Retroactvity and Tax Legislation

Greece

Part I (A, B,C,D,E)

Univ.-Ass. Professor Dr. Eleni Theocharopoulou (PhD. University of Paris II, France)
Faculty of Law of Democritus University of Thrace (Greece)
(author of all the answers of the present questionnaire, from party A to party E)

Univ- Professor Dr. Konstantinos Remelis
President of the Faculty of Law of Democritus University of Thrace (Greece)
(author in collaboration with ass. Prof. E. Theocharopoulou for the answers A3, A4 and A5 of the present questionnaire)

Part II (F)

Panagiotis Melissinos
Bachelor Degree of Finance and Accounting (Athens University of Economics and Business), Law student of the Democritus University of Thrace
(author of the answers of the F party of the present questionnaire)

'Retroactivity and Tax Legislation'

Part I

Univ. - ass. Prof. Dr Eleni Theocharopoulou (author of the answers of parties A, B, C, D and E) with the collaboration of Prof. Dr K. Remelis (coauthor for the answers A3, A4 and A5)

A. On terminology

(1) In Dutch legal discourse, a distinction is usually made between formal retroactivity (here: retroactivity) and material retroactivity (here: retrospectivity).

a. Does legal discourse in your country usually employ concepts like 'retroactivity' and 'retrospectivity'?

Legal academia in Greece uses the term "retroactivity", but not the term "retrospectivity". In Greek legal academia retroactivity is mentioned in general, without any emphasis placed on the distinctions of retroactivity from other concepts.

Sometimes Greek legal academia uses theoretically the concepts of "true retroactivity" and "non-true retroactivity". In fact one could claim that "true retroactivity" according to Greek legal academia is mostly identical to the concept of retroactivity of the present questionnaire (and thus to "formal retroactivity", according to Dutch fiscal literature), whereas "non-true retroactivity has some points in common with retrospectivity – in the broad sense it has in the questionnaire (and therefore with material retroactivity, according to Dutch fiscal literature).

It should be noted in any case that in Greek academia the theoretical distinctions between true and non-true retroactivity are used neither as frequently nor with the absolutely same content in the various fields of law. Therefore, with regard to this theoretical distinction which is frequently encountered especially in Civil Law, it is established that while it is utilized in the case law of the Greek Supreme Court (i.e. of civil courts), it is not encountered in the case-law of administrative courts and of the Council of State. This means that theoretical distinctions of retroactivity are not used by the administrative courts; the administrative courts and the Council of State rule on the permissibility (or impermissibility) of the retroactivity of a statute, whether administrative or tax statutes. In particular, with regard to tax laws, the non- utilization of the relevant theoretical distinctions is certainly justified by the fact that there is an express constitutional provision that allows even the retroactive levying of tax charges, but within a particular time frame, as will be presented in detail under sub-question B 8.

b. Is a clear distinction usually made between 'retroactivity' and 'retrospectivity'?

No. In Greek legal academia and in particular, in the field of tax law, there is no distinction between these two concepts.

However, as it appears from the theoretical analysis above, the concepts of true and non-true retroactivity used by Greek academic theory of tax law have points in common with the concepts of retroactivity and retrospectivity in the present questionnaire respectively. So, this question is answered here with regard to Greek standards of the concepts of true retroactivity and non-true retroactivity.

In Greek legal academia in general there is no absolutely clear distinction between the concepts of "true retroactivity" (in the sense of retroactivity under the questionnaire) and "non-true retroactivity" (which approximates enough to the concept of retrospectivity), given the fact that there are discrepancies in legal definition between various fields of law.

In Civil Law, the distinction is portrayed as follows: The phrase "true retroactivity" of the law usually intimate the regulation by law of legal relations or effects that arise from or came about before the commencement of its application. On the contrary, a law is "non-truly retroactive" when a new law regulates (amends or abolishes) legal effects emerging post to the commencement of its application (even though they emerge from legal relations or situations preexisting to the law), so this is not actually retroactivity. This is also what the case-law of the Supreme Court has held.

Nevertheless, in Tax Law there is some differentiation in the relevant definitions. The concept of "true retroactivity" is defined in only one textbook and means the retroactive enactment of new tax charges or the retroactive amendment of the existing favourable tax provisions to the worse, given the fact that the retroactivity of tax abatements is in principle constitutionally permissible in Greece. Furthermore, the term "non true retroactivity" implies the direct application of new provisions, even in cases pending before tax authorities or courts.

The case-law of administrative courts and of the Council of State does not utilize the relevant distinction at all. The tax provision in question is controlled by the Council of State (and the administrative courts) with regard to its eventual non-compliance with article 78 par. 2 of the Greek Constitution (on the temporal restriction of unfavourable retroactivity of tax legislation) [see below under B8, A7 and C13], without any reference to the concepts of true or non-true retroactivity (in the sense mentioned earlier) or to any other concept of retroactivity. Thus, the following were held by the jurisprudence of the Council of State to be cases of retroactive taxation to the worse: the retroactive abolition or the restriction of an existing favourable tax regime, the retroactive change in the method of determination of the tax base, the retroactive limitation of deductible expenses etc.

In conclusion, the theoretical distinction between true and non-true retroactivity is not especially used by the case-law of the courts in tax cases. Nevertheless, if cases of non-true retroactivity of tax laws – in the sense attributed to the concept of non-true retroactivity by tax law academics in Greece- are considered to fall theoretically under the concept of retrospectivity in the questionnaire, the following should is to be noted: Only in some of the cases where the tax legislator "intervenes" in cases pending (in the sense of retroactive regulation of pending cases by the tax legislature) before tax authorities or courts, the jurisprudence of the Council of State poses certain restrictions to this legislative "retroactivity" (as to be presented below under A 6b, 7 and C13). As to the remainder, the non-true retroactivity of tax laws is mostly found by case- law to be in accordance with the Constitution.

Thus "retrospectivity" in broad sense (i.e. as defined in the introduction to the questionnaire by the General Reporters) may have not been the object of discourse by Greek legal scholars, at least with regard to tax matters, as retrospectivity in broad sense is constitutionally permissible in the field of tax law, with minor exceptions.

(2) It appears to be the case that, although the above-mentioned distinction between the two kinds of retroactivity (i.e., retroactive effect and retrospective effect) ……

a. Does legal discourse in your country usually employ this conceptual distinction?

The legal discourse in Greece does not employ the conceptual distinction between actual retroactivity and de facto retroactivity.

Nevertheless, the issues arising in the frame of the present question definitely are of a certain historical importance for Greece. In particular, according to earlier jurisprudence of the Council of State, a relevant issue arose under the regime of total constitutional prohibition of the retroactivity of tax law which was applicable in Greece on the basis of the military junta Constitution of 1968-1974. In fact under that "constitutional" regime and with regard to income taxation of the current financial year, a law enacted in a year taxing the income produced that year was held to be unconstitutional. Therefore, under the regime of a total prohibition of the retroactivity of tax legislation, the case-law of the

Council of State had ruled that not only actual, but also de facto retroactivity was unconstitutional.
Under the current Greek Constitution in force (i.e. since 1975 and on), this conceptual distinction between actual retroactivity and de facto retroactivity is not of particular interest, given the fact that 78 par. 2 of the Constitution expressly permits both de facto and actual retroactivity, as long as the latter does not extend beyond the financial year prior to the year of enactment of the law (see below under B8 and D16). Moreover, this is provided by the Greek Constitution regardless of the kind of tax. Besides, it is the prevalent opinion in Greece that especially where income is concerned, the annual taxable base is only known by the end of the year, given the fact that the taxable base of the taxpayer's annual income is completed on the last day of the financial year.

b. If in your country the conceptual distinction is employed, please discuss, when answering the questions of section B, C, and D and question 20 of section E, whether this distinction is materially significant, e.g., whether different standards apply.

(3) A second conceptual variation concerns the so-called interpretative statutes,[1] which are statutes that stipulate the interpretation of another statute and are often applicable as from the effective entrance date of that other statute. …..

a. Does the legal system of your country explicitly have the phenomenon of 'interpretative statute'?

The Greek legal system expressly entails the phenomenon of "interpretative statute". The interpretation provided through such law is called authentic interpretation of law. Authentic interpretation is provided by the Constitution in article 77 and produces retroactive effect. In particular, in the frame of the authentic interpretation of the law, if there is a need for clarification of some law, the legislative power interprets the previous law by another law, the so-called interpretative statute.

b. If so:

i. does the retroactive effect of such a statute has a legal basis in the Constitution or the General Tax Act?

The legal foundations of the retroactive effect of interpretative statutes are to be found in the Greek Constitution. It emanates in particular from the interpretation of Article 77 par.1 of the Constitution in conjunction with par. 2. In Art. 77 par. 1 it is stipulated that "the authentic interpretation of the statutes shall rest with the legislative power", while in par. 2 of the same article (article 77) that "a statute that is not truly interpretative shall enter into force only as of its publication". The prevailing opinion in Greek case –law and theory regarding the retroactivity

[1] Victor Thuronyi, *Comparative Tax Law*, The Hague: Kluwer Law International 2003, p. 76, mentions *lois interprétatives* (France), declatory legislation (United Kingdom) and *legge di interpretazione autentica* (Italy).

of interpretative statutes is the following: In the sense of article 77 par. 1 of the Constitution, by concretising its meaning, the interpretative provision reveals the initial meaning of the provision interpreted and thus applies together with the provision interpreted, having retroactive effect. Despite the fact that it may appear to be an interpretative provision, the newer provision is not an authentic interpretation of the law that results into retroactivity, if there is no ambiguity and doubt about the provision interpreted; on the contrary, it is a pseudo-interpretative statute that will apply only for the future (ex nunc), according to art. 77 par. 2 of the Constitution.

