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RE: Retroactivity and tax legislation – Hungary report, EATLP 2010

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“The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice.”

Retroactive actions can take place in the various segments of business life. Apparently, legislation or the judiciary repeal of statutes can be retroactive (it is supposed that judicial lawmaking is not possible). Besides, companies may be induced to reopen their final accounts retroactively both for financial accounting and income tax purposes. In tax law, self-revision of the past tax liability can also occur. For legal purposes, the facts of time, and changes in time, matter. Both the legislator and courts refrain from interfering with completed legal relationships unless there is good reason to do that. The statute of limitations constitutes quite a serious burden for the actions of the state organs, as it clearly turned out in Hungary already early in the nineties where the formulation of political will of the new democracy collided with the constraints of the rule of law.

The evaluation of retroactive (or retrospective) legislation is a matter of providing transitional justice, or rather of seeking to manage transitory times by means of law (i.e., treating an inter-temporal conflict of laws). The two extremes between which a solution must be found are legality and legitimacy. The first option is emphasised by Kelsen or Radbruch. According to them, the idea of substantive justice is to be subsumed under the scope of positive law. It is suggested that not only material justice or legitimacy, but also equality are values that cannot be considered as indispensable within the borders of a legal order. Arguably, positive law must not be subject to outward ideas. It must be a closed system driven by the logic of consistency only. If this is the case, a legal system is apt to substitute lawfulness for any kind of justice.

Retroactive or retrospective legislation can be forgiven for good reasons. After all, the supremacy of the parliament of a country to make law may prevail if necessary over the legal certainty maxim. Legislating substantive rights may thus take priority to the formal concept of the rule of law principle. Indeterminate legal concepts may challenge the operability of the legal order, however. Thus, the rule of law may arguably set a standard that cannot be superseded at any instance by any public body, bound to effective laws, even if enjoying full legitimacy.

2 According to Kelsen, the enforcement of law can be guaranteed by the systematic application of the promise of organised coercion, the eventual technique of law. The technique of social control means with Kelsen in turn the forms, in which conformity to legal norms can be achieved. Hans Kelsen, The law as a specific social technique, University of Chicago Law Review (1941-42), Vol. 9, p. 79.
Lawfulness certainly prevails over justice in the field of criminal law. In the area of tax law, however, legal certainty may be subject from time to time to the considerations of equity or efficiency. This does not mean that the certainty maxim drafted by Adam Smith would not be the norm, in comparison to which deviations like retroactivity can take place only exceptionally.

(A) On terminology

In many jurisdictions, there are no separate terms to denominate legislation, which is retroactive or retrospective (e.g., “lois rétroactive”, “effetto retroattivo”, “обратная сила закона”). In German legal discourse, the case with retroactive or retrospective legislation is better to the extent that distinction can be made between “echte und unechte Rückwirkung”. Since this report is prepared in English, I shall explicitly distinguish between the two terms. Following the Latin roots of “retroagere” (drive back) and “retrospicere” (look back), I shall apply the term of “retroactive” for “ex post facto” legislation. Where a law enters into force with a retroactive effect, I mean that it is applicable to events that started and ended in the past, that is, before the date the law entered into force. Subsequently stipulating rights and obligations that apply to past relationships, a statute is thus introduced as if it had existed before the existence of these relationships. In other words, changes may be made effective in past years, deeming the law to have been that which it was not. A statute, entering into force retrospectively, is applicable to existing relationships, which have started in the past, but which have not yet completed at the time when the new law enters into force. Retrospective legislation suggests changes in law prospectively. This is because the new law will be applicable to events that continue to exist.

In the first case (retroactivity), one can take a look at events from the perspective of a tense of “praeteritum imperfectum”, in the second case (prospective legislation) from the perspective of a tense of “praesens perfectum”. In other words, retroactive legislation alters the past legal consequences of past actions while retrospective legislation changes the future legal consequences of past actions. Admittedly, the borderline between retroactive and retrospective legislation is elusive in many cases. This is because the actions that are affected by new laws can hardly be distinguished conceptually as to whether the events that are addressed by a new statute belong to the past or they continue to exist in certain ways in the future as well. In case of retrospective legislation, vested rights are to be respected by introducing grandfathering provisions (or phasing out rules in respect of diminishing relief opportunities and phasing in rules in respect of newly introduced liabilities). Strictly speaking, a statute enters into force retrospectively if it has immediate effect without grandfathering existing rights.

Quite confusingly, retroactivity is usually called in the British judiciary practice as retrospective, and a retrospective law is called as quasi retrospective. Tax legislation may prefer different approaches, depending on a particular case. Retroactive legislation means in

5 Geoffrey T. Loomer, op.cit. p. 64.
6 No definitional distinction can be accepted between primary and secondary retroactivity (i.e., between retroactive and retrospective legislation). Jill E. Fisch, “Retroactivity and legal change: an equilibrium approach”, Harvard Law Review (1997), Vol. 110, p. 1069. The illusive nature of a precise definition of the problem of “ex post facto” legislation converts the analysis from a binary into a quantitative issue. Rather than asking whether retroactivity is appropriate, we should ask what degree of retroactivity impact is appropriate. See: pp. 1072-1073.
countries like the Netherlands “formal retroactivity”, retrospective legislation suggests in turn “material retroactivity”.

(1) Legal discourse

In Hungarian legal language, no distinction can be made between retroactive and retrospective legislation. The term of “visszaható” means both retroactive and retrospective. Clear distinction is still made in fact between retroactive and retrospective legislation.

In Hungary, retrospective legislation occurs frequently in the area of administrative tax law. From year to year, the new provisions of administrative tax law are applicable even on pending tax matters, provided, however, that changes in law do not take place to the detriment of taxpayers [Section 182 (1) of the Act XCII of 2003 on Taxation Order, as amended]. Retrospective provisions may also concern substantive tax law, but not frequently. In most of such cases, the new law is complemented with grandfathering rights. Thus, the new law usually introduces transitory measures in order to protect vested rights. Retroactive legislation is against the Constitution of the Republic of Hungary, as confirmed by the Constitutional Court several times. Exceptions to this occur very rarely, and in favour of citizens only.

(2) Statutes applying to a previous year (actual retroactivity) and statutes applying as from the beginning of the current year (de facto retroactivity)

It can happen in Hungary that tax law provisions are changed retroactively in the sense that during the fiscal year changes are introduced even concerning existing legal relations with a retroactive effect to the beginning of the fiscal year. If such changes are in favour of taxpayers, they can enter into force. If changes imply in any respect new burden for taxpayers, they cannot be introduced. The distinction between the cases where the new provisions, which entered into force during the fiscal year apply to the previous fiscal year or they apply as from the beginning of the current year, is nevertheless of no relevance.

