC law, and consequently EU integration, depend on referrals being sent to the ECJ by the national courts.³²⁵ Behaviour of national courts towards the preliminary rulings procedure varies considerably, many of them being reluctant to refer issues to the ECJ, especially in respect of direct taxation matters. This means that uniform interpretation of EC law cannot be assured, and although in *Köbler* the ECJ recognized the possibility of state liability in case a national court does not fulfil its obligations to refer a case to the ECJ, the criteria set down by the ECJ and its decision in the same *Köbler* case seem to deny such liability.³²⁶ In other words, the ECJ case law on state liability for damages when a national supreme court does not refer a case to the ECJ (but should have referred it) does not contribute much to the protection of taxpayers under Art. 234 of the EC Treaty.³²⁷

321. Brokelind, C., “The *acte clair* doctrine arising from the ECJ's direct tax case law from a Swedish perspective: use or misuse?”, *The Acte clair... cit.*, at 481 et seq.

322. Kofler, G., “*Acte clair*, Community precedent and direct taxation in the Austrian judicial system”, *The Acte clair... cit.*, at 193.

323. Sousa da Câmara, F., “The meaning and scope of the *acte clair* doctrine concerning direct taxation: the Portuguese experience and the establishment of boundaries”, *The Acte clair... cit.*, at 385–387.

324. Weber, D., Davits, F., “The practical application of the *acte éclairé* and the *acte clair* doctrine (with references to Netherlands direct tax law)”, *The Acte clair... cit.*, at 298 et seq.

325. Sarmiento, D., “Who's afraid of the *acte clair* doctrine?”, *The Acte clair... cit.*, at 74–77.

326. This is not incompatible with the observation of Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford, 2006, at 525, according to whom, Köbler “views the relationship between the ECJ and the national courts as one of hierarchy rather than one of cooperation, since, ultimately, it is for the ECJ to determine whether the breach is “manifest”.

327. See *Köbler*.

As I have argued, the main problem lies in the lack of justification when supreme courts or tribunals deciding in last instance do not refer a case on the basis of *acte clair* (on the basis of no reasonable doubt on how to solve a case), because it contributes to hiding non-referred cases that do not correctly fulfil the *CILFIT* criteria and do not allow us to know what the real underlying motivation is.³²⁸ A rule obliging national courts to justify why they do not refer some cases to the ECJ would, on the one hand, reduce some of those non-referred decisions and, on the other hand, improve the results targeted by *CILFIT*, i.e. contribute to the construction of a vertical system of cooperation between the national courts and the ECJ, a decentralized system of legal protection.³²⁹

In certain situations, taxpayers can, however, take advantage of the different attitude of national courts, choosing the most convenient forum (which will reduce the disadvantages of misapplication of Art. 234 of the EC Treaty by national courts) – this is the case where the legislation of the two Member States applicable to a cross-border situation seems to be incompatible with EC law. Let us imagine that Mr Kerckhaert and Ms Morres, resident in Belgium, receive dividends from France withheld at source, for which France gives no credit.³³⁰ Mr Kerckhaert and Ms Morres could consider whether it would be preferable to raise the incompatibility of either the Belgian law or the French law before the respective competent courts, taking into account the likelihood of each of the involved national courts referring the issue to the ECJ, time-limit constraints and the efficiency of the procedural and process rules in each Member State involved.

In any case, it is important to stress that national courts have not themselves restricted the tax subject matter that can be referred to the ECJ. The main problem of the legal protection of taxpayers, therefore, does not lie in a restrictive scope according to the tax subject matter that can be referred to the ECJ, but instead, in a misinterpretation of Art. 234 of the EC Treaty (and the *CILFIT* doctrine) by the national courts.

Taking as an example the direct taxation issues, referrals by the national courts have so far covered the main elements of the tax legal

328. Dourado, A.P., "Is it *acte clair*?", *cit.*, e.g. at 22, 64–67.

329. See further on this ECJ, *Kühne & Heitz NV*, and Advocate General Stix-Hackl in case C-495/03, *Intermodal Transports BV*, points 104, 107, 121, 122, as well as Dourado, A.P., "Is it *acte clair*?", *cit.*, at 25 et seq., 64 et seq.

