

## GENERAL REPORT (draft)<sup>1</sup>

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### Introduction

This general report deals with a number of topics. These topics concern terminology, i.e. the different concepts in uses with regard to retroactivity (and retrospectivity), ex ante evaluation of retroactivity; the use of retroactivity in legislative practice, ex post evaluation of retroactivity (in case law), and views in literature. In the parts on ex ante evaluation of retroactivity; the use of retroactivity in legislative practice, and ex post evaluation of retroactivity (in case law), the focus is on the various kinds of possibilities to use retroactive tax legislation and limitations on the use of retroactive tax legislation. In presenting the information with regard these topics we will not always strictly follow the questionnaire; for the purpose of readability we will sometimes combine related issues (questions). Of course, it is not possible to present the information presented in the national reports down to the smallest detail. The answers received on some questions were too diverse to recapitulate in this general report.

Another set of remarks concerns the focus of the questionnaire. The questionnaire mainly concerns retroactivity of tax legislation, in particular Acts of Parliament. Hierarchical lower tax rules, therefore, such as subordinate legislation, regulations, decrees, etc. are largely left aside. Moreover, we mainly deal with substantive tax law. Furthermore, the focus is on tax law not on criminal law; so retroactivity with regard to criminal offences against taxation laws, is only indirectly touched upon.

This report could not have been written without the job done by the national reporters; we are very grateful for their industry.

Finally, this is a draft report, so please do not quote. And, of course, any comment is welcome.

### A. On terminology (questions 1-7)

#### *Introduction*

Before it is possible to analyse the issue of retroactivity with respect to the contents, first the terminology used should be made clear. This is necessary because there is an important risk of misunderstanding. The reason is that, in literature as well as in case law, different concepts

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<sup>1</sup> This report is draft, both in terms of its content and its language, and it will be finalized after the 2010 EATLP-congress. Furthermore, the national reporters will be consulted with regard to lack of clarity in their reports, possibly due to vagueness in the questionnaire. The national reporters are cordially invited to comment on our vague or even mistaken interpretations of their reports. We will also ask them to clarify particular answers in their reports.

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are used with various meanings when dealing with the phenomenon of retroactivity in legislation.

We note that when dealing in this report with the issue of retroactivity we do not make a distinction between the introduction of a tax statute and the change (amendment) of an existing tax statute, for there is no conceptual difference between the two. After all, a change in an existing statute is realized by means of the introduction of a statute that provides for the change.

### *Retroactive vs. retrospective*

In English language a potential misunderstanding may arise when using the concepts of retroactivity and retrospectivity. First of all, sometimes these concepts are (implicitly or explicitly) considered synonyms, but often a conceptual distinction is (implicitly or explicitly) made between retroactivity and retrospectivity. Secondly, *if* a conceptual distinction is made, the meaning of retroactivity and retrospectivity is not the same in the various countries and legal discourses in which English is spoken or used. It is even the case that what is called in the one country ‘retroactive’, is called in another country ‘retrospective’, and *vice versa*. This latter has been established more in particular for the area of taxation by, for example, Bobbett in an article in *British Tax Review*<sup>4</sup> with references to the way both terms are used in case law in various English speaking countries. The mixed use of retroactivity and retrospectivity has also been noted in the national report of the United Kingdom.

In accordance with the suggestion of Bobbett<sup>5</sup> and in line with the way the ECJ uses the term<sup>6</sup>, in this general report, the term ‘retroactive’ will be used for the phenomenon that a legal provision affects legal facts that occurred before the provision was officially published, or in other words: the phenomenon that the legal provision is applicable to taxable events or tax periods prior to its official publication. The term ‘retrospective’ will be used for the phenomenon that a new legal provision has ‘immediate effect’, without grandfathering<sup>7</sup> existing situations, and as such is applicable also to existing situations. Such an ‘existing situation’ could be transactions or economic activities that have been started in the past but are not yet closed.

In almost all countries, the courts or at least legal discourse do make a comparable conceptual distinction between ‘retroactivity’ and ‘retrospectivity’ (*casu quo* between the national counterparts of these concepts).<sup>8</sup> It is interesting to mention that in a lot of these countries the national language has its limits in the sense that, other than the English language, not two separate terms are available. In these countries the language has only one term, but nonetheless a conceptual distinction between ‘retroactivity’ and ‘retrospectivity’ is achieved, e.g. by adding adjectives to the term (e.g. formal and material, true and untrue, etc).

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<sup>4</sup> Catherine S. Bobbett, *Retroactive or retrospective? A note on terminology*, *British Tax Review* 2006, pp. 15-18.

<sup>5</sup> Bobbett, l.c., p. 8 concludes: “perhaps it would be better to follow the Canadian meaning: restrict retroactive to statutes that alter or do something to the past (Latin: *retroagere* meaning to lead back, to reverse); and use retrospective for statutes that recognise past transactions but alter the consequences of them in the future without changing the past (Latin: *retrospicere* meaning to look back).”

<sup>6</sup> E.g., the (Dutch) tax case of ECJ April 26, 2005, C-376/02 (*Stichting Goed Wonen II*).

<sup>7</sup> Grandfathering means, in short, that the old rule remains (temporarily) applicable.

<sup>8</sup> Belgium, Denmark, France, Germany, Hungary, Italy, Luxembourg, The Netherlands, Poland, Portugal, Spain, Sweden, Turkey.

However, in Finland only one term (*taannehtivuus*) is used, and in fact only for the phenomenon retroactivity and not for the phenomenon retrospectivity. Furthermore, in Greece in principle only one term is used without making distinctions; it should be noted that although some Greek academics make a distinction between ‘true retroactivity’ and ‘non-true retroactivity’, the latter concept does not correspond with ‘retrospectivity’, but in fact seems to be a special variant of ‘retroactivity’.

The above-mentioned use in this report of the concepts of ‘retroactive’ and ‘retrospective’ implies that the term ‘retroactive’ is used in the narrow sense. In literature, not only law & economics literature but also in other legal literature, sometimes the term ‘retroactive’ is also used in the broad sense, i.e. covering also what is called here ‘retrospective’.<sup>9</sup>

The risk of conceptual misunderstanding appears also from the fact that a great variety of terms exists. This is confirmed by the various national reports. These reports show that a great variety of terms are (or were) used in the various countries. Terms are used such as ‘actual retroactive’, ‘formal retroactive’, ‘true retroactive’, ‘real retroactive’, ‘absolute retroactive’, ‘juridical retroactivity’, ‘maximal retroactivity’, ‘retroactive *stricto sensu*’, and ‘proper retroactivity’; these terms correspond more or less with what is called ‘retroactive’ in this report. Further, terms are used like ‘non-actual retroactive’, ‘material retroactive’, ‘pseudo retroactive’, ‘de facto retroactive’, ‘relative retroactive’, ‘improper retroactive’, ‘medium retroactive’, ‘false retroactive’, ‘inappropriate retroactive’ and ‘economical retroactive’; these terms more or less correspond with what is called ‘retrospective’ in this report. Moreover, illustrative for the potential misunderstanding is that in Denmark the term ‘material retroactive’ is used for what is called in this report ‘retroactive’, while in other countries, if used, the term is used for what is called in this report ‘retrospective’. Another example is the use of the term ‘non-true retroactivity’ in Greece. In the Greek use the term does not correspond to ‘retrospectivity’ (as one may expect) but refers to the phenomenon that the legislator ‘intervenes’ in procedures that are pending for the tax authorities or the courts, which is – in the terminology of this general report – an example of retroactivity.

### *Retrospectivity*

We note that also national reporters of the countries in which the concept ‘retroactivity’ is distinguished from the concept ‘retrospectivity’ – in the way described above –, often remark that the concept of ‘retrospectivity’ is not well-defined or is an ‘open concept’ or is ‘rather vague’.<sup>10</sup>

On the one hand it appears that some cases of legislation would certainly be called retrospective. In the questionnaire, the example was mentioned of a statute that enters into force on January 1, 2010, and that stipulates that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealised gains, as a result of which gains that accrued prior to January 1, 2010 are not tax exempt although they accrued in a period when the exemption applied.<sup>11</sup>

On the other hand it is hard to provide general criteria to draw a line between retrospectivity of a statute and non-retrospectivity of a statute, taking into account that a new statute generally – unless there is a grandfathering provision – has some influence on future consequences of past events and past transactions. A fine example on this latter issue is provided in section 6 of the German national report.<sup>12</sup> Noteworthy is that Hungary not only has a broad concept of retrospectivity (for example, if a statute changes the taxation of interest, and would also be applicable on existing loans, this would be considered

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<sup>9</sup> Note that the US reporter remarks that, in the US, usually not a clear distinction between retroactivity and retrospectivity is made, and that the term retroactive is often used to describe both.

<sup>10</sup> France, Germany, Italy, The Netherlands, Portugal, Sweden.

