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Section I

LAW OF THE EUROPEAN ORGANISATIONS

Non-retroactive or prospective ruling by the Court of Justice of the European Communities in preliminary rulings according to Article 234 EC

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I. Introduction

The article on hand discusses the problem of non-retroactive or prospective rulings (temporal limitation of the effects of the ruling, limitation *ratione temporis*; French: *les limitations des effets des jugements dans le temps*; German: zeitliche Beschränkung der Urteilstwirkung) in the framework of preliminary rulings of the Court of Justice of the European Communities (ECJ) according to Art. 234 EC. The question as to the temporal scope of this type of rulings is – in contrast to rulings according to Art. 230 EC, whose effects can explicitly be limited according to Art. 231 para 2 EC – not answered by the EC-Treaty. The difference between a determination according to Art. 234 EC which *de facto* permanently prohibits the application of opposing national law – due to the primacy in application of community law and the obligation for the national jurisdiction to make a reference – and the constitutive declaration of invalidity can be disregarded in practice owing to their functional similarity. The need to answer the question as to the exact preconditions for a non-retroactive or prospective ruling has become particularly urgent since in the recent past plenty of preliminary questions have been piling up on the dissection table in Luxemburg, which involve rules in the field of national tax law.¹ In this connection the typical constellation is either the discriminatory non-granting of a financial advantage (unequal exclusion of benefits) like a tax exemption, an exemption limit and a possibility to withhold, or the imposition of national taxes in breach of provisions of the directives on the harmonisation of the laws of the Member States relating to turnover taxes (Common system of value

added tax).² If the judicial review results in the finding that a provision of the national tax law is not compatible with community law, each individual is entitled to obtain repayment of charges levied in a Member State in breach of Community provisions due to the review's *ex-tunc* effect. According to settled case-law of the ECJ the Member State in question is therefore required, to apply the new interpretation to legal matters which arose before the preliminary ruling.³ The retroactive redistribution of budget funds at the expense of the current national budget constitutes a grave interference with the system of periodical budget planning and periodical budget authorisation. In order to guarantee a states capacity to act, it might be inevitable under certain circumstances to raise duties and taxes at short notice as a result. The problem of the *ex tunc*-effect of the judgement is particularly virulent in the field of tax law since on the one hand the application of tax provisions – triggering a duty of payment – in the event of their incompatibility with community law *naturally* lead to massive reimbursement claims. On the other hand in several Member States the definitive tax assessment takes quite a long time. In Germany for example it takes seven years on average for enterprises⁴ thanks to the manifold correction provisions within §§ 129, 164 et seq. of the General Tax Code (Abgabenordnung). As a consequence, tax payers can still lodge a legal remedy regarding fiscal periods dating far back. This problem

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¹ Cf. ECJ 13 December 2005 – C-446/03 – *Marks & Spencer*, [2005] ECR I-10837, para. 30.

² Cf. Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145 at 1), as amended by Council Directive 91/680/CEE of 16 December 1991 (OJ 1991 L 376, at 1, the Sixth Directive).

³ ECJ 14 January 1997 – C-192/95 to C-218/95 – *Comateb et al.* [1997] ECR I-165, para 20; ECJ 8 March 2001 – C-397/98 and C-410/98 – *Metallgesellschaft et al.*, [2001] ECR I-1727, para. 84; ECJ 2 October 2003 – C-147/01 – *Weber's Wine World*, [2003] ECR I-11365, para. 93.

⁴ AG Tizzano ECJ 10 November 2005 – C-292/04 – *Meilicke*, not yet published in the European Court Reports, para. 57.

is aggravated by the considerable duration of the proceedings before the ECJ itself which nowadays have levelled off at around three years. In view of the notoriously empty public purses, the Member States as well as voices in literature⁵ urge the ECJ to mollify the consequences imperilling the national budgets by modifying the temporal scope of the preliminary rulings. By contrast, the ECJ is similarly encouraged to stand firm even in cases with budgetary brisance.⁶

II. The significance of a non-retroactive or prospective ruling

In dogmatic terms the essentially applicable *ex tunc*-effect generates a conflict between the fundamental principle of legal certainty, protecting the expectations of the Member States regarding the continuity as well as the legality of their respective national legal orders, and the obligation of the ECJ to ensure the righteous and uniform application of community law. The ECJ is thus correct when pointing out that nothing but “the diminishing and future compromising of the objectivity of law” is at stake.⁷ In the event of a temporal limitation of the ruling’s effect to a – however natured – *ex nunc*-effect the citizens rights to judicial relief would be disappointed, since for a certain period in the past a status of illegality would be perpetuated. The temporal limitation of the effect of the ruling would also contradict the nature of Article 234 EC as an objective judicial proceeding on the legality of measures of Member States.