Nevertheless, as tax statutes are concerned, the question arises whether an interpretative tax law should have the retroactivity attributed by the Constitution to all interpretative statutes or on the contrary, whether its retroactivity is limited to the time limit of one financial year of permissible retroactivity imposed by the Constitution on tax charges (article 78 par. 2, for more details see below under B8 and D16). According to the prevailing opinion in theory, the authentic interpretation of tax law should be subject to the temporal restriction of the permissible retroactivity of article 78 par. 2 of the Constitution, which applies specifically to tax charges. This view is founded on the argument that, since the Constitution prohibits the retroactivity of tax laws imposing tax charges that extends beyond the financial year preceding the year of its enactment, Art.78 par.2 entails a special provision when compared to the general provision of article 77 on interpretative statutes.

ii. is there a special term for this kind of 'retroactivity'?

There is no special term for this kind of retroactivity. There is however, as already mentioned above, a special term for this king of interpretation of the law, which is termed in the Constitution as "authentic interpretation" and the respective laws are called authentic interpretative statutes.

iii. what standards are used to determine that the 'interpretative statute' is actually 'interpretative'? Is it regarded as a problem that possibly the statute confirms the view of the tax authorities, while (some) tax payers have a defensible/justifiable different interpretative view?

With regard to the standards employed to determine that an interpretative statute is truly interpretative the following requirements must be met: 1. the statute interpreted should contain a provision of ambiguous and doubtful nature that creates uncertainty and renders its authentic interpretation by interpretative statute necessary. Usually doubts as to the meaning of a provision arise either within the administration or due to disagreements in case-law (e.g. strong minorities), 2. the interpretative statute should attribute to the provision interpreted

its real meaning and 3. it has to be voted by the Parliament in plenum (article 72 par. 1 of the Constitution), 4. the interpretative statute must be certainly of a later date than the statute interpreted, 5. even if the interpretative statute is not named as such, it should result from the stipulation of the statute that it is interpretative in nature.

If a taxpayer has a different opinion as to the interpretation that is to be given to the statute interpreted, we do not consider that there could be a problem. A problem could be posed only if the statute interpreted does not necessarily require authentic interpretation, but was in fact clear and therefore, the alleged true interpretative statute is pseudo- interpretative. In that case, the following could happen: If taxpayer is entitled to bring an action seeking annulment of the tax administration act levying a tax charge on him, taxpayer may claim in his brief that, based on the interpretative statute, the latter is not truly interpretative, as the statute interpreted was clear and did not require any authentic interpretation. Then, the taxpayer may also support their justifiable view. The court that is to rule on the action for annulment, will adjudicate incidentally based on the aforementioned standards whether it is a truly interpretative or a pseudo-interpretative statute. In the latter case, the court will rule that the law shall apply since its publication and not retroactively. At the same time, the court may attribute to the statute interpreted the meaning claimed by taxpayers. This, however, does not affect other cases, but only the case adjudicated. In any case, if other courts addressed the matter and contradictory judgements emerge, then the competent court for the resolution of the matter is the Supreme Special Court (article 100 of the Constitution).

iv. when answering the questions of sections B, C, and D and question 22 of section F, please discuss whether different standards are used for examining retroactivity of interpretative statutes (in comparison with the normal standards used to examine retroactivity).

(4) A third conceptual variation concerns the so-called validation statutes…..

a. Does your legal system recognise the phenomenon of 'validation statute' as such?

Before responding on the phenomenon of validation statutes in Greece, it should be stressed that in Greece the annulment by the legislature of a particular court judgement is constitutionally prohibited. Such practice would contravene to the constitutionally guaranteed principles of separation of powers (article 26), of the equality of citizens before the law (article 4), but also to the citizens' right to judicial protection (article 20 par. 1). Nevertheless, according to the established case-law of the Council of State, it is considered that the legislature's intervention in pending trials does not violate the constitutionally established principles of separation of powers (article 26), of the equality of citizens before the law (article 4),

nor the citizens' right to judicial protection (article 20 par. 1) under the following conditions: that no final court judgements have been issued nor that the case is pending before a court of cassation. Furthermore, the new law applied on pending cases may not directly ratify an administrative act, the legitimacy of which is pending before a court. Certainly in some cases, both in earlier case law of the Court of Auditors and in recent cases of the Council of State it is implied that generally lis pendens before court authorities and not only the finality of a judgement hinders the legislative intervention under influence of the European Court for Human Rights case-law, with regard to the observance of article 6 par. 1 sent. a ECHR on the right to a fair trial.

With regard to validation statutes in Greece, this has a special content, different than that defined in the questionnaire. The "validation statute" usually contains provisions of an unlawful administrative regulation.
Validation statutes in Greece were addressed by theory and jurisprudence with regard to their dubious constitutionality for various reasons. Academics were particularly critical. One of the reasons was the fact that validation statutes ratify retroactively a regulation of the administrative authority, usually a ministerial decree, which has been issued in violation of the Greek Constitution, because it has been issued without statutory delegation or in excess thereof (in violation of the Greek Constitution).
While in the past the case-law of the Council of State had accepted the constitutionality of such validation statutes and therefore their retroactivity, nevertheless case-law under the influence of theory made a significant turn. The now prevailing opinion in the case-law of the Council of State on validation statutes accepts that they are ineffective as to the part retroactively ratifying a legal rule; yet they apply for the future.
With particular reference to tax validation statutes it is noted that, while the case-law of the Council of State accepted until 1991 that the retroactive ratification of relevant ministerial decrees was lawful within the time limits of the constitutionally permissible retroactivity (article 78 par.2), this case-law turned around under the influence of theory. Due to the constitutional principle of formal legality of the tax (article 78 par. 1 and 4 of the Greek Constitution), according to which the object of taxation, tax rate, tax abatements and exemptions require regulation by formal statute, i.e. an act by the legislature, those substantial tax elements cannot be founded on a ministerial decree but they must be founded on the formal (validation) statute. Therefore, the relevant tax regulations cannot apply retroactively, within the time limits of the constitutionally permissible retroactivity (article 78 par.2), but only since their ratification by law. The case-law accepts the same for validation statutes of various "tax contracts", e.g. of the so-called "development contracts" signed between the Ministry of Finance and taxpayers - entrepreneurs. Contracts are signed in the frame of development efforts by the Ministry, by which certain tax privileges – incentives are granted to the counterpart (usually taxpayer- entrepreneur), in order to take on business activity in a certain field or in a particular geographical territory. Due to the principle of formal legality of tax (article 78 par.1 and 4 of the Greek Constitution), according to which the object of taxation, tax rate, tax abatements and

exemptions require regulation by formal statute, the substantial tax elements shall be founded on the formal validation statute. Therefore, the relevant tax regulations cannot apply retroactively e.g. since the time of conclusion of a tax contract, nor within the time limits of the constitutionally permissible retroactivity (article 78 par.2), but only since their ratification by law.

b. If so:

i. what standards are used to determine that the 'validation statute' really validates legal practice (and not only the unilateral view of the tax authorities)?

Validation statutes do not have such a meaning in Greece.

ii. what is the difference between a 'validation statute' and an 'interpretative statute' (if, in your country, this phenomenon is also separately recognised)?

In Greece there is no relation between validation and interpretative statutes.

iii. when answering the questions of section B, C, and D and question 22 of section F, please discuss whether different standards are used for examining/assessing? retroactivity of validation statutes (in comparison with the normal standards used to judge retroactivity).

The retroactivity of validation statutes is no longer accepted in Greece.

(5) In the Dutch legal system, the date of the entry into force of a statute should be on or after the date of publication of the statute in the Government Gazette. ….

a. Does legal discourse in your country also employ a difference between the date of entry into force of a statute and the effective date of a statute? And is the 'comparison moment' also the moment of entry into force, or is it the moment of the publication in the government's official journal?

In Greek legal theory there is a distinction between formal validity and substantive validity of a statute. The formal validity of the statute commences on the date of its publication in the Government Gazette, unless another means of publication applies that approximates to its character and the object of the regulation attempted. However, the moment of "comparison" for the determination of the statute's retroactivity is the commencement of its substantive validity. The substantive validity is diversified from the formal validity of the statute, if the latter sets a date of entry into force different from the date of its publication in the Government Gazette. The substantive validity of a statute depends also on the state institution issuing the statute.

Thus, if the legislation is issued by the legislative power, then it is called "formal statute" and its substantive effect according to the case-law of the Council of State commences ten days after its publication in the Government Gazette (article 103 of the Law introducing the Civil Code),

unless otherwise stipulated in the formal statute. In other words, the statute itself may set the date of its entry into force at a time posterior or anterior to its date of publication in the Government Gazette. Nevertheless, as far as the possibility of retroactivity of tax laws is concerned, it is limited to the previous financial year of the year of publication, according to article 78 par. 2 of the Greek Constitution (for more detail, see below, especially under A7 and B8). Any legislative provision to the contrary is unconstitutional. Moreover, the provision of retroactivity in tax fines is avoided, given their penal nature and the constitutional prohibition of retroactivity in criminal laws.

