REPARATION FOR LOSS – INFRINGEMENTS BY NATIONAL TAX PROVISIONS[1]

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1. INTRODUCTION

Where the Court of Justice of the European Union ("Court") rules that a provision of a Member State tax statute is unlawful, the relevant national court will be obliged to provide a remedy to taxpayers who have suffered financial loss.

The Court has provided some guidance as to the principles to be applied and the purpose of this brief note is to recount those principles.

The case often cited as containing the principal rules for reparation is *Brasserie du Pêcheur*[3], which was referred to in what appears to have been the earliest of the 'direct tax' cases in which the Court addressed questions concerning reparation, *Metallgesellschaft*[4].

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1 The principles and rules discussed in this note have general application and the 'tax cases' constitute but one field in which the issue of reparation for loss arises.

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3 CJEU 5 March 1996 C-46/93 & 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*. ("*Brasserie du Pêcheur*") [1996] ECR I-1029

4 CJEU 8 March 2001 C-397/98 & 410/98 *Metallgesellschaft Ltd and others (C-397/98) Hoechst AG, Hoechst UK Ltd (C-410/98) and Commissioners of Inland Revenue, H.M. Attorney General* ("*Metallgesellschaft*") [2001] ECR I-1727 para.91

However, the development of the rules were developed in an earlier case. The *Brasserie du Pêcheur* rules were an adaptation of the rules developed by the Court in *Francovich*[5], which concerned a failure of Italy to fully transpose Council Directive 80/987/EEC. There was, thus, a failure to implement express EU provisions. The rules developed in *Francovich* were themselves based on the principles developed in the earliest of the 'supremacy' cases[6].

The adaptation of the rules in *Brasserie du Pêcheur* was to extend the principles to a situation where the right to reparation arose as a result of a Member State failing to give proper effect to the Treaty freedoms of movement and to remove from its legislation restrictive or discriminatory provisions. The Court, thus, developed slightly revised rules to apply where in fields of shared competence. Whilst a default situation is pretty clear where it is the failure of a Member State to fully implement a directive, a default by a Member State in a field of shared competence may not be recognised before the Court has delivered a ruling or other guidance.
As will be seen from the discussion below, the Court, finding no Treaty provisions providing a prescribed solution to a situation where a person has sustained loss resulting from the unlawful imposition of taxes, duties or levies by a Member State, was obliged to develop rules to fill that gap consistent with the common rules in the Member States and having regard for the example in Article 340 TFEU. That Article addresses, in principle, the situation where a person incurs a loss as a result of the action of an EU institution (or its employees) and there is no contractual right to compensation.

The purpose of this brief note is to discuss how the rules developed by the Court may apply to claims for reparation in relation to taxes unlawfully levied, or excessively levied in some manner, in circumstances where a Member State has been held to have been in breach of its obligations under the Treaty freedoms of movement.

2. The Rules Developed In *Brasserie Du Pêcheur*

The Treaty is silent on the matter of the rights of citizens to claim reparation for losses sustained as a direct result of non-compliance with EU law by Member

5 CJEU 19 November 1991 C-6/90 & 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ("*Francovich*") [1991] ECR I-5357 This case concerned the non-transposition of rights provided in a Directive

6 CJEU 5 February 1963 C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ("*van Gend & Loos*") [1963] ECR 3 ; CJEU 15 July 1964 C-6/64 *Flaminio Costa v E.N.E.L.* ("*Costa v E.N.E.L*") [1964] ECR 1194 ; and CJEU 9 March 1978 C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ("*Simmenthal*") [1978] ECR 629

States. Accordingly, to ensure the effectiveness of rights created by the Treaty, the Court was obliged to develop the principle and to provide guidance as to when a Member State would find itself liable. The initial development is to be found in *Frankovich*, which is discussed briefly in 2.1 below, and the principle and guidance rules were further developed in the joined cases comprising the judgment in *Brasserie du Pêcheur*, discussed briefly in 2.2 below.

