

# The Court of Cassation as the Supreme Body of the Judiciary in Belgium

The authors, in this article, describe the organization and functioning of the Belgian Court of Cassation (*Cour de cassation/Hof van Cassatie*) and its importance for Belgian tax and treaty law.

## 1. The Role of the Court of Cassation

### 1.1. Part of the judiciary

There is one Court of Cassation (*Cour de cassation/Hof van Cassatie*) for all of the federal state of Belgium.<sup>1</sup>

Initially, i.e. immediately following the French Revolution, the Court of Cassation (the “*tribunal de cassation*”) was a dependant of the legislative authority and was considered a guardian or guarantor of the body of laws, a “*garde du corps des lois*”, albeit without any power in matters of interpretation.<sup>2</sup> By 1795, however, the Court had already separated itself from the legislative authority. Since then, it has been left to the Court to interpret the law and to give judgement, even where the law offered only silence, or was obscure or incomplete, with no further possibility for the Court to seek an interpretation of the law from the legislator.

From the beginning of the 20th century, there has been no doubt that the Court of Cassation not only upholds the law but also protects the interests of litigants seeking justice, and is part of the judiciary. As with other courts, the Court of Cassation cannot establish general rules.<sup>3</sup>

### 1.2. Guardian of the law

The Court of Cassation has two main functions.<sup>4</sup>

First, the Court of Cassation fulfils a normative task in the sense that its mission is to develop a single coherent body of law and ensure the proper interpretation and ap-

plication of this body of law. The issues brought before the Court of Cassation permit it to refine and classify the points of law in their proper order with the objective of realizing the greatest possible unity and uniformity in jurisprudence and, having realized this, to guarantee legal certainty. This aspect of the task of the Court of Cassation is to serve the public interest, and some consider it to be its primary function.

Second, account must be taken of the fact that the Court of Cassation is the highest body in the Belgian judiciary and, as such, is also charged with the resolution and settlement of individual disputes. In this respect, the task of the Court of Cassation is to take corrective action by examining the legality of an adjudicating judge’s decisions. This function of the Court of Cassation relates, in particular, to the individual interests of the parties.

### 1.3. No pronouncement on the facts of a case

Given the tasks of the Court of Cassation noted in section 1.2., it is not surprising that the Court does not consider the facts of a dispute. Article 147, second paragraph of the Constitution states as much: “[t]his Court does not pronounce on the facts of the case itself”.<sup>5</sup> The Court of Cassation, therefore, deals with judgements in last instance on the grounds of a violation of the law on the part of the lower courts, breaches of essential procedural requirements or points of law prescribed with regard to the penalty of nullity.<sup>6</sup>

In verifying the legality of a decision, three elements are taken into account. These are: (1) the legal text; (2) the preparatory works; and (3) the previous case law of the Court of Cassation

As a result, the Court of Cassation can only adjudicate *in lege*. The ascertaining of facts is exclusively reserved for the other courts and tribunals that form part of the judiciary. The Court of Cassation proceeds on the basis of the facts as they have been accepted by the adjudicating judge, unless the Court decides to undertake a “marginal review”, i.e. to verify whether the adjudicating judge could, on the basis of the facts presented, draw the conclusions that have, in fact, been arrived at.

In this regard, it should be noted the Court of Cassation cannot be regarded as a “court of third instance”. In principle, therefore, when a judgement or a decision is annulled, the Court of Cassation restricts itself to refer-

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1. BE: Constitution, art. 147.

2. N. Fricero, *Evolutie van de functies van het Franse Hof van Cassatie*, in *Hof van Cassatie van België, 175ste verjaardag* p. 34, No. 4 (Larcier 2008) and I. Verougstraete, *Van cassatie naar revisie*, in *Liber amicorum Ludovic De Gryse* p. 445 (B. Dauwe et al. eds., Larcier 2010).

3. I. Beelen, F. Gheeraert & O. Ryde, *Het Hof van Cassatie bij het begin van een nieuwe eeuw: een terugblik en vooruitzichten*. Interview met Pierre Marchal, *Jura Falconis* 1, p. 129 (2000).

4. I. Verougstraete, *Cassatie in civiele zaken (Belgisch recht)*, in *De werkwijze van de hoogste rechtscolleges, Vereniging voor de vergelijkende studie van het recht van België en Nederland* p. 145 (A. de Moor et al., eds., Boom Leg. Publishers 2007) and A. Henkes, *La régulation du flux des affaires civiles et fiscales en cassation – De l’inondation redoutée à la digue abhorrée ou de l’économie de missions quand de la disette des moyens s’installe*, J.T. 6592, p. 128 (2015).

5. All quotes and references to BE: Judicial Code, Law of 10 October 1967 (*Code judiciaire/Gerechtelijk wetboek, JC*), the Belgian Constitution, etc. are the authors’ unofficial translations.