If the statute is issued by the executive power (always based on statutory delegation), then it is called "regulatory administrative act" (e.g. ministerial decree or presidential decree containing legal rules) and its substantial validity is differentiated. It commences on the date of publication in the Government Gazette (or in any other conducive means), unless the regulatory administrative act determines a time subsequent to its publication. Such a statute may be retroactive only if the formal law containing the statutory delegation provided expressly for retroactivity of the regulatory administrative act. Furthermore, if the content of this regulatory administrative act (based on statutory delegation) is tax matter, any retroactivity is limited by article 78 par. 2 of the Greek Constitution. In fact, if it is a tax fine, any retroactivity may be excluded.

Nevertheless, it may be the case that the date of the Government Gazette, in which the said statute was promulgated, may not coincide with the date of the Government Gazette's actual circulation, i.e. the date of its availability to the public. Thus, the date of actual circulation may be posterior to the date of publication, in which case, according to the case-law of the Council of State, the 60-day time limit for filing an action for annulment commences on the day following the public availability of the Government Gazette issue.

(6) Although, in Dutch legal discourse, material retroactivity ('retrospectivity') is distinguished from formal retroactivity, there is not one definition of material retroactivity that is generally accepted and used. ……..

a. How is the concept of retrospectivity defined in your country?

As already mentioned above (under 1 a, b) the issue has not been addressed by tax law theory in Greece. The scientific discussion in Greece refers to topics of true or non-true retroactivity of statutes, which are already discussed above under 1a and b. Regarding in particular the non-true retroactivity of tax statutes, it has already been mentioned that it has some points in common with the concept of retroactivity in this questionnaire. Moreover, as already noted, the issue is not of so much interest in Greece, in as much as the legislature may even levy taxes even with true retroactivity, even though in the restrictive time limits of article 78 par. 2 of the Constitution. Therefore, cases that would fall under retrospectivity in broad sense, as meant by the present questionnaire, are constitutionally permissible in Greece, with some exceptions which will be addressed right below under subquestions A6b, A 7 and C13.

Consequently, tax law theory and especially case-law have addressed cases that are retroactive or not in the sense of article 78 par. 2 and if these cases are constitutional or not, while there is no mention of the concept of retrospectivity.

b. Please provide some examples of situations that would be regarded as retrospective and – if possible – some examples of situations that would not be regarded as retrospective.

As already presented, the theoretical distinction between retrospectivity and retroactivity has not really been addressed by tax law theory in Greece.

An ambiguous case is that of the legislature intervening in a pending trial. Thus, the application of a new tax statute of substantive law to a pending trial is not characterised in case-law as retrospectivity, but as retroactivity (see below under A7 and C13). However, the theory of tax law accepts this case as one of non-true retroactivity.

Moreover, in our opinion, the following practice could be a case of retrospectivity: The practice of the Greek tax legislature to extend the statute limitations for the State's fiscal claims before it expires has been repeatedly held by the case-law of the Council of State to be constitutional. According to this case-law, as long as the extension of the statute of limitations is granted before its expiry, then this law is not retroactive and it is constitutional. On the contrary if the statute of limitations expires and its extension is then provided for in a new statute, then this is a case of retroactive levying of tax (see below under D 19).

(7) With respect to the impact of a statute having 'immediate effect', a distinction is usually made between substantive statutes and procedural statutes. …..

a. Is this distinction (with respect to the impact of a statute having immediate effect) between substantive statutes and procedural statutes also made in your country?

The application in time of a tax statute in Greece is determined up to a certain extent from whether the tax statute is a substantive one or on the contrary, if it is a procedural statute referring to court competence and procedure to be observed before courts (in tax cases). However, with regard to the distinction between a tax statute of substantive law and a tax statute of procedural law, i.e. of a statute referring to competence and procedure to be observed before tax authorities, this distinction is not that determinative as eventually in the case-law of the ECJ, but there are also other significant parameters for the temporal application of such laws. In spite of theoretical views that support the ratione temporis importance of this latter distinction, the relevant case-law of the Council of State always rules on a case-by case basis, taking into account various parameters. Before referring to the application in time of procedural provisions in tax statutes (that refer to the procedure before tax authorities), reference will be made to the application in time of procedural statutes referring to competence and procedure before courts on the one hand and on the other hand, of tax statutes containing substantive law.

It is safe to say that the following applies:

In principle, new procedural statutes apply in pending trials, unless there is an express provision to the contrary in the procedural law. In particular, the case-law of the Council of State has ruled that, according to the general principle of the law of procedure, newer provisions on court competence and procedure apply also on pending trials, unless there is a provision to the contrary in the statute. In fact, case-law seems to be definitely invoking this principle in cases where the newer procedural statute enhances the protection of citizens. In any case, case-law rules on a case- by-case basis. Especially it should be noted that, when procedural law applies to fiscal cases, its retroactivity does not to be limited in time, on the basis of article 78 par. 2 that refers to tax statutes in general, but an eventual unconstitutionality of the legislature's intervention into a pending trial is controlled by the case-law of the Council of State, but only on the basis of other constitutional principles, such as that of article 20 on the citizens' rights to judicial protection and of article 6 ECHR on a right to a fair trial. For example, the express abolition by law of the appellate instance through the establishment of general and objective criteria (e.g.in all pending appeals that have not been heard) was considered to be constitutional. In particular, it was a legislative restriction of the grounds for appeal in fiscal cases, leading to an express termination of trials pending before the Administrative Court of Appeals, for cases not yet heard. It was held in this matter that the appeal is not an established procedural right of the claimant and that such a statute (establishing a retroactive restriction of the grounds for appeal and therefore an abolition of pending appeals not yet heard) is constitutional and does not contravene article 6 par. 1 ECHR.

New tax statutes of substantive law apply ex nunc, i.e. they apply on events giving rise to tax levying that are subsequent to the entry into force of the law. However, the application of tax statutes of substantive law (e.g. of laws regulating the tax subjects and objects, tax rates etc.) is also retroactively permitted on to taxable events that precede the year of publication of the new statute, even in pending trials. Understandably, in both cases this has to be expressly provided, and in any case, this retroactivity is limited in time by article 78 par. 2 of the Greek Constitution. Therefore, the retroactivity of the relevant law may not extend beyond the financial year preceding the publication year of the tax statute (for the exact meaning of the constitutional retroactivity of tax laws, see in detail below, under B8 and D16). The same applies for regulatory administrative acts that refer to tax matters of substantive law. In the latter case, their retroactivity is certainly allowed only if the statute of delegation, which the relevant administrative acts were based on, expressly provides for their retroactivity (see above, under A6).

A particular case pose tax statutes that provides for matters of criminal nature, such as the imposition of tax fines due to tax violations; in this case the following applies:

If the new statute is milder than the preceding legal regime, then this milder statute applies also on pending trials, unless it excludes such retroactivity. The same is acknowledged by the case-law of the Council of State also in cases that a tax statute provides, instead of a tax fine, additional taxes (for the non-submission or belated submission of tax declarations) or any other surcharges, due to violation of tax obligations.

Nevertheless, the retroactivity of such tax statutes has the following particularities: 1.It is absolutely prohibited with regard to tax fines, when these are unfavourable for the perpetrator of tax violations, given the fact that they demonstrate criminal features, 2. Regarding additional taxes and surcharges, their retroactivity is permissible, even when they are unfavourable in comparison with the previous regime, and also apply to pending trials, as long as there is an express legislative provision. Yet, this retroactivity is restricted within the time limits of art. 78 par. 2 of the Greek Constitution and the retroactivity of the relevant law may not extend beyond the financial year preceding the publication year of the tax statute.
Finally, with regard to "procedural" provisions (i.e. those concerning the tax authority competence and those concerning procedure before tax authotities), it is not always clear which they are. Moreover, it appears that a view is expressed in theory, according to which the time limitation in retroactivity of article 78 par. 2 of the Greek Constitution does not apply to them.
Nevertheless, case-law is probably different on a case-by-case basis when it comes to their application in time. Thus, there is relevant case-law of the Council of State, stipulating that they apply to acts taking place during their effect and not retroactively on previous acts. In fact, even though retroactivity was expressly provided for in the statute, which contained – among others- the conditions for the submission to the customs office of an application for exemption from duties for destruction of goods coming from the inward-processing procedure, the Council of State did not apply the relevant procedural provisions on the acts preceding the publication date of the statute. In the grounds of the relevant adjudication it was included that it is not possible to overturn all those created earlier under the regime of a different legal framework.
Yet at the same time, the Council of State held that in a case of inheritance tax, the reference date for assessing which is the locally competent tax authority to issue the demand for payment of the inheritance tax was on the time of death of the deceased and not the time of issue of the act (which took place many years after the death of the deceased).
Moreover, for the application of procedural provisions ratione temporis, it is taken into account by the Council of State whether through the retroactive application of a procedural provision leads to the imposition of e.g. a tax fine. In that case, the application of the provisional procedure may be held as unconstitutional.

b. If so, what kind of tax rules are considered procedural rules (e.g., also rules regarding evidence and the burden of proof)?

Procedural rules are to be distinguished between those applied in administrative procedure (before administrative courts) and those that govern the administrative – tax procedure (before the tax authorities).

Both categories involve issues of competence and procedure. Regarding the rules of evidence and the burden of proof, it appears that no views have been expressed in theory on whether they constitute procedural rules.
It should be noted however that the Council of State has held that the holding the evidence procedure before the administrative courts is a

procedural act in the sense of article 178 of the Code of Administrative Court Procedure). In that sense, the invocation and submission of evidence was considered to be a procedural act. Nevertheless, this characterization does not have a definitive impact on the application of the relevant statutes in time; the reason for that is that the application of the particular statutes in time depends also on the general legislative and constitutional framework.

