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Editorial

Fiscal Federalism in the EU. A Dynamic Process With Multiple Dimensions

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1 Introduction

In 2021 the European Association of Tax Law Professors held its annual conference on 'History and Taxation'[1] One topic dealt with Fiscal Federalism.[2] This concept refers to the study of how spending powers (expenditure side) and tax instruments (revenue side) are allocated across different layers of government.[3] On the one hand the allocation of fiscal powers is influenced by political tendencies within states to give more autonomy to certain sub-central entities in view of establishing a more direct relationship between representation and responsibility for fiscal choices, allowing better adaptability to local preferences. On the other hand this allocation is also influenced by political desires to share (fiscal) sovereignty in view of a supra- or international cooperation. A large variety of so-called multi-tiered or federation states exists, which is inextricably linked to their particular genesis, history and dynamics of the desired balance between autonomy and cohesion.[4] In that respect also the European Union is mentioned. The European Union can indeed be seen as a federation *sui generis*. It does show many characteristics that are associated with federations, especially *centripetal* or bottom-up federations (also called integrative or aggregative federalism), that have evolved out of independent, fragmented parts and have formed a closer union in which the participating entities choose to address and regulate certain issues together. From a fiscal point of view there is within the EU also a clear division of spending and funding powers between the 'federation' (the EU) and its Member States. The funding of the European Union still strongly relies on contributions from its Member States. However, the European Union would like to raise more income through 'own resources', of which customs tariffs and other duties are probably the most important ones to date. One of the key issues is how to best divide fiscal powers within the European Union. This question is often discussed from a top down perspective exploring the possibilities of achieving further fiscal integration at the European level.[5] However, fiscal federalism is a dynamic process that also needs to be seen from a *bottom up* perspective taking into account the historical and political different identities of the Member States. In several Member States constitutional courts have already announced that they would protect the 'hard core' of their national constitution against European interference.[6] This raises the question of what can or should be considered as hard core.

As in the short space of this editorial it is not possible to discuss all Member States, I will by way of example only elaborate on the situation in Belgium, where recently the Constitutional Court tried to give more guidance on this matter.

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1 European Association of Tax Law Professors (EATLP), *History and Taxation*, Annual congress 2021, 786 (P. H. J. Essers ed., IBFD Amsterdam 2022), ISBN 9789087227753.

2 B. Peeters & R. Smet, *Fiscal Federalism and 'No Taxation Without Representation': The Historic Dimension*', in *ibid.*, at 75–101.

3 K. Forman, S. Dougherty & H. Blöchigliger, *Synthesising Good Practices in Fiscal Federalism* 7. (OECD Economic Policy Paper 2020), n. 28.

4 P. Popelier, *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy* 304 (Routledge 2020).

5 In one of his latest articles (written on the occasion of the seventy-fifth anniversary of the Bulletin for International Taxation), Frans Vanistendael dealt with the question of how to best divide tax powers within the European Union, particularly in the area of corporate income tax. (F. Vanistendael, *A EU CIT Filling the Hole in the EU Budget: An End to Tax Competition and 'Tax Abuse'?*, 75(11/12) Bull. Int'l Tax'n 11–13 (2021), point 9). In that contribution, he made a plea for the introduction of a straightforward European corporate income tax on large companies, the proceeds of which would be directly allocated to the European Union's list of own resources.

6 German Bundesverfassungsgericht 30 Jun. 2009, 2 BvE 2/08; 14 Jan. 2014, 2 BvR 2728/13; French Conseil constitutionnel 27 Jul. 2006, Décision nr. 2006-540 DC; 30 Nov. 2006, Décision nr. 2006-543 DC; Italian Corte costituzionale 27 Dec. 1973, Sentenza 183/73, Frontini; 8 Jun. 1984, Sentenza,170/84, Granital; Spanish Tribunal constitucional 13 Dec. 2004, Declaración 1/2004;13 Feb. 2014, Sentencia 26/2014; Polish Trybunal Konstytucyjny 24 Nov. 2010, K 32/09; Tsjech Constitutional Court 8 Mar. 2006, Pl ÚS 50/04; 3 May 2006, Pl ÚS 66/04; 26 Nov. 2008, Pl ÚS 19/08; 3 Nov. 2009, Pl ÚS 29/09. *See* more recently also the controversial decision of the Polish Constitutional Court Polish Constitutional Court, judgment K 3/21, 7 Oct. 2021, https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej (assessed 7 Sep. 2022). In this judgment, the Polish Constitutional Court ruled, inter alia, that Art. 1 TEU (paras 1 and 2), in conjunction with Art. 4(3) TEU, is contrary to Arts 2, 8 and 90 (1) of the Polish Constitution and that Art. 19.1, para. 2 TEU, whether or not read together with Art. 2 TEU, is contrary to Arts 2, 7, 8(1), 90 (1) and 178(1) of the Polish Constitution.

