A. On terminology

Question 1: Does legal discourse in your country generally use concepts like ‘retroactivity’ and ‘retrospectivity’? Is a clear distinction usually made between these concepts?

In older Belgian literature, the expressions ‘relative retroactivity’ and ‘absolute retroactivity’ were used in this respect.¹ These expressions correspond with the concepts of ‘formal retroactivity’ and ‘material retroactivity’ as used in Dutch legal discourse. However, the terminological distinction between relative and absolute retroactivity is nowadays considered as confusing in Belgium.²

In more recent literature (and case law), a clear distinction is usually made between three concepts, being ‘immediate effect’, ‘retroactive effect’ and ‘deferred effect’.³

As a principle, a legal rule is deemed to have ‘immediate’ or ‘retrospective’ effect.⁴ This implies that a new legal rule is both applicable to legal facts that occur after the date of entry into force of this new rule, as well as on legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that took place before this date.⁵ To explain the preference for the concept of immediate effect of legal

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¹ H. DE PAGE, Traité élémentaire de droit civil belge, I, Brussel, Bruylant, 1962, nbr. 230, 328.
⁵ This phrasing can be found in the case law of both the Constitutional Court (e.g. Arbitragehof 22 December 1993, nbr. 88/93, www.arbitrage.be) and the Supreme Court (e.g. Cass. 22 February 1988, Arr. Cass. 1987-88, 808; Cass. 21 February 2003, Pas. 2003, I, nbr. 127). Please note that the name of the Constitutional Court has recently been changed from “Arbitragehof” to “Grondwettelijk Hof” (Revision of the Constitution of 7 May 2007, B.S. 8 May 2007).
rules, reference is usually made to the principle of unity of the law: in each situation and for each period only one legal rule can be applied at a time.\(^6\)

A legal rule is considered as retroactive however, when it affects legal facts that occurred before its date of entry into force.\(^7\) In other words: a legal rule is retroactive when it is applicable to juridical relations that were already definitively completed before this date.\(^8\)

Finally, a legal rule has deferred effect when the former rule is still applied on the future consequences of legal facts that took place before the date of entry into force of the new rule.\(^9\)

Question 2: 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. In the Netherlands, this would be regarded as retroactive. It appears that in some other countries it would not be regarded as (actually) retroactive, because – it is argued – the income tax obligation only arises at the end of the 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). Does legal discourse in your country usually employ this conceptual distinction?

As far as income tax is concerned, a distinction is indeed made between ‘de facto retroactivity’ and ‘actual retroactivity’ (juridical retroactivity). The income tax obligation is deemed not to arise until the end of the taxable period. As a consequence, an income tax rule can be changed during a taxable period and applied as from the beginning of the same taxable period, without having a prohibited (juridical) retroactive effect.\(^10\) Indeed, nothing can prevent the legislator from conferring an immediate effect to a tax measure when the “tax situation” is not yet acquired permanently. Concerning income tax, a tax situation must be considered as acquired permanently at the end of the fiscal year.\(^11\) This position has been confirmed repeatedly in the decisions of the Constitutional Court.\(^12\)

The Supreme Court has recently adopted the same view as the Constitutional Court.\(^13\) Formerly, however, the Supreme Court held the opinion that a changed income tax rule could only be considered as retroactive when it was published after the end of the assessment year. To grasp the full extent of this opinion, a clear distinction has to be made

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\(^7\) P. POPELIER, o.c., 32.

\(^8\) This phrasing can be found in the case law of the Constitutional Court (e.g. Arbitragehof 22 November 1990, nbr. 36/90, www.arbitrage.be).

\(^9\) P. POPELIER, o.c. 32. In English literature this is called “grandfathering”.


between the taxable period (i.e. the period during which income is earned: year x) and the assessment year (i.e. year x+1). According to the Supreme Court, the applicable income tax rules for year x could not only be changed until 31 December of year x, but even until 31 December of year x+1, without being considered as (actually) retroactive. This interpretation had as a result that a taxpayer had to bring his case before the Constitutional Court to enjoy a more favourable interpretation of retroactivity. Logically, this interpretation was severely criticized in fiscal literature.

**Question 3: Does the legal system of your country explicitly have the phenomenon of ‘interpretative statute’?**

Article 85 of the Constitution states that “only the law can give an authentic interpretation of legislation”. An interpretative statute is a statute that provides such an authentic interpretation.