Furthermore, the *ex tunc*-effect could lead to a situation where *one* part of the tax payers benefits twice because it could actually pass the charges levied in breach of Community law on to other persons, private and commercial consumers. Therefore, to repay these tax payers the amount of the charge already received from the purchaser would be tantamount to paying them twofold.⁸ However, it has to be considered that the fact that taxpayers may have been obliged to incorporate the charge in the cost price of the product concerned constitutes in itself a disadvantage in comparison with other competitors. The ECJ delegated the – not easy – task to determine, in the light of the facts in each case, whether the burden of the charge has been transferred, to the national courts.⁹ By contrast, the *other* part of the tax payers would have to pay twice because it would have to make good the shortfall and pay the tax increase necessary for the consolidation of the budget.¹⁰

Since the references for a preliminary ruling in the cases *Meilicke*¹¹ and *Banca Popolare di Cremona*,¹² where the Member States concerned were and still are confronted with enor-

mous claims for repayment of charges levied in breach of Community provisions, the preconditions and the actual point in time for a non-retroactive or rather prospective ruling are yet again highly debated. Before turning to these two abovementioned proceedings, the hitherto existing practice of the ECJ shall be delineated, in order to then pursue the question whether the ECJ has reason to modify its jurisprudence.

III. The criteria developed by the ECJ for non-retroactive or prospective ruling

In 1976, the ECJ had recognised for the first time in the case *Defrenne II* derogations from the principle that interpretative judgements have *ex tunc*-effect¹³ with recourse to “important considerations of legal certainty affecting all the interests involved, both public and private”.¹⁴ Hereby, the ECJ made it clear that financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify the limitation in time of the effects of a preliminary ruling.¹⁵ Otherwise, the most serious infringements would receive more lenient treatment, as those infringements are likely to have the most significant financial implications for Member States. 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.¹⁶ All in all, the ECJ propagates a rather restrictive course, whereby temporal limitations of the ruling’s effect have to be the absolute exception.¹⁷

1. Risk of serious economic repercussions

Firstly, the ECJ does not pronounce such a limitation but in cases where there is a risk of serious economic repercussions owing in particular to the large number of legal relationships concerned.¹⁸ In order to preserve future leeway, the ECJ has understandably avoided determining the quantity of the anticipated repayments, either in terms of an absolute amount or in terms of a certain percentage proportionate to the budget, necessary to entail the risk of serious economic repercussions. At this juncture it is to be pointed out that the ECJ did *not* in

¹³ *Defrenne II* (*supra* note 7), para. 69 et seq.

¹⁴ *Defrenne II* (*supra* note 7), paras 74/75; ECJ 2 February 1988 – 24/86 – *Blaizot*, [1988] I-379, para 28; ECJ 16 July 1992 – C-163/90 – *Legros et al.*, [1992] ECR I-4625, para. 30; ECJ 4 May 1999 – C-262/96 – *Sürül*, [1999] ECR I-2685, para. 108; ECJ 15 March 2005 – C-209/03 – *Bidar*, [2005] ECR I-2119 = [2005] EuLF I-111, para. 67.

¹⁵ ECJ 19 October 1995 – C-137/94 – *Richardson*, [1995] ECR I-3407, para. 37; ECJ 11 August 1995 – C-367/93 to C-377/93 – *Roders et al.*, [1995] ECR I-2229, para. 48; ECJ 20 September 2001 – C-184/99 – *Grzelczyk*, [2001] ECR I-6193, para 52; See *Bidar* (*supra* note 14), para. 68.

¹⁶ See *Grzelczyk* (*supra* note 15), para. 52; ECJ 23 May 2000 – C-104/98 – *Buchner et al.*, [2000] ECR I-3625, para. 41; ECJ 3 February 1996 – C-197/94 and C-252/94 – *Bautiaa and Société française maritime*, para. 55; ECJ 11 August 1995 – C-367/93 to C-377/93 – *Roders*, [1995] ECR I-2229, para. 48.

¹⁷ ECJ 27 March 1980 – 61/79 – *Denkavit italiana*, [1980] ECR I-1205, para. 15 seq.; See *Bidar* (*supra* note 14), para. 67; ECJ 15 September 1998 – C-231/96 – *Edis*, [1998] ECR I-4951, para. 16.

¹⁸ See *Grzelczyk* (*supra* note 15), para. 53; See *Bidar* (*supra* note 14), para. 69.