In Hungary, the argument cannot be accepted that the problem of retroactive legislation would allegedly not arise due to the fact that the liability to pay tax would arise at the end of the fiscal year only, following the date when the new rules entered into force at the start of this year. Notably, the liability to pay income tax is of substantive nature and arises from the legal relationship from which taxable income can be earned. Once the taxpayer enters into such a relationship, the liability arises to pay and administer income tax (by way of filing tax returns, notifying the tax authorities of certain events, etc.). It is another question that it is due to pay (and administer) income tax following the year only in which income has been earned by way of filing the annual tax return. Moreover, income tax liability arises “in abstracto” when the taxpayer enters into a legal relationship which makes it possible to the taxpayer to earn income. The date when taxable income is deemed to be derived may, however, be different from the date when the taxpayer enters into such a legal relationship.

For instance, eligible employees are under employee stock offering programmes entitled to subscribe to shares, which are normally locked up for a certain time period. They are subject to tax liability from the very date they entered the programme be enrolling on it and subscribing to shares. The date when taxable income is, however, deemed for tax law purposes to be earned is at the later date only when an employee is entitled for any reason to dispose of the shares subscribed or otherwise to benefit directly or indirectly from the shares.
deposited during the lock-up period. It is a third date when it is due for the employee who has earned taxable income to file a tax return and pay tax accordingly.  

(3) Interpretative statutes

The Hungarian law is quite strict in prohibiting both retroactive and retrospective legislation. Retrospective legislation can be forgiven in a number of cases, however. An example for this is a judgment of the Constitutional Court, approving an exception to the prohibition of retrospective legislation on the grounds that the new law, introducing an anti-avoidance-principle, were of interpretative nature. The Constitutional Court discussed the case if the principle that contrived transactions had to be disregarded for tax purposes – introduced in line with the adoption of the then effective Act on tax administration, which entered into force on 1 January 1991 – could be applied to transactions, which were carried out before the date of entry into force of this Act. Arguments can be raised in favour of the application of this principle to the cases started not only after, but also before the effective date to the extent that the law, implying now this principle, did not create individual obligations on the taxpayers, involved in current matters. The only thing that has allegedly changed is that the same tax law must now be applied with more consistency. Even if the problem of retrospective legislation could be raised, the Constitutional Court treated the anti-avoidance principle under discussion as a matter of interpretative law and, as such, did not consider that it would fall within the ambit of the prohibition of retrospective legislation.

The Constitutional Court is right, indeed, in arguing that the introduction of such a principle does not place on taxpayers new substantive law obligations. It is doubtful, however, if taxpayers will be protected against the change in law with a retroactive effect in the sense that the introduction of new procedural rules may also lead to laying on taxpayers new obligations. Furthermore, it is doubtful if the provisions on an anti-avoidance principle can really be seen as those of interpretative nature.

(4) Validation statutes

There is no “validation statute” in Hungary, which would be designed to overrule a judicial decision and validate the existing legal practice by introducing new legal rules with a retroactive effect, in order to prevent taxpayers from effectuating tax avoidance. No example can be delivered from the Hungarian practice for the problem (or for a similar problem) raised before the European Court of Human Rights (“ECtHR”) in the case of the National & Provincial Building Society and others v. the United Kingdom. An interpretative statute cannot be considered in Hungary as identical to a validation statute.

(5) Effective date preceding the date of entry into force

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8 For example, the underlying tax liability can occur on 1 July 2009 when an employee enrols on a programme and subscribes to shares during a period of subscription, which is to follow enrolment, but which may not be longer than a couple of weeks. They shares will be freed no earlier than on 1 July 2012. This is the date when the employee is obliged to recognise that taxable income has been derived, even if the employee decides to sell his or her shares at a later date, let us say, on 1 November 2012. The date of 1 July is the first day the employee can dispose of the shares subscribed, irrespective of the fact if the employee exercised this right or not. The employee will then be obliged to file an income tax return for the income earned during the fiscal year of 2012 no later than on 31 May 2013. Liabilities may still occur already in 2012 to arrange for advance income tax.


10 The UK legislator had to overrule with retroactive legal rules the judgment made in the case of Woolwich 1 litigation where the taxpayer liberated itself from the liability to pay tax on interest in a gap period due to the fact that the 1986 Regulations were void on technical grounds. Application No. 117/1996/736/933-935, judgment at Strasbourg on 23 October 1997.
It is quite normal in Hungary that the effective date of particular provisions would follow the date when an Act enters into force. It is categorically prohibited that the effective date of provisions would precede the date when the new Act enters into force. It is not prohibited that the new law is introduced with an immediate effect (the effective date and the date of entry into force are the same in this case). However, it is under scrutiny if those who are addressed by the new law have enough time to prepare themselves for the application of the new law. In that respect, it is not the date of entry into force, but that of the promulgation of the new law that matters, i.e., this is the basis for comparison.

(6) Retrospective legislation (material retroactivity)

Retrospective legislation is not acceptable in Hungary either in the tax law area, or anywhere else. Exceptions to this rule are rare. Section 226 (2) of the Civil Code (Act IV of 1959, as amended) is noteworthy, which provides for that the contents of the contracts, concluded before the date when the new law entered into force, cannot be changed by statutory law, but exceptionally. This means retrospective legislation, affecting the transactions started earlier. However, the new law is applicable prospectively. This exceptional power of legislation can be explained by analogy with the principle of the “clausula rebus sic stantibus”.

The retrospective nature of legislation can be identified in different cases. These cases have in common, however, that they have not yet been fully completed. For instance, the assets purchased may be appreciated. As a result of it, capital gains will be accrued. The new tax law shall apply to the taxation of capital gains, even if they accrued before, in the instance that capital gains are deemed to be derived at the time only when the assets are disposed of at a gain. One can argue that the date when the new law entered into force was preceded by the date when the acquisition of the assets took place. However, one must also take into consideration that the new law entered into force before the date when the disposal of the same assets would have been effectuated.

The question can be raised if this case is conceptually different from a loan contract, which has not yet expired, and the taxation of interest changes in the meantime. This is a case arguably different from the first one because the single transaction, subject to tax, has not yet been completed at the time when the law changed. In fact, for tax purposes, no distinction can be made between the two cases, however. Even in the first case, the transactions of acquisition and disposal must be linked to each other in order to arrive at the economic contents, according to which the taxable event can be interpreted. In both cases, tax legislation is retrospective. Tax laws can change in Hungary, although with grandfathering (as mentioned).

