The EC Tax Journal

PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

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What Community Law Requires of the National Law Applicable to Claims for Recovery of Unduly Paid Taxes

I Introduction: The Principles

The European Court of Justice has laid down the principles of equivalence and effectiveness as Community law requirements. National law is applicable to claims for recovery of charges levied in breach of Community law, but national law is subject to the principles of equivalence and effectiveness as developed by the Court in a comprehensive body of case-law. Most of the cases deal with recovery of unduly paid taxes. However, the principles have a general scope and apply to national rules relating to the exercise of rights under Community law. They apply to sanctions, social benefits and various charges. The essential elements of the principles may be summarised as follows:

Principle of Equivalence

National Rules May Not Be Less Favourable Than Those Governing Similar Domestic Actions

This principle cannot be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment

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for charges levied in breach of Community law.[2]

Principle of Effectiveness

National Rules May Not Render Virtually Impossible or Excessively Difficult the Exercise of Rights Conferred by Community Law

A Member State may not, following a judgment of the Court that certain legislation is incompatible with the Treaty, adopt a precedural rule which has the effect of restricting the bringing of proceedings for recovery of charges imposed by that legislation but no longer due.[3]

This principle precludes a national legislative provision which restricts repayments of a duty held to be contrary to the Treaty by a judgment of the Court solely to plaintiffs who brought an action for repayment before delivery of the judgment.[4]

Any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law. That is so particularly in the case of presumptions or rules 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.[5]

II History of the General Case Law Establishing the Principles

The gradual introduction of the principles of equivalence and effectiveness as Community law requirements in respect of national law is typical of the Court where

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2 Joined cases C-279/96, C-280796 and C-281/96, *Ansaldo,* judgment of 15.9.1998, 1998 ECR I-5025, para 29.

3 Case 240/87, *Deville,* judgment of 29.6.1988, 1988 ECR 3513; case C-343/96, *Dilexport,* judgment of 9.2.1999, 1999 ECR I-579. However, if the limitation respects the principle of equivalence and does not apply specially to the charge which was contrary to Community law but also to internal charges, it is compatible with community law (case C-343/96, *Dilexport,* judgment of 9.2.1999, 1999 ECR I-579, para 40.

4 Case C-309/85, *Barra,* judgment of 2.2.1988, 1988 ECR 355, para 19.

5 Case 199/82, *San Giorgio*, judgment of 9.11.1983, 1983 ECR 3595, para 14; case C-343/96, *Dilexport*, judgment of 9.2.1999, 1999 ECR I-579, para 48.

the interests of national governments are at stake.[6] The Court moves carefully between challenges of safeguarding rights conferred by Community law and respect of legal certainty of well established national law where Community law does not yet provide relevant rules. Therefore it is useful to keep in mind, the history of the doctrine of equivalence and effectiveness.

The early case-law referred to the applicability of national law in order to ensure **access to justice**. In a case from 1976[7] concerning monetary compensatory amounts the Court stated that disputes in connection with the reimbursement of amounts collected for the Community are a matter for national courts and must be settled by them under national law in so far as no provisions of Community law are relevant.[8] Soon, however, national law was subjected to **conditions**. In a case[9] relating to the refund of a payment on importation of charges for phytosanitary inspections since they were regarded as equivalent to customs duties by a judgment of the Court the question arose whether a limitation period was compatible with Community law.

The Court stated that:-

> "in the absence of Community rules ... 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"

and the Court added the first condition which eventually became the above mentioned principle of equivalence:

> "it being understood that such conditions cannot be less favourable than those relating to similar action of a domestic nature"[10]

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6 For other examples see T C Hartley: The Foundations of European Community law, 3rd edn., Clarendon Press, 1994, p. 87-90; see also Martin Shapiro: The European Court of Justice in 'The Evolution of EU Law' , Oxford, 1999, p. 324.

