

The Acte Clair in EC Direct Tax Law

Sample excerpt

Is it acte clair? General report on the role played by *CILFIT* in direct taxation

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1. Introductory remarks

European tax law professors have been meeting with increasing frequency, in order to analyse and discuss the growing body of the European Court of Justice's (hereinafter: the ECJ or the Court) decisions on the compatibility of domestic direct tax law and the EC law.

The number and scope of the decisions on the aforementioned issue is relevant enough to allow and to recommend a systematic analysis of groups of issues, in order to see whether and to what extent national courts of last instance can, under Art. 234 (3) EC Treaty, as interpreted by the Court in the *CILFIT* case¹, decide cases on direct taxation that involve interpretation of EC law without referring them to the ECJ for a preliminary ruling. This analysis is also important, taking into account that the conduct of national courts can lead to state liability in case they do not fulfil their obligation to refer a case under the aforementioned Art. 234 (3) EC Treaty (see the *Köbler* case² and point 6 below) and that the previous non-existence of a preliminary ruling on a legal point of law is a requirement for the ECJ to exceptionally restrict the temporal effects of its rulings (see point 5 below and reference to the relevant ECJ case law). In other words, it is important to understand to what extent the *CILFIT* criteria and the existing ECJ case law on direct taxation can provide some pattern of conduct to national courts (and also to the Member States' tax administrations and legislator) and some legal certainty to taxpayers.

In fact, on the one hand, there are many doubts as to whether national courts in the different Member States correctly apply Art. 234 (3) EC Treaty, as the authors in this book illustrate³; on the other hand, although the ECJ decisions

¹ ECJ, 6 October 1982, case 283/81, *Srl CILFIT and Gavardo SpA*.

² ECJ, 30 September 2003, case C-224/01, *Köbler*.

³ Cécile Brokelind, "The Acte Clair Doctrine Arising from the ECJ's Direct Tax Case Law from a Swedish Perspective: Use or Misuse?", point 5; Francisco de Sousa da Câmara, "The Meaning and Scope of the Acte Clair Doctrine Concerning Direct Taxation: The Portuguese Experience and the Establishment of Boundaries", point 6; Francisco Alfredo García Prats, "The Acte Clair Doctrine and the Effective Judicial Protection of EC Law Rights in Direct Tax Matters: The Spanish Case as an Example", points 4-5; Georg Kofler, "Acte Clair, Community Precedent and Direct Taxation in the Austrian Judicial System", points 3.1., 3.2.; Pasquale Pistone, "The Search for Objective Standards for the Application of the Acte Clair Doctrine to

normally refer to the previous case law, thus creating a system of precedent⁴, the predictability of the results of the subsequent related cases is not as high as it could be expected to be, which may lead us to the conclusion that unless a case on direct tax issues is identical to a previous one (acte éclairé in the sense of *Da Costa*⁵), a national tax court should always refer a case, contrary to what the ECJ recommended in *CILFIT*, in order to avoid inconsistencies regarding the interpretation of the fundamental freedoms (see, for example, *ICI, Lankhorst-Hohorst, De Lasteryie du Saillant* and *Cadbury Schweppes*, on the one hand, and *Columbus Container*, on the other; *Gerritse, Scorpio* and *Centro Equestre da Lezíria Grande; Schumacker, Geschwind* and *De Groot*, on the one hand, and *Schempp*, on the other; *De Lasteryie du Saillant* and *N.*; *Barbier* and *van Hilten; Baars, X and Y, Cadbury Schweppes, ACT Group Litigation*, on the one hand, and *Holböck*, on the other)⁶.

Moreover, the interpretation of the ECJ decisions in direct tax law issues is far from being an easy task for tax lawyers, and, besides, the Court is not bound to a *stare decisis* rule, which although allowing it to improve its own case law, leads to a tension between the certainty that would result from the aforementioned rule and the need for an evolution in the ECJ's case law.

The fact that the number of judges in the Court corresponds to the number of the Member States, and therefore has been increasing, together with its organization in different chambers, can also explain some unexpected and unfortunately not so-well justified decisions on matters that have been previously decided by the Court and which could even be considered settled case law (see on the prohibition of the home Member States from hindering the establishment in another Member State of one of their nationals or of a company incorporated under their legislation, *ICI, Lankhorst-Hohorst, De Lasteryie du Saillant, Marks & Spencers, Keller Holding, Barbier, Centros*⁷, *Cadbury Schweppes* on the one hand, and on the other, *Columbus Container*) - not to mention the problems arising from the work overload of the Court, which have been the origin of several academic contributions proposing a reform and of commissions created for the same purpose⁸.

Direct Taxation (with references to Italian tax law)", point 2.2.; Dennis Weber/ Frauke Davits, "The Practical Application of the Acte Éclairé and the Acte Clair Doctrine (with References to Netherlands Direct Tax Law)", points 6.2., 6.3. See, also, the papers published in Parts 2 to 6 of *Towards a Homogeneous Direct Tax Law, An Assessment of the Member States' Responses to the ECJ's Case Law* (ed. by Cécile Brokelind), IBFD, Amsterdam, 2007.

⁴ On this methodology, Paul Craig/Gráinne de Búrca, *EU Law, Text, Cases and Materials*, 4th ed., Oxford, 2008, p. 468 (467 et seq.).