330. See the ECJ decisions: *Kerckhaert-Morres* and *Denkavit-France*.

obligation: rules on the entitlement to the EC Treaty,³³¹ on the tax incidence and the tax base;³³² domestic exemptions or tax credits regarding double taxation, rates and tax progression;³³³ anti-abuse clauses and presumptions;³³⁴ administrative procedural rules³³⁵ – in all these decisions the ECJ considered the regime to be incompatible with EC law in the presence of a discriminatory or restrictive element; connecting factors and criteria with a view to eliminating double taxation are considered to be under the power of the Member States;³³⁶ regimes aimed at preventing avoidance can justify discriminatory/restrictive regimes when they correspond to the (EC law interpretative) concept of abuse of Community law.³³⁷

With the exception of tax treaty rules,³³⁸ including the methods of eliminating/reducing double taxation,³³⁹ the ECJ does not deny an assessment on the compatibility of tax rules with the EC Treaty – although the case law is not consistent in this respect.³⁴⁰

331. See the ECJ decisions: *Avoir Fiscal*, *Commerzbank*, *Futura*, *Royal Bank of Scotland*, *Saint-Gobain*, *XY*, *CLT-UFA*, *Deutsche Shell*, *Lidl Belgium*; *Werner*, *Schumacker*, *Wielockx*, *Asscher*, *Gilly*, *Gschwind*, *Zurstrassen*, *Wallentin*, *Conijn*; *Metallgesellschaft*.

332. See the ECJ decisions: *Bachmann*, *Danner*, *Skandia*, *Schilling*, *De Lasteyrie du Saillant*, *N.*, *Safir*, *Bent Vestergaard*, *X AB/Y AB*, *Gerritse*, *Scorpio*, *Centro Equestre da Lezíria Grande*; *Metallgesellschaft*, *Bosal*, *Weidert-Paulus*, *Keller Holding*, *Lankhorst-Hohorst*, *Thin Cap Group Litigation*, *Lammers & Van Cleeff*, *Fournier*, *Eurowings*, *ICI*, *Futura*, *Amid*, *Mertens*, *Marks & Spencer*, *Ritter-Coulais*, *Rewe Zentralfinanz*, *Oy AA*, *Deutsche Shell*, *Lidl Belgium*, *Gilly*, *De Groot*, *Bouanich*, *Schempp*, *Jundt*, *Commission v. Portugal & Commission v. Sweden*, *Elisa*, *Commission v. France*, *Jäger*, *A.*, *A&B*, *Jundt*, *Orange European Smallcap Fund*.

333. See the ECJ decisions: *Baars*, *Verkooijen*, *Lenz*, *Holböck*, *Maninnen*, *Meilicke*, *Kerckhaert-Morres*, *ACT Group Litigation*, *FII Group Litigation*, *Royal Bank Scotland*, *CLT-UFA*, *Schumacker*, *Asscher*, *Biehl*, *Gilly*, *De Groot*, *Denkavit France & Amurta & also Commission v. France (Avoir Fiscal) Saint-Gobain*.

334. See the ECJ decisions: *Cadbury Schweppes*, *Lankhorst-Hohorst*, *Thin Cap Group Litigation*, *Lammers & Van Cleeff*, *Lasertec*, *Talotta*, *Elisa* (indirectly); *Rewe Zentralfinanz*, para. 42 and *Oy AA*, para. 54.

335. See the ECJ decisions: *Biehl*, *Schumacker*, *Commerzbank*, *Futura*, *Bent Vestergaard*, *Gerritse*, *N.*, *Scorpio*, *Centro Equestre da Lezíria Grande*, *Stauffer*, *Talotta*, *Elisa*, *A.*, *Orange European Smallcap Fund*.

336. See the ECJ decisions: *Gilly*, *FII Group Litigation*, *Columbus Container*.

337. See the ECJ decisions: *Halifax* and *Part Service*; Opinion of Advocate General Poiares Maduro in *Halifax* and *Cartesio*.