(7) Statutes having an immediate effect in the areas of substantive and procedural tax law

In the Hungarian practice, distinction is to be made between substantive and procedural law where legal rules are introduced with an immediate effect. Substantive tax law rules are usually introduced with grandfathering. Administrative tax law rules with an immediate effect can be applied to pending cases (resulting in retrospective legislation), providing, however, that changes do not take place to the detriment of the taxpayer, as mentioned. Administrative tax law provisions can be found both in the Taxation Order Act and in independent laws on particular taxes (laws on individual income tax, corporation tax, VAT, excise duties, etc.). The Taxation Order Act implies the basic principles that are guiding for the application of tax law in general (prohibition of the abuse of law, legal certainty, non-discrimination, equity, etc.). They can hardly be considered as procedural law provisions. In the rest of the Taxation Order Act, the legal provisions on tax administration can be found. They imply the legal provisions on the exercise by the tax authorities of jurisdiction in tax matters (rules on gathering tax information, on tax assessment, on the
payment of taxes, etc.) and those on the operation of the tax authorities. The provisions belonging to the former group can be considered procedural tax provisions, properly speaking.

In a legal case brought before the Constitutional Court,\(^{11}\) it was discussed that the law on duties was amended from 1990 to 1991, resulting in abolishing a number of relief opportunities as of 1 January 1991. The Constitutional Court concluded that the infringement of Section 12 (2) of the Act XI of 1987 on legislation (as amended) on the prohibition of retroactive legislation could be identified where the new law was applicable to any cases already filed for assessment with the Duties Office, even if the liability to pay duty could have been developed before, i.e., at the date when the taxable contract was concluded. Arguably, the taxable transaction could have been completed during the fiscal year of 1990, before the time the new law entered into force. This way, the new law created the liability to pay duty relating to a transaction made in the past, that is, retroactively. This is an inexcusable infringement of the legal certainty principle (Para. IV.2).

The Hungarian legislator assumed at that time that the legal rules on the liability to pay duties on property transfer, and on procedures instituted before the authorities of public administration and the courts are of procedural nature as a whole. Not making distinction between the substantive and procedural aspects of the liability to pay duties, the legislator neglected the fact that the liability of payment could be developed at the time when the contract was concluded, preceding the event when the complete contract was filed for assessment with the Duties Office, which then imposed by taking a formal decision the duty payable. This confusion could not occur after the judgment of the Constitutional Court.

A similar problem occurred at the time of Hungary’s EU accession (on 1 May 2004) when the EC Assistance Directive and the EC Tax Collection Directives were introduced, and promptly applied, even to the matters not yet finished until the time of accession. Although on the same basis of substantive tax law, the Hungarian taxpayers could still encounter a new situation where the liability to pay taxes is enforced on a new procedural law platform. Such a situation is in fact more burdensome for taxpayers. It is a question only if this change in the taxpayer’s burden can be recognised for legal purposes. Following the idea that the protection of the taxpayer rights must not be confined to that of substantive law rights, this question must be answered in the affirmative, given that, upon the protection of the taxpayer rights, procedural rights cannot always be separated from substantive law rights. As a consequence, one can argue that the retrospective effect of new procedural law rules can be considered in breach of the constitutional principle of the rule of law.

(B) Ex ante evaluation of retroactivity

(8) Legal basis for retroactivity

In Hungary, there is no explicit prohibition in the Constitution or in anywhere else in the legal system on retrospective or retroactive legislation. The Constitutional Court has developed, however, from the principle of the rule of law as enshrined in Section 2 (1) of the Act XX of 1949 on the Constitution of the Republic of Hungary, as amended, that retrospective legislation is not possible, but exceptionally, and with regard to the protection of vested rights, and retroactive legislation is prohibited as such (with very small exceptions, and only if the new law is in favour of citizens). This restrictive approach can be explained by the historical reason that, upon the transition into the new democracy, the political changes, even if revolutionary, could take place strictly within the limits of legal continuity. This historical background explains the sensibility of the public authorities to retrospective or retroactive legislation, which is considered as the infringement of not only the rule of law, but the social compact, according to which radical political changes took place peacefully, and

\(^{11}\) 7/1992 (30.I.) AB.
the Republic of Hungary is in full the legal successor of the People’s Republic of Hungary, existed before 23 October 1989. (This is the main reason, for example, why Hungary did not apply in 1990 for renegotiating with banks the huge public debt assumed by the old government.)

(9) Transition policy

The government has not released a transition policy paper in Hungary. However, the Constitutional Court developed a subtle policy on the possibility of retrospective legislation with particular regard to the protection of vested rights as well as on retroactivity. First time, the Constitutional Court had to face the problem of retroactivity in the criminal law area in 1991 when it prevented the parliament from changing the criminal law rules on the statute of limitations in respect of politically motivated crimes perpetrated during the revolution and civil war of 1956 with a view to prosecuting these crimes. Second time, the Constitutional Court had the opportunity to deal with the problem or retrospective legislation in 1995 when public benefits and allowances were widely reduced through a reform package due to the overall budgetary constraints. The Constitutional Court developed its stance on the conditions under which vested rights must be protected.

As a consequence of the constitutional practice, the tax legislator is also careful. Retroactive tax legislation does not occur (with exceptions to the very few cases where changes in law are in favour of taxpayers). The legal rules introduced from year to year in the area of tax administration result in retrospective legislation, applicable to pending cases. They must not be applied to the detriment of taxpayers, however (as discussed). Retrospective tax legislation usually takes place, but in respect of major issues always with grandfathering. As a consequence of all the more irregularities as recently experienced in the operation of the national government, fiscal legislation has been very much instable, meaning that tax laws may change even within one single fiscal year.

(10) Conseil d’Etat

In Hungary, there is no tradition of categorically separating from each other public and private law, like in France. As a consequence, the Hungarian courts have universal jurisdiction, even if for practical reasons courts are specialised in chambers. Tax cases are decided by the courts competent in the matters of public administration. In the absence of the categorical separation of public administration from civil law matters, there is no need for a public body like “Conseil d’Etat” or “Consiglio di Stato” that would supervise if the acts of the authorities of public administration are lawful.

(C) Use of retroactivity in legislative practice

(11) “Legislating by press”

The instrument of “legislation by press release” does not exist in Hungary. The Constitutional Court is very conservative, sticking to the date of promulgation, in respect of which legislation must not have retroactive effect. It can even happen that the Constitutional Court is not satisfied if a new law is promulgated and published in the official gazette. It is also required that a copy of the gazette with the new law should be available for those who are addressed by the new law, including both the public authorities and citizens.

