



The concept for legal remedies

The concept for legal remedies in the EU tax law according to the Treaties and the practice of CJEU. Means for effective enforcing EU tax law in the member states

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Structure

1. Introduction: general considerations based on the constitution of the EU and the principles developed by the ECJ in its early case law
2. Remedy of setting aside national measures
3. Remedy of restitution
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5. Challenging EU secondary law directly?

1. Introduction: general considerations based on the constitution of the EU and the principles developed by the ECJ

Why national courts, not EU courts?

- Public international law
- van Gend & Loos (26/62)
- Concept of primacy of EU law
- No provisions in the Treaties for access of citizens to EU courts

1. Introduction: general considerations based on the constitution of the EU and the principles developed by the ECJ

Principle of sincere cooperation

- Article 4(3) TEU

"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

"The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

"The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

1. Introduction: general considerations based on the constitution of the EU and the principles developed by the ECJ

Principle of sincere cooperation (cont'd)

- Case 33/76, Rewe-Zentralfinanz, §5

"In the absence of community rules on this subject, it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law".

1. Introduction: general considerations based on the constitution of the EU and the principles developed by the ECJ

Principle of sincere cooperation (cont'd)

- Article 19(1) TEU

"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

- national courts are entrusted with ensuring legal protection which citizens derive from EU law

→ "national procedural autonomy" or "procedural competence"

1. Introduction: general considerations based on the constitution of the EU and the principles developed by the ECJ

Two limits to national procedural autonomy/competence:

- Principle of effectiveness
 - national rules and procedures should not have as effect to make the exercise of a right under EU law impossible in practice or excessively difficult

- Principle of equivalence
 - that the remedies and the forms of action available under national law for a breach of national law must also be made available for a breach of EU law and the latter cannot be less favourable than the former

2. Remedy of setting aside national measures

Follows on from the procedural autonomy of the Member States

Case 106/77, Simmenthal

"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means."

2. Remedy of setting aside national measures

Principle of interpretation in conformity with Union law

Cases C-397/01 to C-403/01, Pfeiffer, §113-119:

"119 Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. [...]"

2. Remedy of setting aside national measures

Limits to the principle of consistent interpretation

no requirement to interpret national law contra legem

- C-105/03, Pupino, §47
- "[...] the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

3. Remedy of restitution

Opinion AG Fennelly in cases C-397 & 410/98, Metallgesellschaft & Hoechst, §45

"The notion underlying this principle is that a Member State must not profit and an individual who has been required to pay the unlawful charge must not suffer loss as a result of the imposition of the charge."

3. Remedy of restitution

Cases C-397 & 410/98, Metallgesellschaft & Hoechst, § 85

"In the absence of Community rules on the restitution of national charges that have been improperly levied, 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, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) [...]."

3. Remedy of restitution

Claim for interest - restitution or compensation?

Cases C-397 & 410/98, Metallgesellschaft & Hoechst, § 86-88

"It is likewise for national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated [...]."

"In the main proceedings, however, the claim for payment of interest covering the cost of loss of the use of the sums paid by way of ACT is not ancillary, but is the very objective sought by the plaintiff's actions in the main proceedings. [...] the award of interest represents the reimbursement of that which was improperly paid and would appear to be essential in restoring equal treatment [...]"

3. Remedy of restitution

Claim for interest – Cases C-397 & 410/98, Metallgesellschaft & Hoechst, § 86-88 (cont'd)

"The national court has said that it is in dispute whether English law provides for restitution in respect of damage arising from loss of the sue of sums of money where no principal sum is due. It must be stressed that in an action for restitution the principal sum due is none other than the amount of interest which would have been generated by the sum, use of which was lost as a result of the premature levy of the tax."

3. Remedy of restitution

Time limits

- Case 33/76, Rewe-Zentralfinanz, §5

"time-limits may not make 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."

3. Remedy of restitution

Time limits (cont'd)

- Case C-453/00, Kühne & Heitz

"Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way."

3. Remedy of restitution

Time limits – Case C-453/00 Kühne & Heitz (cont'd)

"the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where

–under national law, it has the power to reopen that decision;

–the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

3. Remedy of restitution

Time limits – Case C-453/00 Kühne & Heitz (cont'd)

—that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and
—the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court."

3. Remedy of restitution

Time limits (cont'd)

- Case C-2/06, Kempter, §45

"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 the administrative decision."

3. Remedy of restitution

Time limits – Case C-2/06, Kempster (cont'd)

"Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence. " (§60)

3. Remedy of restitution

Time limits (cont'd)

- Cases C-89/10 and C-96/10, Q-Beef NV & Bosschaert, §§34-36:

"[...] in the absence of harmonised rules governing the reimbursement of charges imposed in breach of EU law, the Member States retain the right to apply procedural rules provided for under their national legal system, in particular concerning limitation periods, subject to observance of the principles of equivalence and effectiveness.

"In the present case, it appears that the principle of equivalence is not infringed, in so far as the five-year limitation period applies to all debts owed by the Belgian State and whose applicability does not depend on the question whether those debts arise from a breach of national or EU law, which is for the referring court to determine.

