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## Questionnaire ‘Retroactivity and Tax Legislation’, EATLP 2010

### Denmark

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Please return your report, before September 15, 2009

#### *General preliminary remarks*

There are different concepts with various meanings when dealing with the phenomenon of retroactivity in legislation. Not only are various concepts used for ‘retroactivity’ (e.g., retroactivity, retrospectivity, formal retroactivity, material retroactivity, and true retroactivity) but the same concept is often used with different meanings (viz., the concepts of retroactivity and retrospectivity<sup>2</sup>).

In this questionnaire, the term ‘retroactivity’ means that the effective entrance date of (one of more provisions of) a statute is set at a date prior to the moment on which the statute enters into force (in Dutch fiscal literature, this is called ‘formal retroactivity’), i.e. (one of more provisions of) the statute covers the period before the date of entry into force. For example, a statute enters into force on February 1, 2010, and stipulates that a certain tax exemption is repealed as from January 1, 2009.

The term ‘retrospectivity’ means that the statute has ‘immediate effect’ (i.e., the effective entrance date of a statute is the same date as the date on which the statute enters into force) without grandfathering, as a result of which the statute alters or affects the results of a past event for the future (in Dutch fiscal literature, this is called ‘material retroactivity’). For example, a statute enters into force on January 1, 2010, and stipulates that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealised gains, as a result of which gains that accrued prior to January 1, 2010 are not tax exempt although they accrued in a period when the exemption applied.

Furthermore, if in this questionnaire a reference is made to the introduction of a tax statute, this includes the change (amendment) of an existing tax statute, for there is no conceptual difference between the two. After all, a change in an existing statute is realized by means of the introduction of a statute that provides for the change.

#### 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’?

Danish legal theory employs the concept of retroactivity whereas the concept of retrospectivity is not acknowledged as separate legal concept. However, it seems that

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<sup>1</sup> Jacob Graff Nielsen is a member of Center for Legal Studies in Welfare and EU Marketintegration, cf. <http://jura.ku.dk/welma/english/>.

<sup>2</sup> See, e.g., the editors of *British Tax Review*, *Retroactive or retrospective? A note on terminology*, *British Tax Review* 2006, pp. 15-18.

the concept of retrospectivity more or less corresponds to the concept of un-actual retroactivity in Danish law theory.<sup>3</sup> We shall elaborate further on this concept below.

It is important to accentuate that retroactive legislation is not prohibited pursuant to the Danish Constitution. At the same time it must be noted, that it is a fundamental legislative principle in Danish law that a statute that toughens the legal status is only given retroactive effect if this is found to be absolutely necessary. The assessment of necessity is based on the legislative reasons for and proportionality of the retroactivity. In effect, it often comes down to a political assessment if retroactive legislation is deemed necessary. Retroactive tax law statutes occur relatively often in Denmark.

The legal concept of retroactivity<sup>4</sup> corresponds to the Dutch concept as explained above: The effective entrance date of one or more provisions of a statute precedes the date on which the statute enters into force. This definition is developed further in Danish law theory by distinguishing between material and formal retroactivity. Material retroactivity concerns a situation where (provisions of) a statute has legal effect on dispositions or facts that have taken place before the statute enters into force by promulgation. Whereas Dutch discourse makes use of the terminology of formal retroactivity in this case, the corresponding Danish concept is materiel retroactivity. In Danish legal theory formal retroactivity occurs when (tax) authorities apply (provisions of) a statute before the statute enters into force.

Consequently, the terminology of Dutch and Danish legal theory differs on use of the terms; material and formal retroactivity.

Recently, several cases of formal retroactivity in connection with tax legislation have caused political debate in the Danish Parliament. For instance, the Government raised the age limit for last date of payment of capital pensions in connection with the recent Danish tax reform.<sup>5</sup> Before the statute had been put into effect the Minister of Taxation contacted the pension institutes and requested that the institutes administered the new statute by withholding payments of capital pensions regardless of the original age limit until the new bill was passed. The request thus included capital pensions that exceeded the original age limit for payment of capital pensions in the period from the introduction of the bill to the date on which the statute was put into force. This procedure was criticised by political parties that are not members of the Government and the Tax Minister later recalled the request to the pension institutes. The statute includes some quite unusual provisions on the effect of the statute to remedy the effect of this very special procedure that can be considered as a sort of formal retroactivity.

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<sup>3</sup> In Danish: Uægte tilbagevirkende kraft. It is difficult to translate the concept to English. The phrase un-actual is chosen to indicate that this type of retroactivity is in effect not considered retroactive in Danish legal theory. The concept of un-actual retroactivity does not correspond to the concept of de facto retroactivity as mentioned below in question A, (2), b.

<sup>4</sup> In Danish: Tilbagevirkende kraft.

<sup>5</sup> Spring Tax Reform 2.0 (Forårspakken 2.0), Bill 200, 2008-2009 passed as statute 412 on May 29, 2009. The relevant provisions concerning the age limit of payment of capital pension has effect for capital pensions that has not been taxed at the date on which the statute was put into force (May 31, 2009).