<sup>11</sup> See also the national reports of Denmark, Hungary, The Netherlands and Turkey discussing this (or a comparable) example.

<sup>12</sup> Another example is the discussion in Danish legal discourse with respect to question whether or not in the situation in which new legislation affects ‘*facta pendentia*’ (this is legislation that has effect on continuous events and/or transactions, and as such also covers events that occur partly before and partly after the point of time when the relevant statute comes into effect) the legislation can be qualified as retroactive.

retrospective), but also prohibits retrospectivity; so grandfathering is in Hungary the main rule.

It should be noted that in legal theory literature it is generally accepted that it is not possible to make a sharp distinction between retrospectivity and non-retrospectivity. To the contrary, retrospectivity is mostly considered to be a matter of degree. Also, especially law & economics literature remarks that (almost) any change in tax rules will have an affect on the value of assets and liabilities, and from that point of view is retroactive / retrospective.

Further, we note that it may sound appealing to draw the line between retrospective and non-retrospective at whether or not legitimate expectations are infringed by the statute concerned. However, this approach does not only mix up the conceptual question with the question of the legitimacy, it also only shifts the problem, namely to the question which standards should be used to assess whether expectations are legitimate or not.

Notwithstanding the above in some countries a definition of retrospectivity is available. For example, the Belgian reporter provides the definition that a retrospective rule has an immediate effect, which implies that a new legal rule is both applicable to legal facts that occur after the date of entry into force of this new rule, as well as on legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that took place before this date. In the same line the reporter of Turkey describes retrospectivity as the case in which a new tax provision negatively affects the tax obligations of the taxpayer after the commencement but prior to the completion of the taxable event.

### *'Comparison moment'*

Misunderstanding when discussing retroactivity could also arise because of a different use of the 'comparison moment'. That comparison moment is the moment with which is compared in order to determine whether a statute has retroactive effect.

Some countries use the date of the entry into force of a statute as the 'comparison moment'.<sup>13</sup> This choice for the comparison moment seems to be related to the fact that, at least in most of these countries, the constitution (or another relevant law) provides that a statute should not enter into force prior to the date of publication.<sup>14</sup> In connection with the date of the entry into force of a statute as the 'comparison moment', legal discourse in most of these countries employs a conceptual difference between the date of entry into force of a statute and the 'effective entrance date' of a statute.<sup>15</sup> For example, if a tax statute enters into force on December 1, 2009 and is applicable as from the tax year 2010, the effective entrance date is January 1, 2010. So, in case of retroactivity, the *date of entry into force* is still a future date, but the *effective entrance date* is a date in the past.

Other countries use the date of publication of the statute in the Government Gazette as the comparison moment.<sup>16</sup> It seems that in some of these countries it is possible that the date of entry into force is set at a date of the past; in that case retroactivity could be defined as the case in which the date of entry into force of a statute is prior to the moment of the publication. In some other of these countries, it is arranged that a statute should not enter into force prior to the date of publication, and legal discourse employs a conceptual difference between the date of entry into force (or the date of publication) of a statute on the one hand and the statute's 'effective entrance date' (or a comparable term such as 'date of effect') on the other hand.<sup>17</sup>

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<sup>13</sup> Belgium Finland, France, The Netherlands, Spain, Sweden.

<sup>14</sup> Belgium, Finland, The Netherlands, Spain, Sweden.

<sup>15</sup> Belgium Finland, France, The Netherlands, Spain, Sweden. This difference is also made in Poland.

<sup>16</sup> Denmark, Germany, Hungary, Luxembourg.

<sup>17</sup> Denmark.

This difference with respect to the comparison moment is however not of a significant relevance, but only affects the way ‘retroactivity’ is defined. Theoretically the two views could have different results with respect to the label ‘retroactivity’ in a concrete case, but the appraisal would also then not differ. For example, a statute that is published in the Government Gazette on December 1, 2010, enters into force on February 1, 2011, and would be applicable to taxable events occurred after December 1, 2010, would be called retroactive in the first view but would not be called retroactive in the second view. However, in the countries in which the first view is used, this retroactive effect would not be regarded problematic at all from a legal certainty point of view (leaving aside the possible issue of retrospectivity).

### *‘Tax period related concept’ or ‘taxable event relating concept’ of retroactivity*

A, very interesting, difference that appears from the national reports concerns the following issue. The issue is whether a tax statute (e.g. providing in an increase of the tax rate) that is enacted during a tax period (for example on November 15, 2010) and is applicable as from the start of that tax period (for example, January 1, 2010) should be qualified ‘retroactive’.

In some countries such a statute would indeed be called retroactive.<sup>18</sup> Basic idea is that such a statute should logically be qualified retroactive, since the statute is also applicable to a period prior to the date of publication of the statute in the Government Gazette (or – depending on the comparison moment – the date of entry into force of the statute). Furthermore, the qualification ‘retroactive’ is considered appropriate because the statute applies to the taxable events (expenses, income earned, transactions, etc.) occurred prior the date of publication (or of entry into force). One could say that these countries use a ‘taxable event relating concept’ of retroactivity.

However, there are also a lot of countries in which such a statute would not be considered retroactive but retrospective, at least by the courts.<sup>19</sup> In these countries a statute is only considered retroactive in case a tax statute is applicable to a tax period prior to the period in which the statute is enacted. The basic idea is that the tax obligation of period related taxes (such as the personal income tax and corporate income tax) only arises at the end of the period, that the tax case therefore is not closed until the end of the period, and that therefore a statute enacted prior to the end of the period is not considered retroactive if it applies as from the start of the period. One could say that these countries have a ‘tax period related concept’ of retroactivity.<sup>20</sup> It is worth mentioning that in the UK the phenomenon that a tax statute is introduced during a tax year and applies as from the beginning of that tax year is even standard practice.<sup>21</sup> This UK practice (however) has to do with the constitutional requirement that, in short, there must be a Finance Act in every year.

This difference is not only of technical relevance, but has also consequences to the contents. As – in most countries – the standards that courts use for retroactivity differ from the standards used for retrospectivity (i.e. retroactivity is in principle not allowed while

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<sup>18</sup> Denmark, Finland, Hungary, The Netherlands, Poland, Sweden. The issue is still, after the constitutional revision of 1997, under discussion in Portugal. In Greece the issue is not considered relevant because retroactivity of tax statutes is constitutionally permitted as long as the retroactivity does not extend beyond the financial year prior to the year of the enactment of the statute.

<sup>19</sup> Belgium, France, Germany, Italy, Luxembourg, Spain, Turkey.

In Belgium, until recently, the Supreme Court had even a more far-reaching view (that however deviated from the view of the Constitutional Court): according to the Supreme Court, the applicable income tax rules for year x could not only be changed until 31 December of year x, but even until 31 December of year x+1 (the assessment year), without being considered as (actually) retroactive.

<sup>20</sup> Cf. the German reporter Hey.

<sup>21</sup> Also in the US the practice is common.

retrospectivity is in principle allowed), it obviously matters significantly whether or not a tax period related approach of retroactivity is used in case a statute is tested that is enacted during a taxable period and applies as from the beginning of that period. Furthermore, in connection with the latter point, even if courts in two countries would use the exact same standards to judge retroactivity, the assessment of that statute would differ if in the one country a tax period related concept of retroactivity is used, while in the other country a taxable event related concept is used.

Worth mentioning is that some of the national reporters of the countries in which the tax period related concept of retroactivity is used, note that this concept was developed by the courts, and that the approach is criticised in literature and by some (lower) courts.<sup>22</sup>

If a tax period related concept is used, the question arises to which kind of taxes the concept is applicable. Obviously, the concept applies to typical period related taxes such as the personal income tax and corporate income tax. It is however remarkable that apparently sometimes also the value added tax is regarded as a period related tax.<sup>23</sup> The German legislator even considers the inheritance tax as a period related tax.

### *Interpretative statutes*

Another conceptual variation concerns the so-called interpretative statutes. These are statutes that stipulate the interpretation of another statute. Interpretative statutes are often applicable as from the entrance date of that other statute. Various issues and questions arise with respect to this temporal effect of such statutes, including the qualification as retroactive.

First of all, it should be noted that, in some countries, the phenomenon ‘interpretative statutes’ is explicitly recognised as such, or in other words, interpretative statutes are considered a special category of statutes. This special status could have a legal basis<sup>24</sup> or could be construed in case law.<sup>25</sup> In other countries ‘interpretative statutes’ are not explicitly recognised as special category.<sup>26</sup> However, the national reports show that, nevertheless, the national legislators of some of these latter countries also sometimes grant retroactive effect to a statute, justifying the retroactivity by claiming that the statute only provides for a clarification of the interpretation of another statute.<sup>27</sup> In a few countries however retroactive interpretative statutes are (nearly) unknown or are considered invalid.<sup>28</sup> To conclude, most of the countries are in some way familiar with the phenomenon of retroactive interpretative statutes.

