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Limitation of Temporal Effects of CJEU Judgments – Mission Impossible for Governments of EU Member States

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Mission Impossible for Governments of EU Member States[2]

1. Meilicke and the CJEU Case Law on the Limitation of the Temporal effects of the CJEU

In preliminary ruling cases the CJEU interprets the relevant provision of Union law. The domestic court referring the case to the CJEU has to decide whether a provision of its domestic law complies with or infringes Union law. However, the CJEU avoids deciding on the meaning of the domestic provision which is at stake in the case at hand. It just repeats the meaning of the domestic provision as explained by the domestic court and even avoids giving judgment on whether *the concrete domestic provision* infringes Union law. According to the concept of shared responsibilities between the CJEU and the domestic court, the CJEU regards itself as limited in its competence and to only be allowed to interpret Union law[3]. Of course, it gives its judgment in the light of a domestic provision as that had been described by the domestic court. However, the CJEU usually does not take a stand whether the description provided by the domestic court is the most convincing interpretation of the domestic rule or even accurate. Interpretation of domestic law is just not within the competence of the CJEU.

The CJEU *interprets* Union law and, at least in its own perception, does not *create* Union law. The Court just explains the meaning of the law as it should always have been understood. Consequently, a judgment of the CJEU provides an interpretation that reaches back to the day when the Union law provision went into force. Thus, CJEU judgments usually have automatic

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[3] B Schima, ‚Art 267' in H Mayer and K Stöger (eds) *EUV/AEUV*(Manz'sche Verlags- und Universitätsbuchhandlung 2012) m.no. 40; B W Wegener ‚Art 267' in C Calliess and M Ruffert (eds) *EUV/AEUV* (C.H. Beck 2011), m.no. 3.

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retroactive effect. At least in those domestic cases which are still open, domestic courts and authorities have to apply Union law as it has been interpreted by the Court, irrespective whether in previous case law any indication can be found which supports that interpretation, and even if a new interpretation provided by the CJEU seems to contradict earlier case law.

However, the CJEU seems to be aware that this approach may have far-reaching consequences in some situations and may sometimes lead - at the very least - to confusion. As early as 1976, the CJEU decided for the first time to limit the temporal effects of one of its judgments.[4] As there is no explicit legal basis at all in the EC Treaty for the CJEU to limit the temporal effects of one of its judgments under the rule which is today Art. 267 TFEU, the Court itself had to develop the criteria under which it is willing do so. The Court made it clear right from the beginning of this case law in 1976 that it was only willing to limit the effects of a judgment in exceptional cases. The criteria for limiting the temporal scope of a judgment, which will be further explained below, are in practice rarely applied. Usually the Court comes up with arguments why the criteria are not met in a specific case. However, the Court seems to leave the door open in order to be able to limit the temporal scope of a judgment, in case its judgment would have unforeseen dramatic consequences for a Member State and it thus finds it necessary to take such an action. Thus, the *Defrenne* case law serves as an "emergency brake".

At first sight the *Meilicke* judgment seems to fit in this picture[5]. The Court found another reason why it did not have to limit the temporal scope of its judgment in this case. The CJEU did not want to get into the usual discussion as to whether there was any legal uncertainty or whether the judgment has severe economic repercussions, which is extremely difficult to measure in tax cases. The Court just mentioned that the German government had been too late to request a temporal limitation of the judgment. The appropriate case would have been one of its previous judgments. This seems to be an elegant way of avoiding discussing very technical questions.

However, in the judgments to which the CJEU referred as the appropriate ones where such a request should have been made, cases referred by *other* Member States had been decided. Although the CJEU did not make a clear statement, its reasoning gives the impression that the

[4] Case 43-75 Defrenne v Sabena [1976] ECR 455.
[5] Case C-292/04, *Meilicke* [2007] ECR I-1872.

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temporal effects of a judgment have to be the same throughout the European Union[6]. If the temporal effects of a judgment are not limited, this is relevant in all Member States. Accordingly, if the CJEU limits the temporal effects of a judgment, this can only be done with effect for all Member States[7]:

> "*35 It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith (see, in particular, Case C-104/98 Buchner and Others [2000] ECR I-3625, paragraph 39, and Linneweber and Akritidis, cited above, paragraph 42).*
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> *36 In addition, as the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought (Case 309/85 Barra [1988] ECR 355, paragraph 13; Case 24/86 Blaizot [1988] ECR 379, paragraph 28; Case C-163/90 Legros and Others [1992] ECR I-4625, paragraph 30; Case C-415/93 Bosman and Others [1995] ECR I-4921, paragraph 142; and Case C-437/97 EKW and Wein & Co. [2000] ECR I-1157, paragraph 57).*
>
> *37 Indeed, 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 requirements arising from the principle of legal certainty.*"

The Court emphasizes that "the equal treatment of the Member States and of other persons subject to Community law" has to be guaranteed. The equal treatment of Member States can also be guaranteed if all of them have the opportunity to request a limitation of the temporal effects of a certain judgment at the same time. This does not necessarily mean that such a limitation has effect for all Member States. However, an equal treatment of all "persons subject to Community law" makes it necessary that the temporal effects of a judgment are limited either throughout the European Union or not at all.

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[6] See in more detail M Lang, „Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen im Lichte des Urteils Meilicke", (2007) 7 Internationales Steuerrecht, 237.
[7] Case C-292/04, *Meilicke* [2007] ECR I-1872, Para 35 et seq.

Advocate General *Stix-Hackl* arrived in her Opinion at the opposite result[8]: "Furthermore, where a limitation on the temporal effects of a judgment is ordered, it only applies to the Member State to which it was granted. Thus, the territorial scope of exceptions to ex tunc effect is restricted." In *Banca di Cremona* she explained her position in detail[9]: "However, any temporal limitation and any exception thereto decided upon by the Court will be based on an assessment of the situation — existence of good faith on the part of the State, risk of serious disruption for the State and need for effective judicial protection of diligent claimants — in Italy, and that assessment might be quite different with regard to another Member State which also applied a tax having the same characteristics. […] That consideration implies that any limitation should be not only temporal but also, in effect, spatial — a point of some relevance in the present case since it appears from several of the numerous articles which have already appeared in legal and tax journals concerning this case that one or more Member States other than Italy may apply taxes which, at least in the opinion of some authors, share certain characteristics with IRAP."