In Danish law theory it is debated whether it is correct to use the term that a statute “enters into force” retroactively or the term that a statute “has retroactive effect”.<sup>6</sup> However, this debate is primarily academically and it is generally accepted that both terms cover the same situation.

Furthermore, Danish law theory distinguishes between actual and un-actual retroactivity. Whereas actual retroactivity covers the concept of (material) retroactivity as mentioned above, un-actual retroactivity more or less corresponds to the Dutch concept of retrospectivity or material retroactivity. In Danish law theory, un-actual retroactive legislation refers to the situation where an amendment to a statute or a law reform has effect on past events for the future.

- b. Is a clear distinction usually made between ‘retroactivity’ and ‘retrospectivity’?

The distinction between retroactivity and retrospectivity is not relevant in Danish law theory, but the Danish concepts of actual and un-actual retroactivity resemble the distinction to a great extent. The considerations against actual retroactive legislation are also relevant in case of un-actual retroactivity, but this type of retroactivity is in fact not considered retroactive as defined in this questionnaire.

Recently, a case of un-actual retroactivity has caused debate in the Danish media.<sup>7</sup> In February 2009 a bill concerning the taxation of stock gains obtained via foreign and non-EU investment institutes was passed.<sup>8</sup> The effect of this amendment was that taxation of gains or losses via foreign and non-EU investment institutes changed from realization taxation to yearly taxation of unrealized gains or losses. The relevant provision had effect from the income year of 2009 while the statute as such came into force on February 13, 2009. This was, of course, actual and material retroactivity. However, the consequence of the change from realization taxation to yearly taxation of unrealized gains or losses from 2009 is that losses accrued before 2009 are not taken into consideration. This effect is only relevant for investments via a company in foreign non-EU investment institutes. The second aspect of retroactivity of this statute can be compared with the concept of retrospectivity which is called un-actual retroactivity in Danish legal theory.

- (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) is recognised in most countries, there are some additional varieties. A first conceptual variation concerns the situation that, during a fiscal year, the income tax rules are changed as from the beginning of the fiscal year. For example, an income tax statute enters into force on July 1, 2009, and stipulates that a certain tax exemption is repealed as from January 1, 2009. In the Netherlands this would be regarded as retroactive. It appears that in some other countries it would not be regarded as (actual) retroactive, because – it is argued – the income tax obligation only arises at the end of the

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<sup>6</sup> It is difficult to translate the nuance difference between the Danish terms; enter into force (træde i kraft) and have effect (have virkning). Cf. Peter Germer, *Statsforfatningsret I*, Copenhagen, 2007, p. 143.

<sup>7</sup> Cf. *Morgenavisen Jyllands Posten*, Erhvervsweekend, Saturday, 20th of June, 2009, p. 1 and p. 5.

<sup>8</sup> Bill 23, 2008-2009, passed as Statute 98 on February 2, 2009.

year. In these countries, a conceptual distinction is made between a statute that applies to a previous year (*actual retroactivity*) and a statute that applies as from the beginning of the current year (*de facto retroactivity*).<sup>9</sup>

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

In Danish legal discourse, the above mentioned distinction between actual retroactivity and de facto retroactivity is not relevant. If a tax statute in Denmark enters into force on July 1, 2009, with effect from January 1, 2009, this is simply considered material retroactivity.

- 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 F, whether this distinction is materially significant, e.g., whether different standards apply.

(3) A second conceptual variation concerns the so-called interpretative statutes,<sup>10</sup> which are statutes that stipulate the interpretation of another statute and are often applicable as from the effective entrance date of that other statute. The Dutch legal system does not explicitly have the phenomenon of ‘interpretative statute’. If the Dutch legislator introduces a statute with retroactive effect and explains that the statute provides an interpretation (i.e., only clarifies the meaning) of another statute, this statute is considered ‘retroactive’ in Dutch legal discourse.<sup>11</sup> It appears however that in some countries such a statute would not be called ‘retroactive’ and/or that in some countries even in the Constitution or the General Tax Act, it is explicitly provided that interpretative statutes apply as from the effective entrance date of that the statute to which the interpretation applies.

- a. Does the legal system of your country explicitly have the phenomenon of ‘interpretative statute’?

Danish legal discourse fully resembles Dutch legal discourse in this respect. The concept of interpretive statute is not acknowledged in Danish law theory although statutes that amend and thereby in effect interpret another retroactive statute are not uncommon. The interpretation of statutes does not always require an amendment by a new statute in Denmark and tax law statutes are to a high degree interpreted by the Courts or even by rulings from administrative tax authorities. As the Danish interpretational tradition is relatively pragmatic vagueness and ambiguity can be solved by practice. The Danish Tax Administration (SKAT) issues a large number of administrative notices<sup>12</sup> of an interpretational nature.

If retroactive tax law statutes are amended by another statute with effect from the effective entrance date of the original statute, the latest statute is considered

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<sup>9</sup> Victor Thuronyi, *Comparative Tax Law*, The Hague: Kluwer Law International 2003, pp. 79-80.