6. Art. 608 JC.

ring the case back to a court of fact of the same rank as the court whose decision has been quashed (*see* section 1.4.).<sup>7</sup>

This also applies when the Court of Cassation functions as an appeals body when decisions made by ministers or members of community or regional governments are reviewed regarding offences that such individuals have allegedly committed in the exercise of their official duties or that are alleged to have been committed outside the exercise of their office and for which they are being tried in the course of their tenure. Such cases are exclusively heard by the Courts of Appeal (*Cour d'Appel/Hof van Beroep*),<sup>8</sup> and an appeal can be lodged against such decisions before the Court of Cassation, in United Chambers. In these circumstances, the Court of Cassation does not pronounce on the case itself.

There are certain exceptions to this principle, as the Court of Cassation does periodically pronounce on the merits of a case. For instance, the Court of Cassation can initiate disciplinary action against certain officials or dismiss or suspend them from office.<sup>9</sup> In addition, in the case of annulment of a decision concerning a question of jurisdiction, the Court of Cassation can refer the case to the competent judge, who is bound by the decision of the Court of Cassation regarding the relevant competence.<sup>10</sup> In exceptional cases, for example in the event of annulment without referral, the Court of Cassation may itself rule on the litigation costs of the proceedings.<sup>11</sup>

#### 1.4. Authority of a decision

As the Court of Cassation is part of the judiciary, it cannot make general rules or decisions with authority *erga omnes*.

In this respect, the following distinctions should be noted:

- Where the Court of Cassation rejects an appeal in cassation, the proceedings are terminated and the decision in question becomes *res judicata* for the parties concerned.
- In contrast, annulments have no force of *res judicata*, as the Court of Cassation cannot pronounce on a case and must leave the assessment of the facts to the adjudicating court to which the case is referred; however, in adjudicating on points of fact, such a court cannot adopt a position that diverges from the views of the Court of Cassation. This rule dates from an old dispute between the parliament and the judiciary, in which the parliament did not want to grant power to the Court of Cassation to end a dispute between parties, unless this was after a second annulment. In such a case, one of parties can decide to bring the case before the Court of Cassation for a second time.
- With regard to a civil judgement after cassation, where a new appeal in cassation is lodged on the same grounds as the initial appeal in cassation, the

case is brought before the United Chambers of the Court of Cassation. No further appeal in cassation is permitted against the second decision insofar as this concurs with the first decision of the court of cassation.<sup>12</sup> Following a second appeal in cassation, the court to which referral is made is expected to abide by the legal considerations of the Court of Cassation. In practice, the court to which the case is referred after the first cassation almost always accepts the first decision.

- When a decision is annulled without referral, which is rare, the judgement in question cannot subsequently be interpreted in a way that is contrary to what has been decided by the Court of Cassation.
- A decision of the Court of Cassation regarding the competence of a jurisdiction binds the court to which the case has been referred, but the right of the referring court to pronounce on the merits of the case remains in full.

## 2. Relationship of the Court of Cassation with other Belgian Courts

### 2.1. In general

The existence of other high-level courts in Belgium must be taken into account when considering the Court of Cassation and its functions. These courts include the Council of State (*Conseil d'État/Raad van State*, *see* section 2.2.) and the Constitutional Court (*Cour constitutionnelle/Grondwettelijk Hof*, *see* section 2.3.).

### 2.2. The Council of State

Under article 160 of the Constitution, Belgium is represented by just one Council of State, whose composition, competences and functions are determined by the law. The Council of State is an administrative court and an advisor to the Legislator. As a result, the Council of State is both a Legislative Division that issues advisory opinions to the government, which is not further considered in this article, and an Administrative Law Division, also referred to as an Administrative Division, that decides cases.

The Administrative Law Division of the Council of State has a *contentieux subjectif* (“a subjective judicial competence”) and a *contentieux objectif* (“an objective judicial competence”) judicial competence. The *contentieux subjectif* relates to the competence of the Council of State to pronounce in last instance with full jurisdiction on the merits of cases decided by administrative courts.<sup>13</sup> The *contentieux objectif* of the Administrative Law Division of the Council of State concerns applications by interested parties for annulment or suspension of acts or regulations issued by an administrative authority.<sup>14</sup>

The foregoing reveals that the courts and tribunals of the regular judiciary and the administrative courts have a

7. Id., at art. 1110.  
 8. Arts. 103 and 125 Constitution.  
 9. Arts. 412 and 615 JC.  
 10. Id., at art. 1109/1.  
 11. Id., at art. 1111, third para.