1. The constitutional limits that apply in Belgium to the transfer of (tax) powers to international or supranational institutions and, more specifically, to the European Union.

For quite some time, there has been discussion in Belgium about the constitutionality of transfers of power to international and European institutions. Article 34, introduced in the Constitution in 1970, was meant to end this debate.

Article 34 provides the following: '*The exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law*'.

In its judgement no. 62/2016 of 28 April 2016 concerning an action for annulment of the law 'on assent to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' (hereafter: the Stability Treaty), the Belgian Constitutional Court provided further clarification on the meaning of Article 34 of the Constitution. The Court ruled, on the one hand, that under Article 34 of the Constitution the exercise of certain powers may be conferred on institutions of international law by a treaty or by a law, but on the other hand, the Court ruled that Article 34 of the Constitution '*(cannot) be considered to grant a carte blanche neither to the legislature, when it gives its consent to the Treaty, nor to the institutions concerned when they exercise the powers conferred on them*'.[7] In other words, according to the Constitutional Court, there is a certain constitutional hard core that must not be touched.[8] The Court refers to '*the national identity embodied in the basic political and constitutional structures*', as well as of '*the core values of the protection that the Constitution confers on its subjects*'.

Hereafter, I will go more into detail on the meaning of Article 34 of the Belgian Constitution. (sub 2), the scope of the aforementioned judgment of the Constitutional Court (sub 3) and its meaning in the area of taxation (sub 4). This last focus must be seen in light of an increasing call for greater fiscal autonomy for the European Union.[9]

2 CONSTITUTIONAL PRECONDITIONS FOR THE TRANSFER OF (TAX) POWERS TO INSTITUTIONS OF PUBLIC INTERNATIONAL LAW

2.1 Context of Article 34 of the Belgian Constitution

Article 34 of the Constitution should be read in conjunction with Article 33 of the Constitution. Both articles fall under Title III of the Constitution ('On Powers').

Article 33 Const. states:

All powers emanate from the Nation.

These powers are exercised in the manner laid down by the Constitution.

Article 34 is only about entrusting 'the exercise of specific powers' to institutions of public international law.[10] It therefore only deviates from Article 33, second sentence of the Constitution, and leaves the basic principle contained in Article 33, first sentence untouched.[11]

After all, by merely 'entrusting the exercise of certain powers' to institutions of public international law, the Nation does not relinquish its powers. They continue to belong to the Nation. Consequently, for example, when the institution of public international law to which the exercise of certain powers is entrusted is established only for a limited period of time or is subsequently dissolved, the Nation resumes the exercise of the powers 'which it never relinquished'.[12]

Moreover, Article 34 of the Constitution only allows the exercise of *certain* powers to be transferred to institutions of public international law. According to the report of the Belgian Senate Committee, this could be justified '*in order to prevent a massive transfer, which would ultimately lead to a complete erosion of the state*'.[13] It immediately added that in today's world this is a completely imaginary situation and that it would therefore be best to give a more realistic explanation for the addition of the term '*certain*', namely to indicate '*that one (the State) must know what it gives and the other (the institution) what it gets*'.[14] In other words, the powers of which the exercise is transferred must be 'sufficiently defined'.[15] This exercise may include legislative, executive and judicial powers.[16] This transfer of the exercise of certain powers must be done by treaty or by law. Normally, this will be

[7] Const.Court. n° 62/2016, 28 Apr. 2016, consideration B.8.7. *See also* Cons.Court, n°. 127/2021, 30 Sep. 2021, B.12.

[8] J. Velaers, *De Grondwet. Een artikelsgewijze commentaar*, II Brugge, die Keure 36 (2019), nmbr. 33.

[9] *See also* B. Peeters, *Constitutionele grenzen aan de overdracht van fiscale machten aan internationale en supranationale instellingen*, in *Liber Amicorum Bernard Peeters* 124–145 (Herentals, Knops Publishing 2022).

[10] The concept of institutions of public international law means institutions which belong to the international public legal order. No distinction is made between international or supranational institutions. (Velaers, *supra* n. 8, at 28, nr. 18).

[11] For example, Advice Council of State, n°43.989/AV 29 Jan. 2008 on the preliminary draft of the Act 'on assent to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', and the Final Act, done at Lisbon on 13 Dec. 2007, item 7.