At first sight the recent *Skoma-Lux* decision seems to be on the territorial scope of judgments of the CJEU[10]. This case dealt with a Union law rule which was in effect already before the accession of the Czech Republic to the European Union and had never been translated and officially published by the EU in the Czech language[11]. The Court held that this rule cannot have any binding effect in the Czech Republic. From that perspective the territorial scope of the judgment was limited. The Court was also asked to limit the temporal effects of its judgment. However, the CJEU held that its *Defrenne* case law was not relevant in such a context[12]: "However, that case-law concerns a different situation from that before the Court. In fact, in the present case it is not a question of limiting the temporal effects of a judgment of the Court concerning the interpretation of a provision of Community law, but of limiting the temporal effects of a judgment which concerns the actual enforceability, in a Member State, of a Community act. Consequently, that case-law cannot be applied to the present case." Therefore one cannot conclude from *Skoma-Lux* that the Court wanted to deviate from its decision in *Meilicke*.

Though the CJEU does not seem to accept territorial limitations when it decides to limit the temporal scope of a judgment, the Court has never *explicitly* taken this view, either in

[8] Case C-292/04, *Meilicke* [2007] ECR I-1872, Opinion of AG Stix-Hackl Para 14.
[9] Case C-475/03, *Banca Popolare die Cremona* [2006] ECR I-9373, Opinion of AG Stix-Hackl, Para 181.
[10] Case C-161/06, *Skoma-Lux* [2007] ECR I-10869.
[11] Case C-161/06, *Skoma-Lux* [2007] ECR I-10869, Para. 17.
[12] Case C-161/06, *Skoma-Lux* [2007] ECR I-10869, Para. 68.

Meilicke or in any other later judgment. However, under the assumption that no such territorial limitation can be made it seems to be interesting to examine how this fits into the existing case law and how the Court would apply its usual criteria to limit the temporal scope of a judgment. Therefore, I will describe the criteria used by the CJEU in more detail (section II)[13] and then apply them in the framework just described (section III).

2. The Existing Case Law on the Limitation of Temporal Effects of CJEU Judgments

2.1. The Rule and the Exception

The Court gives the following reasoning why its judgments in general have retroactive effects[14]: "*It has consistently been held that the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 177 [now Article 269] of the Treaty, gives to a rule of Community law clarifies and where necessary 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 can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied […].*"

There is not much room for limiting the temporal effects of judgments of the CJEU[15]: "*It is only exceptionally that the Court may, in application of the general principle of legal*

[13] See already Lang (n 4) 235.
[14] Case 61/79, *Denkavit Italiana* [1980] ECR 1205, Para. 16; Case 66/79, *Salumi* [1980] ECR 1237, Para. 9; Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 27; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, Para. 42; Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 141; Case C-197/94, *Société Bautiaa* [1996] ECR I-00505, Para. 47; Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 107; Case C-294/99, *Athinaiki Zythopoiia AE* [2001] ECR I-6797, Para. 35; Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, Para. 44; Joined Cases C-453/02 and C-462/02 *Linneweber und Akritidis* [2005] ECR I-1131, Para. 41; Case C-209/03, *Dany Bidar* [2005] ECR I-2119, Para. 66; Case C-290/05, *Ákos Nádasdi* [2006] ECR I-0000, Para. 62; Case C-313/05, *Brzezinski* [2007], ECR I-00513, Para. 55; Case C-525/11, *Mednis SIA*, [2012], Para. 41.
[15] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 28; Case C-163/90, *Legros and Others* [1992] ECR I-4625, Para. 30; Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 142; Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 108; Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 57; Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, Para. 45; Joined Cases C-453/02 and C-462/02 *Linneweber und Akritidis* [2005] ECR I-1131, Para. 42; Case C-228/05, *Stradasfalti Srl* [2006] ECR I-0000, Para. 72; Case C-313/05, *Brzezinski* [2007], ECR I-00513, Para. 56; Case C-138/07, *Cobelfret NV* [2009], ECR I-00731, Para. 68; Case C-426/07, *Krawczynski*, ECR I-06021, Para. 42. Case C-2/09, *Kalinchev* [2010], ECR I-04939, Para. 50.

certainty inherent in the Community legal order, be moved to restrict the opportunity for any person concerned to rely upon the provision as thus interpreted with a view to calling in question legal relationships established in good faith. Such a restriction may be allowed only by the Court, in the actual judgment ruling upon the interpretation sought […].” The Court emphasizes that the scope for such exceptions to the rule is very limited[16]: *”In determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision […].”*

Advocate General *Stix-Hackl* summarized the case law of the Court in the following way[17]: “*Such a limitation may only be considered when 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 national rules considered to be validly in force. […] In addition 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.*”

2.2. Good Faith and Legal Uncertainty

The leading case on limitation of temporal effects of CJEU judgments is *Defrenne*[18]. In this judgment the Court already took the position that the Commission has contributed to the uncertainty[19]: *“The fact that, in spite of the warnings given, the commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfill an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.”* Even the fact the Commission did not initiate proceedings against the Member State could, in the Court’s view, establish good faith in the wrong interpretation of the

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Case C-263/11, *Ainars Redlihs* [2012], 19 July 2012, Para. 59. Case C-525/11, *Mednis SIA*, [2012] 18 October 2012, Para. 42.

[16] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 30; Case C-163/90, *Legros and Others* [1992] ECR I-4625, Para. 30; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, Para. 57; Case C-228/05, *Stradasfalti Srl* [2006] ECR I-0000, Para. 72.

[17] Case C-292/04, *Meilicke* [2007] ECR I-1872, Opinion of AG Stix-Hackl, Para 38.

[18] Case 43-75, Defrenne v Sabena [1976] ECR 455.

