CONSEQUENCES OF THE ACTE CLAIR DOCTRINE FOR THE NATIONAL COURTS AND TEMPORAL EFFECTS OF AN ECJ DECISION

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Introduction: Why is there a relationship between Acte Clair and temporal effect of ECJ decisions?

In this panel two subjects are brought together which logically are not directly linked in the system of European Community law: the Acte Clair doctrine on the one hand and the problem of the temporal effect of ECJ decisions on the other. The common link between the two subjects is the principle of legal certainty, which is a principle that has been elevated by the ECJ to a basic principle of European Community law.

Before discussing the part of the questionnaire dealing with our subject, I will briefly explain the reasons why there is a possible relationship between Acte Clair and the temporal effect of ECJ decisions.

1. The Acte Clair doctrine:

As indicated in the first panel the Acte Clair doctrine is used to resolve the question under art. 234 EC treaty whether a national court has the obligation to submit a question for a preliminary ruling by the ECJ. This question is of particular importance in a procedure before national courts making final decisions against which there is no further appeal. Art. 234 last sentence imposes on such courts the obligation to submit a question for a preliminary ruling but only when there is a question of interpretation of Community law or on the validity of a act of a Community institution and the guidance of the ECJ is necessary to resolve these questions in order for the national judge to be able to reach his decision. I.e. there is no obligation to submit a request for a preliminary ruling, whenever an argument of Community law is raised by one of the parties. Only when the answer to this question of Community law is necessary for the national judge of last instance to reach his decision is there an obligation.
The national judge is the final arbiter on the question whether he will submit a request. This whole system is of course built on trust and the bona fide exercise by the national judges of their decision making power. When national judges would refuse to submit requests which are clearly necessary to resolve questions of Community law, this would be tantamount to a mala fide exercise of their powers, undermining the legal foundations of the E.U. There is no direct sanction however for such behaviour, except that the Commission has the power to start a procedure against a Member State before the ECJ for infringement of Community law by the organs of that Member State. The highest courts of a Member State are indeed considered to be organs of that State. However the Commission is very reluctant to start such procedures, because it is seen as an attempt to weaken the independency of the highest national courts.

One of the legal grounds for not submitting a request for a preliminary ruling is the Acte Clair doctrine. This is the case when “the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is raised is to be resolved”\(^\text{1}\). The reasons for not imposing an obligation to submit a request is that (1) there must be a minimum of trust from the part of the ECJ in the competence of the national courts of last instance, to be able to define these situations of correct application of Community law beyond reasonable doubt and (2) the Acte Clair doctrine relieves the ECJ from deciding the obvious.

For an Acte Clair to exist the conditions are very strict. The interpretation of the law in the different Community languages must be taken into account as well as the differences in concepts between Community law and national law and the context and the objectives of Community law. In particular the national court must be convinced that the answer to the question is equally obvious to the courts of the other Member States and to the ECJ. The interesting aspect on the Acte clair doctrine is that it is not based on precedent by the ECJ, i.e. the national court may decide a question which in the past has never been raised before the ECJ. It is rather based on the inexorable logic of Community law and the conviction of the national court that the ECJ and other national courts could not under any circumstance come to a different application of Community law. Precisely because the national court is absolutely convinced about the correctness of its judgment under Community law, there is no need to submit the questions to the ECJ. If the national court would have any doubt on the

\(^1\) Case 283/81, CILFIT, 06.10.1982 at par. 16; see also Case C-231/96, Edis, 15.09.1998 at par. 15 and 16.
application of EU law, it would need the guidance of the ECJ and would be obliged to submit the case to the ECJ.

2. The Acte éclairé doctrine:

The Acte éclairé doctrine in the ECJ case law is also used under art. 234 EC treaty as a valid justification for not submitting a preliminary question to the ECJ. That situation exists “where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical”\(^2\). In the literature and the ECJ jargon this is often referred to as “settled case law”. For the doctrine of Acte éclairé to apply the conditions are less strict than under the Acte clair doctrine, because the decision of the national court here is based on the effect of precedent under specific circumstances and is not based on its own and original interpretation of Community law. There have been already earlier decisions in previous procedures, even though the questions at issue are only similar and not strictly identical.