12. Id., at art. 1119.  
 13. Arts. 145 and 146 Constitution and art. 7 et seq. of the Coordinated Laws of the Council of State of 12 Jan. 1973 (*Lois coordonnées sur le Conseil d'État par A.R. du 12 janv. 1973*, LCCE).  
 14. Arts. 14, para. 1 and 17 LCCE.

separate and distinct competence. The competence of the Council of State relates only to political subjective rights and administrative court decisions, as explicitly stated in law, whereas the Court of Cassation is concerned, as a body of the judiciary, with the remaining subjective rights. Notwithstanding this, it cannot be excluded that an entirely different interpretation may be given to the same legislative measure by the Court of Cassation on the one hand and by the Council of State on the other.<sup>15</sup>

With regard to any conflicts of competence that may arise between the Court of Cassation and the Council of State, article 609, 2 of the Judicial Code, Law of 10 October 1967 (*Code judiciaire/Gerechtelijk wetboek*, JC) leaves the final word to the Court of Cassation

### 2.3. The Constitutional Court

Since 1980, Belgium also has had a Constitutional Court, which was initially called the Arbitration Court. The Constitutional Court is not part of one of the three state authorities, i.e. the executive, the judiciary and the legislature, and has special autonomy.

The Constitutional Court is competent to resolve conflicts between legislative measures, i.e. laws, decrees and ordinances, enacted by the various legislative bodies of the federal state of Belgium, i.e. the various federal authorities, regions and communities, by annulling laws or decrees that disregard constitutional rules determining the distinct competences of the state, the regions and the communities. The Constitutional Court also has the competence to test laws and decrees against the fundamental rights mentioned in Title II of the Constitution, i.e. “the Belgian citizens and their rights”, such as the principles of equality<sup>16</sup> and non-discrimination,<sup>17</sup> and the right to education.<sup>18</sup>

The Constitutional Court may annul a law or decree *ex tunc* and *erga omnes*. Other courts, including the Court of Cassation, may refer preliminary questions regarding the compatibility of laws, decrees or ordinances with constitutional provisions to the Constitutional Court. If the preliminary finding is that of an incompatibility, the law or decree in question cannot be applied by the referring court.

The specific task of the Constitutional Court does not preclude the possibility that a different interpretation for the same legislative measure may arise between the Constitutional Court and the Court of Cassation. This is because the Constitutional Court interprets a legislative measure in light of its compatibility with the Constitution, whereas a court, including Court of Cassation, interprets a legislative measure with regard to the function of its application in a given dispute.<sup>19</sup>

15. P. Martens, *L'interprétation et la qualification de la norme de contrôle et de la norme contrôlée*, in *De verhouding tussen het Arbitragehof, de Rechterlijke Macht en de Raad van State*, Minutes of the symposium of 21 October 2005 p. 276 (A. Arts et al. eds., Die Keure 2006).

16. Art. 10 Constitution.

17. *Id.*, at art. 11.

18. *Id.*, at art. 24.

19. G. de Leval, *La pertinence de la question préjudicielle et l'usage de la réponse par le juge a quo*, in Arts et al., *supra* n. 15 at p. 276.

There has been extensive debate on the inevitability of conflicting interpretations of the various higher courts, but with no resolution of the various issues involved.<sup>20</sup> A partial solution to conflicts of interpretation between the Constitutional Court and the Court of Cassation was attempted by the Special Law of 12 July 2009, which reformed the Law of 6 January 1989 on the Constitutional Court. Specifically, when the same fundamental rights are guaranteed, either partially or in toto, both in a provision of Title II of the Constitution and in a provision of EU or international law, i.e. the concurrence of constitutional rights, the Court of Cassation must first request a preliminary ruling from the Constitutional Court regarding the scope of application of the constitutional provision concerned.<sup>21</sup> Therefore, the requesting court, including the Court of Cassation, can no longer first test the provision against the provisions of EU or international law.<sup>22</sup>

### 3. No Specialized Tax Court in Belgium

There is no separate court that specializes in taxation in Belgium. Similarly, the Court of Cassation, which has three chambers, has no chamber exclusively dealing with tax matters.

In this respect, article 133 of the JC states that:

The First Chamber hears appeals in civil and commercial matters, the second of the decisions in criminal, correctional, and police matters and the third of appeals against the decisions of the court of last instance pronounced by the Labour Courts and tribunals. The remaining cases are allocated amongst the chambers by the President.

As such, tax law is not even referred to as a separate judicial branch and belongs to “the remaining cases” covered by article 133 of the JC. De facto, however, tax cases are divided between the first and the third chamber.

### 4. Workload of the Court of Cassation

In principle, everybody in Belgium is entitled to access to the courts and, therefore, to the Court of Cassation. For some time, the number of procedures initiated before the Court of Cassation has been increasing significantly. At the same time, there has been a decline in the human and other resources available to the Court of Cassation as a result of budget measures, so a limit to the inflow of new cases is highly desirable. Access to the Court of Cassation is, at present, only restricted by the fact that, in civil proceedings except for tax cases, the parties must be represented by a lawyer accredited to the Court of Cassation and by the fact that only questions of law, not of fact, may be raised.

