

# Editorial

## *European Law Restrictions on the Temporal Effect of National Judicial Decisions: The Case of the Belgian Constitutional Court*

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### 1 INTRODUCTION

The Belgian Constitutional Court is a court of law watching over the observance of the Constitution by the legislative authorities of Belgium. It has the power to annul, to declare unconstitutional and suspend laws, decrees and ordinances infringing on important titles and articles of the Constitution, including some pertaining to taxation.<sup>1</sup>

Annulment judgments have absolute binding force (*erga omnes*) from the moment they are published in the Belgian Official Journal. Such annulment has in principle *retroactive effect*, which means that the annulled act must be deemed never to have existed.<sup>2</sup> This also applies when the Constitutional Court annuls a tax law. Unlike in most other countries with a Constitutional Court, an *ex nunc* effect of an annulment judgment was not considered sufficient in Belgium.<sup>3</sup>

From the outset, the Belgian (special) legislator has been aware that the retroactive annulment can have far-

reaching consequences for legal certainty.<sup>4</sup> To address this, he has conferred on the Constitutional Court the power to identify – ‘if it judges this necessary’ – ‘by general decision, those consequences of the annulled provisions which should be considered as being maintained or being provisionally maintained for the period it sets’.<sup>5</sup>

The Constitutional Court makes frequent use of this power also in tax matters.<sup>6</sup> In doing so, the Court not only upheld the effects that had already occurred before the delivery of the judgment, but sometimes also allowed later effects, for example up to the end of the current calendar year<sup>7</sup> or until the legislator has restored the legislative gap, which would arise from the annulment.<sup>8</sup>

### 2 ANNULMENT JUDGMENT WITH MAINTENANCE OF THE EFFECTS OF THE ANNULLED PROVISION: SOME JUSTIFICATIONS

In its case law, the Belgian Constitutional Court justifies the maintenance of the effects of an annulled act that has introduced or increased a tax, often by referring in standard terms to ‘administrative, “practical”, “budgetary” or “legal” difficulties’<sup>9</sup> (‘legal disputes’)<sup>10</sup> that

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<sup>1</sup> Especially Title II of the Constitution (Arts 8 to 32 on the rights and freedoms of the Belgians), Arts 170 and 172 (legality and equality of taxes) and Art. 191 (protection of foreign nationals), the power-defining rules between those authorities, provided for in the Constitution and in laws on institutional reform and on Art. 143, § 1, of the Constitution (the principle of federal loyalty) (Art. 1 Special Act of 6 Jan. 1989 on the Constitutional Court). See also <https://www.const-court.be/> (accessed 4 Mar. 2020).

<sup>2</sup> Article 9, § 1, Special Act of 6 Jan. 1989 on the Constitutional Court.

<sup>3</sup> Within the EU, the ruling of the Constitutional Court only has *ex tunc* effect in six countries (Belgium, Germany, Estonia, Ireland, Portugal, Spain), in sixteen countries it has *ex nunc* effect (Bulgaria, Cyprus, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Austria, Poland, Romania, Slovakia, Slovenia and the Czech Republic), in three countries it is related to the *inter partes* effect (Denmark, Finland and Sweden). The Netherlands has no system of judicial review, but national court has the power to test national law against international treaties. See for more details F. Hufen, *Restriction of the Effects of Judgements in Case of Ascertainment of Their Unconstitutionality – Summary* 13 (Berlin, Bundesministerium der Finanzen 2008), [https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Summary.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Summary.pdf?__blob=publicationFile&v=3) (accessed 4 Mar. 2020).

<sup>4</sup> Parliamentary Documents, *Chamber of Representatives*, no. 674/4, at 6 (1982–1983).

<sup>5</sup> Article 8, third indent, Special Act of 6 Jan. 1989 on the Constitutional Court.

