Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 5 September 2013 [1]

Case C-362/12

Test Claimants in the Franked Investment Income Group Litigation
v
Commissioners of Inland Revenue,
Commissioners for Her Majesty's Revenue and Customs

(Request for a preliminary ruling from the Supreme Court of the United Kingdom (United Kingdom))

(Recovery of national taxes which are contrary to European Union law — Limitation period for instituting proceedings — National legislation curtailing the limitation period with retroactive effect and without advance notice)

I – Introduction

1. This request for a preliminary ruling is the third such request made to the Court in the context of a group action brought before the United Kingdom courts by the Test Claimants in the Franked Investment Income Group Litigation ('the Test Claimants') – companies belonging to the British American Tobacco group and the Aegis group – concerning the tax treatment of dividends paid to parent companies established in the United Kingdom by subsidiaries established abroad.

2. The first of the two earlier requests was made to the Court on 30 October 2004 by the High Court of Justice (England & Wales), Chancery Division (United Kingdom), and concerned the compatibility of the tax treatment of those dividends with the fundamental freedoms entrenched in the FEU Treaty. [2] Following the first ruling made by the Court in the context of this litigation, on 12 December 2006, the national court decided, by judgment of 27 November 2008, to refer questions seeking clarification as to the proper interpretation of that ruling. [3]

3. The Test Claimants lodged an appeal against the judgment of 27 November 2008 before the Court of Appeal (England & Wales), which, by judgment of 23 February 2010, [4] confirmed the decision of the High Court of Justice (England & Wales), Chancery Division, to make a second request to the Court for a preliminary ruling. The second order for reference was made on 21 January 2011 and the Court replied by its ruling of 13 November 2012. [5]

1 — Original language: French.

2 — Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753.

3 — *Test Claimants Franked Investment Income Group Litigation v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893 (Ch), [2009] STC 254.

4 — *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Another* [2010] EWCA Civ 103.

5 — Case C-35/11 *Test Claimants in the FII Group Litigation* [2012] ECR.

4. Meanwhile, the Test Claimants had brought an appeal against the above judgment of the Court of Appeal (England & Wales) before the Supreme Court of the United Kingdom ('the Supreme Court'). The appeal focused on the issue of the causes of action available to taxpayers for the recovery of sums paid, but not due, in connection with taxes declared incompatible with the fundamental freedoms entrenched in the Treaty and, specifically, on the issue of the retroactive amendment, introduced by section 320 of the Finance Act 2004 and section 107 of the Finance Act 2007, of the limitation periods for those causes of action. The Test Claimants challenged the finding made by the Court of Appeal (England & Wales) that their claims for recovery of the tax – levied in breach of EU law and accordingly paid, but not due, to the United Kingdom tax authorities – were time-barred.

5. By judgment of 23 May 2012, the Supreme Court was unanimous in finding that section 107 of the Finance Act 2007 was incompatible with EU law, but was divided on the issue of the compatibility with EU law of the retroactive amendment, introduced without notice by section 320 of the Finance Act 2004, to the applicable limitation period. Five Law Lords (Lord Hope, Lord Walker, Lord Clarke, Lord Dyson and Lord Reed) found that amendment to be contrary to EU law, but two of their fellow peers (Lord Brown and Lord Sumption) considered it to be compatible with EU law.[6] The Supreme Court therefore decided to stay the proceedings and to make the present request for a preliminary ruling.

II – Legal context

A – *EU law*

6. The second subparagraph of Article 19(1) TEU provides:

'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

7. The present case also concerns the application of the principles of effectiveness, legal certainty and the protection of legitimate expectations as they arise out of the Court's case-law.[7]

B – *National law*

8. On 8 September 2003, Aegis – a multinational group active in the field of digital media and communications, whose holding company is established in the United Kingdom – introduced a claim before the English courts for reimbursement of taxes which the Court of Justice had declared incompatible with the fundamental freedoms entrenched in the Treaty.

9. In its judgment in *Test Claimants FII (No 3)*, the Supreme Court decided by a majority that, when the companies belonging to the Aegis group introduced their claim on 8 September 2003, two causes of action were available at 'common law' to claimants seeking restitution of corporation tax levied in breach of EU law.[8]

6 — *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Another* [2012] UKSC 19 ('*Test Claimants FII (No 3)*').

7 — See, to that effect, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraphs 34 to 47.