A legislative initiative to reduce the workload of the Court of Cassation was effected by the introduction of article 1105bis of the JC by the Law of 6 May 1997. Under this provision, a case may be submitted to a chamber of three

20. Arts et al. *supra* n. 15.

21. BE: Special Law of 6 January 1989, art. 26, para. 4.

22. On this, see B. Peeters & A. van de Vijver, *Samenloop van grondrechten in fiscalibus*, T.F.R. 392, p. 991 et seq. (2010).



judges, instead of five, when the decision to be taken in cassation appears to be obvious, based on the analysis of the reporting judge and the Office of the Public Prosecutor. This measure eliminated the backlog of proceedings before the Court of Cassation

However, since this rule can, in practice, be applied only to simple procedures, i.e. appeals lacking a statement of reason and appeals ignoring clear precedent, it was decided to widen its scope. Consequently, under the Law of 10 April 2014, a case may be allocated to a chamber of three judges when the decision “does not require the settlement of legal issues in the interest of the uniformity of jurisprudence or of the evolution of the law”.<sup>23</sup>

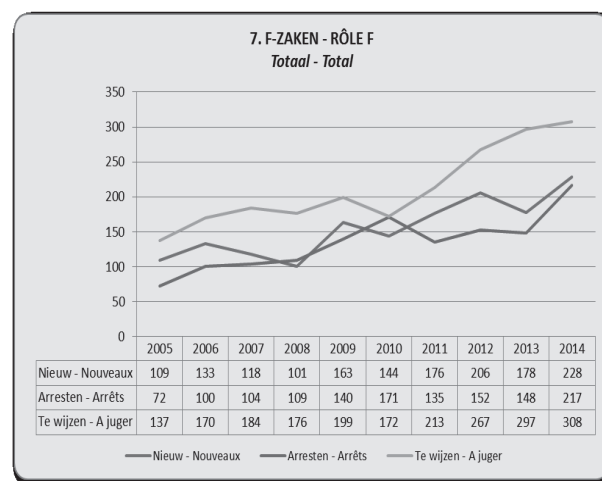
In addition, from 1 June 2015, a law permits the levying of a higher court fee in disputes regarding tax and social law involving a value of more than EUR 250,000. This should further restrict the influx of new proceedings.

Over the past few years, it has been stipulated that, for a number of criminal procedures, appeals in cassation must be lodged by lawyers accredited to Court of Cassation. Very recently, a rule was introduced to the effect that appeals in cassation in criminal cases can only be lodged by certified lawyers who have passed professional exams in that particular discipline.<sup>24</sup>

Proposals have also been formulated, which entail that, in tax proceedings, only a lawyer accredited to the Court of Cassation should be allowed to lodge an appeal and that an Admissions Chamber within the Court should be established. The Admissions Chamber, consisting of three judges, should select cases based, on the one hand, on their monetary importance and, on the other, on the question of whether the legal issue involved is of fundamental interest and necessary to the evolution of the law or is required to guarantee the uniformity of the law.<sup>25</sup>

The Diagram sets out the development of the number of tax cases before the Court of Cassation in the period 2005-2014. The middle line indicates the number of new cases brought before the Court of Cassation, the lower line indicates the number of cases that have been decided and the upper line indicates the cases still to be decided. In 2014, most tax cases, i.e. 57%, related to income taxes, including corporate income tax, 18% to VAT and 17% to local taxes. In the 31% of cases in which the defendant submitted a written statement in reply, the appeal before the Court of Cassation was withheld. This percentage increased to 45% in cases in which no written statement was submitted.

Diagram: Number of cases submitted to the Court of Cassation in 2005-2014



Source: Annual Report of the Court of Cassation 2014

## 5. Role of the Parties in Relation to the Court of Cassation

### 5.1. Right of initiative

Although the role of the Court of Cassation is over and above that of the interests of individual parties, the initiative of the parties to start an action is essential in bringing litigation before the Court of Cassation. This is derived from the fact that the Court of Cassation cannot itself initiate a procedure, which is a logical consequence of the fact that the Court of Cassation is a part of the judicial authority. Given the separation of powers in Belgium, it is not for the Court of Cassation to engage in regulatory action. A case must be brought before the Court of Cassation either by the parties in applying article 1079 of the JC or by the Office of the Public Prosecutor in applying article 1088 or 1089 of the JC, or in response to a preliminary question posed by a court regarding the application of the law on economic competition.

In criminal cases, the Court of Cassation can, in some circumstances, adduce arguments ex officio. In contrast, in civil cases, the Court of Cassation can only decide on the points of a judgement that have been advanced in the initiatory petition.<sup>26</sup> Other than in criminal procedures, it is therefore, in principle, the appellant who determines the boundaries within which the Court of Cassation may consider a case. Neither the parties themselves nor the Court of Cassation can expand the scope of the dispute at a later stage.