Secondly, the question arises whether if an interpretative statute is applicable as from the entrance date of the statute for which the interpretation is provided, the interpretative statute would be considered ‘retroactive’. In most of the countries in which the law does not recognise explicitly ‘interpretative statutes’ as such, the answer to that question is positive:

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<sup>22</sup> National report of Germany.

<sup>23</sup> E.g. in Germany.

<sup>24</sup> Belgium and Luxembourg: in the Constitution; Italy (*legge di interpretazione autentica*): not in the constitution but in the civil code and the statute of taxpayer’s rights; Spain in which they have interpretative ministerial orders, which have a legal basis in the General Tax Act; United Kingdom: the Interpretation Act 1968 (which is a general Act of Parliament). Greece has a special position in this respect; interpretative statutes have a legal basis in the Constitution, but prevailing opinion is that, because of a constitutional provision with respect to retroactivity of tax statutes in general, tax interpretative statutes have only retroactive effect that does not extend beyond the financial year prior to the year of the enactment of the statute.

<sup>25</sup> France (*loi interprétative*).

<sup>26</sup> Denmark, Finland, Germany, Hungary, The Netherlands, Poland, Sweden, Turkey, the US.

<sup>27</sup> Germany (*Klarstellungsinteresse*), The Netherlands, and the US (‘technical corrections’ and ‘restatement of intended meaning’).

<sup>28</sup> Hungary, Poland, Sweden, Turkey.

the statute would in general indeed be considered retroactive.<sup>29</sup> The question is however especially interesting with respect to countries in which ‘interpretative statutes’ are a special category. In some of these countries the statute would not be considered retroactive.<sup>30</sup> Basic idea is that the interpretative statute is supposed not to bring any new in the interpreted statute. However, in other of these countries the term ‘retroactive’ is used, although distinguished from ‘pure’ retroactivity.<sup>31</sup>

Thirdly, the question arises whether the retroactivity of interpretative statutes are assessed in another way than retroactivity of other statutes. This question is usually interrelated with the question what standards are used to distinguish an interpretative statute from a non-interpretative statute. Both questions are interesting especially, but not only, with respect to the countries in which the phenomenon ‘interpretative statutes’ is recognised as such in the law.

To start with the second question, theoretically two approaches can be distinguished. The first approach is – what we would like to call – the formal approach. In that approach a statute is considered interpretative if the legislator has labelled the statute ‘interpretative’. So, the courts do not assess whether such a statute is really interpretative.<sup>32</sup> In the same line, in some countries, the courts will, as a rule, give effect to the will of Parliament if an interpretative statute is introduced.<sup>33</sup>

The second approach is– what we would like to call – the substantive approach. In that approach the national court assesses by means of certain standards whether a statute that is labelled interpretative by the legislator indeed can be qualified as interpretative. It could obviously be the case that a national legislator wrongly labelled a statute as ‘interpretative’.<sup>34</sup> In most of the countries basically the second approach is handled.<sup>35</sup>

The subsequent issue is how to determine whether a statute is indeed interpretative. It seems that different standards are used. It is reported that an interpretative statute should not carry new legal content.<sup>36</sup> It then still remains the question when a statute is considered to carry new legal content. The issue is deeply intermingled with the issue of interpretation methods. In some countries, an interpretative statute is considered interpretative if it stays within the interpretation limits of the statute to which the interpretative statute applies.<sup>37</sup> This is even the case, at least in some countries, if the interpretation provided for by the interpretative statute deviates from the interpretation that the Supreme gave or might give.<sup>38</sup> Some other countries however seem to have a more strict view on interpretative statutes. For example, in Belgium it should be the case that the interpreted legal provision, from its origin, could not possibly be comprehended in a way different from what was indicated in the interpretative law.<sup>39</sup> If a statute that is labelled interpretative by the Belgian legislator does not meet this requirement, the retroactivity of the statute will be judged by the courts on the basis to the standards for retroactivity of ‘normal’ statutes. In Greece an important issue is whether the interpreted statute was indeed unclear; if that is not the case the interpretative statute is not considered truly interpretative. More or less the same applies for Italy, in which the standards are that

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<sup>29</sup> Finland, Germany, The Netherlands.

<sup>30</sup> France, Luxembourg.

<sup>31</sup> Belgium.

<sup>32</sup> This is approach seems to be followed by the administrative supreme court (*Council d’Etat*) in France.

<sup>33</sup> United Kingdom.

<sup>34</sup> In French legal discourse the term ‘falsely interpretative statute’ (*loi faussement interpretative*) is used. In Greece the term ‘pseudo-interpretative statute’ is used.

<sup>35</sup> Belgium, Greece, and also the judicial supreme court (*Cour de cassation*) in France.

<sup>36</sup> National report of France and Italy.

<sup>37</sup> Compare the national reports of Germany.

<sup>38</sup> Germany.

<sup>39</sup> Belgium.

there should be uncertainty, unclearness of the interpreted statute, different or contrasting interpretations by the courts or by the tax authorities.

With respect to the first question, we note that in the above-mentioned countries in which interpretative statutes are not considered retroactive, the standards for ‘retroactivity’ of interpretative statutes are obviously different from these for retroactivity of other statutes. Some other countries provide a fine illustration of the interrelation between the first question and the second question. For example, in Belgium the standards for retroactivity of interpretative statutes are lower than for retroactivity of other statutes, but there is – as just seen – a strict view on the definition of an interpretative statute. In some countries in which interpretative statutes are not recognised as such, it seems that in principle no explicit different standards are used for retroactive statutes that interpret another statute.<sup>40</sup> Obviously, if the interpretation provided is the same as the interpretation that the courts would give if the interpretative statute would not have been enacted, the retroactivity is not a problem.

In various national reports it is explicitly noted that regularly statutes that are labelled interpretative by the legislator in their country, are not really interpretative.<sup>41</sup> Furthermore, it is even noted that ‘it has been common practice throughout the last 100 years that [government] uses an Act of Parliament to reverse the effect of a court decision or to remove a doubt about interpretation in favour of the official view.’<sup>42</sup>

### *Validation statutes*

An interesting phenomenon is the retroactivity of so-called validation statutes. Such a statute ‘validates’ an existing legal practice and/or a certain view of, often, the tax authorities. The various national reports show that most of the countries are familiar with the fact that the tax legislator sometimes introduces a statute with retroactive effect to validate an existing legal practice and/or a certain view of the tax authorities.<sup>43</sup> In some countries however retroactive validation statutes are (nearly) unknown or are considered invalid.<sup>44</sup>

Two types of situations can be distinguished. The first type is that the validation statute is enacted at a moment that the courts have not yet decided whether or not the existing legal practice and/or the view of the tax authorities has sufficient legal basis in the law, i.e. is valid. We note that there could be a conceptual overlap with the phenomenon of interpretative statutes, described above, in case the statute ‘validates’ an interpretation.

The second type is that the validation statute is enacted further to a decision of a court in which the legal practice or the view concerned is rejected because it has no legal basis in the law or another view should be regarded the correct one.<sup>45</sup> Especially in case a court decision reveals there is a ‘gap’ in the tax law, the legislator may enact a validation statute with retroactive effect. In this second situation type the national authorities often first announce to the public, e.g. by press release or a circular, that a validation statute will be introduced, in order to avoid that taxpayers develop confidence in the court’s decision concerned.

In various reports the retroactivity of validation statutes in especially the second type is criticized.<sup>46</sup>

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<sup>40</sup> Denmark.

<sup>41</sup> Germany, Italy.

<sup>42</sup> National report of United Kingdom.

<sup>43</sup> Belgium, Germany, France (*loi de validation*), Italy (*convalida legislativa*), The Netherlands, Spain, Sweden, United Kingdom, the US.

<sup>44</sup> Not: Finland, Greece, Luxembourg, Hungary, Poland, Portugal, Turkey. A middle position seems to be the case in Denmark: if granted retroactive effect, a ‘validation statute’ would normally not be granted further retroactive effect than the date on which the bill is introduced to Parliament.

<sup>45</sup> E.g. Belgium, Germany (*Nichtanwendungsgesetze*), Italy, The Netherlands.

<sup>46</sup> E.g. the national reports of Germany, Italy (‘abuse of judicial activity’).



### *The relevance of the character of the statute concerned: procedural or substantive*

Case law of the European Courts, the ECJ as well as the ECHR, shows that in order to determine the temporal effect of a statute the character of the statute is relevant. A *substantive* statute that has immediate effect applies to taxable events occurring after the date on which the statute enters into force. However, a *procedural* statute that has immediate effect is directly applicable on pending proceedings (so also to proceedings regarding taxable events that occurred prior to the date on which the statute enters into force).