For a recent example of an interpretative provision, we refer to Articles 12-14 of the Bill of 21 December 2009 containing fiscal and miscellaneous provisions. The draft bill provides an interpretation of Article 275 ITCA that concerns withholding tax on earned income. According to this Article, certain scientific institutes are partially exempt from transferring the tax withheld on the earned income to the Treasury. The *ratio legis* of this provision was to stimulate scientific research in Belgium. It was, however, unclear whether or not the scientific institutes were under the obligation to reinvest the exempted funds. According to the Explanatory Statement of the amendment that inserted Article 12-14, it has always been the intent of the legislator that the exempted funds would be used for additional investments in scientific research, and not to reduce the economic cost of the existing research. The draft bill proposes to adjust the text of article 275 ITCA accordingly.

According to the Constitutional Court, an interpretative statute attributes to a legal provision the meaning the legislator had in mind at the time of its adoption. The interpreted provision is deemed to always have had the meaning the authentic interpretation provides. This is also the viewpoint of the Supreme Court.

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17 Article 133 of the Constitution states mutatis mutandis the same for decrees.
18 P. PEETERS, “De fiscale beginselen van gelijkheid, legaliteit, rechtszekerheid en eenjarigheid in de rechtspraak van het Arbitragehof”, *T.B.P.* 2005, vol. 4-5, (334) 347. In general, it is not considered problematic if a retroactive statute confirms the tax authorities, while some tax payers have a defensible different view, in the extent the so-called interpretative statute is not a covert plain retroactive statute.
There is a risk that the legislator will wrongfully use an interpretative law in order to grant actual retroactive effect to a legal rule, or even to influence the outcome of pending litigation.

The task of the Constitutional Court, therefore, consists in verifying whether the so-called interpretative law really has an interpretative character. Otherwise, the alleged interpretative law may be requalified as purely retroactive. In the latter case, the retroactive effect can still be justified.\(^{23}\)

From the case law of the Constitutional Court, four characterisations of interpretative laws can be deduced:

- Interpretative statutes are retroactive from their nature: they apply as from the date the legal provision they interpret, became operative;
- The qualifications of a statute as interpretative cannot assign to the legislator the authority to circumvent the fundamental principle of non-retroactivity;
- Retroactivity of an interpretative statute may be justified if the interpreted legal provision, from its origin, could not possibly be comprehended in a way different from what was indicated in the interpretative law;
- In all other circumstances, the same restrictions as for plain retroactive statutes apply.

In conclusion, we can say that it does not make any difference, whether or not the legislator considers a law to be "interpretative": the supervision of the Constitutional Court on the justification of the retroactive effect remains the same.\(^{24}\)

**Question 4: Does your legal system recognise the phenomenon of ‘validation statute’?**

In Belgium, it does happen regularly that the legislator makes use of the technique of ‘legislative validation’. This technique implies that the legislator interferes by validating *post factum* irregular administrative acts.\(^{25}\)

In this respect, the Constitutional Court gives evidence of a pragmatic approach.\(^{26}\) An example in a fiscal case can illustrate this: a local tax regulation of 1988 was declared invalid by the Council of State in 1990 because irregularities occurred concerning the convocation of the Municipality Council. The issuing of a new local tax regulation with retroactive effect was not possible (article 2 Civil Code). To prevent severe financial consequences for the municipality, the legislator validated in a Law of 1991 the provisions of the local tax regulation of 1988. The Constitutional Court considered the retroactive effect of this statute to be justified since, on the one hand, the statute aimed to prevent severe financial consequences for the municipality and, on the other hand, the decision of the Council of State only concerned a matter of procedure.\(^{27}\)

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\(^{23}\) J. MALHERBE and P. DAENEN, “Retroactivity of domestic tax laws and tax judgements of the European Court of Justice. The Belgian perspective and the European context”, *l.c.* (1) 9-10. In this respect, we also refer to the answer on question 13.


\(^{25}\) P. PEETERS, *l.c.*, (334) 348-350.


For a recent example, we can refer to two decisions of the Constitutional Court, concerning the Law of 24 July 2008. This law validates several local tax regulations that were declared invalid by a decision of the Supreme Court. Also in these cases, the Constitutional Court decided that the severe financial consequences for the municipality can justify the retroactive effect of this statute.

Such a legislative validation can, however, not interfere with juridical decisions that have authority of *res judicata*.

The difference with an ‘interpretative statute’ is that an interpretative statute is regarded as a confirmation of the interpretation which the legislator had in mind at the time of the adoption of the interpreted legal provision. A ‘validation statute’, on the other hand, validates retroactively a local administrative rule that has been declared invalid.

**Question 5: Does legal discourse in your country also employ a difference between the date of entry into force of a statute and the effective date of a statute? And is the ‘comparison moment’ also the moment of entry into force, or is it the moment of the publication in the government’s official journal?**

In Belgium, a difference is made between the effective date of a legal rule, the date of entry into force and the date of publication. To determine whether or not a legal rule has a retroactive effect, the date of entry into force generally serves as the point of reference. According to the Constitutional Court, a legal rule is indeed considered retroactive when it is applicable on juridical relations that were already definitively completed before its date of entry into force. Note that a law can never enter force before the date of publication in the Belgian Official Gazette. Unless stipulated otherwise, a law is deemed to enter force ten days after publication.