2.1. Frankovich

This case concerned rights provided by Council Directive 80/987/EEC, which Italy had failed to transpose fully. From the 'supremacy' cases (FN 6), the Court concluded that:

> "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"[7]
> "…the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty…A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty…Among these is the obligation to nullify the unlawful consequences of a breach of Community law"[8]

This general obligation of Member States to redress any failure on their own part to give proper effect to the rights created by and under the Treaty and secondary measures was not unconditional, however: the Court specified, in the context of the failure to transpose the Directive in point into national law, three pre-conditions[9]:

- The EU provisions created rights for 'individuals'
- Those rights should be capable of being identified
- There must be a causal link between the failure of the Member State to comply with its obligations and the loss sustained by the beneficiary of those rights.

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7 *Francovich* para.33

8 *Francovich* para.35 and para.36 (the cooperation provision "replaced, in substance, by Article 4, paragraph 3, TEU")

9 *Francovich* para.40

The Court gave little further guidance except to charge the Member States to lay down procedures "*to safeguard the rights which individuals derive from Community law*" and to ensure that:

> "..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"[10]

The passage underlined is a statement of the principle of equivalence. The basis for calculation of interest on the principal sums to be repaid has proven to be a contentious matter and is discussed in Section 3 below. The guidance from *Frankovich* is that one should start with the basis applied by national law to similar domestic claims.

2.2. Brasserie du Pêcheur

These joined cases concerned interference with rights granted by two of the freedoms of movement.[11]

The Court took inspiration from the second paragraph of Article 340 TFEU in the absence of any express EU provision addressing the issue of reparation.[12] The second paragraph of Article 340 TFEU provides:

> "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

The Court observed that this provision:

> "...is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also

10 *Francovich* para.43: emphasis added.

11 The joined cases were: *Brasserie du Pêcheur* (Article 30TFEU), which concerned a claim based on the decision of the Court in CJEU 12 March 1987 C-178/84 *Commission of the European Communities v Federal Republic of Germany* ("*Commission v Germany (beer additives)*") [1987] ECR 1227 and *Factortame* (Article 49 TFEU), which was a claim arising from the Court's earlier judgment: CJEU 25 July 1991 C-221/89 *Regina v Secretary of State for Transport* ("*Factortame*") [1991] ECR I-3905

12 *Brasserie du Pêcheur* para.28.

> reflects the obligation on public authorities to make good damage caused in the performance of their duties."[13]

Equating the obligations of a Member State to those of the EU institutions[14], the Court reiterated the statement that it made previously in *Frankovich* as regards the non-contractual liability of Member States to make reparation for losses arising to citizens as a result of non-compliance with EU law[15]. It further observed that it was not relevant which organ of the state (the legislature, the judiciary or the executive) that was responsible for the infringement giving rise to the financial losses.

However, as mentioned above, in a field where the Member State enjoys a wider discretion, where the EU has not legislated, the conditions to be satisfied before a Member State has an obligation to make reparation must be comparable to those that have to be satisfied in the instance of the EU institutions.[16] These conditions are now considered.

2.2.i. The conditions for state liability to accrue

The three conditions to be satisfied where a Member State enjoys wider powers to legislate are similar to those prescribed in *Frankovich* but include a requirement that the infringement must be 'sufficiently serious'. The reason for the distinction made between situations of narrow legislative powers and wider legislative powers was explained by the Court in *Brasserie du Pêcheur*. In paragraph 45, referring to liability of the Union, on which liability of the Member States is modelled, it said (emphasis added):

> "…exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests…in a legislative context characterized by the exercise of a wide discretion…the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers."

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13 *Brasserie du Pêcheur* para.29 emphasis added

14 *Brasserie du Pêcheur* para.42

15 *Francovich* para.35 see FN 8

16 *Brasserie du Pêcheur* para.47

Thus a balance must be attained between, on the one hand, providing a scheme for reparation to persons who have suffered loss as a result of levies under national provisions determined by the Court to have been unlawful and, on the other, unduly interfering with the exercise by the Member States of their [taxing] powers by making any exercise of those powers potentially subject to the threat of claims for damages for infringements not recognised at the time of enacting the offending provisions..