For example in the (tax) case ECJ C-61/98 (*De Haan*), the ECJ ruled: “it should be noted in this connection that (...) 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.” A similar approach is followed by the ECHR.<sup>47</sup>

In the various national reports it is confirmed that the above generally also applies in most of the countries,<sup>48</sup> however not in all countries.<sup>49</sup> A variant is that procedural rules do not apply to procedures initiated before the date the statute enters into force.<sup>50</sup> Note that also in this variant the new procedural rule does apply to the (new) procedures that relate to tax events occurred in the past.

So, in principle, new procedural rules also apply to new, and often also pending, proceedings even if the matter of the proceeding is a taxable event that occurred prior to the date on which the statute enters into force pending cases. An exception, mentioned in most of the national reports, is the case in which the new procedural statute concerned provides differently.

Furthermore, some of the national reports mention more specific exceptions. The immediate effect of a procedural rule may be limited to the extent that a new procedural rule cannot stipulate duties to cooperate for the past, based on the principle that a law may not impose an impossible obligation.<sup>51</sup> Also, sometimes, some rules of evidence or burden of proof will not be given immediate effect.<sup>52</sup> More in general the critical issue is raised that, from the perspective of taxpayers’ rights, it is not always possible to differentiate between procedural and substantive rules.<sup>53</sup>

## **B. *Ex ante* evaluation of retroactivity (questions 8-10)**

### *Limitations to retroactivity of tax statutes*

Retroactive tax legislation is a commonly known phenomenon in the countries referred to in this general report. In the United Kingdom, Parliament has the power to enact by statute any fiscal law, retroactive tax laws included. In the other countries, however, there are (constitutional) limitations to retroactivity of tax statutes.

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<sup>47</sup> E.g. (the non-tax case) ECHR December 19, 1997, no. 26737/95 (*Brualla Gomez*), par. 35 refer to “a generally recognised principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way.”

<sup>48</sup> Belgium, France, Germany, Greece, Hungary, Italy, Luxembourg, The Netherlands, Poland, Portugal, Sweden, Turkey, United Kingdom.

<sup>49</sup> Not: Finland and the US. The Danish report notes that Danish legal theory as well as case law are not consistent with respect to procedural statutes at this issue.

<sup>50</sup> Spain.

<sup>51</sup> Germany.

<sup>52</sup> France, Sweden.

<sup>53</sup> E.g. national reports of Greece, Hungary Italy, and Luxembourg.

Portugal and Sweden have a constitutional provision prohibiting retroactive tax laws. In Portugal this constitutional provision is quite strictly applied. However, in Sweden the constitutional prohibition turns out to be a limitation, rather than a strict prohibition. In Sweden, there is a prohibition of retroactive tax legislation in a constitutional document. However, because of two exceptions – one of them frequently used – the constitutional prohibition seems to be seriously eroded.<sup>54</sup> On the other hand, there are countries which are quite strict on retroactivity due to the (constitutional) courts. In Hungary and Poland, the constitutional courts developed a quite strict prohibition from constitutional principles.<sup>55</sup> Limitations may partially be absolute, turning out to be an absolute prohibition of retroactivity but only with regard to a specific kind of legislation. This is the case in France with respect to the binding force of a judicial decision.

In practice, therefore, in almost none of the participating countries there exists an absolute ban on retroactive tax legislation, though in a country like Poland, Portugal and Hungary (through the court) a near prohibition exists, at least with regard to retroactive tax legislation which is unfavourable for taxpayers. Furthermore, the existing limitations are a matter of degree. Though (constitutional) limitations have a *prima facie* force, other reasons may have more force. Therefore, the force of the limitations to retroactivity have to be weighed against reasons pro, for example, grounds of general interest. See further part D on ex post evaluation (case law).

With regard to the legal source of the limitations to retroactive tax legislation there seem to be four variants. Sometimes different variants are present in one and the same country. Note that these variants concern tax statutes, not hierarchical lower tax rules.

The following variants may be distinguished.

(i) the limitations are derived from a general principle that is laid down in the Constitution or in a constitutional text, e.g., the principle of legality, the principle of fairness, the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of the rule of law, the ability to pay principle, and the protection of property, personal freedoms, democratic state under the rule of law.<sup>56</sup>

(ii) the limitations are explicitly laid down in a general provision, not only regarding tax statutes. This variant may be in theory possible, but does not occur in any of the examined countries.<sup>57</sup>

(iii) the limitations are explicitly laid down in a constitutional provision that specifically regards taxation.

This variant occurs in Greece; Art. 78. par 2 of the Constitution of Greece; Portugal, Art. 103, no. 3 of the Portuguese Constitution; Sweden, Art. 2:10 of the Instrument of Government.

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<sup>54</sup> The first exception applies when Government or a parliamentary committee has presented a tax bill to Parliament. In such a case, tax can be levied already as of the day that the bill was presented to Parliament. The second exception is the case that Government transmits to Parliament a written communication stating that a tax bill will be forthcoming.

<sup>55</sup> The principle of the rule of law and the principle of the democratic state under the rule of law respectively

<sup>56</sup> Belgium, equality; Finland, a constitutional principle of ‘avoidance’ of retroactive tax legislation; France, the necessity of ‘guaranteeing rights’ and of the separation of powers (respect of the binding force of a judicial decision); Germany, the rule of law; Greece, the principle of equality (with regard to tax abatements); Hungary, the principle of the rule of law; Italy, the ability to pay principle, and the principle of legitimate expectations (derived from the principle of equality); Poland, democratic state under the rule of law; Spain, the principle of legal certainty; Turkey, the principle of the rule of law; USA, the fifth amendment to the American Constitution (‘No person shall be ... deprived of life, liberty, or property without due process of law’) and the contract clause.

<sup>57</sup> Many constitutions contain a prohibition of retroactivity for criminal laws, see e.g. Belgium, Germany, Greece, the Netherlands, Turkey, USA. Consequently, retroactivity of more severe fiscal penal statutes may be absolutely prohibited.

(iv) the limitations are derived from an unwritten general principle of law; such as the principle of legal certainty, the principle of equality, the principle of legitimate expectations, the principle of equality, the principle of the rule of law.<sup>58</sup>

(v) the limitations are laid down in a non tax law which is applicable to tax statutes, and reflect a general principle of law

This is the case in Belgium, Article 2 of the Civil Code, and Luxemburg, also laid down in the Civil Code.

### *Transition policy*

Besides the constitutional and legal just mentioned, there also exist ‘informal’ limitations. The legislator may formulate rules which set boundaries to the use of retroactive legislation (self-binding). Thus, the legislator may offer taxpayers guidance with regard to the use of the instrument of retroactive tax legislation. This is quite an exceptional situation. Some guidance may be offered by a parliamentary committee, as is the case in Finland, where lines are set by the standing Constitutional Law Committee.

A single country has an explicit ‘transition policy’ in the field of tax statutes, viz. the Netherlands. In his capacity of co-legislator, the Netherlands State Secretary of Finance has published (and discussed with Parliament) a memorandum that incorporates the main lines of his ‘transition policy’ with respect to the introduction of tax statutes. The memorandum is not legally binding - it is a soft law instrument -, but it has some influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect. The memorandum (also) contains policy guidelines with respect to granting retroactive effect to statutes and grandfathering.<sup>59</sup>

In other countries, less guidance is offered by government. Governments may have a general policy with regard to the quality of legislation, which also covers tax legislation, for example Denmark. However, this general legislative policy does not include a transition policy. Sometimes, a general legislative policy concerns not the national but a regional level. For example, the Flemish region in Belgium played a pioneering role in developing a general legislation policy concerning the quality of tax legislation.

The German national reporter notes that there are neither official nor unofficial guidelines on the tax transition policy. The Ministry of Finance, who is drafting the tax bills in Germany, decides case by case. Sweden reports that, it may be possible to derive an implicit governmental policy from the preparatory works - although a transition policy for legislation (tax legislation included) is lacking. In November 2004, the French government pledged to stop using retroactive provisions detrimental for the taxpayer. However, it is difficult to ascertain if it marks a deep change in legislative practice.

Furthermore, there may be ‘rules of legislative technique’ which regulate also the issues concerning transition provisions. In Poland, these are rules of a technical character:

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<sup>58</sup> Examples of this variant with regard to the principle of legal certainty are Belgium, Denmark and the Netherlands. In Denmark, several other principles are at stake: the principle of legitimate expectations, the principle of equality, the principle of the rule of law, and the ability to pay principle.

<sup>59</sup> The memorandum sets out as the starting points of tax transition policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect (without grandfathering). Furthermore, the question whether or not (formal) retroactivity is justified, is regarded a question of balancing of interests: on the one hand legal certainty of the individual taxpayers concerned and on the other hand the interests of society as a whole that are served by granting retroactive effect to the statute concerned. Whether or not retroactivity in a concrete case is justified, depends on the circumstances of the case. However, two elements are distinguished: whether or not a justification exists for granting retroactive effect (‘the substantive element’) and the period of retroactivity (the ‘timing element’).

recommendations as to the language of a statute, typical terms of a legislative language, layout of a normative act, etc.