Regarding procedural rules applicable before tax authorities there is for example case law by the Council of State referring to the conditions for submission to the customs office of an application for exemption from duties for destruction of goods coming from the inward-processing procedure (see in more detail under A7a).

NB

(i)If relevant, please state two differences in the use of the concepts in fiscal literature, case law, and parliamentary history;

(ii) If in your country the meaning of or the application of concepts differs depending on the nature of the tax concerned (e.g., (corporate) income tax, VAT, withholding tax, etc), please discuss.

B. Ex ante evaluation of retroactivity

(8) In some countries, the Constitution imposes limitations to retroactivity of tax statutes. There seem to be three variants: …..

a. Does your Constitution include a provision that imposes limitations to retroactivity of tax statutes? If so, what variant(s)?

In Greece there is no general prohibition of retroactivity of tax statutes, but there are restrictions to this retroactivity. These restrictions are expressly laid down in a constitutional provision that refers exclusively to tax matters. According to the 1975 Constitution of Greece (article 78 par. 2), a temporal restriction is imposed to the retroactivity of tax statutes in so far as tax charges are levied herewith (levying of tax charges includes the retroactive abolition of a tax exemption). This implies that there is no constitutional temporal restriction on tax abatements. Still any tax abatement, and especially if imposed retroactively, should not violate the constitutionally established principle of equal treatment in the area of taxation (article 4 par. 5); otherwise it is unconstitutional on those grounds. As far as tax fines are concerned, they do not possess any retroactive effect, given their penal nature and the constitutional prohibition of retroactivity of more unfavourable penal statutes (article 7 par. 1).

With regard to the constitutional provision on the non-retroactivity of tax statutes, it appears that there is a prohibition of the unlimited temporal retroactivity of tax statutes, in so far as it contains tax charges. However, according to the same article of the Greek Constitution, the introduction of tax statute (including not only the enactment, but also the amendment of a tax provision), is permitted the retroactivity of which extends to the fiscal year preceding its year of publication.

In fact such retroactivity is acknowledged by the Greek Constitution regardless of the kind of tax. Nevertheless, the retroactive levying of consumption tax should be avoided, as it is a tax that is passed over to

consumers, as well as because VAT as a community tax is governed by the principles of community law, such as for example the community principle of the protection of citizen's legitimate expectations against the State, which according to ECJ case-law, is in certain occasions violated by tax provisions with retroactive effect.

However, in Greek parliamentary history the particular temporal restriction of permissible retroactivity until the fiscal year preceding the year of the tax statute's publication did not apply all along. Thus, due to the lack of the relevant prohibition in previous Greek Constitutions, including the 1952 Constitution that was in force until the current 1975 Constitution in force, retroactivity of tax statutes was permissible, as long as there was an express legislative provision. In particular, the case-law of the Council of State acknowledged on the one hand that retroactive tax charges are contraindicated by the rules of fiscal science; however, in serious instances taxation may be levied retroactively. This was the position of both the Council of State and of the Supreme Court (Arios Pagos); the latter in its plenary judgement 69/1963 placed upon this power of the legislative the restriction of the reasonable time. According to the above judgement, retroactivity was not to exceed a "reasonable period of time", which was in the discretion of the courts. This particular judgement ruled that the "reasonable period of time" extended to one year, and founded this restriction of the reasonable time on the need of establishment of citizens' confidence in the State. The Council of State had ruled similarly at the time.

Finally, according to the current Constitution in force, it should be reminded that, while the retroactivity of authentic interpretative laws is provided for (article 77 par.2), i.e. that they apply in parallel with the statute interpreted, according to the prevailing opinion in theory, the temporal restriction of retroactivity in article 78 par.2 applies especially in interpretative tax statutes, except for cases of tax abatements, where the authentic interpretative applies retroactively since the commencement of the effect of the statute interpreted.

(9) The Dutch State Secretary of Finance has published (and discussed with Parliament) a memorandum that incorporates the main lines of his 'transition policy' …….

a. Does the government of your country have a transition policy in general and/or in the field of tax statutes, and if so has the policy been published?

There is no such transition policy in Greece

b. If so, in what form has this been done, e.g., in a kind of memorandum or an Act? To what extent is this policy legally binding, e.g., has it only influence in the parliamentary debate or do also judges take the policy into account if they test transition law for compatibility?

There is no such transition policy in Greece

c. If a transition policy in the field of tax statutes has been published, what are the policy guidelines with respect to (i) granting retroactive effect to statutes and (ii) grandfathering?

There is no such transition policy in Greece

d. Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to tax payers?

There is no such transition policy in Greece

(10) In the Netherlands, the Council of State provides advice to the government and Parliament with respect to legislative proposals. …..

a. Does an institution like a Council of State (Conseil d'État) exist in your country? NB It might be that in your country instead of, or in addition to, the Council of State, another institution (e.g., the Supreme Court) could be asked for advice. If so, please answer the following questions (also) for that other institution.

In Greece both the Council of State and the Court of Auditors possess consultative competence; the former in the previous processing of presidential decrees and the latter on pension law bills. Nevertheless, the contemporary role of the Council of State in tax matters at hand does not appear to be significant. It should be taken into account that, according to the Greek Constitution, only non-substantial elements of tax can be regulated by presidential decree, i.e. matters that do not involve tax subjects or objects, tax rates and tax exemptions. Thus, there is no consultative competence of the Council of State, in. substantial tax elements.

b. If so, does it follow certain rules to review proposed retroactivity in tax statutes?

No

c. And does it follow certain rules to review whether or not grandfathering is necessary?

No

d. Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to tax payers?

No

C. Use of retroactivity in legislative practice

(11) In the Netherlands, the legislator occasionally makes use of the so-called instrument of 'legislating by press release'…..

a. Is this instrument used in your country?

b. If so, in what kind of cases? E.g., only in cases of anti-abuse legislation or also in cases of a policy change and if the government wants to prevent so-called announcement effects?

No such instrument applies in Greece.

(12) Sometimes the Dutch tax legislator grants retroactive effect to tax statutes reaching further back in time from the moment of the first announcement (e.g., by press release) of the bill in question.

a. Does your legislator grant retroactive effect in cases in which the instrument of 'legislating by press release' is not used? If so, in what kind of cases?

b. And does it happen that the retroactive period reaches further back in the past than the date of the press release? If so, in what kind of cases?

Regarding the possibility of retroactivity, please refer to the analysis above. Press releases do not play any role in Greece.

(13) If the retroactive period is long, it could happen that pending legal proceedings are influenced.

a. Does it happen in your country that retroactive effect is granted to substantive statutes as a result of which also pending legal proceedings are influenced?

The period of retroactivity of tax statutes of substantive law cannot be particularly lengthy in Greece, due to article 78 par. 2 of the Constitution (See above under A7 and B8). Pending trials may be affected only if so provided by the relevant statute of substantive law and, in any case, within, the limited time frame of article 78 par. 2 of the Greek Constitution. Otherwise, the relevant tax statute is unconstitutional and should not be applied by the administration and courts. Certainly, if the tax statute does not contain purely tax provisions, e.g. provisions involving the imposition or modification of a tax rate, tax subjects, objects, tax exemptions etc. but contains provisions for the imposition of tax fines or surcharges or additional taxes, i.e. provisions of a punitive nature, then the following applies:

With reference to the provisions imposing a tax fine, additional tax etc. (see in detail above under A7a), the case-law of the Council of State accepts that a presumption of retroactive effect of the new more lenient statute applies to pending cases, unless this new law expressly excludes it. If this new statute is unfavourable for the perpetrator of tax violations, then in case of tax fines, the law does not apply on to the pending case, as it contravenes the Constitution. In case of additional taxes, even if this new regulation is unfavourable, it can be applied to pending cases as well, if this new law expressly stipulates, but this retroactivity cannot exceed the restricted time limits of article 78 par. 2 of Greek Constitution.

According to case-law, authentic interpretations of tax statutes cover all matters were not finally (unappealably) adjudicated.

b. Or is it common that pending legal proceedings are excluded from the application of the new statute?

No such statistics have come to my attention.

(14) In the Netherlands the legislator sometimes grants retroactive effect to tax statutes that are favourable to tax payers.

a. If that also happens in your country, in what kind of situations does it happen?

It does not happen frequently in Greece.

D. Ex post evaluation of retroactivity (in case law)

Introduction.

Courts may or may not test Acts of Parliament against the national Constitution. In Dutch law, the courts are not allowed to test Acts of Parliament for compatibility with the Constitution nor with general legal principles, because of a constitutional prohibition to do so. The courts are however permitted to test Acts of Parliament for compatibility with international treaties: as far as such an Act infringes a treaty provision that has direct effect, the courts must not apply the Act. Furthermore, the courts are allowed to examine subordinate legislation (i.e. not Acts of Parliament) for compatibility with legal principles.

With respect to the possibilities of a Dutch court to review retroactivity of tax regulations, the above implies that:

(i) the retroactivity of an Act of Parliament on a tax matter cannot be tested against the principle of legal certainty (nor against the principle of legality);

(ii) however, if an Act of Parliament on a tax matter falls within the scope of European Community law, the retroactivity of such an Act can be tested against the general principles of European Community law, viz., the protection of legitimate expectations and legal certainty;

(iii) the retroactivity of an Act of Parliament on a tax matter can also be tested against Article 1 of the First Protocol ('protection of property') to the European Convention on Human Rights (ECHR),[2] although the Dutch Supreme Court has – up till now – never found retroactivity incompatible with that provision;

(iv) the retroactivity of subordinate legislation can be tested against the principle of legal certainty.

