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Tax Treaties and Procedural Law

18

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Tax Treaties and Procedural Law

Why this book?
The application of tax treaties relies, to a large extent, on procedural law. While procedural provisions in tax treaties exist, the implementation of tax treaty law generally lies within the procedural autonomy of the contracting states. Domestic procedural law, therefore, is imperative for the implementation of tax treaty benefits.

This book analyses several crucial areas concerning the procedural aspects of tax treaty law. The topics covered include:

- domestic procedural law and EU law;
- domestic procedural law and tax treaty law;
- domestic procedural law and non-discrimination;
- the implementation of the methods to avoid double taxation in domestic law;
- the implementation of mutual agreements in domestic law;
- the implementation of arbitration awards in domestic law;
- mutual assistance procedures and domestic law;
- the role of the competent authorities under the new tiebreaker rule (article 4(3) of the OECD Model Tax Convention);
- the "mode of application" for withholding tax limitations (articles 10(2) and 11(2) of the OECD Model Tax Convention);
- procedural aspects of the grace clause for potentially abusive triangular structures (article 29(8)(c) of the OECD Model Tax Convention); and
- procedural aspects of the principal purpose test (article 29(9) of the OECD Model Tax Convention).

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Preface

Whereas tax treaties consist mainly of substantive provisions, the implementation of tax treaty benefits is generally a matter of domestic procedural law. Lacking or very restrictive procedural provisions in domestic law can result in the ineffective application of tax treaties. Domestic procedural law, therefore, has a decisive impact on the avoidance of double taxation. At the same time, an increasing number of treaty provisions contain specific rules of procedural law. The interaction of these rules with domestic law raises various questions regarding their interpretation and application.

In order to analyse important issues concerning procedural law in the area of tax treaties, the 26th Viennese Symposium on International Tax Law was held on 17 June 2019 at the WU (Vienna University of Economics and Business). Renowned professors and tax researchers from the WU participated in the Symposium. The speakers offered their findings in the presence of a broad audience consisting of tax law scholars and practitioners, as well as domestic and international policymakers. They have since completed papers using input received during the Symposium, and these papers have become the chapters of this book. Each author offers an in-depth analysis, along with the most recent scientific research on their topic.

The editors would like to thank Renée Pestuka and Florian Fiala, who were the main persons responsible for the organization of the Symposium and made essential contributions to the preparation and publication of this book. The editors would also like to thank all of the authors who have patiently revised their contributions in order to enhance the quality of the book.

Above all, sincere thanks to the publishing house, IBFD, for agreeing to include this publication in its catalogue.

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Michael Lang
Pasquale Pistone
Alexander Rust
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Claus Staringer
Vienna, July 2020

Chapter 1

Domestic Procedural Law and EU Law

Christina Pollak*

1.1. The principle of procedural autonomy and its limitations

The law of the European Union has come to have an influence in most areas of national law of the Member States throughout its development in recent years, and taxation is no exception. Whereas indirect taxation has been widely harmonized within the European Union due to the VAT Directive,[1] direct taxation is lacking such broad harmonization and can be found in only certain specific areas.[2] Both sets of harmonization – and this statement concerns not only tax law, but EU law in general – have in common that they mainly cover material law.[3] Within the material set of rules, certain rights are granted to individuals. It is the obligation of the Member States to ensure the fulfilment of these EU rights, although EU law often does not provide the Member States with procedural provisions. Where there are no procedural provisions provided by EU law, it is within the responsibility of the Member States to ascertain that the protection of the rights granted to individuals is safeguarded. The Court of Justice of the European Union

* The author would like to thank Prof. Lang and Prof. Rust for their valuable input and feedback on this chapter.

1. Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L 347 (2006), Primary Sources IBFD.

2. *See*, e.g. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments made between Associated Companies of Different Member States, OJ L 157 (2003); Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States, OJ L 310 (2009); Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 345 (2011), Primary Sources IBFD; and Council Directive (EU) 2016/1164 of 12 July 2016 laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193 (2016), Primary Sources IBFD.

3. One exception to this is customs law. Since customs law has been fully harmonized with the Unions Customs Code, there has also been some harmonization in procedural law. *See* Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269 (2013), Primary Sources IBFD.