8 — The situation changed in April 2010 with the introduction by the Finance Act 2009 of a new cause of action for the recovery of tax paid but not due, with a limitation period of four years. That new cause of action has replaced the *Woolwich* and *Kleinwort Benson* causes of action in the field of restitution of tax paid but not due.

10. The first cause of action had been recognised in a purely domestic context, long before the current litigation commenced, by the House of Lords in its decision of 20 July 1992 in *Woolwich* ('the *Woolwich* cause of action').[9] On the basis of the *Woolwich* cause of action, it was possible to recover 'all sums paid to a public authority in response to (and sufficiently causally connected with) an apparent statutory requirement to pay tax which (in fact and in law) is not lawfully due'.[10]

11. Under section 5 of the Limitation Act 1980, *Woolwich* claims are time-barred after six years have elapsed from the date on which the cause of action arose, which is normally the date on which the tax was paid.

12. The second cause of action permitted the restitution of taxes paid under mistake either of fact or of law on the part of the taxpayer. That cause of action was recognised for the first time in the judgment handed down by the House of Lords on 29 October 1998 in *Kleinwort Benson*,[11] which overruled longstanding authority to the effect that money paid under a mistake of law was not recoverable ('the *Kleinwort Benson* cause of action').

13. In the judgment of 18 July 2003, handed down in *Deutsche Morgan Grenfell* ('*DMG*')[12] by Park J. of the High Court of Justice (England & Wales), Chancery Division, it was held for the first time that the *Kleinwort Benson* remedy could be used to obtain restitution of tax paid under a mistake of law.

14. Accordingly, Park J. held that the limitation period applicable to that cause of action was the more favourable period laid down in section 32(1)(c) of the Limitation Act 1980, under which:

'… where in the case of any action for which a period of limitation is prescribed by this Act, [and where] –

…

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the … mistake … or could with reasonable diligence have discovered it'.

15. On 4 February 2005, the Court of Appeal (England & Wales) reversed Park J.'s judgment, but the House of Lords reinstated it on 25 October 2006, confirming that taxpayers seeking restitution of tax paid, but not due, had available to them both the *Woolwich* and the *Kleinwort Benson* causes of action.

16. One of the differences between the two causes of action lay in the applicable limitation period: the six-year limitation period for the purposes of the *Woolwich* cause of action started to run as soon as the tax in question was paid, whereas the six-year limitation period for the purposes of the *Kleinwort Benson* cause of action did not start to run until the claimant had discovered, or should have discovered, his mistake.

17. In the meantime, Parliament had adopted the Finance Act 2004, section 320(1) of which provides:

'Section 32(1)(c) of the Limitation Act 1980 … (extended period for bringing an action in case of mistake) does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue.

9 — *Woolwich Equitable Building Society v Inland Revenue Commrs* [1993] AC 70 (HL).

10 — Lord Walker's speech in *Test Claimants FII (No 3)*, paragraph 79.

11 — *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

12 — *Deutsche Morgan Grenfell plc v Inland Revenue Commrs* [2003] EWHC 1779 (Ch), [2003] 4 All ER 645.

This subsection has effect in relation to actions brought on or after 8 September 2003.'

18. In 2007, Parliament adopted the Finance Act 2007, section 107 of which retroactively abolished the extended limitation period available for all claims based on mistake which had been filed before 8 September 2003.

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

19. The main proceedings, brought by the companies of the Aegis group before the referring court, centre upon the advance corporation tax ('ACT'), which was in force in the United Kingdom from 1973 to 1999. In general, ACT was a tax on company profits which was payable in advance by a company as soon as it paid a dividend. English law nevertheless allowed an exception to that obligation where the company paying the dividend and the parent company had opted for group taxation. In that case, they were treated for ACT purposes as a single company and the ACT was no longer payable by the subsidiary but by the parent company, as soon as that company in turn distributed dividends. However, the exception was available only to companies whose parent company was resident in the United Kingdom. [13]

20. Following the judgment in *Metallgesellschaft and Others*, [14] in which that ACT system was found to be incompatible with freedom of establishment and the free movement of capital, and the delivery of the judgment in *DMG* on 18 July 2003, the Aegis group entered a claim – by an action brought on 8 September 2003 at approximately midday – for reimbursement of the sums paid by way of ACT, but not due. The claim covered the period from 1973 to 1999.