(15) Is it possible in the legal system of your country that courts test the retroactivity of a tax statute for compatibility with the Constitution and/or with general legal principles such as the principle of legal certainty (including the principle of legitimate expectations)?

Yes, it is. In Greece courts review the retroactivity of a tax statute for its eventual unconstitutionality, but also for the violation of general principles of the law, especially if the latter are considered to be constitutionally established.

In detail, regarding the review of the retroactivity of a tax law based on the Greek Constitution, it appears that: Due to the existence of article 78 παρ. 2, that determines in particular when the retroactivity of a tax statute is prohibited, the constitutionality review of a tax statute is in general performed by case-law on the basis of that article (on the content of this article, see above B8). However, at the same time, if it is a case of retroactivity of tax abatement, which is not hindered by article 78 par. 2, the retroactivity of this tax exemption may be held to be unconstitutional on the basis of article 4 par. 5 (of the Constitution) on equality in tax matters, if the conditions imposed by the principle of equal treatment are not

[2] E.g., compare the examination of the retroactive effect of a Finnish tax statute for compatibility with Article 1 of the First Protocol ECHR in the case of *M.A. and 34 Others against Finland* (Application no. 27793/95 (decision); see the HUDOC database under 'case law' at <http://www.echr.coe.int/>).

met. With regard to tax fines, article 7 par. 1 of the Constitution on the prohibition of retroactivity of unfavourable penal provisions is intimately taken into account by the recent case-law of the Council of State. Even the tax legislator respects this prohibition and does not grant retroactive effect to tax fines. Furthermore, the retroactivity of interpretative statutes is reviewed by the case-law of the Council of State, based on article 77 par. 2 of the Constitution that prohibits the retroactivity of pseudo-interpretative statutes. (see above under A3, B8,C13).

With regard to the principles of legal certainty and of legitimate expectations, it appears that in the recent years the Council of State reviewed a retroactive tax statute with regard to the rule of law and the individual constitutional principles of legal certainty and of legitimate expectations that derive from it. It is established nevertheless, that in the recent cases before the Council of State- where the court had the opportunity to rule in a relevant matter, taking into account that the principle of legitimate expectations is more frequently invoked by the claimant- the court, when adjudicating on the potential incompatibility of the tax law with the said principle, it usually rules that there is no such incompatibility.

Furthermore, when there is a case of a tax statute that involves a matter of community law, such as e.g. VAT as a community tax, then the principles of community law, such as the community law principle of protected legitimate expectations of the citizens against the State are taken into account.

With regard to procedural provisions applied in pending tax trials, the case-law of the Council of State reviews this retroactivity not in relation to article 78 par. 2 of the Constitution, but in relation to the constitutional principle of equality (article 4) and the citizens' constitutional right to judicial protection (article 20 par.1). These matters are certainly taken into account in general by the Council of State, when adjudicating on legislative provisions, even of substantive law, that apply on pending trials. Finally, the application of a statute on pending trials may not violate the constitutionally established principle of separation of powers (article 26) (for more details, see above under A4, A7 and C13).

In any case, beyond the issue of judicial review of the retroactivity of a tax statute (as already presented), another issue is important to the Greek legal order: the judicial review of the retroactive charging of tax by the tax administration against a certain taxpayer, who however had been exempted in the past by the tax administration itself, due to erroneous interpretation of the tax legislation. While it is in principle accepted that the Greek tax administration may retroactively charge taxes, in case it is ascertained that some taxpayers were tax exempt due erroneous interpretation of the tax statute, there is a bar to it: the principles of sound administration (general principle of law that is not constitutionally established). Thus the relevant case-law of the Council of State accepted that the principle of sound administration hinders retroactive charging and consequently, the retroactive collection of the respective tax, only under particularly strict (special) conditions. It should be noted that a recent case before the Council of State reviewed in relation to the community principle of legitimate expectations, the permissibility or impermissibility of the retroactive charging of VAT (against a taxpayer) on the side of the administration, while the taxpayer had been exempted by the tax administration for that period due to erroneous interpretation of the tax statute.

(16) If, in your country, courts can test the retroactivity of a tax statute against the Constitution and/or with general legal principles, what examination method do courts apply? In other words: when would courts rule retroactivity incompatible?

It should be initially clarified that in Greece the review of unconstitutionality of statutes is performed by any court, but only incidentally, i.e. on the occasion of hearing the claim. In other words, citizens cannot file directly against an unconstitutional statute, requesting the recognition of its unconstitutionality. The incidental judicial review of the unconstitutionality of statutes is performed as follows: citizens vested with a legal interest file an action against the act issued in application of the law and, on the occasion of the hearing of the case, there is either an invocation of unconstitutionality of the statute on which the act is based on, or the court may on its own motion review the constitutionality of the statute. If a statute is found to be unconstitutional by the said court, then the judge does not apply it in the particular case, but this ruling does not have an erga omnes effect. Thus, this statute is not abolished, but also another court can rule on the occasion of another case that the same statute is constitutional. If a legislative provision is found by the Special Supreme Court to be unconstitutional, which is an extraordinary procedure (article 100 of the Constitution), only then can this adjudication have an erga omnes effect.
Furthermore, regarding the method of reviewing the unconstitutionality of statutes by courts, it should be mentioned that in Greece, judges interpret the law according to the Constitution. This means that if a statute by its stipulation allows room for more interpretations, then the judge selects the interpretation that is compliant with the Constitution. In this procedure, the methods of legal interpretation that judges are allowed to use are always taken into account. After following the legal methods of interpretation , a law is found to be unconstitutional, only if there can be no interpretation, that is compliant with the Constitution.

Regarding the review of unconstitutionality of tax statutes, it appears that their interpretation according to the Constitution may only result from the application of the narrow interpretation of tax provisions. It should be noted that the case-law of the Council of State applies in principle the narrow interpretation of tax provisions, due to the constitutionally established principle of the formal legality of tax (article 78 par. 1 and 4 of the Constitution). Therefore, the incongruence of the retroactivity of a tax statute to the Constitution and to the constitutionally established general principles of the law may also result from the narrow interpretation of tax statutes, only if within this framework its interpretation according to the Constitution is not possible.

At the same time, especially with regard to ascertaining the incongruence of the retroactivity of the tax statute of substantive law to the Constitution, courts review the unfavourability of the new retroactive tax statute. The temporally unlimited retroactivity of the unfavourable tax law is prohibited, according to article 78 par. 2 of the Constitution.
At this point, it is worth referring to the interpretation given by the Council of State on the occasion of hearing tax cases with regard to the temporal restriction of constitutionally permissible retroactivity under article 78 par. 2. The Court has ruled in respect of the fact that the tax statute imposing the tax may not have retroactive effect extending beyond the fiscal year preceding the year of its publication, that: the fiscal year preceding the publication year of the relevant tax statute was found to be the fiscal year, during which the tax object was acquired, and not the fiscal year

during which the tax object is subjected to taxation, according to the relevant provisions. Therefore, if, for example, the law imposing income tax is published in 2010, the retroactive taxation of income created in 2008 is prohibited (despite the fact that the tax declaration for this income is submitted in 2009), but income created in 2009 may be taxed. It was also held (in a case of purchase of immovable property) that the relevant tax imposed on the transfer of property imposed by a statute with retroactive effect may not extend beyond the fiscal year preceding the year of publication of the statute, where the preceding year is considered to be the year in which the taxable legal relation came about. Recently, the Council of State ruled in plenum that the legislative provision published in 1998 (article 8 of Law 2579/1998), according to which tax-exempt reserves formed before 1.1.1997 are retroactively taxed, is also unconstitutional due to non-permissible retroactivity.

As to the unfavourability of the retroactive tax statute, this results on the one hand from the comparison between the new tax regime that is retroactively enacted and the previous regime. Thus, the retroactive abolition or limitation of an existing favourable tax regime, the favourable deprivation of the right to select a special tax regime, the retroactive limitation of tax exempt expenses etc. were all found to be unconstitutional. Especially in pending cases, judges will compare the new retroactive statute and the previous one to ascertain whether the new statute and until when it may be applied (on this matter, see above under A7a and C13).

However, the comparison between the previous and the retroactive tax statute is not always determinative. In the same recent case of the plenum of the Council of State involving reserves, it was found that this new provision that retroactively imposed income tax on the reserves of these companies is unfavourable, irrespective of the fact that new, lower (than those applicable at the time) tax rates were enacted herewith. But in that case, the fact was also taken into account , that the new tax statute levied for the first time retroactive taxation on reserves that were temporarily exempt, because they had not been distributed or capitalized. In particular, it was held that this new provision constitutes a retroactive onerous change of the tax regime of these companies, because income tax is levied directly and compulsorily on a tax base that during its formation and the publication of the above statute was tax free, and its taxation depended on future facts that were related to the will of these companies.

With regard to the enactment of a retroactive tax abatement, this is initially accepted without limitations, as long as it does not violate the constitutional principle of equal treatment in tax matters (article 4 par. 5 of the Constitution). According to this principle there has to be equal tax treatment of similar situations and unequal tax treatment of unequal situations, while tax allowances do not breach this principle, if justified by reasons of public interest.

Furthermore, the practice of the Greek tax legislature to extend the statute of limitations for the State's fiscal claims before it expires has been repeatedly held by the case-law of the Council of State to be constitutional. According to this case-law, as long as the extension of the statute of limitations is granted before its expiry, then this law is not retroactive and it is constitutional. On the contrary, if the statute of limitations expires and its extension is then provided for in a new statute, then this is a case of retroactive levying of tax.

