Prochain Arrêt: La Belgique!

Explaining Recent Preliminary References of the Belgian Constitutional Court

Thomas Vandamme*

If Belgium desires a true constitutional court, it will have to be on the basis of a symbiosis between the European and the national frame of reference.

Wilfried Martens

Belgian Constitutional Court beats all in referrals to EU Court – How come? – Origin and evolution of Belgian federalism – Permanent reform – Modest origins of present constitutional court – Use of Belgian and EC law to widen its channels – Identification of Belgian constitutional rules with EC rules – Statutory extension of Court's powers – Use of techniques in referral of Advocaten voor de Wereld – Translation of national constitutional issue into a European one – EC law-driven constitutional evolution in Belgium – Eventual undermining of Belgian constitutional principles

Introduction: National constitutional courts and preliminary references

Hopefully, the reader will forgive the small 'jeu de mots' in the title of this contribution. The recent judgment of the ECJ in *Advocaten voor de Wereld* has no doubt attracted quite a lot of international attention if only because it concerns the European Arrest Warrant (hereinafter: 'EAW'). Indeed, in Belgium too, national constitutional issues were raised, and the implementation of the EAW into Belgian (federal) law was questioned. Yet, it is more than just the next legal ruling ('Arrêt') about this famous, if not notorious, piece of EU (Third Pillar) legislation. Apart from legal issues that are 'EU-proper' (discussed in this volume by Florian Geyer) the ruling of the ECJ may arouse a more general interest in Belgian constitutional law and in particular in the Constitutional Court of Belgium which re-

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ferred the validity questions in *Advocaten voor de Wereld*. Questions such as how the legal challenge to the EAW had found its way to the constitutional court and in what way the latter managed to 'translate' a national constitutional issue into a European constitutional issue should arouse the curiosity of an audience that is not exclusively Belgian. That last point may be particularly interesting to a wider audience as it may further fuel academic debate on the well-known 'dialogue' between national constitutional courts and the ECJ.

National constitutional courts and preliminary references to the ECJ

References from constitutional courts are rare. For the purposes of this contribution a 'constitutional court' is considered to be a court with the exclusive and centralised jurisdiction to review parliamentary legislation in the light of the national constitution.[1] On their (absent) preliminary references, the Annual Report of the ECJ gives more detail. In the course of history the Austrian *Verfassungsgerichtshof*, the Supreme Court of Ireland (which, however, has a dual nature and may refer questions in its capacity of an 'ordinary court') and the *Staatsgerichtshof* of Hessen have referred questions to the ECJ.[2]

From this historic overview it follows that, although the Constitutional Court of Belgium is not the only one to refer preliminary references to the ECJ, it does take a special position. In fact it is the only court to have referred preliminary questions on both *interpretation* issues (in the *Diploma Directive* case; the *Birds Directive* case and in the *Flemish Welfare Aid* case, presently pending before the ECJ on Regulation 1408/71)[3] as well as on *validity* issues (in *Advocaten voor de Wereld* and in *Money Laundering*).

Particularly the latter is unique. The references on validity in *Advocaten voor de Wereld* (concerning the EAW Framework Decision) and in the *Money Laundering* case (concerning the Money Laundering Directive) are exceptional.[4] Thus, the Constitutional Court of Belgium broke at least three records. Among national constitutional courts it is the court that has referred *most* questions to the ECJ (five); moreover it is the first to have made preliminary references on the validity

[1] An interesting overview can be found on the website of the 'Conference of European Constitutional Courts', <Europe Consthttp://www.confcoconsteu.org/en/common/home.html>, last visited on 19 Sept. 2007. Decentralised systems of constitutional review (such as the Danish, the Swedish or the Finnish systems) are for the purposes of this contribution not further discussed.

[2] *See* Court of Justice of the European Communities, Annual Report 2006, p. 100-102, <http://curia.europa.eu/en/instit/presentationfr/rapport/stat/06_cour_stat.pdf >, visited 19 Sept. 2007. In Ireland also the High Court can review acts on their constitutionality.

[3] *See* respectively C-93/97 *Fédération belge des chambres syndicales de médecins* v. *Vlaamse Regering e.a.*, [1998] *ECR* I- 4873 and C-480/03, *Hugo Clerens en Valkeniersgilde bvba* v. *Waalse Ministerraad*

[4] *See* Case 126/2005 of the Constitutional Court of 13 July 2005 leading to Case 305/05, *Ordre des barreaux francophones et germanophone e.a.* v. *Conseil des Ministres*, Judgment of the Court of 26 June 2007, n.y.r.

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of EC law (*Money Laundering*) as well as on the validity of EU law (*Advocaten voor de Wereld*).

In this contribution I will try to explain to a wider audience why this Court has taken a special place in the prestigious league of constitutional courts. How can one explain its 'openness' to EC and EU law? Is the different approach of the Court explained by its very specific origin, distinguishing it from its counterparts? In order to appraise that hypothesis as well as to understand the interaction between Belgian constitutional law and EC/EU law, the national (historic) context in which the Constitutional Court operates must be elaborated below.

A federation sui generis

In order to understand the frequency of rulings of the Constitutional Court (and perhaps put it on the EU lawyer's 'diet'in the future) it is necessary to start with a concise introduction to the constitutional entanglements Belgium has been facing since the 1970s. The country is at present best described as a federation *sui generis*. Repeated, sometimes drastic, constitutional changes have resulted in a highly complex federal state with no less than nine (!) legislators. It has not always been like that. Until 1970 the country was a unitary state with French, Dutch and German as its official languages. It had no constitutional court as its legislator was deemed infallible (as is the case for example in the United Kingdom or the Netherlands).[5] In that year the Constitution introduced what was a long-harboured desire of the Flemish Belgians: decentralised cultural autonomy. To achieve that, Belgium was divided into four 'linguistic areas' from which sprang three 'Language Communities' or simply 'Communities'. Thus, the French-, the Flemish- and the German-speaking Community govern the corresponding officially recognised language areas. The fourth linguistic area, the bilingual region of Brussels-Capital, is not governed by a formally independent 'Community' (*see* below).

After the creation of three Language Communities, each with its own parliament and executive, the country grew more complex in 1980 with the addition of three 'Regions' (at the time mostly a desire of the Walloons): Flanders, Wallonia and the Brussels-Capital Region. In short, the (Language) Communities are competent for socio-cultural matters such as welfare aid, culture, education, sport, tourism and public health.[6] The Regions deal with economic matters such as employment, energy, agriculture, fisheries, environment, housing, public works and science. The federal competences still include matters such as defence, peace

[5] Even though in the Netherlands a bill is pending that will allow a partial constitutional review of Dutch statutes, *see Kamerstukken II* 2004-2005, 28331 [Parliamentary Proceedings of the Dutch House of Commons].