⁵ *Schwarze*, NJW 2005, 3459 (3466).

⁶ *Klein*, IstR 2006, 09 (211).

⁷ ECJ 8 April 1976 – 43/75 – *Defrenne II*, [1976] ECR I-455, para. 71.

⁸ *Comateb et al* (*supra* note 3), paras 21, 22.

⁹ *Comateb et al* (*supra* note 3), para 23.

¹⁰ AG Stix-Hackl, 14 March 2006 – C-475/03 – *Banca Popolare di Cremona*, not yet published in the European Court Reports, para. 175.

¹¹ Reference 11 September 2004 – C-292/04 – *Meilicke*, OJ 2004, – C-228, – at 27.

¹² ECJ 3 October 2006 – C-475/03 – *Banca Popolare di Cremona*, not yet published in the European Court Reports.

the *Dansk Denkvit* Case – as it is sometimes reported¹⁹ – consider inadequate anticipated repayments amounting to 4 % of the national budget. In fact, the ECJ rejected the request of the Kingdom of Denmark for a non-retroactive ruling for lack of good faith.²⁰ Should the ECJ feel inclined to concretise the indefinite concept of law, it is suggested, because of the widely differing economic power of the Member States, that the ECJ should have recourse to a quantitative threshold in terms of a certain percentage proportionate to the budget.²¹ Some authors like to differentiate depending on whether the charges were unlawfully levied by the central government or by some other state entities at regional level like by *départments* and *Länder* or at local level like boroughs, *communes* and *Gemeinden*.²² However, such a differentiation is objectionable in that the quality of the legislator is in principle irrelevant for assessing responsibility at community law level.

2. Objective and significant uncertainty regarding the implications of Community provisions

Secondly, the legal relationships affected have to have been entered into in good faith on the basis of rules considered to be validly in force. Thus, it must be apparent that both individuals and national authorities had been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions.²³ Therefore, the question of good faith on the part of the Member State is a matter of objectified protection of public confidence. For the argument of the protection of public confidence is subject to a plausibility test effected by the ECJ, *scilicet* whether the Member State concerned could reasonably trust in the conformity with Community law and thus the constancy of the national provisions.²⁴ Good faith can especially be generated by the conduct of the Commission and other Member States.²⁵ In this connection it is problematic whether the failure of the Commission to pursue treaty infringement proceedings after an informal preliminary procedure can induce good faith. Such a course of (non-)action may often be due to a number of reasons, other than legal ones, which are based in particular on considerations of expediency.²⁶ It must also be remembered here that in principle the Commission's mere silence may not be understood as sanctioning a particular action of a Member State.²⁷ Nevertheless, in *Defrenne II* the ECJ generously con-

sidered this to be sufficient.²⁸ However, in legal literature this leniency has been criticised as an inversion of responsibilities.²⁹

3. Interconnection between the primary interpretative ruling and the dictum regarding the temporal limitation of the ruling's effects

Thirdly, the dictum regarding the temporal limitation has to be contained in the judgment determining the application for a preliminary ruling.³⁰ According to the ECJ the limitation *ratione temporis* can therefore not be pronounced if the ECJ has been called upon earlier to decide on the same point of law without having restricted the temporal scope of the rulings. The request for a non-retroactive ruling is then precluded. This link between the primary interpretative ruling and the dictum regarding the temporal limitation of the effects shall be called the criterion of interconnection. The ECJ requires a high degree of similarity between the relevant questions for interpretation.³¹ It does not suffice that the same provisions form the subject of the preliminary proceedings.³² The fact that a provision triggered more than one preliminary ruling does not necessarily mean that the same point of law was concerned. The procedural criterion of interconnection is supposed to avoid a situation where tax payers in one Member State – due to the retroactive effect of a preliminary ruling – are still able to exercise their rights, whilst tax payers in another Member State cannot do so due to a non-retroactive or rather prospective ruling, even though the same fiscal periods are concerned.

4. Exception to the limitation *ratione temporis* for the benefit of persons having initiated proceedings

If the said conditions are fulfilled, the ruling merely has an *ex nunc*-effect. The benchmark therefore is the date of the pronouncement of the preliminary ruling. The temporal limitation only applies to the Member State to whom it was granted. Thus, the territorial scope of exceptions to the *ex tunc* effect is restricted.³³ However, it is widely accepted to make an exception from the temporal limitation of the ruling for the benefit of those persons who, before the date of delivery hereof, initiated proceedings or made an equivalent claim.³⁴ The reason for this privilege lies in the fact that these tax payers have invested time and money in the protection of their rights granted by Community law. Denying them the fruit of their efforts might unduly affect the judicial protection under Community law.