(ECJ) already introduced this principle of procedural autonomy in the early cases of *Comet*[4] and *Rewe Zentralfinanz*.[5] The ECJ held that the legal basis for the principle of procedural autonomy is today's article 4(3) of the Treaty on European Union (TEU), then article 5 of the Treaty Establishing the European Economic Community,[6] i.e. the principle of sincere cooperation.[7]

As it is within national procedural autonomy to create procedural rules asserting claims based on EU law, Member States could implement very restrictive procedural rules governing EU law. Substantive law could become ineffective due to the procedural law of the Member States. Therefore, procedural autonomy is constrained by the principle of equivalence and the principle of effectiveness. Although in the early decisions of *Comet* and *Rewe Zentralfinanz*, the ECJ already described the content of the principles of equivalence and effectiveness,[8] the first decision in which it specifically named them as such was *Palmisani*.[9] Since then, the principles have been well-established ECJ case law[10] and are defined as follows:

4. NL: ECJ, 16 Dec. 1976, Case C-45/76, *Comet BV v. Produktschap voor Siergewassen*, para. 11 et seq.
5. DE: ECJ, 16 Dec. 1976, Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, para. 5.
6. Treaty Establishing the European Economic Community (25 Mar. 1957), Treaties & Models IBFD.
7. *Rewe-Zentralfinanz* (C-33/76), at para. 5.
8. *Comet* (C-45/76), at paras. 11 and 16; and *Rewe-Zentralfinanz* (C-33/76), at para. 5.
9. IT: ECJ, 10 July 1997, Case C-261/95, *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)*, para. 27.
10. *See*, e.g. *Palmisani* (C-261/95), at para. 27; IT: ECJ, 15 Sept. 1998, Case C-231/96, *Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze*, para. 34; IT: ECJ, 17 Nov. 1998, Case C-228/96, *Aprile Srl, in liquidation, v. Amministrazione delle Finanze dello Stato*, para. 18; UK: ECJ, 1 Dec. 1998, Case C-326/96, *B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd*, para. 18; IT: ECJ, 9 Feb. 1999, Case C-343/96, *Dilexport Srl v. Amministrazione delle Finanze dello Stato*, para. 25; UK: ECJ, 8 Mar. 2001, Case C-397/98, *Metallgesellschaft Ltd and Others (C-397/98), Hoechst AG and Hoechst (UK) Ltd (C-410/98) v. Commissioners of Inland Revenue and HM Attorney General*, para. 85; FR: ECJ, 21 Nov. 2002, Case C-473/00, *Cofidis SA v. Jean-Louis Fredout*, para. 28; AT: ECJ, 2 Oct. 2003, Case C-147/01, *Weber's Wine World Handels-GmbH and Others v. Abgabenberufungskommission Wien*, para. 38; AT: ECJ, 16 Mar. 2006, Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, para. 22; NL: ECJ, 7 June 2007, Joined Cases C-222/05 to C-225/05, *J. van der Weerd and Others (C-222/05), H. de Rooy sr. and H. de Rooy jr. (C-223/05), Maatschap H. en J. van 't Oever and Others (C-224/05) and B. J. van Middendorp (C-225/05) v. Minister van Landbouw, Natuur en Voedselkwaliteit*, para. 28; DE: ECJ, 12 Feb. 2008, Case C-2/06, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, para. 60; DE: ECJ, 24 Mar. 2009, Case C-445/06, *Danske Slagterier v. Bundesrepublik Deutschland*, para. 31; ES: ECJ, 26 Jan. 2010, Case C-118/08, *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, para. 31; BE: ECJ, 8 Sept. 2011, Joined Cases C-89/10 and C-96/10, *Q-Beef NV (C-89/10) v. Belgische Staat and Frans Bosschaert (C-96/10) v. Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV*, para. 34; UK: ECJ, 19 July 2012, Case C-591/10,

> This diversity between national systems derives mainly from the lack of Community rules […], it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[11]

The development of the principles of equivalence and effectiveness by the ECJ can be classified as a measure supplementing the primacy of EU law and, accordingly, ensuring the efficiency and consistency of EU law.[12]

Ultimately, the ECJ bases its case law on the following rationale: if Member States abuse their procedural autonomy by introducing procedural provisions so restrictive that the substantive legal claims arising from EU law are torpedoed, inevitably, the limit of the principles of equivalence and effectiveness is reached. Therefore, abuse can be prevented by restricting the Member States to impose the same procedural requirements that they impose on other national cases. Then, however, the Member States would still have the power to torpedo EU claims by introducing restrictive procedural rules for all claims. Even if Member States were to treat EU claims as "poorly" as purely national claims in procedural terms, they may do so only to the extent that access to EU law still remains effective.