**Question 6: How is the concept of retrospectivity defined in your country?**

In this respect, we refer to our answer to question 1. A retrospective rule has an immediate effect, which implies that a new legal rule is both applicable to legal facts that occur after the date of entry into force of this new rule, as well as on legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that

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29 B.S. 8 August 2008.
35 In accordance with article 190 of the Constitution, a legal rule cannot have binding effect, unless it is adequately published.
36 For other legal rules, for example royal decrees, similar rules apply.
took place before this date.\textsuperscript{37} A new legal rule is, for example, applicable to all corporate expenses that occur after the date of its entry into force, even though these expenses relate to an agreement that was concluded before this date.\textsuperscript{38}

\textbf{Question 7: In the Netherlands a substantitive 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. Is this distinction also made in your country? If so, what kind of tax rules are considered procedural rules (e.g. also rules regarding evidence and the burden of proof)?}

In Belgium, the same distinction is made between substantive and procedural statutes. According to article 3 of the Judicial Code, procedural rules are indeed immediately applicable to pending proceedings, except in the event the relevant law states differently.

Rules concerning the judicial organisation, judicial competence and judicial procedure, as well as rules regarding evidence and the burden of proof, are considered procedural rules.\textsuperscript{39} Rules modifying the period of limitation are also procedural rules. If a period of limitation is still running, the rules are immediately applicable and the period will be extended or reduced accordingly. A limitation period that has already been terminated, can, however, not be influenced by new procedural rules.\textsuperscript{40} In this respect we also refer to question 13. Finally, the rules concerning administrative sanctions are procedural rules too. According to the E.C.H.R., such administrative sanctions can be of a criminal nature if certain conditions are satisfied.\textsuperscript{41} This view has also explicitly been confirmed by the Belgian Supreme Court.\textsuperscript{42} Under these circumstances, the criminal provisions regarding retroactivity have to be applied. In this respect, we refer to question 8.

\textit{If relevant, please state two differences in the use of the concepts in fiscal literature, case law and parliamentary history.}

In this respect, we refer to the answers on the first two questions.

\textit{If in your country the meaning of or the application of concepts differ depending on the nature of the tax concerned, please discuss.}

It should be noted that the situation discussed under question 2 is only applicable to direct taxation (such as income tax). For an indirect tax (such as VAT), the taxable fact does not range over a certain period, but on the contrary, takes place immediately. As a consequence, the legal rules in force at that specific moment in time are applicable.\textsuperscript{43} The

\textsuperscript{37} This phrasing can be found in the case law of both the Constitutional Court (e.g. Arbitragehof 22 December 1993, nbr. 88/93, www.arbitrage.be) and the Supreme Court (e.g. Cass. 22 February 1988, \textit{Arr. Cass.} 1987-88, 808; Cass. 21 February 2003, \textit{Pas.} 2003, I, nbr. 127).


\textsuperscript{39} P. POPELIER, \textit{o.c.}, 72-75.


\textsuperscript{43} P. POPELIER, \textit{o.c.}, 84-85.
same applies for withholding tax, since the tax debt arises at the moment of the assignment or payment of the income on which the withholding tax is due.\textsuperscript{44}

\section*{B. Ex ante evaluation of retroactivity}

\textit{Question 8: Does your Constitution include a provision that imposes limitations to retroactivity of tax statutes?}

The concept of non-retroactivity does not appear in the Belgian Constitution, but is laid down in Article 2 of the Civil Code, that is also applicable to tax statutes.\textsuperscript{45} According to this provision, a law only disposes for the future and does not have retroactive effect. As a result it is explicitly prohibited to grant retroactive effect to any rule, emanating from a legislative assembly\textsuperscript{46} that is hierarchically lower than a law. In principle, nothing hinders a law from deviating from Article 2 of the Civil Code.\textsuperscript{47} Tax law can indeed provide a retroactive effect, when it specifically does so as an exception to the Civil Code.\textsuperscript{48} This is why, in certain literature, the question arose whether non-retroactivity was merely “wishful thinking” or “soft law”.\textsuperscript{49}

This is, however, incorrect, since the Constitutional Court attributes constitutional value to the principle of non-retroactivity. This is also the general opinion in literature.\textsuperscript{50} In its case law, the Court applies the broader concept of legal certainty, from which the principle of non-retroactivity is derived. Since legal certainty is not explicitly embedded in the Constitution either, the Constitutional Court founds its decisions on the violation of Articles 10 and 11 of the Belgian Constitution which express the principle of equality. In other words, in the event of retroactivity of a law undermining the legal certainty, the Constitutional Court will, in principle, decide that the law constitutes a breach of Articles 10 and 11 of the Constitution.\textsuperscript{51} However, not every retroactive statute constitutes an infringement of the principle of legal certainty.\textsuperscript{52} Moreover, as will be expounded below, retroactivity can be justified if certain conditions are satisfied.

