
Chapter 26

Time Limits, Legal Protection and their Extension

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26.1. Introduction

In the area of direct taxation that has been developing gradually through the case law of the ECJ, the assessment that a domestic law provision is in breach of EC law may only be clear after the ECJ has delivered a decision clarifying the issue. The problem then arises with the taxpayers that have been paying taxes based on that particular provision and who now wish to get the amounts paid back but are not allowed to because the applicable national time limits may have (long) expired.

It is suggested that the existence of two different legal remedies, the refund of taxes unduly paid and compensation for damages, that lead to the same result but under different conditions and for which normally different time limits apply under national law, could possibly create an open area for forum-shopping. This is not desirable at all in a single market.

In order to guarantee that Community rules apply effectively, we must rely directly on the principle of effectiveness developed by the case law of the European Court of Justice (hereinafter: ECJ or Court). There are two options that guarantee the effectiveness of Community rules: the first option is to grant access to an equivalent remedy, after the time limit for the properly provided remedy has expired; the second option is to move the starting point of the time limit of the already provided legal remedy.

In this contribution I will argue that the most appropriate way to guarantee the effectiveness of Community rules is the second option – that is, to move the starting point of the time limit of the already provided remedy.

26.2. Direct applicability of EC Treaty freedoms in the field of direct taxation

According to established case law, the provisions of the EC Treaty on the Community freedoms embody the fundamental principles of the

Community and they have been directly applicable in the Member States since the end of the transitional period.¹⁰²⁹ As far as direct taxation is involved, the vast majority of ECJ case law on direct taxation has evolved around the proper application of those freedoms. And, as the court constantly repeats in its judgments, although direct taxation falls within the competence of Member States, Member States have to exercise their competence in accordance with Community law.

Directly applicable Community provisions must, however, notwithstanding any internal rule or practice whatsoever of the Member States, have full, complete and uniform effect in the legal systems of the Member States in order to protect subjective legal rights created in favour of individuals. The national courts also have the obligation to protect, in cases within their jurisdiction, the rights conferred upon individuals by Community law.¹⁰³⁰

Therefore, in the field of direct taxation, Member States remain in principle free to regulate their systems as they deem proper but their freedom is restricted by means of negative integration. In the absence of positive Community rules, it has been mainly through the case law of the ECJ that a level of integration in the direct taxation field has been achieved, by prohibiting domestic direct taxation rules that are contrary to the EC Treaty freedoms.

The problem with negative integration in the field of direct taxation is that it may well happen that for a long time a domestic measure is considered compatible with EC law until it is challenged before the ECJ and then found to be incompatible with EC law. The time when that particular direct taxation provision is found to be incompatible with EC law is the time when the judgment of the ECJ is published. It is not uncommon in the area of direct taxation, an area under constant development, that certain characteristics of domestic tax systems have only recently been clarified, as the court's case law is developing. By this time, however, it is usually very late for taxpayers to have recourse to the legal remedies provided under their national procedural rules, whether to challenge the assessment or to request refund of taxes unduly paid, because the applicable time limits have expired.

It is established case law that the interpretation that the court gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and

1029. See, for example, ECJ, case C-270/83, *Commission v. France* [Avoir fiscal], para. 13 concerning the freedom of establishment.

1030. ECJ, case C-106/77, [Second] *Simmenthal*, paras. 14 and 16.

applied from the time of its entry into force.¹⁰³¹ It follows that the rule as so interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions allowing an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied.¹⁰³²

It is also settled case law that entitlement to the recovery of sums levied by a Member State in breach of Community law is a consequence of and an adjunct to the rights conferred on individuals by the Community provision as interpreted by the court. The Member State is therefore, as a matter of principle, required to repay charges levied in breach of Community law.¹⁰³³ Accordingly, while the recovery of such charges may in the absence of Community rules governing the matter be sought only under the substantive and procedural conditions laid down by the procedural law of the Member States, those conditions must nevertheless comply with the principles of equivalence and effectiveness.¹⁰³⁴

In cases where the incompatibility with the provisions of the Treaty was only established at a later stage and at the time the tax was paid it was not evident or even suspected that such incompatibility existed, a taxpayer having paid that tax is in a situation where no legal remedy is available to him to make good the harm he has suffered. From a Member State's point of view, the state that has violated its obligations under Community law is escaping the rules of state liability towards both its citizens and towards the Community as well. From a Community law point of view, a serious breach of the EC Treaty has been determined but no measures can be taken to eliminate the breach.

The question then arises – what happens with the amounts that have been paid in the meantime and with regard to which it is now established that they were paid in conflict with Community law? In principle, they would have to be reimbursed;¹⁰³⁵ but under what procedure and going how far back?

1031. ECJ, *Fantask*, para. 36.

1032. ECJ, *Fantask*, para. 37, and case law cited therein.

1033. ECJ, case C-199/82, *San Giorgio*; *Fantask*, para. 38; *Metallgesellschaft*, para. 84.

1034. ECJ, *Fantask*, para. 39.

1035. Indeed, as the Court has already held, remedies for recovering overpaid taxes vary. See, ECJ, case C-343/96, *Dilexport*.

26.3. The principle of effectiveness in Community law

“The principal point is that the effectiveness of community law must not be fundamentally jeopardized”.¹⁰³⁶ This statement made by the court back in the mid-seventies remains current.

The principle of effectiveness of EC law has been developed through the ECJ's case law and is based on the wider scope principle of Community Loyalty, which is provided for in Art. 10 of the EC Treaty. Under the principle of Community Loyalty, national procedural law may not be more cumbersome in respect of the exercise of Community rights than it is in respect of similar actions on a domestic law basis (equivalence), nor may it render the exercise of rights conferred by Community law virtually impossible or excessively difficult (effectiveness). The two principles of equivalence and effectiveness are distinct but apply cumulatively. And whereas it is up to the domestic court to determine the existence of equivalence,¹⁰³⁷ the question of effectiveness remains under the direct control of the ECJ.¹⁰³⁸

The court has repeatedly decided that if national rules impair the effectiveness of Community law or prevent Community rules from having full force and effect, such rules are incompatible with Community law.¹⁰³⁹ If the national legislative measures that are incompatible with Community law had any legal effect, this would amount to denial of the obligations that have been undertaken unconditionally by the states.¹⁰⁴⁰ Therefore, the national courts may, according to the court, have the power (read: Community law permits them to) set aside national legislative provisions that might prevent Community rules from having full force and effect.¹⁰⁴¹ Another result of the effectiveness of Community law is that the national court seized of a dispute governed by Community law must have the power to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.¹⁰⁴² Last but not least, the principle of effectiveness requires that if a national administration has the discretionary power to reexamine a case that has been decided

1036. ECJ, case C-60/75, *Russo*.

1037. See in particular ECJ, case C-326/96, *Levez*, para. 38.

1038. Delicostopoulos, J.S., “Towards European procedural primacy in national legal systems”, *European Law Journal* 9 (2003), at 601.

1039. ECJ, case C-106/77, [Second] *Simmenthal*, paras. 22 and 23.

1040. ECJ, [Second] *Simmenthal* case, para. 18.

1041. ECJ, [Second] *Simmenthal* case, para. 22.

1042. This principle, stated under case C-213/89, *Factortame I*, was also accepted in case C-432/05, *Unibet*.

irrevocably but posterior ECJ case law shows that the national decision was in hindsight incompatible with EC law, the use of such discretionary power becomes mandatory as far as the effectiveness of Community law is concerned.¹⁰⁴³

These considerations also apply in the examination of direct taxation legislation, which although outside Community competence, may nevertheless not violate Community law. In all the examples mentioned above, the ECJ had no hesitation to set aside national procedural rules that impede the full effectiveness of Community rules. In addition, although not always expressly stated, the court gives great importance to a particular aspect of the principle of effectiveness, its complement – the principle of effective judicial protection.