[19] Case 43-75, Defrenne v Sabena [1976] ECR 455Para. 73.

Community law provision at stake. Thus, one can infer from this judgment that it does not require much activity by the Commission to conclude that the Commission contributed to the uncertainty. However, there has to be at least *some* activity by the Commission: In *Brouwer* the CJEU held[20]: *"[…] the fact that the Commission had not initiated any Treaty infringement proceedings in that regard against the Kingdom of Belgium cannot be interpreted as the Commission's tacit consent to the wage discrimination that the Belgian authorities tolerated for the period from 1984 to 1994 in calculating the retirement pensions of female frontier workers."*

However, there are other judgments in which the role of the Commission was more active: In *Blaizot*[21] the Court held *"that letters sent by the Commission to Belgium in 1984 show that at that time the Commission did not consider the imposition of the supplementary enrolment fee to be contrary to community law. It was not until 25 June 1985, in the course of an informal meeting with officials of the Belgian Education Ministries, that the Commission stated that it had changed its position. Two days later […] it stated during a meeting of the Education Committee established by the Council that it had not completed its review of the matter; that is to say, it had not yet formed a definite opinion […] 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."* Also, in *EKW* the Court noted *"that the Commission's conduct may have caused the Austrian Government reasonably to believe that the legislation governing the duty on alcoholic beverages was in conformity with Community law."*[22] For Advocate General *Saggio* there was not sufficient evidence to assume that the Commission had misled the Austrian government[23]: *"The assertion that representatives of the Commission, in the course of negotiations for the accession of the Republic of Austria to the Community, stated to or gave it to be understood by the Austrian authorities that the duty at issue was lawful has not been confirmed by the Commission and it finds no echo in the documents before the Court."* However, for the CJEU it was sufficient that *"the Austrian Government contended, without being challenged on this point, that Commission representatives had assured it, during the negotiations prior to the*

[20] Case C-577/08, *Brouwer*, [2010] ECR I-7489, Para 39.
[21] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 32 et seq.
[22] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 58.
[23] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Opinion of AG Saggio, Para 64.

accession of the Republic of Austria to the European Union, that the beverage duty was compatible with Community law."[24]

In *Stradasfalti* the Italian government was, in the Court's view, not misled[25]: *"In the present case, although the Commission has supported the Italian authorities in respect of the years at issue in the main proceedings, it is nevertheless clear from the observations submitted to the Court that the VAT Committee has repeatedly pointed out to the Italian Government, since 1980, that the derogation in question could not be justified on the basis of Article 17(7) of the Sixth Directive, and that the more conciliatory attitude adopted by that committee during its meetings of 1999 and 2000 was a result of the Italian authorities' undertaking to re-examine the measure before 1 January 2001 and the possibilities presented at that time by the Commission's proposal to amend the Sixth Directive as regards the right to VAT deduction. […] Under those circumstances, the Italian authorities could not be unaware that the systematic renewal, since 1979, of a derogating measure which was supposed to be temporary and which could only be justified, under the very wording of Article 17(7) of the Sixth Directive, by 'cyclical economic reasons', was not compatible with that Article. […] The Italian authorities cannot therefore invoke the existence of legal relationships established in good faith in order to ask the Court to limit the temporal effects of its judgment."*

In *Legros* one cannot deny that the Commission contributed to the legal uncertainty[26]: *"As regards the present case, the particular characteristics of the dock dues and the specific identity of the French overseas departments have created a situation of uncertainty regarding the lawfulness of the charge at issue under Community law. That uncertainty is also reflected by the conduct of the Community institutions in relation to the problem of the dock dues. […] First, the Commission did not pursue the procedure for establishing a breach of obligations which had been initiated against France in relation to the dock dues. It then proposed to the Council Decision 89/688, which was intended, inter alia, to authorize maintenance of the dock dues on a temporary basis in the context of the aforementioned Poseidom programme. Finally, the third and fourth recitals of the preamble to that decision state that "the dock dues at present constitute a means of support for local production, which has to contend with the problems of remoteness and insularity" and that "they also are a vital instrument of self-reliance and local democracy, the resources of which must constitute a means of economic and social development of the French overseas departments". [...] Those circumstances could*

[24] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 56.
[25] Case C-228/05, *Stradasfalti Srl* [2006] ECR I-0000, Para. 73-75.
[26] Case C-163/90, *Legros and Others* [1992] ECR I-4625, Paras. 31-33.

have led the French Republic and the local authorities in the French overseas departments reasonably to consider that the applicable national legislation was in conformity with Community law."

In *Societe Regie Networks*, a tax case in the state aid area, it was a Commission decision, although contested, which contributed sufficiently to the uncertainty[27]: In "*particular, the fact that the aid scheme at issue was notified to the Commission and the decision by which the latter authorised that scheme was not challenged before the Community judicature are capable of justifying the imposition of a limitation on the temporal effects of the declaration that the contested decision is invalid.*"

Nevertheless, Commission and Member States can only *contribute to* the legal uncertainty. The CJEU requires the Member State that is asking for the limitation of the temporal effects to put forward arguments why the legal situation had to be considered uncertain. Yet, it is enough that "*this is the first time that the Court has been called on to interpret"* the provision at stake[28]. The Court consistently rejects the assumption of uncertainty if there is already well-established case law on a certain provision of Community law[29]. However, it is also possible that if the case law of the Court itself gives the impression of being contradictory it creates uncertainty[30]. The CJEU's decision in *Bosman* may serve as an example that the explanation why the legal-uncertainty test is met may be rather short[31]: "*In the present case, the specific features of the rules laid down by the sporting associations for transfers of players between clubs of different Member States, together with the fact that the same or similar rules applied to transfers both between clubs belonging to the same national association and between clubs belonging to different national associations within the same Member State, may have caused uncertainty as to whether those rules were compatible with Community law."* The threshold for legal uncertainty is therefore not very high.