The Court stated the three pre-conditions for state liability to occur in a field of shared competence to be[17]:

- "*the rule of law infringed must be intended to confer rights on individuals*; [18] (as before);
- *the breach must be* ***sufficiently serious*** (see below); and
- *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*" [19] (as before).

The Court provided guidance on the factors to be considered in determining whether an infringement constitutes a breach that is '**sufficiently serious'**:

- "*the clarity and precision of the rule breached,*
- *the measure of discretion left by that rule to the national or Community authorities,*
- *whether the infringement and the damage caused was intentional or involuntary,*
- *whether any error of law was excusable or inexcusable,*
- *the fact that the position taken by a Community institution may have contributed towards the omission,*
- *the adoption or retention of national measures or practices contrary to Community law*" [20]
- "*…a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in*

17 *Brasserie du Pêcheur* para.51

18 Articles 30 & 49 TFEU satisfy this requirement: see para.54

19 *Brasserie du Pêcheur* para.65. The causal link is a matter for the national court to identify.

20 *Brasserie du Pêcheur* para.56

> *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*" [21]

- "*The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law*"[22]

In *Thin Cap GLO*, the Court emphasised the requirement for a causal link and declined to entertain claims of an indirect nature based on opportunity costs and similar:

> "…neither the reliefs or other tax advantages waived by a resident company in order to be able to offset in full a tax levied unlawfully against an amount due in respect of another tax, nor the loss and damage suffered by such a company because the group to which it belongs saw itself as having to substitute financing by way of equity capital for loan capital in order to reduce its overall charge to tax, nor the expenses incurred by the companies in that group in order to comply with the national legislation at issue, can form the basis of an action under Community law for the reimbursement of the tax unlawfully levied or of sums paid to the Member State concerned or withheld by it directly against that tax. Such expenditure is the result of decisions taken by those companies and does not constitute, on their part, an inevitable consequence of the decision by the United Kingdom to treat certain interest paid to non-resident companies as a distribution"[23]

2.2.ii. The basis of determining the appropriate amount of reparation

In the first instance, it is the national rules that will apply subject to the requirement of the principles of equivalence and effectiveness. [24] Where a claimant would be eligible to make a claim for exemplary damages in a domestic situation, he should similarly be eligible to make such a claim in relation to an infringement matter if the behaviour of the organs of the state gives him just cause to do so.[25] Where national legislation contains

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21 *Brasserie du Pêcheur* para.57

22 *Brasserie du Pêcheur* para.79

23 CJEU 13 March 2007 C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ("*Thin Cap GLO*") [2007] ECR I-2107 para.113

24 *Brasserie du Pêcheur* para.67

25 *Brasserie du Pêcheur* para.89

rules obstructing claims for reparation against the state, the principle of effectiveness will require such obstructions to be set aside.[26]

The national courts may take into account whether the claimant took all steps open to him to mitigate his claim or to seek other remedy.[27]

2.2.iii. The extent of the period covered by the claim for reparation

The period will commence with the time at which the conditions in 2.2.i are satisfied[28], which will generally be the later of the enactment of the offending national provision or the first indication by the Court through its case law that a national provision of that nature infringes EU law.

2.3. Concluding comment

The Court has ruled that reparation for losses incurred as a direct consequence of some act or omission by a Member State contrary to its obligations to give effect to Treaty rights is necessary to ensure the effectiveness of those rights.

National courts are charged with the duty to ascertain the reparation properly due in accordance with national law having regard for the principles of equivalence and effectiveness. Where national law obstructs reparation claims made against the state, the latter principle requires such obstructions to be set aside.