⁵ ECJ, 27 March 1963, Joined cases 28 to 30-62, *Da Costa en Schaake NV*.

⁶ See also, on the increasing uncertainty resulting from the ECJ case law on the fundamental freedoms (in general), since the middle of the eighties, Thorsten Kingreen, "Grundfreiheiten", *Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzüge*, Berlin, Heidelberg, 2003, p. 631 et seq.; Trevor C. Hartley, *Constitutional Problems of the European Union*, Oxford and Portland, 1999, p. 66 et seq.

⁷ ECJ, 9 March 1999, C-212/97, *Centros*.

⁸ See, for example, J.P. Jacqué and J.H.H. Weiler, "On Road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference", *Common Market Law Review*, 1990, p. 185 et seq.; «Sur la voie de l'Union européenne, une nouvelle architecture judiciaire », *Revue Trimestrielle de Droit Européen*, 1990, p. 441 et seq.; Walter van Gerven, "The Role and Structure of the European Judiciary

Taking into account the regime in force, the final word on the interpretation of EC law belongs to the ECJ (Art. 234 EC Treaty), but in order to exercise that competence, the ECJ depends on referrals being sent to it by the national courts, since it is unavoidable that the national courts interpret, in a first moment, whether the issue is relevant from the perspective of EC law and whether the issue needs to be referred to the ECJ⁹. Even if the non-fulfilment of the national courts' obligations to refer a case to the ECJ can, in principle, lead to the liability of the Member State, the criteria settled by the Court, together with its decision in the *Köbler* case, seem to deny such liability in practice, unless, perhaps, in exceptional situations. If this interpretation of *Köbler* is correct (see point 6 below), then, again, cooperation of the national courts with the ECJ continues to be essential to the compatibility of national direct tax systems with EC law¹⁰.

As structured, the preliminary ruling procedure of Art. 234 EC Treaty implies an indirect access of the taxpayers to the fundamental freedoms of the EC Treaty. To what extent an effective access exists, and the degree of homogeneous application of Community law within the European Union in 20 years of the ECJ case law on direct taxation, were the two main questions guiding Brokelind's conference held in Lund in 2006.

The results are not the desirable ones either from the perspective of the effectiveness of ECJ case law or the protection of the taxpayers covered by EC law, as it seems that "the actual impact of the ECJ's case law is not as extensive as it should be" and that "the most adequate way to measure the actual impact of the ECJ's case law on Member States' domestic tax law [is] to analyse domestic judges' attitudes towards this source of Community law"¹¹.

Further discussion of this topic required the analysis of the meaning and scope of the *acte clair* doctrine in direct tax law, and this was the object and title of a conference held in Lisbon in September 2007.

Now and in the Future", *European Law Review*, 1996, p. 211 et seq.; Hjalte Rasmussen, "Remedying the crumbling EC judicial system", *Common Market Law Review*, 2000, p. 1071 et seq.; David Edward, "Reform of Article 234 Procedure: The Limits of the Possible", *Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn of Hadley*, (ed. by David O'Keefe, Antonio Bavasso), The Hague, London, Boston, 2000, p. 119 et seq.; Kathryn Hummert, *Neubestimmung der Acte Clair Doktrine im Kooperationsverhältnis zwischen EG und Mitgliedstaaten*, Berlin, 2006, 3. Teil, pp. 75-100; Daniel Sarmiento, "Who's Afraid of the Acte Clair Doctrine?", *in this book*, p..

⁹ On the domestic procedural rules that may hinder application of the preliminary ruling procedure, see John Bridge, "Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States", *European Law Review*, 1984, p. 28 et seq.; David O'Keefe, "Appeals Against an Order to Refer under Article 177 of the EEC Treaty", *European Law Review*, 1984, p. 87 et seq.

¹⁰ This is not incompatible with the observation of Takis Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford, 2006, p. 525, according to whom, Köbler "views the relationship between the ECJ and the national courts as one of hierarchy rather than one of cooperation, since, ultimately, it is for the ECJ to determine whether the breach is "manifest".

¹¹ Cécile Brokelind, "Introduction", *Towards a Homogeneous...*, cit., pp. 3-4.

As we will see among the different contributions to the book, the meaning and scope of the acte clair doctrine are very debatable, but the research on this topic provides us interesting paths.

For the Lisbon Conference, different panels corresponding to different issues were organized and a questionnaire based on those issues was drafted, in order to guide the panellists and the papers that are now being published: the sources and standards of the acte clair doctrine in direct tax law; identification of the object of the acte clair in direct tax issues; the development of an acte clair in direct tax issues (when does an acte clair occur); the role of the “relevant objective elements apt to justify a restriction to a fundamental freedom or a discriminatory treatment”; the consequences of the acte clair doctrine for the national courts and temporal effects of an ECJ decision; damages and liabilities; the interpretation of the acte clair doctrine by the courts of the Member States.

The first part of the book includes papers on some of the specific topics discussed in autonomous panels: this is the case for the papers on the meaning of *CILFIT*, on the justifications issue, and on the temporal effects of the acte clair doctrine.

The other group of papers, published in the second part, answers some of the issues raised in the questionnaire. They contain the authors’ perspective on the issue of the meaning and scope of acte clair doctrine in direct tax issues and inform us as well about the interpretation of the acte clair doctrine by the courts of the respective Member State. This general report follows the structure of the questionnaire and the panels of the conference.