Branch Reporters
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Summary and conclusions

As from the Belgian Constitution of 1831, articles 10 and 11 of the Constitution, together with article 172 of the Constitution relating especially to tax matters, expressly established the fundamental status of the principles of equality of citizens before the law and of the principle of non-discrimination (ND).

The texts of international treaty law protecting human rights whose principles of equality and ND are binding in Belgium are:

- the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the Treaty establishing the European Community;
- the Treaty on European Union;
- the International Covenant on Civil and Political Rights;
- double tax conventions (DTCs).

It is clear, especially since the publication in June 2007 of a Belgian model convention, that Belgium follows the OECD model convention (MC). Interpretation of DTCs includes reference to the OECD commentary.

The ND clause is of strict interpretation. In most cases, it applies to all taxes of any kind whether or not they are covered by a DTC. Therefore, inclusion of an ND clause in other international agreements is not required. However, an ND clause exists under the EU Treaty, the Benelux and the EUBL treaties. Belgium recognizes the primacy of international conventions on domestic regulations. ND provisions are usually recognized as having "direct effect" and therefore can be relied upon by taxpayers before their national courts. Furthermore, cases can be referred to the ECJ, the EFTA Court or the Benelux Court, the decisions of which are binding. Those three agreements include provisions prohibiting discrimination.

The prohibition of discrimination based on nationality, as far as legal persons are concerned, for which the criterion to be considered is the place of incorporation, does not imply that residence and non-residence should not be differentiated. The clause prohibits discrimination against nationals of the other state; it does not prohibit more advantageous treatment granted to those persons.

As regards permanent establishments, comparison has to be made with enterprises of the contracting state in a similar situation. The clause covers any dis-

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crimination whether at the level of computation of the tax basis or establishment of taxation.

Belgian DTCs also include a deductibility discrimination clause, applying to interest, royalties and other expenses.

The "foreign control discrimination" clause only covers discrimination against a company that is controlled by foreign persons. Shareholders are not covered.

The Belgian situation is characterized by a very few court decisions dealing with the application of the DTC ND clause and by a recent referral to the Benelux Court.

This might be explained by the fact that traditionally protection against discrimination is covered in a very extensive manner by domestic rules, in the Belgian Constitution, the interpretation of which is clearly influenced by criteria highlighted by the European Court of Human Rights. In this context, the ND clause remains interesting as it is an international instrument easily accessible to foreigners. Another reason results from the intention of the Belgian legislator to reduce differentiation between resident and non-resident taxpayers in recent years, with the consequence that a large number of discriminatory situations have been eliminated.

When the Constitutional Court was granted power to assess laws, ordinances and decrees with legal force in 1989 according to the principles of equality and ND of articles 10 and 11 of the Constitution, even in tax matters, the Court ratified as such the definitions of equality and discrimination given up to then by the European Court of Human Rights on the basis of article 14 of the European Convention on Human Rights and included a control of proportionality, which was revolutionary at the time in Belgium.

The Court of Cassation and the Council of State in turn during the 1990s gradually brought their case law into line with this definition.

The Belgian Constitutional Court has thus unified the definition of equality and discrimination in Belgium, even where there are DTCs, and with an unlimited scope in the tax field at the level of types of taxes and at the level of the essential elements of each tax.

Thus, in Belgium, the constitutional rule of the equality of all in relation to tax implies that all those in the same situation are equally affected but it does not exclude a distinction being made on the basis of certain categories of individuals provided that the distinction is not arbitrary, i.e. that it can be objectively and reasonably justified. Likewise, the same rules also prohibit categories of individuals in situations which, in light of the measure considered, are different being treated in the same way, without an objective and reasonable justification being evident.

Thus, in Belgium, since the 1990s, the application in tax matters of the principles of equality and ND resulting from the Belgian Constitution in general has allowed a more efficient control than from the same principles in texts of international treaty law.

The principles of equality and ND are written in articles 14 and 18 of the ECHR and in article 1 of the additional protocol. These provisions are directly applicable in Belgian law according to the same principles of interpretation as those highlighted by the European Court of Human Rights.

In Belgium, the principles of equality and ND, as resulting from constitutional law and international treaty law, are certainly not opposed to one another. On the contrary, they are in fact now complementary in Belgium. This complementarity now only reinforces the scope of these fundamental principles.

1. Introduction: the role of the principles of equality and ND in Belgian law

There has been a significant change in the application of the principles of equality and ND in the tax field in Belgium since 1993. Several elements explain this obvious and, in certain aspects, revolutionary change:

- First, a judicial authority, to wit the Constitutional Court (formerly named Court of Arbitration), was empowered in 1989 to rule on the application of the constitutional principles of equality and ND to laws, decrees and ordinances with legal force. The tax case law of the court, which was embryonic in 1989, has quite simply exploded as from the second half of the 1990s.
- Secondly, the case law of the European institutions for the protection of human rights and the European Court of Justice also evolved in the tax field in a more exacting way, which has not been without effect on Belgian law and case law.

However, prior to illustrating the impact of these developments on the Belgian tax landscape, it would not be unwise to review the legal sources of the principles of equality and ND applicable to Belgian taxation.

1.1. The Belgian Constitution

1.1.1. The constitutional texts that set forth the principles

As from the Belgian Constitution of 1831, two constitutional provisions expressly established the fundamental status of the principles of equality of citizens before the law and ND. These are the current articles 10 and 11 of the Constitution, which provide as follows:

- Article 10: "There are no class distinctions in the State. Belgians are equal before the law; they are the only ones eligible for civil and military service, but for the exceptions that could be made by law for special cases. Equal treatment between men and women is guaranteed."
- Article 11: "Enjoyment of the rights and freedoms recognized for Belgians should be ensured without discrimination. To this end, laws and decrees guarantee notably the rights and freedoms of ideological and philosophical minorities."

1.1.2. The legal force of the constitutional principles in Belgium

Given the constitutional status of these principles, contrary to an argument defended at length by the Belgian executive power, a distinction made at the time

of drawing up taxes must thus be justified and cannot be established without control.[1]

1.2. The other instruments of international treaty law

1.2.1. The texts of international treaty law that set forth the principles

The texts of international treaty law protecting human rights whose principles of equality and ND are binding in Belgium are:

- the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950 in Rome and ratified in Belgium by the Act of 13 May 1955, completed by 14 protocols to date;
- the Treaty establishing the European Economic Community (which has since become the Treaty establishing the European Community), signed in Rome on 25 March 1957 and ratified by the Belgian Act of 2 December 1957, several articles of which establish the principle of ND, which is mainly considered from an economic point of view;
- the Treaty on European Union, signed in Maastricht on 7 February 1992 and ratified by the Belgian Act of 26 November 1992 establishing the fact that the European Union respects fundamental rights;
- the international covenants on human rights adopted on 16 December 1966 by the General Assembly of the United Nations as well as their two optional protocols, among which only the International Covenant on Civil and Political Rights (ICCPR) is effectively applicable and binding on all states.