The Court has, however, given guidance on when a claim should be considered to be eligible for reparation. The guidance for situations where the Member State enjoyed wide discretion to legislate (developed in *Brasserie du Pêcheur*) differs from that applicable where the Member State had restricted discretion, such as in relation to the transposition of a Directive (developed in *Frankovich*).

3. Interest and Other Factors

In general, interest and, what the Court has termed 'ancillary matters' relating to reparation claims, are for the national courts to determine in accordance with national law.

This principle was stated by the Court in *Express Dairy* in relation to reparation of losses suffered by traders that arose in respect of EU levies collected under a

26 *Brasserie du Pêcheur* paras.72 & 73

27 *Brasserie du Pêcheur* para.84

28 *Brasserie du Pêcheur* para.92

voided EU regulation. The Court said in respect of such 'ancillary matters':

> "…it is at present for the national authorities, and particularly for national courts, in a case concerning the recovery of charges improperly imposed, to settle all ancillary questions relating to such reimbursement, such as the payment of interest, by applying their domestic rules regarding the rate of interest and the date from which interest must be calculated."[29]

The national courts, in dealing with such claims, must apply the principles of equivalence and effectiveness as EU law is engaged. Accordingly, amounts awarded by way of interest must not be less that would have been awarded had the right to reparation arisen in wholly domestic situations and the right to such reparation must not be made excessively difficult to enforce.

As noted below in 3.1, the award of interest as compensation for the erosion of the value of a compensation amount may be necessary to achieve full compensation for the unlawful wrong and EU law will require any legal obstruction to the making of a full award to be set aside.

Where the unlawful levy has been refunded or credited against subsequent liabilities, thereby discharging them, the claim for compensation consists only of the loss sustained as a result of having been unlawfully deprived of the money for a period of time. Interest is then no longer an 'ancillary matter' but is the substance of the claim. This is discussed in 3.2 below.

3.1. The question of interest and compensation capped by national law - *Marshall II*[30]

This case concerned reparation for damages sustained by a worker subjected to unfair dismissal that was found to be discriminatory on the ground of gender contrary to Council Directive 76/07/EEC. The remedies provided by the Directive consisted of reinstatement or financial compensation. The latter was in point but UK legislation set a ceiling on the amount of compensation that could be awarded. The Court ruled that the ceiling set in the UK legislation was inconsistent with "*…proper implementation of Article 6 of the Directive…*"[31], which required the "*…loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full…*"[32]

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29 CJEU 12 June 1980 C-130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* ("*Express Dairy*") [1980] ECR I-1887 para.17

30 CJEU 2 August 1993 C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* ("*Marshall II*") [1993] ECR I-4367

31 *Marshall II* para.30

32 *Marshall II* para.26

This case concerned a situation where the UK, the Member State in question, had restricted powers of legislation.

As regards the question of applying interest to the compensation sum, the Court stated:

> "…full compensation for the loss and damage sustained…cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest…must therefore be regarded as an essential component of compensation…"[33]

This ruling says nothing specific about the rate of interest to be applied, nor does it say anything about whether the award should be adjusted to take account of notional tax on interest that might have been earned on the settlement monies had they been awarded in a timelier manner. It should be noted, however, that the Court was not examining a claim by a business or a trader and it formulated its guidance in terms of loss of value sustained through 'effluxion of time'. This suggests that an interest award that compensates for the loss in real value through the effect of inflation cannot properly compensate the person unless it is awarded in a 'gross amount'.

A different approach may be necessary for traders and other businesses where their cash situations may vary between being in surplus and in being in deficit. Where a trader has maintained a net deficit exceeding the amount of the unlawful levy on him, he has not suffered any loss in value reflecting inflation[34]. His loss has been in terms of additional finance costs, for which he will have a right of deduction for tax purposes (in most cases). It may prove to be excessively difficult[35] to reconstruct the accounts of a trader to reflect the restored unlawful levies in order to calculate the 'true loss' and the measure of interest will vary according to whether the trader has net borrowings or a net surplus and whether the trader pays down the borrowings or retains the borrowings and a deposit of cash, which will reflect the trader's internal policy on cash resource management.

