

Kluwer International Tax Blog

The Contents of Highlights & Insights on European Taxation, Issue 6, 2022

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Highlights & Insights on European Taxation

Please find below a selection of articles published this month (June 2022) in [Highlights & Insights on European Taxation](#), plus one freely accessible article.

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(comments by **Edwin Thomas**) (H&I 2022/147)

In this procedure, the message of the CJ is that the execution of European law is a joint effort of the CJ and national courts.

The basic ‘ground rule’ for the execution of EU law in the national Member States is clear: national Member States have to comply with rulings of the CJ, rulings of the CJ have retroactive effect and national courts are obliged on their own authority to disapply any national legislation (rules I, III and IV).

The first ‘problem’ of the uncertainty as to how EU law is executed in the national laws of the EU Member States starts with rule three: national courts have to assess the manner in which the ruling of the CJ has to be applied within national law (paragraph 36), including by taking all measures to

facilitate the full effect of Union law (paragraph 38).

The phrase ‘taking all measures to facilitate the full effect of Union law’ creates scope for interpretation and uncertainty by this rule. The CJ, to my knowledge, has not formulated any fixed criteria as to how this aim of ‘full effect of Union law’ could be achieved.

The second ‘problem’ is the rule of procedural autonomy of the national procedural laws of the EU Member States, with only two vague rules in the form of the principles of equivalence and effectiveness. Of those two principles, the principle of effectiveness is the clearest: national procedural rules, in situations covered by the Union law, may not be less favourable than those rules which are applicable to similar situations under national law (rule five).

The principle of effectiveness contains more vague principles, such as ‘the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure’ (rule six).

There are two explicit rules of the CJ, rules seven and eight which, in practice, can and will effectively hinder the execution of the EU law in favour of tax subjects: An objection or appeal period of at least 15 days is reasonable (rule eight) and an administrative body does not have to reconsider such a final administrative decision (rule seven).

This means, in practice, that in situations where the CJ has approved a statement of one taxpayer, other taxpayers often cannot benefit from this ruling because administrative bodies in the EU Member States do not have to reconsider such a final administrative decision (rule seven) in situations where the national objection, appeal, appeal or cassation period has expired on the day that the CJ rendered a favourable decision for several taxpayers.

Therefore, the final rule (nine), which formulates a right for compensation when (tax)subjects have been harmed by a breach of their right under European law, is a very limited rule in practice.

Because of the short term for legal appeal of the legality of tax assessments (hereinafter: procedural period) in many EU Member States, taxpayers can often no longer discuss the legality of one or more assessments legally after a favourable judgment of the CJ because of a procedural period that has now expired. If a taxpayer can no longer question the legality of one or more assessments due to an expired procedural period, the principle of legal certainty will have a disadvantageous effect for taxpayers. Tax assessments for which the objection, appeal, appeal or cassation period has expired are legally deemed to be correct, so that in such case under national law, there will often be no right to compensation.

With this ruling, there is only one clear, hard and fast rule for taxpayers and their advisors: if advisors are aware of ongoing procedures with the CJ, which could possibly be favourable to one or more of their clients/taxpayers, these tax advisors have to timely appeal the tax assessments of their clients which could possibly be influenced positively by a ruling of the CJ.

Therefore, even in cases of doubt if a ruling could be favourable to taxpayers, as said, their advisors have to timely appeal the tax assessments of their clients, to prevent a form of legal ‘waiver’. According to European law, one has to comply with procedural laws of the EU Member States and one has to timely appeal the legality of tax assessments, otherwise EU law cannot be applied in favour of tax subjects. Accordingly, if one does not timely appeal tax assessments, one waives the right of the application in favour of European law.

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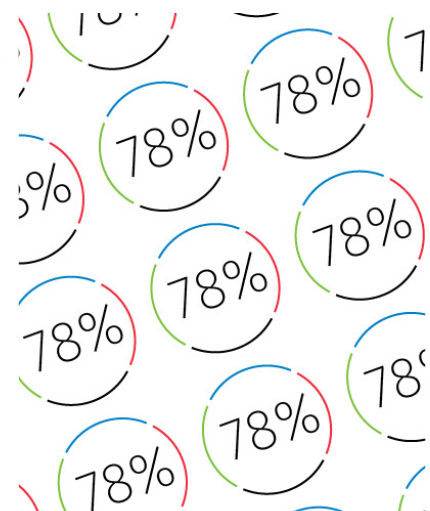
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