21. Given that, under section 32(1)(c) of the Limitation Act 1980, the limitation period for the purposes of the *Kleinwort Benson* cause of action did not start to run until the discovery of the mistake which had resulted in payment of the tax (in this case, not until 8 March 2001, the date on which the judgment in *Metallgesellschaft and Others* was delivered), the Aegis group was able to claim all sums paid by way of ACT under a mistake since 1973, the year in which the United Kingdom of Great Britain and Northern Ireland acceded to the European Economic Community. That would not have been possible on the basis of the *Woolwich* cause of action, for which time for the purposes of the six-year limitation period would have started to run from the date on which the tax was paid.

22. In order to limit its obligation to reimburse the ACT paid but not due, the Inland Revenue announced in a press release published on the afternoon of 8 September 2003 that it intended to have laid before Parliament a measure – applicable to all *Kleinwort Benson* claims lodged from that day forward – precluding application of the extended limitation period under section 32(1)(c) of the Limitation Act 1980. On 22 June 2004, the Finance Act 2004, section 320 of which embodied such a measure, received Royal Assent and that section entered into force retroactively on 8 September 2003, thus applying to the action brought by the Aegis group.

23. Following *DMG*, a judgment which found against the United Kingdom tax authorities, the United Kingdom applied to the Court for a re-opening of the procedure in relation to the request for a preliminary ruling in Case C-446/04, in order to obtain a limitation of the temporal effects of the Court's ruling in response to that first request.

13 — See, to that effect, Lord Walker's speech in *Test Claimants FII (No 3)*, paragraphs 28 to 33. See, also, *Deutsche Morgan Grenfell plc v Inland Revenue Commrs* [2006] UKHL 49, [2007] 1 AC 558, 564.

14 — Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727.

24. On 6 December 2006, the Court refused that application and, on the same day, the Commissioners for Her Majesty's Revenue and Customs announced their decision to propose that Parliament retroactively abolish, subject to a number of exceptions, the limitation period for *Kleinwort Benson* claims, including those lodged before 8 September 2003. This was done. The Finance Act 2007, which received Royal Assent and entered into force on 19 July 2007, provides under section 107 that section 32(1)(c) of the Limitation Act 1980 does not apply to actions concerning claims for the reimbursement of taxes paid under a mistake of law; the exceptions allowed under section 107 have no effect on the main proceedings.

25. The rule laid down in section 107 of the Finance Act 2007 was therefore applicable to the claim lodged by the Test Claimants, other than those belonging to the Aegis group, which are members of the British American Tobacco group.

26. On 30 September 2010, the European Commission officially called upon the United Kingdom to amend section 107 of the Finance Act 2007 so as to bring it into conformity with EU law, but the United Kingdom refused to do so. The Commission also announced, on 26 January 2012, that it intended to open an infringement procedure against the United Kingdom in that connection, but no procedure was launched while the judgment of the Supreme Court on that point had not yet been delivered. [15]

27. In its judgment of 23 May 2012, which is at the origin of the present request for a preliminary ruling, the Supreme Court ruled unanimously that section 107 of the Finance Act 2007 was incompatible with EU law. This explains the fact that the present request for a preliminary ruling does not concern section 107 of the Finance Act 2007 and its effect on the claims filed by the companies belonging to the British American Tobacco group; rather, it solely concerns section 320 of the Finance Act 2004, which affected the action brought by the Aegis group alone. [16]

28. Since the Supreme Court was divided on the issue of the compatibility of section 320 of the Finance Act 2004 with EU law, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Where under the law of a Member State a taxpayer can choose between two alternative causes of action in order to claim restitution of taxes levied contrary to Articles 49 and 63 TFEU and one of those causes of action benefits from a longer limitation period, is it compatible with the principles of effectiveness, legal certainty and legitimate expectations for that Member State to enact legislation curtailing that longer limitation period without notice and retrospectively to the date of the public announcement of the proposed new legislation?

(2) Does it make any difference to the answer to Question 1 that, at the moment when the taxpayer issued its claim using the cause of action which benefited from the longer limitation period, the availability of the cause of action under national law had only been recognised (i) recently and (ii) by a lower court and was not definitively confirmed by the highest judicial authority until later?'

IV – Procedure before the Court

29. The request for a preliminary ruling was lodged at the Court on 30 July 2012. Written observations were lodged by the companies belonging to the Aegis group, the Government of the United Kingdom, the Spanish Government and the Commission, all of whom presented oral argument at the hearing on 26 June 2013.