¹⁹ *Kokott/Henz*, NJW 2006, 177 (179).

²⁰ ECJ 31 March 1992 – C-200/90 – *Dansk Denkvit and Poulsen Trading*, [1992], ECR I-2217, para. 20.

²¹ *Forsthoff*, DStR 2005, 1840 (1842).

²² *Balmes/Ribbrock*, BB 2006, 17 (19).

²³ *Blaizot* (*supra* note 14), para. 28; ECJ 2 February 1988 – 309/85 – *Barra*, [1988], ECR I-355, para. 14; See *Grzelczyk*, (*supra* note 15), para. 53; See *Bidar* (*supra* note 14), para. 69.

²⁴ ECJ 28 September 1994 – C-128/93 – *Barber*, [1994], ECR I-4583, para. 40 seq.; See *Sürül* (*supra* note 14), para. 109 et seq.

²⁵ *Defrenne II* (*supra* note 7), para. 72.

²⁶ AG Stix-Hackl, ECJ 5 October 2006 – C-292/04 – *Meilicke*, not yet published in the European Court Reports, para. 52.

²⁷ See *supra* note 26, para. 54.

²⁸ *Defrenne II* (*supra* note 7), paras 71/73.

²⁹ *Klein*, IStR 2006, 209 (210).

³⁰ *Barra* (*supra* note 23), para. 14; See *Blaizot* (*supra* note 14), para. 28; ECJ 9 March 2000 – C-437/97 – *EKW*, [2000], ECR I-1157, para. 57; See *Sürül* (*supra* note 14), para. 108.

³¹ AG Stix-Hackl, *Meilicke* (*supra* note 26), para. 21.

³² Cf. ECJ 13 February 1985 – 293/83 – *Gravier*, [1985] ECR I-593; See *Blaizot* (*supra* note 14), para 25 et seq.

³³ AG Stix-Hackl, *Meilicke* (*supra* note 26), para. 14.

³⁴ *Sürül* (*supra* note 14), para 112.

5. Burden of proof

The burden of proof regarding the fulfilment of all conditions lies with the Member States,³⁵ since the non-retroactive or rather prospective ruling constitutes an exception to the general principle of the *ex tunc*-effect in their favour. Whereas in the past the ECJ happily settled for information like “very large number of claimants” and reference to amounts in billions,³⁶ it has taken on a more strict approach – not the least since the request for a limitation *ratione temporis* enjoys an enormous popularity among the Member States – and nowadays demands a more detailed description of the anticipated breakdown in tax revenues.³⁷

IV. Proceedings in the cases *Meilicke* and *Banca Popolare di Cremona*

Against the background of this established case-law it is now time to consider the proceedings in the cases *Meilicke* and *Banca Popolare*:

The proceedings still pending in *Meilicke* deal with the conformity of former Paragraph 36(2)(3) of the German Income Tax Law (EstG) with Art. 56 EC. Art. 36 (2) (3) denied the granting of a tax credit in respect of dividends which are paid by companies established in other Member States. The Federal Republic of Germany had abolished the above system by means of a statute from the year 2000 which came into force in the 2001 tax year and replaced it with the so-called ‘Halb-einkünfteverfahren’ (‘half-income procedure’). In this way the double taxation of dividends is supposed to be avoided or at least significantly reduced, without the need to have recourse to tax credits. In the year 2000 the ECJ had rendered its judgement in the *Verkooijen* case dealing with a similar tax credit method. Furthermore, in 2004, shortly after the order for reference had been published, the ECJ had rendered its judgement in *Manninen*³⁸ which dealt with a Finnish variant of the said tax credit method. The order for reference in *Meilicke* attracted such publicity that thousands of tax payers initiated proceedings. The Federal Republic of Germany estimated that anticipated repayments for the years 1998-2001 would amount to 5 billion Euro.³⁹ Thereupon, in a rare step, the oral proceedings were reopened, and a second hearing was appointed.

