

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 5 October 2006¹

I — Introduction

1. By its order for reference received at the Court Registry on 9 July 2004, the Finanzgericht Köln (Finance Court, Cologne) seeks essentially to know whether a national regulation which provides that taxpayers only obtain a tax credit for dividends which they have been paid by companies established in Germany is compatible with Articles 56 EC and 58 EC.

2. The First Chamber of the Court heard the parties at a hearing on 8 September 2005.

3. On 10 November 2005 Advocate General Tizzano delivered his Opinion and proposed that Articles 56 EC and 58 EC should be interpreted as meaning that they precluded a provision such as the one at issue in the main proceedings. He further proposed that the temporal effects of the judgment should be

limited so that the incompatibility with Community law of the national provision in question only takes effect from the day of the delivery of the judgment of 6 June 2000 in *Verkooijen*. It would then not be possible to rely on this incompatibility in order to obtain tax credits for dividends received prior to the judgment in *Verkooijen*. However, this would have no effect on the claims of those who applied for a tax credit or appealed a relevant notice of refusal before the day on which the notice of the order for reference which is the subject-matter of the present proceedings was published in the *Official Journal of the European Union*, that is to say before 11 September 2004, provided always that such claims are not time-barred under national law.

4. In the light of the importance of the question of a possible limitation of the temporal effects of the judgment which is to be delivered, on 19 January 2006 the First Chamber decided to refer the case back to the Court in accordance with Article 44(3) and (4) of the Rules of Procedure of the Court and the Court subsequently reassigned the case to the Grand Chamber.

¹ — Original language: German.

5. On 7 April 2006 the Grand Chamber decided to reopen the oral procedure. The order to reopen the oral procedure fixed a new hearing date of 30 May 2006 and the parties to the proceedings attending the hearing were requested:

- (a) to examine the implications for a possible limitation of the temporal effects of the judgment to be delivered, of the fact that, in earlier judgments, the Court has already interpreted the Community law provisions which are applicable to the present case with regard to national legal provisions like those under discussion in the present case and did not limit the temporal effects of those judgments;

- (b) to comment on the economic repercussions of the interpretation of Community law in respect of which temporal limitation is applied for.

6. At the second hearing on 30 May 2006, 10 Member States, the Commission and Mr Meilicke gave explanations. Mr Meilicke and

the representatives of the German, Czech, French and Netherlands Governments commented on both questions. The representatives of the Commission and the other governments — namely the Danish, Greek, Spanish, Hungarian, Austrian and Swedish Governments as well as the United Kingdom Government — essentially restricted themselves to the first question. Those Member States and the Commission submitted in particular that a decision could only be made about a temporal limitation on the basis of the specific circumstances in the relevant Member State. They argued that this is all the more true as regards national taxation systems which are often complex. Accordingly, they submitted that any bar to an application to limit the temporal effects must be limited to exceptional cases.

7. The German Government takes the view that in the event that the judgment to be delivered has effect *ex tunc* there will be a risk of serious economic repercussions as a result of the probable shortfall in tax revenue.² The French, Greek and Hungarian Governments concur with this assessment of the merits.

² — See point 137 of my Opinion delivered on 14 March 2006 in Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373.

II — Legal framework

8. Under Paragraph 36(2)(3) in conjunction with Paragraph 20 of the German Einkommensteuergesetz (Income Tax Law; 'EStG')³ taxpayers can deduct 3/7 of dividends which are paid to them by companies established in Germany from their income tax debt to the German tax authorities. The provision prevents these profits from being taxed a second time when they are distributed to the shareholders as dividends. However, no such tax credit is granted in respect of dividends which are paid by companies established in other Member States.

9. The Federal Republic of Germany abolished the above system by means of a statute of 2000 which came into force from the 2001 tax year⁴ and replaced it with the so-called 'Halbeinkünfteverfahren' ('half-income pro-

cedure'), pursuant to which income tax is chargeable only on half of the dividends received by the shareholder. In this way the double taxation of dividends is supposed to be avoided or at least significantly reduced, without the need to have recourse to tax credits.⁵

III — The temporal effects of the judgment to be delivered

A — Principle of ex tunc effect of a judgment of the Court of Justice in accordance with Article 234 EC

10. In order to answer the first question posed by the Court in its order dated 7 April 2006, it is first of all necessary to briefly recall the Court's case-law to date on the problem of the temporal limitation of the effects of judgments.⁶