7 Case 26/74, *Société Roquette Frères v Commission*, judgment of 21.5.1976, 1976 ECR 677.

8 Case 26/74, *Société Roquette Frères v Commission*, judgment of 21.5.1976, 1976 ECR 677 para 11.

9 Case 33/76, *Rewe-Zentralfinanz,* judgment of 16.12.1976, 1976 ECR 1989.

10 Case 33/76, *Rewe-Zentralfinanz*, judgment of 16.12.1976, 1976 ECR 1989 para 5.

Thereby the Court relied on the principle of co-operation laid down in Art. 10 (ex Art. 5) of the Treaty and the obligation of Member States to ensure the legal protection which citizens derive from the direct effect of the provisions of Community law. In another case[11] concerning the reimbursement of unduly paid levies on exports of bulbs and corms of flowering plants constituting charges having an effect equivalent to customs duties on exports the Court added the second condition, that such national rules should not make *"it impossible in practice to exercise a right which national courts have a duty to protect"*.[12]

Having thus ensured access to justice by reference to national law submitting the application of national law to conditions the Court was then asked to scrutinise national rules limiting the possibilities of refund of unduly paid charges. The Court recognises the necessity of certain limiting rules such as **time limits**[13] or limitations due to **unjust enrichment**.[14] The Court considers the laying down of reasonable periods of limitation of actions of a fiscal nature as an application of the fundamental principle of legal certainty protecting both tax-payer and the administration concerned.[15]

The aforementioned conditions had become settled case-law but had not restricted the application of national law until the *San Giorgio* case.[16] In this case the **burden of proof** was on the individual undertaking seeking recovery of unduly paid health inspection charges. The Court stated that:

> "...any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the

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11 Case C-45/76, *Comet,* judgment of 16.6.1976, 1976 ECR 2043.

12 Case C-45/76, *Comet,* judgment of 16.6.1976, 1976 ECR 2043, para 16.

13 Case 33/76, *Rewe-Zentralfinanz*, judgment of 16.12.1976, 1976 ECR 1989;Case 45/76, *Comet,* judgment of 16.12.1976, 1976 ECR 2043.

14 Case 61/79, *Denkavit italiana*, judgment of 27.3.1980, 1980 ECR 1205; case 811/79 *Ariete*, judgment of 10.7.1980, 1980 ECR 2545; case 826/79, Mireco, judgment of 10.7.1980, 1980 ECR 2559.

15 Case 33/76, *Rewe-Zentralfinanz,* judgment of 16.12.1976, 1976 ECR 1989 para 5.

16 Case 199/82, *San Giorgio*, judgment of 9.11.1983, 1983 ECR 3595.

> charges duly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced such as the exclusion of any kind of evidence other than documentary evidence. Once it is established that the levying of the charge is incompatible with Community law the court must be free to decide whether or not the burden of the charges has been passed on, wholly or in part, to other persons."[17]

A new doctrine was introduced in the *Emmott* case[18] of 1991, in which the court stated that a time-limit does **not begin to run until the relevant directive has been properly transposed**:

> "So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national court.
>
> Only the proper transposition of the directive will bring that state of certainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are required to assert their rights is created.
>
> It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time."[19]

The *Emmott* case concerned the payment of social security benefits and equal treatment between men and women in an identical family situation. The *Emmott* doctrine has not been confirmed, but has been attributed to the particular circumstances of that case. In other cases in the field of social security law the Court explained that the particular circumstances meant that a time-bar had the

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17 Case 199/82, *San Giorgio*, judgment of 9.11.1983, 1983 ECR 3595 para 14.

18 Case 208/90, *Emmott*, judgment of 25.7.1991, 1991 ECR I-4269.

19 Case 208/90, *Emmott*, judgment of 25.7.1991, 1991 ECR I-4269, para 21-23.

result of depriving the plaintiff in the main proceeding of any opportunity whatsoever of relying on her right to equal treatment under a Community directive[20].

In a tax case on an import surcharge on port duty contrary to Art. 90 (ex Art.95) from 1997 the Court reaffirmed the non-applicability of the *Emmott* doctrine.[21]

In a further tax case, this time on a provision of secondary law the Court stated that:

> "Community law, as it now stands, does not prevent a Member State which has not properly transposed the Directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable"[22].

This is now settled case-law.[23]

The settled case-law of conditions imposed on national law was laid down as principles in 1998 and baptised the principle of equivalence and the principle of effectiveness.[24] Further case-law expressly refers to the condition as the principle of equivalence and the principle of effectiveness[25].