The preliminary proceeding in *Banca Popolare di Cremona* already ruled upon, dealt with the conformity of the IRAP, a regional tax on production levied in Italy with the Community prohibition of national turnover taxes other than VAT according to the Sixth VAT Directive. The order for reference in *Banca Popolare* attracted even more attention than in *Meilicke*. Italy estimated that anticipated repayments would

amount to breath taking 120 Billion Euro.⁴⁰

The preliminary proceedings in *Meilicke* und *Banca Popolare* exhibit a common distinctiveness: Thanks to the remarkable publicity of the orders for reference in expert groups as well as in the daily press, an unparalleled mass of proceedings has been initiated before national courts and public authorities.⁴¹ The notable difficulty in the present cases is that the exception in favour of the apparently vast number of claims would seriously undermine the effect sought by the limitation.⁴² As a mass phenomenon the proceedings add up to the risk of serious economic repercussions on the basis of which the limitation is being debated in the first place.⁴³ Unlike *Banca Popolare* the proceedings in *Meilicke* regard the particular situation that there is an existence of previous judgements where, however, *no* limitation *ratione temporis* had been requested. For neither the Kingdom of the Netherlands nor the Kingdom of Finland had seemed to encounter the risk of serious economic repercussions. But in fact, from the pronouncement of the ruling in *Verkooijen* it was clear that the German tax credit system infringes upon Art. 56 EC. Consequently, the Federal Republic of Germany’s application for a non-retroactive or rather a prospective ruling in *Meilicke* would then have to be rejected for that reason alone, since the request for a limitation *ratione temporis* would have had to be made in the earlier proceedings.

V. Reference date for the exception of the temporal limitation of effects

The proceedings mentioned above have raised the question as to how in the event of claims for reimbursement as a mass phenomenon the reference date for the exception to the temporal limitation should be chosen. The hitherto existing jurisprudence by the ECJ having recourse to the date of the pronouncement of the interpretative judgement does not forearm against the windfall gains, resulting from the fact that tax payers initiate proceedings between the order for reference and the pronouncement of the preliminary ruling.⁴⁴

1. Effect *pro futuro* (at the expiry of a time-limit set by the ECJ)

As a consequence of these recent developments, Advocate General Jacobs (followed by one part of the literature)⁴⁵ demanded that the ECJ should – like the German Federal Constitutional Court in its so-called appeal decisions (Appellentscheidungen) – postpone the declaration of invalidity or non-conformity and set a date for the Italian legislator to enact a measure which meets the requirements of Community law. This solution aims at avoiding situations in which no law

³⁵ Cf. *Grzelczyk* (*supra* note 15), para. 54; ECJ 13 February 1996 – C-197/94 and C-252/94 – *Bautiaa and Société française maritime*, [1996], ECR I-505, para. 50; See *Dansk Denkavit and Poulsen Trading* (*supra* note 20), para. 21 seq.

³⁶ *Barber*, (*supra* note 24), paras 40, 41.

³⁷ *Dansk Denkavit and Poulsen Trading* (*supra* note 20), para. 20; See *Bidar* (*supra* note 14), para. 70.

³⁸ ECJ 7 September 2004 – C-319/02 – *Manninen*, [2004], ECR I-7447.

³⁹ AG Tizzano, *Meilicke* (*supra* note 4), para. 35.

⁴⁰ AG Stix-Hackl, *Banca Popolare di Cremona*, (*supra* note 10), para. 156.

⁴¹ AG Tizzano, *Meilicke* (*supra* note 4), para. 58.

⁴² AG Tizzano, *Meilicke* (*supra* note 4), para. 59; See AG Stix-Hackl, *Banca Popolare di Cremona* (*supra* note 10), para. 167.

⁴³ AG Tizzano, *Meilicke* (*supra* note 4), para. 59.

⁴⁴ Cf. *Düsterhaus*, EuZW 2006, 393 (394).

⁴⁵ *Forsthoft*, DStW 2005, 1840 (1843); Schwarze, NJW 2005, 3459 (3465).

would be worse than a bad law, particularly those in which the State would no longer be able to collect certain revenue or make certain payments.⁴⁶ The interpretation thus gained in the preliminary ruling would not have effect before the suggested time-limit of two years⁴⁷ has expired. Even the parties to the original litigation giving rise to the preliminary ruling could invoke the interpretation in their favour. However, this approach does not take into account the pre-eminent importance of the trigger function of Art. 234 EC.⁴⁸ For the *effet utile* of Community law largely relies on the vigilance of individuals concerned to protect their rights.⁴⁹ Preliminary rulings according to Art. 234 EG compensate the respective deficiencies of the proceedings according to Art. 226 EC and 230 EC. The bottom line is that the temporal limitation of the effect of the ruling which in general denies individuals the remuneration for their efforts would annihilate the incentive to have recourse to the always expensive and time-consuming private enforcement of Community law.