11. According to the Court's established case-law in relation to Article 234 EC, 'the

3 — In the version published in the *Bundesgesetzblatt* (Federal Official Journal) (BGBl. 1990 I, p. 1898). At the material time in the case under discussion here, the EStG applied in the version amended by Article 1 of the Gesetz zur Verbesserung der steuerlichen Bedingungen zur Sicherung des Wirtschaftsstandorts Deutschland im Europäischen Binnenmarkt (Standortsicherungsgesetz — Law on the improvement of the taxation conditions to secure Germany as a business location in the European internal market; 'StandOG') (BGBl. 1993 I, p. 1569) and Article 1 of the Jahressteuergesetz 1996 (the 1996 Tax Law; 'JStG 1996') (BGBl. 1995, p. 1250).

4 — Gesetz zur Senkung der Steuersätze und zur Reform der Unternehmensbesteuerung (Steuersenkungsgesetz — Law on tax reduction; 'StSenkG') of 23 October 2000 (BGBl. 2000 I, p. 1433).

5 — See also the communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 19 December 2003 — 'Dividend taxation of individuals in the internal market' (COM(2003) 810 final).

6 — See in relation to this my detailed Opinion in *Banca popolare di Cremona* (cited in footnote 2), point 130 et seq.

interpretation the Court gives to a rule of Community law is limited to clarifying and defining the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force'.⁷ It follows from this that the courts may, and indeed must, also apply that rule as thus interpreted to legal relationships established before the judgment ruling on the request for interpretation. These judgments of the Court thus generally take effect *ex tunc*.⁸

application of the general principle of legal certainty, be moved to restrict the possibility of relying on the interpretation it has given to a Community law provision with a view to calling in question legal relationships.¹⁰ In *Edis*¹¹ and *Bautiaa and Société française maritime*,¹² the Court emphasised that the limitation of the temporal effects of a judgment must remain the absolute exception.

12. The Court permitted exceptions to this principle for the first time in *Defrenne II*.⁹ The Court took the view that the practical effects of court decisions always had to be weighed up carefully, but at the same time made clear that in taking such practical effects into account the Court cannot go so far as to diminish the objectivity of the law and compromise its future application solely because of the possible repercussions which might result, as regards the past, from a judicial decision (see footnote 35, paragraph 69 et seq.).

14. 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.¹³

13. In later decisions, the Court emphasised that it is only exceptionally that it may, in

15. The case-law on possible justifications for restrictions on the fundamental freedoms for economic reasons should also be recalled in this connection. Where the subject-matter of a preliminary ruling is the interpretation of the fundamental freedoms, the established

7 — See, inter alia, Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 66 with further references.

8 — See also, for instance, Case C-61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 15 et seq.

9 — Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 69 et seq.

10 — *Denkavit italiana* (cited in footnote 8), paragraph 15 et seq., see also *Bidar* (cited in footnote 7), paragraph 67.

11 — Case C-231/96 [1998] ECR I-4951, paragraph 16.

12 — Joined Cases C-197/94 and C-252/94 [1996] ECR I-505, paragraph 48.

13 — See for detail on this my Opinion in *Banca popolare di Cremona* (cited in footnote 2), point 178 et seq. See also in this connection the Opinion of Advocate General Jacobs of 17 March 2005 in the same case, point 75 et seq.

case-law on the justification of restrictions on the fundamental freedoms may not be undermined by limiting the temporal effects of a judgment.

ment, since it is those infringements that are likely to have the most significant financial implications for Member States. Furthermore, the Court maintains that to limit the temporal effects of a judgment solely on the basis of such considerations would considerably diminish judicial protection.¹⁶

16. The Court has consistently ruled on the limitation of the temporal effects of a judgment in accordance with its case-law on the justification of restrictions on the fundamental freedoms. According to that case-law, objectives of a purely economic nature can never constitute an overriding reason in the general interest to justify a restriction on the fundamental freedoms. The same applies to maintaining national budget revenue.¹⁴ It was thus logical for the Court to find, with regard to the limitation of the temporal effects of a judgment, that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of such a ruling.¹⁵ Otherwise the most serious infringements of Community law would receive more lenient treat-

17. In conclusion, it should accordingly be reiterated that an exception to the general *ex tunc* effect of a judgment of the Court is only possible in very exceptional cases and the possible financial repercussions of a particular interpretation of Community law cannot, in themselves, constitute either a justification for possible restrictions on the fundamental freedoms or a reason for a possible limitation of the temporal effects of the judgment in question. If, exceptionally, the Court considers that the effects of its interpretation of Community law on national budget revenue may be taken into account, then it may only do so if, by maintaining national budget revenue, the risk of serious economic repercussions can be countered.¹⁷

14 — See, inter alia, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39; see also Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraph 12, and Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23.