15 — See, to that effect, the Commission's press release of 26 January 2012 (IP/12/64).

16 — At the hearing, the Commission stated that it had not brought an action for failure to fulfil obligations following that judgment of 23 May 2012 and that, to its knowledge, the United Kingdom had not amended section 107 of the Finance Act 2007.

V – Analysis

A – *Question 1*

30. By Question 1, the referring court seeks to ascertain whether the retroactive curtailment without notice of the limitation period for a *Kleinwort Benson* claim for the reimbursement of tax paid but not due is compatible with the principles of effectiveness, legal certainty and the protection of legitimate expectations.

31. Notwithstanding the fact that the referring court refers to those three principles separately, I share the Commission's view that incompatibility with any one of those principles is sufficient to render section 320 of the Finance Act 2004 incompatible with EU law. Although, in the course of my analysis, I shall take the principles of legal certainty and the protection of legitimate expectations into account, I believe that, of the above three principles, the most pertinent to the present case is the principle of effectiveness. [17]

1. The principle of effectiveness

32. In the case which gave rise to the judgment in Case C-446/04 in *Test Claimants in the FII Group Litigation*, one of the issues raised by the High Court of Justice was whether the claims brought by the Test Claimants fell to be classified as 'claims for the repayment of sums unduly levied' or as 'benefits unduly claimed' or, on the other hand, as 'claims for compensation for damage suffered'.

33. The Court has held that '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, including the classification of claims brought by injured parties before the national courts and tribunals. Those courts and tribunals are, however, obliged to ensure that individuals should have an *effective legal remedy* enabling them to obtain reimbursement of the tax unlawfully levied on them and the amounts paid to that Member State or withheld by it directly against that tax'. [18]

34. In the second subparagraph of Article 19(1) thereof, the Treaty of Lisbon formalised the obligation on the Member States to provide remedies sufficient to ensure 'effective legal protection'. [19]

35. That is the legal background against which the Court is called upon to decide whether the companies belonging to the Aegis group had the benefit of 'effective legal protection' in their application for reimbursement of the ACT charged to them in breach of EU law.

36. According to Lord Walker, who delivered the leading judgment for the majority in the case before the referring court, this case falls under the case-law devolving from *Marks & Spencer*, in which the Court held in respect of a measure equivalent to that at issue in the main proceedings that '[w]hilst national legislation reducing the period within which repayment of sums collected in breach of [EU] law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for

17 — The Spanish Government alone thinks that the present case raises an issue of the applicability of the principle of equivalence and not of the principle of effectiveness. In my opinion, that is not so. It is evident from the order for reference that the rules relating to the *Woolwich* cause of action and those applicable to the *Kleinwort Benson* cause of action apply to the reimbursement of all taxes paid but not due, whether those taxes were in breach of national law or of EU law. No issue of equivalence therefore arises.

18 — *Test Claimants in the FII Group Litigation*, paragraph 220. My italics.

19 — That obligation was already provided for in the Court's case-law. See, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 39 and 41.

lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.' [20]

37. On that basis, Lord Walker concluded that the lack of transitional arrangements, combined with the retroactivity of section 320 of the Finance Act 2004, was inconsistent with the principle of effectiveness. [21]

38. However, according to Lord Sumption, who gave the leading judgment for the minority, the companies belonging to the Aegis group had available to them, throughout the proceedings, an effective legal remedy by means of which to obtain restitution of tax paid but not due – namely, a remedy based on the *Woolwich* cause of action – which entirely satisfied the obligations on the United Kingdom under the FEU Treaty, notwithstanding the fact that the limitation period for that cause of action was different in that time for those purposes ran from the date on which the tax was paid. [22]

39. Lord Sumption distinguished the case which gave rise to the judgment in *Marks & Spencer* from the present case, on the grounds that, in order to claim reimbursement of value added tax ('VAT'), paid but not due, Marks & Spencer plc only had available a single effective legal remedy, for which the time allowed had been retroactively curtailed, whereas, in the present case, the companies belonging to the Aegis group have always had available to them another effective remedy, for which the limitation period was unaffected by section 320 of the Finance Act 2004: namely, the remedy based on the *Woolwich* cause of action. [23] For that reason, Lord Sumption found that the existence and availability of the *Woolwich* cause of action was enough in itself to meet the United Kingdom's obligations under EU law. [24]

40. It is that difference between the majority view and the minority view of the Supreme Court which has led to the present request for a preliminary ruling on the compatibility with EU law of section 320 of the Finance Act 2004. It is accordingly for the Court to decide whether the *Marks & Spencer* case-law extends to cases in which, as in the present case, two causes of action are available to the applicant, but the national legislation, without making provision for transitional arrangements, has retroactively curtailed the limitation period for the cause of action already chosen (from those two causes of action available) by the claimant.