A further expression of the procedural autonomy of the Member States is that they may decide the preconditions of reopening proceedings in their national laws. In general, a res judicata matter cannot be reopened. The effect of a judgment becoming final is that the possibility of any party,

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Littlewoods Retail Ltd and Others v. Her Majesty's Commissioners of Revenue and Customs, para. 27; UK: ECJ, 12 Dec. 2013, Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue and Commissioners for Her Majesty's Revenue and Customs*, para. 32; RO: ECJ, 6 Oct. 2015, Case C-69/14, *Dragoş Constantin Târşia v. Statul român and Serviciul Public Comunitar Regim Permise de Conducere si Inmatriculare a Autovehiculelor*, para. 27; and RO: ECJ, 30 June 2016, Case C-200/14, *Silvia Georgiana Câmpean v. Serviciul Fiscal Municipal Mediaş, anciennement Administraţia Finanţelor Publice a Municipiului Mediaş and Administraţia Fondului pentru Mediu*, para. 39.

11. *Edis* (C-231/96), at para. 34. For further information on the principles of equivalence and effectiveness, *see* sec. 1.2.

12. A. Hatje, *Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung* p. 55 et seq. (Nomos 1998); and V. Madner, *Effektivitätsgebot und Abgabenverfahrensrecht*, in *Abgabenverfahrensrecht und Gemeinschaftsrecht* p. 119 (M. Holoubek & M. Lang eds., Linde 2006).

including the court itself, to continue the litigation of a case once the case has been closed is excluded. The principle of res judicata leads to legal peace, although it bears the risk that wrongful legal interpretations will become final. This principle is one expression of the principle of legal certainty, which is one of the general principles of EU law. Also in light of this basic principle, the ECJ has had to find a balance between legal certainty and the legality of EU law. After all, the measuring stick in challenging a final decision also consists of the principles of equivalence and effectiveness.

This chapter investigates the extent of procedural autonomy and the circumstances in which the ECJ has decided that the principles of equivalence and effectiveness limit this autonomy of the Member States. It will examine the origin of the principles, their interplay and the limits of their applicability.

1.2. The principles developed by the ECJ

1.2.1. The principle of equivalence

1.2.1.1. Content and development

The principle of equivalence serves as an initial filter for the ECJ to determine whether the national courts have correctly applied their national procedural law to protect rights granted under EU law. Under the principle of equivalence, a situation and its consequences derived from EU law cannot be less favourable than a situation and its consequences based on national law.[13] Already in its early case law, the ECJ held that the principle of equivalence is an expression of the principle of equal treatment.[14] In literature, it has been discussed whether the principle of equivalence is an expression of equal treatment or of non-discrimination, with the outcome that it is an

13. *See*, e.g. *Palmisani* (C-261/95), at para. 27; *Edis* (C-231/96), at para. 34; *Aprile* (C-228/96), at para. 18; *Levez* (C-326/96), at para. 18; *Dilexport* (C-343/96), at para. 25; *Metallgesellschaft* (C-397/98), at para. 85; *Cofidis* (C-473/00), at para. 28; *Weber's Wine World* (C-147/01), at para. 38; *Kapferer* (C-234/04), at para. 22; *van der Weerd and Others* (C-222/05 to C-225/05), at para. 28; *Kempter* (C-2/06), at para. 60; *Danske Slagterier* (C-445/06), at para. 31; *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 31; *Q-Beef and Bosschaert* (C-89/10 and C-96/10), at para. 34; *Littlewoods Retail and Others* (C-591/10), at para. 27; *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12), at para. 32; *Târşia* (C-69/14), at para. 27; and *Câmpean* (C-200/14), at para. 39.
14. IT: ECJ, 19 June 2003, Case C-34/02, *Sante Pasquini v. Istituto nazionale della previdenza sociale (INPS)*, para. 70.

expression of the non-discrimination principle.[15] The consequence of this result is the prohibition of procedurally treating claims based on EU law worse than compared to claims based on national law, but not the reverse.[16] As the principle of equivalence is an expression of equal treatment, laws being tested against the principle of equivalence should be subject to the equality test.