15 — See, in particular, Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 37, and Joined Cases C-367/93 to C-377/93 *Rodens and Others* [1995] ECR I-2229, paragraph 48.

16 — *Bidar* (cited in footnote 7), paragraph 68; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 52; Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 41; *Bautiaa and Société française maritime* (cited in footnote 12), paragraph 55; and *Rodens and Others* (cited in footnote 15), paragraph 48.

17 — See, in particular, Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 59: '... overriding grounds of legal certainty preclude calling in question legal relations which have exhausted their effects in the past; to do so would retroactively cast into confusion the system whereby Austrian municipalities are financed'.

B — *Is the application for the limitation of temporal effects time-barred?*

18. The limitation of the temporal effects of a judgment could be ruled out already in this case because the Court has already interpreted the Community law provisions which are applicable in the present case in earlier judgments without limiting the temporal effects of the judgment.¹⁸

19. According to the Court's case-law, the order on limiting the temporal effects of a judgment must be made in the judgment ruling upon the interpretation sought.¹⁹ Therefore if the present case concerned the same question of interpretation as *Verkooijen*²⁰ or *Manninen*,²¹ the case-law which has been cited could be understood as meaning that an application to limit the temporal effects of a judgment should already have been made in each of these cases. The Federal Republic of Germany's application in the present case would then have to be rejected for that reason alone.

18 — On the question whether the national provision under discussion here is comparable to national provisions in other proceedings, see the Opinion of Advocate General Tizzano delivered on 10 November 2005 in the present case, point 15 et seq.

19 — Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 108. See also Case C-35/97 *Commission v France* [1998] ECR I-5325, paragraph 49, which was, however, delivered in Treaty infringement proceedings.

20 — Case C-35/98 [2000] ECR I-4071.

21 — Case C-319/02 [2004] ECR I-7477.

20. The question arises therefore as to whether this case-law should preclude the limitation of temporal effects in the present case.

21. In this respect it must be remembered that the Court requires a high degree of similarity between the relevant questions for interpretation, which is the criterion for thus barring a limitation of the temporal effects. Thus in *Gravier*²² and *Blaizot*²³ the Court was able to discern sufficient differences to differentiate between them. Those differences existed although the same national provision was the reason for both requests for preliminary rulings and hence the questions for interpretation were very similar.

22. In view of the complexity of the connections between the respective national tax laws, a point made repeatedly at the second hearing on 30 May 2006, it should really be possible to differentiate between the relevant provisions of various Member States, despite all the apparent common ground. However, taking such an approach could entail an excessively detailed analysis.

22 — Case 293/83 [1985] ECR 593.

23 — Case 24/86 [1988] ECR 379, paragraph 25 et seq.

23. Further, it should not be forgotten that even the same national court to which a previous preliminary ruling has been addressed can seek a ruling from the Court again before the main proceedings are decided.²⁴ It is justifiable for a — further — question to be referred if the national court refers a fresh question of law to the Court, or if it submits new considerations which might lead the Court to give a different answer to a question submitted earlier.²⁵

24. In that light, the German Government should also be given the opportunity to put before the Court aspects of the law not considered in *Verkooijen* and *Manninen* with regard to the question of the temporal limitation of the effects of a judgment.

25. In that connection, particular consideration must be given to the fact that the uncertain or unresolved outcome of proceedings for a preliminary ruling on a new legal question makes it difficult for Member States to assess the significance of the proceedings concerned for their own legal system sufficiently exactly and at the right time.

24 — See, for example, Case C-466/03 *Reiss*, pending before the Court.

25 — See the order in Case 69/85 *Wünsche* [1986] ECR 947, paragraph 15.