It should be noted that the Court has recognised that a different approach may be necessary when considering, on the one hand, an individual acting in his personal capacity and, on the other hand, a business.

In the context of 'exit taxation', the Court ruled in *National Grid Indus* that:

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33 *Marshall II* para.31

34 That is, he cannot claim to have had a monetary asset whose real value has been diminished by the ravages of inflation.

35 See the discussion in relation to 'Unjust Enrichment' in section 3.3 below.

> "…in *N*, which related to national legislation under which a private individual was subject…to tax on the unrealised capital gains relating to a substantial shareholding he had in a company, the Court held that, in order to be regarded as proportionate …a system of tax must take full account of decreases in value that may arise after the transfer of residence by the taxpayer concerned, unless those decreases have already been taken into account in the host Member State…
>
> …in contrast to the position in *N*, the failure of the Member State of origin to take into account…decreases in value that occur after the transfer of a company's place of effective management cannot be regarded as disproportionate…
>
> …The assets of a company are assigned directly to economic activities that are intended to produce a profit. Moreover, the extent of a company's taxable profits is partly influenced by the valuation of its assets in the balance sheet, in so far as depreciation reduces the basis of taxation."[36]

Whilst 'exit taxation' and reparation are very different matters, the damage caused by the failure of the national legislation to give proper effect to rights under EU law can be viewed differently where the losses have been taken account of for tax purposes in the accounts of a business.

Accordingly, in the case of a trader, it is suggested that compensation based upon a representative commercial rate, discounted for notional tax, if the compensation award is not itself subject to tax, may achieve the result of effective reparation.
That is subject to the *proviso* that national law does not provide a scheme of reparation applicable to wholly domestic situations that can apply also to a situation where the reparation arises by reason of rights under EU law.

3.2. Where interest is the substance of the claim–Metallgesellschaft

The UK tax held to have been unlawfully levied was described[37] to the Court as a prepayment of corporation tax. The levy was not permanent in the instance of the claimants and their claim for reparation was for the time value of the money paid prematurely.

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36 CJEU 29 November 2011 C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam* ("*National Grid Indus*") [2011] ECR I-0000 paras.54, 56 & 57

37 Incorrectly described in the Author's opinion - see Turner GHJ, (2012), *A misunderstanding of fACT - Metallgesellschaft "Turner [ECTJ 2012 Metallgesellachaft]*" The EC Tax Journal Vol. 13 Iss. 1 pages 35 - 64

The substance of the claim was the interest itself and full reparation was necessary in order to redress the infringement of rights guaranteed (in that case) by Article 49 TFEU.[38] Accordingly, whether or not interest at a commercial rate could be awarded under national law in respect of such loss was not relevant as such remedy was required in order to cure the loss sustained as a result of the alleged infringement.[39]

3.3. Unjust enrichment

Where a trader has been unlawfully charged VAT, duties or levies, there remains the possibility that part or all the cost of these has been borne by the trader's customers through increased prices for the goods or services purchased.

The Court's ruling in *Express Dairy* was:

> "…the protection of rights guaranteed…by the Community legal order does not require the grant of an order for the recovery of charges improperly levied in conditions such as would involve an unjustified enrichment of assigns and…there is therefore nothing to prevent national courts from taking account…of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers of the products in question…"[40]

That would appear to authorise a national court to simply deny a claim for repayment of unlawful charges where a trader has maintained its profit margin. However, if the unlawful charge has been passed on to customers, the national court may be required to take account of adverse consequences to the taxpayer's business of the increased price of the goods:

> "…even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales" [41]

The onus of evidence required of the taxpayer should not make it:

> "…virtually impossible or excessively difficult to secure the repayment of charges levied…That is so particularly in the case of presumptions or rules

38 *Metallgesellschaft* paras.87 & 95

39 *Metallgesellschaft* paras.91 & 92

40 *Express Dairy* para.13

41 CJEU 10 April 2008 C-309/06 *Marks & Spencer plc v Commissioners of Customs and Excise* ("*Marks & Spencer (teacakes)*") [2008] ECR I-2283 para.42

> of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons…"[42]

It is proposed that the onus placed on a trader for evidence of a reduction of business having been sustained as a result of the increased pricing should be similarly constrained.