(12) –

(13) Pending substantive tax law cases excluded form retroactive legislation

Pending cases cannot be affected in any way by retroactive legislation. As mentioned, new legal rules on tax administration can apply retrospectively, with the proviso,
however, that the new law must not badly affect taxpayers. The Constitutional Court has the power to repeal a legal rule considered as unconstitutional retroactively, and may provide for that the repealed law cannot apply to a pending case. Repeal by judiciary means of legal rules retroactively is, of course, a matter different from adopting a new legal rule with a retroactive effect.

(14) Grant of retroactive effect to tax statutes that are favourable for taxpayers

It is not precluded in Hungary that in very exceptional cases the legislator grants retroactive effect to tax statutes that are favourable for taxpayers. It can even happen that amnesty programmes are introduced, but very rarely. Such amnesty programmes are still strongly criticised because they hurt the principles of the ability-to-pay and of legal certainty, and they have not been associated with the programme of combating tax avoidance and tax evasion.¹²

(D) Ex post evaluation of retroactivity
(15 – 16) Testing by courts of the retroactivity of a tax statute for compatibility with the Constitution

The Hungarian courts are not allowed to test Acts or legal regulations for compatibility with the Constitution. As a consequence, the retroactivity of a tax statute cannot be tested either. The Supreme Court does not have any jurisdiction over constitutional matters. As well, the courts are bound to the effective legal rules as they are. The only possibility for a court is to apply for a legality review with the Constitutional Court where the court seized of a specific case, while applying legal rules, finds that the conformity of these rules with the constitutional order is doubtful. The Constitutional Court has the exceptional opportunity to repeal the legal rule found unconstitutional with a retroactive effect. This rule cannot then be applied to the specific case either.

(17) Testing by courts of the retroactivity of a tax statute against Article 1 of the First Protocol ECHR

The problem of the retroactivity of Hungarian legislation has not yet been brought before the ECJ or the ECtHR. In principle, it is not precluded that Hungarian courts refer to Article 1 of the First Protocol ECHR¹³ in the context of retroactivity where they approach the Constitutional Court for review.

(18 – 20) –

(E) Retroactivity of case law
(21) Abandoning by the Supreme Court of the existing case law and formulating by it a new general rule

Judgments do not have in Hungary any “erga omnes” effect. While the study of the relevant legal cases has been all the more important in the recent two decades, there are no precedents in Hungary. Where differences are developed for any reason between judgments made in comparable cases, the Supreme Court must pass resolutions on the uniform applicability of law. The subject of such resolutions is solely to solve the possible conflicts developed between the past judgments. The Supreme Court is not allowed to abandon existing case law and formulate a new general rule.

¹³ European Convention on Human Rights, signed at Rome on 4 November 1950; Protocol No. 1, signed at Paris on 20 March 1952.
The Constitutional Court has the power to repeal Acts or legal regulations if they are found as unconstitutional. Normally, the Constitutional Court will repeal them prospectively. If they are repealed with a retrospective effect, this fact is always precisely explained by the judgment. The Constitutional Court is not authorised to formulate new principles of law or adopt transitory measures. It has the power, however, to decide that the legal norms repealed with a retroactive effect should not affect certain legal relationships that have been completed. Apparently, the Constitutional Court refrains itself from interfering with the past without sufficient reason.

Legal cases cannot be reopened in Hungarian law as a result of new judgments. It is a possibility to get remedy only where it turns out that the legal rules applied in the case under discussion have been declared subsequently as unconstitutional. Due to the principle of “res iudicata”, final judgments are not subject to review, but within the strict limits of a petition of legal review that can be filed with the Supreme Court within 60 days from the time the judgment has been final, and in certain cases only.

Where the Constitutional Court repeals certain legal provisions with a retroactive effect and excludes the applicability of these provisions to a case that has been decided by a final judgment, the Supreme Court asks the petitioner who challenged the applicability of the provisions to the case under discussion to decide whether to apply for novation of litigation within 30 days (Section 361 of the Act III of 1952 on Civil Procedure, as amended). Furthermore, final judgments may in principle be changed as a result of the intervention of the ECJ that may find that the national law provisions, on the basis of which the case was decided are not consistent with Community law (see, e.g., Kühne and Heitz, Lucchini, Kempter).

(F) Views in literature
(22 – 23) –

(G) Background study on the Hungarian Constitutional Court’s practice on retrospective and retroactive legislation with particular regard to tax cases
   (i) A history of the restrictive approach to retroactive legislation

The Constitutional Court faced the problem of retroactive legislation early in the nineties already. Legal certainty was one of the crucial issues at the time when it was at stake how much successful the transition would be from the state socialism and a centrally managed economy into a parliamentary democracy and a market economy. The Constitutional Court contended that even the utmost radical political changes had to take place strictly within the framework of the rule of law. Changes in the legal system was therefore established on the continuity principle: the democratically elected new parliament and the government responsible for this parliament were bound to the old legal rules, which were in effect at the time of taking over the power. To date, it has been the only possibility to change the effective legal rules if changes are in accordance with the constitutional order and the due procedures of legislation.

There was a landmark decision in 1992 when the Constitutional Court prevented the parliament from adopting a law, which was designed to change the criminal law rules on the statute of limitations in respect of the political crimes perpetrated during the 1956 revolution, which were not persecuted before 1990 for political reasons (as mentioned).¹⁴ The idea was that these crimes must not remain unpunished because the new republic must be freed from

¹⁴ 1/1992 (5.III.) AB.
the psychological and moral burden of the crimes left unpunished. It was still difficult to
digest the lesson that political ideas could not be developed unless they were consistent with
the effective legal order. In particular, it was important to understand that even the -- maybe
invisible -- law had to be respected on how to change laws.

Obviously, the questions of the statute of limitations and retroactive legislation must
not be discussed in the same way in criminal and tax law. However, this judgment of the
Constitutional Court goes beyond the scope of criminal law in its significance. It has laid
down the foundations, which have been effective to date, of the possible treatment of
retroactive and retrospective legislation in general. One cannot understand, but from this
judgment of the Constitutional Court why the Hungarian standpoint on retroactive legislation
has been much more restrictive than in old democracies.

According to the Constitutional Court, the term of the state of law (the rule of law)
suggests a state of the art and a project simultaneously. The rule of law can be accomplished
not only because the state organs operate regularly, but also due to the fact that the whole
society is permeated by the conceptual order of constitution (Para. III.1). The point to the
changes of the political system of 1989 is that the radical political changes are accompanied
from a legal point of view with continuity. As a consequence, no distinction must be made
between the two layers of the legal order, depending on, whether laws have been adopted
before or after the political changes (Para. III.3). The two layers of the law are of the same
value, validity and nature, the Constitutional Court contends.