[27] Case C-333/07, *Société Régie Networks* [2008] ECR I-10807, Para 123.
[28] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 29; Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 109; Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 58.
[29] Case 61/79, *Denkavit Italiana* [1980] ECR 1205, Para. 21; Case C-57/93, *Vroege* [1994] ECR I-04541, Paras. 28-30; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, Para. 45; Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 146; Case C-104/98, *Johann Buchner* [2000] ECR I-3625, Para. 40.
[30] Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 110.
[31] Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 143.

2.3. Serious Economic Repercussions

From *Defrenne* one can already infer that a risk of serious economic percussions has to exist if the Court is to limit the temporal effects of its judgment[32]: "*In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.*" However, the Court did not mention how it arrived at these conclusions. Thus, it left open what the real threshold is in order to assume that the financial situation of undertakings is "seriously" affected.

While in *Defrenne* private undertakings had to suffer serious economic difficulties, in other cases the governments, although at different levels, were the victims. However, in those judgments the Court did not give a more detailed reasoning either: In *EKW* the Court just stated that not limiting the temporal effects of the judgment "*would retroactively cast into confusion the system whereby Austrian municipalities are financed.*"[33] In *Legros* the CJEU held that "*overriding considerations of legal certainty preclude legal relationships whose effects have been exhausted in the past from being called into question when this would retroactively upset the system for financing the local authorities of the French overseas departments.*" [34] Similarily, the Court in *Sürül* took the position that "*any reopening of the question of legal relationships which have been definitively determined before the delivery of this judgment […] would retroactively throw the financing of the social security systems of the Member States into confusion.*" [35] In *Blaizot* the CJEU used a similar terminology, again without examining the situation in detail[36]: "I*n 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 university education into confusion and might have unforeseeable consequences for the proper functioning of universities.*" A very brief reasoning can be found in *Société Régie Networks* where the CJEU granted a limitation of the temporal effects of its judgment[37]: "*In this instance, it is clear, […], that the aid scheme in question was applicable for a period of five years and that a great deal of aid was paid under that scheme, affecting a large number of operators.*" The CJEU's judgment in *Bosman* can serve as an example that there are even cases in which the Court does not explicitly examine

[32] Case 43-75, Defrenne v Sabena [1976] ECR 455Para. 70.
[33] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 59.
[34] Case C-163/90, *Legros and Others* [1992] ECR I-4625, Para. 34.
[35] Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 111.
[36] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 34.
[37] Case C-333/07, *Société Régie Networks* [2008] ECR I-10807, Para 123.

the issue of possible economic consequences at all[38]. All these judgments have in common that the Court finally limited the temporal effects of its judgment.

In other judgments the CJEU arrived at different results: In *Société Bautiaa* the Court did not accept "*the argument that the French Government would suffer significant financial loss […]. The financial consequences which might ensue for a government owing to the unlawfulness of a tax or imposition have never in themselves justified limiting the effects of a judgment of the Court […]. 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 […].*" Since "*the French Government has not shown that, at the time when the registration duty at issue was levied, Community law could reasonably be understood as authorizing the maintenance of that duty*", the Court was not willing to limit the temporal effects of its judgments.[39] The fact that this judgment was the first time the CJEU had been called on to interpret this Community provision was not sufficient for assuming legal uncertainty. In *Athinaiki Zythopoiia* the Court rejected the request of the Greek government to limit the temporal effects of the CJEU's judgment on the interpretation of a provision of the Parent-Subsidiary Directive for identical reasons.[40]

The Court has made it clear that it does not assume it has an obligation to examine ex officio how severe the economic consequences of its judgments are. On the contrary, the burden of proof is completely with the governments of the Member States: In *Bidar* the Court held that in "*the present case, it suffices to state that the information provided by the United Kingdom, German and Austrian Governments is not capable of supporting their argument that this judgment might, if its effects were not limited in time, entail significant financial consequences for the Member States. The figures referred to by those governments in fact relate also to cases which are not similar to that at issue in the main proceedings.*"[41] Thus, it was decisive that the governments did not provide the Court with the figures which were relevant in the Court's view, and the Court, moreover, did not find it necessary to ask the governments to come up with figures that relate to the cases which were relevant in the Court's opinion. In *Stradasfalti* the CJEU reasoned that "*the Italian Government has not been able to demonstrate the soundness of the calculation which led it to argue before the Court that the present judgment might, if its temporal effects were not limited, entail significant*

[38] Case C-415/93, *Bosman* [1995] ECR I-04921,.
[39] Case C-197/94, *Société Bautiaa* [1996] ECR I-00505, Paras. 54 and 55.
[40] Case C-294/99, *Athinaiki Zythopoiia AE* [2001] ECR I-6797, Para. 39
[41] Case C-209/03, *Dany Bidar* [2005] ECR I-2119, Para. 70.

financial consequences"[42]. Similarly, the CJEU decided in *Brzezinski* against the limitation of the temporal effects of its judgment[43]: "*Regarding the risk of serious difficulties, at the hearing the Polish Government produced figures relating to the period from 1 May 2004, the date on which the Republic of Poland acceded to the European Union, and 30 April 2006, thus a two-year period, and showing that the total excise duties levied on passenger cars amounted to 1.16% of the budget revenues forecasted for 2006. However, the Court has not been provided with a breakdown of those figures, which would have afforded the opportunity to assess what proportion of that total would give rise to reimbursement. Moreover, only the excise duty amounts exceeding those corresponding to the residual duty included in similar second-hand vehicles originating from the Member State concerned must be reimbursed.*" The CJEU's reasoning in *Kalinchev* is similar[44]: "*At the hearing, the Bulgarian Government produced figures relating to the amount presumed owing following a possible unfavourable judgment by the Court. However, the Court has not been provided with a breakdown of those figures, which would have afforded the opportunity to assess what proportion of that total would give rise to reimbursement. […] Consequently, the Court finds that the risk of serious economic difficulties, as contemplated in the case-law referred to in paragraphs 50 to 52 of this judgment, such as to justify placing a temporal limitation on the effects of this judgment, has not been established.*" In *Test Claimants in the FII Group Litigation* the Court took the position that "*it is sufficient to hold […] the United Kingdom Government has put forward an amount which includes the actions brought by the claimants in the main proceedings and which form the subject-matter of each of the questions referred for preliminary ruling, thereby proceeding on the, incorrect, assumption that the Court would answer each of the questions in the manner proposed by the claimants in the main proceedings. […] In those circumstances, it is not necessary to limit the temporal effects of this judgment.*"[45] This reasoning indicates that the Court might have considered limiting the temporal effects if the government had provided the Court with alternative calculations, taking into account that the Court may hold on some questions in the manner proposed by the claimants, and on others differently.