41. The position argued for by the United Kingdom Government is that, for the companies belonging to the Aegis group, the *Woolwich* cause of action provides a fully effective remedy for the purposes of recovering the tax charged or levied in breach of EU law, as the amendment introduced by section 320 of the Finance Act 2004 in no way affected the limitation period for that cause of action.

42. The companies belonging to the Aegis group, on the other hand, contend that the position adopted by the United Kingdom Government is based on a misinterpretation of *Marks & Spencer*. They argue that the breach of the principle of effectiveness found in that judgment did not consist in the fact that no effective legal remedy had been provided for restitution of the VAT unlawfully paid; nor did it

20 — *Marks & Spencer*, paragraph 38.

21 — Lord Walker's speech in *Test Claimants FII (No 3)*, paragraphs 111 to 115.

22 — Lord Sumption's speech in *Test Claimants FII (No 3)*, paragraph 142.

23 — Ibid., paragraph 197. At the hearing, the United Kingdom Government stressed this distinction, the companies belonging to the Aegis group claiming on the contrary that, in *Marks & Spencer*, the claimant also had the choice between two causes of action for reimbursement of VAT: (i) the tax had been unlawfully levied by the tax authorities or (ii) the VAT had been paid under a mistake of law on the part of the taxpayer.

24 — Ibid., paragraph 199.

consist in the fact that no reasonable limitation period had been laid down; rather, it lay in the fact that the period for bringing a claim, based on national law, for reimbursement of the VAT unlawfully levied had been curtailed without notice and retroactively, with the result that the taxpayers were taken by surprise and prevented from timeously bringing claims in relation to certain earlier periods.

43. Although, for its part, the Commission agrees with the United Kingdom tax authorities that the *Woolwich* cause of action provides an effective legal remedy, it argues that that does not mean that the other legal remedy may in fact be abolished without notice by means of an amendment to the rules governing the time-barring of claims.[25] To that effect, the Commission observes that the parallel with *Marks & Spencer* is particularly striking and sees no justification for a conclusion different from the one reached in that case, that is to say, that section 320 of the Finance Act 2004 is contrary to the principle of effectiveness.

44. To my mind, in the light of *Marks & Spencer*, the submission made by the companies belonging to the Aegis group, and by the Commission, that section 320 of the Finance Act 2004 is contrary to the principle of effectiveness is correct.

45. Admittedly, the principle of effectiveness does not require Member States to establish more than one legal remedy to enable individuals to safeguard the rights which they derive from EU law.

46. Indeed, under the second subparagraph of Article 19(1) TEU, Member States are required quite simply to establish 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'. That obligation leaves Member States a measure of discretion in the exercise of their procedural autonomy and allows them to define the detailed procedural rules governing actions for the safeguarding of rights which individuals derive from EU law.[26]

47. If, however, in application of the principle of procedural autonomy, a Member State makes a number of legal remedies available to individuals, the second subparagraph of Article 19(1) TEU requires that each of those remedies ensure effective legal protection, and a legal remedy cannot offer 'effective' protection unless the conditions in accordance with which it may be used and achieve a positive outcome are known in advance.

48. Accordingly, as soon as taxpayers choose one of the national legal remedies available under national law (in the present case, the *Kleinwort Benson* remedy) or have recourse to the only national legal remedy available, they must come under the protection offered by the general principles of EU law.

49. It follows that the amendment made by the Finance Act 2004, with retroactive effect but without transitional arrangements, to the rules governing the time-barring of claims based on a cause of action which had been open to the litigants makes it impossible to exercise rights conferred upon them by EU law.

25 — At the hearing, the Commission stated that, while the United Kingdom Government probably had the right to curtail the limitation period for the *Kleinwort Benson* cause of action in order to restrict its liability to reimburse overpaid ACT, it was obliged to grant taxpayers a period of grace so that they could lodge their claims. The Commission submits that, in the circumstances of the present case, a period of two months would have been sufficient to meet that obligation.