[6] *See* Art. 5 of the Special Law on the Reform of the Institutions of 8 Aug. 1980.

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and security, justice (an example being the federal parliamentary Act incorporating the EAW into Belgian law),[7] civil matters, immigration, nationality and social security. Yet, some areas are not allocated in a clear-cut way to one of the entities. Trade, transport, employment and energy are important examples of policy areas that are partly the domain of the Federation and partly that of the Regions.

Most complex of all is Brussels. It is one of Belgium's three Regions (the Brussels-Capital Region) but on its territory a separate (Language) Community is never established. Socio-cultural 'language community competences' are exercised by two new entities that operate under supervision of either the Flemish Community or the French Community: the 'Flemish Community Commission' and the 'French Community Commission'. As Brussels is not territorially divided along linguistic lines, the competences of the two 'Sub-Communities' in Brussels do not relate to persons but to the institutions they have set up in Brussels and which cater to either the French or Flemish-speaking 'Bruxellois/Brusselaar'.[8] By contrast, Brussels' affairs that relate to persons rather than to institutions must be dealt with by the two Community Commissions operating jointly. To that end they form the 'Joint Community Commission', an entity that enjoys law-making powers (by adopting 'ordinances').[9] After the federation, the three communities and three regions, this becomes therefore the eighth legislator. For completeness' sake, it should be mentioned that the French (Language) Community has transferred some of its law-making powers to the French Community Commission in Brussels, making this entity legislator number nine in Belgium.[10] Brussels is therefore highly asymmetrical, with the French Community Commission having more powers than its Flemish counterpart.

The Belgian constitutional structure may seem bewildering for an outsider. In fact, it may even appear so for the Belgians themselves. On the upside, one can say the system can be considered a constitutional regime that allows for a certain flexibility necessary in a federal state the size of Belgium, where cultural and economic needs do not necessarily follow the same geographical-linguistic lines. Yet,

[7] The federal entities however, do have the power to penalise the violations of their laws, *see* Art. 11 of the Special Law on the Reform if the Institutions of 8 Aug. 1980.

[8] They are free to establish institutions in Brussels but it is for the Bruxellois to choose the institution of their liking, according to their personal language preferences. *See* Art. 127(2) Belgian Constitution.

[9] *Commission Communautaire Commune* (French) or *Gemeenschappelijke Gemeenschapscommissie* (Flemish)

[10] And to the Walloon Region, *see* Art. 138 Belgian Constitution. On the Flemish side, this has not occurred. The Flemish Community Commission in Brussels is therefore not officially designated as a legislator, although it consists of a directly elected parliamentary assembly. The first six elected members (of 17 in total) also sit in the Flemish Parliament as the six Brussels-elected members (another personal union). The Flemish Community exercises control over the Flemish Community Commission.

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the downside is that a highly complicated state structure may increase 'democratic deficit' problems (something with which most EU-lawyers are all too familiar). Furthermore, its flexibility (*see* below) can lead to instability as Belgium seems to find itself in a permanent state of reform.

The division of competences in the Belgian federation: Permanent reform

The division of competences is a recurring issue in all federal elections in Belgium.[11] Most political parties in Flanders advocate transfer of more powers to the federal entities (with two separatist parties, 'Vlaams Belang' and the 'Nieuw-Vlaamse Alliantie' going so far as to demand a complete dissolution of the federation). Especially in those policy areas that are scattered among the different entities, like employment policy, there is on the Flemish side a strong wish to regroup these competences completely on the federated level.

At first sight, Belgium seems to have a very flexible constitution to accommodate such (continuous) changes in the division of competences. One can change the constitution without changing the 'Constitution'. Many aspects can be dealt with by 'Special Laws' (also called 'Double Majority Laws') adopted under special procedures but not necessitating the difficult process for amendment of the formal constitution.[12] The single most vital piece of the Belgian (substantive) Constitution that concerns the allocation of competences between the nine law-making entities in Belgium is such a 'Special Law'. It bears the deceptively technical sounding name of 'Special Law on the Reform of the Institutions of 1980' (hereafter: 'Special Law of 1980'). Over the years, it has been the Special Law of 1980 and its subsequent amendments that formed the 'battlefield' for constitutional disputes relating to (further) federalisation. It is also with the adoption of the Special Law of 1980 that the establishment of some type of constitutional court in the Belgian federation became unavoidable.

The development of the Court of Arbitration

The Constitutional Court of Belgium started out as a foreign element in Belgian law. As stated earlier, in the old Belgian unitary state, a leading principle of Belgian constitutional law has always been that the legislator was infallible. As in the Netherlands no court was allowed to question Parliament's view on the constitutionality of statutes. When Belgium broke away from the unitary state, it eventually saw itself forced to break away from this principle too.

[11] The most recent elections in June 2007 were no exception.

[12] By means of dissolution of Parliament, new elections, and a two thirds majority in both newly elected houses of the federal parliament *see* Art. 195 and 46 Belgian Constitution. Surprisingly the federal entities have no say in the process of reform.

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It must be remembered that the tensions in the country that started the process of federalisation also account for a certain mistrust in federal politics. To that end, it was decided that federal law would have no primacy over acts of the newly established federal entities. The different (ultimately nine) legislatures would enjoy formal equality. With the absence of any principle of primacy there was no rule of conflict. It was felt that in such circumstances the country needed an independent 'arbiter'.[13] A new court was instituted (effectively only in 1983) to guard the lines and limits between the different legislatures by testing legislative acts against one particular part of the Constitution: that relating to the distribution of competences to the nine different legislators. The original name of what is now the Constitutional Court of Belgium reflected this first function: '*Arbitragehof/Cour d'Arbitrage*'.

The Special Law of 1980 and its 'renvoi' to EC Law

The powers of constitutional review of this newly established court would be exclusive.[14] In its early days, the Special Law of 1980 formed the most important source of its 'bloc de constitutionnalité'. This set of rules of reference the Court of Arbitration had to police was therefore quite modest. It had no jurisdiction to guard over the rest of the Belgian Constitution, including its Title II on human rights. It could also not test statutes on compliance with EC law and international law. The latter function was exercised by the ordinary courts and the administrative courts (headed by the Court of Cassation and the Council of State respectively).[15]

Yet, already at this stage in the Court's development EC law provided it with the opportunity to make the most of this modest set of powers. It must be remembered that in 1980, with the establishment of the Regions in addition to the Communities, powers in the economic sphere were attributed to the Regions. Article 6 of the Special Law of 1980 refers to EC law in the sense that the Regions, when exercising their legislative powers, must respect the 'economic union (…) as established by (…) international treaties'.[16] This phrase is widely understood as

[13] For an excellent historic overview, *see* J. Velaers, *Van Arbitragehof tot Grondwettelijk Hof* (Antwerpen, Maklu 1990) p. 68.