The other texts of international treaty law in relation to tax matters which also set forth principles of equality and ND but whose scope is limited to the tax matter provided for under such conventions should also be added thereto.

1.2.2. The legal force of the principles of international law in Belgium

In Belgium, international treaty law follows the legislative channel of the law of approval of the international treaty (article 167(2) and (3) of the Constitution). This Act does not formally incorporate the content of the treaty into domestic law but it ensures that the international treaty, while retaining its intrinsic nature as international treaty law, is given a specific legal value into domestic law which ensures for each and all the effectiveness of the substance of the recognized rights and freedoms.

However, to consider that a current international norm has a direct effect in Belgian domestic law, it must be legally complete and precise and it must not leave the state in question any discretionary power, which is the case with most norms of the ECHR and texts of international treaty law.[2]

1 Cass., 22 March 2001, *Lar. Cass*., 2001, p. 112. V. Sepulchre, *Droits de l'homme et libertés fondamentales en droit fiscal*, Ed. Larcier, 2004, no. 83.

2 For example, see, on art. 6 ECHR, Cass., 16 March 1999, *Pas*., 1999, I, p. 397; *JT*, 2000, p. 124, note F. Kuty; *RDP*, 2000, p. 344, note F.C. See, on the ICCPR, Cass., 8 June 1999, *Pas*., 1999, I, p. 805.

Lastly, the question is most difficult when it relates to determining the rank of treaties in domestic law.[3] Since the famous judgment of the Belgian Court of Cassation of 27 May 1971,[4] regulating the relationship between European law and Belgian domestic law,[5] the Belgian courts may apply the norms of domestic law only if they are not incompatible with the norms of international law that have direct effect in the domestic legal order.[6]

2. Article 24 of the convention model and DTCs

2.1. The role and dogmatics of ND in DTCs

Almost all the DTCs concluded by Belgium contain an ND clause. Only those with Australia, ex-Yugoslavia and New Zealand do not have such a clause, and it seems that the reason for this absence is to be found on the side of those contracting states.

Negotiating and concluding international treaties is the competence of the executive power. The legislature does not, as a rule, intervene. The reporters are not aware of any document explicating the policy followed by the tax authorities when negotiating DTCs, as might be the case in other countries.[7]

With rare exceptions, no information is to be found in the parliamentary works in the assenting process of DTCs, or in the general explanation usually given by the Ministry of Finance or in the parliamentary papers. From the few indications found in those documents, it can be understood that Belgium follows the OECD MC.[8] This has been recently confirmed during the assenting process to the new Belgium–USA DTC: "negotiations have taken into consideration the OECD Model of tax convention regarding income and capital of July 2005 … as well as DTCs recently concluded by both countries".

This point of view was also recently confirmed in the publication, by the Ministry of Finance, of a Belgian model tax convention, the ND of which is the same as that of the OECD, completed by a specific provision on "fonds de pension/pension schemes".[9]

In this context, the ND clause would be one among other clauses of any DTC based on the MC. However, older Belgian DTCs – which are not based on the

3 R. Ergec, "Le statut interne de la Convention européenne des droits de l'homme et sa mise en oeuvre dans les pays d'Europe occidentale, centrale et de l'Est", in *La mise en oeuvre interne de la Convention européenne des droits de l'homme*, Ed. du Jeune Barreau de Bruxelles, 1994, p. 3.

4 *Pas*., 1971, I, p. 886, concl. Ganshof van der Meersch. See also the case law of the Constitutional Court, Const. Court, 25 October 2000, no. 105/2000, *MB*, 10 November 2000.

5 On the ECHR, same conclusion: see V. Sepulchre, *La protection juridictionnelle des droits de l'homme en Belgique*, Ed. Kluwer, 2007, no. 242.

6 On the primacy of the Belgian Constitution, see M. Uyttendaele, *Précis de droit constitutionnel belge*, Bruylant, 2005, pp. 138–148; Sepulchre, *op. cit*., note 5, no. 253.

7 See the Netherlands, for example.

8 See the Law Proposal on the assenting to the new DTCs concluded with the USA, *Parl. Doc*., Belgian Senate, 2006–2007, no. 3-2344/1.

9 http://www.fisconet.fgov.be/fr/docs/Standaardmodel/Draft%20June%202007.pdf.

model – also provide for such a clause and this may reflect a more general intention to ensure protection against ND in favour of non-residents, along the lines of the very wide protection offered by the Belgian Constitution to nationals, which, as we know, receives a wide interpretation by the Constitutional Court.

2.2. An overview of the ND article in Belgian DTCs

Belgian DTCs may be classified into two categories: DTCs concluded as from the 1990s mostly follow the OECD model, which was not necessarily the case for the oldest DTCs. Moreover, the various paragraphs of this article must also be considered.

As regards article 24(1) and 24(2), all Belgian DTCs contain an ND clause prohibiting discrimination against nationals from the other contracting state. But not all of them contain the *apatride* extension, and there is no official explanation as to the inclusion or not of the *apatride* clause.

All the DTCs also grant protection against ND to permanent establishments (article 24(3)), except those with France, Kuwait and Singapore.

All the DTCs concluded since the 1990s also include the "interest and royalties" clause, except for those with India and Kuwait (article 24(4)); this clause does not exist in some old DTCs: Germany, Austria, Bulgaria, France, Israel, Japan, Luxembourg, Malaysia, Niger, Singapore and the ex-USSR.

Protection against discrimination by reason of a control by foreign residents of enterprises of one of the contracting states is also given in all the new DTCs, except for those with Bangladesh, Canada and Kuwait, as well as in old DTCs except for those with Bulgaria, France and the ex-USSR (article 24(5)).

The "extension" of the protection to taxes covered by the DTC to "taxes of every kind and description" appears in all the Belgian DTCs, except those with Canada, France, Hong Kong, Malaysia, Mexico, Russia, Slovakia, Turkey and the ex-USSR. The extension is limited to "taxes for services rendered and other similar payments" in the DTC with Albania.

The fact that such an extensive clause exists allows Belgium not to include an ND clause in the other international agreements it concludes.

2.3. The individual paragraphs of article 24 MC

2.3.1. Nationality-based ND (paragraph (1))

As a rule, the ND clause in Belgian DTCs refers to "nationals". The term *ressortissant* in the old Belgium–USA DTC is replaced by "national" in the 2004 DTC (not yet in force).

A definition of the term "national" is given in the ND clause in some DTCs.[10] In others, the definition is given in the general definition clause of article 3

[10] Mostly old DTCs: Algeria (1991), Argentina (1996), Austria (1971), Brazil ((old) 1976), Cyprus (1996), Denmark (1969), Egypt (1991), France (1964), Gabon (1993), Germany (1967), Ireland (1970), Israel (1972), Japan (1968), Luxembourg (1970), Malaysia (1973), Morocco (1972), Mexico (1992), Portugal (1969), Singapore (1972), Sweden (1991), Switzerland (1978), Tunisia (1975).