These conclusions give us a very strong hint for resolving the issue examined in this contribution and for how the relationship between the principle of effectiveness of Community law and the related principle of effective judicial protection, on the one hand, and the principle of national procedural autonomy and other possible limitations of the former should be treated when it comes to tax cases.

26.4. The principle of effective judicial protection

The principle of effective judicial protection is the necessary complement of the principle of effectiveness discussed previously. Under the principle of effective judicial protection of an individual's rights under EC law, Member States must provide effective legal remedies that may not be less favourable than those governing similar domestic actions. Effective judicial protection is a fundamental right of the individuals. This right is recognized as a general principle of Community law stemming from the constitutional traditions common to the Member States.¹⁰⁴⁴

One of the consequences of the principle of effective judicial protection is that Member States have the obligation to establish a system of legal remedies and procedures that ensure respect of the individuals' right to effective judicial protection. It is true that the Treaty "was not intended to create new remedies in the national courts to ensure the observance of community

1043. See ECJ, case C-453/00, *Kühne & Heitz*.

1044. ECJ, *Unibet*, para. 37.

law other than those already laid down by national law".¹⁰⁴⁵ However, this seems to apply in cases where it is apparent from the overall scheme of the national legal system that a remedy exists that makes it possible to ensure, even indirectly, respect for an individual's Community law rights. If this is not the case, then Community law intervenes and *must* do so in order to ensure within a given national legal system the effective judicial protection of the rights that individuals derive from Community law.¹⁰⁴⁶ Established case law makes it clear that the principle of effective judicial protection takes priority over national procedural autonomy.

National courts have the burden of establishing whether the system of legal remedies and procedures available do guarantee effective judicial protection.¹⁰⁴⁷ The court has provided guidance to the national courts on this issue. When there is doubt whether the existing system is appropriate and capable of ensuring effective protection, then the national court must do what is necessary to ensure full effectiveness of Community rights and of any judgment to be given on the existence of such rights.¹⁰⁴⁸

The principle of effective judicial protection also applies to cases of direct taxation. Therefore, in cases where taxes have been paid to a state in conflict with Community law, that state must ensure that its legal system guarantees the full effectiveness of (a) the Community law provision that was breached; (b) the judicial protection of the individual that suffered; and (c) the refund. In the sections below some possible limitations of this obligation will be examined.

26.5. Possible limitations to the principle of effectiveness: National procedural autonomy

A study of the ECJ case law reveals that in order to establish the scope of application of the principle of effectiveness the court often refers to the scope of the principle of national procedural autonomy.¹⁰⁴⁹ The interrelation between those two principles will be discussed here.

1045. ECJ, case 158/80, *Rewe*; *Unibet*, para. 40.

1046. *Unibet*, paras. 40 and 41 with references to previous case law of *Rewe*, *Comet* and *Factortame*.

1047. *Unibet*, para. 64.

1048. *Unibet*, paras. 72 and 77.

1049. On the issue of the relationship between the principle of national procedural autonomy and the principle of effectiveness with reference to the ECJ case law, see Flynn, L., "When national procedural autonomy meets the effectiveness of Community law, can

According to established ECJ case law,¹⁰⁵⁰ under the principle of cooperation laid down in Art. 10 of the EC Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, 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 the direct effect of Community law.

Under such a decentralized (in fact: fragmented) system of application of Community law, the risk is increased that the rights of the individuals derived under Community law are compromised. The parallel application of multiple (and different) sets of procedural rules may have very different results from one Member State to the other¹⁰⁵¹ and may create room for abuse or forum shopping.

The court has limited the principle of national procedural autonomy by setting two conditions that domestic remedies must fulfill in order to be compatible with Community law. The domestic rules must not be less favourable than those governing similar domestic actions (principle of equivalence) nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).¹⁰⁵²

Apart from the limits set by the court, the principle of national procedural autonomy seems to be becoming less and less rigid as Community law develops. There has been an increasing amount of Community legislation that affects directly national procedural autonomy, by setting up uniform procedural rules in various areas – this is the case, for example, with the public procurement directives,¹⁰⁵³ the national civil procedure rules

it survive the impact?", *ERA Forum* (2008) 9, at 245–258. On the more general issue of the interplay between national procedural rules and European Interventions, see Delicostopoulos, J.S., "Towards European procedural primacy in national legal systems", *European Law Journal* 9 (2003), at 599–613.

1050. See ECJ, decision, case C-312/1993, *Peterbroeck*, para. 12 and the older cases cited therein, in particular case C-33/76, *Rewe*, para. 5, case C-45/76, *Comet*, paras. 12 to 16 and case C-199/82, *San Giorgio*, para. 14.

1051. Schermers, H.G., Waelbroeck, D.F., *Judicial protection in the European Union*, at 199.

1052. In this contribution I will not deal with the principle of equivalence, which is for the domestic court to determine, but the principle of effectiveness will be addressed in the next section.

1053. The directives on remedies in the field of public procurement are: Directive 2007/66/EC of the European Parliament and of the Council of 11.12.2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness

concerning the regulation on small claims procedure,¹⁰⁵⁴ the legal aid directive¹⁰⁵⁵ initiated by DG Freedom, Security and Justice, the DG Competition White Paper on damages for breaches of antitrust rules¹⁰⁵⁶ and the Directive on enforcement of intellectual property rights.¹⁰⁵⁷

This is not a strange development. On the contrary, the progressive development of Community law (even in areas where the Community has very limited competence, as in the area of direct taxation) creates an urgent need for a progressive coordination of national procedural rules so as to guarantee adequate judicial protection to all EU citizens and to avoid forum shopping. The area of direct taxation that has been developing around the basic Treaty freedoms cannot be an exception.

In conclusion, the (weakening of the) principle of natural procedural autonomy cannot constitute a valid limitation of the principle of effectiveness.¹⁰⁵⁸ The autonomy that national courts enjoy is in choosing how to remedy a violation of EC law – not whether they will remedy it or not!¹⁰⁵⁹ Guidance on the first issue was given by the court very early,¹⁰⁶⁰ the answer to the latter is given by the principle of effectiveness (and effective judicial protection).

of review procedures concerning the award of public contracts (to be implemented by Member States into national law before 20.12.2009), Council Directive 92/13/EEC of 25.2.1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and Council Directive 89/665/EEC of 21.12.1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

1054. Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11.7.2007 establishing a European Small Claims Procedure.

1055. Council Directive 2003/8/EC of 27.1.2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

1056. White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008.

1057. Directive 2004/48/EC of the European Parliament and of the Council of 29.4.2004 on the enforcement of intellectual property rights.

1058. See also Furuseth, E., "Can procedural rules create obstacles to fundamental freedoms in European law?", *Intertax* 35 (2007), at 256 et seq.

1059. Advocate General Léger concluded in point 70 of his Opinion on the *Kühne & Heitz* case delivered on 17.6.2003 that "the principle of procedural autonomy should be applied in the context of asserting before the courts a right based on Community law and not in an action concerning the actual existence of such right".