[14] The exception are the ordinances adopted by the legislature of the Brussels Capital Region. These are tested on their constitutionality either by ordinary courts (in as far as parts of the Belgian Constitution are concernend on which the Court is (still) not competent) or by the Court (when it is competent). With the gradual expansion of the competences of the Court, those of the ordinary courts (including the Council of State) to control Brussels' laws therefore 'shrink', *see also* B. Renauld, 'La Cour d'Arbitrage depuis 2003, confirmation de compétences, nouveautés de procédure', in *La Cour d'Arbitrage, un juge comme les autres?* (Liège, Éditions du Jeune Barreau de Liège 2004) p. 30.

[15] This has been accepted by the Court of Cassation in its Franco-Suisse *Le Ski* judgment of 1971, *see* Cas. 27 May 1971, Pas., I, 886.

[16] *See* Art. 6(1)(VI)(3) of the Special Law of 1980 on the Reform of the Institutions.

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incorporating EC law into the chapter of Belgian constitutional law that deals with the attribution of competences. This *renvoi* already led to a considerable amount of case-law in which the Constitutional Court interpreted and applied EC law. For even though testing Belgian law for its compliance with EC law as such was officially beyond its powers, the Court could do so in the process of judging whether a Region stayed within the boundaries of its powers. A good example is the *Flemish Ecotax* case in which the Court had to rule on a Flemish Decree on environmental levies. The question was whether it violated the constitutionally guaranteed distribution of competences by introducing *vis-à-vis* the other Regions 'charges having equivalent effect as import/export duties'. The Court first stated that:

> The Belgian State is based upon the notion of an economic and monetary union, characterised by a common market and a common currency. The Economic union implies a free movement of goods and production factors between the different parts of the Belgian state.[17]

When interpreting this phrase the Constitutional Court referred explicitly to Article 25 EC and the interpretations given thereto by the ECJ:

> It must be established whether the Flemish Ecotax is to be regarded as a charge having equivalent effect to a customs duty. To that end, this court may refer *mutatis mutandis* to the definition provided by the Court of Justice of the European Communities.[18]

Furthermore, this incorporation by reference is not confined to primary EC law. This *renvoi* can also result in EC directives becoming part of Belgian constitutional law (for instance when they concern public procurement) and in that capacity justiciable before the Constitutional Court.[19]

Although this mechanism indirectly makes EC law norms applicable in cases concerning the division of competences in Belgium, it also incorporates their limitations. To be more specific, also before the Constitutional Court the 'internal situation' may be an obstacle to invoking EC law successfully. Thus, when a number of Flemish crematoria were challenging before the Constitutional Court a Flemish Decree that prevented the private running of crematoria, they were not

[17] Case 55/96 of the Constitutional Court of 15 Oct. 1996, par. B.4.2.5. and B.4.2.7 (translation by the author).

[18] *See* Case 55/96 of the Constitutional Court of 15 Oct. 1996, par. B.4.2.5. In fact, the case showed resemblance to that of C-213/96 *Autokumpu Oy* [1998] ECR I-1777.

[19] *See* Case 6/96, of the Constitutional Court of 18 Jan. 1996. *See also* Chr. Vanderveeren, et al., *De economische en monetaire unie in de Belgische staatshervorming, juridische en economische aspecten* (Antwerpen, Maklu 1988) p. 101.

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successful in claiming that the Decree violated the division of powers because it violated Articles 43 and 49 EC (freedom of establishment and to provide services). The Court stated that:

> as the companies are incorporated under Belgian law, domiciled in Belgium and challenge a Flemish Decree, all legal relations are within the internal sphere of a Member State and therefore the plaintiffs cannot invoke Articles 43 and 49 EC.[20]

In conclusion, the 'Special legislator' when it adopted the Special Law of 1980 had given the Court of Arbitration / Constitutional Court an opportunity to indirectly apply EC law. The latter in its turn has welcomed that opportunity from the start.

Une cour de plus en plus constitutionnelle'[21]

Very soon after the creation of the Court of Arbitration, it became evident that merely policing the powers scattered over the nine Belgian legislatures would be insufficient to maintain the legal balance and coherence of the country. Within the boundaries of the competences allotted to a legislator, there might be temptations to discriminate between the Flemish and the Walloons. Safeguards had to be built into the system of constitutional review in order to protect the Belgians against their several legislators (discriminating without just cause between the citizens). Thus, as from 1989 the Constitutional Court was also empowered to watch over the application of two vital Articles from the Belgian Constitution: Articles 10 and 11 of the Belgian Constitution on equality and non-discrimination.[22] They read as follows:

> Article 10 of the Belgian Constitution:
> There are no class distinctions in the State
> Belgians are equal before the law (…)[23]

[20] Case 132/2005 of the Constitutional Court of 19 July 2005, para. B.6.3. They also unsuccessfully invoked Art. 86(2) EC. It must be noted however that the *Flemish Ecotax* case also dealt with an internal situation. The notion of a Belgian economic union thus draws more heavily on free movement of goods then on free movement of services and establishment.

[21] Borrowed from R. Ergec, 'Une Cour de plus en plus constitutionnelle, propos sur la loi spéciale du 9 mars 2003 sur la cour d'arbitrage', *C.D.P.K.* (2003), p. 623.

[22] It was also empowered to test the compliance with Art. 24 Belgian Constitution (on educational freedoms). At the time Arts. 10, 11 and 24 Belgian Constitution were regards as one package.

[23] Although the Arts. 10 and 11 seem restricted to Belgians, through Art. 191 of the Belgian Constitution they are extended to all foreigners.

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> Article 11 of the Belgian Constitution:
> Enjoyment of the rights and freedoms recognized for Belgians[24] should be ensured without discrimination. To this end, laws and decrees guarantee notably the rights and freedoms of ideological and philosophical minorities.

Officially, the Court's competences were restricted to these Articles of the Constitution. That seems a very modest addition to its earlier *bloc de constitutionnalité* regarding the distribution of powers. Yet, the Constitutional Court has used Articles 10 and 11 of the Belgian Constitution to their fullest potential. Under this jurisprudence, these two articles have opened a whole array of norms that could be invoked before the constitutional court. Through the gate of the 'rights and freedoms' other parts of the Constitution as well as international treaties to which Belgium adheres enter the Belgian *bloc de constitutionnalité*. Articles 10 and 11 of the Belgian Constitution serve as a *passe partout* through which the Court could rule on the compliance of parliamentary law with all conceivable rights laid down in written Belgian constitutional law (Title II of the written Belgian Constitution), unwritten Belgian Constitutional law,[25] international law (in particular the ECHR) and in European law.