<sup>10</sup> Victor Thuronyi, *Comparative Tax Law*, The Hague: Kluwer Law International 2003, p. 76, mentions *lois interprétatives* (France), declaratory legislation (United Kingdom) and *legge di interpretazione autentica* (Italy).

<sup>11</sup> Notwithstanding, when judging (e.g., by parliament or by the courts) whether the (proposed) retroactive effect is justified, it could be taken into account that the statute ‘only’ provides a clarification.

<sup>12</sup> In Danish these administrative notices are called: Styresignaler og meddelelser. These notices are published on SKAT’s homepage: [www.skat.dk](http://www.skat.dk).

retroactive in a material respect. The necessity of applying retroactive effect to the amendment is considered separately, but in many cases the same criteria that gave reason to the retroactivity of the first statute, are also relevant for the (interpretational) amendment.

A specific principle of authentic interpretation has been acknowledged in earlier Danish legal theory.<sup>13</sup> Authentic interpretation meant that a new statute could ascribe retroactivity to itself by containing information about the interpretation of a previous statute. According to authentic interpretation, retroactivity was not relevant if the meaning of a previous statute could be clarified by common interpretation principles. It is now assumed in current legal discourse that authentic interpretation of a retroactive nature requires the same assessment of necessity as retroactive legislation.

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

Not relevant in Danish law discourse, cf. above. Retroactivity is not prohibited pursuant to the Danish Constitution.

- ii. is there a special term for this kind of ‘retroactivity’?
- No, cf. above.
- 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?

As mentioned above interpretational problems in connection with tax law statutes are either solved by passing amendments, by Court rulings or by changing administrative practice or issuing administrative notices. The distinction between interpretive statutes and other statutes (actual amendments) is not relevant in Danish law theory. From a Danish perspective it seems quite difficult if not impossible to make such a distinction.

However, interpretational clarification of a retroactive statute with a date of effect that corresponds to the retroactive effect of the original statute can only be accomplished by a new retroactive statute.

- 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 judicial decision may deviate from the legal practice (shared view by tax

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<sup>13</sup> Cf. *Poul Andersen*: Forvaltningsret, 5. ed., 1965, p. 28 and *Peter Germer*: Statsforfatningsret, 4. ed., 2007, p. 147-48.

payers and tax authorities) or the view of the tax authorities. It happens that the legislator then introduces a statute with retroactive effect to ‘validate’ the legal practice or the view of the tax authorities. Although it sometimes happens that the Dutch tax legislator introduces a statute with retroactive effect to ‘overrule’ a judicial decision, the phenomenon ‘validation statute’ is not recognised as such.

- a. Does your legal system recognise the phenomenon of ‘validation statute’ as such?

It is essential to accentuate that general retroactive changes of administrative tax law practice in a way that is unfavourable to tax payers is not allowed in Denmark. This was established by the Danish Supreme Court in 1984<sup>14</sup> and has been confirmed in subsequent court rulings, cf. TfS 1984, 138 Ø, TfS 1986, 615 H.

The concept of validation statutes is not acknowledged in Danish legal discourse. Retroactive changes to practice by a validation statute would be considered a worrying approach in Danish law, but the Danish Constitution does not prohibit that the legislator changes practice retroactively. As a consequence, the problem is of a politico-legal character. If the legislator should choose to abandon a favourable practice which has been developed by the courts of law with retroactive effect, this approach could be contrary to the provision on resumption in the Tax Administration Act sec. 25 (1) (7).

The usual solution by the legislator in Denmark is to grant retroactivity to a statute with effect from the date on which the bill is introduced to the Danish Parliament. Even if the favourable practice is found to be unacceptable, a so called validating statute would normally not be granted retroactive effect further back.

- 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)?

This question is not relevant to Danish law.

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

No distinction between validation statutes and interpretative statutes is found in Danish discourse.

- 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).

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<sup>14</sup> Cf. UfR 1983.8 H and *Aage Michelsen, Steen Askholt, Jane Bolander og John Engsig*: Lærebog om indkomstskat, 13. ed., 2009, p. 119.

- (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 conceptual distinction is made between the date of entry into force of a statute and the effective date of a statute. If retroactive effect is granted to a statute by the legislator, the date of entry into force still is a future date, but the statute's effective entrance date is a date in the past. This explains why, at least in Dutch legal discourse, the relevant moment to compare with in order to determine whether a statute has retroactive effect, is the date of the entry into force of the statute.
- 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?

Pursuant to sec. 22 of the Danish Constitution all statutes have to be promulgated to be valid and the procedure of promulgation is regulated in the Danish Law Gazette Act.<sup>15</sup> Section 3 of the Danish Law Gazette Act stipulates that statutes come into force at the beginning of the twenty-four hour period ensuing the twenty-four hour period in which the statute is published in the Gazette. For instance, if a statute is published in the Gazette on October 1, 2009, the statute comes into effect the exact moment the clock passes midnight between October 1 and October 2, 2009. It is, of course, possible for the Parliament to introduce another date and time of effect for a statute including a date and time that is retroactive, but this has to be expressly stipulated in the statute.