338. See the ECJ decisions: *D.* and *ACT Glo*.

339. See the ECJ decisions: *Gilly*, *FII Glo*.

340. See in this respect the ECJ decisions on the *Avoir Fiscal* and *Saint Gobain* cases.

8.2.2. The possibility for a lower court in a Member State to interact directly with the ECJ

The possibility of a lower court in a Member State to directly interact with the ECJ is vital to the uniform interpretation and the effective application of EC law (as indicated in the Opinion of Advocate General Poiares Maduro in *Cartesio*³⁴¹). Not only does it reduce the time-length and costs of the whole process, and therefore, increase the legal protection of the taxpayer, but it also strengthens the position of national courts as EC law courts and the vertical cooperation between the ECJ and the national courts. Besides, in direct tax law issues, in Member States where lower courts directly interact with the ECJ, referrals to the ECJ are also more frequent than in Member States where only the court of last instance applies Art. 234 of the EC Treaty.³⁴²

But, generally considered, Art. 234 of the EC Treaty also requires national lower courts to decide as Community courts, and this implies that they must take into account the consequences for the Community legal order as a whole.³⁴³ Understanding any national courts as Community courts also means that the issue of the necessity for a request for a preliminary ruling is to be decided between the referring court and the ECJ and the authority to refer a question under Art. 234 of the EC Treaty cannot be decided by national law³⁴⁴ – national rules may not oblige lower courts to suspend or even to revoke a request for a preliminary ruling.³⁴⁵ In *Cartesio*, the court confirmed the Opinion of the Advocate General.

At first sight, the disadvantage of referrals being sent directly by the lower courts to the ECJ is the increase or the number of referrals, consequently contributing to the work overload of the ECJ. But, on the one hand, this problem is to be solved by other means (a reform of the preliminary ruling mechanism),³⁴⁶ and, on the other, the interaction of lower courts with the ECJ has a much broader and more relevant meaning than the referral of cases to the latter. It means that lower courts as Community courts are privileged interlocutors of the ECJ in the interpretation and development of

341. AG Maduro, Opinion delivered on 22.5.2008, case C-210/06, para. 19.

342. See Weber, D., Davits, F., *cit.*, at 298 et seq.

343. Poiares Maduro, M., Preface, *cit.*, at 3.

344. Opinion of Advocate General Poiares Maduro in *Cartesio*, case C-210/06, 22 May 2008, point 20.

345. *Id.* at point 17.

346. See footnote 8 of Dourado, A.P., “Is it *acte clair*?”, *cit.*

Community law,³⁴⁷ that they are therefore familiar with EC law and contribute to its development, and may directly apply it, in case there is *acte clair*. I would argue that rather than increasing the workload of the ECJ, lower national courts will in this way contribute to relieving it from superfluous referrals.

8.2.3. The role of the ECJ when applying Art. 234 of the EC Treaty

In 1982, in the *CILFIT* case, the ECJ interpreted Art. 234 of the EC Treaty (then Art. 177 of the EEC) in such a way that it is claimed to have transformed a clear and unconditional obligation of national courts of last instance to make references to the ECJ into a discretionary decision.³⁴⁸ According to the *CILFIT* doctrine, national courts of last instance may implement EC law on their own authority when the result “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”.^{349,350}

As I have argued before, there is no reason to be afraid of *CILFIT*, since it results from interpretation of Art. 234 (3) of the EC Treaty and it is not likely that without *CILFIT* there would be more referrals in direct tax issues to the ECJ – the dynamic interpretation of Community law (“the state of evolution of Community law”) is of major importance in the application of Art. 234 (3) of the EC Treaty by the national courts, as the court held in para. 20 of *CILFIT*,³⁵¹ and the existence of a *reasonable doubt* is the relevant condition that justifies a referral to the ECJ³⁵² – when there is a reasonable doubt, referrals to courts occur even if a very similar case has been decided before.³⁵³ But the interaction of the ECJ and national courts

347. See Poiares Maduro, M., Preface, *cit.*, at 2–3.

348. Sarmiento, D., “Who’s afraid...?”, *cit.*, at 72.

349. ECJ, *CILFIT*, first part of para. 16.

350. Sarmiento, D., “Who’s afraid...?”, *cit.*, at 71.

351. See Weber, D., Davits, F., “The Practical Application...”, *cit.*, points 2.2.3.; 4.3.2. d), 6.2.2. b); 6.2.3. b); and in general (on the ECJ relevant case law) add Hummert, K., *Neubestimmung der Acte clair im Kooperationsverhältnis zwischen EU und Mitgliedstaaten*, Berlin, 2006, at 111 et seq.