OECD MC. In the new Belgian model, the term "national" is defined in the general definition article 3.

The DTC with Russia excludes legal entities where "nationals" refer to "individuals" having Belgian or Russian nationality.

As regards individuals, it has been ruled that in the case of double nationality, only Belgian nationality has to be considered, prohibiting an individual from basing his/her claim against Belgian tax law on the ND clause.[11]

As regards legal persons, the definition usually refers to "any legal person, partnership and association set up in accordance with the law applying in a Contracting State". Some DTCs only cover "companies set up in accordance with the law applying in a Contracting State".[12]

The criterion is the place of incorporation, not the place of residence. The fact that legal entities from the other contracting state fall within the scope of article 24(1) MC does not imply prohibition of any discrimination between resident and non-resident legal entities. The DTC with France explicitly says that nationals resident in one contracting state are not in the same situation as those nationals which are not resident.[13] On the other hand, residence is not required for the ND clause to apply to nationals.

Only discrimination based on nationality is to be considered under this paragraph. Discrimination between taxpayers subject to different taxes in view of their residence is outside its scope.[14]

In Belgium, companies with legal personality are subject to corporation tax. There is no distinction made according to the nationality – the place of incorporation – of the company as regards the computation and payment of corporation tax. However, it is questionable, especially in the actual context of liberalization of some economic sectors, whether discrimination exists when certain entities incorporated in Belgium are expressly excluded from corporation tax where a similar foreign entity having the same activities in Belgium would be subject to corporation tax.

As a rule, it is not required that the national be a Belgian resident to claim protection under article 24(1) MC. This interpretation allows a Belgian national who is not a Belgian resident or a resident of the contracting state, but who is subject to tax in that state, to be treated in a similar manner to the national of the contracting state who is not a resident in that state.

Some of the DTCs concluded by Belgium, however, impose an additional condition of residence. This is the case, for example, of the "old" DTC with the USA: "a national of one Contracting State who is a resident of the other Contracting State". A similar provision also exists in the DTC with the Philippines.

Any kind of discrimination based on nationality has to be considered at the level of the assessment of the tax or the payment of the tax.

The provision is written in a negative way. This prohibits discrimination leading to less favourable treatment of the foreign national. This does not prohibit more favourable treatment being granted to those foreign nationals. Some of the

11 Brussels Court of Appeal, 9 March 1993, *FJF* 93/241.
12 Austria, Denmark, Germany, Luxembourg.
13 Art. 25(1)(b) DTC Belgium–France.
14 Parl. Question no. 832 of 27 March 1997, *Bull. Q&R*, 1997, no. 91.

DTCs concluded by Belgium contain provisions granting specific advantages to nationals of the other contracting state which are non-resident in Belgium (in most cases, those residents are granted the same regime as residents).[15]

The reporters are not aware of any case law regarding discrimination against foreign nationals based on a non-tax regulation; it is assumed that this would be considered within the scope of the ND provision.

2.3.2. Permanent establishment discrimination (paragraph (3))

All Belgian DTCs have the "permanent establishment" clause, except those with France, Kuwait and Singapore.

Today, domestic rules which apply to non-resident taxpayers are mostly similar to those applying to resident taxpayers (the latter being taxed on their worldwide income). This was not the case in the past where, as an example, the rate of corporation tax was higher for non-residents than for residents.

As regards permanent establishments, protection against discrimination extends not only to the tax basis but also to the structure and rate of the tax. The reporters understand that all the income attributed to the permanent establishment and taxable in its name, and not only business profits, is to be considered as falling within the scope of this provision.

The possibility to impute with corporation tax withholding tax relating to dividends was expressly denied to non-resident corporations, while this imputation was allowed to resident companies (article 192(2) ITC). It has been judged that this provision was contrary to the ND clause of article 24(3) MC.[16] Article 192(2) ITC has been abrogated.

More recently, the following situation was submitted to the Court's control. An individual who had a permanent establishment in Belgium did not file his tax return in due time. His taxation was based on a lump-sum minimum basis. The taxpayer claimed discrimination against non-resident taxpayers who were taxed on the basis of a "minimum basis" amount, while this rule did not apply to resident taxpayers in a similar situation. The case was based on the ND provision in the DTC and on the EC Treaty. The case was referred to the ECJ which decided that this was indeed a case of unjustified discrimination based on nationality.[17] The Belgian court thus did not have to apply the DTC provision. Its conclusion might have been based on the OECD commentary 24(20) providing that "it does not constitute discrimination to tax non-resident persons differently, for practical reasons, from resident persons, as long as this does not result in more burdensome taxation for the former than for the latter". The domestic provision has been modified accordingly.[18] However, discrimination still exists as, in the case of a regular tax return not supported by probative documentation, the minimum basis can be applied but only to non-resident taxpayers.

[15] See, e.g. the DTCs with Luxembourg, Morocco, Tunisia, the Netherlands.

[16] See Court of Cassation, 26 January 1995, *Pas*. 1995, I, p. 84, *FJF* 1995, p. 105 confirming Brussels, 28 May 1993, *RGF* 1993/11, p. 305 regarding the Belgium–Switzerland DTC.

[17] ECJ, 22 March 2007, C-383/05, *Talotta*.

[18] See art. 342(3) ITC.

It results from the combination of various provisions of DTCs that permanent establishments in Belgium of foreign partnerships are subject to taxation in Belgium on their aggregated income. The fact that those permanent establishments are taxed as such where income from similar Belgian partnerships is taxed in the hands of their partners is not considered as discrimination.[19] This position of the tax authorities is confirmed by some recent rulings of the advance decision service.[20]

As regards loss compensation, both resident and non-resident taxpayers – individuals as well as companies – are allowed unlimited carryforward.

In most Belgian DTCs, the permanent establishment ND clause does not extend to granting to residents of the other contracting state the benefit of personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which is granted to Belgian residents.

2.3.3. Deductibility discrimination (paragraph (4))

This clause is included in almost all ND articles in Belgian DTCs. Among old DTCs which do not have such a clause are those with Austria, Bulgaria, France, Germany, Israel, Japan, Luxembourg, Malaysia, the ex-USSR, Niger, Singapore (less than one-third of the old DTCs still in force). Only two new DTCs do not include that paragraph: those with India and Kuwait.

Article 24(5) of the Belgian model refers to "interest, royalties and other disbursements". All Belgian DTCs use the same wording except for the 1976 DTC with Brazil of which the scope is limited to interest (while the 2002 protocol (not yet in force) is based on the OECD MC), and the DTC with Canada which is restricted to royalties (article 24(3)). As a rule, non-deductibility is authorized in the case provided for in articles 9, 11 and 12 MC.