1060. Flynn, L., op. cit., at 252 with reference to the case 34/67, *Lück*.

National procedural autonomy does, however, provide a limitation to the effects of Community law. In principle, no new remedies may be created under Community law and transposed into national judicial systems. Therefore, on a procedural level, the solution to the problem of effective judicial protection in cases of direct tax measures that are found incompatible with Community rules by a decision of the ECJ can be:

- to use alternative remedies that exist under the legislation of the Member States; or
- to expand the application of the remedies provided already.¹⁰⁶¹

Only in cases where neither of the above possibilities provides adequate protection must the national court be able to introduce a new remedy, subject to the further conditions set by ECJ case law.¹⁰⁶² The analysis that will follow is based on the assumption that effective legal remedies do exist; therefore, we will not deal with the issue of possible introduction of new remedies.

In any case and in order to avoid problems like forum shopping, the setting of common standards¹⁰⁶³ is highly desirable.

26.6. National remedies for the repayment of taxes

Based on the above analysis and on the relevant case law, it appears that two possibilities exist to guarantee the minimum level of effectiveness that is required under ECJ case law for the protection of Community rights: one is to grant access to alternative remedies (damages) and the other is to grant access to the existing remedy (refund of taxes) by moving the starting point of the time limits for the reimbursement of taxes paid contrary to Community law, if necessary. The aim in both cases is the same, to eliminate the harmful effects of the breach by the state.

However, the parallel existence of these options does not eliminate the possibility of forum shopping. Problems like forum shopping can be effectively addressed only when the proposed solutions are similarly applied EU-wide. This of course could be achieved by instituting a new and specific remedy armed with some degree of coordination power, which unfortunately will not be the case in the area of direct taxation for the foreseeable future.

1061. See, for example, ECJ, case C-213/89, *Factortame*.

1062. See, for example, *Unibet*, para. 73.

1063. ECJ, joined cases C-6 and 9/90, *Francovich*.

26.6.1. The use of alternative remedies (damages)

The first option is to grant access to alternative remedies that are usually used in Member States for claiming damages. These remedies often provide for longer time limits, thus granting higher legal protection to taxpayers. This solution, however, does not solve the problem of forum shopping, on the contrary, the problem remains as not all Member States have the same kind of remedies and also not all states have set the same requirements in order to fulfill the conditions for "damage". In fact, these requirements vary substantially from one Member State to the other, making it impossible to find a common neutral standard type of remedy that would apply to all Member States. On the other hand, this solution does not provide any help at all to economic operators that are active in more than one Member State and of course it does not promote the functioning of the internal market.

26.6.2. The use of the remedy provided already (refund of taxes unduly paid)

Using the remedy that has already been provided for the reimbursement of taxes unduly paid could prove to be a more effective way to deal with the problem. The problem that arises is that the usually short time-limits will in most cases have expired by the time the unlawfulness of a provision is established. If, however, the starting point of the time limit for bringing a claim for reimbursement of taxes unduly paid is moved to the time when the measure is found to be contrary to EC law (that is, when the relevant decision of the ECJ is published), all taxpayers that have suffered the unlawful taxation will have a real opportunity to make their claim.

In fact, we should not even be talking about an extension of the time limit. Since the unlawfulness of the measure was not known but became apparent only at a later time, the time limit cannot be deemed to have started running. The time limit must start running as from the time that the right to a refund was born. This right only comes in to being when the incompatibility of a particular measure is determined; the time limit for bringing an action before the competent national court asking for the refund should also start at that time.

This is not unfamiliar within the Greek legal system. The law provides that claims against the state for taxes that were unduly paid are limited to

three years after the payment was made.¹⁰⁶⁴ This means that a tax that was paid in May 2005 can be re-claimed only up to May 2008. This provision has been interpreted by the Supreme Administrative Court (*Συμβούλιο της Επικρατείας*) in many cases.¹⁰⁶⁵ According to the case law, the limitation period that defines the extent of the claim does not start running from the day the payment was made, provided that at that date the payment was lawful. If the obligation of the state for repayment of that tax is created by a subsequent fact, the three-year limitation period starts running as from the day that this fact took place. It is only then that the repayment of the unduly paid tax may be sought before a court. According to the Greek legislation, if the fact that would make the payment of the tax in May 2005 unlawful arose in January 2009, then the taxpayer may file a claim for repayment of that tax, since its limitation period starts in January 2009 and will end in January 2011.

A similar rule with similar legal effects exists in the UK. The normal UK time limit for claims for compensation or refund is six years from the date of payment. If the tax was paid under a mistake of law, the claim can be made at any time within six years after the discovery of the mistake. Deutsche Morgan Grenfell and the GLO litigants, who had complained about ACT paid by UK subsidiaries on dividends to their EU parent companies, submitted that the mistake of law could not be discovered until the date of the ECJ judgment in *Metallgesellschaft*, which was delivered on 8 March 2001. The case was heard by the UK House of Lords (the highest UK court) and the claimants' argument was accepted. The UK House of Lords decided by a majority that the time limit for making a claim in a case challenging UK tax provisions under EC law can stretch up to six years from the date of the relevant decision on EC law by the ECJ.¹⁰⁶⁶ As a result, all the claims for ACT compensation that had been made by Deutsche Morgan Grenfell fell within the relevant time limit. The UK government, of course, rushed to adopt legislation that would limit the effect of the above-mentioned legislation, showing how unwilling states would be when faced with such an option. The fact, however, that a legal system provides for the possibility of reopening a case even after a long time should not be disregarded. A comparative study would reveal that the same possibility may exist in a

1064. Art. 90 para. 2 of Law 2362/1995.

1065. See, for example, Supreme Administrative Court (*Συμβούλιο της Επικρατείας*) decisions 1218/1994 and 4290/1995. The case law was applied by the Legal Council of the State (*Νομικό Συμβούλιο του Κράτους*) in its Opinion No. 439/2003.

1066. *Deutsche Morgan Grenfell Group plc v. HMRC*, decided 25.10.2006; see Tomsett, E., "UK House of Lords adopts "mistake of law" theory in setting limitations period in *Deutsche Morgan*", *Intertax* 35 (2007), at 62 et seq.

number of Member States, but this lies outside the limited scope of this contribution.

It is not disputed that a balance must be struck in every legal system between the rights of the individual and the collective interest in providing a degree of legal certainty for the state.¹⁰⁶⁷ But this issue is no longer a legal issue and the discussion is a political rather than a legal one. On the legal level one could argue, however, that if a legal system tolerates a remedy that provides full repayment of taxes under the civil law principle of unjust enrichment for which a limitation period of up to 20 years exists, then it is a little strange that the same legal system does not tolerate the extension of the limitation period of the obligation of the state to reimburse unduly paid taxes. This discussion and the question whether differences between civil law and tax law provisions on time limits are justified and to what extent is outside the scope of this contribution.

As Peter Wattel correctly points out,¹⁰⁶⁸ apart from the forum shopping problem, the differences between the administrative law procedure for refund and the civil law procedure for damages and the incongruence in the ECJ case law would only be academic if national time limits for bringing appeals before administrative courts and for bringing tort proceedings before private law courts were identical.

I submit that both the forum shopping problem and the mix of administrative and civil law procedures (i.e. using a civil law procedure for an administrative law claim) can be avoided by using the legal remedy already provided (in most cases an administrative law one) but providing, where necessary from an EC law point of view, an extension to the relevant time limit for access to it. EC law principles and ECJ case law seem to permit this procedural solution in cases where the fact that renders a particular tax provision unlawful for the first time is an ECJ judgment. In such cases, where the unlawfulness could not have been predicted earlier, the fact that triggers the time limit should be the delivery of the ECJ judgment. The ECJ has had the opportunity to deal with the compatibility of national time limits with Community law in many cases; this case law will be examined here.