26 — Point 22 of my Opinion in Case C-565/11 *Irimie* [2013] ECR.

50. The fact that the litigants could have chosen another cause of action, fully consistent with the principles of equivalence and effectiveness, is irrelevant in that regard. After all, were the position adopted by the United Kingdom Government to be approved, a Member State would always have the possibility of leaving a claimant to choose the remedy best suited to his purposes and of then altering, without notice and without providing for transitional arrangements, the conditions under which the cause of action already chosen can succeed. That would deprive the principle of effectiveness of its content and cannot therefore be accepted.

51. As Lord Walker observes, the fact that the companies belonging to the Aegis group could not have complained if section 32(1)(c) of the Limitation Act 1980 had never existed is not decisive so far as observance of the principle of effectiveness is concerned.[27] That would also be the position if the *Kleinwort Benson* cause of action had never existed.

52. I would point out that the United Kingdom is not criticised for curtailing the limitation period for *Kleinwort Benson* claims but, as the companies belonging to the Aegis group emphasise, for doing so with retroactive effect, with consequences for the claims already pending, and without providing for transitional arrangements as required by the Court in *Marks & Spencer*. It has long been settled law that 'a national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were wrongly levied under that legislation'.[28]

53. Furthermore, the existence of one or of two causes of action in *Marks & Spencer* has no effect on the present case, since the guarantees attaching to the principle of effectiveness apply to every legal remedy which national law makes available to claimants for the reimbursement of taxes levied in breach of EU law.

54. That conclusion is to be found in similar cases decided by the Court, which, in relation to a tax system restrictive of the free movement of capital, ruled that 'the existence of an option which would possibly render a situation compatible with [EU] law does not, in itself, correct the illegal nature of a system, such as the system provided for by the contested rules, which comprises a mechanism of taxation not compatible with that law'.[29] Accordingly, the existence, alongside a legal remedy contrary to the principle of effectiveness, of another remedy which is not cannot cure the first legal remedy of its incompatibility with EU law.

55. For those reasons, I agree with the majority view of the Supreme Court that section 320 of the Finance Act 2004 is contrary to the principle of effectiveness.

56. Although that conclusion is a sufficient basis for finding that EU law precludes legislation such as section 320 of the Finance Act 2004, I shall nevertheless consider that issue from the perspective of the principles of legal certainty and the protection of legitimate expectations. That will lend support to my first conclusion.

2. The principles of legal certainty and the protection of legitimate expectations

57. As the Commission states, there is considerable overlap between the principle of legal certainty and the principle of the protection of legitimate expectations.

27 — Lord Walker's speech in *Test Claimants FII (No 3)*, paragraph 114.

28 — Case 240/87 *Deville* [1988] ECR 3513, paragraph 13. See also, to that effect, *Marks & Spencer*, paragraph 36.

29 — Case C-168/11 *Beker and Beker* [2013] ECR, paragraph 62. See also Case C-446/04 *Test Claimants in the FII Group Litigation*, paragraph 462, and Case C-440/08 *Gielen* [2010] ECR I-2323, paragraph 53.

58. The Court has acknowledged that it was open to Member States, in the interests of legal certainty – which protects both the taxpayer and the authorities – to lay down reasonable time limits for bringing proceedings. [30]

59. In the same context, the Court has also held that, according to its settled case-law, 'the principle of the protection of legitimate expectations forms part of the [EU] legal order and must be observed by the Member States when they exercise the powers conferred on them by [EU] directives' [31] and that 'a legislative amendment retroactively depriving a taxable person of a right to deduction he has derived from [EU law] is incompatible with the principle of the protection of legitimate expectations'. [32]

60. According to Lord Sumption, whose view is shared by the United Kingdom Government, section 320 of the Finance Act 2004 is not inconsistent with the principle of the protection of legitimate expectations. [33] Lord Sumption maintains that, given the specific circumstances in which the *Kleinwort Benson* cause of action was opened up by the *DMG* judgment, the companies belonging to the Aegis group could not have had a legitimate expectation that the limitation period laid down in section 32(1)(c) of the Limitation Act 1980 would be retained.