It is considered a basic interpretation principle that statutes – as a rule – only have effect on future events and dispositions. As a consequence, it has to be obvious in the provisions concerning the effect of the statute that retroactivity is intended.<sup>16</sup> A disputed example of this interpretation principle contra retroactivity concerns change of provisions in connection with resumption of tax assessment.

*UfR 1999.1480 H:* This Supreme Court ruling concerns an amendment to the former Tax Administration Act sec. 35. Pursuant to the original phrasing of sec. 35, the Tax Administration could reassume the tax assessment no later than three years after the expiration of the relevant assessment year. This resumption provision was amended by a statute which came into effect on January 1, 1996. According to the new phrasing of sec. 35, the Tax Administration could reassume tax assessment no later than May 1, the fourth year after the expiration of year which the tax assessment concerned. On April 1, 1996, the Tax Administration gave notice of a resumption of a tax assessment concerning the income year of 1992. This was only possible according to the new phrasing of the Tax Administration Act sec. 35 which came into effect on January 1, 1996. A majority of the Supreme Court judges (3-2) came to the conclusion that the retroactive effect of the amendment was sufficiently indicated in legislative material.<sup>17</sup>

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<sup>15</sup> Cf. Consolidated act on Law Gazette no. 608 issued on June 24, 2008 (in Danish: Lovtidendeloven).

<sup>16</sup> Cf. UfR 1996.68 H (insufficient indication of retroactivity), UfR 1996.1474 Ø (insufficient indication of retroactivity), UfR 1999.1480 H (sufficient indication of retroactivity).

<sup>17</sup> This ruling is criticized by Peter Germer in *Statsforfatningsret*, 4. ed., 2007, p. 149.

As in Dutch law discourse, the relevant moment of comparison when establishing if a statute is retroactive, is the time of promulgation or publication of the relevant statute.<sup>18</sup>

- (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. Furthermore, it is not clear which situation is one of 'material retroactivity'. The above-mentioned example of a statute that enters into force on January 1, 2010, and that stipulates that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealised gains, would certainly be regarded as an example of 'material retroactivity'. However, if a statute that enters into force and that stipulates that interest on a certain type of loan is not tax-deductible anymore without grandfathering existing loans, many but not all authors in literature would call that 'material retroactive'.
- a. How is the concept of retrospectivity defined in your country?

As mentioned above, retrospectivity as a concept does not exist in Danish legal discourse. However, the Danish terminology of un-actual retroactivity seems to cover the same situation as the Dutch concept of material retroactivity or retrospectivity. To clarify this further, that Danish terminology operates with three different situations:

- *Facta praeterita*: Legislation with effect on past events and/or transactions and described as material and actual retroactive.
- *Facta futura*: Legislation with effect on future events and/or dispositions. This sort of legislations is not considered retroactive in any way.
- *Facta pendentia*: Legislation with effect on continuous events and/or transactions. This sort of legislation covers events that occur partly before and partly after the point of time when the relevant statute comes into effect

It is disputed in Danish discourse, if the last-mentioned sort of legislation can be considered retroactive at all and the literature concerning un-actual retroactivity is not extensive. Generally, it is concluded that un-actual retroactive legislation involves some of the same challenges for due process protection as (actual) material retroactivity. In connection with tax law statutes it can be considered customary to introduce transitional rules that take into consideration continuous events. If, for instance, an asset that was exempt from taxation before the introduction of a new statute, is covered by capital gains taxation with effect from January 1, 2009, asset value added before the date of effect will normally be exempt from taxation. In this way, un-actual retroactivity is generally avoided.

As actual material retroactivity is allowed by the Danish Constitution, un-actual retroactivity can also occur. Generally, un-actual retroactive tax law statutes require the same assessment of necessity as actual material retroactivity.

- 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.

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<sup>18</sup> Cf. *Peter Germer*: *Statsforfatningsret*, 4. ed., 2007, p. 148.

Un-actual retroactivity is exemplified above as a part of the answer on question A, (1), b, and A, (6), a. We refer to these examples.

- (7) With respect to the impact of a statute having ‘immediate effect’, a distinction is usually made between substantive statutes and procedural statutes. A substantive statute with immediate effect applies to taxable events occurring after the date on which the statute enters into force, while a procedural statute with immediate effect is directly applicable on pending proceedings (so also to proceedings regarding taxable events that occurred prior to the date on which the statute enters into force).<sup>19</sup>
- 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?

A distinction between substantive and procedural statutes is not part of Danish discourse on retroactivity. However, a case law study indicates that a distinction between procedural retroactivity and substantive statutes can be registered. The case (UfR 1999.1480 H) mentioned in section A, (5), a, can be considered an example of a procedural statute with immediate effect. The change of the former Tax Administration Act was disadvantageous to the tax payer as the amendment allowed resumption of a tax assessment that was not possible pursuant to the former phrasing of the provision in mention. None the less, the Danish Supreme Court allowed the procedural retroactivity as it was found to be the intention of the legislator. The implications of this ruling are disputed.