Subject to those constraints, the matter is left to the discretion of the national courts and to national law.

3.4. Claims and tax assessments settled prior to a Court ruling

The Court has long recognised the importance of legal certainty in matters that have financial consequences. Whilst the Court's statement in *Halifax* was made in respect of liabilities to VAT, the national rules for which must comply with the VAT Directive, the principle of legal certainty is a general principle. The Court said:

> "Community legislation must be certain and its application foreseeable by those subject to it…That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them…"[43]

Where a tax assessment has become final and a ruling by the Court has an implication for one of the matters agreed in reaching that settlement, the taxpayer may not have the right under EU law to insist upon the assessment being reopened. The Court said in *Kuhn & Heitz*:

> "…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...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"[44]

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42 CJEU 9 November 1983 C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* ("*San Giorgio*") [1983] ECR 3595 para.14

43 CJEU 21 February 2006 C-255/02 *Halifax plc (and others) v Commissioners of Customs & Excise* ("*Halifax*") [2006] ECR I-1609 para.72

44 CJEU 13 January 2004 C-453/00 *Kühne & Heitz NV and Productschap voor Pluimvee en Eieren* ("*Kühne & Heitz*") [2004] ECR I-837 para.24

The taxpayer may be entitled to call for the assessment to be reopened, however, where[45]:

- The administrative body has the power under national law to reopen a matter;
- The administrative decision was based on a judgment of a national court from which there is no right of appeal;
- That court's judgment was based on an interpretation of EU law that was proved to be incorrect by a subsequent ruling of the Court[46];
- That national court had not sought a preliminary ruling from the Court on that interpretation; and
- The taxpayer made complaint to the administrative body when the subsequent judgment of the Court became known by him[47]; then

that administrative body is obliged by the principle of cooperation provided in the Treaty to undertake a review of that decision.

The administration, however, can only reopen the assessment if permitted to do so under national law.

3.5. Time Limits for lodging a claim for repayment

Whilst setting time limits for making claims for repayment of excessive or unlawfully levied taxation and for compensation may result in some taxpayers being denied full reparation, the Court has accepted that statutory time limits are permissible in the interests of legal certainty.[48] The Court has, however, specified certain conditions[49]:

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45 *Kühne & Heitz* para.27

46 The Court clarified in CJEU 12 February 2008 C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* ("*Kempter*") [2008] ECR I-411 para.44 that this condition is satisfied if the national court did consider the point of EU law subsequently clarified by the Court regardless of whether the taxpayer raised the point, or if the national court did not but could have raised the point "of its own motion."

47 The Court clarified in *Kempter* paras.54 – 59 that the taxpayer's complaint need not be made immediately but must be made within a reasonable time. The Court recognises that time limits for bringing such proceedings may be permitted under EU law in the interest of legal certainty.

48 CJEU 11 July 2002 C-62/00 *Marks & Spencer plc and Commissioners of Customs & Excise* ("*Marks & Spencer (gift tokens)*") [2002] ECR I-6325 para.35

49 *Marks & Spencer (gift tokens)* para.36

- The introduction of time limits by the errant Member State must not be for the purpose of frustrating reparation following a Court judgment;
- The time period for making claims prescribed by the limitation provisions must be sufficient to enable claims to be formulated and submitted and the provisions may not be retroactive.
- Where new limitation periods are introduced, there must be transitional provisions allowing claims within a reasonable period following the enactment of them. The new limitation period cannot act so as to dispossess the rights to claim reparation of taxpayers who, at the time of enactment, were within the limitation period previously prescribed but outside the new period prescribed in subsequent provisions[50]