26. This applies especially to the prior conditions for an order limiting the temporal effects of a judgment which are explained in more detail below. Thus, in the present case, the German Government should, in the proceedings in *Verkooijen* — or in the proceedings in *Manninen* — for instance have clarified whether the interpretation of Community law in each case would create the risk of serious economic repercussions for it. In view of the fact that until the delivery of the judgment in *Verkooijen* the question of the interpretation of Community law in relation to national tax credit procedures had not been definitively dealt with and the specific question of a system of tax credits was not clarified at all until *Manninen*, which give the most extensive clarification to date, it hardly appears possible to make such an assessment in advance.

27. On the other hand an — ultimately purely preventive — routine application by Member States for the limitation of the temporal effects of a judgment on interpretation which is to be delivered might not be desirable from the point of view of procedural economy, as was quite rightly argued by the Member States at the hearing on 30 May 2006. Then of course the Court would have to consider the necessarily abstract observations of all of the Member States applying on the potential implications of the judgment for each of them.

28. In the light of the foregoing, the German Government's application to limit the temporal effects cannot be regarded as belated in my opinion.

31. This principle is also cited in relation to the temporal limitation of the effects of judgments in *Grzelczyk*,²⁷ *Bautiaa and Société française maritime*²⁸ and *Dansk Denkavit and Poulsen Trading*.²⁹

C — Burden of proof for the existence of the conditions for the limitation of temporal effects

29. Before the conditions for a possible order limiting temporal effects are examined, it is necessary first to consider the burden of proof in relation to such an order.

32. Thus, in the judgment in *Grzelczyk*, the Court stated that the Belgian Government in that case had not made any submissions to support its application to limit the temporal effects of the relevant judgment which could prove that any objective and significant uncertainty regarding the Treaty provisions at issue could have led its national authorities to behave in a way which did not comply with those provisions.³⁰

30. According to established case-law, the party relying on an exception to a general principle, which is favourable to him, must prove that the requirements of the exception are fulfilled.²⁶

33. In *Bautiaa and Société française maritime*, the Court refused to limit the temporal effects of the judgment, since the French Government, which was a party to the case, had not shown that, at the time when the disputed national provision was in force, Community law could reasonably have been understood as authorising the retention of that provision.³¹

26 — See, inter alia, Case C-128/89 *Commission v Italy* [1990] ECR I-3239, paragraph 23, on the free movement of goods; Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 51, in relation to Article 88(2) EC; Case C-318/94 *Commission v Germany* [1996] ECR I-1949, paragraph 13; and Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, paragraph 58.

27 — Cited in footnote 16.

28 — Cited in footnote 12.

29 — Case C-200/90 [1992] ECR I-2217.

30 — Loc. cit., paragraph 54.

31 — Loc. cit., paragraph 50.

34. In *Dansk Denkavit and Poulsen Trading*, the Court held that the Danish Government had not established that at the time when the contested levy was introduced Community law could reasonably be construed as permitting such a tax. On the contrary, the Court stated that the provision in question contained a clear prohibition, the scope of which had, significantly for the case to be decided, already been defined by the Court in another judgment,³² which conversely moreover also shows that the Court did not apparently assume that the Member State was precluded from making the application despite a previous ruling on the point.

thetical issues, or on the basis of mere assumptions that could prove to be inaccurate.³⁴ For that reason, Advocate General Geelhoed proposed that the Court should reject the application of the Member State concerned in the proceedings for the temporal limitation of the judgment to be delivered without more, solely on the basis that the existence of the necessary conditions for the exception was insufficiently substantiated.³⁵

36. In the present case, it is therefore incumbent upon the Federal Republic of Germany to demonstrate and, if necessary, adduce evidence that the following conditions for the limitation of temporal effects are fulfilled.

35. Recently Advocate General Geelhoed also considered the requirements for the Member State's burden of proof in relation to the issue of the limitation of the temporal effects of a judgment to be delivered in his Opinion in *Test Claimants in the FII Group Litigation*.³³ He emphasised that where a party raises a plea in a procedure before the Court, it is for that party to ensure that its arguments have been sufficiently enunciated, and that the Court has before it sufficient information to allow it to come to a judgment on the issue. He maintained that this was necessary in order to avoid the Court giving judgment on purely hypo-

D — *Details of the conditions for the limitation of the temporal effects of the judgment to be delivered*

37. On the basis of the principle of legal certainty relied on in *Defrenne II*,³⁶ the Court, in its later case-law, established two conditions for a limitation of temporal effects.

32 — Loc. cit., paragraph 21 et seq.

33 — Opinion delivered on 6 April 2006 in Case C-446/04, pending before the Court.