352. See Arnulf, A., “The Use and Abuse of Art. 177 EEC”, *Modern Law Review*, 1989, at 622–623; Hummert, K., *Neubestimmung der Acte clair...*, *cit.*, at 101–107, 111 et seq.

353. See, for direct tax issues, Pistone, P., “The Search for Objective Standards for the Application of the *Acte clair* Doctrine to Direct Taxation”, in Dourado, A.P., da Palma Borges, R. (eds.), *cit.*, at 233.

is not enough for EC law to progress. The implementation aspects of the preliminary ruling by the national courts also have to be considered by the ECJ in its rulings, since rulings that prove difficult to implement weaken the legal protection of taxpayers. Even if the ECJ has to leave some implementation aspects to the national courts, cases such as *Marks & Spencer* and *Gerritse* left relevant issues open and their implementation is more than problematic.

The court also plays a role in recognizing the existence of *acte clair*, both when it decides by reasoned order and when it does not restrict the temporal effects of its rulings. Even though decisions on direct tax issues imply interpretation of vague principles (the fundamental freedoms), the court has recognized the possibility of *acte clair* by deciding by reasoned order.^{354,355} Also, the court exceptionally allows restricting the temporal effects of its rulings, as long as, among other conditions, no previous preliminary ruling on a legal point of law exists, and it has applied the same reasoning to a direct tax case – one case on a legal point of law may be enough for domestic courts to abstain from referring a case in direct tax issues.³⁵⁶ Only in the actual judgment on an interpretation on a point of law may there be a restriction to temporal effects (*Barra*,³⁵⁷ *Vincent Blaizot*,³⁵⁸ *Legros and Others*,³⁵⁹ *Bosman and Others*,³⁶⁰ *EKW and Wein and Co.*,³⁶¹ *Meilicke*³⁶²).

“Ruling upon an interpretation on a point of law” seems to be a synonym for *acte clair* and although it is difficult to determine when there is *acte clair* in direct tax issues, the court’s case law on temporal effects strengthens the taxpayer protection, since the decisions will have as a rule retroactive effect. However, the fact that the temporal limitation of the effects of a preliminary ruling has to be requested by a Member State in the first ECJ judgment on a point of law does not seem to contribute much to legal certainty

354. See the ECJ orders: *Mertens, De Baeck, Lasertec, A and B, Stahlwerk Ergste Westig GmbH*.

355. See Kofler, G., “*Acte clair*, Community Precedent...”, id., at 188–189; Zalasinski, A., “*Acte clair*, *Acte Éclairé*...”, id., at 334–335; Weber D., Davits, F., “The Practical Application...”, id., at 293–294; as well as the Opinion of Advocate General Sitx-Hackl, *Intermodal Transports BV*, point 106.

356. See Dourado, A.P., “Is it *acte clair*?...”, cit., at 54.

357. ECJ, decision 2.2.1988, case 309/85, *Barra*, para. 13.

358. ECJ, decision 2.2.1988, case 24/86, *Blaizot*, para. 28.

359. ECJ, decision 16.7.1992, case C-163/90, *Legros*, para. 30.

360. ECJ, decision 15.12.1995, case C-415/93, *Bosman*, para. 142.

361. ECJ, decision 9.3.2000, case C-437/97, *Evangelischer Krankenhausverein Wien*, para. 57.

362. ECJ, decision 6.3.2007, case C-292/04, *Wienand Meilicke*, para. 62.

and consequently to the legal protection of taxpayers under Art. 234 of the EC Treaty, since it is often difficult to identify the first ruling on a certain point of law (cf. *Meilicke, Verkooijen and Manninen*), except that it is clear that after the first ECJ ruling (when this is correctly identified), the aforementioned limitation will not be allowed (*Meilicke* and the previous cases mentioned there).