<sup>6</sup> For example, Const.Court 14 July 1994, no. 57/94; Const.Court 14 July 1997, no. 42/97; Const.Court 14 July 1997, no. 43/97; Const.Court 17 Mar. 2004, no. 45/2004; Const.Court 31 Mar. 2004, no. 59/2004; Const.Court 14 Dec. 2005, no. 186/2005; Const.Court 13 Mar. 2008, no. 54/2008; Const.Court 17 July 2008, no. 104/2008; Const.Court 19 June 2014, no. 93/2014; Const.Court 19 Sept. 2014, no. 130/2014; Const.Court 16 July 2015, no. 105/2015; Const.Court 22 June 2017, no. 83/2017; Const.Court 1 Mar. 2018, no. 24/2018; Const.Court 22 Mar. 2018, no. 34/2018; Const.Court 17 oktober 2019, no. 138/2019; Const.Court 5 Dec. 2019, no. 194/2019. The Constitutional Court is also entitled to maintain the consequences of an unconstitutional act in preliminary ruling proceeding (Art. 28, second indent Special Act of 6 Jan. 1989 on the Constitutional Court). To date, the Court has not yet maintained the effects of a tax law found to be unconstitutional in a judgment on a question referred for a preliminary ruling.

<sup>7</sup> Const.Court 17 July 2008, no. 104/2008.

<sup>8</sup> Const.Court 17 Mar. 2004, no. 45/2004, B.7.

<sup>9</sup> Const.Court 22 June 2017, no. 83/2017, B.13.

<sup>10</sup> Const.Court 1 Mar. 2018, no. 24/2018, B. 40.1; Const.Court 17 Oct. 2019, no. 138/2019, B.41.

would arise for the government if the annulment judgment had a retroactive effect.<sup>11</sup> Under Belgian law, the taxable person would – without this decision on the maintenance of the effects of the annulled act – indeed be entitled to reclaim the tax already paid.<sup>12</sup>

The action for annulment before the Belgian Constitutional Court does not suspend the effect of the challenged act. In order to prevent that the challenged act may cause ‘*serious prejudice that is difficult to repair*’ during the period between the institution of the action and the pronouncement of the judgment, and that a subsequent retroactive annulment may no longer have any effect, the Belgian Constitutional Court may, at the applicant’s request and in exceptional circumstances, order the suspension of the challenged act pending judgment on the merits of the case, which has to be given within three months following a suspension decision.<sup>13</sup>

The Constitutional Court very exceptionally grants a suspension, also in tax matters. The main reason for this limited application lies in the restrictive interpretation given by the Court to the condition of ‘*the serious prejudice that is difficult to repair*’. The Court finds that a purely financial disadvantage cannot be regarded as difficult to repair.<sup>14</sup> Referring to the retroactive effect of the annulment judgment, the Court argues that it is still possible to reclaim the unjustly paid taxes in the event of annulment.<sup>15</sup> However, if in the annulment judgment, the Court decides to maintain the legal effects of the annulled act, it seems to invalidate the aforementioned argument for not granting the suspension.

It is therefore not surprising that the rulings of the Constitutional Court, in which it maintains the legal effects of a tax law declared unconstitutional, are strongly criticized by Belgian scholars.<sup>16</sup>

### 3 EUROPEAN RESTRICTIONS

An important point of attention concerns the extent to which the maintenance by the Constitutional Court in an annulment judgment of the legal consequences of the annulled act is compatible with EU law. After all, it is conceivable that an individual, after the Constitutional Court has annulled an act with maintenance of its legal effects, tries to challenge the application of this (temporarily) maintained act before another national court on the grounds of a violation of EU law.

#### 3.1 Principle of Sincere Cooperation

According to settled case law of the Court of Justice, the principle of sincere cooperation laid down in Article 4 (3) Treaty on European Union (TEU) requires the Member States to remedy the unlawful consequences of a breach of EU law.<sup>17</sup> Any national court, hearing a case within its jurisdiction, has ‘*to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union*’.<sup>18</sup> In the Polish *Filipiak* case the Court of Justice decided that this obligation also applies irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.<sup>19</sup> It is clear that a national court cannot hide behind a judgment of a constitutional court that upholds the legal effects of an annulled national provision (deemed unconstitutional) in order to ignore directly applicable law of the Union.