The Supreme Court has adopted a different approach regarding the existence of a principle of non-retroactivity. The Supreme Court considers non-retroactivity of laws to be a general principle of law that has been concretely embodied, \textit{inter alia}, in Article 2 of the Civil Code.\textsuperscript{53} In a decision of 2005, the Court stated that the non-retroactivity founded on the

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\item \textsuperscript{44} Arbitragehof 23 June 2004, nbr. 109/2004; Arbitragehof 17 May 2006, nbr. 77/2006, both on www.arbitrage.be.
\item \textsuperscript{46} Please note that there are, in Belgium, several legislative assemblies on different political levels.
\item \textsuperscript{47} Cass. 11 September 2003, www.juridat.be.
\item \textsuperscript{48} Cass. 24 February 1977, \textit{Pas.} 1977, I, 672.
\item \textsuperscript{49} L.P. SUETENS, “De retroactiviteit van wetten, decreten en ordonnanties”, \textit{T.F.R.} 1993, (218) 219.
\item \textsuperscript{50} O. NEIRYNCK, \textit{I.c.}, (139) 140-141; R. ERGEC, “La rétroactivité et droit fiscal”, \textit{R.G.F.} 1997, (4) 4.
\item \textsuperscript{51} P. PEETERS, “De beginselen van gelijkheid, legaliteit, rechtszekerheid en eenjarigheid in de rechtspraak van het Arbitragehof”, \textit{T.B.P.} 2005, vol. 4-5, (334) 346-347; Arbitragehof 5 July 1990, nbr. 25/90; Arbitragehof 22 November 1990, nbr. 36/90; Arbitragehof 11 February 1993, nbr. 10/93; Arbitragehof 6 November 1997, nbr. 64/97, (all on www.arbitrage.be).
\item \textsuperscript{52} Arbitragehof 13 July 2001, nbr. 98/2001; Arbitragehof 15 September 1999, nbr. 97/99. All on www.arbitrage.be.
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principle of legal certainty, however, does not have constitutional value.\textsuperscript{54} Yet this decision is criticized in literature.\textsuperscript{55} It should also be noted that, in its annual report of 2002-2003, the Supreme Court stated explicitly the constitutional value of the principle of legal certainty.

Article 2 Civil Code is also applicable to royal decrees and other regulations emanating from the executive. Article 108 of the Law of 4 August 1986 stipulates that decrees implementing tax laws can only apply to future events and, hence, that such decrees have no retroactive effect except in the event the relevant law provides an explicit deviation.

Finally, it should be noted that retroactivity of more severe fiscal penal statutes is absolutely prohibited.\textsuperscript{56} If, however, the penalty at the time of the judgement is less severe than at the time of the offence, the so-called “lex mitior” has to be applied.\textsuperscript{57} As mentioned above, these rules are also applicable to administrative penalties of a criminal nature.

Question 9: The Dutch State Secretary of Finance has published a memorandum that incorporates the main lines of his ‘transition policy’ with respect to the introduction of tax statutes. 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? If so, in what form has this been done? And to what extent is this policy legally binding?

To our knowledge, the government does not have a specific transition policy in the field of tax statutes. The Flemish region did, however, play a pioneering role in developing a general legislation policy concerning the quality of tax legislation.\textsuperscript{58} At the Walloon side, as well as at Federal level, the emphasis is rather on administrative simplification.

An extensive Flemish circular letter of 17 July 2009\textsuperscript{59}, addressed to all staff members of the Flemish government, looks into different aspects of legislation technique. Although a circular letter is, strictly speaking, not legally binding, it does give important recommendations worthy of consideration. Among other issues, this circular letter recapitulates the general principles regarding the application ratione temporis of Flemish legal rules. The circular letter states a.o. that a legal rule has, in principle, immediate effect and that retroactive effect is only granted in exceptional circumstances. Reference is also made to the case law of the Constitutional Court. More importantly, the circular letter also states that retroactive effect of decrees might be justified if the legal rule grants certain advantages. The circular letter also examines the necessity of transition provisions: if the application of new rules is not sufficiently predictable for the parties concerned, it can be expedient for the old rules to remain applicable to these situations. In many cases, the

\textsuperscript{56} Article 2 Penal Code, Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights.
\textsuperscript{57} Article 2, §2 Penal Code. It is uncertain whether this rule can also be applied on purely administrative sanctions.
\textsuperscript{59} www.wetsmatiging.be
preservation of vested rights needs to be guaranteed. As mentioned above, none of these recommendations specifically concerns tax statutes.