[12] *Parl.Doc.* Chamber of Representatives, BZ 1968, nr. 16/2,3 (report Wigny); *Parl.Doc.* Senate, 1969-70, nr. 275, at 3 (report Dehousse); *Parl.Acts.* Senate, 1969-70, 24 Mar. 1970, at 1010. Velaers, *supra* n. 8, at 25, nr. 10.

[13] *Parl.Doc.*. Senat, 1969-70, *supra* n. 12, at 4 (report Dehousse).

[14] *Ibid.*

[15] For example, Advice Council of State 43.989/AV 29 Jan. 2008 on the preliminary draft of the Act 'on assent to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', and the Final Act, done at Lisbon on 13 Dec. 2007, item 7.

[16] For example, Advice Council of State n°. 28936/2, 21 Apr. 1999 on a draft law 'on the agreement to the Rome Statute of the International Criminal Court', done at Rome on 17 Jul. 1998; Velaers, *supra* n. 8, at 25–26, nr. 10.

done by the treaty that creates the institution or that transfers new powers to it.[17]

2.2 Article 34 of the Constitution and the Transfer of the Exercise of (Fiscal) Powers to the European Union

During the discussion on the introduction of Article 34 in the Constitution (former Article 25bis of the Constitution), the question arose in the Chamber of Representatives whether this article would prevent a (future) transformation of the European Community into a federal European State, following a decision of the European Parliament that would claim its own sovereignty to extend its own competence.[18] In reply to this question, reporter WIGNY indicated that Article 34 of the Constitution only concerned the transfer of the exercise of powers, whereas the powers continue to belong to the state. Furthermore, the article would not exclude that Belgium could fit into a European federal state in the future, but a new treaty would be required for that.[19]

Today it is assumed that Article 34 of the Constitution only allows for the transfer by treaty or by law of *the exercise* of powers. Consequently, it would be contrary to Article 34 of the Constitution if a power were to be transferred by treaty or by law to an institution of international law, such as the European Union, to extend its own powers (the so-called *Kompetenz-Kompetenz*), which would allow it to take over additional powers from the state.[20]

2.3 Relationship Between the Articles 33, 34 and 167 of the Belgian Constitution

Since Article 33 of the Constitution stipulates that the powers are to be exercised in the manner laid down by the Constitution, the King must also comply with the Constitution when concluding international treaties, and so must the Chamber of Representatives when giving its assent within the meaning of Article 167 of the Constitution. Thus, the Section Legislation of the Council of State, when confronted with a treaty that is contrary to the Constitution, has advised that the bill of assent to that treaty cannot be passed until after a prior revision of the Constitution.[21]

However, the question arises whether it is possible to invoke the unconstitutionality of a treaty once it has been concluded.

Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969 provides that states may not invoke their national law in order not to implement a treaty. However, Article 46 of the same Convention provides an exception to this principle:

> *The fact that a State's consent to be bound by a treaty has been given in violation of a provision of its domestic law concerning the competence to conclude treaties may not be invoked by that State as grounds for invalidating such consent, unless that violation was undeniable and constituted a rule of fundamental importance of its domestic law* (underlining added).

Considering the case law of the Constitutional Court, the relationship between the Constitution and treaties in Belgium is qualified as 'conditional monism'[22]: international treaties take precedence over national law, including the national constitution, in the internal legal order, provided that the law giving consent to the treaty was in conformity with the constitution *at the time it was passed.*

The Constitutional Court expressed the foregoing as follows:

> The Constitutional Court which prohibits the legislature from adopting internal legal norms contrary to those referred to in Art. 107ter of the Constitution [now Art. 142 of the Constitution concerning the competence of the Constitutional Court] cannot be deemed to allow that legislature to do so indirectly, through assent to an international treaty.[23]

In concrete terms, this means that the primacy only applies to provisions of the Constitution that have been enacted at a later point in time or to the extent that the inconsistency with the Constitution has only subsequently become apparent through the way in which the treaty has been interpreted by an international court.[24] The constitutional basis for this priority is then provided

[17] This treaty is subject to the rules of Art. 167 of the Belgian Constitution, which deals with a.o. the treaty-making power of the King. The notion 'treaty' can also refer to a treaty whereby a community or region grants decision-making power to institutions of public international law each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament

[18] *Parl.Acts.* Chamber of Representatives, 1969-70, 27 May 1970, nr. 74, 4–5.

[19] *Ibid.*, at 5–6.