The Danish High Court came to another conclusion in a case concerning procedural rules on debt collection cf. UfR 1998.1086 Ø. The case concerned a demand for payment that was made before a statute came into effect that changed the requirements for this type of demands. The Danish High Court found that it was unsubstantiated to assume that the demand for payment made before the date of effect of the amendment should meet the requirements of the new statute to form basis of an ensuing execution. Though this case does not relate to tax procedure it might indicate that the Danish interpretational principle contra retroactivity also applies in cases concerning procedural retroactivity.

However, this point of view is contradicted by the Danish Supreme Court in a later case cf. UfR 2000.1682 H. In this case the Supreme Court concluded that if a statute implementing changes of criminal procedure does not contain transitional provisions the statute in mention applies to ongoing criminal cases. It would appear that this case contradicts the High Court ruling referred in UfR 1998.1086 Ø, but it is assumed that it is not possible to generalize from these two cases.<sup>20</sup>

These cases indicate that Danish law theory and case law are not consistent as regards procedural retroactivity.

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<sup>19</sup> E.g., ECJ C-61/98 (*De Haan*), pt. 13: “It should be noted in this connection that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.”

<sup>20</sup> Cf *Peter Germer*: Statsforfatningsret, 4. ed., 2007, p. 147.

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

As mentioned, the distinction between substantive and procedural statutes in Denmark is far from consistent and of dubious value in connection with retroactivity. The Danish understanding of procedural rules include all provisions concerning administrative tax complaints, tax assessment procedure, time limits for filing complaints and resumption, rules regarding evidence and burden of proof etc.

*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: (i) the limitations are derived from a general principle (e.g., the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of the rule of law, and the ability to pay principle) that is laid down in the Constitution, (ii) the limitations are explicitly laid down in a general<sup>21</sup> provision, (iii) the limitations are explicitly laid down in a provision that specifically regards taxation.

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

As mentioned above in section A, (1), a, the Danish Constitution does not impose limitations to retroactivity of tax statutes. The interpretation principle contra retroactivity implies the existence of a requirement for explicit consent from the legislator to retroactive statutes. This principle could be considered constitutional, but it has not been acknowledged as such in Danish legal discourse.

The fundamental reservations concerning retroactivity in Danish legal theory that is the reason for the assessment of necessity and the interpretation principle contra retroactivity are undoubtedly based on the above mentioned principles including the principle of legal certainty, the principle of legitimate expectations, the principle of equality and the principle of the rule of law. The nature of these principles is probably considered to be primarily politico-legal rather than constitutional when it comes to retroactivity.

- (9) The Dutch State Secretary of Finance has published (and discussed with Parliament) a memorandum that incorporates the main lines of his 'transition policy' with respect to the introduction of tax statutes. The memorandum is

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<sup>21</sup> Not only regarding tax statutes.

not legally binding, but it has some influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect.

- 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?

The Danish Ministry of Justice has issued Guidance on Legislation Quality<sup>22</sup> that contains a brief account of retroactive legislation.<sup>23</sup> Furthermore, the Ministry of Justice has issued a circular concerning provision on effect and promulgation.<sup>24</sup> None of these two publications contain provisions on transition policy. The Danish Ministry of Taxation has no guidelines or official policy about transition provisions that are available to the public.

However, it is evident that the Ministry of Taxation puts a lot of effort in drawing up transitional provisions in tax law statutes. As a rule, extra attention is devoted to transitional provisions in connection with preparatory work on retroactive tax law statutes.

- 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?

As no official guidelines or policy on transition exist, this question is to a less degree relevant to Denmark.

The responsibility regarding transitional provisions is primarily handled by the Ministry of Taxation with assistance from the Ministry of Justice. Due to considerable attention to transition in connection with tax law statutes, the Danish Parliament often includes transition and retroactivity in debates as part of the parliamentary readings. Furthermore, the Committee of Fiscal Affairs often includes an assessment on the date of effect and transitional provisions concerning tax statutes.

In 2006 the Danish Law Gazette Act was amended and according to the legislative history behind the amendment it is common legislative practice for statutes to include provisions on the statutes date of effect and transitional matters. It was also concluded in the preparatory material behind the amendment, that statutes often deviate from the date of effect according to the Danish Law Gazette Act sec. 3.

- 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?

The considerations concerning retroactivity including the assessment of necessity and the criteria that forms the basis of this assessment are mentioned above in section A, (1), a. No detailed transition policy or guidelines exist.

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<sup>22</sup> The guidance from June 2005 is available at the Ministry of Justice's homepage: [www.jm.dk](http://www.jm.dk).

<sup>23</sup> Cf. The Ministry of Justice's Guidance on Legislation Quality section 4.3.3.

<sup>24</sup> Circular no. 4, January 10, 1966.

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

According to Danish legal discourse retroactive statutes that favour the tax payers are found all but unproblematic. As a consequence, the assessment of necessity often does not hinder, that retroactive tax bills are passed if the bill in mention is favourable to tax payer.

(10) In the Netherlands, the Council of State provides advice to the government and Parliament with respect to legislative proposals. The Council of State has laid down criteria with respect to the question of when, in its opinion, granting retroactive effect to tax statutes is allowed.