But in spite of *acte clair*, expressly recognized by the ECJ or not, it must be stressed that under Art. 234 of the EC Treaty, the ECJ is not bound to a *stare decisis* rule, and this allows the development of the case law. However, the inconsistencies between the ECJ decisions could be better avoided if the court expressly mentioned that previous case law is overcome or at least that the case law “has developed since...”³⁶³ and has justified the developments and/or new orientation. The current composition of the court – one judge per country – seems to hamper this simple methodological approach.

In direct taxation issues, the ECJ has progressively enlarged the comparison tests and they currently cover the comparison between residents and non-resident taxpayers and between non-residents (in spite of *Columbus Container and Truck Center*), the comparison between the tax advantage granted in favour of a shareholder and the tax payable by way of corporation tax, the comparison between the host and the home states (in some situations) and the comparison of the situation of the recipient of the taxpayer’s deductible amounts. This methodology seems to favour an integrated perspective of the taxpayer’s situation in the internal market but still needs to be improved in order to gain some consistency and coherence. Non-comparable situations, the accepted justifications for discriminatory/restrictive measures and non-acceptance of a most-favoured-nation clause can be considered negative limits to the assessment of the court on the compatibility of tax regimes with the fundamental freedoms, and they are to some extent settled case law.

Finally, *CILFIT* has to be complemented by the other side of the coin – the ECJ also decides when a question referred to it is to be accepted and when it is of practical significance for the uniform interpretation/application of EC law, and is not artificially related to the facts – the rules of admissibility of a preliminary ruling by the ECJ should not be applied in a too restrictive

363. See the Opinion of Advocate General Poiares Maduro delivered on 22.5.2008, in case C-210/06, *Cartesio*, points 27 et seq.

manner (*Lyckeskog*).³⁶⁴ Another issue concerns alternative solutions to the current preliminary rulings procedure, which have been dealt with elsewhere in this book.³⁶⁵

8.3. The principles of national procedural autonomy and effective judicial protection

According to the principle of national procedural autonomy, in the absence of Community rules governing the matter, each Member State must designate the competent courts and tribunals and lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive from Community law.³⁶⁶

Moreover, under the above-mentioned principle, it is also for the Member States to ensure that rights deriving from EC law are effectively protected in each case³⁶⁷ and it is the responsibility of the national courts in particular to provide the legal protection that individuals derive from the rules of Community law, and to ensure that those rules are fully effective.³⁶⁸

The principle of national procedural autonomy as constructed by the ECJ plays a relevant role, although it is at odds with other principles, namely with the principle of effective judicial protection, which is also a general principle of Community law.³⁶⁹ In fact, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law

364. On the issue see in particular point 6 the Opinion of Advocate General Poiares Maduro in *Cartesio*.

365. See Brokelind, C., in chapter 6 of this book.

366. See, in particular the ECJ decisions: case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral*, in [1976] ECR, p. 1989, para. 5; case 45/76, *Comet*, in [1976] ECR, p. 2043, para. 13; case C-312/93, *Peterbroeck*, in [1995] ECR, p. I-4599, para. 12; case C-432/05, *Unibet*, para. 39; and joined cases C-222/05 to C-225/05 *van der Weerd and Others*, in [2007] ECR I-4233, para. 28.

367. See, in particular the ECJ decisions: case 179/84, *Bozzetti*, in [1985] ECR, p. 2301, para. 17; case C-446/93, *SEIM*, in [1996] ECR, p. I-73, para. 32; and case C-54/96, *Dorsch Consult*, in [1997] ECR, p. I-4961, para. 40.

368. ECJ, joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, in [2004] ECR, p. I-8835, para. 111.

369. ECJ, case C-432/05, *Unibet* [2007] ECR I-2271, para. 37 and the case law cited.

(principle of effectiveness).³⁷⁰ If the domestic procedural rules do not protect taxpayers' rights both under Community and domestic law, then forum shopping will probably occur. Alternatively, the taxpayer may prefer not to raise the issue before the domestic courts and may plan his investment according to the effectiveness of legal protection.