[20] Velaers, *supra* n. 8, at 29, nr. 19 with reference to Advice Council of State, n°43.989/AV 29 Jan. 2008 on the preliminary draft of the Act 'on assent to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', and the Final Act, done at Lisbon on 13 Dec. 2007; Advice Council of State, n° 48.762/2, 25 Oct. 2010 on a preliminary draft law 'assenting to the Protocol', done at Brussels on 23 Jun. 2010, amending the Protocol on transitional provisions annexed to the Treaty on the European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.

[21] Bv. Advise. Council of State 21.540/A.V. 6 May 1992 on a preliminary draft law approving the Treaty on European Union, seventeen Protocols and the Final Act with thirty-three Declarations, drawn up in Maastricht on 7 Feb. 1992. This treaty granted EU citizens the right to vote and stand for election, which the Council of State found to be in violation of Art. 8 of the Constitution. (formerly Art. 4, second paragraph Constitution). However, the legislator did not follow this advice. It was only after the convention had been approved that Art. 8 of the Constitution was revised.

[22] P. Popelier, *De verhouding tussen de Belgische Grondwet en het internationale recht*, in *En hommage à Francis Delpérée. Intinéraires d'un constitutionalist* 1231–1254 (Brussel, Bruylant 2007).

[23] Const. Court, n° 12/1994, 3 Feb. 1994, B.4. *See also* Const.Court n°. 62/2016, 28 Apr. 2016, B.8.5.

[24] Velaers, *supra* n. 8, at 402, nr. 87.

by Article 34 of the Constitution (*see* below under 3). An important element in this principled position, as pointed out by the Constitutional Court, is that '*in its review it will have to take into account the fact that this is not a unilateral act of sovereignty, but a treaty norm which also produces legal effects outside the internal legal order*'.[25] In summary, the Court considers itself competent to review the consent act. However, this review seems to be extremely marginal. To date, the Belgian Constitutional Court has not (yet) found a consent act to be contrary to the Constitution.[26]

3 Belgian Constitutional Court: Article 34 is not a general 'carte blanche'

3.1 Constitutional Court Ruling no. 62/2016 on the Stability Treaty

As indicated above, the Constitutional Court has had the opportunity to provide further clarification on the scope of Article 34 of the Constitution in its ruling no. 62/2016 of 28 April 2016.[27]

This judgment concerns a.o. the Act of 18 July 2013, which gave assent to the so-called Stability Treaty concluded on 2 March 2012 between the then Member States of the European Union, with the exception of the Czech Republic and the United Kingdom.

The Stability Treaty was established in the wake of the euro crisis to stabilize the euro area and strengthen the European Economic and Monetary Union. It contains three pillars: (1) strict budgetary discipline, (2) more closely coordinated economic policies and (3) better governance of the euro area.

The applications submitted to the Constitutional Court against the consent act to this treaty concerned the first pillar of the treaty, contained in Title II, entitled 'Budgetary Pact', which lay down rules designed to promote budgetary discipline. They concern, on the one hand, the budget balance and, on the other hand, the public debt. The Stability Treaty not only provides a tight budgetary framework, it also assigns certain powers to the institutions of the European Union, in particular to the European Commission and the Court of Justice of the European Union.[28]

With the law of assent, the legislator gave its consent to the obligations undertaken in the Stability Treaty. According to the applicants before the Constitutional Court, assent to the Stability Pact implies, on the one hand, an erosion of certain (social) fundamental rights and, on the other hand, a transfer of essential elements of sovereignty to the EU institutions.[29]

Although the Court rejected the applicants' actions for annulment on the grounds that they did not show the required interest, the judgment is of particular interest in the context of this contribution on account of the following *obiter dictum* which it contains:

> When the legislature approves a treaty of such scope, it must respect Article 34 of the Constitution. Under that provision, the exercise of certain powers may be entrusted by a treaty or by a law to institutions of public international law. Admittedly, those institutions may then decide independently how to exercise the powers conferred, but Article 34 of the Constitution cannot be regarded as granting generalized carte blanche, either to the legislature, when it gives its assent to the treaty, or to the institutions concerned, when they exercise the powers conferred on them. In no case shall Article 34 of the Constitution permit the national identity inherent in the basic political and constitutional structures, or the core values of the protection afforded to the nationals under the Constitution to be undermined in a discriminatory manner.(unofficial translation)[30]

3.2 Article 34 of the Constitution Is No Carte Blanche

It can be deduced from the aforementioned consideration B.8.7. of the judgment of the Constitutional Court that, when transferring the exercise of powers to institutions of public international law, account must be taken of a hard core that must not be touched.