Because this exception to the obligation of the national courts to submit a request for a preliminary ruling to the ECJ is based on precedent, the national court is always at liberty to make such a request, even when there has been settled case law. A national court may submit such a request when it is of the opinion that the conditions of the case sub judice are a little bit different from earlier precedents and when it would like to receive some additional guidance, or even when it may want the ECJ to change its earlier case law. When it takes its decision within the framework of the earlier settled case law there is of course no reason to submit a request for a preliminary ruling. In this situation there is always the risk however that the national court does not make the correct decision and may err in its interpretation of settled case law.

3. Legal certainty and temporal effect:

The temporal effect of ECJ decisions was determined in Denkavit Italiana\(^3\):

“The interpretation which …the Court of Justice gives to a rule of Community law clarifies and defines …the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must be applied by the courts even to legal relationships arising and

\(^2\) Case 283/81, CILFIT, 06.10.1882, at par. 14.
\(^3\) Case 61/79, Denkavit Italiana, 27.03.1980 at par. 16
established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied.’ This means that decisions of the ECJ have a legal effect ex tunc on legal relationships existing before that decision. I.e. a tax held by the ECJ to be levied in violation of the fundamental freedoms cannot be applied by a national court even when the tax was due before the ECJ decision and is subject to a refund. In other words the decision has retroactive effect.

The ECJ case law has put two limitations to this rule (1) the taxpayer should respect the national statute of limitations in reclaiming a refund, although this statute of limitations should not make such refund based on a violation of the EC treaty, effectively impossible\(^4\) and (2) the taxpayer must prove that he has incurred an effective damage by paying the tax not due and has not shifted the tax burden to another person\(^5\).

In exceptional cases, the retroactive effect of ECJ decisions is also limited by the principle of legal certainty. This was established in Defrenne v. Sabena\(^6\) where ECJ held that “…it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of possible repercussions which might result, as regards the past, from such a judicial decision. However, in the light of the conduct of several of the Member States and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to art. 119, although not yet prohibited under their national law. ….. In these circumstances… important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past”. This was confirmed more than ten years later in Vincent Blaizot v. Université de Liège, a case dealing specifically with the retroactive effect of an earlier ECJ decision. The ECJ held: “The attitude thus adopted by the Commission might reasonably have led the authorities concerned in Belgium to consider that the relevant Belgian legislation was in conformity with Community law. In those circumstances pressing considerations of legal certainty preclude any reopening of the question of past legal relationships where that would retroactively throw the financing of

\(^4\) Case 61/79 Denkavit Italiana, 27.03.1980 at par. 25-28; Case 283/81, CILFIT, 06.10.1982, at par. 16 in fine

\(^5\) Joint Cases C-6/90 and C-9/90, Francovich, 19.11.1991

\(^6\) Case 43/75, Defrenne v. Sabena, 08.04.1976 at par. 69 – 75.
university education into confusion and might have unforeseeable consequences for the proper functioning of universities”7. As a general rule claims for reimbursement of taxes paid or chargeable prior to the date of the judgment would not be recognized, except for claimants who had initiated legal proceedings or administrative claims before that date.

In both cases the retroactive effect of the ECJ holding was stopped for private entities. The question is whether this principle of legal certainty also applies to the public authorities of the Member States and in particular to their tax administrations when taxes have been levied in violation of EC treaty provisions having direct effect. There have been many cases in which national tax administrations argued, without success, against the retroactive effect of ECJ decisions8. In a few cases however the ECJ has agreed to restrict the retroactivity of its holding in tax cases on the basis of the principle of legal certainty9. It is important to note however that in non-tax cases with considerable budgetary implications the ECJ has consistently held that “the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling”10.

4. Some new developments on legal certainty and temporal effect of tax decisions:

So far this is the traditional and conventional doctrine on legal certainty and temporal effect of ECJ decisions. Changes in the taxpayer’s procedural strategies and the growing impact of the budgetary consequences have resulted in some new approaches to be considered in recent case law. These changes are highlighted by four opinions of advocate-generals in two highly publicized cases: Banca Popolare di Cremona11 and Wienand Meilicke12.