Making such calculations has become very difficult for another reason as well: At least in the area of the freedoms the Court has accepted more justifications than previously, which has

[42] Case C-228/05, *Stradasfalti Srl* [2006] ECR I-0000, Para. 76.
[43] Case C-313/05, *Brzezinski* [2007], ECR I-00513, Para 59.
[44] Case C-2/09, *Kalinchev* [2010], ECR I-04939, Para. 54 et seq.
[45] Case C-446/04, *Test Claimants in the FII Group Litigation* [2006] ECR I-0000, Para. 224.

forced it to examine proportionality more closely too[46]. Therefore, more and more often the CJEU neither merely declares a certain rule to comply with or to infringe Union law but develops criteria under which such a rule may be acceptable. A famous but in no way extreme example is *Marks & Spencer*[47]: "*Accordingly, the answer to the first question must be that, as Community law now stands, Articles 43 EC and 48 EC do not preclude provisions of a Member State which generally prevent a resident parent company from deducting from its taxable profits losses incurred in another Member State by a subsidiary established in that Member State although they allow it to deduct losses incurred by a resident subsidiary. However, it is contrary to Articles 43 EC and 48 EC to prevent the resident parent company from doing so where the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods and where there are no possibilities for those losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.*" More than seven years later it is still unclear what the Court really had in mind when requiring the deduction of final losses, and recently it has even been suggested that the CJEU should completely reconsider that line of case law[48]. At the time when the *Marks & Spencer* decision was rendered its content was considered a surprise by most observers and rarely did anybody predict the requirements which were developed by the Court in its judgment. Therefore, it is questionable to require from a government, which requests to limit the temporal effects of the judgment, not only to foresee what exactly the Court will decide but to come up with detailed calculations for this and any other scenario which the CJEU might otherwise develop. At least in theory there are uncountable possible scenarios.

If possible, the Court avoids referring to concrete figures. One exception is the judgment in *Akos Nadasdi*[49]: "*The Hungarian Government estimated the total amount of revenue from registration duty charged on those vehicles to be around 116 million euros. It acknowledged that not all of that amount would have to be reimbursed, but only the part corresponding to the excess duty charged on those vehicles in light of their depreciation. […] The amount to be reimbursed is not so high that the reimbursement, as such, is likely to have serious economic repercussions of such a kind to justify a limitation of the temporal effect of this judgment.*" In

[46] See in more detail Lang, (n 4) 236.
[47] Case C-446/03, *Marks & Spencer* [2005] ECR I-10837, Para. 59.
[48] See Case C-123/11, *A Oy*, 21 February 2013, Opinion of AG Kokott, Para 47 et seq.
[49] Case C-290/05, *Akos Nadasdi* [2006] ECR I-10115, Paras. 64 and 68.

Meilicke Advocate General *Stix-Hackl* emphasized that the sum of 5 billion *"relates to the potential scale of the financial risks if all of the taxpayers affected by the credit procedure were to lodge appeals"*[50]. In her Opinion in *Banca populare di Cremona* she accepted that the *"amount of tax which may be claimed back has been stated by the Italian Government to be some EUR 120 billion*", since "*the figure has not been contested"*[51].

The latter statement seems to indicate that the burden of proof could be shifted to other parties represented in the case. So, if a certain amount of revenue losses stated by a government has not been contested by any other party in a certain case, one could continue to work with the assumption that the economic repercussions are as severe as described by the government. However, this leads to the question who the other parties are and what their interests and capacities are. The other governments tend to be loyal to the governments whose revenue might be at stake, for the simple reason that there will be other cases where the roles are reversed and they will depend on the support of the other Member States. The Commission, as the watchdog of Union law, is in a neutral and objective position, but does not have any power to look into the tax files of the taxpayers who might have a claim to a reimbursement of their tax and thus cannot assess the estimate provided by the government. The taxpayer whose case was the reason for the preliminary ruling does not have any possibility to make this assessment either. For reasons of tax secrecy his government will not permit him to look into other taxpayers' files. Even more important, he does not have any motivation to contest such an estimate provided by a government: He is not all affected by a possible limitation of the temporal effects of a judgment, since the CJEU, if it is to their benefit, usually excludes from the limitation of the temporal effects of the judgment those taxpayers who had initiated the domestic court procedure that led to the judgment[52]. So in case the CJEU takes the estimate provided by the government for granted, unless contested, there is a structural problem, since no other party is either willing or able to come up with other serious calculations. Therefore, on the one hand, it makes sense to require the government to provide real evidence. On the other hand, for governments this is, for the reasons mentioned above, an almost impossible task.

[50] Case C-292/04, *Meilicke* [2007] ECR I-1872, Opinion of AG Stix-Hackl, Para 63.
[51] Case C-475/03, *Banca popolare di Cremona,* [2006] ECR I-9373, Opinion of AG Stix-Hackl, Para 156.
[52] Case C-163/90, *Legros and Others* [1992] ECR I-4625, Paras. 35 et seq.

3. Limitation of Temporal Effects: Applicable in all Member States?

3.1. The Relevant Judgment

The deliberations above have already shown that applying the criteria the CJEU has developed in order to decide on the limitation of the temporal effects of its judgments is not an easy task. The burden on governments to provide the necessary evidence is high. In *Meilicke* the Court made it clear that such a request can only be dealt with in the judgment in which the CJEU decides a legal question for the first time and if governments miss this opportunity the Court is prevented from granting such a limitation of the temporal effects of its case law in a later judgment[53]. Therefore, governments have to make a lot of effort to make this request the appropriate case. Moreover, in *Meilicke* the CJEU gave the impression that the temporal effects of a judgment cannot be limited for a single Member State alone but only for the whole European Union. If the Court maintains this position even those governments which are not immediately involved in a case, because the request for a preliminary ruling came from a court of another Member State, could be forced to ask for a limitation of the temporal effects of a judgment, in order not to miss the right point in time. Therefore, determining the case in which a certain interpretation of the relevant European law provision will be rendered for the first time might be crucial.