Whilst considering the part played by the principle of legal certainty in relation to finalisation of tax liabilities, whereas the Court has ruled that a Member State may prescribe that its tax administration has a longer period in which to raise assessments in tax evasion cases where the sources of income are external to the Member State, such discriminatory provisions must be restricted to situations where the tax administration has no evidence of the existence of the foreign sources of income. Once the tax administration does have such evidence, a discriminatory, longer, period ceases to be proportionate.[51]

3.6. Concluding comments

Whilst the Court has stated that, in the absence of EU rules prescribing matters such as interest entitlement, rates of interest, the time period over which it is calculated, claim limitation periods and similar, the national courts should determine these matters in accordance with national law. That freedom of the national courts to so determine such matters, however, is constrained by the principle of effectiveness to ensure that the reparation awarded constitutes proper compensation for the losses sustained as a result of the unlawful levy or act. National law obstacles to achieving that result must be set aside.

4. Summary

The Court commenced its development of principles in this field with the notion that full effect to the rights provided by the Treaty could not be achieved in the

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50 *Marks & Spencer (gift tokens)* paras.38 & 40

51 CJEU 11 June 2009 C-155/08 & 157/08 *X (C-155/08) and E. H. A. Passenheim-van Schoot (C-157/08) v Staatssecretaris van Financiën* ("*X & Passenheim*") [2009] ECR I-5093 paras.62 - 76

absence of full reparation for losses sustained by a person as a result of infringement of those rights by national laws.

The Court obtained comfort and inspiration from Article 340 TFEU in this respect. If the Treaty provided that remedy should be available to those suffering (unlawful) loss as a result of the actions of the EU institutions then comparable remedy should be available to persons suffering loss resulting from the unlawful levies and acts of the Member States and their administrative organs.

However, the right to claim reparation cannot be wholly unconditional. The Court developed simple rules to be applied to determine when a claim might be eligible and, to some degree, the extent to which it might be eligible. In this respect, the Court identified two situations: the first is where the Member State has little discretion in its scope to legislate, such as where it has been required to transcribe a Directive into national law; and the second is where the Member State has wide discretion to legislate and the unlawfulness of a provision of national law might not have been evident before the Court had given a ruling on that provision or in relation to a similar situation relating to a provision in the legislation of another Member State.

Accordingly, when the two sets of rules are compared, one finds that both require there to be clearly defined rights that have been interfered with and there must be a clear causal link between the national legislation (or act) and the loss sustained. The principal difference is that, in a field in which the Member State enjoys wide discretion was regards its legislation or acts, liability cannot start to accrue until such time as the Member State could reasonably have been expected to know that its legislation or act might be unlawful under EU law.

Having defined the triggers for state liability, the Court had to clarify the extent to which the quantum of the claim, and other practical issues, should be determined to satisfy the requirements of EU law. In the absence of express regulations or rules, the overriding principle is that the loss sustained in consequence of the unlawful legislation or act should be fully compensated for.

When it comes to determining entitlement to interest, regardless of national rules defining rates and entitlement or even denying entitlement, the conclusion must be reached that, to satisfy the EU law requirement, the amount awarded, however calculated, must compensate the taxpayer for the loss of use of the money: that is, the *"loss in value of the principal through effluxion of time before settlement"*.

In the discussion, it has been suggested that a distinction needs to be made between on the one hand, a claim by a person that is not related to a business activity, in which case, the Court's formula might require the ravages of inflation to be

neutralised and, on the other hand, claims related to losses taken into account in the results of an economic activity, which might be settled on the basis of applying a representative commercial rate of interest subject to a deduction for notional tax unless the compensation awarded is itself subject to taxation in the hands of the trader.

In arriving at the figure of compensation required, the Court made it clear that it is necessary to take account only of the direct consequences of the Member State unlawful levy on the taxpayer. There is no obligation to take account of 'opportunity costs' or of costs incurred indirectly as a result of the unlawful levy.