34 — Point 140 et seq., in particular point 143 of the Opinion cited.

35 — Point 144 et seq. of the Opinion cited.

36 — Cited in footnote 9, paragraph 74.

38. 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.³⁷ 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.³⁸

39. It is now necessary to consider these two conditions.

1. Objective and significant legal uncertainty

40. Having regard to the requirement for an objective and significant uncertainty in relation to the scope of Community law provi-

sions, the Court made clear in *Ampafrance and Sanofi*³⁹ — albeit in a different context, namely in proceedings relating to the validity of Community action — that this criterion may not be interpreted in terms of the protection of a legitimate expectation of Member States.

41. Accordingly, the Court has repeatedly pointed out that there must be *objective* legal uncertainty. It is not sufficient for there to be subjective legal uncertainty on the part of a Member State. Therefore in the interests of the equal treatment of Member States and of the uniform application of Community law, the Court must examine whether or not objective legal uncertainty existed at the relevant time.

42. Thus the Court rejected a Member State's submissions relating to the novelty of the question referred, since case-law of the Court already existed which enabled the relevant Member State to assess the com-

37 — See also the Opinion of Advocate General Tizzano in the present case (cited in paragraph 3 and footnote 17), point 34.

38 — See also the Opinion of Advocate General Tizzano in the present case (cited in paragraph 3 and footnote 17), point 34.

39 — Joined Cases C-177/99 and C-181/99 [2000] ECR I-7013, paragraph 65 et seq.: '... the principle of legitimate expectations cannot be relied on by a Government in order to avoid the consequences of a decision of the Court declaring a Community provision invalid, since it would jeopardise the possibility for individuals to be protected against conduct of the public authorities based on unlawful rules'.

patibility of the national rules in question with Community law.^{40 41}

43. Conversely in *Barber*⁴² the Court held that there should be a limitation of the temporal effects of the judgment because on the basis of the Community law provision relating to the period of application of the principle of equal treatment which was in question in that case the Member States and those affected by it may reasonably have assumed that exceptions to the principle of equal treatment of men and women were still permitted in the area concerned.

44. Similar arguments are also considered in other judgments. Thus in *Bosman*⁴³ there was found to be legal uncertainty as regards the temporal effects of the judgment to be delivered because of the particular situation of a large number of different regulations which were overlapping in part.⁴⁴

40 — *Buchner and Others* (cited in footnote 16), paragraph 38 et seq. See also the judgments in Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 46, in *Rodens and Others* (cited in footnote 15), paragraph 45, and in Joined Cases C-453/02 and C-462/02 *Linneweber and Others* [2005] ECR I-1131, paragraph 43, and my Opinion delivered on 8 July 2004 in the latter case, point 60.

41 — See also *Dansk Denkavit and Poulsen Trading* (cited in footnote 29), paragraph 21 et seq.

42 — Case C-128/93 [1994] ECR I-4583, paragraph 40 et seq. See also *Sürül* (cited in footnote 19), paragraph 109 et seq.

43 — Case C-415/93 [1995] ECR I-4921, paragraph 143 et seq.

44 — See also Case C-163/90 *Legros and Others* [1992] ECR I-4625, paragraph 31 et seq., and Case 41/84 *Pinna* [1986] ECR I, paragraph 26 et seq.

45. The following findings must be made in relation to the present case: as has already been stated,⁴⁵ the Court first dealt with the interpretation of the applicable provisions of Community law in relation to the treatment of dividend payments for income tax purposes in *Verkooijen*. A national — Finnish — credit procedure, which is probably comparable to the provisions of the German EStG which are the subject of these proceedings, was considered for the first time in *Manninen*. Consequently, objective and significant legal uncertainty could have existed at least until the position was clarified in the judgment in *Verkooijen*.

46. The question is whether and to what extent significance should be attached to the Commission's actions in relation to this issue. Advocate General Tizzano has already raised this question too in his Opinion in the present case.⁴⁶

47. By its letter dated 31 October 1995 the Commission drew the German Government's attention to the fact that in the Commission's opinion the German credit procedure was contrary to the fundamental freedoms laid down in the EC Treaty. However the Commission did not then

45 — See above, point 26.