61. Specifically, Lord Sumption predicates his view on the principle that, although it is open to the English courts to create new causes of action, the fixing of time limits is a matter for Parliament. According to Lord Sumption, given the brevity of the interval between the delivery on 18 July 2003 of the judgment in *DMG* and the announcement on 8 September 2003 of the adoption of section 320 of the Finance Act 2004, the certainty that the tax authorities would lodge an appeal against that judgment and the uncertainty regarding the outcome of that appeal, the companies belonging to the Aegis group could not have based any legitimate expectation on the continuing availability of the *Kleinwort Benson* remedy.

62. Accordingly, in adopting section 320 of the Finance Act 2004, Parliament – in the view of Lord Sumption and of the United Kingdom Government – lawfully exercised the discretion allowed to Member States in determining the limitation period for what was at that time a new legal remedy for the reimbursement of tax paid under a mistake of law, which had just been recognised by the *DMG* judgment of 18 July 2003. On that basis, the United Kingdom Government tried at the hearing to distinguish the present case yet further from *Marks & Spencer*, which, in its view, concerned the abolition of a cause of action which already existed in English law.

63. In addition, Lord Sumption disputes – and his position on this point is again shared by the United Kingdom Government – the majority view of the Supreme Court that the companies belonging to the Aegis group had the choice of two causes of action, the *Woolwich* and the *Kleinwort Benson*, on account of the declaratory nature of judgments, which means that a judgment declares the law as it has always been, despite any uncertainty which the litigants may have had before its delivery.

64. The Commission, for its part, regards as irrelevant the argument that, before the judgment of the House of Lords in *Kleinwort Benson*, no one could legitimately have expected a cause of action to be made available for restitution claims for the recovery of taxes paid under a mistake of law. According to the Commission, the question is rather what taxpayers could expect to be entitled to after that

30 — Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19 and the case-law cited. See also *Marks & Spencer*, paragraph 35.

31 — *Marks & Spencer*, paragraph 44. See also Case 316/86 *Krücken* [1988] ECR 2213, paragraph 22; Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 33; Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraph 26; and Case C-396/98 *Schlossstrasse* [2000] ECR I-4279, paragraph 44.

32 — *Marks & Spencer*, paragraph 45. See also *Schlossstrasse*, paragraph 47.

33 — Lord Sumption's speech in *Test Claimants FII (No 3)*, paragraphs 200 to 202.

judgment and immediately before the official announcement of the introduction of section 320 of the Finance Act 2004. The Commission goes on to argue that, so long as the Court of Appeal (England & Wales) and the House of Lords had not decided to the contrary, taxpayers were entitled to believe that the remedy in question was available to them.

65. In my opinion, the view of Lord Sumption and of the United Kingdom Government is based on a misinterpretation of the principles of legal certainty and the protection of legitimate expectations.

66. The Court has consistently held that it is not for the Court to rule on the interpretation and applicability of provisions of national law or to establish the facts relevant to the decision in the main proceedings. Rather, the Court must, under the division of jurisdiction between the Courts of the European Union and the national courts, take account of the factual and legislative context, as described in the order for reference, in which the question put to it is set. [34]

67. Accordingly, it is not for the Court to determine the position under English law; nor is it for the Court even to decide whether it is necessary to adopt the theory of the declaratory nature of judgments as accepted by the majority view of the Supreme Court. The starting point for my analysis is that, as that majority view accepted, until the entry into force of section 320 of the Finance Act 2004, the companies belonging to the Aegis group had the choice of two causes of action, the *Woolwich* and the *Kleinwort Benson*, by means of which to recover the ACT paid, but not due.

68. With effect at the latest from18 July 2003, the date on which the judgment in *DMG* was delivered, English law recognised the *Kleinwort Benson* cause of action as being available for the purposes of recovering taxes paid but not due, subject to the time limits laid down in section 32(1)(c) of the Limitation Act 1980.

69. At the hearing, the United Kingdom Government stressed the fact that, at the time when the judgment in *DMG* was delivered, it was not certain that that judgment would be confirmed on appeal, and that, accordingly, the companies belonging to the Aegis group could not at that time legitimately count on the ultimate success of their *Kleinwort Benson* claim.

70. That was not the issue for the companies belonging to the Aegis group. Rather, they submit that, when they lodged their claim on 8 September 2003, they could legitimately expect that their claim would be ruled upon by the English courts on the basis of the law in force on the date on which that claim was lodged.