1067. Advocate General Opinion in *Fantask*, point 69.

1068. Wattel, P., "National procedural autonomy and effectiveness of EC law: challenge the charge, file for restitution, sue for damages" in *Legal Issues of Economic Integration* 35 (2): at 109–132, 2008.

26.7. National limitation periods under the scrutiny of the ECJ

First of all, it must be observed that in some cases a seemingly simple procedural rule may deeply affect the core or the very existence of a Community right. Since substantive Community rights depend on national procedural rules to become fully effective, the role of the national procedural rules in the realization of the Community goals becomes even more important. National limitation periods are no exception to this rule.

Two kinds of time limits are of special importance with regard to direct taxes paid contrary to a Community law provision: one is the time limit for bringing a tax assessment before the court by challenging its legality (access to court) and the second is the time limit for asking the reimbursement of such taxes (right of refund).¹⁰⁶⁹ Both time limits are considered procedural rules that aim at creating legal certainty both for the taxpayer and the state concerned and ensuring the proper conduct of procedure. Their application, however, may seriously affect the enjoyment of a Community right based directly on the provisions of the EC Treaty and therefore undermine the supremacy of Community law. This is the reason why the application in practice of such time limits has been put under the scrutiny of the ECJ several times.

In its early *Emmott* case, the court held that "Community law precludes the competent authorities of a Member State from relying in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by [a directive], on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system".¹⁰⁷⁰

The facts of that case were of course exceptional since it appeared that the state authorities had in fact misled Mrs Emmott regarding her rights. In my opinion, the court simply applied its established case law on effectiveness, it found that the combination of the default of the Member State that had not properly transposed the directive and of the misleading behaviour of the

1069. In his Opinion in the *Fantask* case, Advocate General Jacobs states that the two time limits may be essentially seen as the two sides of one coin and he thus tends to assimilate them. I tend not to agree with such assimilation, since the purpose of each time limit is different and its function within a legal system is also different.

1070. ECJ, case C-208/90, *Emmott*, paras. 17 and 24.

competent authorities had in practice made it *impossible* for Mrs Emmott to claim her Community law rights. Therefore, the judgment was correct in giving guidance to the national court to extend the time limits of the normally available legal remedy, as this is one of the options that exist under Community law.¹⁰⁷¹

In its subsequent judgment in the *Steenhorst-Neerings* case,¹⁰⁷² the court dealt with a slightly different issue – it did not deal with the issue of whether Mrs Steenhorst-Neerings could claim benefits deriving from a directive but with the issue of the limitation in time of those benefits. Seen from the point of view of the effectiveness test of the court, Mrs Steenhorst-Neerings did have a genuine and suitable opportunity to claim her rights and in this respect, her case was different from that of Mrs Emmott. Since the test of the minimum level of effectiveness was satisfied, the court concluded that the subsequent limitation in time of the benefits that Mrs Steenhorst-Neerings was entitled to claim did not infringe the principle of effectiveness. From this point of view the two cases are consistent with the court's previous case law. The court did not limit its *Emmott* judgment – it simply applied its established case law.

The *Peterbroeck* case¹⁰⁷³ also involved a time limit for bringing a claim to the court. The court held that “each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration”.

The court went on to establish that whilst a period of 60 days imposed on a litigant to bring forward his claim is not objectionable per se, the special features of the procedure in question must be emphasized. After the court established that the litigant did not have a genuinely appropriate chance to make a claim based on Community law, it concluded that such a rule was

1071. See *supra*, section 26.3.1.

1072. ECJ, case C-338/91, *Steenhorst-Neerings*, para. 24.

1073. ECJ, case C-312/93, *Peterbroeck*, paras. 14 et seq.

contrary to Community law.¹⁰⁷⁴ Again, the court followed its established case law.

The *Fantask* case¹⁰⁷⁵ related to the time limit for the repayment of taxes that had been imposed in Denmark is in conflict with the Capital Duty Directive. The court accepted that although Denmark had not properly transposed the Capital Duty Directive and it imposed charges contrary to it, the authorities could rely on the five-year time limit to reimburse charges so levied. The court agreed with Advocate General Jacobs who took the view that "a Member State is entitled to rely upon a reasonable limitation period laid down by national law in order to resist claims based on a Community directive notwithstanding the absence of proper implementation. The five-year limitation period laid down by Danish law for challenges to decisions of the Office seems wholly reasonable and does not appear to make reliance upon the Directive impossible or unduly difficult".¹⁰⁷⁶ Again, the court contented itself with the satisfaction of the minimum requirement of effectiveness ("non-impossibility"), even though it is not obvious how the court reached the conclusion that this minimum requirement was satisfied. This judgment seems to be to the opposite direction when compared with the previous case law of the court. Closer reading of the decision and the Opinion of the Advocate General may, however, shed some light.

What is worth noting is the fact that the Advocate General bases his proposal on the fact that there is a parallel domestic remedy, in particular the claim for damages, which is at the disposal of the taxpayers. By using this remedy (claim for damages), the claimants can seek satisfaction for their whole claim (even beyond the five-year time limit), as a claim for damages usually provides protection for a longer time. As the Advocate General points out in his Opinion: "The existence of a wholly independent claim for damages, subject to longer time-limits than the comparatively short ones prescribed for restitutionary and entitlement claims in many Member States, is consistent with the different nature of the claim. Its basis is not merely the unjust enrichment of the State resulting from simple error in the routine application of technical legislation but a serious violation of individual rights, calling for a re-appraisal of the balance between such rights and the collective interest in a measure of legal certainty for the State".¹⁰⁷⁷

1074. The solution adopted in the *Peterbroeck* case was not the extension of the time limit as it would not offer effective protection; instead it was preferred to make the national court able to take into account the Community law claims of its own motion.

1075. ECJ, case C-188/95, *Fantask*, paras. 42 et seq.

1076. Opinion of the Advocate General, delivered on 26.6.1997, point 89.

1077. Opinion in *Fantask*, point 83.

I agree with the idea that in matters of taxation an individual should be able to obtain full compensation for loss or damage incurred but I tend to disagree with the substitution of the properly provided remedy (restitution or refund) with a remedy that serves a different purpose (claim for damages). I can understand that under the approach that requires the court to take into account the whole procedural situation of the claimant, the existence of such a remedy can offer an alternative that fully satisfies the claimant; therefore, there is no need to extend the time limits of the restitution remedy, an act that had led to great criticism by the governments of the Member States.¹⁰⁷⁸

According to the proposition made by the Advocate General, the taxpayer may rely on the claim for damages and claim the whole amount of taxes unduly paid for the whole time that has elapsed until the wrong application was corrected. First of all, the very fact that the claim for damages is recognized as an alternative remedy is, in my opinion, a confirmation of the fact that there is something wrong with not granting full refund in cases of breach of Community law. The essence remains that the taxpayer must be able to get the amounts of unduly paid charges back. Once this principle has been acknowledged, the formula under which the taxpayer will be able to do so (is still an important issue but) becomes a secondary one.