It results from the above paragraphs that to deal with the multiplicity of national non-harmonized legal remedies in the EU, the ECJ has developed interacting principles: the primary role of national procedural law ("national procedural autonomy") or the "no new remedies rule",³⁷¹ the principles of effectiveness and equivalence. The principle of legal certainty also plays an important role, and is connected to the acceptance of time limits regarding certain types of procedures.

The first three principles were introduced in the *Rewe*³⁷² and *Comet*³⁷³ cases: "In the absence of Community rules on the refund of national charges levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law³⁷⁴ ... [principle of national procedural autonomy] ..., provided first, that such rules are not less favorable than those governing similar domestic actions³⁷⁵ (principle of equivalence) and secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law³⁷⁶ (principle of effectiveness)".

All of the above-mentioned principles have been developed by the ECJ as conflicting principles: for example, when the principle of effectiveness has been given priority, it is closely linked to emphasizing the substantive EC law right and the "no new remedies rule" becomes secondary

370. See, in particular, ECJ, *Rewe-Zentralfinanz and Rewe-Zentral*, *cit.*, para. 5; *Comet*, paras. 13 to 16; *Peterbroeck*, para. 12; *Unibet*, para. 43; and *van der Weerd and Others*, para. 28.

371. Craig, P., De Búrca, G., *EU Law, Text, cases and materials*, 4th ed., Oxford University Press, Oxford, New York, 2008, at 311 et seq.

372. ECJ, case 33/76, in [1976] ECR, p. 1989.

373. ECJ, case 45/76, in [1976] ECR, p. 2043.

374. Author's emphasis.

375. *Id.*

376. *Id.*

(See *Dekker*,³⁷⁷ *Factortame I*,³⁷⁸ *Cotter*³⁷⁹ and *Emmott*,³⁸⁰ and *Metallgesellschaft and Hoechst*^{381,382}). In fact, if I take the example of *Metallgesellschaft and Hoechst*, it was not relevant that restitution might not be available under English law in the concrete circumstances (restitution due to loss of the use of money where no principal sum was due), in other words, the “no remedies rule” turned out to be irrelevant, and the principle of effectiveness prevailed, because the court considered that the interest that would have accrued had the taxpayer not been subject to discriminatory advance taxation was a right directly resulting from the breach of Art. 43 of the EC Treaty.³⁸³

Legal certainty can also conflict with the principle of effectiveness, since it is assured in litigation by the acceptance of reasonable time limits for bringing proceedings against administrative decisions (see *Arcor* and *I-21*,³⁸⁴ *Deggendorf*,³⁸⁵ *National Farmers' Union*³⁸⁶ and *Assi Domän Kraft*³⁸⁷). Although the principle of legal certainty is mitigated by the possibility of reopening of deadlines for challenging administrative acts (including tax assessments) due to a subsequent ECJ decision (see *Kühne and Heitz*³⁸⁸), legal certainty restricts the principle of effectiveness when it prevails over it. Again, the court's case law is not clear in this respect, since in *Thin Cap Group Litigation*³⁸⁹ it recognized access to (civil) tort proceedings to interested taxpayers who failed to use all remedies available

377. ECJ, case C-177/88, *Dekker v. Stichting voor Jong Volwassenen (VJV) Plus*, in [1990] ECR, p. I-395, para. 26.

378. ECJ, case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. & Others*, in [1990] ECR, p. I-2433.

379. ECJ, case C-377/89, *Cotter & MacDermott v. Minister for Social Welfare*, in [1991] ECR, p. I-1155.

380. ECJ, case C-208/90, *Emmott v. Minister for Social Welfare*, in [1991] ECR, p. I-4269.

381. ECJ, case C-410/98, *Metallgesellschaft & Hoechst v. Inland Revenue*, in [2001] ECR, p. I-4727.

382. Craig, P., De Búrca, G., *EU Law...*, *cit.*, at 313 et seq.

383. Craig P., De Búrca, G., *id.*, at 319–320.

384. ECJ, joined cases C-392/04 and C-422/04, in [2006] ECR, p. I-8559.

385. ECJ, case C-188/92, *TWD Textilwerke Deggendorf*, in [1994] ECR, p. I-833.

386. ECJ, case C-241/01, *National Farmers' Union v. Secrétariat général du gouvernement*, in [2002] ECR, p. I-9079.

387. ECJ, case C-310/97, *P Commission v. AssiDomän Kraft Products AB & Others*, in [1999] ECR, p. I-5363.

388. ECJ, case C-453/00, *Kühne und Heitz NV v. Productschap voor pluimvee en eieren*, in [2004] ECR, p. I-837, para. 24.