According to André Alen, at that moment president of the Constitutional Court, the Court wished to clarify that the primacy, unity and functioning of European Union law only have room in light of Article 34 of the Constitution, in so far as EU law does not disregard the 'national identity that is inherent in the political and constitutional basic structures', as well as 'the core values of the protection that the Constitution confers on its subjects'.[31]

According to him, the judgment is also intended as a reaction to the judgment of the Court of Justice in the Melloni case (concerning the European arrest warrant). In this judgment, the Court decided the following: 'It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the

[25] Const. Court n°. 12/1994, 3 Feb. 1994, B.6 (constant justice). *See* e.g., also Const.Court n°. 62/2016, 28 Apr. 2016, B.1.3 (on the law approving the so-called Stability Treaty); and Const.Court, n°.163/2018, 29 Nov. 2018, B.6 relating to a reference for a preliminary ruling concerning Art. 1 of the Law of 2 Sep. 1980 approving the Convention between the Kingdom of Belgium and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income and on capital, signed at Bern on 28 Aug. 1978).

[26] Velaers, *supra* n. 8, at 402, nr. 87.

[27] *See also* Ph. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*, EuConst 182–205 (2017).

[28] Const.Court, n°. 62/2016, 28 Apr. 2016, B.8.7.

[29] *Ibid.*, A.3.1, A.4.2 en A.5.1.

[30] *Ibid.*, B.8.7.

[31] A. Alen, *De nationale identiteit – Slotwoord*', (6) Tijdschrift voor bestuurswetenschappen en publiekrecht (hereafter: TBP), 370 (2017).

Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[32] According to the Court of Justice, a Member State cannot prevent the application of acts of Union law which are fully compatible with the Charter by deeming them to be contrary to the fundamental rights guaranteed by the Constitution of that Member State, even if those rights are more extensive.[33]

André Alen argues in this context for more dialogue 'in order to bridge the gap between two distinct values: on the one hand, the uniform application of Union law and the mutual confidence of the Member States that goes with it, and on the other hand, the primacy of the broadest protection of fundamental rights'. In his view, 'in any event, dialogue is far preferable to the so-called "dogma" of the primacy of Union law'.[34] He sees this dialogue being achieved through the submission of preliminary questions by the Constitutional Court to the Court of Justice. This view is also in line with what Koen Lenaerts wrote about Article 53 of the Charter. According to the latter this article should not be seen as a 'rule of conflict', but as an expression of 'constitutional pluralism' and more concretely as a mandate for the Court of Justice to enter into dialogue with the national constitutional courts.[35] This view is also consistent with Article 4(2) Treaty on European Union (TEU), according to which the European Union respects the national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

In Belgium, both the Constitutional Court and, in the preventive legislative phase, the Section Legislation of the Council of State have the task of ensuring that the limits which Article 34 of the Constitution imposes are observed.[36]

Further, the question raises what meaning should be given to the two limits which the Constitutional Court imposes on the transfer of the exercise of powers on the basis of Article 34 of the Constitution, namely: (1) national identity embodied in the fundamental political and constitutional structures and (2) the core values of the protection that the Constitution confers on its subjects (*see* 3.3):

3.3 National Identity Embodied in the Fundamental Political and Constitutional Structures and the Core Values of the Protection that the Constitution Confers on Its Subjects

It is apparently no coincidence that, in formulating the first limit, the Constitutional Court literally copied the wording of Article 4(2) TEU.[37] For what should happen when the dialogue (*see* above under 3.2) between the Court of Justice and the Constitutional Court on the content of the 'national identity' does not lead to a uniform conclusion. According to some scholars, it is then up to the Constitutional Court, and not to the Court of Justice, to determine the interpretation of the reservation based on Article 34 of the Constitution.[38] To rule otherwise would be 'to disregard the very *ratio constitutionis* of the reservation, which is to act as a barrier against an excessive exercise of power by the EU institutions, of which the Court of Justice is also one'.[39]

With the reservation expressed in section B.8.7, the Belgian Constitutional Court is not alone. As mentioned in the introduction also Germany, France, Italy, Spain, Poland and the Czech Republic had already announced that they would protect the 'hard core' of their national constitution against European interference.

However, in Belgium it is not entirely clear what exactly is to be understood by these two limits. Some authors even speak of a still far from unravelled 'mystery' surrounding the Belgian national and constitutional identity.[40] As rightly put forward by S. Van Drooghenbroeck, it would be better if the Constituent itself intervened to clarify the limits it wishes to set on the primacy of international and European Union law.[41]

For some elements, however, there is a feeling that, as far as Belgium is concerned, they belong to the national identity that is embedded in the fundamental political

[32] EUCJ (Grand Chamber) 26 Feb. 2013, *Melloni*, C-399/11, cons. 60.