Of course, a (constitutional) court may develop an (implicit) policy on the possibility of retrospective legislation with particular regard to retroactivity. Consequently, the tax legislator may be careful not to transgress the boundaries set by the court (infra section D).

With regard retroactive tax statutes that are favourable to taxpayers, they are generally not regarded problematic (e.g. Denmark and Luxemburg). In Finland, it does not raise a question of retroactivity from the constitutional point of view and there is a policy, although not expressly stated. As for the Netherlands, the above mentioned general memorandum of the State Secretary of Finance pays no attention to this topic.

### *Ex ante control by an independent body*

Part of the legislative process may be the consultation of formal bodies which give their opinion on the quality of draft legislation, the retroactivity included. In many countries a formal institution exists which reviews or advises on (draft) legislation.

This body may be another Ministry, for example the Ministry of Justice, which reviews all bills.<sup>60</sup> Another variant is that consultative committees, such as a Council of State,<sup>61</sup> Council on Legislation,<sup>62</sup> or a court could (or even, should) be asked for – non-binding – advice.<sup>63</sup> However, the competence of such formal body may be limited, as is the case in Greece, where the Council of State has no consultative competence on substantive tax elements.

Apart from these formal bodies, still other consultative committees may play an important role in the legislative decision procedure. This is the case in, for example, Greece which has a Court of Auditors. Another example is Belgium, without there being specific formal advisory or consultative obligations for fiscal matters.

Finally, there may be a (parliamentary) standing Committee for Constitutional Law, which examines a statute against the constitution before it is enacted.

The ex ante control by an independent body may be of a legal-technical nature and of a substantive nature. In Denmark, for example, the review by the Ministry of Justice is partly of a legal-technical nature, but also includes constitutional principles, EU-law and retroactivity. The Belgian Council of State gives judicial, linguistic and legislative advice about draft decrees, preliminary bills and proposals of law, decree or ordinance as well as amendments concerning these.

The publication of the criteria for good legislation applied in the review process would enhance its transparency. However, these criteria are often not published. The Danish Ministry of Justice, for example, has not laid down explicit rules concerning this review. Rules may also not be known because advices of such an institution, which possibly may contain rules, are not published, as is the case with the advices of the French Council of State. Even if criteria or rules are published, it may be the case that these are general rules, which apply to all kinds of legislation. This goes for Sweden, which has no particular rules regarding tax legislation.

Also with regard to retroactivity itself, criteria or rules may be published which do not specifically concern tax statutes, but are of a general nature. The website of the Belgian

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<sup>60</sup> In Denmark, for example, all ministerial bills pass a consultation process that includes a review by the Ministry of Justice.

<sup>61</sup> E.g. Belgium, France, Greece, Luxembourg, the Netherlands.

<sup>62</sup> In Sweden, government is in principle obliged to remit major items of draft legislation to the Council on Legislation, composed of members of the Supreme Court and the Supreme Administrative Court.

<sup>63</sup> In Turkey, the Supreme Administrative Court has advisory competence with regard to draft legislation in general, but this court has not advised in tax matters yet.

Council of State, for example, uses a manual with recommendations published on its website. This manual also contains observations regarding retroactivity. Yet, these observations do not specifically concern tax statutes, but are of a general nature. The manual states that, in general, legislative and administrative rules do not have retroactive effect. For retroactivity to be justified, certain conditions have to be met.

In the Netherlands, on the other hand, the Council of State has laid down criteria with respect to the question of when, in its opinion, granting retroactive effect to tax statutes is allowed. This Council of State uses these rules to review whether exceptional circumstances justify (formal) retroactivity that is disadvantageous for the taxpayers, with respect to the period of retroactivity, and whether or not grandfathering is necessary.

### C. Use of retroactivity in legislative practice (questions 11-14)

#### *'Legislation by press release' / announcement*

The legislator often announces envisaged changes of tax legislation. Sometimes, he also proposes retroactivity till the date of the announcement. In this respect, for example, he may use the so-called instrument of 'legislating by press release':<sup>64</sup> it is announced in a press release that a bill is (or will be) proposed in Parliament and that the bill provides for retroactivity till the date of the press release. Such a press release, which makes an envisaged change of tax legislation known to the public at large, is a particular kind of announcement. An official announcement may also be found in parliamentary proceedings, for example with regard to a bill, a motion or an amendment.<sup>65</sup> Typically, here the temporal reach of the retroactivity of the tax act is connected to the date of the announcement.

As will be shown below, there are several variants. The general idea, however, is on the one hand, there is some kind of an announcement to take away expectations / legal certainty of taxpayers, and, on the other hand, retroactivity is applied till the date of the announcement (the timing element).

Of course, press releases are often used to announce cabinet decisions to put forward a bill or legislator's acceptance of a bill.<sup>66</sup> In Sweden, there is even a general obligation to communicate a proposal concerning retroactive tax legislation.<sup>67</sup> These press releases, however, are not used for setting the date as from which the new law will be applied. Thus, press releases, occasionally with respect to envisioned tax policy changes, are purely used for information purposes without any legal consequences attached to them (see for example Luxembourg and Turkey).

The legislative technique of 'legislation by press release' is not used in all countries in tax matters, as the reports from Denmark,<sup>68</sup> Greece, Hungary, Luxemburg, Poland, and Portugal show. In some countries, for example Hungary and Poland, the constitutional court acts as a blockade against 'legislation by press release.'

This use of legislative technique may cause different degrees or intensities of retroactivity. This degree or intensity of retroactivity depends on the space of time between the press

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<sup>64</sup> For an example, see the disputed retroactivity in the *Stichting Goed Wonen II* case (ECJ C-376/02).

<sup>65</sup> In the Netherlands, a bill only is published after the advice of the Council of State. In this constitutional context, a press release, for example published on the date the bill is brought before parliament (and sent to the Council of State for advice), is an instrument to inform the public on intended changes of legislation.

<sup>66</sup> In the Netherlands, press releases in tax matters are issued by a single member of government, the State Secretary of Finance, regularly after consultation of the Council of Ministers.

<sup>67</sup> This is normally done through a press release or even a press conference.

<sup>68</sup> Promulgation by press release (and other media, such as radio and TV) has occurred in Denmark, but not in connection with tax statutes.

release / announcement, i.e. the date till which retroactivity is applied, and the publication in the Official Gazette.

There are several variants. In the Netherlands, it happens that a press release announces that a bill will be proposed in Parliament and that the bill provides for retroactivity till the date of the press release. A less far reaching is the situation in which it is announced in a press release that new tax legislation will be applied as from the date of the press release following the session of the Council of Ministers that has decided to propose a certain tax measure to be voted by Parliament (for example, Belgium, Finland, the Netherlands and Sweden). Belgium also offers an example for another variant of this technique: the entry into force as from the date upon which the decision to enact the new legislation was published in the Belgian Official Gazette. In Spain, retroactivity is permitted back to the date of the publication of the draft retroactive provisions in the Parliament official journal. In the USA, congress will frequently use a date prior to the enactment date of legislation as the limit of the extent to which the substantive provisions will be retroactively applied. Various dates may be used, including a date connected to an administrative pronouncement, or a date with significance in the legislative process including a presidential budget message, a committee announcement or press release, the release of a committee report and the date a conference agreement is reached. All these events may in some way be announced, for example by press release.

Legislation by announcements, for example, a press release, pushes aside the legal certainty provided by the rule of law demand of formal promulgation of new statutes in the constitutionally provided organ of publication.<sup>69</sup> Taxpayers are demanded to take note of an emerging new statute by other sources, which do not have the same reliability, as the constitutionally provided Official Gazette. No wonder, in many countries this practice gives rise to serious scholarly debate.

A justification may be found in cases of anti-abuse legislation or in cases where government wants to prevent a so-called announcement effect, i.e. the situation where taxpayers, as soon as they become aware of future changes in legislation, take certain actions, make use of a loophole, which will undermine the effect of this legislation.

In most countries, is hardly possible to classify the types of cases in which the instrument of 'legislation by press release' is used. Such announcement is likely to be used in various types of tax and other legislation, as the US report points out. In France, 'legislation by press release' is used for new tax incentives, in order to get effects of from the date of the announcement. With regard to the Netherlands, however, there are grosso modo two types of situations in which the instrument is used. The first is that the new statute concerned is aimed at (existing or expected) abuse or improper use of tax rules. The second type of situation is that an existing favourable tax policy rule is changed or withdrawn, for example, a fiscal subsidy.

### *Retroactive period further back than the date of the press release / announcement*

In exceptional cases the retroactive period of tax legislation reaches further back in time than the date of the announcement.<sup>70</sup> This occurrence may be related to a certain technique of retroactive legislation, for example validation statutes. In countries in which validation statutes occur, such as Belgium, France, the Netherlands and Turkey (supra, part A 'Terminology'), the retroactive period of tax legislation often reaches further back in time

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<sup>69</sup> The one exception is the situation that the announcement and the formal publication of an approved bill, i.e. new statute, in the constitutionally provided organ of publication bear even date.