There seems to be no doubt on the alignment on the OECD MC and, accordingly, one may conclude that the paragraph should be interpreted in the light of the OECD commentary.[21]

Article 18(2) Belgian ITC interpreted as authorizing the requalification of interest in dividends when the director of the Belgian company is a foreign company, while such a requalification would not occur in the case of a director being a Belgian company, could be considered as discrimination in the sense of article 24(4) MC.

Article 54 ITC refuses the deductibility of interest and royalties when paid or attributed directly or indirectly to a non-resident taxpayer or to a permanent establishment which, according to the provisions applicable in the country where they are established, are not subject to income tax or are subject in that country to a tax regime which is notably more advantageous than the one that would be applied in Belgium, unless the taxpayer justifies by any means of law that they carry out real and sincere operations and do not exceed the normal limits.

19 Com. Conv. 24/22.

20 See, e.g. Decisions no. 600,059 of 23 March 2006 and no. 500,252 of 24 November 2005.

21 Which is to be considered as one source for interpretation: see e.g. Cass., 28 May 2004, *FJF* 2004/244; Brussels Court of Appeal, 14 June 2000, *Courr. Fisc.*, 2000/392.

The situation of non-resident beneficiaries with regard to interest and royalties is thus less favourable. As such, this provision does not fall within one of the exceptions of the DTC on interest and royalties. It is not clear whether it should be within the "at arm's length" exception of article 9 in so far as deductibility would only be refused in those cases where the operation was not sincere and exceeded normal limits. There is no case law on this problem.

According to article 198(11) ITC, deductibility of interest is not allowed when interest is paid to a non-resident beneficiary which is not subject to taxation or is subject, for that income, to a regime notably more advantageous than the normal tax regime in Belgium, in so far as the total amount borrowed exceeds a certain amount of the taxed reserved and paid-in capital. This provision does not fall under one of the exceptions of the DTC and is not, as such, within the framework of article 25(4) MC. Here again there is no case law on this topic. It is admitted that this provision is contrary to EU law.

2.3.4. Foreign control discrimination (paragraph (5))

The foreign control discrimination clause only applies to enterprises the control of which is directly or indirectly held by foreigners. A comparison has to be made between those enterprises and enterprises which are not under foreign control, in the light of the interpretation of the OECD commentary,[22] which is now confirmed by the working group.[23]

The protection of article 24(5) MC does not extend to non-resident shareholders.[24]

There is no case law on the application of this clause. This might reflect the fact that no differentiation is made in Belgium between enterprises based on the criterion of their shareholders.

Belgium does not apply an imputation system of company/shareholder taxation.

2.4. Critical evaluation of article 24 MC and of its provisions

Until now, this ND clause has provoked little case law.

The reasons for that might be the fact that most discrimination cases are resolved by means of the application of the ND clause of the Belgian Constitution which is much wider. Furthermore, most discrimination against non-nationals has been abrogated and cases which still remain are less easily detectable. A third reason might be that transnational discrimination cases are also dealt with by the ECJ.

The DTC ND clause is mainly useful in so far as it allows foreign taxpayers to refer to an international agreement which they can easily rely upon, rather than a domestic provision.

22 OECD Comm. 24.57.

23 OECD, *Application and Interpretation of Article 24 (non-discrimination)*, Public discussion draft, 3 May 2007, point 88.

24 Com. Conv. 24/43.

3. ND in other tax systems

3.1. ND in the national tax context

3.1.1. The foundation of principles of equality and ND in the Belgian Constitution applicable in Belgian tax law

As already said, the foundation of the principles of equality and ND in Belgian law is mainly in articles 10 and 11 of the Belgian Constitution. These articles 10 and 11 are general in scope in that they prohibit any discrimination, regardless of its origin. These articles are thus also applicable in the tax field.

Furthermore, a third provision stressed the importance of the principles in the tax field. In fact, in parallel to the legality of taxes being imposed as a constitutional principle under article 170 of the Constitution, article 172 of the Constitution provides that "No privileges with regard to taxes can be established. No exemption or reduction of taxes can be established except by a law". This provision is only a statement or a special application of the general principle of equality set forth in article 10 of the Constitution.[25]

3.1.2. Historic development in Belgium

It must be pointed out here the essential role that the Belgian Constitutional Court has played since 1989.

In fact, the Court of Cassation[26] once traditionally considered that when the judicial power classified a tax as excessive it incontestably acted *ultra vires*.[27] This interpretation was followed by the Council of State[28] when it was established in 1946. In 1964, however, it adopted its own, stricter, definition.[29] In this judgment the fact that a tax condition unrelated to the nature of the taxation and its purpose had to be considered to be arbitrary and contrary to articles 10 and 172 of the Constitution appeared as a new factor. This new case law thus no longer followed the case law of the Belgian Court of Cassation and the European Commission of Human Rights at that time.[30]

This stricter definition was thus adopted (and improved) by the Court of Cassation in two judgments of 20 November 1975[31] in which the principles of the equality of all in relation to tax implied that all those who were in the same situation were equally affected but did not prohibit exemptions in connection with the nature and purposes of the taxation being drawn up in favour of certain cat-

25 Settled case law. See Sepulchre, *op. cit.*, note 1, no. 83.

26 Highest Court of Appeal in Belgium.

27 Gen. Av. Terlinden, under Cass., 16 March 1908, cited by E. Krings, "L'égalité en matière fiscale dans la jurisprudence de la Cour de cassation", in *Protection des droits fondamentaux du contribuable*, Bruylant, Brussels, 1993, p. 90.

28 Highest Court of Appeal in Belgium.

29 9 June 1964, Lemmens, no. 10.675, *RACE*, 1964, p. 535.

30 Sepulchre, *op. cit.*, note 1, no. 84.

31 Cass., 20 November 1975, *Pas.*, 1976, I, p. 347; *RCJB*, 1977, p. 246, obs.; Cass., 20 November 1975, *Pas.*, 1976, I, p. 360.

egories of individuals. It should be noted that at the time the Court of Cassation followed the same development as the European Commission of Human Rights at the beginning of the 1970s.[32]

Nevertheless, it should be emphasized that the definition of equality still did not include the control of proportionality between the aim sought and the means employed although the European Court of Human Rights had followed this development in its famous and ground-breaking judgments in *Engel* of 8 June 1976 and *Spörrong and Lönnroth* of 23 September 1982. However, in 1978, the Court of Cassation began to take control of proportionality. At that time the rule of the equality of Belgians before the law and that of the equality of all in relation to tax implied that all those in the same situation should be treated in the same way, but did not exclude a distinction being made between certain categories of individuals, provided that the distinction was not arbitrary, i.e. could be justified.[33] To be complete, the only element missing was the control of reasonableness.

When the Constitutional Court was granted power to assess laws, ordinances and decrees with legal force in 1989 according to the principles of equality and ND of articles 10 and 11 of the Constitution, even in tax matters, the Court ratified the definitions of equality and discrimination given up to then by the European Court of Human Rights on the basis of article 14 of the ECHR[34] and included the control of proportionality, which was revolutionary at the time in Belgium. The Court of Cassation and the Council of State in turn during the 1990s gradually brought their case law into line with this definition.