The incongruence of a tax statute is also reviewed in relation to community law. Thus, the retroactive levying of consumption tax should be completely avoided, as it is a tax that is passed over to consumers, as well as because VAT as a community tax is governed by the principles of community law, such as for example the community principle of the protection of citizen's legitimate expectations against the State, which

according to ECJ case-law, is in certain occasions violated by tax provisions with retroactive effect. Taking into account the ECJ case-law on prohibited state aids, the Council of State held that article 78 par. 2 of the Constitution is not violated in the following case: when a statute is enacted aiming at the retroactive levying of taxes beyond the permissible limits of article 78 par. 2 on a certain category of companies that had been unlawfully exempted in the past, given the fact that this tax exemption was found by the ECJ to be a prohibited state aid. In spite of the fact that this quest for taxes was founded on a retroactive abolition of tax exemption, just because the granting of the tax exemption was found to be in breach of community law, and as a result unlawful, the Council of State ruled that the particular retroactive tax was not in violation of article 78 par. 2 of the Constitution. It was essentially considered that the state was to collect taxes that had unlawfully not been collected.

(17) Do the courts in your country test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR? If so, have the courts ever found a tax statute containing retroactivity incompatible with Article 1 of the First Protocol ECHR?

In certain cases, the Council of State has reviewed tax provisions in relation to article 1 of the First Additional Protocol, particularly with regard to tax sanctions due to tax violations, but not with regard to retroactivity. In fact, the Council of State has not ruled to date on a violation of the said article.

(18) If the courts in your country test retroactivity of Acts of Parliament and/or subordinate legislation against the principle of legal certainty, what examination method do the courts apply?

In the framework of the review of unconstitutionality of laws (see above under D 16), and of the eventual violation of community law by a formal statute or a regulatory administrative act, courts are in a position to review whether the retroactivity of a statute breaches the principle of legal certainty and in particular the principle of legitimate expectations.
In particular, in case of tax statutes, whether these are parliamentary statutes or secondary legislation, the Council of State has occasionally reviewed their retroactivity in relation to the principle of legitimate expectations, without however accepting that there is a violation of the principle. The long-term preservation of a tax regime that is favourable to a specific group of persons does not constitute any obstacle to its modification. In fact reference to that was made in a certain case, not only to the principle of legitimate expectations, but also to the principle of legal certainty, without ruling in the end that either of the two principles was breached.
However, it is interesting to present as part of the recent Greek case-law the case in which the Council of State reviewed, not the retroactivity of the tax legislation, but the retroactive charging of tax by the fiscal administration in relation to the principle of legitimate expectations. More precisely, it was a case where the tax administration retroactively charged VAT to the expense of a company that had not been charged with VAT until then, due to erroneous interpretation and application of the law on the side of the administration. In this case, the Council of State accepted that the tax administration is obliged during the application of

VAT as a community tax to observe the community principle of the citizens' legitimate expectations against the state. In fact, the Council of State determined in this judgment the conditions that need to be met according to the case-law of the ECJ for the application of the principle of legitimate expectations. In particular, the Council of State ruled that there has to be good faith on the side of the tax payer with regards to the tax exemption, so that the taxpayer a) could not recognise the inaccuracy of the information provided by the national tax authority and b) the administrative act, by which information was granted to him with regard to the tax was by itself conducive of good faith on the side of the tax payer regarding the tax exemption of his act. Nevertheless, the Council of State did not rule on the violation of the principle in this case, but remanded the case for adjudication to the Administrative Court of Appeals.

(19) Do courts in your country use interpretations that avoid what might be retroactive applications, because such applications might raise further questions about legitimacy and validity?

Courts in Greece interpret statutes in compliance with the Constitution and, in this framework, if they have the possibility, they will select the interpretation which will lead to the avoidance of the retroactive effect of a statute, especially if the retroactive application of a statute raises constitutionality issues. An indicative case for this is that of the Council of State 1508/2002, in which the court ruled on the constitutionality of a provision that was in effect from 12.9.1997 and extended the statute of limitations for uncontested debts at tax offices (towards the State and third parties), which were to prescribed in the years 1997 and 1998. The provision was found to be constitutional, as the Council of State accepted that this provision implies that it does not cover all debts of 1997, but only these whose statute of limitations had not expired at the time of publication of this law (thus, the debts whose statute of limitations expired from 12.9.1997 onwards).

(20) If courts in your country do not recognise limits on the use of retroactivity, is there a reason, e.g., the legislator is regarded to be sufficiently self-disciplined?

NB regarding questions 15-20: (i) please discuss justifications that are accepted by the courts in your country for granting retroactive effect by the tax legislator, and (ii) if there are examples of cases in which the judge had found retroactivity incompatible, please discuss these cases briefly.

E. Retroactivity of case law

Introduction

The question of retroactivity of tax law not only arises with respect to the introduction of tax statutes, but also with respect to case law when a judgment has an erga omnes effect. …..

(21) If the Supreme Court of your country abandons existing case law and formulates a new (general) rule, does the Supreme Court provide in a

kind of transition rule to limit the retroactive effect of its judgment (e.g., prospective overruling)? If so, does the Supreme Court only provide such a rule if the new rule is unfavourable to tax payers, or also if the new rule is favourable to tax payers (and thus unfavourable to the government)? If the latter is the case, does the Supreme Court make an exception for the tax payer concerned in the legal proceedings before the court? NB If there are peculiarities[3] in the tax system of your country that are relevant for understanding the way the Supreme Court rules in this respect, please state these peculiarities.

In Greece no court judgements on tax matters produce erga omnes effects. The court judgement is only binding on the two litigants, i.e. the Tax Administratioin and the particular tax payer. Only if the constitutionality of a legislative provision is challenged, usually after contradictory judgements have been issued by the Greek Supreme Courts (e.g. Council of State and Supreme Court), then the case is submitted for adjudication before the Special Supreme Court (SSC) and the ruling of the SSC on the constitutionality or unconstitutionality of the particular legislative provision is binding on everybody. Again even in that case, the present question (21) is not relevant for Greece.

F. Views in literature

22. **Is there a general opinion in the fiscal literature of your country regarding retroactivity of tax statutes? Is there, for example, consensus with respect to the type of cases (e.g. anti-abuse legislation, legislation to abandon gaps in tax law, policy changes, etc.) in which it is considered justified (or the other way around: in which it is in any case considered not justified) to grant retroactive effect to tax statutes?**

In Greece, the prevailing opinion about retroactivity of tax statutes is so far that the Constitution by article 78 paragraph 2 expresses the public sense of justice. Thus it is accepted that there is no reason to reform the aforementioned article and, on the contrary, there is a duty to protect it.

In particular there is a general consensus on the time limits imposed by the Constitution in reference to retroactive tax charges (regardless of the type of case). According to the express constitutional provision of article 78 par. 2, a tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax. As presented below in the frame of the next question (question 23a), when the Constitution of 1975 was enacted in Greece, this case of retroactive imposition of taxes was considered correct and therefore acceptable, by reason of preserving thereby the principle of democracy. In

[3] For example, if the Dutch Supreme Court changes its interpretation of a certain statute in favour of the tax payers, the retroactive effect of that judgment is *de facto* limited because previously paid tax on a tax assessment will not be refunded, unless an appeal against the tax assessment has been made in time (i.e., within 6 weeks after the date of the assessment). It might be, however, that the tax system of another country is different, for example, in the sense that, in the situation described, a refund should be made by the tax authorities if it is clear that tax has been paid unnecessarily (according to the new interpretation). Since the financial consequences for the government of a change of interpretation might be great, this might be a reason for the Supreme Court for 'prospective overruling'.

particular, it was accepted that this permissible retroactivity of tax legislation makes it feasible for a newly-elected government to apply immediately the fiscal policy it was elected for and therefore, be able to exercise its economic policy in its entirety. There is thus the capability in present fiscal years to raise budget revenues through taxes that will be levied on income and financial transactions of the present as well as of the previous fiscal year. It should be noted that as far as allowances are considered, retroactivity is allowed in all cases, a practice condoned by jurists, politicians and the public opinion.

As a result, only the retroactive imposition of taxes extending beyond the fiscal year preceding the imposition of the tax is constitutionally prohibited in Greece. Even in cases of anti-abuse legislation, legislation to abandon gaps in tax law, policy changes etc., all solutions proposed by the political leadership, by jurists and economists do not deviate in matters of retroactivity from the above constitutional framework.

23. **In the Netherlands, the law and economics view has so far provoked very little debate in fiscal literature and has not been invoked explicitly by the tax legislator or the Dutch State Secretary of Finance during parliamentary debate.**

a. **Has the law and economics view on transition tax law, or other non-traditional legal views, provoked a debate in your country?**

In Greece, the opinion of the economic analysis of law and generally of law and economics on transition tax law has not given rise to discussion in scientific bibliography. Moreover, it is not a view invoked by politicians and finally it hasn't been reviewed by case law. The above is the result of a series of factors presented in detail further below and which can be briefly described as: i) the limited influence of Law and Economics in Greece, ii) the constitutional provision that allows, under certain conditions, a limited retroactivity of tax legislation and iii) the fact that transition tax policy has not been introduced in Greece.

i) The Influence of Law and Economics in Greece.[4]

In 1999, assistant professor Aristides N. Hatzis stated the following[5]: "Economic analysis of law (EAL) is at a nascent level in Greece. It is virtually unknown to the great majority of lawyers and economists (including academics), who think of it as something as exotic and elusive as sociology of law (which is established as a course in the three public law schools of Athens, Thessaloniki and Komotini). For some lawyers, economic analysis of law (the term 'law and economics' is not employed) is similar to economic law, an all-encompassing term for the sum of commercial, banking, company, and so on, laws. For economists, EAL is equally vague, perhaps something they hear about in a conference, although most of them are familiar with the Coase theorem and theories of regulation. There is definitely no Greek EAL, if by this we mean a coherent body of work and a relevant group of scholars dedicated to

[4] The term "Economic Analysis of Law" has prevailed in Greek bibliography, instead of the notionally broader term of "Law and Economics". In the present paper, the latter term will be used.