1.2.1.2. The comparability requirement

The first requirement under this test is the determination of two comparable situations. These two comparable situations are subsumed under different national procedural laws and, accordingly, are treated differently. For national procedural law to interfere with the principle of equivalence, the procedural rule applicable to the claim based on EU law must be less favourable than the procedural rule applicable to the national claim. Therefore, when testing the national rule against the procedural rule governing EU law, the comparability of the two systems must be determined.[17]

The decision as to which rules are comparable is left for the national court.[18] This competence of the national courts emerges due to the fact that the ECJ is only allowed to interpret EU law. The decision that procedural rules are applicable for the enforcement of EU rights, however, is based on national procedural law. Although the ECJ cannot interpret the applicable national procedural law, it still provides some guidance for the national courts: when choosing the two comparable procedural rules, their purpose and essential characteristics must be taken into consideration.[19] Accordingly, the two procedural rules must have the same purpose, and their scopes must be comparable, as well.[20] Furthermore, the procedural rules must be interpreted within a general context, which means that the comparison of the two rules undertaken must be an objective comparison, not a subjective one with reference to the specific case.[21] Moreover, the national law of one Member State

15. T. Ehrke-Rabel, *Äquivalenzgebot und Abgabenverfahrensrecht*, in *Abgabenverfahrensrecht und Gemeinschaftsrecht* p. 135 et seq. (M. Holoubek & M. Lang eds., Linde 2006).
16. Id., at p. 136.
17. *Palmisani* (C-261/95), at para. 38.
18. *Palmisani* (C-261/95), at para. 38; and *Levez* (C-326/96), at paras. 38 and 42 et seq.
19. *Palmisani* (C-261/95), at para. 38; UK: ECJ, 16 May 2000, Case C-78/98, *Shirley Preston and Others v. Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v. Midland Bank plc*, para. 56; *Levez* (C-326/96), at para. 43; and *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 35.
20. *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 36 et seq.
21. *Preston and Others* (C-78/98), at para. 62.

is the basis for the comparability analysis (it is not necessary that within the different Member States, similar procedural laws are in force), and the comparability concerns only the equal treatment of EU rights compared to national rights.[22] It follows that comparable situations should be subsumed under comparable procedural rules, or at least that EU rights should not be subsumed under less favourable procedural rules, whereas different treatment can also be followed in non-comparable situations.[23]

1.2.1.3. Less favourable treatment of EU claims

If the national court has established that two claims are comparable, in a second step, the analysis should be made as to whether the treatment of the EU claim is less favourable compared to the comparable national claim. Less favourable treatment, however, does not imply the extension of the most favourable rules governed by national law to all actions of EU law;[24] it only provides for the safeguard that claims that are based on EU law and similar to a national claim cannot be treated worse than national claims.

To decide whether a procedural provision governing EU law is less favourable than a provision governing national law, the national court must evaluate "the role of the provision in the procedure, viewed as a whole, of the conduct of that procedure and of its special features".[25] In this sense, the ECJ has held that the fact that EU claims are decided by a different national court than national claims may not be regarded as unfavourable if these courts are – although less numerous – hierarchically superior to the courts deciding national claims.[26] After all, the specialized national courts may even ultimately be more favourable for the claimant, as their designation will lead to homogeneous jurisprudence from a national court specialized in matters relating to the specific EU claims in question.[27] Furthermore, the ECJ ruled that the possible incurrence of higher costs for the claimant is also not considered less favourable treatment.[28]

22. *Aprile* (C-228/96), at para. 17; and *Dilexport* (C-343/96), at para. 24.
23. *See*, e.g. IT: ECJ, 2 May 2018, Case C-574/15, *Criminal proceedings against Mauro Scialdone*, para. 59.
24. *Edis* (C-231/96), at para. 36; IT: ECJ, 15 Sept. 1998, Case C-260/96, *Ministero delle Finanze v. Spac SpA*, para. 20; *Levez* (C-326/96), at para. 42; *Dilexport* (C-343/96), at para. 27; and *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 34.
25. ES: ECJ, 8 Sept. 2011, Case C-177/10, *Francisco Javier Rosado Santana v. Consejería de Justicia y Administración Pública de la Junta de Andalucía*, para. 90.
26. HU: ECJ, 12 Feb. 2015, Case C-567/13, *Nóra Baczó and János István Vizsnyiczai v. Raiffeisen Bank Zrt*, para. 46.
27. *Baczó and Vizsnyiczai* (C-567/13), at para. 46.
28. *Baczó and Vizsnyiczai* (C-567/13), at para. 47.