#### 3.2 Competence of the Court of Justice

Only the Court of Justice can determine the conditions that must be met in order to maintain a national provision that is contrary to Union law.<sup>20</sup> To this end the Court applies by *analogy* the criteria that it has developed within the scope of its competence mentioned in Article 264, second sentence Treaty on the Functioning of the European Union (TFEU).<sup>21</sup> According to this provision the Court of Justice has a discretion to indicate, in each particular case, which effects of a Union measure which it annuls or declares invalid must be regarded as definitive.<sup>22</sup> In the exercise of that power, the Court of Justice may also decide to suspend the effects of the

<sup>11</sup> Sometimes the Constitutional Court also invokes other grounds for justification, such as the ‘disruption of the operation of the public service’ (Const.Court, 13 Mar. 2008, no. 54/2008, B. 21).

In this case, the annulment concerned a one-off tax levied on the gas sector. The annulment of that tax while maintaining its legal effects could therefore be regarded as a Pyrrhic victory for the applicant.

<sup>12</sup> Article 18 Special Act of 6 Jan. 1989 on the Constitutional Court.

<sup>13</sup> Article 20, 1° Special Act of 6 Jan. 1989 on the Constitutional Court. Such an action for suspension must be brought within three months following the publication of the challenged act in the Official Journal.

<sup>14</sup> Const.Court 12 Apr. 2012, no. 56/2012, B.7-B.8.

<sup>15</sup> Const.Court 11 May 2016, no. 70/2016, B.5.

<sup>16</sup> For example, M. Daelemans, *Supranationale beperkingen op de mogelijkheid om de rechtsgevolgen van de vernietigingsarresten te handhaven*, in *Liber discipulorum André Alen* 45 (W. Pas, P. Peeters & W. Verrijdt eds, Brugge, die Keure 2015); J. Riemsdag, *De handhaving van gevolgen door het Grondwettelijk Hof inzake de btw op online kansspelen: een goede daad blijft niet ongestraft* (note by Const.C. nr. 155/2018, 8 Nov. 2018, *Tijdschrift voor Fiscaal Recht*, 2019, at 634).

<sup>17</sup> EUCJ, 27 June 2019, C-597/17, *Belgian Syndicate of Chiropraxie* e. a. pt. 54, with references to EUCJ 28 Feb. 2012, C-41/11, *Inter-Environnement Wallonie et Terre wallonne*, pt. 43 and EUCJ 28 July 2016, C-37915, *Association France Nature Environnement*, pt. 31.

<sup>18</sup> Zie bv. EUCJ, 8 Sept. 2010, C-409/06, *Winner Wetten GmbH*, pt. 55.

<sup>19</sup> EUCJ, 19 Nov. 2009, C-314/08, *Filipiak*, pt. 85.

<sup>20</sup> EUCJ, *supra* n. 18, pt. 67.

<sup>21</sup> *Ibid.*, pts 64 and 67.

<sup>22</sup> *Ibid.*, pt. 64.

annulment or the finding of invalidity of such a measure until the adoption of a new measure remedying the illegality found. The Court may, for example, decide a suspension – in view of legal certainty – to prevent a legal vacuum from arising before a new measure replaces the measure thus annulled or declared invalid.<sup>23</sup> In two environmental cases the Court of Justice has allowed under strict conditions to a national court to maintain temporarily a national measure that is contrary to EU law.<sup>24</sup> In these cases the Court mentioned the following conditions:

*that the contested provision of national law constitutes a measure correctly transposing EU law on environmental protection; that the adoption and coming into force of a new provision of national law do not make it possible to avoid the damaging effects on the environment arising from the annulment of the contested provision of national law; that annulment of the contested provision of national law would have the effect of creating a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment, in the sense that that annulment would result in lesser protection and would thus run counter to the essential objective of the EU law; and that any exceptional maintaining of the effects of the contested provision of national law lasts only for the period strictly necessary for the adoption of the measures making it possible to remedy the irregularity found.*