71. On that point, I agree with Lord Hope and Lord Reed that the companies belonging to the Aegis group were entitled to expect, in accordance with the principles of legal certainty and the protection of legitimate expectations, that they would not be deprived of that right by a statute which, a few months after their claim was lodged, amended the related time limits without notice and with retroactive effect. [35]

72. In its application for a hearing, the United Kingdom Government refers to the amounts at stake in the present case. It submits that the reimbursement sought by the companies belonging to the Aegis group amounts to at least 2 billion pounds sterling and that the financial consequences for the tax authorities with regard to other claimants will amount to several billion pounds sterling. In its view, this raises a question of the protection of the public interest in preventing the disruption of public finances.

34 — Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42.

35 — Lord Hope's speech in *Test Claimants FII (No 3)*, paragraph 19, and Lord Reed's speech in *Test Claimants FII No* 3, paragraph 243.

73. If the reimbursement of tax paid but not due is not to be treated differently depending on whether significant amounts are involved, that argument cannot be taken into consideration, since the Court has not, in declaring the taxes at issue here incompatible with EU law, restricted the temporal effects of its judgments.

74. It is settled case-law that the right to a refund of taxes levied in a Member State in breach of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law prohibiting such taxes. [36] There is only one exception to that obligation: where charges to tax have been passed on in their entirety to a third party and their reimbursement would bring about the unjust enrichment of the taxable person. [37] That is not the position here.

75. Furthermore, in its recent judgments in *Irimie* and *Littlewoods Retail and Others*, the Court held – on the basis of the case-law in *Metallgesellschaft and Others* and *Test Claimants in the FII Group Litigation* – that the Member States were under an obligation to repay with interest tax levied in breach of EU law. [38]

76. Consequently, the answer to Question 1 is that, where, under the law of a Member State, a taxpayer can choose between two causes of action in order to claim restitution of taxes levied contrary to Articles 49 TFEU and 63 TFEU and one of those causes of action benefits from a longer limitation period, the principles of effectiveness, legal certainty and the protection of legitimate expectations preclude legislation of that Member State, adopted after the claim has been brought, under which that longer limitation period is curtailed without notice and retrospectively.

B – *Question 2*

77. By Question 2, the referring court wishes to ascertain whether the answer to Question 1 is in any way affected by the fact that, when the companies belonging to the Aegis group lodged their *Kleinwort Benson* claim on 8 September 2003, that cause of action had only been recognised recently (by the *DMG* judgment) and by a lower court (the High Court of Justice (England & Wales), Chancery Division), and was not definitively confirmed by the highest judicial authority until later (on 25 October 2006 by the House of Lords).

78. Question 2 is obviously linked to the position adopted by Lord Sumption and by Lord Brown, according to which the principle applicable in the present case is that of the protection of legitimate expectations. In fact, the observations on the proximity of the date of entry into force of section 320 of the Finance Act 2004 to the date of delivery of *DMG* and on the uncertainty regarding the confirmation of that judgment by the House of Lords are linked to the question whether, in the national legal context as it was on 8 September 2003, the companies belonging to the Aegis group could legitimately expect that their *Kleinwort Benson* claim would not be adversely affected by the above provision.

79. In the light of the considerations which I have set out regarding the principles of legal certainty and the protection of legitimate expectations (see points 65 to 70 above), it is my belief that Question 2 should be answered in the negative.

36 — Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12; *Metallgesellschaft and Others*, paragraph 84; and Case C-446/04 *Test Claimants in the FII Group Litigations*, paragraph 202.

37 — Case 68/79 *Just* [1980] ECR 501, paragraph 26; Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 33; and Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraphs 94 and 102.

38 — *Irimie*, paragraphs 21 and 22, and Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraphs 25 and 26.

VI – Conclusion

80. I therefore propose that, in answer to the questions referred by the Supreme Court, the Court should rule as follows:

(1) Where, under the law of a Member State, a taxpayer can choose between two causes of action in order to claim restitution of taxes levied contrary to Articles 49 TFEU and 63 TFEU and one of those causes of action benefits from a longer limitation period, the principles of effectiveness, legal certainty and the protection of legitimate expectations preclude legislation of that Member State, adopted after the claim has been brought, under which that longer limitation period is curtailed without notice and retrospectively.

(2) The answer to Question 1 is in no way affected by the fact that, when the companies belonging to the Aegis group lodged their claim using the cause of action which benefited from the longer limitation period, that cause of action had only been recognised (i) recently and (ii) by a lower court and (iii) was not definitively confirmed by the highest judicial authority until later.