### 5.2. Adversarial debate

In response to the case law of the European Court of Human Rights (ECtHR),<sup>27</sup> the possibilities for the parties

23. A. Meulder, *La loi du 10 avril 2014 modifiant le Code judiciaire en ce qui concerne la procédure devant la Cour de cassation et la procédure en récusation: capita selecta*, J.T. 6601, p. 333 (2015).

24. BE: Criminal Procedure Code (*Code d'Instruction Criminelle*), art. 425, para. 1.

25. A. Henkes, *La régulation du flux des affaires civiles en fiscales en cassation. De l'inondation redoutée à la digue abhorrée ou de l'économie de missions quand de la disette des moyens "installe selecta"*, J.T. 6592, p. 128 (2015). See also S. Lierman, *Hoe breed is de poort van het Hof van Cassatie? Selectiemechanismen voor burgerlijke zaken gewikt en gewogen*, in *Liber spei et amicitiae Ivan Verougstraete* p. 201 A. Bossuyt et al. eds., Larcier 2011).

26. Art. 1095 JC.

27. *Skondrianos v. Grèce*, 18 Dec. 2003; *Clinique des Acacias v. France*, 13 Oct. 2005; *Prikyan et Angelova v. Bulgarie*, 16 Feb. 2006; *Drassich v. Italy*, 11 Dec. 2007; *Cimolino v. Italy*, 22 Sept. 2009.

to a case to proceed to an adversarial debate have been expanded.<sup>28</sup>

### 5.3. Defendant in cassation

#### 5.3.1. Opening comments

Defendants in cassation can respond to the petition containing the findings of the appellant by offering their own counterarguments in a statement in reply.<sup>29</sup> When a defendant has entered a plea of non-admissibility against the action, the appellants can then submit further arguments in support of their case.<sup>30</sup>

#### 5.3.2. Office of the Public Prosecutor

The parties must be informed in the event that the Office of the Public Prosecutor intends to lodge a plea of inadmissibility against the action for reasons of infringement of a public policy rule.<sup>31</sup> In the event that written conclusions are presented by the Office of the Public Prosecutor, these must also be communicated to the parties.<sup>32</sup> Questions that the Office of the Public Prosecutor intends to address to the lawyers or to the parties must also be communicated in advance.<sup>33</sup>

The parties to a case can orally or by way of a note respond to the written or oral conclusions presented by the Office of the Public Prosecutor.<sup>34</sup> Such action cannot, however, result in the submission of new arguments.

#### 5.3.3. The Court of Cassation

Where the Court of Cassation itself wishes to present an argument for inadmissibility, the parties must be notified of this in advance.<sup>35</sup> Such a situation may arise when the Court of Cassation decides to uphold the contested judgement but substitute the reasons given in that judgement.

In these circumstances, the Court of Cassation decides that the dictum of the judgement is legal, but the reasons for that decision are incorrect. The Court of Cassation, therefore, replaces the reasons as advanced by the adjudicating judge with a legal ground that is based on the actual facts and documents in the contested case. The new considerations then justify the judgement on legal grounds. In such a case, the Court of Cassation notes that the plea is not admissible for the reason of lack of interest, as the decision, given due consideration of the other legal ground(s), is legally justified. An eventuality that the appellant could not foresee could, for example, be a change of opinion on the part of the Court of Cassation, in consequence of which a plea is held to be inadmissible.

Similarly, the questions that the Court of Cassation intends to pose to the lawyers or to the parties must be communi-

28. See, inter alia, A. Fettweis, 'La fin de non-recevoir au moyen, soulevé d'office par la Cour de Cassation, et le principe de la contradiction', in Bossuyt et al., *supra* n. 25, at p. 179.

29. Art. 1092 J.C.

30. *Id.*, at art. 1094.

31. *Id.*, at art. 1097.

32. *Id.*, at art. 1105.

33. *Id.*, at art. 1106, third para.

34. *Id.*, at art. 1107.

35. *Id.*, at new art. 1097/1.

cated to the parties in advance.<sup>36</sup> This permits the parties to respond to such questions in the course of a hearing.

## 6. Advisors to the Court of Cassation

### 6.1. Introductory remarks

Within the Court of Cassation, an important role is reserved for the reporting judge and for the Office of the Public Prosecutor. The legal assistants at the Court of Cassation also provide important services to the Court.

### 6.2. Reporting judge

Once a case has been submitted to the Court of Cassation by petition and the arguments and exhibits have been duly deposited, the Court Clerk hands the file into the care of the President. The President, in turn, appoints one of the judges in the case to act as *rapporteur*.<sup>37</sup>

The reporting judge begins to draft the decision. He does the research and draws up a preliminary draft, which is subsequently passed on to the Public Prosecutor in charge of the case. After this, the Public Prosecutor draws up his findings and conclusions. It is important to note that the parties do not participate in the dialogue between the Public Prosecutor and the reporting judge.