### 3.3 Obligation for the National (Constitutional) Court to Ask the Court of Justice for a Preliminary Ruling

If the Belgian Constitutional Court considers a national (tax) law contrary to a provision of the Constitution read in conjunction with EU law, it cannot simply decide to maintain its consequences, ‘if it judges this necessary’. In line with the case law of the Court of Justice, the Constitutional Court must ask the Court of Justice for a preliminary ruling. The Court of Justice will only allow the maintenance of the consequence of that annulled act, if the strict conditions described above are met, eventually making exception ‘in favour of persons who may have taken timely steps to safeguard their rights’.<sup>25</sup> If, however, the Constitutional Court would maintain the consequences on its own initiative, the ordinary national courts are not bound by that decision.<sup>26</sup>

The Belgian Constitutional Court clearly takes this into account. In its judgment of 23 January 2014<sup>27</sup> the Court annulled (*ex tunc*) a statutory tax exemption for

breach of the constitutional principle of equality, after the Court of Justice (case C-383/10)<sup>28</sup> had also declared this rule to be contrary to the free movement of services. In the same judgment the Constitutional Court refused to accept the request of the Belgian authorities to maintain the legal effects of the annulled provision in order to prevent Belgium from re-exposing itself at European level to a new claim for non-compliance. Indeed, in case C-383/10 the Court of Justice did not maintain the effects of the provisions it has interpreted and it is settled case law that the Court of Justice<sup>29</sup> does not allow this maintenance to be decided in a later judgment.

In its judgment of 1 March 2018 the Constitutional Court annulled the so called fairness tax for violation of the constitutional legality and equality principle, read in conjunction with the Parent Subsidiary directive.<sup>30</sup> The Constitutional Court came to this conclusion after the Court of Justice, in its judgment of 17 May 2017,<sup>31</sup> in response to a preliminary question from the same Constitutional Court, had also found the fairness tax to be contrary to the Parent Subsidiary directive. In order to take into account the budgetary and administrative difficulties and the judicial disputes that could result from the annulment judgment the Constitutional Court maintained the effects of the annulled provisions for the tax years 2014 till 2018,<sup>32</sup> with the exception, however, of the tax assessments where the fairness tax was levied in violation of the Parent Subsidiary directive.<sup>33</sup>

In a value added tax (VAT) dispute the Belgian Constitutional Court has also asked the Court of Justice whether it may temporarily maintain the effects of a national provision annulled for incompatibility with the constitution read in conjunction with VAT Directive 2006/112, until they are brought into line with that directive.<sup>34</sup> The Constitutional Court wanted to maintain these effects, in order on the one hand, to limit the risks of legal uncertainty resulting from the retroactive effect of that annulment and, on the other hand, to avoid the application of the national regime predating those provisions which is incompatible with the directive.

The Court of Justice<sup>35</sup> decided that the contested legislation was indeed contrary to the VAT Directive, but considered it impossible to maintain the effects. The Court of Justice found that the Constitutional Court had not mentioned specific elements that could support the specific risk of legal uncertainty. The simple reference to budgetary and administrative difficulties that might result from the annulment of the contested provisions, is not sufficient to qualify

<sup>23</sup> *Ibid.*, pts 65 and 66.

<sup>24</sup> EUCJ, 28 Feb. 2012, C-41/11, Inter-Environnement Wallonie and Terre Wallonne, pt. 63 and EUCJ 28 July 2016, C-379/15, Association France Nature, pt. 43.

<sup>25</sup> For example, EUCJ, 5 Dec. 1995, C-415/93, pt. 144; EUCJ, 9 Mar. 2000, C-437/97, Evangelischer Kirchen Verein Wien, pt. 60. The Court of Justice accepts this exception in order not to deprive an individual of its right to effective judicial protection (EUCJ, 26 Apr. 1994, C-228/92, Roquette Frères SA, pt. 27).