**Question 10a: In the Netherlands, the Council of State provides advice to the government and Parliament with respect to legislative proposals. Doe an institution like a Council of State exist in your country?**

A comparable institution does also exist in Belgium. The legislation department of the Belgian Council of State gives judicial, linguistic and legislative advice about draft decrees, preliminary bills and proposals of law, decree or ordinance as well as amendments concerning these. This advice does, however, not have a binding force.

Apart from the Council of State, some consultative committees also play an important role in the Belgian decision-making procedure, during both the formal and the informal preparatory phase. Depending on the subject matter, a preliminary bill of law has to be proposed to the advisory committees or has to be discussed with representatives of the trade unions. For fiscal matters, however, there are in general no specific formal advisory or consultative obligations.

**Question 10b-c: If so, does it follow certain rules to review proposed retroactivity in tax statutes, and to review whether or not grandfathering is necessary?**

The website of the Council of State provides information regarding legislation technique. A manual with recommendations in this respect can be downloaded from the website. This manual also contains observations regarding retroactivity. Yet, these observations do not specifically concern tax statutes, but are of a general nature.

The manual states that, in general, legislative and administrative rules do not have retroactive effect. For retroactivity to be justified, certain conditions have to be met. For legislative rules, the manual refers to the case law of the Constitutional Court and states that a retroactive measure can only be justified “when it is indispensable to achieve a goal of public interest, such as the well-functioning or continuation of public service”. For administrative rules, reference is made to the advice of the Council of State itself: retroactive effect of administrative rules can only be justified in exceptional circumstances, such as the continuation of public service or regularization of a juridical or factual situation, and insofar the requirements concerning legal certainty and individual rights are preserved.

**Question 10d: Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to taxpayers?**

We are not aware of any specific policy in this respect. We also refer to the answers to questions 9 and 14.

C. Use of retroactivity in legislative practice

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61 [www.raadvst-consecat.be](http://www.raadvst-consecat.be) (tab “wetgevingstechniek”)
Question 11: Is the instrument of ‘legislating by press release’ used in your country? If so, in what kind of cases?

During the last two decades, the government has increasingly made use of this technique, whereby new tax legislation may enter force as from the date upon which the decision to enact the new legislation was published in the Belgian Official Gazette, or even as from the date of the press release following the session of the Council of Ministers that has decided to propose a certain tax measure to be voted by Parliament.

It even occurs that the retroactive period reaches further back in time than the date of the press release.

This technique is used in cases where the government wants to prevent a so-called announcement effect, i.e. the situation where tax payers, as soon as they become aware of future changes in legislation, take certain actions that undermine the effect of this legislation.

The Council of State, as well as certain literature, considers it admissible that a new statute is applicable as from the date of announcement in the Belgian Official Gazette. An announcement with retroactive effect of its own is, however, one bridge too far for the Council of State, since the whole purpose of the announcement is to justify the retroactive effect of a future legal rule.

The Constitutional Court adopted an even stricter position in its judgement of 23 June 2004. At first, the Constitutional Court acknowledged that such announcement corrects, to a certain extent, the unpredictability of a retroactive measure. Furthermore, the Court admitted that the public interest could demand that a tax measure should have effect as from the day the draft was made public, to reduce the risk that tax payers would anticipate on the effects of that measure. Notwithstanding the apparent acceptance of such announcements, the Court is of the opinion that an informative announcement published in the Belgian Official Gazette cannot, by its nature, correct the legal uncertainty created by the retroactive effect, and therefore, cannot justify the retroactive nature of a legal provision. This case law seems to condemn the use of the announcement-technique as a sole justification for the retroactive effect of a tax provision.

65 First example: Wet 20 March 1996, B.S. 7 May 1996. The announcement was published on 19 May 1995, and the act was granted retroactive effect as from 7 April 1995. Second example: Wet 24 December 2002, B.S. 31 December 2002. The announcement was published on 23 April 2002, and the act was granted retroactive effect as from 1 January 2002. Since it concerned withholding tax, the act could not be qualified as "retroactive" in the sense of question 2.
70 O. NEIRYNCK, l.c., (139) 158-161.
Furthermore, certain literature is of the opinion that the technique of the announcement is not compatible with the principle of non-retroactivity.\textsuperscript{71}

According to other opinions, the compatibility of the announcement with the principle of non-retroactivity must be analysed case by case.\textsuperscript{72} If certain conditions are met, the announcement does not undermine the legitimate expectations of the tax payers as a result of which the technique of the announcement might be able to justify the retroactive effect of a legal measure. These conditions are the following:

- The announcement has to emanate from the government itself;
- The government needs to have the intention to influence the behaviour of the tax payers;
- The announcement has to be properly announced;
- The announcement has to indicate clearly to what extent the future legal rule will influence the former legislation;
- It has to be sufficiently convincing that the draft measure will be accepted by the final decision-making body. In this respect, there has to be an adequate link between the body making the announcement and the decision-making body.\textsuperscript{73}

**Question 12a:** Does your legislator grant retroactive effect in cases in which the instrument of ‘legislating by press release’ is not used?