More and more taxpayers involved in E.U. tax litigation are organizing themselves in groups so as to bring group or class actions before the ECJ, in particular in Member States with a “no cure no pay system”. This

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7 Case 24/86, Vincent Blaizot v. Université de Liège, 02.02.1988 at par. 33 and 34.
8 Cases 61/79, Denkavit Italiana, 27.03.1980 at par. 6-10, where the Italian government argued 22 years after the signing of the Treaty of Rome that the concept of charges having an equivalent effect was not entirely clear and therefore a public health levy should be held to violate the EC treaty only for the future!; and more recently Joint cases C-453/02 and C-462/02 Finanzamt Gladbeck v. Linneweber and Finanzamt Herne West v. Savvas Akritidis; and C-292/04 Wienand Meilicke.
10 C-184/99, Rudy Grzelczyk, 20.09.2000 at par. 52 and C-104/98, Johann Buchner, 23.05.2000 at par. 41 and a whole series of cases cited there.
11 C-475/03, Banca popolare di Cremona, 03.10.2006
12 C-292/04, Wienand Meilicke, 06.03.2007
reduces the cost of litigating considerably, but it increases the publicity of the case and attracts other taxpayers to litigate and increases, in case of success, the costs of reimbursement for the national treasuries of the member States. Because of the publicity and the increased awareness of the impact of E.U. law, more and more taxpayers are engaging in “speculative” litigation before their national courts, once it is known that a tax issue is brought before the ECJ. When in the end the ECJ decides in favour of the other taxpayers who initiated the procedures before the ECJ, they have a free ride on that decision and their claims will not be stopped because of limitations of the temporal effect of the decision imposed by the ECJ. Also Member States increasingly have brought pressure to bear on the ECJ arguing the catastrophic budgetary consequences of the many billions of Euro’s they were stand to loose in case the ECJ would hold a tax rule to be in violation of the EC treaty.

The four opinions can best be summarized on the basis of the final and lengthy opinion on the subject of advocate-general Stix-Hackl in the Banca Popolare di Cremona and the Meilicke case. In Meilicke she restates the principle that ECJ decisions have a declaratory effect on a rule of Community law, “clarifying and defining the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force”\(^\text{14}\). I.e. the judgments of the ECJ take effect ex tunc. In exceptional cases however the ECJ may restrict the temporal effect of a decision, when legal certainty is at stake and many bona fide established legal relationships would be called into question.

Such restrictions in the temporal effect of an ECJ decision are subject to two separate and mandatory conditions: (1) “there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of the national rules considered to be validly in force” and (2) “it must be apparent that the individuals and the national authorities have been led into adopting practices which do not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions to which the conduct of other Member States or the Commission may even have contributed”\(^\text{15}\).

In her opinion she takes the position that “where a limitation on the temporal effects of a judgment is ordered, it only applies to the Member

\(^{13}\) C-475, Banca popolare di Cremona, opinion advocate-general Stix-Hackl, 14.03.2006; C-292/04, Wienand Meilicke, opinion advocate-general Stix-Hackl of 05.10.2006.

\(^{14}\) C-292/04, Wienand Meilicke, opinion Stix-Hackl, at par. 11 e.s.

\(^{15}\) C-292/04, Wienand Meilicke, opinion Stix-Hackl, at par. 38.
State to whom it has been granted. Thus the territorial scope of the exceptions to ex tunc effect is restricted. However the Court did not follow the position of its advocate-general on this point. It held that there was no room for a territorial exception in this case because “there must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation, which the Court gives of a provision of Community law. In that regard, the principle that a restriction may be allowed only in the actual judgment ruling upon that interpretation guarantees the equal treatment of the Member States and of other persons subject to Community law, under that law, fulfilling, at the same time, the requirement arising from the principle of legal certainty.” In other words with respect to the temporal effect of a judgment, the equal treatment of the Member States, requires an effect ex tunc if in a similar or identical decision with respect to another Member State the Court has not restricted the retro-active effect of that judgment. In the Meilicke case there had been an earlier decision in Manninen on the same question, without any restriction on the temporal effect.

In Banca Popolare di Cremona advocate-general Stix-Hackl points out that the doctrine of retroactive effect of ECJ decisions has been developed in cases brought under art. 231 EC treaty in of annulment of Community measures, but that the Court has also developed a doctrine of temporal limitation on the effects of a preliminary ruling on the interpretation of a provision of Community law. She then goes on to analyze the different ways in which the retroactive effect of an ECJ decision can be restricted reviewing several of the possibilities proposed by advocate-general Tizziano in his opinion in the Meilicke case a few months earlier. The traditional restriction has always been that the interpretation takes effect as of the date of the judgment, but that claims that have been brought before that date will benefit from the new interpretation by the ECJ.