In this sense, the question arises as to which treatment is considered to be less favourable and, accordingly, contrary to the principle of equivalence. There has been only one case in which the ECJ itself decided that the principle of equivalence was infringed. The case revolved around two state liability rules under Spanish law: when the state liability is caused by an infringement of EU law, the remedies against the administrative measure must be exhausted in order to claim state liability, whereas when the state liability is due to a breach of the national Constitution, this precondition did not have to be fulfilled.[29] The ECJ held, in this case, that the national procedural rules are regarded as being similar.[30] Therefore, the ECJ concluded that the principle of equivalence precludes the application of this national procedural rule.[31]

What is remarkable about this judgment is that it is the only one in which the ECJ held that the principle of equivalence was infringed, and the final decision was not left to the national court to decide. Moreover, the ECJ did not discuss whether the treatment of the procedural law governing EU law was unfavourable; the ECJ took this precondition as a given, without seeing any need to further evaluate it. The ECJ also did not discuss possible reasons of justification that – in theory – could also be tested when applying the principle of equivalence.

1.2.1.4. Possible justifications and the proportionality test

Whereas the first two described conditions are expressly mentioned by the ECJ when testing the principle of equivalence against a national procedural rule, possible justification grounds are not directly tested by the ECJ. However, as the principle of equivalence is one expression of the non-discrimination principle, possible justifications and the following proportionality test could be tested against the principle of equivalence.

Also in its rulings, the ECJ has hinted that a limitation to the principle of equivalence could be justified. When the ECJ tested the procedural rule in question against the principle of equivalence in *Levez*,[32] it referred, mutatis

29. *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 28.
30. *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 45.
31. *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 46.
32. *Levez* (C-326/96).

mutandis, to the *Van Schijndel*[33] case.[34] In *Van Schijndel*, the ECJ held that, when applying the principle of effectiveness, the national procedural law principles may justify an ineffective application of EU law.[35] Applying this argument with the reference in *Levez* to the *Van Schijndel* case, one could conclude that also for the principle of equivalence might a possible justification be that of national procedural principles.

In a last step, when a justification is determined, this justification also needs to withstand the proportionality test. Under this test, the justification needs to be weighed against a breach of the principle of equivalence. For this, the justification must be suitable and necessary. Only if these preconditions are met and the national court concludes that the importance of the national procedural principle outweighs the severity of the restriction of the principle of equivalence may the national court conclude that the less favourable treatment of EU law claims compared to national law claims is justified. Accordingly, there would not be any breach of the principle of equivalence, although EU claims would be treated worse than comparable national law claims.

1.2.2. The principle of effectiveness

1.2.2.1. Content and development

The principle of effectiveness is the second principle developed by the ECJ that serves as a limitation to the principle of procedural autonomy. Under the principle of effectiveness, national procedural rules do not render the exercise of rights conferred by EU law virtually impossible or excessively difficult.[36]

33. NL: ECJ, 14 Dec. 1995, Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, para. 19.
34. *Levez* (C-326/96), at para. 44.
35. *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten* (C-430/93 and C-431/93), para. 21. For a more detailed description of this case, *see* sec. 1.2.2.3.
36. *See*, e.g. *Palmisani* (C-261/95), at para. 27; *Edis* (C-231/96), at para. 34; *Aprile* (C-228/96), at para. 18; *Levez* (C-326/96), at para. 18; *Dilexport* (C-343/96), at para. 25; *Metallgesellschaft* (C-397/98), at para. 85; *Cofidis* (C-473/00), at para. 28; *Weber's Wine World* (C-147/01), at para. 38; *Kapferer* (C-234/04), at para. 22; *van der Weerd and Others* (C-222/05 to C-225/05), at para. 28; *Kempter* (C-2/06), at para. 60; *Danske Slagterier* (C-445/06), at para. 31; *Transportes Urbanos y Servicios Generales* (C-118/08), at para. 31; *Q-Beef and Bosschaert* (C-89/10 & C-96/10), at para. 34; *Littlewoods Retail and Others* (C-591/10), at para. 27; *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12), at para. 32; *Târşia* (C-69/14), at para. 27; and *Câmpean* (C-200/14), at para. 39.