This does indeed happen in Belgium, for example, in cases where the legislator wrongfully qualifies statutes that are actually retroactive as interpretative statutes. Another example is the legislative validation statutes.

**Question 12b:** Does it happen that the retroactive period reaches further back in the past than the date of the press release?

In this respect, we refer to the answer to question 11.

**Question 13:** 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 or is it common that pending legal proceedings are excluded from the application of the new statute?

In principle, pending legal proceedings are excluded from the scope of application of a new substantive statute. Occasionally, however, it does happen that retroactive substantive statutes have an influence on pending legal proceedings. In cases where the retroactivity of an act substantially influences the outcome of pending cases or prevents the courts to handle certain issues, the Constitutional Court has adopted a strict approach. Either

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“exceptional circumstances” or “compelling motives of public interest” are required to justify the retroactive effect of such a statute. In a recent decision regarding a regional tax, the Court considered such exceptional circumstances to be present.

Another important case related to the intervention of the legislator in pending litigation was case 177/2005. Article 145 RD/ITC states that the limitation period for direct tax amounts to a five-year period as from the date they became due. After this five year period, any tax debtor who has not yet settled his debts with regard to direct taxes can consider himself discharged and the Tax Collector will no longer be entitled to institute legal proceedings for recovery of contributions that have not yet been paid, unless the limitation period has been interrupted or suspended. It was generally accepted that a summons, i.e. a bailiff’s deed by which the debtor receives a payment order under an enforceable title, interrupted the limitation period according to Article 2244 of the Civil Code. However, on 10 October 2002, the Supreme Court decided that the issue of a summons to pay did not interrupt the period of limitation in case the tax had been contested. According to this jurisprudence, summons to pay only have an interruptive effect on the amount of the tax indisputably due. Consequently, the tax authorities were confronted with tax debts for which the limitation period had not been interrupted, even though summons to pay had been issued.

A new law of 22 December 2003 substantially modified the rules relating to the limitation period in income tax matters. The new provisions were only applicable to limitations, which were not yet effective. As a result, the tax claims for which the limitation period had already expired, were at risk to be permanently lost. In order to remedy this disastrous situation – at least from the point of view of the government – another act was passed. On 9 July 2004, a so-called interpretative statute was introduced that stated the following: “the summons must be interpreted as also constituting an act of interruption of the limitation period within the meaning of Article 2244 of the Civil Code, even when the contested tax debt has no certain or liquid nature”. According to the Constitutional Court, this provision cannot be considered as interpretative, but should be considered as retroactive, aiming at influencing the outcome of litigation. The Court, however, found that, in this case, the retroactive effect could be justified. On the one hand, the Court accepted the existence of “exceptional circumstances”: the legislator intended to neutralise the devastating effect of the Supreme Court’s decision. On the other hand, the Court accepted as “imperious motives of public interest” the fact that the rights of the Treasury had to be protected in respect of the contested tax debts.

**Question 14:** In the Netherlands the legislator sometimes grants retroactive effect to tax statutes that are favourable to tax payers. If that also happens in your country, in what kind of situations does it happen?

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79 The preceding analysis can be found in J. MALHERBE and P. DAENEN, “Retroactivity of domestic tax laws and tax judgements of the European Court of Justice. The Belgian perspective and the European context”, *l.c.*, (1) 10-11.
We are not aware of any cases where a retroactive effect was granted to such a favourable tax statute.

It should, however, be noted that – although administrative regulations with an individual scope can, in principle, not be applied retroactively – the Council of State decided that administrative regulations with an individual scope are considered to have retroactive effect if they are favourable to the relevant individual (e.g. the introduction of a fiscal exemption that is more favourable than the former exemption).80

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

Question 15: Is it possible in the legal system of your country that courts test compatibility of a tax statute with the Constitution and/or general legal principle such as the principle of legal certainty?

In Belgium, only the Constitutional Courts can test whether laws, decrees or ordinances are compatible with the Constitution. As mentioned above, the Belgian Constitution does not include a provision that imposes limitations to retroactivity of statutes. In its case law, the Constitutional Court applies the broader concept of legal certainty, from which the principle of non-retroactivity is derived. Since legal certainty is not explicitly embedded in the Constitution either, the Constitutional Court founds its decisions on the violation of articles 10 and 11 of the Belgian Constitution, which express the principle of equality.