As can be seen, in a period of barely 25 years Belgian case law has evolved from a limited control over legality of taxes to real judicial control of the principles of equality and ND in tax matters, which includes a control of relevance and control of proportionality.

3.1.3. The current scope of the principles of equality and ND in the Belgian Constitution

The constitutional rule of equality in relation to tax implies that all those in the same situation are equally affected but it does not exclude a distinction being made on the basis of certain categories of individuals provided that the distinction is not arbitrary, i.e. that it can be objectively and reasonably justified.[35] Likewise, the same rules also prohibit categories of individuals in situations

32 Sepulchre, *op. cit.*, note 1, nos. 8–11.

33 Cass., 18 September 1981, *Pas.*, 1982, I, p. 98; Cass., 18 December 1978, *Pas.*, 1979, I, p. 469; Cass., 12 June 1978, *Pas.*, 1978, I, p. 1168.

34 Const. Court, 13 October 1989, no. 23/99, *Rev. rég. dr.*, 1989, p. 611, note X. Delgrange: "Quand la Cour d'arbitrage s'inspire de la Cour de Strasbourg"; H. Simonart and A. Rasson, "La jurisprudence de la Cour constitutionnelle", in *Protection des droits fondamentaux du contribuable*, Bruylant, Brussels, 1993, p. 38; M. Melchior, "La Cour constitutionnelle et les droits fondamentaux", in *Le point sur les droits de l'homme*, Commission CUP, Liège, September 2000, vol. 40, p. 20.

35 Const. Court, 13 October 1989, no. 23/99, *Rev. rég. dr.*, 1989, p. 611, note X. Delgrange: settled case law (see Sepulchre, *op. cit.*, note 1, no. 87; Sepulchre, *op. cit.*, note 5, no. 87).

which, in the light of the measure considered, are different being treated in the same way, without an objective and reasonable justification being evident.[36]

The existence or non-existence of such a justification must be assessed in relation to the aim and effects of the tax drawn up as well as the reasonableness of the relationship of proportionality between the means employed and the aim sought.[37]

Thus, when a difference in treatment or identical treatment between different distinct groups of individuals is criticized, the review of a tax norm should withstand the following questions:[38]

(a) Does the tax norm create a difference in treatment between different distinct groups of comparable natural persons or legal entities or identical treatment between different groups of natural persons or legal entities actually in different situations in light of the norm in question?
(b) Is the aim that the legislator pursues using the tax norm legitimate?
(c) Is there objective and reasonable justification for the difference in treatment or the identical treatment in relation to the legitimate aim pursued in that:
   – either the distinction or identical treatment is based on an objective criterion that is pertinent to reach the aim set in the norm at issue and does not result in effects that are out of proportion in relation to the aim sought (in this case, the tax norm will be deemed not to violate articles 10 and 11 of the Constitution)?
   – or is the distinction or identical treatment based on a criterion that is not objective or that is not relevant in relation to the aim sought by the tax norm in question or there is no reasonable relationship of proportionality between the effects resulting from the distinction or identical treatment and the aim sought (in this case, the tax norm will be deemed to violate articles 10 and 11 of the Constitution)?

The Constitutional Court should thus criticize the choice of the legislator only if the distinctions are (clearly) arbitrary or unreasonable and it should accept measures that stay within the limits of the margin of appreciation of the legislator provided that they are reasonably and objectively justified.[39]

3.1.4. Ratione personae *scope of the principles of equality and ND of the Belgian Constitution*

Based on the wording of articles 10 and 11 of the Constitution, it is clear that, formally, the guarantee of the principles of equality and ND seems to be reserved to "Belgians".

However, considering that article 191 of the Constitution provides that "All foreigners on Belgian soil benefit from that protection provided to persons and property, save for those exceptions provided for by law"[40] and considering that

36 Const. Court, 12 March 1992, no. 16/92, *JT*, 1992, p. 344; Cass., 29 March 2001, *AFT*, 2001, p. 440, note J. Astaes: settled case law.
37 See Sepulchre, *op. cit.*, note 1, no. 87.
38 *Ibid.*, no. 94. For examples, see also pp. 89–114.
39 Const. Court, 14 July 1997, no. 42/97, *Arr. CA*, 1997, p. 599.
40 On art. 191 of the Belgian Constitution, see Const. Court, 22 July 2003, no. 106/2003, *MB*, 4 November 2003; Const. Court, 19 May 2004, no. 92/2004, *MB*, 20 September 2004.

an application for annulment may be brought before the Constitutional Court "by a natural person or legal entity that justifies an interest" (article 2(2), Special Act of 6 January 1989), any natural person or legal entity whose situation may be directly and adversely affected by the norm at issue,[41] even if they are non-residents,[42] may contest a tax norm on the basis of the principles of equality and ND, even in the case of a preliminary ruling.[43]

Lastly, it should be pointed out that the judicial protection of the principles of equality and ND are accessible to the aforementioned citizens and legal entities: this is not contested in Belgium.[44] However, although these two categories of natural persons and legal entities are comparable, the Constitutional Court may accept differences in treatment between natural persons and legal entities when they are justified.[45]

3.1.5. The methods of control of the principles of equality and ND in Belgian law

3.1.5.1. The legal act whose compatibility with the Convention is to be controlled is a law, a decree or an ordinance

When a legal act is a law, a decree or an ordinance, the principles of equality and ND may be controlled in the following conditions and circumstances:

- first method: application for annulment or suspension of the legal act, which must be filed before the Belgian Constitutional Court (article 1 of the Special Act of 6 January 1989 on the Court of Arbitration);[46]
- second method: preliminary ruling raised before the Constitutional Court by any Belgian court (article 26 of the 1989 Act);[47]
- third method:
  - the plea or the ground of incompatibility with the principles of equality and ND (based on the judgment of the Court of Cassation of 27 May 1971) when the source of the principles is international treaty law;
  - a preliminary ruling raised before the Constitutional Court (see previous dash), when it relates to principles of equality and ND set forth in the Belgian Constitution.

41 Const. Court, 7 November 1991, no. 31/91: settled case law.

42 Const. Court, 21 November 1991, no. 34/91, *JT*, 1992, p. 95, obs.; *Journ. procès*, 1992, no. 209, p. 23, note Bours, J.-P.

43 Const. Court, 22 January 2003, no. 10/2003, *Arr. CA*, 2003, p. 87.

44 Const. Court, 23 June 2004, no. 109/2004, *MB*, 13 July 2004.

45 Const. Court, 15 September 2004, no. 146/2004, *MB*, 19 October 2004.

46 On the compatibility of a tax norm with the international treaty law, see Sepulchre, *op. cit.*, note 5, nos. 256–258.