Because of the change in strategies Tizziano envisaged in Meilicke new cut off dates: (1) the ECJ decision should have effect as of the date of an earlier decision (Verkooijen) in which the interpretation of Community law had been made clear, but recognizing claims that had been brought before the date of the Verkooijen decision and also recognizing claims that were brought after the Verkooijen decision but before the date in which the order

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17 C-292/04, Wienand Meilicke, 06.03.2007, at par. 37.
18 C-319/02, Petri Manninen, 07.09.2004.
19 C-475/04, Banca popolare di Cremona, opinion Stix-Hackl, at par. 132 e.s.
20 C-292/04, Wienand Meilicke, opinion advocate-general Tizziano, 05.10.2005
21 C-292/04, Wienand Meilicke, opinion Tizziano at par. 48. His proposal was to allow retroactive effect for the Meilicke decision until the date of the decision in C-35/98, Verkooijen, 06.06.2000.
for reference in Meilicke was published in the Official Journal and even (2) a future date from which the judgment may be relied upon.

The idea of a future date is taken from the German constitutional order whereby the Bundesverfassungsgericht, when striking down a provision of national law as unconstitutional, allows a certain time for the legislator to adapt and change the legislation. This way of operating presupposes a close and good working relationship between the Court and the legislator, which may be true in a national constitutional order, but is subject to some skepticism in the European legal order. The Council of Ministers being the chief legislator, and Member States having veto power on any tax legislation in Europe and taking into account the hostile attitude of some Ministers of Finance vis-à-vis the ECJ, cooperation is highly unlikely.

The solution of cutting of some litigation as of the date of the publication of the order of reference does not look a very good idea, because it would require tax advisors to keep a log of the order of references to find out whether their client would have standing before the ECJ.

In this respect Advocate-General Stix-Hackl makes an interesting distinction between cases brought at a time when the effect of the ECJ decisions was not entirely clear and when there was still some risk and uncertainty in the outcome of the litigation and other cases “brought at a later date in the light of a perceived probability of success”. The latter claims were clearly an attempt to get a free ride on the decision following the main procedure. Because of the increasing number of class actions this problem should be taken care of by setting another date than the date of the decision. In stead of fixing the date at the publication of the order of reference it would be preferable for the ECJ itself to set a fixed date, which may be the publication date of the order of reference, but which also could be another date. The advantage of the ECJ setting a date in its decision would be that that date would be announced to the public together with the publication of the decision. It also has the advantage of tailoring the retroactive effect of a decision to the special circumstances of each individual case. The ECJ has emphasized time and again that the question of retroactive effect should indeed be decided taking into account these specific circumstances.

The solution of using the date of the judgment at which the position of the ECJ on the interpretation of Community law became fully clear raises the

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23 C-475/04, Banca Popolare di Cremona, opinion Stic Hackl at par. 168.
question of the significance of the Acte clair for such date and for the consequences to be attached to a situation of Acte clair.

5. Questions on Acte clair and temporal effect:

The link between Acte clair and temporal effect is of course that when the interpretation of a question of Community law is totally clear in the sense of an Acte clair and national provisions are maintained in violation of the EC treaty provisions, there can be no excuse for a Member State to claim limitations in the temporal effect of a decision. Indeed Acte clair in this situation means that the whole framework of EU law dictates a solution for which there cannot be the slightest doubt. A decision by a national judge based on Acte clair necessarily has effect ex tunc as far as the interpretation of EU law and its application in the national legal order is concerned.

Although this observation in itself is fully clear, it raises several questions:

(1) The first question of course is under which circumstances a national court can raise the Acte clair doctrine to settle a case. That question has been answered in an earlier panel.

(2) The next question is what happens when a national court raises the doctrine of Acte clair in a negative way, in the sense that it is clearly established that a national provision does not violate the EC treaty, e.g. the decision of the Tax Commissioner in the Marks & Spencer case. This question raises several other questions such as (a) what are the conditions for such a negative Acte clair decision to be valid and more important (b) is it possible in tax matters that Community law is totally clear so as to enable a national judge to decide that a national rule will never violate the EC treaty provisions, in other situations than the situation where the interpretation of Community law is totally irrelevant to resolve the issues raised or where the issues raised are identical to issues raised in other judgments by the ECJ, i.e. in litigation where the Acte clair doctrine is in effect redundant to resolve the legal issues raised in the procedure.