Only the Constitutional Court has the authority to acknowledge general principles of law and to test laws, decrees and ordinances against these principles. In the past, the Supreme Court has also acknowledged general principles of law, but since the establishment of a separate Constitutional Court, this is no longer admissible.81 This applies all the more for hierarchically lower Courts. It would indeed be rather inconsistent if regular courts were competent to test laws, decrees and ordinances against general principles of law, while it is explicitly prohibited for them to test these legal rules against the constitution itself.82

Question 16: If the answer on question 15 is positive, what examination method do the courts apply?

As mentioned above, the Constitutional Court does not consider every retroactive statute to constitute an infringement of the principle of legal certainty.83

First of all, it is possible that retroactive provisions simply confirm legal rules that had been published earlier. For example, if a new act repeats and confirms provisions of an

81 In spite of this, the Supreme Court still seems to consider itself competent to determine whether or not a general principle has “constitutional value”. Viz. Cass. 17 November 2005, F.J.F. 2006, 2006/153.
82 J. VANDELANOTTE en G. GOEDERTIER, Overzicht Publiekrecht, Brugge, Die Keure, 2007, 169-175.
83 As mentioned above, the Constitutional Court combines the principle of legal certainty with the principle of equality as laid down in article 10 and 11 of the Constitution.
existing royal decree, the new act only consolidates an existing situation. The retroactive effect of such a provision does not constitute a breach of the principle of legal certainty.\textsuperscript{84}

Secondly, the Constitutional Court holds the opinion that retroactivity can be justified in certain circumstances. Justification is possible when the retroactive effect of a legal rule is indispensable to achieve a goal of public interest, such as the well-functioning or continuation of public services.\textsuperscript{85} Although, in many cases, reference is made to the impact on public finances, this justification is generally rejected.\textsuperscript{86} The Constitutional Court only accepts this justification when it is accompanied by other persuasive considerations.\textsuperscript{87} Whether grounds for justification are present is examined on a casuistic basis.

As mentioned above, the Court will be more reluctant to accept a justification when the retroactive legal rule has an influence on the outcome of pending legal proceedings. In this respect, we refer to the answer to question 13.

Question 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?

All Belgian courts have the authority to test whether (tax) statutes are compatible with the international treaty provisions that have direct effect. However, as from 10 August 2009 onwards, judges are obliged to ask the Constitutional Court to give a preliminary ruling if a law, decree or ordinance potentially violates a basic right that is guaranteed both in the Belgian Constitution and in a European or international treaty.\textsuperscript{88} Since both article 16 of the Belgian Constitution and Article 1 of the First Protocol ECHR deal with the protection of property, the Constitutional Court should always be asked for a preliminary ruling in this respect.

In case 177/2005\textsuperscript{89}, the Constitutional Court tested the compatibility of a retroactive tax statute with Article 1 of the First Protocol ECHR. For the background of this case, we refer to question 13. The Constitutional Court decided however that there was no disproportionate interference with the right of property. First of all, the taxpayers did not obtain a claim against the State that equalised the amount of the contested tax debt. Secondly, even under the assumption that the period of limitation had expired and that the expired debt constituted a possession for the taxpayer, the interference of the legislator could be justified based on the second paragraph of article 1 of the First Protocol ECHR. The criticised measure was indeed considered to be in accordance with the public interest and indispensable to secure the payment of taxes.

\textsuperscript{84} Arbitragehof 15 September 1999, nbr. 97/99; Arbitragehof 21 July 2001, nbr. 98/2001, both on www.arbitrage.be.
\textsuperscript{86} O. NEIRYNCK, \textit{l.c.}, (139) 156.
\textsuperscript{87} O. BERTIN, “Les lois rétroactives en matière d’impôt sur les revenus”, \textit{J.D.F.} 2001, (193) 215
Question 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?

Concerning the Acts of Parliament, we refer to the answer to question 15.

Since the principle of non-retroactivity is embedded in Article 2 of the Belgian Civil Code and Article 108 of the Law of 4 August 1986, there is no need for courts to test subordinate legislation against the principle of legal certainty. According to Article 159 of the Constitution, judges are obliged to make abstraction of subordinate legislation that interferes with laws, decrees and ordinances. As a consequence, if subordinate legislation interferes with Article 2 C.C. or Article 108 Law 4 August 1986, it will be set aside by the judge.

Question 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?