47 *Ibid.*

3.1.5.2. The legal act whose compatibility with the Convention is to be controlled is not a law, a decree or an ordinance but another legal act

When the legal act is a royal, ministerial, regional government or Community order or other act of administrative authorities,[48] the principles of equality and ND may be controlled in accordance with the following conditions and circumstances:

- first method: application for annulment or suspension of the legal act that must be filed before the Council of State (article 14(1) of the Coordinated Acts of 12 January 1973 on the Council of State);
- second method: the plea or ground of incompatibility with the principles of equality and ND (based on the judgment of the Court of Cassation of 27 May 1971, when the source of the principles is international treaty law; based on article 159 of the Constitution, when the source of the principles is the Belgian Constitution).

3.1.6. DTCs and the principles of equality and ND in the Belgian Constitution

Even though they are international conventions, DTCs take effect in Belgium only following ratification by the federal chambers or by the community or regional councils as the case may be (article 167(2) and (3) of the Constitution).

For this reason, laws, decrees or ordinances of approval also fall within the powers of the Constitutional Court, which may check whether the norm of approval authorized or did not authorize discrimination contrary to articles 10 and 11 of the Constitution. If such discrimination is pleaded, the Constitutional Court must review the content of the provisions of the DTC, without, however, taking tax situations beyond the control of the Belgian legal order as a point of comparison.[49]

Nevertheless, it should be noted that, according to the Constitutional Court, the principle of equality does not require that in each of the conventions that it negotiates with neighbouring states to avoid the phenomenon of double taxation, Belgium concern itself with ensuring to frontier workers the tax treatment that is most favourable to them at any time.[50]

Likewise, according to the Constitutional Court, when a model convention drawn up by the OECD was amended since a particular DTC was signed, this circumstance does not imply that the earlier rule in force is incompatible or would have become incompatible with the principles of equality and ND. The same applies in the circumstance where the Belgian state adopted, in like conventions signed more recently with other states, regulations that do not include the same difference of treatment.[51]

48 See M. Leroy, *Contentieux administratif*, Bruylant, Brussels, 1996, pp. 148–214.

49 Const. Court, 16 October 1991, no. 26/91, *MB*, 1991, p. 26328; *FJF*, 1991, p. 463.

50 Const. Court, 16 October 1991, no. 26/91, *op. cit.* See also Const. Court, 4 February 2004, no. 20/2004, *MB*, 23 February 2004; Const. Court, 1 February 2006, no. 19/2006, *MB*, 27 March 2006.

51 Const. Court, 1 February 2006, no. 19/2006, *MB*, 27 March 2006.

3.1.7. Examples of application relating to the establishment of a tax

For instance, a judgment of the Constitutional Court no. 162/2006 of 8 November 2006[52] ruled on the fact that a tax credit in favour of companies to further the self-financing of small and medium sized companies (SMEs) (article 289bis ITC; provision since withdrawn) was limited to companies whose annual taxable profit did not exceed 323,750 euro (article 215(2) ITC): the Constitutional Court decided that, if there was justification for the legislator to provide for special regulations for SMEs, the absolute amount of the profit taxable during a given financial year was not relevant to assess if it was a company that was classed as an SME as there are SMEs that make taxable profits in excess of the limit set by article 215(2) ITC, without their losing the status of an SME and that, moreover, some SMEs, even though they made a taxable profit under the limit, cannot enjoy the reduced rate as they do not satisfy the other conditions of article 215 ITC.[53]

Moreover, according to the Constitutional Court, a particularly high taxation rate can be envisaged only if the tax legislator endeavours to influence the conduct of taxpayers in certain matters, such that an estate tax of 90 per cent violates articles 10 and 11 of the Belgian Constitution.[54]

3.1.8. Example relating to the tax procedure: the judicial control of tax fines in Belgium

3.1.8.1. Traditional opinion of the tax authorities

According to the traditional view of the tax authorities, the judicial power must limit its control to the legality of tax fines.[55] Only the Minister for Finance may exercise a power of clemency with regard to tax fines that includes a control of opportunity[56] (article 9 of the Regent's order of 18 March 1831 that sets forth the organic regulations of the Ministry for Finance).

3.1.8.2. The applicability of article 6 of the ECHR to tax fines, according to the Belgian Court of Cassation

As from 1984, the European institutions for the protection of human rights established that the court could exercise a power of full jurisdiction in relation to penalties of any kind of punitive or dissuasive nature, regardless of their criminal or non-criminal classification in domestic law.[57]

52 *MB*, 22 January 2007. See also Const. Court, 31 March 2004, no. 59/2004, *MB*, 3 May 2004.
53 Const. Court, 16 October 1991, no. 162/2006, *MB*, 2007, p. 2650.
54 Const. Court, 22 June 2005, no. 107/2005, *MB*, 4 July 2005.
55 Rapport de la Commission d'étude de la répression pénale de la fraude fiscale, *Doc. parl. Chambre*, session 1961–2, no. 264/1, annex II; *RGEN*, no. 20735, p. 123; A. Demoulin, "A propos du contrôle judiciaire des amendes fiscales", under Cass., 22 January 1998, *Act. Droit*, 1998, p. 723.
56 Cass., 22 January 1998, *Act. droit*, 1998, p. 716, note A. Demoulin.
57 On art. 6 ECHR, see Sepulchre, *op. cit.*, note 1, nos. 306–336; Sepulchre, "L'article 6 de la C.E.D.H. et le droit de se taire et de ne point contribuer à sa propre incrimination en droit

However, the Belgian Court of Cassation accepted only in 1999 the criteria of "criminal" penalties within the meaning of article 6 ECHR, as developed by the European institutions for the protection of human rights,[58] to acknowledge (at last) the possibility of applying article 6 ECHR to tax fines provided that they may be classified as "criminal" within the meaning of article 6 ECHR. Nevertheless, one still cannot say to date that the recognition is complete. In fact, the Court of Cassation still considers that the application of article 6 ECHR excludes a reduction of tax fines by the court "*only* [emphasis added] for reasons of opportunity and equity", while allowing a control of the compliance of the fine in relation to the general principles of law (including the principle of proportionality), the duty of prudence of the authorities or else the binding requirements of international conventions (including the ECHR and consequently also, in particular, the consequences of exceeding the reasonable time limit that also allows the court to go below the legal minimum).[59]

Only a judgment that is a little unusual (and unknown) of the Court of Cassation of 2002 relating to the Eurovignette[60] allowed the court, based on the circumstances of the case (a quite isolated offence), to go below the legal minimum upon review of compliance with the international conventions and general principles of law.

It should be noted that the European Court of Human Rights ruled against partial control.[61] However, the principles laid down in the 2002 judgment of the Court of Cassation on the Eurovignette and by the Court of Arbitration (see section 3.1.8.3 below) may satisfy article 6 ECHR.