[33] *Ibid.*, cons. 58. In the case at hand, a framework decision on the European arrest warrant was seen compatible with Arts 47 and 48 (2) of the Charter, but was deemed contrary to the right to a fair trial in the Spanish Constitution by the Spanish Constitutional Court, which referred the question to the Court of Justice for a preliminary ruling.

[34] Alen, *supra* n. 31, at 368.

[35] K. Lenaerts, *Human Rights Protection Through Judicial Dialogue Between National Constitutional Courts and the European Court of Justice*, in *Liber amicorum Marc Bossuyt* 367, 369–370 (A. Alen, V. Joosten, R. Leysen & W. Verrijdt eds, Antwerpen, Intersentia 2013).

[36] Although the Constitutional Court cannot test directly against Art. 34 of the Constitution (Const.Court n° 43/2021, 11 Mar. 2021, B. 9.2 and B. 9.3), it does consider itself empowered to do so indirectly, in connection with Arts 10 and 11 of the Constitution (non-discrimination principle), as was demonstrated in judgement no. 62/2016 (Const.Court, n°. 62/2016, 28 Apr. 2016, B.8.7). 'In no case does Article 34 of the Constitution permit *discriminatory* prejudice to'. (emphasis added). The latter does not mean that there is nothing wrong with a non-discriminatory violation of Art. 34 of the Constitution. A non-discriminatory infringement is also prohibited, but the Constitutional Court then has no jurisdiction to rule on it. (*See also* Velaers, *supra* n. 8, at 39, nr. 40.)

[37] Alen, *supra* n. 31, at 370–371, nrs. 10 en 12.

[38] Velaers, *supra* n. 8, at 37, nr. 37, voetnoot 251.

[39] Velaers, *supra* n. 8, at 37, nr. 37.

[40] E. Cloots, *Het mysterie van de Belgische nationale en constitutionele identiteit*, (6) TBP 321 (2017). The francophone doctrine in Belgium also points out a certain ambiguity in the wording of recital B.8.7 of the judgement n°. 62/2016 of the Constitutional Court and the somewhat 'foggy' nature of the content of these borders for the time being (S. Van Drooghenbroeck, *La Cour constitutionelle et la primauté du droit international. L'héritage Le Ski sous bénéfice d'inventaire*, Journal des tribunaux, 618, 622 (2021)).

[41] Van Droogenbroeck, *supra* n. 40, at 618, 622.

and constitutional structures. This applies, for example, to the federal structure of the state, the autonomy of the federated states and the related division of powers between the state, the communities and the regions, the territoriality principle in language matters, the principle of the separation of powers and the principle of democracy, more specifically the right to participate in elections in order to influence policy, parliamentary control over the government and administration (cf. the principle of ministerial responsibility), the independence of the judiciary and the reservation of certain essential powers to the legislative power, which express the great confidence of the constituent in the parliament and – related to this – the distrust in the executive power.[42] With regard to the latter, mention may be made of the constitutional principle of legality in the Articles 12 and 14 (criminal matters), 15 (inviolability of the home), 16 (expropriations in the public interest), 22 (respect for private life), 23, paragraph 2 (fundamental social and economic rights), 24, paragraph 5 (educational matters) and 170 (tax matters) of the Belgian Constitution.[43]

The second limit of 'core values' mentioned above seems to refer to the essential aspects of the legal protection that the Constitution grants to its citizens, especially in the area of fundamental rights and freedoms, but also to the core values of the protection system itself, such as the possibility of the direct effect of international treaties, the constitutionality review by the Constitutional Court (Article 142 of the Constitution) and the legality review of the executive power by the courts (Article 159 of the Constitution) and the Council of State (Article 160 of the Constitution).[44]

4 Significance of Article 34 of the Belgian Constitution in the field of taxation

4.1 No Taxation Without Representation

In the field of taxation, it is not excluded that – as indicated above by certain authors – the principle of legality, which expresses the great confidence that the constituent shows in the legislator in matters of taxation (Article 170 of the Constitution), can be counted among the hard core that must not be touched.

This principle guarantees every citizen that he is not subjected to a tax that has not been decided upon by a deliberative assembly that has been democratically elected. It refers to the principle of *'no taxation without representation'*, which is one of the most deeply rooted principles governing the introduction of taxes.[45]

The principle of legality in Article 170 of the Constitution is primarily a principle of legislation. It means not only that the introduction of taxes is a power reserved for the legislator, but also that every tax law must contain 'precise, unambiguous and clear criteria for determining who is liable to pay tax and the amount of tax due'.[46] Every taxpayer must be able to determine with a minimum degree of foresight the tax system that will be applied to him.[47] Secondly, the principle of legality is also a principle of law application. It implies that tax law is applied only to the cases for which it is intended,[48] and it also explains why tax law is strictly applied.[49] In this sense, the principle of legality is also closely linked to the principle of equality in Article 172 of the Constitution. The tax administration must correctly apply the tax law to each taxpayer and may not grant exemptions.