As all these norms had to be linked to Articles 10 and 11 of the Belgian Constitution, a sometimes painstaking exercise of connecting the violation of EC law (and other norms of international or domestic origin) to the violation of the equality/non-discrimination provisions is necessary. In most cases such an exercise is fruitful as a result of the Court's leniency in accepting conjunctions of domestic, international and European law with a plea regarding discrimination. For an outsider, these conjunctions are not always self-evident, in fact almost seem like *ad hoc* 'concoctions'. Yet the (former) Court of Arbitration adopted a very broad view on the concept of non-discrimination and thereby allowed itself to become the full-fledged constitutional court that it is today.[26]

That is not to say that there are no limits to invoking discrimination in combination with other norms such as those laid down in EC law. An example is case 136/2000 *Maximum Doctor Fees*, in which a Belgian syndicate of doctors challenged the maximization of doctor's fees as laid down by a federal law, *inter alia*, by reference to Articles 10 and 11 of the Belgian Constitution combined with EC competition law (Article 81 EC). The Constitutional Court however considered

[24] Again, *see* the previous note.

[25] *See* for an example of the latter: Case 6/95 of the Court of Arbitration of 2 Feb. 1995 (concerning the freedom of trade which is not laid down in Title II Belgian Constitution).

[26] Although the 'Special legislature' and the 'Belgian Constituent' did not intend Arts. 10 an 11 Belgian Constitution to be so broadly applied, *see* M. Uyttendaele, *Précis de droit constitutionnel belge* (Bruylant, Brussels 2005) p. 586-587.

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it to be unclear in what way the violation of EC competition law by the federal statute would take place in a discriminating fashion. It stated:

> The Court would be exceeding its authority, as granted to it by the Constitution, if it were to consider every violation of Community law a violation of the principle of equality.[27]

In a case like this, ordinary courts must provide the doctor's syndicate with the required remedy. They have the general power to review Belgian acts against EC law without the necessity of combining them with the constitutional guarantees for equality and non-discrimination (Articles 10 and 11 of the Belgian Constitution). Yet, as will be explained below, recourse to ordinary courts may be less appealing to private plaintiffs than turning directly to the Constitutional Court.

The 'Merger' between constitutional norms and European norms

It follows that, although a direct test against EC law is excluded,[28] the Constitutional Court could perform such a test indirectly through Articles 10 and 11 of the Belgian Constitution. Next to the already existing possibility to test Belgian statutes on EC law in the context of the distribution of competences (*see* above), the Court had obtained a position where it could often test statutes with norms of European and international origin. In litigation practice before the Constitutional Court, parties often invoke norms from both the Belgian Constitution as well as from EC or international origin. That rapidly led to interpretation issues before the Constitutional Court in case these norms appeared to be 'the same'. Was an international/European norm to be interpreted differently or 'parallel' to a Belgian Constitutional norm?

From the start the leading jurisprudence of the Constitutional Court on this issue has been that different interpretations must be avoided. What is more, politicians have explicitly endorsed this development. Exemplary in this regard is a statement of former prime minister Wilfried Martens in 1989 when the extensions of the Constitutional Court's powers were discussed in the Belgian Senate:

> If Belgium desires a true constitutional court, it will have to be on the basis of a symbiosis between the European and the national frame of reference.[29]

[27] *See* Case 136/2000 *Maximum Doctors Fees*, of 21 Dec. 2000, para. B.50. The Court there also declined to refer a preliminary question to the ECJ.

[28] Plans to grant the Constitutional Court the power to test statutes directly against EC law never made it into law, *see* Velaers, *supra* n. 13, p. 252.

[29] Parl. St., Senaat, 1988-1989, nr. 483/2, 7-8. *See also* Velaers, *supra* n. 13, p. 250.

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Thus, rules of Belgian constitutional law (Articles 10 and 11 of the Belgian Constitution) may be 'merged' with rules emanating from EC/EU rule. This 'merger' can even be implicit. At one point, the Court had to deal with a question concerning the compatibility of a legislative act with Articles 12 and 14 of the Belgian Constitution (concerning the principle of legality in criminal law). After it had ruled that the statute was legal, it was in a second, subsequent, case asked to rule on that same statute's compatibility with Article 7 ECHR (concerning the same principle). The Court stated that as it previously ruled on the fundamental rights in the Belgian Constitution, it must be presumed that it simultaneously (implicitly) took into account the compatibility with ECHR provisions that are 'analogous'.[30]

In fact, when EC law is invoked in conjunction with Articles 10 and 11 of the Belgian Constitution, the matter is often facilitated if the EC rule is itself based upon notions of equality and non-discrimination. Thus, when in the *Social Participation* case, the Ligue des droits de l'homme challenged before the Constitutional Court federal legislation that extended a right to 'social participation' to EU citizens working in Belgium but not to other EU citizens legally residing on Belgian soil, the Court was quick to accept that this violated Articles 12 and 17 EC (prohibition to discriminate EU citizens on the basis of their nationality) *resulting in* a violation of Articles 10 and 11 of the Belgian Constitution.[31]

This 'merger' at least partly explains why the Court holds the record for being the constitutional court with the largest number of preliminary references on its name. It is this interrelationship between EC law and Articles 10 and 11 of the Belgian Constitution that obviously induces the Court to refer preliminary questions to the ECJ.

The Constitutional Court of Belgium and EC law after 9 March 2003

The next significant change of the legal framework in which the Constitutional Court operates was brought about by the Special Law of 9 March 2003. The 'special legislature' (acting with double majority vote, *see* above) had curtailed the powers of the Constitutional Court. In the interest of guaranteeing the stability of Belgium's international relations, the Court is no longer to review the constitutionality of acts approving 'constituent treaties' relating to the EU or the ECHR.[32] In the past, the legislator has indeed been shown not to shun the adoption of an unconstitutional act to ratify such a treaty. The Treaty of Maastricht has been

[30] *See* Case 136/2004 of the Constitutional Court of 22 July 2004, para. B.5.3.

[31] Case 5/2004 of the Constitutional Court of 14 Jan. 2004, para. B.5.4.

[32] Now in Art. 26 of the Special Law of 1989 on the Court of Arbitration, as modified by the Special Law of 2003.

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approved even though this Treaty, contrary to constitutional law at the time, granted electoral rights to EU citizens in municipal elections.[33]

As to the exact scope of this new restriction (what are 'constituent treaties') there is some discussion.[34] There is consensus that (the Acts approving) the Schengen Treaty and its subsequent modifying treaties would not have been covered by the restriction.[35] But the debate persists as to the possible differentiation within one treaty between its 'constitutive' and 'non-constitutive provisions' or as to whether laws approving accession treaties of new EU member states are now excluded from the competence of the Constitutional Court.[36]

But besides this curtailment, the Special Law of 2003 also further improved the position of the Constitutional Court. It has formally extended the Court's powers to test laws against the entire Title II of the Belgium Constitution that contains the 'national' human rights catalogue as well as against Articles 170 ('no taxation without representation'), 172 (equality in fiscal matters) and 191 of the Belgian Constitution (extension of fundamental rights protection to foreigners).[37] Articles 10 and 11 are a part of Title II (Articles 8 to 32 of the Belgian Constitution).