<sup>70</sup> E.g. Belgium, France, Germany, the Netherlands, Spain, Sweden, USA.

than the date of the announcement. This also goes for cases where the legislator uses interpretative statutes.

It may also be the case that media reports, instead of an official press release, inform the general public, thus weakening the trust of the taxpayers (Germany).

Of course, a (constitutional) prohibition of retroactivity may rule out this possibility of retroactivity which reaches further back in time than the date of the announcement, as is the case in, for example, Portugal. In other countries, although a constitutional prohibition is lacking, this far reaching form of retroactivity is rarely used.<sup>71</sup>

Note, however, that in several countries a (constitutional) temporal limitation exists as a consequence of which retroactivity which reaches further back in time than the date of the announcement is not banned. According to the Constitution of Greece, for example, retroactivity is permitted which does not extend beyond the fiscal year prior to the year of publication of the law. In Finland, there also is a limitation: retroactivity may reach back to the beginning of the fiscal year. Obviously, this also goes for countries with a taxable period related concept (supra, part A 'Terminology').

There may be reasons for retroactivity which reaches further back in time than the date of the press release. These reasons may also occur in combination:

- public interest because of the risk of serious announcement effects' (Belgium & Germany), possibly in conjunction with the degree of legal uncertainty for the taxpayers (Spain);
- tax avoidance (Sweden) or more broadly the elimination of a loophole (Netherlands, USA);
- correction of technical errors and omissions in prior legislation (Netherlands, USA);
- inadvertently created hardships or benefits (USA);
- obvious (substantive) omissions and errors (Netherlands);
- Court's judgments with drastic negative budgetary consequences (Netherlands).

### *Retroactive period and pending legal proceedings*

Retroactive effect granted to substantive statutes may influence pending legal proceedings. In some countries such as France, it often happens and it is frequently the explicit aim of the statute. This is especially occurs in cases of validation statutes. The same goes for Germany, where more generally, a statute which is enacted with unlimited retroactivity applies to any pending procedure. Pending cases are normally not excluded from the application of the new statute.

USA reports that there is no established modern practice for Congress, but early cases allowed Congress to affect the outcome in pending cases through the enactment of retroactive legislation.

In the United Kingdom it sometimes happens, but not very frequently.

In Sweden, the only condition to be met that this far-reaching retroactivity (most commonly in case of tax avoidance) ought to be regulated in the transition rules enacted by law in connection to the tax act in question.

In Netherlands, there is no explicit prohibition in this respect. However, because most of the cases of retroactivity of legislation concern 'legislation by press release' the retroactive effect does normally not have the effect that pending legal proceedings are influenced. The same goes for Sweden; normally, it is not a practical problem since retroactivity is generally not granted for more than perhaps a couple of months and not years.

In some countries pending legal proceedings are excluded from the application of the new statute, for example Denmark, Hungary, Italy, Portugal (because of the general non

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<sup>71</sup> E.g. Denmark, Finland [?], Poland .

retroactivity in tax matters). In Finland, it is a mere theoretical situation, for retroactive effect is granted very seldom and in which cases the legislator act fast.

In Greece, pending cases may be affected only within the limited time frame set by the constitution which expressly permits retroactivity as long as the latter does not extend beyond the financial year prior to the year of enactment of the law.

Spain reports that, in principle, pending legal proceedings are excluded from the application of the new statute, so there seems to be some latitude for the legislator.

The same goes for Belgium: in principle, pending legal proceedings are excluded from the scope of application of a new substantive statute. If it occasionally happens, however, strict conditions have to be met.

### *Retroactivity favourable to taxpayers*

The legislator sometimes grants retroactive effect to tax statutes that are favourable to taxpayers. However, in some countries it does not happen, examples are Belgium and Sweden.

In other countries, such as Hungary, granting these favourable retroactive effect to tax statutes is possible, but it does occur only in very exceptional cases. Germany reports that, although the legislator is free to grant these kind of retroactive effects to tax statutes, favourable changes with retroactive effect are rather rare. One of the reasons for might be to compensate for a long lasting political debate or a protracted legislative procedure. In Turkey, this type of retroactivity is occurs, whereas the principle of equality sets limits to the measure concerned (although there is some scholarly debate on this issue). Spain reports that this kind of retroactivity only applies to administrative penalties, surcharges and, occasionally, to late interests and special cases of tax liability.

Still other countries report a more frequent use of favourable changes with retroactive effect. In the United Kingdom it is not uncommon. In France it happens frequently, in cases of 'legislation by press release', and in Italy it is generally permitted

The Netherlands legislator regularly grants retroactive effect to tax statutes that are favourable to taxpayers, seemingly mostly in situations in which the field of application *ratione materiae* of a provision has a different scope than expected and intended.

The USA reports that such effects are common when, as part of the income tax, Congress enacts "extender" legislation after a provision that was subject to sunset has expired.

As for the kind of situations in which this kind of favourable retroactivity is granted does it happen there often is no specific pattern, as Danish reporter states, the decisive factor being a political wish to favour taxpayers retroactively. On the other hand, in Finland a tax relief is considered a typical situation.

## **D. Ex post evaluation of retroactivity; case law on retroactivity (questions 15-20)**

### *Introduction*

If the legislator introduces a tax statute with retroactive effect that is disadvantageous for taxpayers, taxpayers may appeal to court to challenge the retroactivity. Whether or not such a challenge would be successful depends, of course, on the legislator's reasons for the retroactivity. Furthermore, this depends on (i) the possibilities the courts have to test retroactivity and (ii) the standards that are used to assess whether or not the retroactivity concerned is legitimate. In this section, we deal with these latter two aspect.



In principle, courts would have the following the possibilities to test retroactivity:

- testing against the national Constitution;
- testing against general principles of law;
- testing for compatibility with international treaties.

There may be an overlap between these possibilities. The principle of legal certainty is a fine example. This principle is, in the first place, a general principle of law. The principle may however also be enshrined in the Constitution (or courts may derive the principle from another general principle enshrined in the Constitution). Furthermore, the principle of legal certainty is also relevant when testing of retroactivity for compatibility with international treaties. First of all; according to settled case law of the ECJ the principle of legal certainty and the principle of legitimate expectations are qualified as general principles of community law.<sup>72</sup> Secondly, although the principle is not explicitly laid down in the European Convention on Human Rights, the European Court ruled that the principle of legal certainty is necessarily inherent in the law of the Convention.<sup>73</sup> As such the principle plays a role in the case law of the European Court with respect to, for example, article 6 ECHR and article 1 of the First Protocol ECHR.

### *Possibilities and limitations to test retroactivity*

Not all just mentioned three possibilities may be available for national courts. The courts' competence may be limited, for example by the Constitution. In that respect also the nature of the tax statute concerned may be relevant.

In most countries the courts are allowed to test statutes, including Acts of Parliament, for compatibility with the Constitution.<sup>74</sup> Note however that in some of these countries not all courts are permitted to do such a test, but only a specific court, often the constitutional court, are allowed to do so.

In The Netherlands, however, the Constitution prohibits that Acts of Parliament are tested for compatibility with the Constitution or with ('unwritten') general principles of law. Acts of Parliament may only be examined for compatibility with international treaties. Since the constitutional prohibition of testing legislation only concerns Acts of Parliament, other legislation (for example, municipal legislation) could however be examined for compatibility with the Constitution as well as with general principles of law. In France the situation is very similar to the situation in The Netherlands. However, recently the French Constitution has been reformed and it is noted by the French reporter that the impact of this reform is hard to predict. Further, in the UK, courts do not test tax statutes for compatibility with the Constitution or general legal principles; this seems to be based on the idea that parliament is sovereign.

The international treaties that are the most relevant for testing retroactivity are – at least in the European context – the EU treaty and the European Convention on Human Rights.

As mentioned above, according to settled case law of the ECJ, the principles of legal certainty and legitimate expectations are considered general principles of community law. So, in case the national tax legislation concerned falls under the scope of EU law, the retroactivity can be tested against the community principles of legal certainty and legitimate expectations. Thus, if the national legislation concerns VAT, the retroactivity can be tested against these

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<sup>72</sup> ECJ April 26, 2005, C-376/02 (*Stichting Goed Wonen II*), par. 31.

<sup>73</sup> E.g. the non-tax case ECHR Juni 13, 1979, no. 6833/74 (*Marckx*), par. 58.

<sup>74</sup> Belgium, Finland, Germany, Greece, Hungary, Italy, Poland, Portugal, Spain, Sweden, Turkey, the US.

principles.<sup>75</sup> Moreover, as the case concerned should fall under the scope of EU law, not in all cases retroactivity of national tax legislation can be for compatibility with these community principles.<sup>76</sup> So, the nature of the statute concerned, or at least of the case at hand, is important in this respect.