389. ECJ, case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, in [2007] ECR, p. I-2107.

to them under national law, because they expected to be turned down by the national authorities.³⁹⁰

Since in many Member States, time limits for bringing administrative appeal procedures are much shorter than time limits for bringing civil restitution of damages proceedings, decisions such as the one in *Thin Cap Group Litigation* will probably lead to forum shopping.³⁹¹ Taking into account that the ECJ uses a standards-based approach and that its position when the above-mentioned principles conflict is not totally clear, potential litigants can take advantage of the indeterminacy of the standards approach used by the ECJ. The fact that more than one legal remedy can be used and that more than one Member State can legitimately exercise jurisdiction over the parties gives rise to the possibility that the outcome of a case depends on the choice of the forum. This possibility will reduce legal certainty, but the choice of the forum will in turn probably increase the legal protection of the taxpayer, although that legal protection is not a result of the preliminary rulings procedure, since the interplay of the above-mentioned conflicting principle is far from being clear.

8.4. Cases involving indirect taxation issues and direct taxation issues

It is common knowledge that in indirect taxation issues, e.g. in respect of VAT issues, the level of protection of the taxpayer is higher than in direct taxation issues – legal uncertainty in direct taxation issues results from the fact that the ECJ is applying the fundamental freedoms principles of the Treaty and is not constructing second-level EC law courts and contributing to the development of EC principles, as previously claimed.³⁹² The principle of abuse as results from *Halifax* is to be applied by the national courts in *Part Service* and besides, in its decision, the ECJ provides several paths for the referring national court.³⁹³

390. In this sense, Wattel, P.J., “National Procedural Autonomy and Effectiveness of EC Law: Challenge the Charge, File for Restitution, Sue for Damages?”, *Legal Issues of Economic Integration*, 35 (2), 2008, at 112.

391. However, also other aspects will have to be weighed: see Dourado, A.P., “Forum Shopping in EC Tax Law in the Context of Legal Pluralism: Spontaneous Order as the Optimal Solution or Taxpayers Rights to a Code of Legality?” Editorial, *Intertax*, 2008, n.º 10, at 422 et seq.

392. Dourado, A.P., “Is it *acte clair*?...”, *cit.*, at 45–47, 66.

393. See in particular: paras. 48–53, providing examples on the meaning of “single supply”, “principal service”, “ancillary service”.

But let me assume that the taxpayer or the national court considers that the ECJ missed a relevant point or a different question referred by the national court. It is then possible to refer the issue again and the ECJ may confirm its previous case law, as in *Halifax* and *Part Service*, either developing it, or deciding by reasoned order.³⁹⁴ By confirming previous ECJ case law, reasoned orders give some legal certainty to the taxpayer, as in the cases *Petrolvilla & Bortolotti SpA*, *Nonwoven SpA*.

National courts seem to feel more comfortable in referring cases regarding the interpretation of EC secondary legislation (e.g. the VAT directives), than regarding the interpretation of EC Treaty principles, with the exception of potential abuse of law issues³⁹⁵ and this seems to demonstrate a pro-nationalist attitude towards application of Art. 234 of the EC Treaty. Surprisingly or not, *Da Costa*, *CILFIT*, and the Opinions of the Advocates General asking for the national courts' self-restraint in respect of Art. 234 relate to the interpretation of very detailed rules and not to non-harmonized direct tax issues.

Comments and Notes on Part Two

394. See ECJ, order 15.3.2001, joined cases C-279/99, C-293/99, C-296/99 and C-336/99, *Petrolvilla & Bortolotti SpA*; 27.11.1998, case C-4/97, *Nonwoven SpA*.

395. See Pistone, P., "The Search for Objective Standards...", *cit.*, at 253-254.