Moreover, as manifested by the decisions of the German Federal Constitutional Court, the setting of a certain time-limit by the ECJ would not rest the case: The German Constitutional Court does not only set a time-limit for the enacting of new measures but sees fit to prescribe in a rather detailed manner the way according to which the measures should be modelled after the fixed date. This occurred most prominently in the decision regarding the constitutionality of child allowance and the household allowance scheme.⁵⁰ Up to date the German Federal Constitutional Court has not developed tangible criteria in order to create a system of operative parts of the judgements with respect to possible limitations *ratione temporis*.⁵¹ The competence to set a time-limit and to dictate the content of the measures to be enacted, conflicts with the ECJ's obligation according to Art. 220 EC to ensure, that in the interpretation and application of the EC-Treaty the law is observed. It does not suffice to solely work towards the observation of law in the future. This point of view is corroborated by the objective nature of Art. 234 EC as an objective judicial proceeding on the legality of measures of Member States (German: objektives Rechtsbeanstandungsverfahren). Eventually, the ECJ would dangerously approximate legislative competences.⁵² Even if one rejected the idea of an excess of jurisdictional competences the ECJ would *de facto* be overwhelmed with the task. In addition to legal considerations also economic and financial political aspects would have to be taken into account. It may already seem rather doubtful whether a national constitutional court is actually able to survey all the social and economic implications within its domestic legal order. At any rate, the ECJ certainly does not dispose of the knowledge to dictate the content of the measures to be

enacted for each of the 25 national economies. The *pro futuro* approach poses subsequent problems: The ECJ would have to decide on the duration of the time-limit adequate under the circumstances. Ultimately, due to the loss of potential sanction via the *ex nunc*-effect the *pro futuro approach* entails the risks of causing the Member State to become comfortable and complacent. For the mild admonition of the limitation *pro futuro* is much less a deterrent than the harsh sanction of the – however modified – *ex tunc*-effect. *In toto*, it is suggested not to embrace the concept of law derived from national constitutional law regarding the temporal limitation of the effect of the ruling *pro futuro*.

2. Pronouncement of the previous preliminary rulings

The proposal to choose the point in time of the pronouncement of the primary preliminary ruling does not seem very promising either. The *Meilicke* case may serve as an example: All tax payers who had initiated proceedings after 6 June 2000, the day the primary ruling in *Verkooijen* was pronounced, would be precluded to take advantage of a favourable ruling. It is easily discernible that this date of reference would make the assertion of rights conferred by Community law *de facto* impossible.

3. Publication of the closing argument by the Advocate General

In addition, the publication of the closing argument by the Advocate General has been suggested as a reference date for the exception of the temporal limitation of effects.⁵³ However, such a reference date is objectionable in view of the following considerations: Though the opinion of the Advocate General is indeed without doubt a particularly substantiated point of view, the Advocate General does not form part of the panel of judges actually deciding the case. The view taken by the Advocate General in his/her closing argument is not binding for the ECJ. Contrary to widespread belief, there are no statistics which show that the ECJ in predominant numbers assumes the point of view of the Advocate General. To choose the publication of the Advocate General as a reference date would enhance the false impression that the closing arguments predetermine the decision of the ECJ.⁵⁴ Leaving that aside, it may well be – as happened in *Meilicke* and *Banca Popolare* – that the order for reference draws such an attention in interested circles that the avalanche of remedies has already been set off by the time the closing argument by the Advocate General is published.

4. Publication of the order for reference

It seems therefore preferable to draw the line concerning the claims of those who applied for a tax credit or appealed a relevant notice of refusal on the day on which the notice of the

⁴⁶ AG Stix-Hackl, *Banca Popolare di Cremona* (*supra* note 10), para. 145.

⁴⁷ *Schwarze*, NJW 2005, 3459 (3465).

⁴⁸ Cf. *Düsterhaus*, EuZW 2006, 393 (395); Sedemand, IstR 2005, 810 (815).

⁴⁹ ECJ 5 February 1963 – 26/62 – *van Gend en Loos*, [1963], 3, 1 (26).

⁵⁰ BVerfG (D) 10 November 1998, 2 BvR 1057/91, para. 94.

⁵¹ *Düsterhaus*, EuZW 2006, 393 (397).

⁵² Cf. Lord Nicholls of Birkenhead *National Westminster Bank v Spectrum Plus* [2005] UKHL 41.

⁵³ AG Stix-Hackl, *Banca Popolare di Cremona* (*supra* note 10), para. 145, para. 172.

⁵⁴ Cf. *Düsterhaus*, EuZW 2006, 393 (396).

order for reference which is the subject matter of the actual proceedings was published. The order for reference is also a reasoned statement in written form which is universally accessible via the Official Journal of the European Union. Thus, the order for reference has the announcement and publicity effect necessary to serve as a reference for the date for the exception to the temporal limitation of the effects of the ruling.