3. Remedy of restitution

Time limits – Cases C-89/10 and C-96/10, Q-Beef NV & Bosschaert, §§34-36 (cont'd)

"As regards the principle of effectiveness, the Court has stated that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned. Such periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought [...]. In that regard, by way of example, a time-limit of three years under national law was considered reasonable (see, to that effect, Case C-542/08 Barth [2010] ECR I-0000, paragraph 29)."

3. Remedy of restitution

Conditions for restitution

- Cases C-397 & 410/98, Metallgesellschaft & Hoechst, § 105-106

"the United Kingdom Government is blaming the plaintiffs for lack of diligence and for not availing themselves earlier of legal remedies other than those which they took to challenge the compatibility with Community law of the national provisions denying a tax advantage to subsidiaries of non-resident parent companies. It is thus criticising the plaintiffs for complying with national legislation and for paying ACT without applying for the group income election regime or using the available legal remedies to challenge the refusal with which the tax authorities would inevitably have met their application.

3. Remedy of restitution

Conditions for restitution - Cases C-397 & 410/98, Metallgesellschaft & Hoechst, § 105-106 (cont'd)

"The exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law."

- Cf. also case C-524/04, Thin Cap Group Litigation, § 125-127

4. Remedy of compensation

Cases C-6/90 & C-9/90, Francovich

National court asked whether a MS is obliged to make good loss and damage suffered by individuals as a result of the failure to transpose a directive

"The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible."
(§33)

4. Remedy of compensation

Francovich (cont'd)

Conditions for State liability: 3 conditions:

"The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties."

"Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

4. Remedy of compensation

Francovich (cont'd)

Procedural autonomy of the MSs:

§42

"[...] it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law."

4. Remedy of compensation

Francovich (cont'd)

Procedural autonomy of the MSs:

principles of equivalence and of effectiveness

§43

"Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation"

4. Remedy of compensation

Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame, §51:

3 conditions – reformulation/clarification of the second condition:

"Community law confers a right to reparation where three conditions are met:

- 1. the rule of law infringed must be intended to confer rights on individuals;*
- 2. the breach must be a sufficiently serious; and*
- 3. there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."*

4. Remedy of compensation

Second criterion – sufficiently serious

Case C-446/04, Test Claimants in the FII Group Litigation

→ manifest and grave unlawfulness

"212 As regards the second condition, it should be pointed out, first, that a breach of Community law will be sufficiently serious where, in the exercise of its legislative power, a Member State has manifestly and gravely disregarded the limits on its discretion [...]. Secondly, where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach [...]."

4. Remedy of compensation

FII (cont'd)

Sufficiently serious: factors to be taken into account

"213 In order to determine whether a breach of Community law is sufficiently serious, it is necessary to take account of all the factors which characterise the situation brought before the national court. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law [...]."

4. Remedy of compensation

FII (cont'd)

Sufficiently serious: factors to be taken into account

"214 *On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement [...].*"

4. Remedy of compensation

FII (cont'd)

Sufficiently serious: factors to be taken into account – direct taxation: EU law not always sufficiently clear – consequence?

"215 [...] the national court must take into account the fact that, in a field such as direct taxation, the consequences arising from the freedoms of movement guaranteed by the Treaty have been only gradually made clear, in particular by the principles identified by the Court since delivering judgment in Case 270/83 Commission v France. Moreover, as regards the taxation of dividends received by resident companies from non-resident companies, it was only in Verkooijen, Lenz and Manninen that the Court had the opportunity to clarify the requirements arising from the freedoms of movement, in particular as regards the free movement of capital."

4. Remedy of compensation

Inspiration of case law on limitation of temporal effect?

Preliminary rulings : interpretation EU law 'ex tunc'

Case 292/04, Meilicke, §35-36

"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 [...]"

"In addition, as the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought [...]"

4. Remedy of compensation

Third criterion – causal link

Tax examples of consequential damage: sufficient causal link?

- Case C-446/04, Test Claimants in the FII Group Litigation
→ decision to pay a higher dividend
- Case C-524/04, Test Claimants in the Thin Cap Group Litigation
→ decision to provide share capital rather than loans

ECJ simply refers to national court to decide whether there is a sufficient causal link

5. Challenging EU secondary law directly?

article 265 TFEU:

"The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

"It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

5. Challenging EU secondary law directly?

Article 265 TFEU (cont'd):

"The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

"[...]

"The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

5. Challenging EU secondary law directly?

Case 25/62, Plaumann

"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed . In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee."

5. Challenging EU secondary law directly?

Individuals may raise the issue of the validity of the directive in the national courts by challenging the national law implementing the directive.

Article 267 TFEU:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

5. Challenging EU secondary law directly?

Article 267 TFEU (cont'd)

"Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

"Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

"If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

5. Challenging EU secondary law directly?

Case 314/85, Foto-Frost, §17:

"Since article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice."

5. Challenging EU secondary law directly?

Article 277 TFEU:

"Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act."

5. Challenging EU secondary law directly?

Consequences of a preliminary ruling finding the Union act invalid:

- EU institutions need to take necessary measures to remedy the illegality
 - Cases C-120/06P and C-121/06P, FIAMM, §123: application by analogy of article 266 TFEU:
 - "The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the ECJ."*
- possibility of compensation/claim for damages against the EU
 - articles 268 and 340 TFEU

Any questions?

Many thanks for your attention