Also concerning the principle of effectiveness, the ECJ has held that the role of the provision in question, its progress and its special features must be taken into consideration when applying the principle of effectiveness.[37] Similarly to the principle of equivalence, when the ECJ is testing a national procedural rule against the principle of effectiveness, the national procedural rules must be viewed as a whole.[38] However, national procedural law principles, such as the protection of the right to defence, the principle of legal certainty and the proper conduct of procedure, must not be disregarded.[39] There are several lines of jurisdiction in which the ECJ has had to decide the impact of the principle of effectiveness on national legislation.

1.2.2.2. The challenge of national time limits

One jurisdiction line of the ECJ in which the effect of the principle of effectiveness becomes very clear is the challenge of national time limits. Over the past 40 years, the ECJ has had to rule on many cases in which national time limits were questioned. In general, the ECJ has held that, due to the principle of legal certainty, the application of national time limits is not precluded.[40] For limitation periods to comply with the principle of legal certainty, they must be set in advance – otherwise, the national time limits might result in a breach of the principle of effectiveness.[41] Time limits are one way of protecting taxpayer rights, as well as the rights of the tax authorities. On the one hand, the ECJ has held that the principle of effectiveness is not infringed if a national limitation period in force for individuals is less beneficial compared to the national limitation period in force for the tax authorities.[42] On the other hand, the principle of effectiveness is infringed if the taxpayer overpaid a tax or other charge and can neither receive reimbursement for this overpayment within the national time limits set nor bring proceedings

37. BE: ECJ, 14 Dec. 1995, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, para. 14; and *Cofidis* (C-473/00), at para. 37.
38. *Peterbroeck, Van Campenhout & Cie v. Belgian State* (C-312/93), at para. 14; and *Cofidis* (C-473/00), at para. 37.
39. *Peterbroeck, Van Campenhout & Cie v. Belgian State* (C-312/93), at para. 14; and *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten* (C-430/93 and C-431/93), at para. 19.
40. *Rewe-Zentralfinanz* (C-33/76), at para. 5; *Edis* (C-231/96), at para. 35.
41. NL: ECJ, 15 July 1970, Case C-41/69, *ACF Chemiefarma NV v. Commission of the European Communities*, para. 19; UK: ECJ, 11 July 2002, Case C-62/00, *Marks & Spencer plc v. Commissioners of Customs & Excise*, para. 39; *Danske Slagterier* (C-445/06), at para. 33; IT: ECJ, 16 July 2009, Case C-69/08, *Raffaello Visciano v. Istituto nazionale della previdenza sociale (INPS)*, para. 49.
42. IT: ECJ, 8 May 2008, Joined Cases C-95/07 and C-96/07, *Ecotrade SpA v. Agenzia delle Entrate - Ufficio di Genova 3*, para. 54; and *Q-Beef and Bosschaert* (C-89/10 and C-96/10), at para. 42.

against the state.[43] In general, national time limits are applicable as long as they do not render the application of rights virtually impossible or excessively difficult and, therefore, comply with the principle of effectiveness.[44]

The early social security case of *Emmott*[45] set a very broad interpretation of the principle of effectiveness in connection with time limits. The ECJ held, in this case, that Member States may not rely on national time limits if a directive has been wrongly implemented or not been implemented at all.[46] In later cases, the ECJ limited this scope of *Emmott*. The ECJ held that national limitation periods are applicable even if a Member State has not properly transposed the directive on which the claim is based.[47] The ECJ has emphasized that the difference in the latter cases compared to *Emmott* was that the proceedings were not barred, but there was a limited period for asserting a legal claim.[48] It was repeatedly accentuated that the solution in *Emmott* was justified by the particularity of the circumstances, as the plaintiff in *Emmott* was deprived of any opportunity to rely on the rights granted by the directive.[49] In *Fantask*[50] and the judgments after it, the ECJ concluded that a 5-year limitation period must be accepted under EU law, even if the Member State has not transposed the directive in question properly into its national law.[51] Therefore, the broad interpretation of *Emmott* was overruled.