The legal certainty standard requires that the legal relationships as completed must
not be affected unless there are exceptional circumstances that produce proof to the contrary.
Legal facts become independent of the underlying legal norms (Para. III.4). The state must
thus not interfere with the accomplished legal facts, but exceptionally. Justice that can be
spelled out in a judgment, being of partial and subjective nature, should be superseded by the
legal certainty standard, based on objective criteria and on pure formalities (Para. III.5).
Legal certainty requires that legal provisions be clear, predictable and transparent. It directly
comes from these requirements -- the Constitutional Court contends -- that the application of
retroactive legislation or legislation per analogy is prohibited (Para. IV.1).

The constitutional liberties represent the very foundations of the state of law
(Rechtsstaat). It comes therefrom that the public power is not without limitation. State
interference must take place in accordance with the principle of subsidiarity. Therefore, state
interference cannot be considered as constitutional unless it is indispensable, necessary and
proportional with the envisaged aims (Para. IV.2).

This standpoint may also serve as a guidance for the prescription of tax liability. It
can be required from a constitutional point of view that the private law-driven schemes must
not be affected by tax legislation as long as the abuse of law cannot be ascertained. Private
law takes even in respect of tax legislation priority to public law. This entails that public
bodies cannot act unless they are explicitly authorised to do that. There is thus no universal
authority that would be granted to the public authorities. Where the authorisation of the state
organs is incomplete or obsolete, gaps left by public law must be filled by the principles and
consideration of private law.

The Constitutional Court holds that, according to the rule of law, it is not guaranteed
that a time period will not elapse, out of which crimes cannot be persecuted longer. It is
guaranteed, however, that the rules on the statute of limitations are unchanged.
Administrative measures are not apt for interrupting or suspending the period of the statute of
limitations (Para. V.2-3). By force of the statute of limitations, the natural fact of the running
time is converted into legal facts, i.e., into facts with a legal effect (V.4). The state has
limited possibility to interfere with this process.
One can add that, quite similarly, it is difficult to change the conditions for the recovery of tax claims. Where tax amnesty is introduced, the enforceability of taxes is unexpectedly and radically reduced, and the tax claim developed in the past can be forgiven due to the new law introduced retroactively. This change is made in favour of taxpayers. However, it can be criticised because an amnesty project will amend the share in public burden, which inadvertently affects the taxpayers who cannot, or will not, benefit from the amnesty programme.

(ii) Retrospective and retroactive legislation

In an important case, the Constitutional Court introduced distinction between retrospective and retroactive legislation, holding that it was justified to interfere prospectively with the conditions of the preferential long-term housing loans granted by the state. These loans were determined with low interest rates before the political changes. It could be justified to adjust these interest rates to reflect the deterioration of the circumstances in the public budget. It could also be appreciated that the changes were accompanied with transitory measures, giving a possibility for debtors to opt out. The government made use of Section 226 (2) of the Civil Code (as discussed, it provides for that the contents of the contracts, which were concluded before the entry into force of a new law can exceptionally be changed by the new law). The Constitutional Court contended that in principle the state could not be prevented from unilaterally changing the conditions of contractual relationships, the components of which arose both from private and public law (Para. IV.4).

Under Section 12 (2) of the Act on Legislation, a legal rule must not determine any obligation, which had to be fulfilled before the date when the new rule has been promulgated. The provisions on changing the interest conditions of preferential housing loans cannot be interpreted as if they had been introduced with a retroactive effect. The raise in the interest rate ensued the amendment of the conditions of the preferential loans for the future. This is true even if the new law induces changes that affect the conditions of the existing loan contracts. This amendment is thus not covered by Section 12 (2) of the Act on Legislation. The new law may still be affected by Section 12 (3) of the same Act. According to it, the date of entry into force must be determined in a way that enough time remain for making preparations for the application of the new law. In the specific case, the legislator could not be blamed even for the infringement of the provisions of Section 12 (3) because the new law was accompanied by the introduction of transitory rules (V.1.3). The Constitutional Court did not find a link between the changes in the conditions of preferential public loans and the ability-to-pay principle. There was a dissenting opinion, however, according to which the changes made in the conditions of subsidies are inseparably connected to the liability to pay taxes.

Another early case can also be highlighted. It comes from the files that the transfer of immovable property for no consideration was made on 30 December 1989, the case was filed for assessment with the Duties Office on 3 January 1990, the new law on the property transfer duty was adopted and promulgated on 28 December 1989, but the official gazette with the new law on the liability to pay duty on the gratuitous transfer of property was distributed and delivered to subscribers on 8 January 1990 only. The new law entered into force on 1 January 1990 with an effect as from the same date.

The Constitutional Court concluded (Para. II.2) that the legislator infringed both Paragraph 2 and Paragraph 3 of Section 12 of the Act on Legislation because

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15 32/1991 (6.VI.) AB.
16 34/1991 (15.VI.) AB.
- the law, being inconsistent with Section 12 (2), created an obligation in connection with a transaction completed before the date when information of the new law was available for taxpayers (that is, before 8 January 1990); and
- the new law did not leave enough time for preparations that would have been necessary in compliance with Section 12 (3).

Interestingly, the new law was adopted by the parliament already on 28 December 1989, before the date when the transaction was effectuated (on 30 December). Taxpayers might have had the opportunity to get informed of the new law already on 28 December 1989. However, the Hungarian practice is strict enough to stick to the later date for comparison. Hence, those who are addressed by the new law should be granted the real opportunity to get informed of the new law, which could be insured if the date of comparison is no earlier than at the date when the official gazette was delivered to the subscribers of the official gazette.

As discussed, the Constitutional Court did not object to the raise of the interest rates of the preferential housing loans for 1991. However, the problem of raising the interest rates of the preferential housing loans was the subject of another case as well.\(^\text{17}\) This time, the Constitutional Court did not approve that the new law was introduced with an effect of 1 January 1991, although a copy of it was available for those who were addressed by the law on 14 January 1991 only when the official gazette with the new law was delivered to subscribers. This way, the new law created obligations with a retroactive effect. Accordingly, the Constitutional Court declared the provisions of the new law unconstitutional for a period from 1 January to 13 January 1991, yet adding that the act of repeal does not affect the legal relationships developed before the date when the resolution of the Constitutional Court was promulgated (30 April 1991). The Constitutional Court took into consideration that the inapplicability of the new law for a short period of two weeks would lead to confusion, and it was not the intention of the Constitutional Court to embarrass people engaged in legal relationship that have been already completed. The Constitutional Court contended nevertheless in this judgment as follows: it is not consistent with the principle of the rule of law that someone could be called into account for the infringement of a legal rule which the affected person was not aware of, and could not be aware of, because the new rule was not promulgated or because it was promulgated subsequently and introduced with a retroactive effect.