Has the 2003 amendment of the Constitution[38] diminished the importance of international and European law for the Constitutional Court? The answer to that question must be negative for several reasons. First, there are still norms not covered by this extension of the Court's norms of reference (human rights other than those in Title II). For those norms, the Articles 10 and 11 of the Belgian Constitution remain important legal portals to international instruments. Secondly, the Constitutional Court maintains its tradition of 'merging' national constitutional norms with European and international law. Thirdly, there is still the reference to European law in the rules on the powers of the Regions (in the Special Law of 1980). Furthermore, although this relates to EC/EU law in a more indirect manner, the formal extension of the Court's competences in 2003 has no effect on the existing possibility (and necessity) to review parts of the Belgian

[33] *See* presently Art. 19 EC. Constitutional law at the time (Art. 8 Belgian Constitution (old) required the Belgian nationality). *See also* P. Popeliers, 'Constitutionele toetsing van wetgeving in België', *RegelMaat* (2006), p. 119.

[34] J.-Th. Debry, 'Les questions préjudicielles après la loi spéciale du 9 mars 2003', in *La Cour d'Arbitrage, un juge comme les autres?* (Liège, Éditions du Jeune Barreau de Liège 2004) p. 30.

[35] Doc. Sénat, 2001-2002, No. 897/6, p. 224.

[36] *See* Debry, *supra* n. 34, p. 64.

[37] As many constitutional changes in Belgium, this amendment took place by a special law (or 'Double Majority Law') as provided for in Art. 142 Belgian Constitution. As to Art. 191 Belgian Constitution, the Court already in its older case-law extended its protection to non-Belgians.

[38] The word 'constitution' is here used in a substantive sense, the formal Constitution does not have to be changed to upgrade the powers of the Constitutional Court, a 'special law' suffices, *see* Art. 142 Belgian Constitution.

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Constitution other than its human rights chapter through Articles 10 and 11 of the Belgian Constitution. This last aspect of the Court's jurisdiction explains its first preliminary question to the ECJ in *Advocaten voor de Wereld*.

EU law and Belgian Trias Politica: explaining the Advocaten voor de Wereld case

It will be remembered that the first question the Constitutional Court asked in *Advocaten voor de Wereld* concerned the competences of the EU legislature when it adopted the EAW Framework Decision. Or, to be more precise, more than competences it was a question of form: was the EAW not to be established by means of a Third Pillar treaty as provided for by Article 34(2)(d)? Before the Constitutional Court, *Advocaten voor de Wereld* invoked in this context three provisions that deal with democratic procedure: the safeguarding of the exclusive competence of the federal legislature to adopt federal law (Article 36 of the Belgian Constitution), the rule that the Federal Government ('The King') is to conclude federal treaties (Article 167 of the Belgian Constitution) and the rule that both Houses of the Federal Parliament are to be kept informed on all (amendments to) treaties supplementing the EU and EC treaties (including a Third Pillar-treaty on the EAW; Article 168 of the Belgian Constitution).

This part of *Advocaten voor de Wereld* must be understood as follows. The interaction between the EU Treaty and Belgian constitutional law boils down to an alleged violation of the Belgian constitutional arrangements on treaty-making. This renders the question of the legality of the EAW Framework Decision a relevant question for the Constitutional Court.[39] The relationship between an EU act and national constitutional law is 'exposed' if the already incorporated EU act would prove invalid.

This author has elsewhere carried out a legal analysis that led to the conclusion that the established invalidity of an EC Directive as such leads to the invalidity of the national implementing act only if that follows from the latter's national (constitutional) context. It is an obvious next step to expand that conclusion to EU framework decisions.[40] It is thus for all courts to expose the relationship between their national law and the EC/EU instrument they incorporate before referring any validity question to the ECJ. Translated to Belgian law this means that *if* the EAW (by having been laid down in a framework decision instead of a treaty) has illegally violated / compromised the *trias politica* constellation in the Belgian con-

[39] Belgium has accepted the jurisdiction of the ECJ in the Third Pillar in the variety of Art. 35(3)(b) EU (all courts can refer, a court of highest instance must refer), *see OJEC* 1999, L 114/56.

[40] *See* T.A.J.A. Vandamme, *The Invalid Directive, the Legal Authority of a Union Act Requiring Domestic Lawmaking* (Groningen, Europa Law Publishing 2005) p. 153.

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stitutional order, then indeed its invalidity under EU law might result in the unconstitutionality of the federal 'EAW law'.

This interaction between EU law and Belgian constitutional law is not changed in any way by the Special Law of March 2003 mentioned above. That extension of the Court's powers did (still) not provide it with a complete jurisdiction. The part of the Constitution dealing with *trias politica* is not among the Articles that are *directly* justiciable before the Constitutional Court. Thus, *Advocaten voor de Wereld* had to resort to the well-known legal formula of invoking the Articles 10 and 11 of the Belgian Constitution in conjunction with the provisions dealing with the treaty-making powers of the Belgian federation. The reasoning of *Advocaten voor de Wereld* was thus not only that these federal competences were violated if the EAW enters Belgian law trough an unlawful instrument (a framework decision) but also that consequently such a negation of the Belgian *trias politica* constellation amounted to a discrimination of Belgian citizens.[41]

The 'merger' of norms in the 'Advocaten voor de Wereld' and 'Money Laundering' cases

The 'merger' of international or European norms with parallel Belgian constitutional norms explains the second preliminary question of the Constitutional Court in *Advocaten voor de Wereld* as well as its preliminary question in the *Money Laundering* case. Both questions deal with human rights and the validity of EU/EC law. Even though both cases date from after 9 March 2003 (and so the Constitutional Court was already a court competent to guarantee the complete set of human rights provisions in the Belgian Constitution), the preliminary references to the ECJ were deemed relevant by the Court on account of this established tradition of merging norms of different origin.

In *Advocaten voor de Wereld* the federal law introducing the EAW was challenged on account of the unjustifiable discrimination it was said to entail. The ground for this challenge was the differentiation the EAW made between crimes for which the double criminality is abrogated and those for which this is maintained. To this end, *Advocaten voor de Wereld* invoked Articles 10 and 11 of the Belgian Constitution in their own right. The Court confirmed that there is indeed a differentiation made by the federal Act (and of course the underlying framework decision).[42] The plaintiff's second ground, strongly related to the first, was

[41] *See* para. A3.3. of the ruling of the Constitutional Court of 13 July 2005. It is not the first case in which Arts. 10 and 11 Belgian Constitution are used in conjunction with the provisions on the functioning of the different state powers, *see* for instance Case 90/94 of 22 Dec. 1994. *See also* K. Rimanque, *De Grondwet toegelicht, gewikt en gewogen* (Antwerpen, Intersentia 2005) p. 316-317.