This approach has been criticised for the fact that the right to obtain repayment of charges thus depends on a reference date for which the individual as well as the collective diligence of the tax payers is irrelevant.⁵⁵ The order for reference is indeed a matter of discretion of the national court. However, it is a mistake to criticise that the reference date does not mirror the degree of diligence on the part of the tax payers. Firstly, it is exactly this diligence and vigilance that – as a mass phenomenon – causes problems. Secondly, the reference to the date of the day the order for reference is published has the advantage of distinguishing the particularly diligent tax payers from the “free riders”. For the exception should not benefit claims of a speculative nature, introduced at no great effort or expense with a view to profiting from the forthcoming judgment.⁵⁶ Once a reference is made to the ECJ, it seems plausible that proceedings can be brought with a reasonable chance of success.⁵⁷ Therefore, the publication of the order for reference marks the date on which the attention even of less diligent claimants is attracted to the possibility of a refund.⁵⁸

VI. Dispensability of the criterion of interconnection

According to the Court’s case-law the dictum temporally limiting the effects of a judgment must be made in the judgment ruling upon the interpretation sought. Therefore if earlier judgements concerned the same question of interpretation and no dictum which temporally limited the effects was made, the question arises whether the application for a limitation *ratione temporis* in the proceedings at hand is precluded.

1. Distinction between the criterion of interconnection and the criterion of good faith

In order to determine whether the criterion of interconnection, i.e. the interconnection between the primary ruling and the dictum temporally limiting the effects, is necessary for a successful application for a limitation *ratione temporis*, it is essential to distinguish the criterion of interconnection from the criterion of good faith which is tied to the existence of objective, significant uncertainty in respect of the implications of Community provisions. In this regard it is to be born in mind that from the perspective of a “prudent” Member State a series of factors can contribute to such an uncertainty, namely the conduct of the organs of the Community, Commission,

Council and ECJ as well as the conduct of other Member States. In contrast, the criterion of interconnection solely refers to a preliminary ruling of the ECJ previous to the proceedings at hand which dealt with the same question of interpretation. Thus, it may well be, as happened in *Meilicke*, that the previous judgement makes quite a clear statement which also holds true in the proceedings on hand; however the Member State, due to the conduct of the Commission, plausibly invokes good faith.

2. Objective of the criterion of interconnection

The criterion of interconnection emanates from the Community principle of non-discrimination. It is supposed to avoid a situation – like for example in *Meilicke* – that investors in one Member State can still deduct corporate income tax thanks to the *ex tunc*-effect of the previous judgement, whilst investors in another Member State cannot do so regarding the same fiscal periods due to an eventual order temporally limiting the effects of the posterior ruling. In addition, it seems possible that considerations of procedural forfeiture play a role, although this has never been articulated by the ECJ.

3. Arguments against the criterion of interconnection

However, it seem appropriate to desist from the requisite for interconnection: There is a subtle but significant distinction between the similarity of the questions of law raised in the previous and the posterior judgement, which has to be determined according to the criterion of interconnection, and the perceptibility for the Member State of the necessity to request a limitation *ratione temporis*. The question as to the similarity is rather easily answered. The question as to the perceptibility of the necessity to request a limitation *ratione temporis* demands to examine *ex ante* the circumstances as they presented themselves to the Member State at the time. The crux in the matter of *Meilicke* is the fact that in the previous proceedings the Member States concerned had no reason to request a temporal limitation of the effects. It is not astonishing –irrespective that the field of tax law is a pathologically non-transparent thicket – that other Member States with a similar tax credit system did not think of requesting a limitation *ratione temporis* by way of precaution, even if the similarity as such had indeed been realised. The fact that the Member States concerned in the previous proceedings did not make a request can contribute to the expectation of other Member States that the non-conformity with Community law of their domestic provisions would not cause repayments imperilling the national budgets. Thus, from the perspective of the Member State it is not at all easy to rightly and in time estimate the significance of the previous judgement for the domestic legal order.

The criterion of interconnection is particularly not appropriate in the field of tax law. The reason is the long incubation time of the illegality which originates from the long and widely differing duration of the assessment in the Member States, initially mentioned above.⁵⁹ Ultimately, the discrimination of the tax payers is due to the differing duration of as-

⁵⁵ AG Stix-Hackl, *Banca Popolare di Cremona* (*supra* note 10), para. 145, para 176; Kokott/Henze, NJW 2006, 177 (182).

⁵⁶ AG Stix-Hackl, *Banca Popolare di Cremona* (*supra* note 10), para. 145, para. 167.