In another case,\(^\text{18}\) there was a problem with a ministerial decree on customs tariffs because the new regulation entered into force on 11 February 1991 with an effect on the same day, and it was promulgated no earlier than on the same day. The Constitutional Court had the opportunity to illuminate the meaning of Section 12 (3) of the Act on Legislation (Para. II), holding that the effective date of the new rules must be determined with regard at least to the following:
- a copy of the official gazette with the new law must be available, and time must be ensured for those who are addressed by the new law to study it and get information from the authorities if necessary in connection with its application; and
- the authorities competent in applying the new law must also be given enough time to prepare themselves.

Exceptionally, it is not precluded that new legal rules will be promulgated on the date when they enter into force and become effective where the early publication would endanger the correct application of the new law (one can add that, for example, it may be the legislator’s intention to preclude this way the application of blatant tax planning schemes).

In a further case,\(^\text{19}\) the Constitutional Court was expected to decide on the conformity with the constitutional order of the abolishment in 1995 of a number of child-care benefits.

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\(^{17}\) 25/1992 (30.IV.) AB.

\(^{18}\) 28/1992 (30.IV.) AB.

\(^{19}\) 43/1995 (30.VI.) AB.
The abrupt introduction of the new law was condemned. The Constitutional Court concluded that the change under discussion in the conditions of social security allowances could not be challenged even if they concerned existing family relations. However, vested rights must be protected. To that end, a sufficient transitory period must be ensured to give enough time to those who are addressed by the new law to prepare themselves (Para. 1).

Some times it can happen that the calculation of the (advance or final) tax liability is based on the income earned in the previous year. In a case, the Constitutional Court made a scrutiny of the newly adopted law on the liability of a particular class of sole traders to pay social security contributions, based on the income earned in the previous year. The Constitutional Court has explained that it does not mean retroactive legislation if the new law provides for the conditions of the liability to pay contribution prospectively. Furthermore, it is matter of technique only whether or not to calculate the liability of payment, based on the previous year’s earnings (Para. II.1).

It cannot yet be precluded that the application of such a technique may result in the infringement of the taxpayer rights, which must be protected constitutionally. For instance, in the case of the National & Provincial Building Society and others, which was discussed before the ECtHR, the applicants raised among other things the objection to the UK law on the taxation of interest in a gap period that the prompt taxation of interest, based on the interest income earned in the previous fiscal year, and its later correction, regularly led to granting by taxpayers a loan involuntarily to the Treasury. In such circumstances, the introduction of taxation in a gap period may result in retroactive legislation. Where, however, the technique of the calculation of tax liability, which is based on previous year-earnings, is neutral, it must be intact from the problem of retroactive legislation.

(iii) Failure to explore the lack of retrospective legislation due to the failure to discover the lack of real change in law

Conflicts between the principle of the prohibition of retrospective or retroactive legislation and the protection of the public interest (or, in particular cases, the respect of the considerations of equity or efficiency) cannot be solved mechanically. Instead, inquiries must be made after the facts and circumstances as the case arises. Attention must be given among other things to the circumstances in which the new legal provisions have been adopted. It must be borne in mind that the rights vested not much time before the entry into force of the new law requires particular protection.

In a case, the Constitutional Court, making a scrutiny of the Act, which extended the obligation of obtaining from the police permit to Flobert rifles retrospectively, did not consider the new law unconstitutional in general. The new Act interfered with the existing conditions of holding personal weapons, but it was introduced prospectively. The Constitutional Court still identified the problem that the new law was not simply applied to those who already possessed weapons, but also to those who were in the process of applying for renewed permit. The Constitutional Court concluded that, the legislator was not reasonable in extending the new law with a prompt effect even to those who were applying for renewed permit. The new Act could be challenged because it did not secure a transitory period in which the persons concerned by the new law could have prepared themselves for the application of the new law (Para. III.B.2.1).

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20 54/1995 (15.IX.) AB.
21 Application No. 117/1996/736/933-935 by the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom; judgment at Strasbourg on 23 October1997.
22 9/2007. (7.III.) AB.
Similarly, if companies have enjoyed corporate tax allowance relating to qualifying investment projects since a long period of time, they must not be felt to be hurt if the allowances will be reduced or withdrawn after a while. However, when taxpayers enter a privileged status just before the time the law has been changed, they may expect a kind of stability, and that the law should not be changed abruptly. It is another issue if tax holidays are granted for a specific period of time. Vested rights certainly enjoy in these cases increased protection.

In a case, the Constitutional Court repealed retrospective legislation, which changed the conditions of tax holidays prospectively, allegedly to the detriment of existing taxpayers. The new Act restricted the scope of existing tax holidays, but the effective liability to pay tax did not change because of the simultaneous reduction in corporate tax rates. The taxpayers argued that they were entitled to tax allowance, calculable as a certain percentage of nominal corporate tax. This percentage was changed to their detriment. The government argued in turn that the taxpayers did not suffer any disadvantage because the tax liability was the same as a result of the general reduction in the corporate tax liability. As a consequence, no retrospective legislation could be ascertained. According to the Constitutional Court, however, the reduction by retrospective legislation in vested rights obtained for a specific period of time could not be upheld (Para. II.7.1). As a consequence, the Constitutional Court repealed the law under dispute with a retroactive effect to the date of its entry into force.

Before 1995, corporate taxpayers could benefit in certain conditions from a 100% allowance of 36% corporate tax. After 1995 (and in 1996), they could benefit under similar conditions from 100% of 18% corporate tax. However, a 23% supplementary tax was levied on distribution as well. According to the interpretation of the new law by the Finance Ministry, the supplementary tax could be treated as a withholding tax on dividends that could be sheltered almost in full by a respective double tax convention. It could not yet be taken for granted that the supplementary tax could have been treated as a withholding tax on dividends, although this question was not discussed by the Constitutional Court.

The Constitutional Court preferred a formalistic approach, which can be criticised. Namely, it focused on the basic tax of 18% only, and discussed the change in the corporate tax burden without taking into account the interplay between the basic tax and the supplementary tax. In fact, the Constitutional Court failed to make a real assessment of the corporate tax burden changing from 1994 to 1995 as a whole. Had the Constitutional Court grasped the real case, it could have realised that no change took place in corporate tax burden in fact. Accordingly, if no change takes place, there is no room for ascertaining retrospective legislation either. There were dissenting opinions. The point to them is that the majority opinion is not well-established that comes from the fact that the Constitutional Court discussed the basic tax in isolation from the supplementary tax, misled by the petitioners who, being interested in raising the issue of the basic tax only, did not challenge the new legal provisions on the supplementary tax.