As it is within a Member State's national procedural autonomy to introduce time limits, a related question concerns which lengths of time limits have been accepted by the ECJ. The ECJ has not stated in its judgments that a certain amount of time as a limitation period or period for appeal is ineffective. The limitation provided by the ECJ is that the rights of the individuals conferred under EU law must be safeguarded.[52] In most of the decided cases in which the ECJ has held that the time limits do not comply with

43. *Q-Beef and Bosschaert* (C-89/10 and C-96/10), at para. 43.
44. *Edis* (C-231/96), at para. 35.
45. IE: ECJ, 25 July 1991, Case C-208/90, *Theresa Emmott v. Minister for Social Welfare and Attorney General*.
46. *Emmott* (C-208/90), at para. 23.
47. NL: ECJ, 27 Oct. 1993, Case C-338/91, *H. Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, para. 21 et seq.; and UK: ECJ, 6 Dec. 1994, Case C-410/92, *Elsie Rita Johnson v. Chief Adjudication Officer*, para. 36.
48. *Johnson v. Chief Adjudication Officer* (C-410/92), at para. 30.
49. *Johnson v. Chief Adjudication Officer* (C-410/92), at para. 26; DK: ECJ, 2 Dec. 1997, Case C-188/95, *Fantask A/S e.a. v. Industriministeriet (Erhvervministeriet)*, para. 51; *Edis* (C-231/96), at para. 46; and *Ministero delle Finanze v. Spac* (C-260/96), at para. 29.
50. *Fantask and Others v. Industriministeriet* (C-188/95).
51. *Fantask and Others v. Industriministeriet* (C-188/95), at paras. 40 and 52; and *Edis* (C-231/96), at para. 30.
52. *Marks & Spencer* (C-62/00), at para. 42.

the principle of effectiveness, it was due to the specific circumstances of the case. The length of the time limit itself was not the focus of the ECJ's objection, which can be seen from a case in which even a time limit of 15 days was considered particularly short, but was not rejected by the ECJ due to its length.[53]

In cases in which the ECJ has held that a certain time limit contradicts the principle of effectiveness, the persons contesting the decisions were especially vulnerable persons. One example of this would be a pregnant woman who, under Luxembourg law, had only 15 days to apply for an action for nullity and reinstatement of her dismissal.[54] Another illustration is seen in a case in which a woman was discriminated against based on her sex concerning the wage paid to her but could not bring the action in due time under national law, as the employer did not provide her with all the necessary information.[55] A further example is seen in a case in which a 15-day period was granted to refugees to file an application for subsidiary protection, since their application for asylum was rejected.[56] The ECJ explicitly held, in this case, that, due to the "difficult human and material situation"[57] of the refugee, the principle of effectiveness precluded a limitation period of 15 days.[58] Also in the other described cases, the ECJ ruled that, due to the special circumstances of the cases and the persons concerned, the time limits did not comply with the principle of effectiveness.[59]

When comparing cases on the principle of effectiveness concerning national time limits, the line between acceptable time limits and non-acceptable time limits is difficult to draw. This is the reason why the rulings might seem contradictory concerning the allowance of time limits.[60] However, based on an analysis of ECJ case law, one can derive that, especially when vulnerable persons are involved, the ECJ has a tendency to apply the restriction of the

53. LU: ECJ, 29 Oct. 2009, Case C-63/08, *Virginie Pontin v. T-Comalux SA*, para. 62.
54. *Pontin* (C-63/08), at para. 62.
55. *Levez* (C-326/96), at para. 31.
56. IR: ECJ, 20 Oct. 2016, Case C-429/15, *Evelyn Danqua v. Minister for Justice and Equality and Others*, para. 10.
57. *Danqua* (C-429/15), at para. 46.
58. *Danqua* (C-429/15), at para. 49.
59. *See Levez* (C-326/96), at para. 32; and *Danqua* (C-429/15), at para. 49; whereas in *Pontin* (C-63/08), at para. 67, the ECJ held that it appears that the national law did not comply with the principle of effectiveness, but it left this for the national court to determine.
60. For an overview of cases, their time limits and whether the ECJ decided that the time limit was an infringement of EU law, *see* A. van Eijsden & J. van Dam, *Possibilities and Impossibilities for Challenging Final Tax Assessments and Decisions in Tax Cases that Contravene EC Law*, 19 EC Tax Review 6, p. 250 (2010).

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