III Application of the Community Law Principles on Tax Related Issues of National Law

1 Recovery of Unduly Paid Taxes

Under Community law Member States have an obligation to provide access to justice.

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20 *Johnson*, para 26.

21 Case C-907 94, *Haahr Petroleum*, judgment of 17.7.1997, 1997 ECR I-4085, para 52.

22 Case C-188/95, *Fantask,* judgment of 2.12.1997, 1997 ECR I-6783, para 52.

23 Case C-260/96, *Spac*, judgment of 15.9.1998, 1998 ECR I-4997, para 29.

24 Joined cases C-279/96, C-280/96 and C-281/96, *Ansaldo*, judgment of 15.9.1998, 1998 ECR I-5025, para 27.

25 Case C-88/99. *Roquette Frères*, judgment of 28.11.2000, para 21.

Member States are in principle required to repay charges levied in breach of Community law. Entitlement of individuals to the repayment of such charges is a consequence of, and an adjunct to, rights conferred on individuals by Community law.[26] Such provisions may be Treaty provisions or secondary law provisions. The case-law on reimbursement of unduly paid taxes is a mirror of the case-law of the Court in tax cases. The early case-law dealt with taxes unduly paid because they were incompatible with Treaty tax provisions. As harmonised tax measures were decided, cases of national provisions in breach of secondary law provisions appeared and more recent case-law deals with reimbursement claims as a follow-up on findings of the Court on the directive on, for instance, capital duty.

According to settled case-law of the Court, in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.[27]

2 Permissible Conditions and Their Limits

In the absence of Community rules the reference to national law entails the reference to well defined bodies of national law. Therefore limitations such as unjust enrichment or limitation periods to similar claims of reimbursement were recognised as compatible with Community law. The principles of equivalence and effectiveness set limits to such permissible conditions to recovery of unduly paid taxes. Unjust enrichment cannot be presumed by placing the burden of proof for non passing on the tax on the tax payer. Permissible limitation periods may not be introduced specially to limit the consequences of the findings of the Court.

2.1 Unjust Enrichment

A Member State can resist repayment if reimbursement would constitute unjust enrichment.

National legislative provisions which prevent the reimbursement of taxes, charges

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26 Case 199/82, *San Giorgio*, judgment of 9.11.83, 1983 ECR 3595,para 12; cases C-192/95-C-218/95, *Comateb*, judgment of 14.1.1997, 1997 ECR I-165, para 20; case C-343//96, *Dilexport*, judgment of 9.2.1999, 1999 ECR I 579, para 23; case 441/98 and C-442/98, *AE* and *IKA*, judgment of 21.9.2000, para 30.

27 Cases C-279/96, C-280/96 and C-281/96, *Ansaldo*, judgment of 15.9.1998, para16.

and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay such charges has actually passed them on to other persons.[28]

When indirect taxes as consumption taxes are designed to be passed on to the final consumer, it may not be assumed, however that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary. The Court argues that even if in commerce they are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts.[29]

It should be borne in mind, that in preliminary rulings the Court has no jurisdiction to interpret national law. However, it seems helpful to indicate what kind of national provisions have been questioned:

- Exclusion of any kind of evidence other than documentary evidence (*San Giorgio*).
- Onus on the taxpayer that the unduly paid tax has not been passed on (*Bianco and Girard*).
- Legal obligation to incorporate the charge in the cost price does not mean that it cannot be assumed that the entire charge has been passed on (*Comateb*).
- Duties and taxes are to be reimbursed where they are incompatible with Community legislation unless the burden thereof has been passed on to other persons. If it is for the administration to show, by any form of evidence generally accepted by national law, that the charge was passed on to other persons, the provisions in question are not to be considered contrary to Community law (*Dilexport*).

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28 Case 199/82, *San Giorgio*, judgment of 9.11.83,198] ECR 3595, para 13, case 68/79, *Just*, judgment of 27.2.1980, 1980 ECR 501, para 26; cases C-192/95-C-218/95, *Comateb*, judgment of 14.1.1997, 1997 ECR I-165, para 24; case 441/98 and C-442/98, *AE* and *IKA*, judgment of 21.9.2000, para 32.

