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Recent Belgian Constitutional Court Judgment Strikes Down Retroactive Tax Increase For Collective Investments

By [Orestis Omran](#), [Nora Wouters](#) on January 27, 2015

On January 22, 2015, the Belgian Constitutional Court delivered a judgment (Case no. 1/2015) in a case opposing a Luxembourgish company "Robeco Capital Growth Funds, SICAV" to the Belgian State ("Robeco Capital Growth case"). Robeco Capital Growth Funds had requested the annulment of Article 106 of the Belgian Act of 17 June 2013 containing tax and financial provisions relating to sustainable development. That legislative provision increased the annual tax rate applicable to undertakings for collective investment ("Belgian Subscription Tax") from 0.08% to 0.0965% with effect as from January 1, 2013 and to 0.0925% with effect as from January 1, 2014. Article 106 ("the disputed provision") was intended to amend the Belgian Inheritance Code.

The Belgian Subscription Tax is an annual tax, which is based on the value of the subscriptions received from Belgian investors. The tax applies to the value of the net subscriptions that are made by Belgian investors through a Belgian financial intermediary. The tax is calculated on the units that are "outstanding in Belgium" on December 31 of each year, namely shares held on December 31 that were acquired by subscription or transfer via a Belgian financial intermediary. Such a tax is payable to Belgium's competent tax authority by March 31 of each year. A more favorable rate (0.01 %) is applicable provided that one of the compartments or share classes of the Undertaking for the Collective Investment in Transferable Securities ('UCITS') is exclusively collected from institutional or professional investors who deal on their own account and that its parts can be acquired by these investors only.

The applicant in the Robeco Capital Growth case had argued that the disputed provision was in breach of the principle of equality and of non-discrimination for regulating situations that were final on January 1, 2013. Robeco Capital Growth Funds had argued that Article 106 of the Belgian Act of 17 June 2013 amounted to introducing retroactive tax legislation in the absence of any objective justification. The Belgian Constitutional Court ruled that the principle of non-retroactivity of Belgian Acts originated from and found its *raison d'être* in the Rule of Law. The latter concept implies that legislative acts should be sufficiently foreseeable and accessible so as to allow economic operators to adjust their behavior to the legal consequences that may attach to their economic activities in the future. The Belgian Constitutional Court defined retroactive legislation as legislative acts that regulate situations, acts or facts that were definitively settled or final at the time of their entry into force. This was the case of Article 106 since the Belgian Inheritance Code required the taxes on collective investment funds to be paid by March 31, 2013. The Court ruled that retroactive legislation could nevertheless remain constitutional provided that it was objectively justified in the name of an objective of general interest. In this respect, the Belgian Constitutional Court did not consider that the trivial impact of this retroactive tax provision on individual investors qualified as an objective justification. The Belgian Constitutional Court ruled that it was not the interest of individual investors that had to be considered in its justificatory analysis but that of the UCITS. The Belgian Constitutional Court also disregarded the alternate justification according to which this retroactive increase in the annual tax rate applicable to undertakings for collective investment was in line with the legislative movement towards increasing the withholding tax on dividends. The Court ruled instead that both taxes are not comparable to each other. Accordingly, the Belgian Constitutional Court decided that Article 106 should be annulled and therefore be permanently removed from the Belgian Act of 17 June 2013 and the Belgian Inheritance Code for it breached the principle of non-retroactivity of domestic legislation without any objective justification and ultimately the principle of equality and of non-discrimination. The Belgian Constitutional Court did not expressly elaborate upon the connection between the principle of equality and non-discrimination (justiciable grounds of annulment) and the principle of non-retroactivity. However, the Court's reasoning must be drawn on the premise that the application of

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retroactive tax legislation to UCITS implies subjecting situations that are objectively dissimilar (i.e. situations that were final at the time of the entry into force of the disputed provision and new situations or existing situations whose effects were still ongoing at the time of the entry into force of the said provision) to a uniform set of rules in breach of the principle of non-discrimination.

The constitutional judgment in the Robeco Capital Growth case shows how seriously the Belgian Constitutional Court will scrutinize tax legislation in the face of the non-retroactivity principle: tax laws may not apply retrospectively to facts, acts or situations that were final or definitively settled at the time of their entry into force unless retroactivity may be objectively called for by an objective of general interest. It will be important for the initiator of any retroactive tax bill to discuss the objective reasons for its retrospective application in the course of the parliamentary debates in order to reduce the risk of the Belgian Constitutional Court permanently undoing the Government's and/or the Parliament's legislative work through an annulment judgment.

Foreign Collective Investors in Belgium need to be fully informed about any change to the applicable tax system brought about by either the legislature or the judiciary. Such a change may have a considerable impact on the investment strategies and on the marketability of foreign UCITS traded in Belgium. The absence of compliance with the applicable tax legislation can in turn affect the granting of authorizations that each fund needs to obtain in order to enter and remain active on the Belgian financial markets.



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