Although it is currently impossible to predict the actual scope that the Constitutional Court will give to Article 34 of the Constitution, read in conjunction with Articles 10, 11 (and 172) of the Constitution, it is theoretically possible that the principle of '*no taxation without representation*' will be called into question, if, for example, in order to fund the EU budget (Article 311 of the Treaty on the Functioning of the European Union (TFEU) taxes are imposed (also) on Belgian nationals at European level in violation of this principle. In this respect G. Bizioli rightly observes the following:

> *Irrespective of the meaning assigned under article 311 of the TFEU,* i.e. *whether the levying of EU taxes is a general competence or if its is restricted to the EU competences, the exercise of this power directly impacts the choice concerning the distribution of the tax burden among EU citizens, and eventually, the redistribution of wealth among the groups of citizens within the European polity. In this case, therefore, the national parliaments did not endorse a precise regulatory choice through the ratification of the Treaties, and the parliamentary approval of the decision about "own resources" is insufficient to bridge the democratic gap.*[50]

In view of this supranational interest (namely the distribution of the tax burden and the redistribution of wealth among EU citizens), those fiscal measures require in view of the principle 'no taxation without representation' the consent of those citizens through their representatives in the European Parliament. However, the current decision-making process lacks the representation

[42] Cloots, *supra* n. 40, at 313; Velaers, *supra* n. 8, at 38.
[43] Cloots, *supra* n. 40, at , at 320, n. 79.
[44] Velaers, *supra* n. 8, at 38, nr. 39.
[45] *See* B. Peeters, *Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?*, in *De grondwet in groothoekperspectief. Liber amicorum discipulorumque Karel Rimanque* 511–515 (B. Peeters & J. Velaers eds, Intersentia, Antwerpen 2007).
[46] Const.Court, n°. 24/2018, 1 Mar. 2018, B.23.2; Const.Court n°. 103/2011, 16 Jun. 2011, B.5.1-B.5.3; Const.Court n°. 54/2008, 13 Mar. 2008, B.12.
[47] Const.Court, n°. 24/2018, *supra* n. 46, B.14.1.
[48] Bv. Advice Council of State, n°. 22.376/2, 4 May 1993.
[49] Cass. 13 Apr. 1978, *Arr.Cass*, 1978, at 930.
[50] G. Bizioli, *EU Taxes and 'No Taxation Without Representation'*, in EATLP, *supra* n. 1, at 141.

of the supranational interest. Therefore a rebalance of the decision-making process is urgently needed.[51]

4.2 Division of Tax Competences

As indicated above, the division of tax competences could also be included in the '*national identity*'. However, in light of a recent judgment of 21 September 2021 of the Constitutional Court, some caution is called for.[52] The latter judgment concerns an action for annulment and suspension of the Act of 16 March 2021 on assent to Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335EU, Euratom.[53]

For Belgium, the aforementioned Council Decision (EU, Euratom) 2020/2053 was approved by the law of 16 March 2021.[54] In its opinion of 2 February 2021, the Section Legislation of the Council of State had a fundamental objection to the preliminary draft of the law on the assent of this Council Decision.[55] It was of the opinion that not only the federal legislator is competent to assent to Council Decision 2020/2053, but also the regions. Indeed, Article 2, paragraph 1, c of the Council Decision mentions as a new category of the European Union's own resources the '*revenue from (…) the application of a uniform rate of call to the weight of non-recycled plastic packaging waste generated in each member state, with that uniform rate of call being set at EUR 0.80 per kilogram*'.

It is clear from recital 7 of Council Decision 2020/2053 that the introduction of this new category of own resources was conceived as part of a waste management policy.[56] The section legislation of the Belgian Council of State concluded that the regions should also give their consent to this decision and that '*once this has been done, the regions should agree among themselves on the concrete measures to be taken in order for Belgium to properly apply the system of national contributions introduced by decision 2020/2053 to reduce pollution from plastic packaging waste*'.[57]

During the parliamentary discussion of the draft law on the approval of decision 2020/2053, several members – referring to the aforementioned opinion of the section legislation of the Council of State – pointed out the need for the regions to approve decision 2020/2053.[58] However, according to the Vice Prime Minister it was agreed, in close consultation with the Cabinets of the Minister-Presidents of the Regions, that the federal ratification process, given its great importance not only for Belgium but also for the entire European Union, would continue. At the same time, discussions were started on the implementation of the plastic tax on an intra-Belgian level.[59] The Vice Prime Minister pointed out that he had asked the Regions for a legislative initiative to be drawn up by the regions, as waste policy is a regional competence. Two regions only acknowledged receipt of this demand. A third region replied in detail, saying that it was best for the tax to be levied at federal level.[60] A consequence of this whole 'consultation' was that only the federal legislator had formally agreed to the aforementioned Council Decision 2020/2053 and not the regions.