⁵⁷ AG Stix-Hackl, *Banca Popolare di Cremona* (*supra* note 10), para. 145, para. 170.

⁵⁸ AG Tizzano, *Meilicke* (*supra* note 4), para. 62.

assessment which in turn is based on the fact that the Community has not yet achieved a harmonised fiscal system. Under these circumstances it would be inequitable to reject a Member State's request for limitation *ratione temporis* which has reacted to the previous judgement by taking counter-measures according to Art 10 EC, and while there is a "risk of serious economic repercussions" and "good faith". In this connection it is to be observed that Art. 234 EC does not have punitive character.⁶⁰ Disciplining Member States going beyond the "objektive Rechtsbeziehung" is not intended.

This is all the more true if the disciplining could lead to a situation where one part of the tax payers benefits twice because it could actually pass the charges levied in breach of Community law on to other persons, private and commercial consumers, whilst the other part of the tax payers would have to pay twice because it would have to make good the shortfall and pay the tax increase necessary for the consolidation of the budget.

The criterion of interconnection and the sword of Damocles implied in the risk of preclusion is not desirable considering the consequences for procedural economy: The risk of preclusion may well lead to a situation where the Member States on a regular basis and purely prophylactically request the temporal limitation of the effects of the judgement. It is obvious that this would further complicate things in proceedings in preliminary rulings. As a result, it is suggested to abandon the criterion of interconnection in the future.

VII. Conclusion and future prospect

Recapitulating the results, one can draw the following conclusions: The ECJ can order the temporal limitation of the effects of a preliminary ruling although in previous rulings a limitation *ratione temporis* has not been requested. In princi-

ple the reference date for the temporal limitation of the effects is the pronouncement of the judgement in the proceedings at hand. An exception is granted to those tax payers who, before that day, have applied for a tax credit or appealed a relevant notice of refusal, provided always that such claims are not time-barred under national law. However, this exception does not apply if the exception due to the vast number of claims would seriously undermine the effect sought by the limitation. In this event the reference date for the exception is the publication of the notice of the order for reference in the Official Journal of the European Union.

In *Banca Popolare* the ECJ more or less elegantly – critics would say speciously – shunned from discussing the problems presented there by declaring the Italian tax IRAP compatible with the Common system of value added tax.⁶¹ Apparently, the sums at stake (again 130 billion Euro) would have been too high for Italy, and it would have been too difficult to obtain the majority required within the ECJ to solve for good the Gordian knot regarding the problem of non-retroactive or rather prospective rulings. In the long run, the ECJ may not be able to evade confronting the issue. The proceedings in *Meilicke* and *Banca Popolare* are the forerunners of a more general phenomenon: The adjudication of the ECJ has penetrated the public consciousness. Orders for reference, closing arguments by the Advocate Generals and *a fortiori* judgments immediately trigger reactions in interested circles. It is therefore that the decision in *Meilicke* is being awaited with great expectation. However, if the ECJ should fail to deliver an answer, there will certainly be other cases.

⁵⁹ At p. 197.

⁶⁰ Cf. AG Tizzano, *Meilicke* (*supra* note 4), para. 42.

⁶¹ *Banca Popolare di Cremona* (*supra* note 12), para. 39.

INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

ECJ 23 November 2006 – C-315/05 – *Lidl Italia Srl v Comune di Arcole (VR)*

Directive 2000/13¹ – Labelling of foodstuffs to be delivered as such to the ultimate consumer – Scope of the obligations under Articles 2, 3 and 12 – Compulsory statement of the alcoholic strength by volume for certain alcoholic beverages – Alcoholic beverage produced in a Member State other than that in which the distributor is established – 'Amaro alle erbe' – Actual alcoholic strength by volume lower than that appearing on the label – Overstepping of the tolerance – Administrative fine – Liability of the distributor

Articles 2, 3 and 12 of Directive 2000/13 are to be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which makes it possible for an operator, established in that Member State, which distributes a pre-packaged alcoholic beverage to be delivered as such within the meaning of Article 1 of that directive, produced by an operator established in another Member State, to be held liable for an infringement of that provision, established by a public authority, resulting from the producer's inaccurate statement on the product label of the alcoholic strength by volume of the product and, consequently, to be penalised by an administrative fine, even where, as the mere distributor, it simply markets the product as delivered to it by the producer.

¹ Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000, L 109, at 29).

Facts: Jürgen Weber GmbH produces in Germany an alcoholic beverage, known as 'amaro alle erbe', the label of which states that its alcoholic strength by volume is 35%. On 13 March 2003,