[42] *See* para. B.7.3 of the ruling of the Constitutional Court in *Advocaten voor de Wereld.*

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that the principle of legality in criminal law was violated because the list of crimes for which there is no longer a required double incrimination is vague and imprecise. To this end, the plaintiffs invoked Article 14 of the Belgian Constitution (legality in criminal law) and 7 ECHR (principle of legality), both in conjunction with Articles 10 and 11 of the Belgian Constitution. The vagueness of the provisions was said to result in a disparate application of the EAW rules by the different judicial authorities in Belgium. One may illuminate this issue by providing a typical Belgian example. A court in Veurne (Flanders) might consider a certain crime committed in Poland to be covered by one of the categories described in Article 2(2) of the EAW Framework Decision (no double incrimination required) whereas a court in Namur (Wallonia) might consider the same crime, also committed in Poland, to be outside one of these categorical exceptions from the double incrimination requirement.[43]

The Constitutional Court translated these national constitutional issues into a European constitutional issue. It stated that non-discrimination and equal treatment (Articles 10 and 11 of the Belgian Constitution) as well as the principles of legality and legal certainty (14 of the Belgian Constitution) are Belgian constitutional principles but also general principles of Community law. By then reiterating that, although initially developed in an EC context, the EU is to respect these principles as well (6(2) EU) the Court completes its translation of (typical) Belgian constitutional problems into an EU institutional problem.[44] 'Belgian human rights' and 'EU human rights' are merged for the purposes of reviewing the validity of the EAW Framework Decision.

In the *Money Laundering* case (referred to the ECJ by the Constitutional Court on the same day as *Advocaten voor de Wereld*),[45] this identification seems to have achieved even fuller perfection. Several professional organisations for practising lawyers in Belgium all challenged a federal statute designed to implement Directive 2001/97/EC on money laundering into Belgian law. The problem was that the Directive effectively extended the scope of the previously existing duties to inform the authorities of suspect financial (money laundering) transactions to lawyers. The lawyer's organisations claimed that such extension of this duty amounts to a violation of Articles 10 and 11 of the Belgian Constitution in conjunction with Articles 6 to 8 ECHR, Articles 12 to 14 of the Belgian Constitution and

[43] The example on purpose gives a inter-Community twist to the problem. Yet, non-discrimination is of course a legal issue that can also be invoked between the Flemish *inter se* of the Walloons *inter se*.

[44] *See* paras. B.9 and B.10 of the ruling of the Constitutional Court in *Advocaten voor de Wereld*.

[45] *See* Case 126/2005 of the Constitutional Court of 13 July 2005 leading to Case 305/05, *Ordre des barreaux francophones et germanophone e.a.* v. *Conseil des Ministres*, Judgment of the Court of 26 June 2007, n.y.r.

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Article 47 and 48 of the Charter of Fundamental Rights of the European Union (all dealing with the right to a fair trail, the right to privacy and the principle of legality in criminal matters).

Even though Articles 12 and 14 Belgian Constitution enjoy direct applicability before the Constitutional Court since 2003, the private plaintiffs invoke also the overlapping norms in international and European law (assuming for the moment that the reference to the Charter is to be understood as a reference to the general principles of Community law). The Court stated that 'any constitutional review of the federal law pre-necessitates review by the ECJ of the Money Laundering Directive.' It then proceeded to refer a validity question to the ECJ in which it 'merged' Belgian Constitutional norms with the general principles of Community law.[46]

This interaction between national constitutional law and EU law shows a openness that is remarkable, especially for a national constitutional court. EC/EU law does not form part of the 'bloc de constitutionnalité' at the disposal of the Court (unless in conjunction with Articles 10 and 11 of the Belgian Constitution or as a result of Article 6 of the Special Law of 1980, *see* above), nor is Belgian constitutional law part of the 'bloc de constitutionnalité' at the disposal of the ECJ. Yet the Constitutional Court respects these dividing lines and resorts to a merger of the two issues (Belgian and European) by rephrasing a Belgian legal issue in terms of the general principles of Community law. Remarkable as all this may seem, the Court follows here a tradition it had set already years earlier. It will therefore probably be much less surprising to Belgian lawyers than to their foreign colleagues.

The further 'Europeanisation' of the division of competences: the Flemish Welfare Aid case

As stated above, the oldest function of the Constitutional Court is to guarantee that no Belgian legislature usurps the competences of any of the other legislators. That function is to some extent already 'Europeanised' from the outset as Article 6 of the Special Law of 1980 refers to EC law as part of the framework in which the Regions must function and which the Constitutional Court can sanction. One notices that the relevant provisions of the Special Law of 1980 mention the Regions, and not the Communities. Yet also the latter can violate EC law. The Court will have to apply EC law to the Communities by resorting to the well-known incorporation of EC law through the *passe partout* of Articles 10 and 11 of the Belgian Constitution. This forms the background to the *Flemish Welfare Aid*

[46] *See* para. B.10. and B.11 of Case 126/2005 of the Constitutional Court of 13 July 2005.

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case,[47] at the time of writing still pending before the ECJ. This time however, 'merging' European law (on free movement) with national constitutional law (Articles 10 and 11 of the Belgian Constitution) may have very far-reaching consequences for the Belgian Federation. The Court saw itself compelled to refer questions on how an EC instrument could be used to challenge the rules relating to the distribution of powers between the different Belgian entities.

The case concerns Regulation 1408/71 on the co-ordination of social security schemes. It was used by the Walloon Government to challenge a decree of the Flemish Community. The Flemish decree established a welfare aid scheme that provides non-medical help to those unable to take care of their own daily needs. The Communities of the German-speaking and the French-speaking Belgians had not established a similar system. The original version of the Decree (of 30 March 1999) stated as a prerequisite that the beneficiary has to reside on the territory of the Flemish Region or in the Brussels-Capital Region (where one can decide to be affiliated with the institutions of the Flemish Community Commission, *see* above). The European Commission had of course complained about the residence requirement and in answer thereto the Flemish Community had extended the applicability of the legal regime to EU nationals working in Flanders or Brussels but residing in another member state. However, the French-speaking Community took things one step further. If EC law sufficed to force a Belgian legislator (*in casu* the Flemish Community) to open up its welfare aid scheme to EU nationals living abroad, should it then not, in combination with Articles 10 and 11 of the Belgian Constitution, also be forced to open it up even further to *all Belgians* who work in Flanders?