With respect to the European Convention on Human Rights, in principle, article 6 ECHR, article 7 ECHR and article 1 of the First Protocol ECHR are important for testing retroactivity. The principle of non-retroactivity of article 7 ECHR however only concerns criminal offences. Furthermore, according to settled, but criticized, case law of the ECHR, pure tax disputes do not fall under the scope of article 6 ECHR.<sup>77</sup> Therefore, for retroactivity of tax legislation (not concerning tax penalties) only article 1 of the First Protocol ECHR remains as a possibility to test retroactivity. Case law of the ECHR shows that retroactivity of tax legislation can be tested for compatibility with this provision, notwithstanding that, in principle, a wide margin of appreciation is left to the national legislator.<sup>78</sup>

It can be assumed that, in principle, the possibilities that international treaties provide to courts for testing retroactivity are less important in the countries in which courts are constitutionally allowed to test retroactivity against the Constitution, than in countries in which courts are not permitted to do so.

This assumption gets support in the various national reports, at least with respect to article 1 of the First Protocol ECHR. On the one hand, in most of the countries in which courts are constitutionally allowed to test retroactivity against the Constitution, article 1 of the First Protocol ECHR does not play a role in case law (at least up till now).<sup>79</sup> On the other hand, in countries in which there are constitutional restrictions for the court to review Acts of Parliament, article 1 of the First Protocol ECHR is regularly invoked by taxpayers for the courts to challenge retroactivity.<sup>80</sup>

In general, in countries in which courts test retroactivity of tax statutes for compatibility with article 1 of the First Protocol ECHR, courts have very rarely ruled retroactivity incompatible with that provision.<sup>81</sup>

Notwithstanding the above, it could (at least theoretically<sup>82</sup>) be that also in countries in which courts are constitutionally allowed to test retroactivity against the Constitution, the international treaties provide extra possibilities. This could be the case if the Constitution does not impose restrictions on the retroactivity of tax legislation. This could also be the case if the

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<sup>75</sup> E.g., ECJ December 3, 1998, C-381/97 (*Belgocodex*), ECJ June 8, 2000, C-396/98 (*Schloßstraße*), ECJ July 11, 2002, C-62/00 (*Marks&Spencer*), and ECJ April 26, 2005, C-376/02 (*Stichting Goed Wonen II*). See also for retrospectivity ECJ April 29, 2004, C-487/01 and C-7/02 (*Gemeente Leusden / Holin Groep*).

<sup>76</sup> The answer to the question when exactly an Act can be tested for compatibility against a general principle of community law, seems not to be very clear yet. See for a view S. Douma, The principle of legal certainty: enforcing international norms under community law, in: S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries*, Amsterdam, IBFD, 2008, pp. 217-249.

<sup>77</sup> ECHR July 12, 2001, no. 44759/98 (*Ferrazzini*).

<sup>78</sup> See, e.g., ECHR Maart 10, 1981, no. 8531/79 (*A.B.C. en D.*), ECHR October 23, 1997, nos. 21319/93, 21449/93 and 21675/93 (*National & Provincial Building Society c.s.*), and ECHR June 10, 2003, no. 27793/95 (*M.A. and 34 Others*). See about the ECHR case law in this respect, e.g., P. Baker, "Retroactive tax legislation and the European convention on human rights", *British Tax Review* 2005, pp. 1-9, and, in extenso, Pauwels, l.c., pp. 401-440.

<sup>79</sup> Not a role: Hungary, Germany, Italy, Poland, Portugal, Spain, Turkey. This is obviously also the case in countries in which the national legislator does not introduce (disadvantageous) tax statutes with retroactive effect; for example Luxembourg.

<sup>80</sup> France, The Netherlands.

<sup>81</sup> Belgium, Denmark, Finland, France (exceptions are some administrative court decisions on a specific interpretative act, but the supreme administrative court has not ruled yet), The Netherlands (exception is one case of a Higher Court), Sweden, the UK.

<sup>82</sup> In none of the various national reports an example in this line was mentioned.

restrictions that the Constitution imposes (or at least the restrictions that courts derive from the Constitution) are less strict than the restrictions that the international treaties impose.

### *Standards applied when testing retroactivity*

The standards applied to test retroactivity of tax statutes in the various countries vary. An important reason is the variety in the restrictions that the various Constitutions impose with respect to retroactivity.

Furthermore, even if *grosso modo* the same standard would be used in two countries, the way the standard is used may differ. This is caused by the fact that standards have to be abstract to a certain extent, which however may have the effect that the application of the standard in a concrete case may differ. For example, the standard may be that retroactivity is only allowed in case of special circumstances, or in case there are weighty reasons, but there could be different results in a concrete case due to the fact that judgments may differ with respect to the question whether or not special circumstances are at hand, or whether the reasons the legislator had for the retroactivity are sufficiently ‘weighty’.

Not of all countries, standards of the courts for testing retroactivity of tax statutes are known. This is obviously the case in countries in which the legislator does not introduce tax legislation with retroactive effect, notwithstanding the absence of a Constitutional prohibition for the legislator in this respect.<sup>83</sup>

It could also be that standards are absent for another reason. Standards are for example absent in countries in which the courts do not test retroactivity of tax statutes, because granting retroactive effect to a tax statute is considered a political decision or because Parliament is considered sovereign.<sup>84</sup> A reason could also be that there is a constitutional obstacle for courts to test retroactivity, which is – as seen above – the case in France and The Netherlands, at least with respect to Acts of Parliament. Another reason for the lack of standards could be that, although tax statutes may be tested for (un)constitutionality, case law shows that the chance that a court would declare retroactivity unconstitutional is merely theoretical.<sup>85</sup>

However, the national reports show that in most of the countries standards are developed and used by the courts to test retroactivity, albeit sometimes standards directly laid down in the constitution concerned.

In some countries, the standards applied with respect to retroactivity are (partly) *formal* in the sense that the period of retroactivity is a decisive factor.

The most extreme standard in this respect is that – due to Constitutional restrictions or due to restrictions derived by the courts from a general principle of law – retroactivity is never allowed in case it is disadvantageous for taxpayers.<sup>86</sup>

Another example is the standard that retroactivity is never allowed if and insofar as the period of retroactivity reaches beyond a certain period. This is the case in Greece, in which the retroactive effect of a tax statute may not go beyond the fiscal year preceding the year of the publication of the statute (so, a tax statute imposed in 2010 may not impose retroactively tax on income earned in the year 2008).<sup>87</sup>

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<sup>83</sup> Luxembourg.

<sup>84</sup> Denmark, the UK.

<sup>85</sup> Finland.

<sup>86</sup> Hungary, Poland, Portugal.

<sup>87</sup> An exception applies for retroactive taxation in case a tax exemption was found to be prohibited state aid by the ECJ.

The period of retroactivity could also be a decisive factor the other way around, namely that retroactivity is in any case allowed as long as retroactivity stays within a certain period. This is the case in Greece: retroactivity of tax statutes to the fiscal year preceding the year of publication of the statute is in any case allowed. In a certain sense this is also the case in countries that have a so-called, above described, 'tax period related concept' of retroactivity (supra, section A). Since in these countries a statute that is introduced during a fiscal year (e.g. in November 2009) and that applies as from the beginning of that year (e.g. January 1, 2009) is not considered retroactive, backdating is thus in any case allowed to the extent that it stays within the fiscal year.

In most countries however courts employ, whether together with a formal standard in the just mentioned sense or not, *substantive* standards. The following can be derived from the national reports:<sup>88</sup>

- In Belgium, the Constitutional Court does not consider every retroactive statute to constitute an infringement of the principle of legal certainty. First of all, it is possible that retroactive provisions simply confirm legal rules that had been published earlier. Secondly, retroactivity can be justified in certain circumstances. Whether grounds for justification are present is examined on a casuistic basis. Justification is possible when the retroactive effect of a legal rule is indispensable to achieve a goal of public interest, such as the well-functioning or continuation of public services. The interest of public revenue is only accepted as a justification when it is accompanied by other persuasive considerations. Furthermore, in the situation in which the retroactive effect of an act substantially influences the outcome of pending cases, a strict approach applies: either "exceptional circumstances" or "compelling motives of public interest" are required. Notwithstanding these strict requirements, case law shows that it is possible that there are situations in which courts accept that such exceptional circumstances are present.
- In Finland, the Supreme Court would rule that retroactivity is unconstitutional in case the legislator does not meet the test formulated by the Constitutional Law Committee.
- In Germany, the Constitutional Court states in principle a ban of retroactivity, but allows exceptions. A first exception is the situation in which a reasonable taxpayer can not claim trust in the (still) prevailing legal situation, which is the case (i) from the date of adoption of the bill in parliament, or (ii) in case of an evidentially unclear or unconstitutional legal situation.<sup>89</sup> The second exception is the situation in which the confidence in the prevailing legal situation has to be subordinated to the interest of the legislator to change the law retroactively. This applies if (i) the disadvantage the taxpayer suffers from the retroactive enactment is negligible (*de minimis* rule; it can be seen as an outcome of the principle of proportionality), and (ii) the legislator can claim overriding urgent/compelling public interest. Mere public revenue interest has never been accepted as the only ground of justification, but it could be combined with facts which unsettle the taxpayer's faith, for example the legislative intent to combat announcement effects.