29 Joined cases 331, 376 and 378/85, *Bianco* and *Girard* judgment of 25.2.1988, 1988 ECR 1099 para 17; joined cases C-192/95 to C-218/95, judgment of 14.1.1997, 1997 ECR I -165, para 25.

2.2 Limitation Periods

The Court has recognised that it is in the interests of legal certainty that both the taxpayer and the administration concerned are protected and it is compatible with Community law that Member States lay down reasonable limitation periods for bringing proceedings.[30]

If subsequent to a judgment of the Court declaring a tax or charge contrary to the Treaty the national legislator introduces a reduction of the time limit applicable to claims for reimbursement of the unduly paid tax, this is compatible with Community law, if the amendment applies to all claims and sets a time limit sufficient to guarantee the effectiveness of the right of reimbursement. Only measures intended specially to limit the consequences of the findings made by the Court in its judgments are caught.[31]

Community law does not preclude national provisions from making repayment of taxes contrary to Community law subject to less favourable time-limits than those laid down for actions between private individuals for recovery of sums paid but not due.[32]

Nor does Community law preclude lex specialis limitation periods in tax matters. Thus, Community law does not in principle preclude legislation of a Member State laying down, alongside a limitation period applicable under the ordinary law to actions between individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of taxes and other charges.[33]

It should be borne in mind, that in preliminary rulings the Court has no jurisdiction to interpret national law. However, it seems helpful to indicate examples of the kind of national provisions which have been questioned and found reasonable.

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30 Cases C-279/96, C-280/96 and C-281/96, *Ansaldo,* judgment of 15.9.1998,1998 ECR I-5025, para 17.

31 Case C-342/96, *Dilexport*, judgment of the Court of 9.2.1999, 1999 ECR I 579, para, 34-43.

32 Case C-342/96, Dilexport, judgment of the Court of 9.2.1999, 1999 ECR I 579, para, 33.

33 *Edis,* para 37; Case C-260/96, *Spac*, judgment of 15.9.1998, 1998 ECR I-4997 , para 21, joined cases C-10/97 to C-22/97, *In.Co.Ge.* 1998 ECR I-6307, para 27, *Aprile,* para 21; case C-88/99, *Roquette Frères*, judgment of 28.11.2000, para 30.

- A limitation period of five years was considered to be reasonable (*Haahr Petroleum*).

- A time limit of three years by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period allowed is more favourable (*Spac*).

- A national limitation period of up to a minimum of 4 years and a maximum of 5 years preceding the year of the judicial decision finding the rule of national law establishing the tax to be incompatible with a superior rule of law was considered reasonable (*Roquette Frères*).

The event from which moment to calculate the limitation period became a special issue after the *Emmott* case. However, as we have seen above, Community law does not require that this period starts to run only after the directive in question has been properly transposed.

IV Concluding Remarks

The interplay between Community law – 'as it now stands' – and national law is a dynamic process.

The principles of equivalence and effectiveness form part of the sui generis Community legal order framing and permeating national law as a follow-up to the fundamental features of Community law, one of which is direct applicability. In the early case-law on equivalence and effectiveness the direct effect of Treaty provisions was at stake. Later, breach of Community law of harmonised measures was at issue.

The Court has to move carefully because legal certainty is ensured by the body of national rules on procedural administrative law. Community law – 'as it now stands' does not yet provide harmonised administrative and procedural rules in tax cases as it does in customs law.

The Court has ensured access to justice under national law and subjected national law to conditions which have grown to become principles. Where Community law does not provide relevant rules the Court leaves it to Member States to differentiate between rules applicable to claims between private parties and claims in tax cases, to differentiate the length of the limitation period. There is not much hope for the taxpayer seeking recovery of unduly paid taxes if he is caught in procedural rules. However, the Court is watching what happens to rights under Community law.

Measures intended specially to limit the consequences of the findings made by the Court in its judgments are caught by the principles as the Court found in the *Delville* case.

The principles serve as correctives whenever Member States go too far in globally rejecting claims. This was the case of the burden of proof in the *San Giorgio* case.

The principles applied jointly guide the national court so that access to justice is not less favourable when claims are based on Community law and the exercise of rights conferred by Community law is not rendered virtually impossible or excessively difficult.