Advocate-General Sharpston gives a nice example of a French national wanting to work in Flanders close to the language border with Wallonia. He will want to settle there as his children will be able to continue their education in French. Yet, he will not then be covered by the Flemish scheme. Might this induce him not to take on the position in Flanders (and not make use of his right as guaranteed under Article 39 EC)?[48] To the benefit of the Walloon Region, Advocate-General Sharpston and the Commission agree that the point of reference must be the '*lex loci laboris*'. Everybody working in the territory of Flanders is to be covered by Flemish legislation. This is in line with the rule as laid down in Regulation 1408/71 (Article 13).[49] The competent 'state' in terms of Regulation 1408/71

[47] C-212/06 *Gouvernement de la Communauté Française et Gouvernement Wallon* v. *Vlaamse Regering* (pending). The Opinion of Advocate-General Sharpston in this case was published on 28 June 2007.

[48] She reiterates that it is not necessary for a measure to affect only non-nationals negatively in order to be indirectly discriminating, *see* point 92 of the opinion of A-G Sharpston, with reference to C-281/98 *Angonese* and C-388/01 *Commission* v. *Italy*.

[49] *See* points 84/85 of the Opinion of Advocate-General Sharpston.

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must then be read as including also the federal entities within a state (and on which territory one works).

What makes the reference of the Constitutional Court in the *Flemish Welfare Aid* case remarkable is that it undermines one of the very basic principles of Belgian constitutional law. It must be remembered that the Belgian constitutional order is organised on strict territorial lines (with the exception of Brussels). The different legislatures in Belgium of course adopt different laws that inevitably discriminate between Belgians according to the jurisdiction within which they reside. Such discrimination is a logical consequence of federalisation itself. This explains the position the Flemish Government takes. It states that, even if it wanted to, it had no competence to expand its legislation to persons (irrespective of their nationality) who are domiciled in other parts of the Belgian Federation.[50] Therefore such discrimination can not be challenged purely by reference to the national norms of Articles 10 and 11 of the Belgian Constitution. But what happens if the 'merger' of these national norms with EC norms means that the three Belgian Communities cannot treat each other's inhabitants differently anymore? Clearly, if the ECJ decides the issue in favour of the French-speaking Community, it would follow that Articles 10/11 of the Belgian Constitution, through their merger with EC law, will conflict with the present system of the distribution of competences. Such a new interpretation of Articles 10 and 11 of the Belgian Constitution might help certain parties in the system to use EC law in order to achieve things that would otherwise not be possible. The *Flemish Welfare Aid* case may present a new line of case-law that can bring about an EC law-driven constitutional change without the painstakingly difficult political process of Belgian constitutional amendment.

Political appointment and political composition of the Constitutional Court

If one is to contemplate the 'openness' of the Constitutional Court in relation to EC and EU law, one cannot do so without paying attention to the composition of the Court. The relevant rules are quite remarkable and they must be appreciated against the background of the fading principle of the infallible legislature. One notices that the process of federalisation of Belgium started in 1970 with the

[50] *See* para. B.9.8 of the ruling of the Constitutional Court. The incongruence is that, under EC law pressure, Flanders has in a way already violated this territoriality-rule for the benefit of EU nationals living in another member state. The Court therefore had to confirm first of all that this aspect of the Flemish Decree (extending the decree to EU Citizens living outside of Belgium) did not violate the distribution of competences in Belgium. *See also* point 99 of the Opinion of Advocate-General Sharpston for this case.

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institution of the Communities but the Constitutional Court became operational only in 1983. Long discussions preceded its establishment and they show how difficult it is for a country to move away from an infallible legislature to a constitutional court. Many feared a *gouvernement des juges*.

To sweeten the pill for those parliamentarians who had difficulties giving up their status as constitutional guarantor, it was decided to include former politicians in the Constitutional Court.[51] Of the twelve judges of the Court, six are to be former Members of Parliament whereas that remaining six must have a legal-professional background.[52] Furthermore, six judges must be from the 'Flemish Language Group' and the other six from the 'French Language Group'.[53]

An intriguing question is whether the Court's composition affects its functioning and if so, in what way. Some indeed describe the Constitutional Court as pragmatic and point to its composition as an explanatory factor. In the Senate it was stated that:

> This formula responds to the concern that there must be an equilibrium between the interpretation of abstract legal rules and practice. It will help to guarantee that the interpretation of the Constitution will be sufficiently dynamic (translation by author).[54]

Indeed, when one considers how the Court incorporates international and European norms into its '*bloc de constitutionnalité*' and how it 'merges' them with Belgian norms, it is hard to deny it a certain dynamism.

Procedural changes: from a restricted to an open court

Finally, certain procedural aspects of the Court should be highlighted for a better understanding of its role on the European stage. Procedural law has developed quite dramatically over time. From 1983 to 1989 the court had as its exclusive purpose the protection of the interests (competences) of the different entities as laid down in the Constitution and the Special Law of 1980. Consequently only institutional litigants (the federal government, the governments of the Regions and of the Communities) could start an action before the Constitutional Court.[55]

[51] *See* Velaers, *supra* n. 13, p. 412-414.

[52] With at least 5 years of parliamentary experience. These years may have been served in either chamber of the Federal Parliament or in one of the parliaments of the federal entities, *see* Art. 34(2) Special Law on the Court of Arbitration.

[53] Furthermore, it is prescribed that at least one of these 12 judges knows the German language.

[54] *See* Uyttendaele, *supra* n. 26, p. 562.

[55] Also the different parliamentary assemblies were not yet competent to address the Constitutional Court. Since 1989, they can address the Court if that is the wish of two-thirds of their members. Unlike those in Spain and Germany, minorities in the different Belgian parliaments are not protected by a possible recourse to the Constitutional Court.

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Ordinary citizens were not expected to have any interest in the sanctioning of the rules on the distribution of powers.[56] However, when the Court's powers were enlarged in 1989 with the addition of Articles 10, 11 and 24 of the Belgian Constitution, the role of the private plaintiff also changed.