In *Meilicke* the Court explained that the relevant judgment had already been *Verkooijen*[54]: "*The interpretation sought by the present reference for a preliminary ruling concerns the tax treatment which a Member State must, within the framework of a national system designed to prevent or lessen double taxation, accord to dividends distributed by a company established in another Member State. In that regard, it is clear from Verkooijen that Community law precludes a legislative provision of a Member State, which makes the grant of exemption from income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State (paragraph 62).*" The Court added[55]: "*In addition, the principles adopted in Verkooijen, which thus clarified the requirements arising from the principle of free movement of capital in respect of dividends received by residents from non-resident companies, were confirmed by*

[53] See in more detail Lang (n. 4) 235 et seq.
[54] Case C-292/04, *Meilicke* [2007] ECR I-1872Para 38.
[55] Case C-292/04, *Meilicke* [2007] ECR I-1872Para 40.

the judgments in Case C-315/02 Lenz [2004] ECR I-7063 and in Manninen (see Test Claimants in the FII Group Litigation, paragraph 215)."

It is obvious that the legal questions referred to the CJEU usually differ from case to case. Even if the European law provision which is at stake is identical, the domestic legal framework of the case differs. Although the CJEU has no competence to interpret domestic law, it has to interpret Union law in the light of the case at hand and therefore indirectly in the light of the domestic provisions which cause the potential infringement. At least in respect of technical details such domestic provisions differ from Member State to Member State. Sometimes the details of a domestic provision are not very different but they are embedded in another legal context. Therefore, it is almost never the case that the CJEU has to decide on a legal question which is *completely* identical to the question it had to deal with in a previous case. Therefore, determining the "actual judgment ruling upon the interpretation sought" depends on the level of abstraction.

Meilicke and *Verkooijen* have in common that both cases had been on dividends paid by a foreign corporation to a domestic shareholder. In both cases the taxpayers were individuals and the cases therefore dealt with individual income taxation. This is also true for *Lenz* and *Manninen*. These cases had been decided by the Court after *Verkooijen* and the CJEU referred to them in *Meilicke* as well. From this one could conclude that *Verkooijen* was the relevant judgment for all cases of discriminatory treatment of dividends paid by entities resident in other EU Member States to domestic individual shareholders. Whenever any other such case is referred to the CJEU, the Court is prevented from limiting the temporal effects of its judgment.

However, the statements made by the CJEU in *Meilicke* could be understood as even going beyond this: The Court cited *Test Claimants in the FII Group Litigation* as well. That case dealt with domestic *corporations* to which foreign dividends were paid. Not *individual* income tax but *corporate* income tax was at stake. So one could go one step further and conclude that governments will never be granted any limitation of temporal effects of a judgment in cases of discriminatory treatment of dividends, irrespective whether in the area of individual or corporate income tax.

This leads to the question why *Verkooijen* should not be seen as the relevant judgment for other taxes as well. One could assume that it should not make a difference whether foreign shares are discriminated against in the area of individual or corporate income tax, on the one

hand, or for property or net wealth tax purposes, on the other hand. However, it must not be overlooked that the Court in *Meilicke* had not referred to *Baars* which had been decided already before *Verkooijen* and where the Court had to decide on the interpretation of the freedoms in light of the Netherlands wealth tax[56]. In *Baars* foreign shares were treated discriminatorily[57]. Since the CJEU did not mention its *Baars* judgment in *Meilicke* one can assume that the Court distinguishes between income taxes and other taxes[58].

There is another difference between *Verkooijen* and *Baars*: *Verkooijen* was on the interpretation of the free movement on capital, whereas in *Baars* the CJEU had to decide on the interpretation of the freedom of establishment. However, at least in intra-Union situations the standard applied by the CJEU to both freedoms is identical. It would therefore be surprising if the applicable freedom really matters. Since the Court accepted *Verkooijen* as the appropriate judgment where it should have been asked to decide on the limitation of the temporal effects of its judgment on the discriminatory treatment of foreign shares, it could have gone one step further and already considered *Baars* as its relevant judgment for these cases[59].

However, *Meilicke* and *Manninen* have in common that both cases deal with imputation systems[60]. Both in *Meilicke* and *Manninen* the Court has looked at tax systems of two different Member States in order to avoid discriminatory treatment in the residence state. In *Baars*, *Verkooijen* and *Lenz* the Court did not consider it relevant what the tax burden in the other Member State is. Therefore, many experts had expected that the CJEU would require in *Manninen* that foreign dividends have to be completely exempt, since this may be the factual effect in internal situations in Finland when a 19 % corporate income tax can be credited against a 19 % individual income tax. It came as a surprise to many observers that the Court finally held that the residence state may in such a situation continue to levy income taxes on foreign dividends and is merely obliged to grant a credit for the foreign tax[61]. Since in *Manninen* the Swedish corporate income tax was lower than the corporate income tax in Finland, there was a remaining individual income tax burden in Finland. In *Meilicke* this outcome had already been expected. Therefore, observers paid much more attention to the temporal effects of this judgment than to the substantive issue. From that perspective it would

[56] See already Lang (n 4)240.
[57] Case C-251/98, *Baars* [2000] ECR I-2787, Para.. 41.
[58] Lang (n 4) 240.
[59] Lang (n 4) 239.
[60] Lang (n 4) 240.
[61] J de Weerth, „Grenzüberschreitende Körperschaftsteueranrechnung nach „Manninen"!", (2004) 14 *Deutsches Steuerrecht* 1994.

have been much more convincing to consider *Manninen* to be the relevant judgment where the governments should have requested a limitation of the temporal effects[62].