3.1.8.3. The applicability of the principles of equality and ND in relation to tax fines according to the Constitutional Court

According to a judgment of the Constitutional Court of 1999,[62]

cont.
fiscal", *RGF*, 2002, pp. 181–182; Sepulchre, "Le contrôle juridictionnel des amendes fiscales", *RGCF*, 2003, no. 2, p. 5. See also CEDH, *Jussila* v. *Finland*, 23 November 2006, req. no. 73.053/01.

58 Cass., 14 January 1999, *Pas*., 1999, I, p. 24; Cass., 5 February 1999, *Pas*., 1999, I, pp. 148 and 163; *JDF*, 1999, p. 201, note MB; *FJF*, 1999, p. 227; *JLMB*, 1999, p. 537, note A. Demoulin; *RW*, 1999–2000, p. 640, obs.; *TFR*, 1999, p. 375, note B. Coopman and G. Stessens; *R. Cass*., 2000, p. 213, note I. Van de Woesteyne (judgment of the Court of Cassation clearly inspired by §46 of the judgment *Bendenoun* v. *France* of 24 February 1994 of the ECHR).

59 Cass., 21 January 2005. Cass., 16 February 2007. For critics, see also Sepulchre, *op. cit*., note 1, nos. 671–674; D. Garabedian, "Le pouvoir d'appréciation du juge à l'égard des amendes administratives fiscales et de la cotisation spéciale sur 'commissions secrètes'", in *Liber amicorum Jacques Malherbe*, Ed. Bruylant, 2006, p. 491.

60 Cass., 24 January 2002, *FJF*, 2002, p. 445 and 2003, p. 112.

61 CEDH, *Silvester's Horeca Service* v. *Belgique*, 4 March 2004, req. no. 47650/99, *FJF*, 2004, p. 528.

62 Const. Court, 24 February 1999, no. 22/99, *Arr. CA*, 1999, p. 257; *FJF*, 1999, no. 181, p. 489; *JT*, 1999, p. 445; *JLMB*, 1999, p. 532, note A. Demoulin; *TFR*, 1999, p. 385, note B. Coopman and J. Steffens; *RW*, 1998–99, p. 1346, note C. Vermeersch; *TBP*, 1999, p. 679. See also with the same opinion, Const. Court, 12 June 2002, no. 96/2002, *MB*, 2002, p. 35389; *Courr. fisc*., 2002, p. 538, note W. Defoor; Const. Court, 17 March 1999, no. 32/99, *Arr. CA*, 1999, p. 371; *JT*, 1999, p. 766, note E. Willemart; *FJF*, 1999, p. 299.

> "The legislator is responsible for assessing if it is necessary to compel the authorities and the court to be severe when an offence is particularly harmful to the general interest. But if it is considered that it should allow the authorities to adjust the extent of the penalty, *nothing that falls within the scope of appreciation of the authorities must escape control by the court*."

Thus, there is no violation of the principles of equality and ND provided for in articles 10 and 11 of the Constitution only if

> "the court, to which a petition to object to the enforcement of a constraint is submitted, exercises a power of full jurisdiction that enables it to control all matters that fall within the appreciation of the authorities in relation to the tax fine",

which thus includes the control of opportunity mentioned above.[63]

As from 1999, on the basis of articles 10 and 11 of the Constitution, the Constitutional Court thus went further than the aforementioned case law of the Court of Cassation, under pressure from article 6 ECHR.

This is thus an illustration of the fact that, in Belgium, since the 1990s, the application in tax matters of the principles of equality and ND resulting from the Belgian Constitution in general allowed a more efficient control than the same principles resulting from the texts of international treaty law, such as the ECHR or DTCs.

3.1.9. Conclusions

First of all, one should highlight that the definition of the principles of equality and ND in Belgian tax law is currently very consistent as the Belgian Constitutional Court has unified, and one might say has "pacified", their definition.

Furthermore, considering the constitutional status of these principles in Belgium, one can say that their scope in the tax field is unlimited as regards types of taxes (no type of tax can escape these principles in Belgium) and the essential elements of each tax (whether it relates to the establishment of the tax debt or tax obligations, tax assessment, litigation or tax collection), which is not necessarily the case with DTCs.

3.2. ND in commercial agreements

Among international agreements concluded by Belgium, one must first of all refer to the EU Treaty which contains some provisions prohibiting discrimination. It is not the scope of this report to detail those provisions. The reporters only note that the ECJ has ruled that those provisions have direct effect and, consequently, that they can be relied upon by individuals even in claims against the tax authorities. As already mentioned, Belgium recognizes the primacy of inter-

[63] For an analysis of the results of this point, see Sepulchre, *op. cit.,* note 1, nos. 675–707; Garabedian, *op. cit.*, p. 491.

national law, with the consequence that provision of international law having direct effect can be put forward even before national jurisdictions.

In this context, as regards intra-Community relations, the taxpayer will rely on the EU Treaty provisions rather than on the ND MC article. The *Talotta* case is a good example. The individual taxpayer based his claim both on the EU Treaty and on the ND clause. The case was referred to the ECJ.[64]

3.2.1. Air and maritime agreements

Belgium has concluded international agreements in the field of air and maritime transport. As a rule, those agreements grant, on a basis of reciprocity, a tax exemption to the enterprises of the other state; there are no ND rules in those agreements.

3.2.2. Economic union between Belgium and Luxembourg

A coordinated agreement on economic union between Belgium and Luxembourg was signed on 18 December 2002 (coordination of the 1922 Convention).

Article 23 of this agreement provides that the nationals of one contracting state which become established, live temporarily in the territory or go through the territory of the contracting state cannot be subject in that contracting state to any tax or duties other than those applying to nationals because of the product of their agriculture, their commerce, their industry, their capital or their work, because of agricultural, commercial, industrial, financial operations or professions, or because of the transportation of their merchandise, of their person or of their goods.

There is no case law published regarding this article 23.

3.2.3. The Benelux Treaty

Article 2(2) of the Benelux Treaty provides that nationals of each of the contracting states being on the territory of another contracting state shall enjoy the same treatment as nationals of that state, as regards "f) taxes and charges of any kind".

According to article 58 Benelux, activities of companies established under the legislation of one contracting state may not be subject to stricter conditions than those applied to national companies. "Albeit, the companies of one of the High Contracting Parties may not enjoy more rights in the territory of another Contracting Party than similar national companies of the latter Party."

Recently, the Benelux Court had to decide on a case based on article 2(2) of the treaty. The situation was similar to the *Talotta* case (see above). The Court ruled that the Belgian rule according to which non-resident taxpayers are taxed, in certain circumstances, on a minimum basis, when such a rule does not apply to residents, with the consequence that the tax to be paid by a non-resident is higher than what would have been paid by a resident, was contrary to article 2(2) Benelux.[65]

64 ECJ, 22 March 2007, C-383/05, *Talotta*.

65 Benelux Court, 19 March 2007, *Metabouw-Bouwbedrijf B.V.C.* v. *Belgium*.

3.3. Conclusion

There is a wide application of the EU Treaty provisions in the tax field. On the other hand, there is very little, if any, case law concerning the Benelux Treaty and the treaty on economic union between Belgium and Luxembourg. Probably those provisions have not been very well known, up to now, by taxpayers. The recent case decided by the Benelux Court will perhaps be the first of many others in the future, especially if the Benelux provisions appear to have a broader scope than the EU ones or the Belgian Constitution.