### 6.3. Office of the Public Prosecutor

The Office of the Public Prosecutor fulfils an important role in the procedure before the Court of Cassation. Specifically, the Office of the Public Prosecutor can, in a number of instances, bring procedures before the Court of Cassation, ex officio, invoke grounds for inadmissibility, proffer advice by way of (written) arguments and enter into discussions with the parties.

In particular, the Office of the Public Prosecutor has the following powers:

- Right of initiative: the Public Prosecutor can institute a cassation procedure in the interest of the law.<sup>38</sup> The Prosecutor-General can also lodge a claim for annulment regarding the misuse of powers.<sup>39</sup>
- Admissibility: the Office of the Public Prosecutor can ex officio advance grounds for inadmissibility for reason of infringement of a rule of public policy.<sup>40</sup>
- Advice: more importantly, the Office of the Public Prosecutor is heard in all cases and delivers its findings either in writing or otherwise.<sup>41</sup> The preliminary draft from the reporting judge is passed to the Public Prosecutor, who, in turn, charges an Advocate General to proffer advice, in consequence of which a dialogue is started between the Advocate General and the Reporting Judge.<sup>42</sup>

36. *Id.*, at art. 1106, third para.

37. *Id.*, at art. 1104.

38. *Id.*, at art. 1089.

39. *Id.*, at art. 1088.

40. *Id.*, at art. 1097.

41. *Id.*, at art. 1105.

42. Verougstraete, *supra* n. 4, at p. 175 et seq.

- Debate: in order to enhance adversarial debate before the Court of Cassation, new article 1106, third paragraph of the Judicial Code, was recently introduced, which offers the Court or the Office of the Public Prosecutor the possibility to ask questions at the hearing of the lawyers or of the parties that do not have legal representation.

Initially, the Office of the Public Prosecutor took part in the deliberations within the Court. Consequently, the members of the Office were considered to be *amici curiae*. However, this practice was terminated under the influence of the ECtHR. Nonetheless, judgements are still given in public session, in the presence of the Office of the Public Prosecutor.<sup>43</sup>

While the task of the Office of the Public Prosecutor is primarily advisory, it does appear that the vision of the Office often serves as a guide in the decision-making of the Court of Cassation and contributes significantly to the interpretation of the law. The role of the Office of the Public Prosecutor entails arriving, impartially and independently, at reasoned opinions and conclusions regarding questions of law and, thereby, to assist the Court of Cassation in its task of ensuring respect for the law in its interpretation. The Office of the Public Prosecutor should in its opinions and findings only defend standpoints that are deemed to be important in the interest of the law.

Albeit not required, the Office of the Public Prosecutor often expresses its findings in writing and, very often, the findings are made public on the website of the Court of Cassation<sup>44</sup> and published in legal journals. These greatly contribute to the debate regarding the issues in the law that are dealt with by the Court of Cassation

#### 6.4. Court assistants

The Court of Cassation can call for scientific support from a number of legal assistants. Although these are not magistrates, the legal assistants share a number of duties and rights with magistrates. Their duties consist primarily of assisting in the investigation of appeals in cassation. As such, they are responsible for editing preliminary drafts of decisions or drafts of the findings from the Office of the Public Prosecutor and undertaking studies to be used during the deliberations. Although they do not participate in the deliberations, they may be invited by the President to assist in certain matters.

### 7. Case Law of the Court of Cassation

It is striking that, in Belgium, no broad-based social discussions take place before the Court of Cassation adopts a position regarding a given point of law. Such a debate only happens afterwards. This is due to the rather rigid, mainly written, procedure, whereby, in civil cases, only points in the decision that are stated in the initiatory petition can be taken into consideration,<sup>45</sup> in respect of which argu-

ments can only deal with the legal questions that have been raised by the appeal or to the arguments of inadmissibility that have been advanced against the case or against the arguments.<sup>46</sup>

The judges of the Court of Cassation are also sworn to confidentiality with regard to the deliberations in which they have participated. Although not established by law, the principle of confidentiality in deliberations has traditionally been accepted in Belgium as a deontological rule.<sup>47</sup>

It is only later, once a judgement has been given, that an often comprehensive debate takes place. Such a debate can involve the following:

- The decisions of the Court of Cassation are generally published on Juridat,<sup>48</sup> a database that can be consulted by the public via the Internet. Publication generally follows shortly after the pronouncement of the decision.
- The written conclusions of the Advocate General of the Court of Cassation are also published with the decisions. These conclusions are often required for further clarification of the generally very concisely reasoned decisions.
- In its annual reports, the Court of Cassation provides the wider public with an explanation of its interpretations of its case law.
- In very exceptional instances, the Court of Cassation indicates that it wishes to change its previous point of view with regard to a given issue. For instance, the recent decision of 12 June 2015 on article 49 of the Belgian Internal Revenue Code (IRC) states that “[t]he Court reverts herewith its earlier ruling”.<sup>49</sup>
- The judges of the Court of Cassation are prohibited from expressing their individual views. Belgium’s legal system does not admit dissenting or concurring opinions that can, for example, be expressed by the ECtHR. The reason for this lies in the fact that the judges of the Court of Cassation are sworn to maintain the confidentiality of the deliberations in which they have participated.

