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 ECJ 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.

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Edited by Pasquale Pistone

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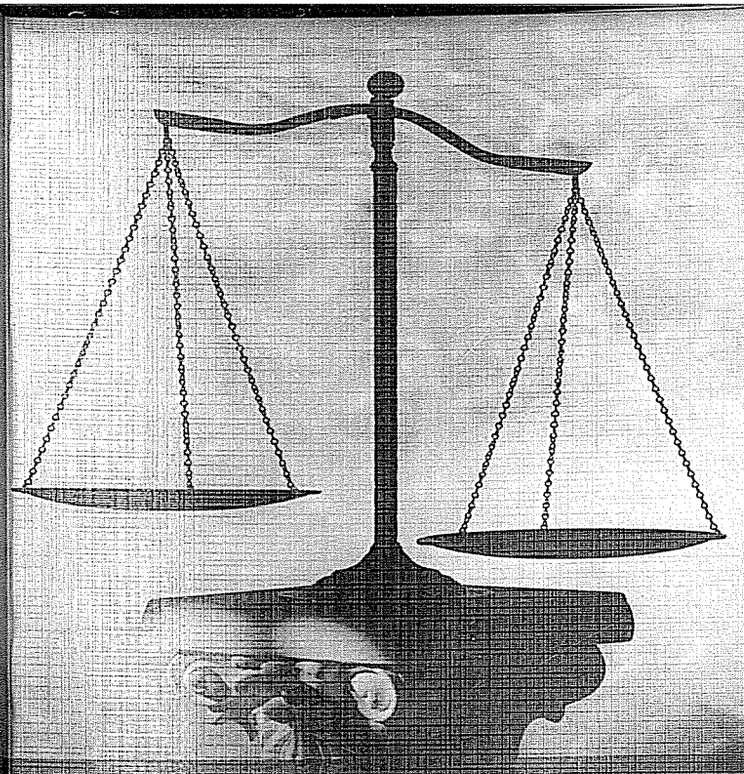

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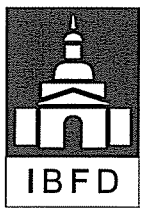

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Preface

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 *G*roup of *R*esearch on *E*uropean *I*nternational *T*axation (*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 multilateral 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/Davits[324] 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 rules[335] – 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 law[344] – 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 ECJ[352] – 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 Arnull, 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; Zalasiński, 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 tax-payer'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 case[367] 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 law[374] ... [principle of national procedural autonomy] ..., provided first, that such rules are not less favorable than those governing similar domestic actions[375] (principle of equivalence) and secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law[376] (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 *1-21*,[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 issues[395] 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.

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.

Comments and Notes on Part Two