(3) The next question is what is the temporal effect of an Acte clair decision in the context of a national legal order: (a) to what extent is retroactive effect of a judicial decision recognized in the national legal order and more important (b) do the European rules with respect to the temporal effect of ECJ decisions on the interpretation of Community law have priority on national rules restricting the temporal effect of a decision by a national judge?

(4) Finally there is the question whether the absence of an Acte clair doctrine on a particular issue of interpretation of Community law is a sufficient justification for a Member State to argue that the basic
principle that the ruling by the ECJ establishing the interpretation of Community Law affects also legal relationships existing before the date of the ruling, does not apply and that in the interest of legal certainty.

6. Answers to questions on Acte clair and temporal effect:

In answering these questions in the area of taxation, I would like to submit the proposition that with respect to the interpretation of the fundamental freedoms under the EC treaty instances of Acte clair are the very rare exception if ever they can be assumed to exist at all. An Acte clair in the sense that a national judge could decide that a national rule violates one of the fundamental freedoms under the EC treaty is already a very rare exception. The contradictory views not only among learned authors, but also among opinions of different advocate-generals of the ECJ make it almost impossible to think of a situation where a national judge would singlehandedly decide on the positive application of the EC treaty, without any reference to precedents decided by the ECJ. He almost certainly would refer to judicial precedent and in the latter case we are dealing with an Acte éclairé rather than an Acte clair.

The idea that the doctrine of Acte clair could result in refusing to apply the fundamental freedoms in some cases is even more far fetched. The most spectacular case of refusal to submit an application for preliminary ruling is Marks & Spencer, but this is not a specimen of Acte clair, because the two Commissioners cited extensively ECJ case law. Therefore it is rather an application of Acte éclairé.

From the above propositions it follows that the absence of Acte clair cannot result in any conclusion as to the temporal effect of an ECJ judgment. Besides when a national court would decide on the basis of Acte clair, nothing prevents another national court neither from submitting the question again to the ECJ, nor the ECJ from ruling on this question.

6. The impact of Acte éclairé and temporal effect:

The question of the relationship between Acte éclairé, or settled ECJ case law and temporal effect of ECJ decisions is in my view more relevant. As a general rule cases decided on Acte éclairé also do have a general effect ex tunc, without any limitation on the retroactive effect of the decision. However settled case law may still leave an opening to some questions. To the extent that the ECJ itself may decide that the request submitted in fact covers a different situation than the situations dealt with in the settled case
law, we may find a new interpretation of the EC treaty that now is decided for the first time. In such a situation the ECJ can decide to restrict the temporal effect of its “new” decision when the two conditions are fulfilled. This is even more so in the other situation where the national court submits a question that in principle has already been decided in settled case law, but where the national court wants to obtain a reversal of earlier case law. When the ECJ would grant such reversal there is clearly a “new” interpretation of EU law and again of the two conditions are fulfilled there is legal ground for restricting the temporal effect of the new ruling. The condition that the Member State which has been violating the EC treaty is bona fide is almost certainly fulfilled in such a situation.

Unlike the absence of an Acte clair, the absence of settled case law on a legal question may have consequences for the temporal effect of an ECJ decision, because if the question has not yet been settled a Member State may hold the bona fide position that its rules are not violating the EC treaty. There are of course other circumstances which may also determine the bona fide position of a Member State, such as the attitude of the Commission, but also internal challenges and questions from national politicians or national authors on EU law.

7. The relationship of the retroactive interpretation of EU law and the national rules on the retroactive effect of national judicial decisions:

Finally there is the question about the relationship between the retroactive declaratory effect of ECJ judgments and the national rules on the temporal effect of a decision by a national judge in tax cases. It is clear that the declaratory effect of the ECJ decision is subject to the rules that the Court itself has established in the European legal order. On the other hand there are various national rules controlling the retroactive effect of national court decisions. These rules may limit the retroactive effect in tax cases. As long as the rules are applied equally in litigation involving national and EU tax law there is no problem, provided that the national rules do not totally exclude the retroactive application of the declaratory character of the ECJ decisions or make such application nearly impossible. These general rules for the temporal effect of ECJ rulings within a given national legal order are not specific for tax law, but are part of general community law and therefore also applicable in tax cases.