### 8. Composition of the Court of Cassation

In order to be appointed a judge at the Court of Cassation, a candidate must have been engaged in legal work for at least 15 years, the last 10 of which as a member of the magistracy or the public prosecution.<sup>50</sup> The members of the Court of Cassation are, therefore, professional judges and are appointed for life. In the selection of judges, a recent development is a trend to move away from political

43. Art. 1109 JC.

44. See [www.juridat.be](http://www.juridat.be).

45. Art. 1095 JC.

46. Id., at art. 1107, first para.

47. See BE: Cass., 4 May 1953, *Arr.Cass.*, 1953, 597 and BE: Cass., 14 June 1958, *Pas.*, 1958, I, 261; and E. Brewaeys, *Gerechtigd recht*, in *Het beraad en de rechter. Ad vocare, Interdisciplinair Cahier*, 19.1 p. 23 (F. Fleerackers & R. van Ransbeeck eds., Larcier 2011).

48. See [www.juridat.be](http://www.juridat.be).

49. BE: Cass., 12 June 2015, F. 13.0163.N (not yet published at the time of the writing of this article).

50. Art. 254, para. 3 JC.



appointments towards a more objective admission to the magistracy, in respect of which an important role has been reserved for the Belgian High Council of Justice (*Conseil supérieur de la Justice/Hoge Raad voor de Justitie*).

To become a judge at the Court of Cassation, lawyers can, for example, participate in an annual examination. This offers the following two possible approaches: (1) comparative admissions examination for candidates without professional experience and (2) comparative admissions for those who have already had at least one year of internship at the bar. Subsequently, they can complete a court internship and, at its conclusion, present their candidacy for a function as a magistrate at the level of the Court of First Instance (*Cour de première instance/rechtbank van eerste aanleg*), i.e. at the court or the public prosecutor's office. Lawyers with more professional experience can participate in an examination that tests their professional competencies, following which they may immediately present their candidacy for a seat on the bench. After some years of practice in the Court of First Instance, the candidate may apply for a function as a judge with the Court of Appeal, following which an application can be made for a seat at the Court of Cassation.

Many of the judges with the Court of Cassation have (had) an academic career and can claim authorship for a number of publications in scientific journals. There are no gender quotas. The judges also safeguard their autonomy and impartiality by refraining from comments in the media.

## 9. (Tax) *Capita Selecta* and the Court of Cassation

### 9.1. Commentaries on the OECD Model

Only rarely or never do the decisions of the Court of Cassation contain references to legal doctrine, and the Court of Cassation, therefore, almost never refers directly to the Commentaries on the OECD Model.<sup>51</sup> This does not, however, mean that the OECD Commentaries are never considered relevant in the case law of the Court of Cassation

Notably, the findings and opinions of the Advocate General of the Court of Cassation periodically contain references to the OECD Commentaries. For instance, Advocate General D'Hoore expressed in his conclusions accompanying the *Freens* case (1990)<sup>52</sup> that the OECD Commentaries were relevant to the context of article 3(2) of the Belgium-Netherlands Income and Capital Tax Treaty (1970).<sup>53</sup> In this case, the Advocate General favoured, based on the OECD Commentaries, the rejection of the appeal in cassation. This conclusion was followed by the Court of Cassation.

51. Most recently, *OECD Model Tax Convention on Income and on Capital: Commentaries* (15 July 2014), Models IBFD.

52. BE: Opinion of Advocate General D'Hoore, 21 Nov. 1990, A.C., 1990-1991, 456 (457).

53. *Convention between the Government of the Kingdom of the Netherlands and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and for the Settlement of Some Other Questions on Tax Matters* (unofficial translation) (19 Oct. 1970), Treaties IBFD.

In another instance, with regard to a decision of 9 January 2015,<sup>54</sup> the Advocate General, in a case that required the interpretation of article 17 of the Belgium-Ireland Income Tax Treaty (1970),<sup>55</sup> proposed the annulment of the decision *a quo*, in submitting, as the principal argument, the (in the meantime adopted) Commentaries on the OECD Model. In this case, the Court of Cassation declined to follow the advice of the Advocate General.

It, therefore, appears that the Court of Cassation is prepared to consider the Commentaries on the OECD Model as a context within the meaning of article 3(2) of the OECD Model.<sup>56</sup> However, *mutatis mutandis*, the Court of Cassation does not reject the OECD Commentaries by dismissing an advocated dynamic application of the OECD Commentaries.