[5] Aristides N. Hatzis, Law and Economics in Greece, 1999, cited at the website of encyclopedia of law and economics (http://encyclo.findlaw.com/0335book.pdf) and at the website of the Greek Association of Law and Economics (http://www.phs.uoa.gr/~ahatzis/Law_and_Economics_in_Greece.pdf)

its promotion." Ten years later, although there has been improvement, the situation is not all that different.

Despite the fact that law and economics is an elective course in the Faculties of Law of the Kapodestrian University of Athens and of the Aristotle University of Thessaloniki[6] and is frequently referred to in textbooks of various fields of law, most Greek jurists are expected not to have knowledge of the content of the term, while it may be the case that they have not heard of it at all. It should be noted, however, that the Greek Association for the Economic Analysis of Law was established in 2002. Furthermore, relevant articles, even though limited in number and in attention received, have discussed matters from various fields of the legal science, such as commercial law in a broader sense, labour law, family law, law of obligations, property law, criminal law etc.

In particular there are only limited articles with regard to the economic analysis of tax law, which are mainly introductory in nature[7]. At the same time, it should be noted that transition tax law has not been the object of research and therefore, the opinions voiced by Professors Graetz, Kaplow and the other researchers in economic analysis of tax law have not been presented in Greece.

ii) The Greek Constitution and the fairness and efficiency criteria applied.

The present Greek Constitution was enacted by the 5th "revisional" Parliament in 1975 and was consequently partly reformed 3 times, in 1986, 2001 and 2008. The basic structure of the Constitution retains its initial form; this also applies for the article 78 paragraph 2 that has not been revised since its enactment in 1975 according to which, "A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax." This article establishes limited retroactivity in Greece with regard to tax charges (and not tax allowances) in the following sense: On the one hand, it deprives the legislature of the ability to impose a retroactive tax upon economic events that refer to the fiscal year prior to the fiscal year preceding the imposition of the tax and on the other hand, it allows the retroactive imposition of taxes if they refer to the fiscal year preceding their publication.

---

[6] Professor Ar. Hatzis, who is specialized in the field of law and economics, teaches at the Faculty of Law of the Kapodestrian University of Athens the course of "Law and Economics", while Prof. Nik. Intzesiloglou, who is specialized in the field of sociology of law, teaches at the Faculty of Law of the Aristotle University of Thessaloniki the course of "Economic Analysis of Law and institutions". It should be noted that the Vocational Training Centre of the Kapodestrian University of Athens offers a complementary distance (e-learning) programme on "Law and Economics".

[7] See for example, Rodios N.D. "I kampyli tou Laffer peri tis fthinousas apodosis tis forologias" ("The Laffer curve on Diminishing Tax Revenues"), Efimeris Ellinon Nomikon, 53, 1986, pp. 216-218, Gavriilidou A., "Enallaktikes Protaseis ston Foro Eisodimatos" ("Alternatives to Income Tax") Nomiko Vima 38, 1990, pp.382-400, Goubanitsas G. "Economiki Analysis tou fenomenou tis forodiafygis" ("An Economic Analysis of the tax evasion phenomenon"), Digital Library of the Aristotle University of Thessaloniki (www.phs.uoa.gr/~ahatzis/Goubanitsas.doc), Velentzas G. "Economiko Forologiko Dikeo" ("Economic Tax Law"), Jus Publications, 2004. Also one should add to the above the recent doctoral thesis of Prokopidis H. "Apotelesmatikotita ke forologiko dikaio sto plaisio tis periorismenis orthologikotitas ton forologoumenon" ("Effectiveness and tax law in the frame of bounded rationality of tax payers"), Aristotle University of Thessaloniki, 2009.

The members of Parliament that participated in the 1975 Constitutional Reform based the enactment of the said article on two principles. On the one hand, they wanted to establish a secure economic environment that would allow everyone to know in advance what taxes would be levied for their economic activities. This was a demand raised by politicians, law professors and lawyers, who were disappointed by court decisions issued prior to 1975 that had declared retroactive tax legislation to be permissible.[8]. The fifth revisional parliament answered their call and unanimously accepted that retroactivity of tax laws should be prohibited. Therefore, the discussion held during the parliamentary debate was short and focused primarily on fairness arguments, such as reliance considerations[9], accepting them as obvious. Although the issue of efficiency[10] was not directly invoked, it can be concluded that the members of parliament considered that the proposed article was also in favour of efficiency. For example, the leader of the largest opposition party of the time, Georgios Mavros, argued with regard to retroactivity of inheritance taxes that the uncertainty of the tax system leads potentially to delays (and sometimes even reluctance) in the acceptance of heritages and this leads to uncertainty in transactions[11]. Thus, one could deduce that the prohibition of retroactivity could prevent such uncertainty.

However, on the other hand, it was agreed that the absolute prohibition of retroactivity should be avoided and on the contrary, that limited in nature retroactivity should be permitted. This was decided so that newly-elected governments could be able to apply their political platform from the commencement of their term. As noted by Panayotis Papaligouras, Minister of Coordination[12] at the time, if a government were elected in June, rates in direct taxation could not be amended for the following year and a half[13]. Therefore, it would be obliged to rule for 18 months applying the policy of the previous government, which could have possibly been voted down by the public. It should be stressed that this argumentation, based on the principle of

[8] Prior to the enactment of article 78 par. 2 of the 1975 Constitution, the case-law of the Council of State acknowledged that retroactive tax charges are constrained by the rules of fiscal science; however, in serious instances taxation may be levied retroactively. The Supreme Court (Arios Pagos) was more specific; it held that the relevant ability of the legislature was acceptable only under the condition that retroactivity was limited to a reasonable period of time in relation to the burden imposed and to the circumstances pending in the particular case.

[9] Such as the principles of legal certainty and the protection of legitimate expectations.

[10] In economics, an allocation is more efficient than another when it leads to the same result with a lower cost, or alternatively, when it leads to a greater result with the same cost. Usually the Pareto efficiency concept is used in the economic analysis of law, which is defined as an allocation that can make at least one individual better off without making any other individual worse off (due to the difficulty in applying the aforementioned concept, usually the relevant Pareto or the Kaldor-Hicks efficiency are preferred). The difficulties encountered during the assessment of efficiency involve among others the determination of parameters and their contribution that will be taken into account, in order to evaluate whether an individual is better or worse off. As mentioned above the efficiency criteria were not directly invoked during the proceedings of the 5th revisional parliament. Nevertheless, efficiency was examined indirectly. The factors taken mainly into account were the stability of fiscal and investment environment and the possibility of a government to exercise a general economic policy.

[11] "...transactions with the inheritable property are effected based on a certain taxation of inheritance levied, based on the law applicable on the passing of the inheritance. And these transactions, e.g. transfers of property, are not accepted by tax authorities unless there is a certificate for the payment of inheritance tax. … An external heir having in mind a particular tax regime accepts the inheritance and sells his share; in three months he is informed that taxation has been changed and he is invited to pay, while he had no knowledge thereof. This is why it is of particular importance… and there will be uncertainty in transactions. Neither heirs nor purchasers will know whether to contract or not". Georgios Mavros, 1975.

[12] The Ministry of Coordination of the time embodied among other ministries, the Ministry of Economy.

[13] Panayiotis Papaligouras clearly meant the following: Even if a given government changed immediately after election the tax rates, the incomes burdened by the new tax regime would be the ones of the future, i.e. in the best case scenario the incomes created in the period from June to December. The tax revenues, though, deriving from these incomes would be collected near the end of the next year. Therefore, in the meantime the taxes would be collected according to the tax regime, implemented by the previous government.

democracy[14], was stipulated during the final phase of constitutional reform[15]and led to the final formulation of Article 78 paragraph 2. Otherwise, the absolute prohibition of retroactivity of tax legislation would have been applied in Greece.

Thus it appears that, while the argumentation that formed the basis of the enactment of article 78 paragraph 2 of the Greek Constitution was founded on legal arguments that tried to express in the best possible way the public sense of justice, the final formulation of the article allows- even through in a limited fashion- the retroactivity of tax law. Therefore, while it emerges from the proceedings of the 5th revisional parliament (of the 1975 Constitution) that efforts were made to observe the principle of legal certainty in taxation[16], this justification was subsequently overturned and the retroactivity of tax charges was permitted with limitations in the name of the effective exercise of political authority. This entails that, in that frame, the principle of legal certainty in taxation cannot be absolutely upheld and therefore it is impossible for the taxpayers to know in advance and in full certainty the tax regime governing the citizens' economic activities.

It is evident from the above that the deontological approach of law clashed with the empirical approach of economics and this resulted into article 78 paragraph 2 not being enacted on purely deontological criteria[17]. Otherwise, had members of the parliament upheld what they considered as just, i.e. observing the principle of legal certainty in taxation, then it would have been difficult or almost impossible for any given government to practice its own economic policy, as fiscal policy would not be able to be applied for a considerable period of time. This fact would lead to the inability of a given government to exercise an overall economic policy, when at the same time it would have to apply inconsistent policy segments. Therefore, it would be extremely difficult to uphold economic efficiency. This fact weighed in considerably and averted the parliament to enact article 78 paragraph 2 in a way that would serve the principle of legal certainty in taxation.