46 — Loc. cit. point 36 et seq. See also my Opinion on the same question in *Banca popolare di Cremona* (cited in footnote 2), point 156.

initiate Treaty infringement proceedings. When asked at the second hearing on 30 May 2006 the Commission explained that it had refrained from commencing Treaty infringement proceedings because the German Government had given notice of an amendment to the legal provision in question and the Commission had preferred to monitor the efforts of the German Government.

48. In his Opinion of 10 November 2005, Advocate General Tizzano takes the view that the failure to pursue Treaty infringement proceedings could have resulted in objective legal uncertainty.⁴⁷ However, it seems appropriate first to recall the Court's case-law as to the legal significance of the initiation by the Commission of Treaty infringement proceedings in order to be able to assess the Commission's actions in the present case, with regard, also, to its submissions at the second hearing.⁴⁸

49. According to this case-law, the Commission is not empowered to determine conclusively, by reasoned opinions formulated pursuant to Article 226 EC or other statements of its position in the course of such

proceedings, the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with Community law.⁴⁹ Instead, according to Articles 227 EC and 228 EC, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice.⁵⁰

50. According to the case-law of the Court, the issue of a reasoned opinion is part of the pre-litigation procedure. The pre-litigation procedure enables the Member State 'to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position'.⁵¹ This must be at least equally true of any informal inquiry of the Member State by the Commission.

51. The Court has further emphasised that the Commission's decision as to whether or not to commence Treaty infringement proceedings is a matter for the discretion of the Commission and is ultimately not subject to review by the Court.⁵² Thus the Court does not have to prove any specific legal interest for the purposes of bringing Treaty infringe-

47 — Loc. cit., point 36 et seq.

48 — See my earlier Opinion in *Linneweber and Others* (cited in footnote 40), point 60.

49 — Case C-135/01 *Commission v Germany* [2003] ECR I-2837, paragraph 24. See also in relation to this Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 16.

50 — Case C-393/98 *Gomes Valente* [2001] ECR I-1327, paragraph 18.

51 — Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 44.

52 — See Case C-477/03 *Commission v Germany* (not published in the ECR), paragraph 11 (OJ 2004 C 300, p. 23), which refers to Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11.

ment proceedings. Instead, the Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom.⁵³ Accordingly it is incumbent upon the Commission alone to decide whether it is appropriate to bring Treaty infringement proceedings against a Member State.⁵⁴

52. The failure to pursue Treaty infringement proceedings after an informal preliminary procedure may thus often be due to a number of reasons, other than legal ones, which are based in particular on considerations of expediency. The Commission may also have had such considerations in mind in the present case: in my opinion, the Commission explained, at least at the second hearing, entirely plausibly, that it did not remain inactive but preferred, by consensus and for reasons of expediency, to wait for the amendment of the national legal provisions of which it had been notified. Looking at the situation in this way, however, I find it difficult to view in isolation the Commission's previous statements before the Court

to the effect that it had not commenced Treaty infringement proceedings because the German tax credit provision was subsequently abolished.⁵⁵ The continuing contact between the Commission's departments and the German authorities, which the Commission mentioned in particular at the second hearing and which was not disputed by the German Government, also points in favour of this view.

53. However, the Commission's conduct, and in particular the failure to commence formal Treaty infringement proceedings against Germany, then hardly seems such as to have contributed to increasing possible legal uncertainty in relation to the question of the compatibility of the German EStG with Community law, unlike in *Defrenne II*.⁵⁶

54. Even if there had been longer periods of time between the dates of the contact cited, this could hardly have been interpreted as a decision not to commence Treaty infringement proceedings which was such as to give rise to a legitimate exception. It must also be

53 — See, inter alia, Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 21.

54 — See in relation to this Case C-476/98 *Commission v Germany* [2002] ECR I-9855, paragraph 38, which refers to Case C-431/92 *Commission v Germany* (cited in footnote 53), paragraph 22. See also *Star Fruit v Commission* (cited in footnote 52), where an action for failure to act brought by a natural or legal person for a declaration that in not commencing against a Member State proceedings to establish its breach of obligations the Commission has, in breach of the Treaty, failed to take a decision, was inadmissible.

55 — Advocate General Tizzano in his Opinion of 10 November 2005, following the first hearing, point 37.

56 — Cited in footnote 9. However see Advocate General Tizzano's Opinion in the present case, point 38.

remembered here that in accordance with the Court's established case-law the Commission's mere silence may not be understood as sanctioning a particular action of a Member State.⁵⁷

statutes and were often included even without any actual reference to Community law,⁵⁹ does not seem very convincing at least in as much as the German Government did not contradict the Commission's submissions in relation to continuing contact.