This illustrates that it is extremely difficult for governments to guess which case is the appropriate one to request a limitation for the temporal effects. Only one judgment is the correct one, and they may learn later from the CJEU that they have already missed their opportunity. In *Meilicke* the Court took the view that *Verkooijen* would have been the appropriate case. The deliberations above demonstrate that the Court also had good reasons to consider *Baars* or *Manninen* the appropriate judgment. However, unlike *Meilicke* none of these cases was a German case. Therefore, governments have to observe all cases very carefully, and not only the ones stemming from their own countries, in order not to miss their opportunity.

3.2. Good Faith and Legal Uncertainty

Meilicke could also have the implication that the temporal effects of a judgment have to be the same throughout the European Union[63]. If the Court limits the temporal effects of a judgment, this can then only be done for all Member States. This might have further implications for the application of the criteria under which the Court is willing to accede to a government's request.

The CJEU requires the Member State that is asking for the limitation of the temporal effects to put forward arguments why the legal situation had to be considered uncertain. The criterion of uncertainty is an objective one and it does not seem to depend on the situation in one specific Member State. The CJEU held that such an uncertainty could arise if it "is the first time that the Court has been called on to interpret" the provision at stake[64]. The Court consistently rejects the assumption of uncertainty if there is already well-established case law

[62] Lang (n 4) 241.
[63] See in more detail Lang (n 4) 237.
[64] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 29; Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 109; Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 58.

on a certain provision of Union law[65]. It is also possible that if the case law of the Court itself gives the impression of being contradictory it creates uncertainty[66].

However, the above-cited CJEU decision in *Bosman* may serve as an example that the application of the legal-uncertainty test may be closely related to the legal situation in one Member State[67]: "*In the present case, the specific features of the rules laid down by the sporting associations for transfers of players between clubs of different Member States, together with the fact that the same or similar rules applied to transfers both between clubs belonging to the same national association and between clubs belonging to different national associations within the same Member State, may have caused uncertainty as to whether those rules were compatible with Community law.*" This can be explained by the fact that the CJEU gives guidance on the interpretation of Union law in the light of the facts of the case and therefore the domestic legal situation in one Member State may indirectly come into play. Therefore, the CJEU can limit the temporal effects of one of its judgments if the previous interpretation of the Union law provision at stake was not uncertain in general but only in the light of the domestic situation in one single Member State. This Member State is not necessarily the state from which the case stems but can be any other Member State. If the government of one state can convince the CJEU that in the light of its domestic law situation the interpretation of the relevant Union law provision was previously sufficiently uncertain, this might, if the other criteria are met as well, lead to the limitation of the temporal effects of that judgment throughout the whole Union.

In addition, the Court requires that the Commission has contributed to this uncertainty. Sometimes, but not always, inactivity of the Commission is sufficient[68]: "*The fact that, in spite of the warnings given, the Commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfill an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.*" Even the fact the Commission did not initiate proceedings against the Member State could, in the Court's view, establish good faith in the wrong interpretation of the Community law provision at stake. The Court occasionally holds that the Commission has contributed to the uncertainty by tolerating a certain domestic treatment which later had been held to infringe Union law by the Court and

[65] Case 61/79, *Denkavit Italiana* [1980] ECR 1205, Para. 21; Case C-57/93, *Vroege* [1994] ECR I-04541, Paras. 28-30; Joined Cases C-367/93 to C-377/93, *Roders and others* [1995] ECR I-02229, Para. 45; Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 146; Case C-104/98, *Johann Buchner* [2000] ECR I-3625, Para. 40.
[66] Case C-262/96, *Sürül* [1999] ECR I-2685, Para. 110.
[67] Case C-415/93, *Bosman* [1995] ECR I-04921, Para. 143.
[68] Case 43-75, Defrenne v Sabena [1976] ECR 455Para. 73.

thus give the impression that the applicable Union law provision could be understood differently than later decided by the Court. Again, this could mean that governments have to monitor the domestic legal situation throughout the Union if they want to convince the Court that there was uncertainty. The fact that the Commission tolerated a certain Maltese provision for some time could serve as an argument for the Finnish government to explain to the Court that the interpretation of the Union law provision was uncertain before the CJEU judgment, and the Finnish government could raise such argument in an Irish case in which it asks for the limitation of the temporal effects of the expected judgment in the Irish case.

More often, the Court requires that the Commission has taken at least some action which contributed to the uncertainty. The above-mentioned *Blaizot* case illustrates that good faith is often established by means of communication between the Commission and a specific Member State.[69] The Commission might contribute to uncertainty by communicating with a specific Member State in writing or even orally. It is extremely difficult for other Member States to find out about an exchange of letters or a discussion going on between one Member State and the Commission. If they are aware of the fact that the Commission has contributed to the uncertainty in respect of one Member State they can raise that argument. However, often they will find out only by mere coincidence, even if they try to closely monitor how the Commission is dealing with other Member States.

An extreme example already mentioned is *EKW*: In *EKW* the Court noted *"that the Commission's conduct may have caused the Austrian Government reasonably to believe that the legislation governing the duty on alcoholic beverages was in conformity with Community law."* [70] For Advocate General *Saggio* there was not sufficient evidence to assume that the Commission had misled the Austrian government[71]: *"The assertion that representatives of the Commission, in the course of negotiations for the accession of the Republic of Austria to the Community, stated to or gave it to be understood by the Austrian authorities that the duty at issue was lawful has not been confirmed by the Commission and it finds no echo in the documents before the Court."* However, for the CJEU it was sufficient that *"the Austrian Government contended, without being challenged on this point, that Commission representatives had assured it, during the negotiations prior to the accession of the Republic of Austria to the European Union, that the beverage duty was compatible with Community*

[69] Case 24/86, *Blaizot v Université de Liège* [1988] ECR 379, Para. 32 et seq.
[70] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 58.
[71] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Opinion of AG Saggio, Para 64.

law."[72] For other Member States it would have been impossible to find out about this very informal communication which took place between the Commission and the Austrian government even before Austria joined the Union. However, if another Member State knew about it, and if the Austrian government itself had not successfully made this point, this information could have supported the claim to limit the temporal limitation of *EKW*.