The Constitutional Court has ruled several times that the “non-retroactivity of laws is a safeguard against legal uncertainty”. This is the reason why retroactive applications can only be justified in specific circumstances. The fact that retroactive applications might raise further questions about legitimacy and validity is not explicitly taken into consideration.

Question 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).

This question is not relevant in casu, since the Belgian Courts do impose limits on the use of retroactivity.

E. Retroactivity of case law

Question 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 judgement (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 unfavourable for 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?

Older case law and literature held on to the principle that judgements necessarily have a declaratory character, pursuant to which case law was deemed to always have a retroactive effect. This declaratory character is based on the theory that judges do not create, but

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merely determine and apply the prevailing law.\textsuperscript{92} As has been demonstrated extensively by the Dutch author HAAZEN, this theory currently tends to be superseded.\textsuperscript{93}

Furthermore, in Belgian literature, this view has been strongly criticized. Certain authors argue strongly in favour of some sort of judicial transition rule.\textsuperscript{94}

It should be noted that both the Constitutional Court and the Council of State do have the authority to determine and limit the temporal effect of their decisions that nullify a legal rule “erga omnes”.\textsuperscript{95}

The law does not, however, grant the Supreme Court this authority. In a decision of 2005, the Constitutional Court refers explicitly to the problematic nature of the fact that the Supreme Court is not entitled to limit the temporal effect of its decisions.\textsuperscript{96}

In a recent decision, the Supreme Court obliquely dealt with this matter for the first time and seems to have opened the door for a potential temporal modulation of its case law.\textsuperscript{97} Although this decision did not concern its own jurisprudence but, on the contrary, the preliminary rulings of the Constitutional Court, it can be argued that this decision has general scope and is also applicable to its own case law.\textsuperscript{98} The Supreme Court seems an advocate of the establishment of a broader juridical transition law.\textsuperscript{99}

Given the limited case law regarding transition rules, we are unable to answer part two and three of this question.

Please note that none of the above specifically concerns tax regulation. The consequences for the government of a (retroactive) judgement of the Supreme Court concerning tax regulation is, however, \textit{de facto} limited, as a notice of objection against a tax assessment can only be lodged within 6 months after the date the assessment was sent out.\textsuperscript{100} Apart from this, article 376 ITC provides in a 5 year period to claim an \textit{ex officio} relief of overtaxation emerging from new documents or facts. According to the second paragraph of this article, changes in jurisprudence are not regarded as a new fact in this respect. In spite of this, the Constitutional Court has ruled several times that its decisions indeed qualify as a new fact.\textsuperscript{101} This has been explicitly confirmed in an administrative circular, both for

\textsuperscript{92} C. BERX, \textit{Rechtsbescherming van de burger tegen de overheid}, Antwerpen, Intersentia, 2000, 338-342.
\textsuperscript{95} Art. 8 of the Extraordinary Law on the Constitutional Court and art. 14ter of the Coordinated Laws on the Council of State. The Constitutional Court does not have this authority with respect to preliminary rulings.
\textsuperscript{98} E. DIRIX, “Rechterlijk overgangsrecht”, \textit{R.W.} 2008-09, (1754) 1757-1758.
\textsuperscript{100} Art. 371 ITC.
erga omnes decisions and preliminary rulings. This administrative divergence should, however, be interpreted in a restrictive manner and can therefore, not be considered applicable to decisions of the Supreme Court.

F. Views in literature

Question 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 in which it is considered (not) justified to grant retroactive effect to tax statutes?

In this respect, we refer to the answers above, as we believe that the general opinion in fiscal literature has already been discussed at length. Summarizing, it may be said that the general view in fiscal literature corresponds, to a large extent, to the case law on retroactivity.

Question 23: Has the law and economics view on transition law, or other non-traditional legal views, provoked a debate in your country?

To our knowledge, the law and economics view has provoked very little debate in Belgium. In (Belgian) literature, the law and economics view regarding fiscal retroactivity does not receive ample treatment.

A contribution of Kaplow himself can be found in the “Encyclopedia of Law and Economics” by Bouckaert and De Geest. This contribution, however, has a rather general scope and does not discuss the Belgian repercussions of Kaplow’s theory.

Furthermore, different law and economics views on fiscal retroactivity are discussed briefly in the Liber Amicorum J.J. Couturier. However, the conclusion is that each one of these views only clarifies one single aspect of the problem. For instance, the view arguing that changes in tax law should have retroactive effect because that would result in more efficient lawmaking, is founded on the distributive function of taxation. This argumentation is only valid when the distributive function of a taxation rule prevails. However, this is not always the case. In this respect, we can refer to the Belgian rules that provide in an augmentation of tax in case no advance payments are made. Clearly the function of this rule is not of a distributive nature. The goal of this rule is to incite certain taxpayers to already pay their tax due during the taxable period by means of advance payments.

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