Secondly, it appears to me that acceptance of the proposition that the remedy for claiming damages could be used instead, amounts, at least from a financial point of view, to moving the starting point of the time limit for the repayment of that tax to the time when the rule upon which the tax was levied is found to be incompatible with Community law; the effect is the same, the way to reach that effect is different. But why change the legal nature of a claim (from refund to damages) when we can simply extend the application of the legal remedy that is proper for the legal nature of the claim (refund)? Therefore, I tend to conclude that the *Fantask* case was only drafted in such strict language as compared to the *Emmott* judgment for two reasons: first, because the court had received a lot of criticism from the governments of the Member States, who complained about their budgets; second, because, as the Advocate General put it, the claimants had at their disposal the possibility to use the alternative remedy of the claim for damages. Therefore, the claimants in *Fantask* were not in an *Emmot*-like situation, where “the time-bar had the result of depriving the applicant of

1078. See, for example, the interventions and criticism regarding the *Emmott* decision by the Danish, French, Italian and United Kingdom Governments as reported by Advocate General Jacobs in his Opinion of 26.6.1997, points 55 and 57 et seq.

any opportunity whatever to rely on her right to equal treatment under a community directive".¹⁰⁷⁹

In the *Edis* case¹⁰⁸⁰ the ECJ held that the fact that the court has given a preliminary ruling interpreting a provision of Community law without limiting the temporal effects of its judgment does not affect the right of a Member State to impose a time limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced. This time limit concerns not the right of the individual to ask for repayment but rather regulates the time after the delivery for the ECJ decision within which he is entitled to do so. Regarding the issue of when the limitation period for repayment of taxes starts, the court held that, in circumstances such as those of the main proceedings, Community law does not prevent a Member State from resisting actions for repayment of charges levied in breach of a directive by relying on a time limit under national law which is reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had not yet been properly transposed into national law.¹⁰⁸¹ This is the only judgment that expressly precluded that possibility without, however, offering adequate explanation why.

In the joined cases of *Arcor* and *i-21*¹⁰⁸² the court had the opportunity to deal with the issue of a fee that was levied contrary to Community law and which the German authorities refused to repay on the grounds that the claim from *Arcor* and *i-21* was filed too late, after the one-month time-limit for the appeal had elapsed. In this case, the court acknowledged that the time limit provided was not per se contrary to the principle of effectiveness. It appears from the facts and the relevant German legislation that the companies that had suffered the illegal fee did have a domestic law remedy to claim the amounts unduly paid. The guidance granted by the court could only facilitate their claim under domestic law:

- the court confirmed that the fee was imposed in a manner contrary to Community law;
- it also confirmed that under domestic law a manifestly unlawful administrative act which is contrary to domestic law must be annulled, irrespective of any time limits; and

1079. *Fantask*, para. 51.

1080. ECJ, case C-231/96.

1081. The *Edis* judgment on time limits is considered to be the rule by Dassesse, M., "Taxes paid in violation of EU law: how far back can a taxpayer claim reimbursement?", *IBFD* 2004, at 510 et seq.

1082. ECJ, joined cases C-392/04 and C-422/04.

- it made a brief reference to the principle of equivalence, requiring the Member State to extend that possibility to acts that are manifestly contrary to Community law provisions.

Having established this, the court lets the competent domestic court ascertain the facts and decide whether the illegal assessments must be withdrawn. This pattern is not unfamiliar, the court once again seems to be taking into account all the aspects of the status of the claimants and not only the particular time limit.¹⁰⁸³ In this case there was no need to grant an extension to the time limit since the principle of effectiveness was not breached – the companies having paid the illegal fee could be fully covered by an existing domestic law remedy for the annulment of manifestly unlawful administrative acts.

In the *Kempter* case¹⁰⁸⁴ the court, following the Opinion of Advocate General Bot,¹⁰⁸⁵ held that it is clear that Community law does not impose any specific time limit for making an application for review in cases where the reopening of a case is dictated (under the circumstances of the particular case) by Community law. The court recognized that according to its settled case law it is compatible with Community law to lay down reasonable time limits for bringing proceedings in the interest of legal certainty. The time limit the court is dealing with is the time limit that applies to the time when a taxpayer has the right to present his claim before the competent authority (court or administrative body) *After* the case is reopened and not to the time limit under which the taxpayer has the right to ask for his case to be reopened. As the court put it, “it follows from that settled case law that the Member States may, on the basis of the principle of legal certainty require an application for review and withdrawal of an administrative decision that has become final and is contrary to Community law as interpreted

1083. To this end see, for example, joined cases C-222/05 to C-225/05, *van der Weerd a.o.*, para. 33:

“As regards the principle of effectiveness, it is clear from the Court’s case-law that each case which raises the question whether a national procedural provision renders the exercise of rights conferred by the Community legal order on individuals impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings” and the case law cited therein.

1084. ECJ, decision 12.2.2008, case C-2/06, *Willy Kempter KG*.

1085. Opinion of Advocate General Bot delivered on 27.4.2007.

subsequently by the court to be made to the competent administrative authority within a reasonable period".¹⁰⁸⁶ Therefore, this case law does not affect the issue discussed in this contribution, which is precisely the time limit under which a taxpayer may ask for review of his case if it is found to be unlawful based on a subsequent interpretation of Community law by the ECJ.

Finally, in its recent *Danske Slagterier*¹⁰⁸⁷ judgment the court had the opportunity to deal with the question of whether the institution of infringement procedures under Art. 226 of the EC Treaty is capable of interrupting or suspending the national limitation period for presenting a claim for reparation of loss or damage caused as a result of the breach of Community law by a Member State. The court held that this is not possible, as the rights of individuals cannot depend on the Commission's assessment of the expediency of taking action against a Member State or on the delivery by the court of any judgment finding an infringement.¹⁰⁸⁸ The court is not viewing the initiation of an infringement procedure or the ECJ judgment finding an infringement as a prerequisite for the admissibility of a claim for reparation of loss or damage, as this would amount to a limitation of the rights of the individuals. The court in this case examined the functioning of an ECJ judgment finding an infringement as against the individual and it ruled that this is not possible; it did not examine a situation where the delivery of an ECJ judgment finding an infringement actually creates rights for the individuals nor can the *Danske Slagterier* judgment can be regarded as covering this issue as well.

After the analysis of these selected cases, some conclusions can be drawn as to the court's disposition towards time limits. First of all, it seems that the court makes an assessment of the whole procedural status of the claimant in order to ascertain whether the Community right that is harmed can be somehow adequately protected. When it is established that this is the case, the court does not intervene in the national procedural competence of the Member State involved. This is perfectly consistent with the principle of subsidiarity. If the court finds, however, that the protection of the Community rights of the claimant is not adequate, then it relies on the principle of effectiveness and offers a solution to bypass the time-barrier, either by proposing the use of an alternative remedy that leads to the same result

1086. ECJ, *Kempter*, para. 59.

1087. ECJ 24.3.2009, case C-445/06, *Danske Slagterier*, H&I 2009/5.2, with comment by Van Eijdsden, A.

1088. ECJ, *Danske Slagterier*, paras. 38 and 45–46.

or by extending the time limits of existing remedies. The extension of the provided time limits seems to be the last resort, when there are other means that can lead to the protection of legitimate rights of qualifying claimants.

26.8. The principle of legal certainty and national limitation periods

The principle of legal certainty is recognized by the court as a fundamental principle of the Member States' legal systems and consequently of the Community legal order as well. In particular, the court has recognized that it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings. It cannot be said that this makes the exercise of rights conferred by Community law either virtually impossible or excessively difficult, even though the expiry of such limitation periods entails by definition the rejection, wholly or in part, of the action brought.¹⁰⁸⁹

As the court has repeatedly held, Community legislation must be certain and its application foreseeable by those subject to it. This requirement of legal certainty must be observed even more strictly in the case of rules liable to entail financial consequences. This is the only way for those concerned to know precisely the extent of the obligations which those rules impose on them.¹⁰⁹⁰ This is true for both the taxpayer and the tax authorities, since the financial impact of a certain rule is crucial for both. However, the burden of ensuring legal certainty falls on the state and its organs (executive, legislative and judicial).