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<sup>88</sup> Please take into consideration that that the question whether or not a justification exists for retroactivity, is preceded by the question whether or not there is retroactivity. As the latter question may be answered differently (for example depending on whether a 'tax period related concept' or a 'taxable event relating concept' of retroactivity is used; see section A) it could be that, for the same situation, the court in the one country has to answer the former question but that the court in another country does not get round to that question.

<sup>89</sup> This latter exception is invented to overcome the transition period after the Second World War, but is hardly ever been used.

- In Italy, the Constitutional Court tests retroactivity against the constitution and the enshrined general principles; the constitutional ‘ability to pay principle’ is invoked, but more recently also the principle of legitimate expectations is used. On the basis of this latter principle, retroactivity of tax statutes must be justified by ‘reasonableness’ and must not be in conflict with ‘values and constitutional interests’. In general, the protection of a higher collective interest could be accepted as a justification. For example, the curbing of tax evasion and the abuse of tax laws, or the existence of an extraordinary economic situation. Sometimes also ‘Treasury requirements’ based on extraordinary fiscal needs are accepted.
- In The Netherlands, the Supreme Court takes the position that deviation from “the legal principle based on the requirements of legal certainty that legislative measures should only apply for the future” in disadvantage for taxpayers is only justified in case of ‘special circumstances.’ It is not entirely crystallized out which circumstances could qualify as special circumstances, but it is clear that in case the taxation, for which the retroactive rule provides, was *foreseeable* for taxpayers, the retroactivity concerned could be justified. Up till now, the Supreme Court has never ruled in a concrete case that the retroactivity concerned was incompatible with the principle of legal certainty. The Supreme Court did however once ruled in a case of retrospectivity (immediate effect without grandfathering) that the principle of legal certainty was violated.
- In Spain, retroactivity of tax statutes is forbidden unless ‘it is justified by serious reasons of general interest.’ Constitutional case law provides examples of cases in which retroactivity is considered not unconstitutional as well as of cases in which retroactivity is deemed to be unconstitutional.
- In Sweden, based on a constitutional provision, retroactivity of tax statutes is in principle prohibited, unless one of the exceptions applies that are described in detail in that constitutional provision. One of these exceptions applies when the Government or a parliamentary committee has presented a tax bill to Parliament. In such a case, tax can be levied already as of the day that the bill was presented to Parliament. The same applies when the Government transmits to Parliament a written communication stating that a tax bill will be forthcoming. This possibility has frequently been used, especially in order to hinder undesired consequences of tax law, such as undesired tax planning and tax evasion. According to the constitutional provision, the Parliament may furthermore prescribe that exceptions shall be made on the principle of non-retroactivity, if it considers this is warranted on special grounds connected with war, the danger of war, or grave economic crisis. It is noted that it only once happened that a court deemed a retroactive tax statute unconstitutional.
- In Turkey, the Constitutional court takes the following position: ‘Under the principle of non-retroactivity, the statutes must be applied on subsequent legal actions, events or transactions that are occurred after their enactment. Exceptional cases may appear which are accepted as necessary for public interest or public order or for the protection of vested rights or for the improvement of financial rights.’ Although the Constitutional Court has tested retroactive tax statutes in a few cases, no retroactive tax statute has found to be incompatible with the Constitution.
- In the US, there are technically two strains of federal constitutional doctrine that can be invoked to limit the enactment of retroactive taxes,<sup>90</sup> but in modern practice these two are generally viewed as one. In the important case *United States v. Carlton (1994)*

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<sup>90</sup> The first involves potential limits on the power of the federal Congress, primarily under the fifth amendment's command that property not be taken by Congress without Due Process of Law, but also under the ‘contract clause.’ The second involves the potential limits under the fourteenth amendment on the state legislatures' ability to impose taxes.

it was noted by the majority opinion of the Supreme Court: ‘Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.’ Furthermore, the majority opinion effectively dismissed the only set of cases (dating from the years 1927 en 1928) in which the Supreme Court held that, in these cases, retroactive taxes imposed by Congress were invalid. So, nowadays, the Supreme Court does not impose strict limitations on the use of retroactivity.<sup>91</sup> In a certain type of situation the Supreme Court is however more stringent. The Supreme Court is very hostile to attempts by state legislators to limit the effect of judgments holding state taxes invalid. It is expected – based on the separation of powers doctrine – that the same would apply in case the Congress would try to cure defective (federal) tax collections.

This overview shows that the *substantive* standards to test retroactivity vary. However, there are some general lines. The general substantive standard is *grosso modo* that there should be a justification for retroactivity that is disadvantageous for taxpayers. There are basically two lines of justification, although that not in all just mentioned countries the two lines are both employed. First, the line that concerns the expectations of taxpayers: retroactivity could be allowed in case retroactivity is considered not to infringe taxpayers’ reasonable expectations. Secondly, the line of a compelling public interest: retroactivity could be allowed in case an overriding public interest is served by the retroactivity. Note that the first line implies that the weight of legal certainty is considered low, while the in the second line the public interest outweighs the principle of legal certainty. Both lines show that the issue of retroactivity is a ‘balancing act’. Noteworthy is also that, at least in some of the countries, the mere public revenue interest is not accepted as the only justification for retroactivity.

### *Final observations*

In general, it can be observed that in the various countries the standards that courts impose for retroactivity of tax legislation differ significantly. On the one side, there are countries in which the courts (almost) fully leave the issue of granting retroactive effect to tax legislation to the discretion of the legislator. On the other side, there is a group of countries in which an (almost) absolute prohibition of retroactive taxes applies. Between these opposite positions, there are countries in which courts review whether legislator’s decision to grant retroactive effect stays within certain (formal and/or substantive) standards. These differences are at first sight remarkable.

More research should be done on this issue, but it seems that the differences have partly historical roots. Countries in which the restrictions for retroactivity are the most stringent, have often recently overcome a non-democratic past.<sup>92</sup> Further, countries in which courts in principle (almost) fully respect the legislator’s decision to grant retroactive effect to tax statutes, often have a strong democratic history.

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<sup>91</sup> Please note that the *state* courts (at least some of them) impose more stringent limitations on retroactivity than the Supreme Court. There are also recent examples of cases in which a state court found retroactivity invalid; see the US report.

<sup>92</sup> Compare the Hungarian national report for an observation along this line of thought for Hungary.

### **E. Retroactivity of case law (question 21)**

Unfortunately, the information provided in the national reports did not suffice to make a good comparison between retroactive judicial lawmaking and retroactive (tax) legislation; possibly because in many countries judicial lawmaking and legislative lawmaking are quite incomparable.

### **F. Views in literature text (questions 22 & 23)**

The literature regarding the prohibition on retroactive legislation corresponds, to a large extent, to the national constitutional and legal provisions and the national case law on retroactivity. In Greece, for example, the prevailing opinion is that there is a duty to protect the constitutional temporal restrictions. In the USA, academic writers find few constitutional problems with retroactive tax legislation. Turkish literature strongly opposes the case law of the Turkish Constitutional Court.

In a single country there is hardly any debate in literature (for example, Hungary). In many countries, literature largely focuses on conceptual distinctions and the legal consequences connected to the different concepts, the (weight of the) principle of non-retroactivity, and grounds of justifications (e.g. Germany, Netherlands). Tax law scholars and sometimes constitutional law scholars may contribute to the debate (e.g. Sweden).

Scholars generally take a critical stance towards retroactivity, their concern being among other things proportionate protection of legal certainty and predictability (e.g. Spain). Possible justifications of the use retroactivity are often debated, e.g. targeting abuse or avoidance or the prevention of announcement effects or 'windfall gains', and sometimes closing gaps in tax law. However, even when scholars accept that retroactive effect sometimes may be granted, this does not imply a *communis opinio* with respect to the question when retroactivity of tax legislation is justified (e.g. the Netherlands). Policy changes in favour of the taxpayer are often debated, also in countries with a prohibition of non-retroactivity (Poland, Portugal). In the USA, the desirability of general policies when tax changes are made is still a matter of considerable debate, especially to prevent because violations of the principle of equality. Therefore, it seems that the appreciation of retroactivity partly depends on the legal culture of a country.

The law and economics view has hardly provoked any debate in fiscal literature, as far as the reviewed European countries are concerned. In these countries, though, in other fields of law the law and economics movement often is flourishing. The one country where law and economics is an important view in the scholarly fiscal literature is the USA.