4. ND in international conventions relating to human rights and fundamental freedoms and civil and political rights

4.1. The foundation of the principles of equality and ND in the ECHR applicable to Belgian tax law

The various provisions of the European Convention on Human Rights also affect the principles of equality and ND in tax law in Belgium.

First of all, "the taxation constitutes interference with the right of property guaranteed under paragraph 1 of article 1 of the additional Protocol but said interference is justified by paragraph 2 of said article that expressly authorises the contracting States to enforce such laws as it deems necessary … to secure the payment of taxes."[66]

Then, the principles of equality and ND are written into articles 14 and 18 ECHR.

These provisions are directly applicable in Belgian law according to the same principles of interpretation as those highlighted by the European Court of Human Rights.[67]

4.2. The impact in Belgium of the current scope of the principles of equality and ND in the ECHR

At first view, article 1 of the additional protocol no. 1 strongly reconciles the rights of states to decide on the impairment of the right of property (application of the theory of "margin of application".[68] However, laws and acts of states that impair the right of property must strike a "fair balance" between the general

66 Comm. DH, 9 May 1988, *JDF*, 1989, p. 129.

67 Cass., 21 May 2003. For the interpretation of arts. 14 and 18 ECHR in tax matters by the European institutions for the protection of human rights, see Sepulchre, *op. cit.*, note 1, nos. 5–14 and 73–81bis. See also CEDH, *Eko-Elda Avee* v. *Greece*, 9 March 2006, req. no. 10162/02.

68 CEDH, *Van Raalte*, 21 February 1997, *Rec.*, 1997, vol. I.

interest and the individual interest, in compliance with the limitations resulting from articles 14 and 18 ECHR.[69]

In view of the terms above, a clear parallel will thus be noticed between the interpretation of the principles of equality and ND in relation to tax matters as they result from article 14 ECHR and these same principles as they result from articles 10 and 11 of the Belgian Constitution.

The Constitutional Court, in its recent judgments, extended the control of compliance with the Convention. In fact, since 2004, the Constitutional Court has held that, when an article of a convention, in particular, the ECHR, is similar in scope to one or more articles of the Constitution that protect rights and freedoms, the guarantees established under the article of the Convention constitute an indissociable whole with the guarantees set forth in the articles of the Constitution. Moreover, it ensures that, when a violation of Belgian constitutional rights and freedoms is alleged, the Constitutional Court must take account of the provisions of international law such as the Convention that guarantees similar rights or freedoms,[70] even the case law of the European Court of Human Rights in relation to the interpretation of the rights and freedoms.[71]

Thus, on a regular basis, Belgian taxpayers contesting tax norms invoke a combination of articles 10 and 11 of the Constitution, article 1 of protocol no. 1 combined with article 14 of the ECHR. In this case, the Constitutional Court will always adopt a single interpretation of the principles of equality and ND. Moreover, knowing that a later action before the European Court of Human Rights requires that all domestic remedies have been exhausted (article 35(1), ECHR), which implies that the complaint be at least raised in substance before the relevant national courts, such a combined legal argument is needed to meet this condition.[72]

4.3. Application of other articles of the ECHR in tax matters

The principles of equality and ND included in the ECHR are independent of other guarantees provided for in the convention. However, it should be noted that today the application of article 6 (for tax and criminal penalties as well as for collection, to the exclusion of the setting of the tax debt itself) and article 8 of the ECHR in tax matters is no longer contested in Belgium.[73]

4.4. Example of application relating to the setting of a tax

It should be noted that the European institutions for the protection of human rights only rarely accepted the existence of discrimination in tax matters on the

69 For examples, see Sepulchre, *op. cit.*, note 1, nos. 5–14 and 73–81bis. See also CEDH, *Eko-Elda Avee* v. *Greece*, 9 March 2006, req. no. 10162/02. See also L. Condorelli, "Premier protocole additionnel", in *La Convention européenne des Droits de l'Homme. Commentaire article par article*, Economica, Paris, 1999, pp. 973–974.

70 Const. Court, 22 July 2004, no. 136/2004, *MB*, 19 October 2004; Const. Court, 20 October 2004, no. 158/2004, *MB*, 28 October 2004; Const. Court, 7 June 2006, no. 91/2006, *MB*, 23 June 2006.

71 Const. Court, 7 June 2006, no. 91/2006, *MB*, 23 June 2006.

72 Sepulchre, *op. cit.*, note 5, nos. 112–118.

73 See Sepulchre, *op. cit.*, note 1.

basis of article 14 ECHR.[74] However, such European decisions may have repercussions on Belgian tax law when the norms rejected at European level for certain states are simultaneously found in Belgian tax law.

Thus, to the extent that the estate duties applicable in the three regions in Belgium also use such a distinction, it is necessary to watch the development of the *Burden & Burden* case which is still pending at the time of writing this report before the Grand Chamber of the European Court of Human Rights, after a first non-final judgment of non-violation on 12 December 2006 (req. no. 13.378/05). In fact, in this case, a British law in relation to estate duty which resulted in a debt of estate duty of 40 per cent between sisters is challenged when this amount of duty would not be owed on account of the surviving member of a married couple or a civil partnership.

4.5. Example relating to the tax procedure

Apart from the application of article 6 ECHR to the judicial control of tax fines (see above), there is violation of article 1 of protocol no. 1 in the event of the extended lock-up of a reimbursement of a tax paid but not owed five years after the request for reimbursement.[75] It is quite possible to refer to the European decision in Belgium in all cases where Belgian tax law does not provide for moratorium interest.

4.6. Conclusions

After having noted the work that the Belgian Constitutional Court has carried out to unify Belgian law, the link the Court has tended to establish since 2004 between Belgian domestic law and international treaty law must be emphasized. Today, the principles of equality and ND, as resulting from constitutional law and international treaty law, are certainly not to be opposed to each other. Quite the contrary, they are in fact now complementary. This complementarity now only reinforces the scope of these fundamental principles.

[74] For such discrimination, over a tax on the family allowances, see CEDH, *Van Raalte*, 21 February 1997, *Rec*., 1997, vol. I; or over a clerical tax, CEDH, *Darby* v. *Sweden*, 23 October 1990, Série A, no. 187; *RTDH*, 1992, p. 181, note Jean-François Flauss; *FJF*, 1992, p. 75.

[75] CEDH, *Eko-Elda Avee* v. *Greece*, 9 March 2006, req. no. 10162/02. See also, with the same opinion, CEDH, *Buffalo SRL en liquidation* v. *Italy*, 3 July 2003, req. no. 38746/97.