The principle of legal certainty, which forms part of the Community legal order, must also be observed both by the Community institutions and by the Member States when they exercise the powers conferred on them by Community directives.¹⁰⁹¹ Since the principle of legal certainty is a Community legal order principle, it must be observed at a Community level in cases of direct taxation, even though the area of direct taxation falls primarily within the competence of Member States. In other words, in areas where Community law is relevant Member States must guarantee that legal certainty at a Community level is observed. In most cases this would result in

1089. See, in particular, ECJ, case C-326/96, *Levez*, para. 19 and the case law cited therein.

1090. ECJ, case C-288/07, *Isle of Wight Council a.o.*, para. 47.

1091. ECJ, case C-288/07, para. 48.

legal certainty at national level being observed as well, but in cases where a possible conflict might occur (*legal certainty on a Community level v. legal certainty on a national level*), the principle of cooperation (Art. 10 of the EC Treaty) would lead us to conclude that Community-level legal certainty must be preferred over national-level legal certainty.

This is even more so in cases where directly applicable primary Community law rules are concerned. The Community-level principle of legal certainty would be jeopardized if Member States had the power to compromise the application and full effect of directly applicable Community rules by unilateral national rules disguised under the form of "procedure". Plenty of room for forum shopping would be created in such cases. Both results are incompatible with the idea of the internal market and surely create obstacles to its realization. Neither the state authorities nor private operators will be in a position to know with the desired degree of certainty for the arrangement of their affairs whether, in a given local market, the breach of an EC Treaty rule by the state will or will not result in full refund of the taxes paid contrary to Community law. This situation does not promote legal certainty on a Community level.

The principle of legal certainty requires that reasonable limitations of actions of fiscal nature be fixed. In the *Rewe* case,¹⁰⁹² the court held that "the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed. The laying down of such time limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned".

This holding does not contradict the idea discussed in this contribution. The issue is not whether there is a need to have time limits or not; the answer to this is clearly "yes". The issue discussed is what happens when the existing time limits have already expired at the time when the unlawfulness of a measure becomes apparent, thus in essence depriving the taxpayer of its rights, as the taxpayer never had the opportunity to claim them. The *Rewe* decision does not give an answer to this question.

1092. ECJ, case C-33/76, para. 5.

Furthermore, in its *Gioconda Camaroto* case¹⁰⁹³ the court, making reference to its *Rewe* case law, repeated that “it is compatible with Community law for reasonable limitation periods for bringing proceedings to be laid down in the interests of legal certainty”.¹⁰⁹⁴ Again, this reference in the light of the principle of effectiveness is only meaningful when made for cases where a genuine opportunity to use the remedy was given to the claimant and cannot be construed so as to be extended to cases where no such opportunity ever existed.

Even though the principle of legal certainty is used as an acceptable defense for national procedural measures limiting the access of citizens to the rights conferred on them by Community legislation, there is always a minimum level beyond which the principle of legal certainty can no longer be invoked. This is the level that is defined negatively by the court as “non-impossibility”.¹⁰⁹⁵ This minimum requirement, which forms a part of the principle of effectiveness, guarantees that in any case any person has at least a genuinely suitable opportunity to make his claim and he has not in practice been “deprived” of his right. It works as a threshold, below which the principle of legal certainty seems to be of less importance compared to the principle of effectiveness.

The essence of the case law and the interrelationship between the principle of effectiveness and the principle of legal certainty is, in my view, based on the functioning in practice of the relevant procedural rule (time limits in particular) – as long as in principle nothing can prevent a person from making its claim under Community law within the time limit generally prescribed by its national legislation, there can be no infringement of the principle of effectiveness. Negligence is not, and should not be, rewarded or cured. If, however, that person did not have a genuinely suitable opportunity to make his claim under national law within the prescribed time limit, we are confronted with a case where the principle of legal certainty must give way to the principle of effectiveness, since the minimum standard of “non-impossibility” has not been observed.

1093. ECJ, joined cases C-52/99 and 53/99, in [2001] ECR, p. I-1335, paras 28 et seq.

1094. To support its view the Court made reference to case 33/76, *Rewe*, para. 5; case 45/76, *Comet* in [1976] ECR, p. 2043, paras. 17 and 18, and case 61/79, *Denkavit Italiana*, in [1980] ECR, p., 1205, para. 23.

1095. ECJ, *Rewe*, para. 30:

“It follows that Community law does not preclude application of a two-year time-limit, provided that the national rules for its implementation are compatible with the principle of equivalence and *do not render the exercise of rights of review impossible in practice or excessively difficult*” (italics added).

In conclusion and in the light of the analysis so far, I propose that the application of the principle of legal certainty is not capable of blocking a national court from granting an extension of a time limit that has already expired, when it is established that by not doing so the taxpayer is left basically unprotected.

This proposition will be tested against some possible counter-arguments that could be invoked in order to support the position that there is nothing wrong with the principle of legal certainty barring the refund of taxes unduly paid when the unlawfulness was not known at the time the payment was made.

26.9. Possible counter-arguments

26.9.1. Excusable error

First of all, it could be suggested that since the state was unaware of the fact that the particular direct tax rule was contrary to Community law, it is found in a situation of excusable error. Could this argument work in favour of the state and release it from the obligation to pay back the sums that it has unduly received during the time that the unlawful measure was effective? I think the answer should be "no". An infringing state may not invoke that kind of argument against the taxpayer.

Since the *Fantask* case, the defense of the excusable error is not acceptable. According to the ECJ "Community law precludes actions for the recovery of charges levied in breach of the Directive from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful."¹⁰⁹⁶

This is exactly the case with existing direct taxation domestic rules that are found incompatible with the Treaty freedoms only after an ECJ decision is published. The breach of Community law cannot be disregarded based on the fact that the state was not aware of the unlawfulness of the measure. Accordingly, the incompatible rule cannot be justified by the fact that the state or the taxpayers were not aware of its incompatibility with

¹⁰⁹⁶ ECJ, *Fantask*, para. 41.

Community law. To allow a Member State to rely on time limits and bar the taxpayer's claims would permit it to escape the consequences of its own unlawful conduct and discourage it from taking steps to remedy the incompatible rules.

If this argument were to be accepted and such an option were to exist, it would have been excessively difficult for the taxpayers to recover taxes paid contrary to Community law.

26.9.2. Settled practice

One could argue that since the rule existed for a long period of time without being challenged, this has created a settled practice and any claims brought against the rule should be dismissed on that ground. This argument is not convincing. As the court held in the *Fantask* case, "a general principle of national law under which the courts of a Member State should dismiss claims for the recovery of charges levied over a long period in breach of Community law without either the authorities of that State or the persons liable to pay the charges having been aware that they were unlawful" would not satisfy the conditions of effectiveness, and therefore, it would be incompatible with Community law (read: inapplicable). Moreover, it would have the effect of encouraging infringements of Community law which have been committed over a long period.¹⁰⁹⁷

26.9.3. The taxpayer never complained

In the same line with the above arguments, one could argue that the affected taxpayers had never complained about the unlawful measure before. This argument was brought forward in the *Metallgesellschaft* case. The court held in para. 106 of the judgment in *Metallgesellschaft* that the exercise of rights conferred on private persons by directly applicable Community law provisions would be impossible or extremely difficult if their claims for refund or compensation based on the infringement of Community law were rejected or reduced solely because the persons concerned had not applied for the application of a tax advantage that national law denied them. The same conclusion was repeated in the *Thin Cap* case.¹⁰⁹⁸

¹⁰⁹⁷. ECJ, *Fantask*, para. 40.