(iv) Repeal of existing laws with retroactive effect

Under Section 42 (1) of the Act XXXII of 1989 on the Constitutional Court, as amended, where the Constitutional Court repeals legal rules for any reason, the incriminated

23 16/1996 (3.V.) AB.
rules will be abolished with an effect of “ex nunc”, that is, as from the date when the resolution of the Constitutional Court is promulgated. They cannot thus be applied from that date on [Section 43 (1) of the Act on the Constitutional Court]. Under Section 43 (2), nullification by the Constitutional Court of legal rules does not affect either the legal relationships developed before that date, or the rights and obligations arising from these relationships. Exceptionally, under Section 43 (4), the Constitutional Court is empowered to repeal a legal rule as from a fixed future date, or even with an effect of “ex tunc”. The Constitutional Court may also decide under the same Section whether the legal provisions repealed (retroactively or prospectively) are applicable or not to a specific legal case referred to by petitioners before the Constitutional Court.

In a case,\textsuperscript{26} it was proposed that the Constitutional Court be obliged as a rule to repeal the legal rules found as unconstitutional with an “ex tunc” effect. Arguably, once a legal rule is considered as unconstitutional, it is invalid, and must be declared as inapplicable with an effect both retroactively and prospectively. The Constitutional Court did not agree on this proposal, holding that one must distinguish between the act of nullification and the fact of being null and void (invalid from the outset). The Constitutional Court, while exercising scrutiny over the legal rules presented before it, does not take a stand on the question whether the legal rule, which is to be repealed, is invalid. It only decides on the non-applicability of the legal rule that has been found as unconstitutional. Since the question of invalidity is not affected, the Constitutional Court does not commit itself to decide on abolishing a legal rule, which is not consistent with the constitutional order with a retroactive effect. It can do that, but it is not obliged to do that.

The act by the Constitutional Court of nullification is of constitutive nature, that is, the act under discussion becomes inapplicable as a result of the specific decision of the Constitutional Court. Were it possible to ascertain the invalidity of the legal rules under discussion, the decision of the Constitutional Court would be of declarative nature only (only declaring what the law has ever been), meaning that the legal rule as challenged before the Constitutional Court would have been invalid from the outset irrespective of the fact if the Constitutional Court decided on it or not.

Similarly, the non-application of national law contrary to Community law does not result in that the national law provisions, which cannot be applied in a certain case, would be invalid. The ECJ held in joined cases C-10/97 to 22/97 IN.CO.GE. ‘90\textsuperscript{27} that the obligation of a national court to disapply national legislation introducing a charge contrary to Community law must lead that court, in principle, to uphold claims for repayment of that charge. Such repayment must be ensured, however, in accordance with the provisions of its national law, on condition that those provisions are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. Any reclassification of the legal relationship established between the tax authorities of a Member State and certain companies in that State when a domestic charge subsequently found to be contrary to Community law was levied is therefore a matter of national law. The national law classification of the relationship between the taxpayers and the tax authorities was important in the said case in two instances because it depended on the classification of this relationship whether

- a court competent in fiscal or civil law matters had to take a decision; and
- the time limits relating to fiscal or civil law matters were applicable.

\textsuperscript{26} 10/1992 (25.II.) AB, Para. II.3.

\textsuperscript{27} ECR 1998, p. I-6307, Para. 29; See also: Joined Cases C-392/04 and C-422/04 i-21 Germany, Arcor AG, ECR 2006, p. I-8559, Para. 72.
In another case, the Constitutional Court found that the law, which provided for the effective date of 1 July 2001 on the changes in the conditions of the payment of professional training contribution, but which was promulgated on 5 July only, was unconstitutional due to retroactive legislation. However, the Constitutional Court did not repeal the Section of the new law which provided for the effective date “ex post facto”, taking into account that interference with complete legal relationships would lead to embarrassment in the application of the law on professional training contribution (Para. III.2).

The voluntary reduction in competence of the Constitutional Court is developed, seen from the point of view of dogmatics, suggesting distinction between the act of nullification and the fact of invalidity. Such a standpoint can be supported by the considerations of legal policy as well. The Constitutional Court emphasises the importance of the rule of law and legal certainty. It considers therefore carefully whether to interfere with the legal relationships that have been completed. There should exist very convincing arguments to justify that the legal rules found unconstitutional be abolished with a retroactive affect.

Another aspect of retroactivity can be revealed in connection with identifying the effect of the ECJ judgments. It is the established practice of the ECJ that the rules of Community law as interpreted by the ECJ must be applied by the national courts even to legal relationships developed before the judgment ruling on the request for interpretation. It is only exceptionally that the ECJ may set limits on the effect of its judgments. Two criteria must be fulfilled before such a limitation can be imposed, namely that those persons who are concerned should have acted in good faith and there should be a risk of serious difficulties.

In Hungarian law, in addition to the normal legal actions brought before courts, citizens may put forward complaints of constitutional nature (Section 48 of the Act on the Constitutional Court). Such a complaint can be presented before the Constitutional Court and concerns the alleged inconsistency with the Constitution of the legal rules applicable in a specific legal case. The petitioner may ask that the respective legal rules be declared as unconstitutional with an effect retroactive to the case under dispute. Where such a claim is met by the Constitutional Court, the claim can be enforced before the normal court by means of a particular legal remedy as regulated by the Act on Civil Procedure (as discussed above).

National legal provisions can be declared by the ECJ as not applicable with a retroactive effect to the case under discussion where it turns out subsequently that they are not consistent with Community law. As a result, the resolutions of the national authorities passed earlier are to be revoked and replaced by new ones that reflect the change in the legal basis.

In Kühne & Heitz, it has been held that the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the EC Court where
- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the EC Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third Paragraph of Article 234 EC; and

28 797/B/2001 AB.
the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.\(^{30}\)

(v) Relevance of the practice of the ECtHR and the ECJ on retroactive legislation to Hungarian law

An early case discussed before ECtHR\(^{31}\) makes a clear presentation of the legal basis for retroactive legislation, the components of which are as follows:
- Article 6 ECHR on fair trial cannot be applied directly in respect of retroactive legislation. This is because no subjective right can be explored that would be associated with legislative amendments. A legislative amendment affecting the applicant's civil rights cannot be regarded as a determination of those rights.
- Similarly, Article 13 ECHR on effective legal remedy does not relate to legislation and does not guarantee a remedy by which legislation could be controlled as to its conformity with the Convention.
- In the light of Article 14 ECHR on non-discrimination, in conjunction with Article 1 of the First Protocol on the protection of property, it is not precluded that retroactive legislation is adopted in order to prevent taxpayers from getting involved in manoeuvres of tax avoidance. Such a law can be justified to the extent that combating tax avoidance can be recognised as a reasonable legislative aim. The retroactivity of legislation is not disproportionate to the aim sought to be realised if it is necessary for fully achieving this aim. The provision of Article 1, Paragraph 2 of the First Protocol on the right of a state to secure the payment of taxes can be applied to a legislative measure, which is designed to prevent tax avoidance.