As already stated above, article 78 paragraph 2 of the Constitution has not been revised and thus retains the same formulation of 1975. The legislature and the executive have generally observed article 78 paragraph 2 of the Constitution and in the rare exceptions that this was not the case, court case-law proclaimed the majority of relevant provisions to be unconstitutional[18]. The feeling that both fairness and effectiveness[19] are better served, when the retroactive enactment of tax legislation

---

[14] I.D. Anastopoulos – Th. P. Fortsakis, Tax Law, Ant. Sakkoulas Publications (2002), p. 122. In this textbook the writers agree as well that the prohibition of the enactment of retroactive taxation is founded on the principle of democracy, however base their opinion on opposite grounds; in particular they claim that, if retroactive taxation were to be permitted, then the democratic legitimization of the present legislature would substitute the respective legitimization of the previous legislature.

[15] During the proceedings of Parliamentary plenary sessions.

[16] According to the principle of legal certainty of taxation, tax and its essential elements (subject, object, taxation rate, allowances and exemptions) should be clearly defined in advance. It should be stated that the principle of legal certainty of taxation was only indirectly invoked during the parliamentary debate.

[17] ***The relation between law and economics is analyzed by Prof. P. Gemtos in his textbook "Economics and Law", volume A: Methodological and Economic Foundations, Ant. N. Sakkoulas Publications 2003, and in particular in chapter 1, "Methodological Foundations", pp. 23-45, as well as in his article «Methodological Programs in Economics and Law and the Problem of their Interdisciplinary Cooperation", Nomiko Vima 36 (1988), p. 1192-1202***

[18] Nevertheless, the case of Law 257/1976, was an exception; enacted on 10.02.1976, it involved the income of the financial year of 1/1/1974-31/12/1974. The Council of State accepted in judgement 1317/1979, given in plenary session, the constitutionality of the particular subscription, by invoking the argument of "appropriateness" that the legislature did not possess any other data on February 1976 (I.D. Anastopoulos – Th. P. Fortsakis, Tax Law, Ant. Sakkoulas Publications (2002), p. 127).

[19] Efficiency is understood here as ensuring a stable tax regime that leads to a steady investment environment, which in turn favors investment and growth.

beyond the prescribed constitutional limits is prohibited, prevails also today and is expressed each time the issue of retroactivity of a tax statute is to be adjudicated[20]. Furthermore, the prevailing opinion is that article 78 paragraph 2 of the Constitution expresses the public sense of justice and therefore, the legal academic world doesn't feel the need to investigate the possibility of its reform. On the contrary, legal scholars focus on efforts to protect and interpret the constitutional provision. Thus, the discussion on retroactivity of tax legislation is limited to the efforts of ascertaining whether a tax statute is in violation of the Constitution[21].

It is apparent that the members of parliament that participated in the enactment of article 78 paragraph 2 of the Constitution could not have been privy to the scientific approach of law and economics on transition tax policy, and in particular of the approaches by Professors Graetz and Kaplow, as they were published subsequently. Nevertheless, these views were not introduced in Greek bibliography at a later stage, nor were they studied in detail. As a result, the retroactive consequences of a tax statute with direct effect have not been studied in Greece, as analysed by Professor Graetz, and these consequences are not studied in the frame of political or legal analysis.

iii) Transition tax policy in Greece

It should be pointed out that the vast majority of tax laws are enacted either prospectively or are applied retroactively within the limits set by the Constitution (The aforementioned applies in the case of tax charges and, on the contrary, no prohibition to retroactivity applies for tax allowances). For this reason, there is no great variety in the enactment method of tax statutes and classifications applied by transition tax policy analysts e.g. Phased-in effective dates[22], delayed effective dates or grandfathered effective dates are rarely or never encountered. Nevertheless when a grandfathered rule[23] is enacted in Greek Law – not in Tax law particularly- then it is considered to be expressing the public sense of justice, as it observes the principle of legitimate expectations of the citizen towards the State, and at the same time established acquired rights are protected[24]. Thus, any positions expressed by the law and economics analysis on transition tax policy with regard to differences between different enactment methods of a tax statute have not been the object of detailed study by Greek legal science.

---

[20] For example, in the case of the exceptional income tax imposed by Law 3758/2009.

[21] For example, in judgement 176/1990 the Council of State held that the legislative readjustment of the value of the immovable property owned by enterprises and the levying of taxes on the surplus resulting from this readjustment does not constitute a case of retroactive taxation (Th. P. Fortsakis, Tax Law, Ant. Sakkoulas Publications (2003), p. 124).

[22] Phased-in effective dates have been used recently to impose beneficiary reforms of income tax laws. For example, the Law 3522/2006 prescribes a gradual reduction of income tax rates, starting from the year 2007 and ending in 2009. Nevertheless, this choice was not based on efficiency or on fairness criteria but it was determined by the country's fiscal tightness that prevented the government from implementing immediately the tax allowances it had planned. Despite all that, the scientific approach of Professor Graetz regarding retroactivity emerges at this point, as the issue arises whether the legitimate expectations created by phasing-in statute may be overturned at a future date.

[23] These are laws with immediate effect, but provide an exception for all cases that are retroactively affected.

[24] For example, laws that revised the conditions for awarding a pension to active employees excluded certain employee groups from unfavorable consequences (the criterion being the year of commencement of working life), on the grounds that these employees had established pension rights and especially that otherwise the "agreement" concluded between these employees and their social security funds at the beginning of their working life would be breached.

Additionally, the following should be observed with regard to particular issues addressed by law and economics on transition tax policy and the way they are dealt with in Greek reality. As an initial fact, any party that sustained loss by a tax reform in Greece is not to recover damages[25]. At the same time, the fact that tax statutes entailing burdens for a group of taxpayers may benefit other group of citizens[26] is not taken into account; the same applies to the fact that these consequences could have been predicted and thus incorporated in market values[27] of respective rights and goods. What is more, while it is frequently acknowledged that encumbered taxpayers are not the only citizens affected by revisions in tax statutes[28], this acknowledgement has not been studied in the frame of retroactive application of tax provisions[29]. However, it is under no circumstances accepted that the revision, and in fact the retroactive revision of tax regimes is a risk that approximates to financial risks and therefore should be dealt with accordingly[30]. It should be noted that this fact is not examined even in the frame of economic analysis[31].
As a conclusion, the satisfaction of jurists and politicians with the constitutional provision allowing the limited retroactivity of tax legislation has averted the introduction of new scientific approaches with regard to this matter. Moreover, where the case of law and economics analysis and the views of Professors Graetz and Kaplow are concerned, their non-introduction into Greek scientific discourse is also the result of the additional limited penetration of the field of law and economics in Greece. However, the increased interest shown in Greece by legal scholars in acquiring better knowledge of economic matters, as observed in recent years, which is expressed through the more frequent choice of postgraduate studies in economics, may possibly lead to the study of the approach of the law and economics analysis on transition tax policy, an issue explored in the USA since the late 1980's.

b.If so, please provide a brief overview of the debate, and please state especially whether and, if so to what extent, the law and economics view (especially the dogmatic view of Graetz and Kaplow), or another non-traditional legal view, has gained support, e.g., from the legislator or in the fiscal literature.

---

[25] Nevertheless, if a tax is declared unconstitutional, then the State is to return the unduly unpaid taxes with interest.

[26] Graetz, Legal Transitions: The case of retroactivity in income Tax Revision, University of Pennsylvania Law Review 1977 pp.57"*The effects of a (tax) change, however, will often extend to persons other than individuals nominally effective…*"

[27] Kaplow, An Economic Analysis of Legal Transitions, Harvard Law Review 1986 pp. 526, *"For example, if compensation were not required for takings, one would expect purchasers of land to have paid less than they otherwise would, to reflect the probability that their land would be taken."*

[28] In the frame of economic analysis and political discourse it is accepted that additional tax charges imposed on a group of professionals frequently bring about unfavourable consequences to the entire sector, which this group of professionals belongs to. A typical case is the additional taxation on immovable property, which, according to the prevailing point of view, expressed primarily by politicians, affects the entirety of enterprises and employees that are active and employed respectively in construction and, at the same time, it affects adversely all the remaining population due to the overall burden imposed on the economy (because of the big importance of the sector of construction for the Greek Economy).

[29] Graetz, Implementing a Progressive Consumption Tax, Harvard Law Review 1979 pp. 1651-1652 (he provides an example of a decrease in the tax of a competitive product)

[30] Graetz, Legal Transitions: The case of retroactivity in income Tax Revision, University of Pennsylvania Law Review 1977 pp.65, "*The risks of a change in law do not seem necessarily different in kind nor in magnitude from the risks of a change in market demand or technology…In fact efficiency may demand that persons expect changes in the law. In the market context, only behavior that takes into account probabilities of change is treated as reasonable*."

[31] Usually only the definition of legal risk is taught to students of economic sciences, such as of Economics and Finance, as they focus primarily on market risk, credit risk, liquidity risk and in some cases, on operational risk.

As presented in detail under the subquestion above, no scientific discourse has been held in the frame of economic analysis of law, and in particular, the approaches by Graetz and Kaplow have not been analysed. Furthermore, scientists and politicians alike have not held any other discussion that departs from traditional legal discourse.