¹⁰⁹⁸. ECJ, case C-524/04, *Thin Cap*, para. 126.

This is not new; the same reasoning is found in the *Fantask* case, where the court concluded that the fact that a charge was levied over a long period without the persons liable to pay the charges having been aware that they were unlawful does not justify the levy of the charge. It seems that it is not important how long the unlawful charge was levied – the persons who were paying the charges without being aware that the charges were unlawful are worthy of protection under Community law.

Especially as far as EC Treaty freedoms are concerned, even though these provisions are directly applicable, their content as far as direct taxation cases are concerned as well as their impact on national tax systems is only gradually being clarified. Therefore, requiring, for example, that a taxpayer guessed in 1990 the possible effect that the rules regarding the freedom of establishment (or free movement of capital) could have on the dividend taxation system of a Member State and denying him the possibility to enforce his rights because he should have predicted this effect, makes the enjoyment of his rights under the Treaty practically impossible or at least very difficult.

26.9.4. The taxpayer had a duty to mitigate its exposure

This argument cannot apply in tax cases. It applies in cases where damages or losses are discussed but it cannot be invoked in cases where the payment is a public law duty/obligation, as in tax or social security cases. As Advocate General Jacobs correctly pointed out in his Opinion in the *Fantask* case¹⁰⁹⁹ “the duty to mitigate loss or damage by using other remedies (...) has no relevance to the restitutionary or entitlement element of the claim, i.e. the amount of the overpaid tax or benefit denied. Whereas the duty to mitigate will be relevant in the case of a loss of profits, the loss corresponding to overpaid tax or denial of benefits will not be aggravated by the delay in bringing proceedings”.

The argument of diligence by the taxpayers was also used by the UK government in the *Metallgesellschaft* case¹¹⁰⁰ and again in the *Thin Cap* case¹¹⁰¹ but it was not accepted by the court. It held that accepting this argument would result in rendering the exercise of rights conferred on private persons

1099. In para. 82.

1100. ECJ, joined cases C-397/98 and C-410/98, *Metallgesellschaft*, paras. 99 et seq.

1101. ECJ, *Thin Cap*, paras. 124 et seq.

by directly applicable provisions of Community law impossible or excessively difficult.

This was recently confirmed by the court in its *Danske Slagterier* judgment,¹¹⁰² where the court recognized that it would be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all legal remedies available to them, even if that would give rise to excessive difficulties or could not reasonably be required of them. The fact of when this would be reasonably required, is a matter of national courts to determine.

26.9.5. Res judicata or finality of court decisions and administrative acts

Finality of administrative or judicial decisions, which is acquired upon expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies, is an expression of the principle of legal certainty. The court accepted in its *Kühne & Heitz* judgment that Community law does not require that administrative bodies be under an obligation, in principle, to reopen an administrative decision that has become final in that way.¹¹⁰³ If, however, that option exists under national law, then the court finds that Art. 10 of the EC Treaty creates an obligation (under the further conditions described in that judgment) for the national authorities to reopen the case.

The court, giving priority to the principles of direct applicability and primacy of Community law as well as to the obligations imposed by Arts. 10 and 234 of the EC Treaty, confirmed that the national administrative body has the duty to set aside any national rule that constitutes an obstacle to the full effectiveness of Community law. Since the Netherlands legal system already provided for the reopening of the case, the court held that this option (under the further conditions that it set) should be used in the case of *Kühne & Heitz* so that the interpretation of the relevant provision of Community law given subsequently by the court could be taken into account.

In his Opinion on the *Kühne & Heitz* case Advocate General Léger observed that.¹¹⁰⁴ “The primacy of Community law is a principle which must be obeyed with the same force by administrative authorities, regardless of

1102. ECJ, case C-445/06, *Danske Slagterier*, para. 62.

1103. ECJ, case C-453/00, *Kühne & Heitz NV*, para. 24.

1104. Opinion of Advocate General Léger delivered on 17.6.2003, point 66.

whether they are concerned with a decision having the authority of *res judicata* or a decision having the authority of a final judgment. The primacy principle prevents a national administrative body from refusing an individual's claim for payment based on Community law on the ground that the claim seeks to call into question a prior administrative decision which has not been criticised by a judicial decision, irrespective of whether it has the legal authority of *res judicata* or that of a final judgment."

The *Kühne & Heitz* case law was confirmed and elaborated on recently by the court in its *Kempter* judgment.¹¹⁰⁵ The court accepted that in order for the interpretation given by it in a subsequent judgment to be taken into account it is not required that the claimant had raised the issue of misinterpretation of Community law in its initial legal action. The court accepted that "in the context of a procedure before an administrative body for review of an administrative decision that became final by virtue of a judgment delivered by a court of final instance which in the light of a decision given by the Court subsequent to it was based on a misinterpretation of Community law, Community law does not require the claimant to have relied on Community law in the legal action under domestic law which he brought against that decision".¹¹⁰⁶

Advocate General Bot has summarized the court's case law on the relationship between the principle of *res judicata* and the obligation imposed on national administrative or judicial bodies to review final administrative or court decisions:¹¹⁰⁷

74. Having regard to the importance of the principles of legal certainty and *res judicata* in the Community and national legal systems, the rule is that Community law does not require a national authority to reopen a final

1105. ECJ, case C-2/06, *Willy Kempter KG*. This decision reconciled the *Kühne & Heitz* decision with the previous case law of the Court on *res judicata*, such as *Kapferer* and *Eco Swiss* according to which Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, ECJ, case C-234/04, *Kapferer*, para. 21 and case C-126/97, *Eco Swiss*, paras. 46 and 47); see the relevant discussion in the Opinion of Advocate General Bot on the *Kempter* case delivered on 24.4.2007.

For the effects of the *Kempter* judgment in the Greek legal system, see Raikos, D., "The review of a final administrative act that is contrary to Community law after the ECJ judgment on C-2/06, *Willy Kempter KG*", *Theory and Practice of Administrative Law*, 2008, at 1081 et seq.

1106. ECJ, *Kempter*, para. 46.

1107. Opinion of Advocate General Bot delivered on 24.4.2007 on case C-2/06, *Kempter*, points 73 et seq.

decision which it has adopted, even if the decision is incompatible with Community law as subsequently interpreted by the Court.

75. Therefore national procedural law is to apply fully in accordance with the principle of procedural autonomy of the Member States.
76. However, if it is shown that a national procedural rule preventing the review of a final decision is contrary to the principle of equivalence and/or the principle of effectiveness, that rule should be disregarded by the national court.
77. Regarding the specific issue of the review of final administrative decisions, Art. 10 EC produces effects the nature and intensity of which vary, depending on the situation.

Again it appears that the principles of equivalence and effectiveness combined with the principle of Community loyalty are capable of leading to the reopening of a case that has become final, especially when the unlawfulness of a certain provision became apparent for the first time by subsequent ECJ judgment.

26.9.6. National procedural autonomy v. principle of effectiveness

Another argument that could be used is that in cases of conflict between the principle of national procedural autonomy and the principle of effectiveness, the former should prevail. This argument could be further supported by the fact that in direct taxation matters there is no Community competence for the substantive issue (direct taxation), and even less so for the procedural ones. This set of arguments is not convincing, either. Negative integration is as important as positive integration for the Community legal order. And from the moment that we have some degree of integration of substantive rules, we also need some kind of coordination of procedural rules as well. Therefore, the principle of national procedural autonomy cannot constitute a valid argument for the denial of substantive Community rights of the taxpayers.