First of all, a preliminary reference procedure was introduced to all ordinary courts. They either can or must refer a validity question to the Constitutional Court under a system that resembles to some extent the EC system of preliminary references in Article 234 EC. All Belgian courts before which a question on the constitutionality of a parliamentary Act is raised must refer the question to the Constitutional Court. This duty however, is subject to an *acte clair* type of exception (if the Act is very blatantly valid) and to an *acte eclairé* type of exception (if the Court had already ruled on the issue).[57] In case the constitutional issue before an ordinary court has an EC law component the procedure can get rather complicated. If for example, an ordinary court refers a preliminary question to the ECJ on an interpretation issue, but at the same time rephrases that question as an issue on the Belgian distribution of competences (*see* above) it may or must refer the question to the Constitutional Court too. Velaers submits that, to avoid any conflict of interpretation between the Constitutional Court and the ECJ, the former must await the answer of the latter.[58]

Apart from the Belgian preliminary reference procedure, also a direct action was introduced for private plaintiffs.[59] Apart from deadlines, the only restriction here is that private parties are able to show an 'interest' in the annulment of a statute. The Constitutional Court again strengthened its position by interpreting very liberally the provisions on *locus standi* of private plaintiffs. Short of an *action popularis*, the Court accepts most pleas on 'affected interests' complaints thus practically creating a Belgian version of the German 'Verfassungsbeschwerde'.[60]

One should keep this in mind when reading the *Advocaten voor de Wereld* case as it demonstrates the leniency of the Court on *locus standi*. It may be recalled that the plaintiff is a non-profit organisation which had set itself the very ambitious goal of fighting underdevelopment and poverty, furthering the rule of law, human rights, and the defence of the rights of the underprivileged. The Court first reiterated that the goal of an association must have a 'certain specificity' that distin-

[56] *See* Popeliers, *supra* n. 33, p. 117.

[57] Furthermore, the ordinary court need not refer the question when the validity question is not relevant to resolve the dispute at hand. There is also an exception for cases of incompetence of the ordinary court, *see* Art. 26(2) of the Special Law on the Court of Arbitration of 1989 (as amended in 2003).

[58] *See* Velaers, *supra* n. 13, p. 257.

[59] As in EC law, the legal consequences of an annulment in direct action and a declaration of invalidity in a preliminary reference differ.

[60] The Court has drawn on pre-existing case-law of the Belgian Council of State that operates with a similar criterion of 'interest', *see* Velaers *supra* n. 13, p. 280.

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guishes it from the public interest at large (so that its action does not amount to an *actio popularis*). Yet, it then accepted that the aim of *Advocaten voor de Wereld* was potentially affected by the federal Act that introduced the EAW into Belgian law. Consequently the plaintiff had an 'interest' in annulling the federal Act on the EAW, in itself proof of the accessibility of the Constitutional Court to (associations of) individuals.[61]

In view of its accessibility for direct actions from private plaintiffs, the Constitutional Court can be an attractive court for individuals who want to contest the constitutionality of Belgian legislative Acts. The alternative of the preliminary reference procedure may be more costly, time-consuming and risky than a direct recourse to the Constitutional Court.[62] The readiness of the Court to include EC law in its *bloc de constitutionnalité* combined with its broad acceptance of an 'interest' will probably also in the future guarantee that it is a court that has many dealings with EC law, including EC-EU law validity issues as in *Money Laundering* and in *Advocaten voor de Wereld*.

Conclusions

The openness of the Constitutional Court of Belgium displayed by the mere fact that it poses preliminary (validity) questions to the ECJ in cases such as *Advocaten voor de Wereld*, *Money Laundering* and *Flemish Welfare Aid* is best explained by its specific constitutional-historical context. As opposed to many of its counterparts in other member states, the Constitutional Court (formerly: 'Court of Arbitration') was introduced as an arbiter, but grew into a full-fledged constitutional court.

This development was in part stimulated by the Belgian Constituent and the Belgian 'Special Legislator', but to a large extent it was also an achievement of the Court *proprio motu*. It interpreted and applied the few powers it did have in its early days with eagerness and audacity. Especially the wide use of Articles 10 and 11 of the Belgian Constitution as portals has been ground breaking. This has allowed the Court to include EC and EU law (and other sources of public international law) in its set of norms of control. Consequently, external sources such as EC law have helped it to obtain its present position as a full-fledged constitutional court. This explains why the 'dialogue' between the Constitutional Court of Belgium and the ECJ is so different from that of other national constitutional courts, such as the German *Bundesverfassungsgericht* with the ECJ. When in such 'dia-

[61] *See* Para. B.1.3 and B.1.4. of the Ruling of the Constitutional Court of 13 July 2005. *See*, for a similar situation, Case 5/2004 of the Constitutional Court of 14 Jan. 2004 where the 'Ligue des droits de l'homme' got access to the Constitutional Court.

[62] Needless to say that for private plaintiffs who want to contest the validity of EC acts, this will sound all too familiar.

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logue' the national partner owes, to some extent, its existence to EC law it is not surprising that it adopts a position that is very open to EC-EU law. The process of 'merging' Belgian constitutional norms on fundamental rights with the general principles of EC law is the most fascinating aspect of this 'direct dialogue'.

The fact that politicians rather than professional judges make up 50% of the membership of the Constitutional Court is a factor that one should not ignore when appreciating this EC-mindedness, although it is hard to measure to what extent it affects the EC-mindedness.[63] Even so, what can be objectively established is that Belgian politicians have done nothing to stop the Court in its process of acquiring the status of a full constitutional court. On the contrary, they have condoned it. The constitutional amendment of March 2003 which rendered the entire catalogue of 'Belgian' fundamental rights justiciable is exemplary of this 'political approval' of the Court's position.

Other than as a sign of political approval the 2003 constitutional amendment is, however, of limited importance. It has not changed the fact that European law will remain an important factor in constitutional review by the Court also in future cases. Its references (after 2003) in *Advocaten voor de Wereld* and *Money Laundering* illustrate this. When the Constitutional Court (both before and after 2003) identifies its national constitutional frame of reference with 'analogous' provisions of EC law, it can refer validity questions on EC/EU Acts as a logical extension of its domestic constitutional role. As a consequence, the Court is likely to maintain its 'record' as the constitutional court with the highest number of preliminary references in the EU. Hereby it is also important to stress that the Court would no doubt have fewer occasions to refer preliminary questions if it were not fuelled by numerous, often creative, private actions from citizens. The great accessibility of the Court through its liberal position on *locus standi* is therefore of course also a factor of importance in this regard.

Although interesting for the outsider, the Belgians themselves seem not be too surprised with the record which their constitutional court has set. By contrast, the (still pending) reference in the *Flemish Welfare Aid* case will receive their fullest attention. It appears that the Constitutional Court does not hesitate to refer questions to the ECJ that may have a drastic impact on national constitutional law. In effect, it has put before the ECJ an issue where the interpretation of EC law will possibly result in an 'identical' interpretation of the Articles 10/11 of the Belgian Constitution that will affect the single most sensitive issue in Belgian politics: the division of powers between the three Communities. One need merely look at the grave political crisis that Belgium currently faces (and in which no agreement can be reached on a new federal Government that could also initiate amendments to the Special Law of 1980) to see that the ECJ will have to tread carefully in this matter.

[63] *See* Popeliers, *supra* n. 33, p. 126.

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