55. Finally, the conduct of the German Government is not inconsistent with an awareness, at least, that there was a problem of Community law in relation to the German EStG's credit procedure. At the second hearing on 30 May 2006, the German Government did not dispute that the abolition of the credit procedure at issue was initiated a few months *before* the judgment in *Verkooijen*.⁵⁸ The objection that that was just as lacking in significance as the grounds stated in the preparatory documents, to the effect that the new provisions in question had to be drafted in accordance with Community law, because formulations of this type were usual in the grounds for

56. However a definitive finding of the existence of objective and significant legal uncertainty could prove to be unnecessary if sufficient evidence of a risk of serious financial repercussions was not adduced.

2. The risk of serious economic repercussions

57. In the decision of 7 April 2006 on reopening the oral procedure, the parties to

57 — *Richardson* (cited in footnote 14), paragraph 35, in connection with Council Directive 79/7/EEC. See also *Legros and Others* (cited in footnote 43), paragraph 31 et seq., *ÉKW and Wein & Co.* (cited in footnote 16), paragraphs 56 and 58, and *Blaizot* (cited in footnote 22), paragraph 32 et seq.

58 — 15 February 2000 — SPD and Bündnis 90/Die Grünen, draft Gesetz zur Senkung der Steuersätze und zur Reform der Unternehmensbesteuerung (Steuersenkungsgesetz) (Law to reduce tax rates and to reform the taxation of businesses (Law on tax reduction; 'StSenkG'), government draft dated 30 March 2000.

In relation to this, Advocate General Tizzano states, clearly wrongly, in his Opinion in this case that 'without delay after the delivery of the abovementioned judgment the German Government ensured the conformity of the law which had previously been in force' (point 40).

59 — In the grounds for the draft of 15 February 2000 of the StSenkG (Deutscher Bundestag — 14. Wahlperiode, Drucksache 14/2683) at page 95 at point (ee) in the right-hand column the following paragraph appears however:

'The full credit procedure is only effective nationally on the other hand and is therefore domestically-orientated. It only eliminates double taxation in relation to a shareholder and its company within Germany. The foreign shareholder of a company established in Germany does not benefit from this tax credit and neither does the German shareholder of a company established abroad. The difference in taxation of domestic and foreign dividends *has therefore caused the EU Commission to object* to the German full credit procedure's infringement of the free movement of capital and the freedom of establishment' (my emphasis).

the proceedings were expressly requested to comment on the economic repercussions of the interpretation of Community law, in relation to which there is an application for temporal limitation.

58. First of all it must be emphasised that in the leading case *Defrenne II*⁶⁰ the question of the exact level of probable financial consequences of an *ex tunc* effect was left open. Reference should also be made to the established case-law, according to which the financial consequences which might ensue for a Member State from a preliminary ruling cannot in themselves justify limiting the temporal effect of such a ruling.⁶¹

59. It should also be noted that a judgment may take effect *ex tunc* regardless of whether it imposes charges or confers benefits on those involved. In particular, it is not of any significance whether payments of money are involved which a Member State levied in breach of Community law.⁶²

60. It is apparent from the above that the amount of the financial consequences cannot by itself be decisive in relation to the limitation of the temporal effects of a judgment. The risk of serious economic repercussions may not be established solely by reference to figures, but requires an assessment by the Court based upon the submissions of fact of the Member State which made the application. Accordingly, in my view, the Court should resist the temptation to link the degree of severity of the financial repercussions to the level of the possible financial consequences or specific sums of money. Even taking into account the varying economic strength of the various Member States, I think it is dangerous to proceed in the long term on the basis that specific (even if large) amounts of money imply a risk of serious economic repercussions from the outset.⁶³ This would seem to me to be putting the cart before the horse and could even, in the worst case scenario, lead to a 'threshold value discussion'.⁶⁴

61. In the light of the above, it is therefore, in my view, necessary to analyse at this point whether the German Government has sufficiently proved the risk of serious economic repercussions. The shortfall in tax revenue alleged in this connection, amounting to EUR 5 billion — reduced to this amount at the first hearing — does not suffice in that,

60 — Cited in footnote 35.

61 — See the above statements and the related evidence, point 16 et seq.