26.9.7. Legal certainty supersedes effectiveness of Community law

Another argument that could be put forward is that in cases of conflict between the principle of effectiveness and the principle of legal certainty,

priority should be given to the latter. This argument is not convincing. As the analysis has shown, the court, even though it has never said so explicitly, while recognizing the importance of the principle of legal certainty, gives priority to the principle of effectiveness of Community rules.

Indeed, limitation periods aim at ensuring legal certainty for both the taxpayers and the state. In order to serve their purpose, limitation periods must be fixed in advance, otherwise the legal uncertainty that is created may result in a breach of the principle of effectiveness.¹¹⁰⁸ The fact whether the applicable time limit is sufficiently foreseeable is for the national court to determine. This determination is to be based among other criteria on whether the concerned individual is in the first place aware (or reasonably expected to be aware) that the fact(s) triggering the time limit have taken place. This condition is not satisfied in cases where the unlawfulness of a tax provision becomes apparent only after an ECJ judgment is delivered. In other words, a limitation period cannot begin to run until the persons concerned are reasonably expected to be aware of their rights.¹¹⁰⁹

26.9.8. Budgetary certainty

One of the aspects of legal certainty that is particularly important not only in theory but also in practice is budgetary certainty. No one denies the importance that it has for the states in ensuring the finality of their tax receipts. However, this argument in itself is not enough to justify infringements of Community law. This has been confirmed many times by the court, which is constantly denying any kind of temporal limitation of its judgments despite the complaints of the Member States about the economic repercussions that a judgment may have. Therefore, it seems that any such argument that is based on the possible economic effects that the adoption of the proposed solution could create for the Member States' budgets will not be automatically accepted by the court.¹¹¹⁰

1108. ECJ, *Danske Slagterier*, para. 33, with further reference to the case C-228/96, *Aprile*, and the case C-62/00, *Marks & Spencer*.

1109. This argument is derived by the considerations of the Court in its *Danske Slagterier* decision, paras. 51 and 52. In that case the Court, confirming its decision on joined cases C-295/04 to 298/04, *Manfredi and Others*, essentially held that a situation where a limitation period begins to run or indeed expires without the person who has sustained a loss even knowing that he has been harmed is not acceptable.

1110. An excellent overview of the issue is offered by Lang, M., "Limitation of the temporal effects of judgments of the ECJ", *Intertax* 35 (2007), at 230 et seq.

It is only in a handful of exceptional cases that the ECJ has limited the temporal effects of its judgments.¹¹¹¹ For the first time in the judgment in the *Defrenne* case,¹¹¹² the court reserved the right to limit the retroactive effect of judgments giving preliminary rulings on questions of interpretation, having regard to important considerations of legal certainty affecting all the interests involved, both public and private.¹¹¹³

In the tax area, since the mid-90s the court has accepted in a case concerning capital duty that “The financial consequences which might ensue for a government owing to the unlawfulness of a tax or imposition have never in themselves justified limiting the effects of a judgment of the Court. Furthermore, to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which taxpayers have under Community fiscal legislation.”¹¹¹⁴

The ECJ case law on the issue has been summarized by Advocate General Stix-Hackl in her Opinion on the *Meilicke* case:¹¹¹⁵

On the basis of the principle of legal certainty relied on in *Defrenne II*, the Court, in its later case-law, established two conditions for a limitation of temporal effects.

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

1111. See, for example, the confirmation of the Court in case C-292/04, *Meilicke*, para. 35: “It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith”.

1112. ECJ, case C-43/75.

1113. Since the *Defrenne* decision, the Court has imposed such a restriction in only a few cases: e.g. case C-163/90, *Legros and Others*; case C-126/94, *Cadi Surgelés and Others*; case C-437/97, *EKW and Wein & Co.*; case C-24/86, *Blaizot and Others*; case C-415/93, *Bosman* and case C-262/96, *Sürül*.

1114. ECJ, case C-197/94, *Société Bautiaa*, para. 55.

1115. Advocate General Stix-Hackl’s Opinion delivered on 5.10.2006 on case C-292/04, *Meilicke*, points 37–38.

It is under such circumstances that the court may decide to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted. Even in such cases, though, the court generally takes care not to exclude the retroactive effect of its judgments containing preliminary rulings in relation to the parties to the main proceedings and persons who, before the date when such judgments were given, institute legal proceedings or raise an equivalent claim.

In addition to the above-mentioned conditions under which temporal limitation of a judgment could be granted by the court, Member States are required to prove the economic effect that a judgment would have on their budgets.¹¹¹⁶ So far, no Member State has managed to prove this¹¹¹⁷ and consequently the court has not granted temporal limitation to any of its recent judgments in direct tax cases.

In conclusion, an argument contra the extension of a time limit under which a taxpayer can bring his action for refund of taxes paid contrary to Community law is very difficult for a Member State to make successfully before the court.

26.10. Final remarks

EC tax law is still in the course of evolution. In the absence of Community competence on the matter it is only by means of ECJ case law that a certain level of integration has been achieved. In many cases the unlawfulness of a certain tax measure is established in this way only after an ECJ decision on the issue is delivered. Since the primacy of Community law and the related principles of effectiveness and effective judicial protection demand that the unlawfully levied charges must be repaid to the taxpayers, Community law leaves it to the national legal orders to take care of such repayment. In most

1116. See, for example, the decisions in cases C-292/04, *Meilicke*; C-446/04, *FII*; C-524/04, *Thin Cap*.

1117. In the *Thin Cap* decision, paras. 130–132, the Court held that:

“It is clear that the United Kingdom Government has not, in the present case, stated the basis on which it reaches its estimate of the costs of the effects of this judgment, nor even whether that amount relates only to the financial consequences arising under the main proceedings or also to those which would flow from this judgment in other cases. In addition, the amount put forward by that Government proceeds on the hypothesis that the answers given by the Court would, in their entirety, be those proposed by the claimants in the main proceedings, which, however, it is for the national court to determine. In those circumstances, the Court does not have sufficient information before it to consider the application made by the United Kingdom Government.”

cases, however, national procedural rules, and especially national limitation periods, bar the enjoyment of the Community law rights of taxpayers. Can such national limitation periods be tolerated under Community law?

The analysis in the previous paragraphs showed that nothing prevents a Member State from granting full, effective legal protection to its taxpayers, despite the concerns, both legal and financial, that may be raised. The solution preferred in this contribution is the moving of the starting point of national limitation periods that apply to repayment of taxes, when the unlawfulness of the particular tax measure arose subsequently and was established by an ECJ judgment. The advantages of this solution are mainly two: first of all, the domestic competent authority (either legal or administrative) will be called on to decide the issue and, secondly, the forum-shopping issue is effectively dealt with, as there will be no reason to bypass the provided (administrative law) remedy and try to fit in a civil law claim for damages.

Many concerns may be raised with regard to this proposal: the principle of national procedural autonomy, the principle of legal certainty, budgetary concerns – all of them justified. Though, when compared with the primacy of Community law and the obligations that the Member States unconditionally undertook by the Treaties, they do not seem to be able to survive the conflict.

A study of many ECJ judgments shows that such a solution could fit in the existing case law without creating much disturbance. Member States would not be happy with such a solution, since it is certain that in many cases it will result in their obligation to pay back large amounts of taxes that may date back many years. Member States, however, do have the means to react, apart from enacting new legislation (as has already been the case), they always have the possibility to prove the actual economic impact that a decision may have and to ask for the temporal limitation of a judgment.