### 9.2. Article 25 of the OECD Model

To the best of the authors' knowledge, the Court of Cassation has not yet had an opportunity to give its opinion explicitly regarding the legal merit of interpretative, i.e. article 25(3), first sentence of the OECD Model, or legislative, i.e. article 25(3), second sentence, agreements entailed in article 25. However, in its decision of 9 May 2008, the Court of Cassation did hold that an interpretative agreement, under which the Belgian and French tax authorities offered an adapted definition of the concept of a "frontier worker", which was published on 11 September 1971 in the Belgian Official Journal, had to be accepted as "law" within the meaning of article 608 of the JC.<sup>57</sup> As stated in section 1.3., article 608 of the JC states that the Court of Cassation notes the decisions of the Court of Appeal that were brought before the Court for reason of an infringement of the law.

The possibility to conclude legislative agreements does not arise in relation to Belgian tax treaties.

Whether or not an interpretative agreement according to Belgian concepts should be regarded as a treaty or, in contrast, as a subsequent agreement falling within the meaning of article 31(3) of the Vienna Convention on the Law of Treaties (1969)<sup>58</sup> has not yet been clearly clarified.<sup>59</sup>

### 9.3. Action 14 of the OECD Base Erosion and Profit Shifting project

In the "Public Discussion Draft" regarding Action 14 of the OECD Base Erosion and Profit Shifting (BEPS) project,<sup>60</sup> numerous proposals have been advanced that are intended

54. BE: Cass. 9 Jan. 2015, www.juridat.be.

55. *Convention between Ireland and Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (24 June 1970), Treaties IBFD.

56. Most recently, *OECD Model Tax Convention on Income and on Capital* (15 July 2014), Models IBFD.

57. Cass., 9 May 2008, RGCF, 2008/5, 400 et seq.

58. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties IBFD.

59. L. De Broe & C. De Backere, *Over de – miskende? – doorwerking van internationaalrechtelijk verbindende onderlinge akkoorden ('mutual agreements') in de Belgische rechtsorde*, AFT 1, p. 4 (2014).

60. OECD, *Public Discussion Draft BEPS Action 14: Make Dispute Resolution Mechanisms More Effective* (OECD 2014), International Organizations' Documentation IBFD.

to improve the guarantee of access and the proper functioning of the consultation process contained in article 25 of the OECD Model to avoid, as much as possible, protracted disputes regarding the application of tax treaties. This should be welcomed, a fortiori, if a question of effective double taxation arises. It could also contribute to reducing the current workload of the Belgian courts and tribunals, which would, in turn, benefit proper administration of justice.

Nevertheless, in the comments on the draft proposal, many have urged the inclusion of, for example, a binding arbitration clause. From a Belgian perspective, however, this would require specific attention to the public order character of Belgian tax law in view of the constitutional principle that excludes, in principle, agreements on the application of tax law, which would be binding on a court.<sup>61</sup>

#### 9.4. Foreign (tax) case law

Rarely or never does the case law of the Court of Cassation explicitly refer to the case law of the other treaty partner state when dealing with the same problem. Similarly, such reference is seldom made in the public prosecutor's findings. Nonetheless, it has been stated by the Court of Cassation that tax treaties must be interpreted, inter alia, on the basis of the common meaning and purport of the contracting states.

#### 9.5. Experts and third parties

Experts and third parties cannot, in principle, appear before the Court of Cassation in tax cases.

61. Arts. 170 and 172 Constitution.

#### 9.6. Relationship to accountancy law

In 1931, the Court of Cassation held that common law is a determinant for the application of the tax law, except in cases where the latter provides for an alternative ruling.<sup>62</sup> With regard to the determination of taxable profits in respect of commercial entities subject to Belgian accounting law, the latter is regarded as common law.

#### 9.7. *Stare decisis et quieta non movere?*

Article 6 of the JC states that “[i]n cases that are subject to their judgement, the courts shall not deliver a ruling by way of a general and commonly accepted decision”. On this basis, it is generally accepted that Belgian law does not recognize the principle of *stare decisis*, or strict precedent. On the other hand, the case law of the Court of Cassation can be characterized by its remarkable consistency. Nonetheless, circumstances may compel the Court of Cassation to depart from prior case law, i.e. “*revirement de jurisprudence*”. This, for example, may be the case in the absence of a legal submission, for instance, in which case the lower courts may refuse to accept the case law of the Court of Cassation, or when substantial changes have occurred in society.<sup>63</sup>

62. BE: Cass., 9 July 1931, Pas., 1931, I, 218.

63. I. Verhelst, *Het Angelsaksisch Stare decisis-beginsel: helemaal niet of toch enigszins terug te vinden in het Belgisch recht?* Jura Falconis, p. 123 (1993-94).