- 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 Denmark, all ministerial bills pass a consultation process that includes a review by the Ministry of Justice.<sup>25</sup> This review is partly of legal-technical nature, but the review by the Ministry of Justice also includes constitutional principles, EU-law and retroactivity.

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

No, to our knowledge no certain rules exist concerning the Ministry of Justice's review of ministerial bills.

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

No such procedural provisions exist concerning the Ministry of Justice's review.

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

As mentioned above, retroactive effect is considered far less problematic if the effect is granted to statutes that are favourable to tax payers.

### 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':<sup>26</sup> it is announced in a press release that a bill is (or will be) proposed in Parliament and that the bill provides for retroactivity till the date of the press release.

- a. Is this instrument used in your country?

<sup>25</sup> Cf. *Jens Drejer: Lovgivningsprocessen på skatteområdet*, published in *Festsskrift til Ole Bjørn*, 2004, p. 193-94.

<sup>26</sup> For an example, see the disputed retroactivity in the *Stichting Goed Wonen II* case (ECJ C-376/02).

Promulgation by press release has occurred in Denmark, but not in connection with tax statutes. For instance, statutory intervention by the Government in connection with labour disputes has been published by radio and TV. Pursuant to sec. 6 in statute no. 289 which was passed on May 20, 1987, the statute came into effect at the beginning of May 21, 1987, whereas sec. 5 came into effect immediately. In this instance, the urgency required promulgation by special means. The same model was used in a similar situation, where a collective labour agreement was put into effect immediately by statute no. 317 dated May 21, 1999.

One of the best known cases regarding retroactivity is the so called Sudden Thaw-case, cf. UfR 1958.955 Ø. The police stopped a transport in the afternoon on March 5, 1956. The restrictions on driving in the sudden thaw period appeared from ministerial order no. 45 dated March 3, 1956, and in which the time of effect was set to be March 5, 1956 at 6 a.m. The contents of the ministerial order were transferred via Ritzau to all daily newspapers while the order was published in the Danish Law Gazette on March 7. The Danish High Court found that immediate intervention was required why the ministerial order's provisions on effect and the unusual promulgation were necessary to take care of vital interests.

- 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?

We refer to section C, (11), a.

(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?

Legislation by press release is infrequent in Denmark and retroactive effect that goes back further than the date on which the bill is introduced in the Parliament is also very uncommon as regards tax statutes. Statute no. 614 dated December 19, 1984 concerning share sale to holding companies had effect on all share sales in 1984. However, the statute offered a possibility of dispensation which in practice was very lenient when it came to share sales conducted before the date on which the bill was introduced i.e. December 4, 1984.<sup>27</sup>

The normal procedure in recent legislative practice is that tax statutes that are disadvantageous to tax payers are only given effect from the date of introduction of the bill to the Danish Parliament. If the assessment of necessity results in lack of need for retroactivity, the statute is given effect from the ensuing income year.

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<sup>27</sup> Cf *Aage Michelsen, Steen Askholt, Jane Bolander and John Engsig: Lærebog om indkomstskat*, 13. ed., 2009, p. 110-11.

- 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?

Yes, cf. section C, (12), a.

(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?

It has not occurred to our knowledge that retroactive effect is granted to substantive statutes also influence pending legal cases.

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

We refer to section A, (7), a and b. Danish legal discourse is unclear when it comes to procedural retroactivity.

(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?

We refer to B, (9), d, and (10), d. Granting retroactive effect to statutes that favour occur in no specific pattern the decisive factor being a political wish to favour tax payers retroactively.

#### 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;<sup>28</sup>

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<sup>28</sup> E.g., the *Stichting Goed Wonen II* case (ECJ C-376/02)

(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),<sup>29</sup> 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)?

Danish legal theory distinguishes between formal and material constitutionality of parliamentary acts.<sup>30</sup> Formal constitutionality concerns statutes' compliance with constitutional provisions on the statute creation procedure e.g. sec. 22 of The Danish Constitution regarding promulgation of statutes.

Material constitutionality on the other hand occurs when the substance of a statute is unconstitutional.

Whereas there has not been much debate as to whether the Danish courts of law are competent to test statutes' formal constitutionality,<sup>31</sup> it has been disputed whether the courts were competent to test material constitutionality of statutes. According to recent constitutional law theory, the Danish courts are competent to test the material constitutionality of statutes based on solid court practice.<sup>32</sup>

Hence, retroactivity is not considered unconstitutional in Danish legal theory why the Danish courts of law are not testing whether a statute's retroactivity is constitutional but in stead whether a statute's retroactivity is sufficiently substantiated by the legislator.

(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?

This question is not relevant to Danish law. We refer to section D, (15).

(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?

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<sup>29</sup> 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/>>).

<sup>30</sup> Cf. *Peter Germer*: *Statsforfatningsret*, 4. ed., 2007, p. 210-216.

<sup>31</sup> Cf. e.g. UfR 1941.1071 H, UfR 1945.570 Ø, UfR 1967.22 H, UfR 1993.321 H and UfR 1994.29 H.