<sup>26</sup> EUCJ, 19 Nov. 2009, C-314/08, Filipiak, pt. 85.

<sup>27</sup> Const.Court, 23 Jan. 2014, no. 7/2014, B.8.2.

<sup>28</sup> EUCJ, 6 June 2013, C-383/10, *Commission v. Belgium*.

<sup>29</sup> For example, EUCJ, 6 Mar. 2007, C-292/04, Meilicke, pt. 36.

<sup>30</sup> Const.Court, 1 Mar. 2018, no. 24/2018, B.40.1.

<sup>31</sup> EUCJ, 17 May 2017, C-68/15, X vs. Ministerraad.

<sup>32</sup> Const.Court, 1 Mar. 2018, no. 24/2018, B.40.1.

<sup>33</sup> Const.Court, 1 Mar. 2018, no. 24/2018, B.40.2.

<sup>34</sup> Const.Court, 28 Sept. 2017, no. 106/2017.

<sup>35</sup> EUCJ, 27 June 2019, C-597/17, Belgian Syndicate of Chiropraxie e.a. pts 55–63.

as ‘important considerations of legal certainty’.<sup>36</sup> Finally, the Court of Justice took also into account that the contested provision did not constitute a measure correctly transposing EU law.<sup>37</sup>

The Constitutional Court subsequently annulled the contested legal provisions and, referring to the judgment of the Court of Justice, it ruled that ‘maintaining the future effects of the annulled provisions is not possible in this respect, even when it comes to enable the legislator to bring the legislation into line with the VAT Directive’.<sup>38</sup> However, the Constitutional Court maintained the effects of the annulled provisions for the past.<sup>39</sup> Making reference to the Defrenne case of the Court of Justice,<sup>40</sup> the Constitutional Court decided ‘that important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible to give the annulment judgment a retroactive effect’. The Court refers in particular to:

*the practical impossibility of returning incorrectly collected VAT to the customers of the supplies or services provided by the taxable person or demanding payment from them in the event of unjustified non-submission, in particular where a large number of unidentified persons or taxable persons do not have an accounting system that allows them to still identify the supplies or services concerned and their value.*<sup>41</sup>

#### 4 COMMENT

The key question is whether the Constitutional Court was entitled to decide on the latter issue without having previous consent of the Court of Justice. As stated above, the Court of Justice has decided that any national court, hearing a case within its jurisdiction, has ‘to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union’.<sup>42</sup> Does the word ‘disapplying’ only refer to a disapplication in the future or also to a disapplication in the past? In other words, does EU law demands that each Member State also provides for the possibility for individuals to claim retroactively the annulment of legal provisions contrary to EU law before a national court?

In our understanding, the Court of Justice has not yet decided on this issue. All the rulings of the Court discussed above relate to requests to maintain the application of the

rule contrary to EU law for a transitional period and not to maintain the effects for the past.<sup>43</sup>

As mentioned above,<sup>44</sup> only a limited number of Member States foresee the legal possibility of a retroactive action for annulment before a Constitutional Court. These Member States have decided this autonomously and, at first sight, they seem to have the power to determine the limits of this retroactive annulment themselves.

However, it seems to us, that it would have been better that in the aforementioned judgment of 5 December 2019 the Belgian Constitutional Court as the maintenance of the effects of the annulled provision is concerned, had asked the Court of Justice for a preliminary ruling.