The Hungarian Constitutional Court also confirmed several times that the legislator widely enjoys freedom in changing the conditions of the share in public burden, including the payment of taxes. Retroactive legislation cannot still be recognised, as discussed above. The Hungarian standard developed by the Constitutional Court is thus higher, compared to the practice of ECtHR, which seems to be more lenient in this respect.

In the case of M.A. and others,\(^{32}\) it was discussed before the ECtHR that the Finnish parliament adopted in September 1994 an amendment to the existing income tax law with a planned effective date of 1 January 1995. Getting informed of the proposed amendment, a series of Finnish companies accelerated the right of eligible employees to exercise the rights, which were secured to them by employee stock offering programmes, with a view to escaping being subject to less beneficial taxation expected as a result of the proposed legislative changes. Reacting to these manoeuvres, the Finnish parliament adopted the new law in December 1994 with a retroactive effect to September 1994, applicable to the taxpayers who took part in employee stock offering programmes and whose programmes provided after September 1994 for acceleration. The ECtHR approved the procedure of the Finnish legislator. In the light of the Hungarian practice the Constitutional Court has developed so far, it is most likely that such a piece of retroactive legislation would have been repealed as unconstitutional.

As it turns out in De Haan Beveer\(^{33}\) that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. This means that, as a rule, the ECJ does not approve not only


\(^{31}\) Application No. 8531/79 by A., B., C. and D. v. the United Kingdom, decision of 10 March 1981 on the admissibility of the application.

\(^{32}\) Application No. 27793/95 by M.A. and 34 others against Finland, decision at Strasbourg on 10 June 2003.

retroactive, but even retrospective legislation in the area of substantive law. This is a practice that seems to be much more restrictive than that of the ECtHR, and as much restrictive as the Hungarian practice. Notably, exceptions to the prohibition of retrospective legislation are not unprecedented in the ECJ practice.\textsuperscript{34}

In Stichting “Goed Wonen” II, it turns out that when the new law exempts an economic transaction in respect of immovable property previously subject to VAT, it may have the effect of revoking a VAT adjustment made on account of the exercise, when immovable property was used for a transaction regarded at that time as taxable, of a right to deduct VAT paid in respect of the supply of that immovable property. The principles of the protection of legitimate expectations and legal certainty do not preclude a Member State, on an exceptional basis and in order to avoid the large-scale use, during the legislative process, of contrived financial arrangements intended to minimise the burden of VAT that an amending law is specifically designed to combat, from giving that law retroactive effect when economic operators carrying out economic transactions such as those referred to by the law were warned of the impending adoption of that law and of the retroactive effect envisaged in a way that enabled them to understand the consequences of the legislative amendment planned for the transactions they carry out.\textsuperscript{35}

It comes from the above summary analysis that the Hungarian position developed by the Constitutional Court is quite restrictive. As emphasised, retroactive tax legislation is not possible, but exceptionally, and exclusively in favour of taxpayers. The Constitutional Court is also steady in its practice, not repealing the legal provisions found unconstitutional with a retroactive effect. Retrospective legislation is approved in the administrative tax law area where the new law may apply to pending cases, however, with the proviso again that changes in law must not affect taxpayers badly. In the substantive tax law area, legislation with an immediate effect must be normally accompanied by grandfathering. It is still an exception to the strict Hungarian standpoint that the provisions of anti-avoidance principles are not considered to be apt to create individual rights and obligations. As a consequence, they must be legislated even retroactively, not yet violating taxpayer rights.

Compared to the ECJ judgment in Stichting “Goed Wonen” II, the Hungarian practice seems to be anachronistic in that the Constitutional Court requires that those who are addressed by the new law should be provided with a copy of the official gazette with the new law. The Constitutional Court does not take into consideration what may well happen both before the ECJ and the ECtHR that taxpayers can be expected to be informed of the legislation by press release. The above-mentioned rigid features of the Hungarian practice can be explained, as discussed, by the circumstances of the historical transition. In a new democracy, sensibility is shown at legal forums to changes that would impair legal certainty and stability. This is why mistrust of retroactive, and even retrospective legislation has been widespread to date.\textsuperscript{36}

Arguments for retroactivity cannot be easily accepted in a Central and East European country like Hungary because instability can hardly be tolerated as the Hungarian law stands at present. If the high-level instability of the legal system were further enhanced by broad


\textsuperscript{35} Para 45. The taxpayer granted a usufructuary right in rem on 28 April 1995, the Dutch government announced its intention to amend the effective law already on 31 March, the bill was submitted to the parliament on 23 May and adopted by it on 18 December with a retroactive effect to 31 March.

\textsuperscript{36} A theory of equilibrium would be permissible for retroactivity in a state of flux. In the context of a stable equilibrium, the lawmaker should avoid retroactivity. See: Jill E. Fisch, op.cit. p. 1106. Change is relatively easy in an unstable equilibrium, however, and relatively little force is needed to effect change in this respect (p. 1108). The likelihood of legal change mitigates the potential fairness problems, and efficiency will in turn be appreciated. Arguments for retroactivity are more compelling in such a context (p. 1109).
retroactive legislation, it would undermine social cohesion. A dynamic theory that argues for the acceptability of retroactive legislation depending on a state of instable equilibrium is viable, provided that the outcome of a stable equilibrium is as much likely as an instable one. For the lack of such a balance, however, a theory, which is otherwise complex and elastic, does not seem to be operative. One can conclude that retroactive legislation is a kind of luxury, which a sophisticated legal system can admit to have. In a less balanced society, the elbowroom for policymaking is more restrictive and the legislator’s power is more fragile. The considerations of efficiency and the opportunity of market remedies do not seem to be sufficient to compensate the threat of disintegration. The tax legislature enjoys in Hungary relatively much freedom, including the possibility of the milder forms of retroactive (or rather retrospective) legislation. This does not yet mean that even the tax legislator would not be disciplined by the standards the Constitutional Court has ironed out.