<sup>32</sup> Cf. *Peter Germer*: *Statsforfatningsret*, 4. ed., 2007, p. 210, *Poul Andersen*: *Dansk Statsforfatningsret*, 1954, p. 466-69 and *Henrik Zahle*: *Dansk forfatningsret* 2, 3. ed., 2001, p. 157-61.

The Danish courts of law are competent to test the compatibility of tax statutes or tax procedure with ECHR including art. 1 of the First Protocol concerning the protection of private property. The courts have never found a retroactive tax statute incompatible with art. 1 of the First Protocol to ECHR or the Danish Constitution sec. 73 which concerns the inviolability of property rights.

ECHR is incorporated in Danish law by statute<sup>33</sup> which means that citizens can complaint or take legal action against the Tax Administration with direct reference to ECHR.

The Danish High Courts have established that tax imposition is not incompatible with sec. 73 of the Danish Constitution, cf. UfR 1958.595 V the reason on the one hand being that tax imposition is based on general provisions and on the other hand that taxes are paid in cash in stead of cession of concrete assets.<sup>34</sup>

(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?

The principle of certainty is not acknowledged as a separate legal principle in Danish legal theory, because substantive due process of law as a general legal principle contains the aspect of legal certainty. A retroactivity test of a statute by the Danish courts of law does not constitute a validity test based on constitutionality or fundamental legal principles such as the principle of substantive due process cf. section D, (15) above.

(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?

As a rule, the Danish courts of law enforce a principle of interpretation contra retroactivity which is almost the opposite approach than interpretations that avoid possible retroactive application. However, when the courts of law test the assessment of necessity for retroactivity some instances of a tendency towards leniency have been established. The case mentioned above in section A, (5), a – UfR 1999.1480 H – has been criticized because insufficient substantiation of the amendment's retroactive effect was present in the legislative material to which the court referred. This court ruling is most commonly regarded as an exception that does not constitute general leniency. On the contrary, court practice generally demonstrates that the interpretation principle contra retroactivity is enforced persistently.

(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?

As the Danish Constitution and/or supranational provisions do not limit the legislator's possibility of passing retroactive tax law bills, no further explanation for

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<sup>33</sup> Cf. Consolidated act. no. 750 dated October 19, 1998.

<sup>34</sup> Cf. *Aage Michelsen, Steen Aksholt, Jane Bolander and John Engsig*: Lærebog om indkomstskat, 13. ed., 2009, p. 109.

the legislator's competence is considered necessary. The legislative politico-legal principle demonstrated by the assessment of necessity proves that retroactivity is only applied on basis of careful considerations. Furthermore, the Danish courts of law require interpretational clarity to establish that the legislator has intended retroactivity.

These instruments do now carry the same legal weight as constitutional provisions, but they serve their purpose by limiting the occurrences of retroactive statutes to exceptional cases.

*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. The subject of retroactivity of case law is worth investigating separately, because it is related to the question of the nature of case law: when can case law be regarded as declaratory ('only declaring what the law has ever been') and when can it be regarded as constitutive ('new law'). We will not deal with this here.<sup>35</sup> Nonetheless, at least in one situation transition law with respect to case law is very comparable with the transition law question with respect to changes in statutes. In that situation, the court explicitly abandons existing case law and formulates a new (general) rule.

- (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<sup>36</sup> in the tax system of your country that are*

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<sup>35</sup> Various items that relate to the subject of 'retroactivity of case law' (e.g. the item of limitation of the effects of case law of the European Court of Justice) are therefore not touched upon in this questionnaire either.

<sup>36</sup> 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'.

*relevant for understanding the way the Supreme Court rules in this respect, please state these peculiarities.*

The Danish court system is based on a two instance-principle and as a rule legal proceedings in tax law cases are filed at the City Courts as first instance. As a consequence, City Court rulings can be appealed to one of the two Danish High Courts, but civil law suits including tax cases cannot be appealed to the Danish Supreme Court unless the law suit is of a principle nature.<sup>37</sup>

Rulings from the Danish Supreme Court are relatively uncommon which is illustrated by the number of cases in 2008: In 2008 16 tax law cases were appealed to the Danish Supreme Court whereas the number of cases in 2007 was 72.

Since the Danish court reform in 2007, the Danish High Courts must in fact be considered the final instance in tax law cases.

The Danish courts do not formulate transitional rules in case of rulings that abandon existing case law. Transitional provisions in connection with a change of practice are found in the Tax Administration Act. sec. 27 (1) (7). Pursuant to this provision, the tax payer can request a special resumption of a yearly tax statement if existing practice is abandoned by a final administrative decision from the National Danish Tax Tribunal or by a final judgement from the courts of law *if the decision is favourable to the tax payer*. The provision is also applicable if the Tax Ministry publishes a change of administrative practice *in favour of tax payers*. In these cases, special resumption of an otherwise closed yearly tax statement is allowed counting from the income year that the overruling decision concerned. Alternately, special resumption is always allowed counting from the income year that began but did not end three years before the year in which the first overruling of practice took place.