62 — *Salumi and Others* (cited in footnote 14), paragraph 12.

63 — See on this Advocate General Tizzano's Opinion in the present case, at the end of point 35.

64 — In addition, serious financial repercussions may not always be assessed, such as, for example, Case C-147/03 *Commission v Austria* [2005] ECR I-5969 demonstrates.

whilst it may suggest that serious economic repercussions are to be feared, in itself it is none the less not sufficient proof of them. The sum mentioned, the calculation of which was certainly clearly detailed in the German Government's submissions at the second hearing on 30 May 2006,⁶⁵ is arrived at on the basis of a demonstration of the financial budgetary repercussions, which in accordance with established case-law⁶⁶ does not suffice taken alone as appropriate evidence of a risk of serious economic repercussions.

62. Nor does the risk of serious economic repercussions arise from mathematically setting the sum of EUR 5 billion against the German budget deficit — and the consequent reduction in the sum available for investments,⁶⁷ the income from corporation tax and other reference figures — since such data (still) make clear the 'purely' financial consequences of the judgment to be delivered.

65 — The extent to which estimates of shortfall in tax revenue based on the Hamburg Finanzamt's (Hamburg Tax Office) statements are capable of generalisation was not explained however by the German Government.

66 — See the evidence in point 16 et seq.

67 — According to Deutsche Presse Agentur (German Press Agency) statements, for 2006 the federal budget earmarks investments in the sum of EUR 23.2 billion — with new debt of EUR 38.2 billion and total spending of EUR 261.6 billion.

63. What is more, the sum referred to by the German Government relates to a four-year period (1998-2001), whilst the reference figures relate in each case to one budget year. As expressly confirmed by the German Government at the second hearing, the EUR 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. Although the resulting budget risks arise from a provision which is no longer in force, the German Government has not managed to state, even approximately — within the relevant review period — how many taxpayers have actually lodged appeals. In this respect the present case can also be distinguished from *Banca popolare di Cremona*,⁶⁸ where the national provision in question is still in force and, according to the Italian Government's submissions, which are not disputed, represents a substantial part of the financing of regional authorities.

64. Accordingly, there seem to me to be good grounds for finding that sufficient evidence of the risk of serious economic repercussions has not been adduced.

68 — Cited in footnote 2.

65. Nor can Germany's objection be accepted that an *ex tunc* effect of the judgment to be delivered would be disproportionate and would constitute a penalty for which there is no provision in proceedings for a preliminary ruling.

66. It is indeed correct that the Community legal system and accordingly also proceedings for a preliminary ruling are exclusively aimed at upholding and safeguarding the law. The imposition of a charge or even a fine on Member States is not as a rule a part of that system. Further, as Advocate General Tizzano stated, the situation of Member States should not be made any more difficult than is absolutely necessary.⁶⁹ However, that does not change the fact that on the basis of established case-law the consequences which have been pleaded are a corollary of the basic *ex tunc* effect of a judgment on interpretation.

67. For the sake of completeness, reference should be made to the possible arrangements Member States could make. In *Edis*,⁷⁰ the Court decided that despite the *ex tunc* effect of a judgment it could only be applied by a Member State's court to the facts of a case

which took place before the delivery of that judgment, if the detailed rules applicable to the national proceedings had been complied with both substantively and formally.⁷¹

It is clear from settled case-law that, in the absence of Community rules governing the refund of national taxes levied though not due, 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. However, as is well known, such rules may not be less favourable than those governing similar domestic actions and must not render the exercise of rights conferred by Community law virtually impossible or excessively difficult.⁷²

From a Community law perspective, it would not generally be possible to challenge, for instance, the laying-down of appropriate time-limits for bringing a claim in the interests of legal certainty, protecting both the taxpayer and the administration concerned.⁷³

69 — Opinion of 10 November 2005 in the present case, point 42.
70 — Cited in footnote 11.

71 — *Loc. cit.*, paragraph 17.

72 — *Edis* (cited in footnote 11), paragraph 19. See also Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* [1976] ECR 2043, paragraphs 13 and 16.

73 — *Rewe* (cited in footnote 72), paragraph 5; *Comet* (cited in footnote 72), paragraphs 17 and 18; and *Denkavit italiana* (cited in footnote 8), paragraph 23.

IV — Conclusion

68. In the light of the foregoing, I propose that the Court should not limit the temporal effects of the judgment in the present case.