However, the appeal for annulment and suspension lodged with the Constitutional Court against the Consent Decree of 16 March 2021 was rejected by the Court as inadmissible, since none of the applicants demonstrated the required interest.[61] It is noteworthy that in this ruling (subsection B.12), the Constitutional Court again mentions Article 34 of the Constitution and repeats (almost) literally the mantra contained in paragraph B.8.7 of its ruling on the Stability Treaty.[62] In this judgment, however, the Court does not address the issue discussed above. It was apparently not raised before the Court either. Nor did the Court raise this issue of on their own initiative.

Although substantial importance is attached in literature to consideration B.8.7, in Judgment No. 162/2016 of 28 April 2016 from a principle point of view, the restriction on the primacy of European Union law expressed therein by the Constitutional Court has not yet had much impact in practice. To date, the Belgian Constitutional Court has not yet found any law giving assent to a treaty to be contrary to the Constitution. Nor has it yet decided that a statute transposing a directive into national law is contrary to the above-mentioned 'hard core'.[63]

5 Conclusion

As mentioned above the Belgian Constitutional Court made it clear that Article 34 of the Constitution is not *a blanco cheque* and that the primacy, unity and functioning of European Union law can only be guaranteed in light of Article 34 of the Constitution, insofar as EU law does not disregard the 'national identity inherent in the

[51] *Ibid.*, at 141.
[52] Const.Court, n°. 127/2021, 30 Sep. 2021.
[53] OJ EU L 424/1, 15 Dec. 2020.
[54] Belgian Official Gazette 23 Mar. 2021.
[55] Advice Council of State, n°. 68.743/VR, 2 Feb. 2021, *Parl.Doc.* Chamber of Representatives, 2020-21, nr. 55-1792/001, at 16–18.
[56] Recital 7 reads as follows: 'In accordance with the European strategy for plastics, the
Union budget can contribute to reduce pollution from plastic packaging waste. An own resource which is based on national contributions that are proportional to the quantity of plastic packaging waste that is not recycled in each Member State will provide an incentive to reduce the consumption of single-use plastics, foster recycling and boost the circular economy. At the same time, Member States will be free to take the most suitable measures to achieve those goals, in line with the principle of subsidiarity.'.
[57] Advice Council of State, *supra* n. 55, at 17–18.
[58] Report Commission Finance and Budget, *Parl.Doc.* Chamber of Representatives, 2020-21, n°. 55-1792/002, at 6–7 en 14–15.
[59] *Ibid.*, at 4.
[60] *Ibid.*, at 20.
[61] Const.Court, n°. 127/2021, 30 Sep. 2021.
[62] *Ibid.*, at B.12.
[63] J. Velaers, *La hiérarchie des normes et l'arrêt Franco-Suisse Le Ski*, Journal des Tribunaux, 596, 601 (2021).

fundamental political and constitutional structures' and 'the core values of the protection afforded to the nationals under the Constitution'.

This message was formulated as an *obiter dictum* and inspired by what supreme courts in other countries had already decided, was received as a surprise. The text itself of Article 34 of the Constitution does not contain any such reservation and, moreover, there had never been any serious discussion on this before.

The Constitutional Court did not specify the limits mentioned in the aforesaid judgments either. To date, the Court has not found any act of consent to a treaty to be contrary to the Constitution. Nor has the Court ruled that a law transposing a directive into national law is contrary to the aforementioned 'hard core'.

Should it turn out that in practice a '*hard core*' must be taken into account, it would be appropriate for the Section legislation of the Council of State (*ex ante*) and the Constitutional Court (*ex post*) to act as caring guardians of these limits. They would do well to avoid deadlocks or even outright conflicts with the supranational European level. To this end, it seems appropriate that they should opt for conciliatory interpretations and dialogue with the Court of Justice. This way, the constitutional pluralism, as also expressed in Article 4(2) TEU, according to which the European Union 'respects the national identities inherent in their fundamental structures, political and constitutional, including those of regional and local self-government', can be structurally shaped'.