During that procedure before the Court of Justice it could then have become more clear whether the arguments put forward by the Constitutional Court to limit the retroactive application of the judgment for annulment, are also for the Court of Justice ‘important considerations of legal certainty’. After all, it should not be forgotten that, in light of Article 267 TFEU, the Constitutional Court, in spite of its decision to maintain the legal consequences for the past, cannot prevent that another national court who is asked to ‘disapply’ the law contrary to EU law, refers a preliminary question to the Court of Justice for review of the argument<sup>45</sup> invoked by the Constitutional Court.<sup>46</sup>

Finally, the question arises as to whether the Constitutional Court may circumvent the preventive assessment by the Court of Justice as the maintenance of the annulled provisions is concerned by failing to address, alleged breaches of European law raised by the parties to the dispute. This situation has recently arisen in a judgment of the Constitutional Court<sup>47</sup> in which the Court has completely annulled a tax on securities accounts for breach of the constitutional principle of equality. Some applicants also invoked, in connection with the constitutional principle of equality, breaches of European law such as the violation of the freedom of establishment, the freedom to provide services, the free movement of capital (Articles 49, 56 and 63 TFEU) and the Council Directive 2008/7/EC of 12 February 2008 «concerning indirect taxes on the raising of capital». A few applicants have also requested the Constitutional Court to refer this question to the Court of Justice

<sup>36</sup> EUCJ, 27 June 2019, C-597/17, Belgian Syndicate of Chiropraxie e.a. pt. 60.

<sup>37</sup> EUCJ, 27 June 2019, C-597/17, Belgian Syndicate of Chiropraxie e.a. pts 61–62. In this respect the Court refers to the aforementioned cases Inter-Environnement Wallonie and Terre wallonne (C-41/11) and Association France Nature Environnement (C-379/15) (see fn. 25).

<sup>38</sup> Const.Court, 5 Dec. 2019, no. 194/2019, B. 20.1.

<sup>39</sup> Const.Court, 5 Dec. 2019, no. 194/2019, B. 20.2.

<sup>40</sup> EUCJ, 8 Apr. 1976, C-43/75, Defrenne/Sabena, pt. 74.

<sup>41</sup> Const.Court, 5 Dec. 2019, no. 194/2019, B. 20.2.

<sup>42</sup> For example, EUCJ, 8 Sept. 2010, C-409/06, Winner Wetten GmbH, pt. 55.

<sup>43</sup> The Belgian constitutional court has raised the question to the Court of Justice in its judgment of 8 Nov. 2018 concerning a tax on stock exchange transactions (Const.Court, 8 Nov. 2018, no. 149/2018). However, the EUCJ did not respond to that question since it considered the difference in treatment to the detriment of recipients of services using non-resident professional intermediaries was justified (EUCJ 30 Jan. 2020, C-725/18, Anton Van Zantbeek VOF, pt. 46).

<sup>44</sup> See *supra* n. 3.

<sup>45</sup> Namely the above mentioned argument referring to ‘the practical impossibility of returning incorrectly collected VAT back to the customers’.

<sup>46</sup> See also EUCJ 22 June 2010, *samengevoegde zaken C-188/10 en C-189/10*, Aziz Melki en Sélim Abdeli, pt. 45.

<sup>47</sup> Const.Court 17 Oktober 2019, no. 138/2019.

for a preliminary ruling.<sup>48</sup> The Constitutional Court, however, did not respond to these arguments under European law. It justified this as follows: '*Since the examination of the other means put forward by the applicants could not lead to a more extensive annulment, they should not be examined*'.<sup>49</sup> The Court nevertheless decided to maintain the effects of the annulled provision to 'take into account the budgetary and administrative consequences and the judicial contention that could result from the judgment for annulment for the tax due for the reference periods ending before or on 30 September 2019'.<sup>50</sup>

In our view the Belgian Constitutional Court in disregarding European law arguments as unnecessary and at the same time deciding to maintain the annulled provisions without a previous assessment by the Court of Justice, has missed an opportunity to get more clarity from the Court of Justice about the correct scope of the above mentioned obligation of any national court (also the Constitutional Court) to disapply any provision of national law which may be contrary to the rule of law of the Union.

<sup>48</sup> Const.Court 17 Oktober 2019, no. 138/2019, A.28, A.61, A.64.2, A.65, A.66.2, A.77, A. 114 – A.127.3.

<sup>49</sup> Const.Court 17 Oct. 2019, no. 138/2019, B. 40.

<sup>50</sup> Const.Court 17 Oct. 2019, no. 138/2019, B. 41.