If the Danish High Court delivers a tax payer favourable judgment on November 5, 2009 concerning a tax assessment of the income year of 2003 and the High Court judgment affirms the previous City Court judgment from November 3, 2007, special resumption can be requested by tax payers concerning income years from and including 2003.<sup>38</sup>

In these cases the Danish Tax Administration publishes an administrative notice containing information on the resumption options for tax payers.

Unfavourable judgments of changes of administrative practice only have effect on future decisions and practice including pending and appealed cases.

In addition, a controversial case law practice has developed in Denmark that involves a sort of retroactive effect. In several cases the Danish Tax and Customs

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<sup>37</sup> Cf. The Administration of Justice Act. sec. 226. Before comprehensive Danish court reform in 2007, all law suits in tax law cases were filed at the High Courts as first instance which meant that all tax law cases could be appealed to the Danish Supreme Court. An extraordinary possibility of third instance dispensation exists.

<sup>38</sup> It is a precondition that the City Court judgment overruled the decision by the administrative Danish National Tax Tribunal. Otherwise, special resumption is allowed counting from and including the income year in which the National Tax Tribunal reached its decision.

Administration refuses to accept decisions from the National Danish Tax Tribunal, which is the final administrative appeals tribunal in Denmark. As a consequence, the Danish Tax and Customs Administration does not correct administrative practice even though this practice is in conflict with the decision by the National Danish Tax Tribunal. In these instances, the taxpayers cannot support their cases on the decision by the National Danish Tax Tribunal, which in effect results in retroactivity, if the courts of law assent to this approach in an ensuing judgment.<sup>39</sup>

#### 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?

The description above in section A, (1), a, corresponds to the general opinion in fiscal and constitutional law literature in Denmark regarding retroactivity of tax statutes.<sup>40</sup> Retroactive statutes occur in connection with anti-abuse legislation, to avoid hamstringing when raising excise duties, but also in connection with legislation to close gaps in tax law. Normally, the retroactive effect is granted from the date on which the bill is introduced to the Parliament, but in special circumstances retroactive effect may be counted from an even earlier point of time. However, this is very rare.

The law and economics view: Introduction.

The law and economics view is an important theoretical view in the academic literature in the US on tax transitions. This view was developed and supported by especially Graetz<sup>41</sup> and Kaplow.<sup>42</sup> Brief, the law and economics view on tax transitions argues that changes in tax law should have retroactive effect<sup>43</sup> because that is 'efficient'. A very short summary of the line of reasoning is provided by, among others Fisch

“Although fairness arguments are typically used to support prospective lawmaking, efficiency is generally viewed as favoring retroactivity. Efficient lawmaking can be defined as lawmaking that maximizes the net benefits of legal change. The traditional economic conception of rational or efficient legal change is based on the utilitarian

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<sup>39</sup> Cf. *Aage Michelsen* in R & R 2006/9 SM p. 259 ff ("Begrænset skattepligt - Luftkaptajner - Retskildhierarki") a comment on the Supreme Court's judgment in SKM 2006.483 H.

<sup>40</sup> Cf. our reference to literature above in section A, (1), a.

<sup>41</sup> M.J. Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, *University of Pennsylvania Law Review* 1977, pp. 47-87, and M.J. Graetz, Retroactivity Revisited, *Harvard Law Review* 1985, pp. 1820-1841.

<sup>42</sup> L. Kaplow, An Economic Analysis of Legal Transitions, *Harvard Law Review* 1986, pp. 509-617, and L. Kaplow, Transition Policy: A Conceptual Framework, *Journal of Contemporary Legal Issues* 2003, pp. 161-209.

<sup>43</sup> The economic view holds that there is no fundamental (but only a gradual) difference between (formal) retroactivity and retrospectivity.

conception of a net gain in social welfare without regard for distributional issues. This conception explains the failure of economic analysis to address the moral concerns of fairness arguments. Retroactivity could produce net social gain and yet impose clearly identifiable costs; there are winners and losers when a law is applied retroactively. Efficiency arguments typically add an additional normative factor to the analysis: the assumption that legal change has occurred because of a determination that the new rule is an improvement. The view that the new rule improves the operative legal principles supports the application of that rule to as broad a class of cases as possible.”<sup>44</sup>

In the meantime, other law and economics scholars (than Graetz and Kaplow), have developed views with a different emphasis. Shaviro, for example, argues that policy changes should be retroactive (in the terminology used here: should be retrospective), but should not be nominally retroactive (in the terminology used here: should not be retroactive).<sup>45</sup>

(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?

The law and economics view has not given rise to discussion regarding retroactivity in Danish law and economics theory. Arguments of an economical nature are included as part of the assessment of necessity on which the legislator bases retroactivity. For instance, the risk of the economic effects of hamstring can be the reason for granting retroactivity to a statute on excise taxes.

- 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.

No specific law and economics debate or literature exists about retroactivity.

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<sup>44</sup> J.E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, *Harvard Law Review* 1997, p. 1088.

<sup>45</sup> D.N. Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief And Retroactivity*, Chicago: University of Chicago Press, 2000, pp. 98-111.