3.3. Serious Economic Repercussions

The second relevant criterion for a limitation of the temporal effects of a judgment is that otherwise there would be "serious economic repercussions". In tax cases one of the most relevant questions in this respect is the budgetary implications. It has already been noted how difficult it is to measure these and that it is almost impossible for the governments to come up with appropriate evidence.

However, the budgetary impact of similar rules in different Member States may be very different. If we take the tax rules on foreign dividends as examples, as they had been part of the domestic tax systems in *Verkooijen*, *Lenz*, *Manninen* and *Test Claimants in the FII Group Litigation*, we easily realize that the budgetary implications of such judgments depend on the amount of the foreign investment, the domestic individual income tax rate, the budgetary relevance of income taxation compared to indirect taxes, and many other factors. Procedural rules could be extremely relevant since they may determine how many cases are still open and have to be decided in the light of a new judgment, if the Court does not limit its temporal effects. Countries whose tax system is built on just a few pillars might more severely suffer from an unexpected loss in revenues in respect of a certain tax than other countries.

EKW illustrates that it might matter at which governmental level a tax is levied: The Austrian beverage tax which was at stake in that Austrian case was levied on a municipal level. This is why the Court stated in *EKW* that not limiting the temporal effects of the judgment "*would retroactively cast into confusion the system whereby Austrian municipalities are financed.*" For Austrian municipalities *EKW* would have otherwise had severe economic repercussions. However, if the same beverage tax had been levied on the central level, the economic repercussions for Austria in general would have been much less severe. Most likely the Court would not have considered limiting the temporal effects then. If the temporal effects of a

[72] Case C-437/97, *EKW and Wein & Co* [2000] ECR I-1157, Para. 56.

judgment have to be the same throughout the whole Union, the limitation of these effects might depend whether a certain tax is levied in a single Member state on a local level. Municipalities and provinces usually levy fewer different types of taxes. If these local governments have to pay back revenues in respect of one of these taxes the economic repercussions are often much more severe compared to a tax levied by the central government. If another Member State had a similar Union law problem as Austria had with its beverage taxes and if that Member State had already asked for a limitation of the temporal effects of the judgment, it would have benefitted from the fact that the Austrian beverage tax is levied at a local level. One might question whether such a result is satisfactory.

Let us assume that for whatever reason the Austrian government would not have requested a limitation of the temporal effects of *EKW* and that such a limitation would have been in the interest of other Member States: For other Member States it would not have been possible to provide any evidence how severe the economic repercussions would have been for the Austrian municipalities. They would not have any access to the relevant information including taxpayers' files in order to come up with any serious calculations. So if the Austrian central government, i.e. for reasons of internal politics, had not supported the Austrian municipalities and had just watched which repercussions they would suffer in order to increase their dependency on the central government, the governments of all the other EU Member States with similar beverage tax provisions would not have the slightest chance to get a limitation of the temporal effects of such a judgment.

The severity of the economic repercussions might also depend on the number of legal relationships concerned. This has already been illustrated in *Defrenne,* which is the leading case in this area[73]: "*In view of the large number of people concerned by such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy*." Although in the tax area the possible loss of revenue will be more relevant, administrative difficulties due to the large number of taxpayers could come into play as well. Again, the limitation of the temporal effects might then depend on the legal situation in a single Member State: If a beverage tax like the one at stake in *EKW* has to be paid back to each single consumer, this could also be taken in consideration. So if all but one Member State collects such a tax only from the producer of beverages, whereas one State applies a system where a large number of taxpayers

[73] Case 43-75, Defrenne v Sabena [1976] ECR 455, Para. 70.

are concerned, the other Member States could benefit from the economic repercussions raised by that system, if they ask for a limitation of the temporal effects of the CJEU judgment.

4. Conclusions

The general approach of the CJEU in respect of the temporal effects of its judgments is understandable from a policy point of view: The Court wants to make sure that its judgments have retroactive effect as a matter of principle. Otherwise, Member States would not take the Court seriously, in particular not in tax cases. They will only observe Union law requirements if they have to fear that they might otherwise suffer severe economic consequences and that they might be forced to pay back a considerable amount of their tax revenues. However, at the same time it is understandable that the CJEU wants to leave the door open in order to limit these effects, if necessary. A retroactive application of its case law could in exceptional cases lead to an undesirable financial disaster for one or more Member States. The CJEU sees a need for an "emergency brake". However, it is questionable whether the criteria developed by the Court in order to maintain this possibility really fit. Since the Court regards a limitation of the temporal effects of its judgment to be a rare exceptional situation, the standards to meet the criteria for such a limitation are extremely high. It is almost impossible for governments to meet them. Governments could consider it almost cynical if they are asked to provide evidence which often is almost impossible to provide. *Meilicke* has further complicated the rules of the game for the Member States: They have to request this limitation in the appropriate case. Appropriateness depends on the level of abstraction and it is impossible for the governments to foresee which case the CJEU will retrospectively consider to be the relevant one. In order not to miss any opportunity they have to come up with self-accusation as early as possible: A government will only be successful with its request for a limitation of the temporal effects in a case stemming from another Member State if it can convince the Court that its own tax system infringes Union law and that a judgment will lead to serious economic repercussions for its country. It goes without saying that the position of such a government will be rather weak when they have to defend the same tax rule in a later case and argue that the relevant Union law provision is not applicable to it. If the CJEU in *Meilicke* has really developed its case law further in the direction that temporal effects of judgment can be limited only for all or for no Member State, requesting a limitation of these effects becomes even more challenging for governments and the consequences arbitrary. The legal situation in

a single Member State might be decisive as to whether the CJEU may grant the limitation of temporal effects to all the others. For all these reasons the Court would be well advised, on the one hand, to maintain its case law according to which only in exceptional cases judgments do not have retroactive effect and, on the other hand, to develop more transparent and operational criteria under which it is willing to distinguish between the rule and the exception.