The Special Financing Law: Tax Competition and Fiscal Consolidation at the Heart of Belgium's Material Economic Constitution

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Introduction

The six constitutional reforms adopted between 1970 and 2011 transformed Belgium from a unitary state into a fully-fledged federal state. This complex federation shows many peculiarities. One of them is the coexistence of two types of federated entities covering distinct, yet partially overlapping, territories: the Communities and the Regions. The Belgian Federation is also structured around two main poles as a result of the linguistic divide between Dutch- and French-speakers. It is centrifugal as well, as an ever-growing body of competences is being devolved from the central – or, as we know it today, the "federal" – level to the federated entities.[1] Through these successive waves of State reforms, the Belgian Communities and Regions have acquired significant political, legal, and financial authority: according to Eurostat's most recent data, federated states (institutional sector S1312) managed 19.3% of the country's gross domestic product (GDP) in 2019. This represented almost 40% of the total resources collected by Belgian public authorities.[2] According to these sources, the federated entities' level of revenue is the highest of the whole continent, placing Belgium ahead of Spain (14.9% of GDP) and Germany (13.9% of GDP), well above the average for the European Union (EU 27: 5.7% of GDP) and the euro area (6.7% of GDP).

The financial framework for Belgium's federated entities is enshrined in the Special Law of 16 January 1989 on the financing of the Communities and the Regions (hereafter referred to as "the Special Financing Law" – SFL),[3] whose foundations are laid down in Articles 175 to 178 of the Belgian Constitution.

1 K. Deschouwer, *The Politics of Belgium: Governing a Divided Society*, Basingstoke, Palgrave Macmillan, 2012.

2 The European System of National and Regional Accounts (ESA) divides the general government sector (S13) into four distinct subsectors: central government (S1311), state government (S1312), local government (S1313), and social security funds (S1314).

3 Special Law of 16 January 1989 on the Financing of the Communities and Regions (*Official Gazette* – hereafter referred to as "O.G" – 17 January 1989).

 | DOI:10.1163/9789004519350_023

The SFL effectively sets the degree of financial and tax autonomy enjoyed by the component units of the Belgian Federation, as it defines how financial resources are allocated, both *vertically* (i.e. between the federal government and the federated entities) and *horizontally* (i.e. among the federated entities). It therefore represents the cornerstone of Belgium's fiscal federalism and, by extension, is an essential feature of the material economic Constitution in such a highly federalized country. This also explains the relevance of its study in the context of this book.[4]

This contribution goes beyond a purely technical explanation of what is often depicted as "an immensely complicated system".[5] It more generally aims to highlight the normative underpinnings of this intricate legislation, as well as their connection with some general public policy trends witnessed in recent decades. To do so, the SFL is examined through an innovative theoretical framework: the sociology of neoliberalism. This approach shows that the inherent complexity of this piece of legislation encompasses several features of widespread social transformation, such as the reinvention of (Belgian) public authorities in line with the so-called "imperatives" of responsibility, competition, and fiscal consolidation.[6]

The examination of Belgium's neoliberal reshaping through the lens of public finance will be conducted in three steps. First, I will briefly outline the sociological approach to neoliberalism that I will subsequently use to shed new light on economic reforms implemented in Belgium from the 1980s (1.). Second, as a case study, I will turn to a crucial part of Belgium's material economic Constitution, namely the Special Financing Law. A stylized historical overview of the federated entities' financial system will retrace the development of their main sources of income through time – including the increase of regional tax autonomy (2.). Third, I will stress three complementary neoliberal

4 This focus on the SFL as the internal economic constitution of the Belgian Federation provides essential, yet only partial, insight into the reshaping of Belgian public finance management mechanisms in the neoliberal era. A systematic analysis of this phenomenon implies a consideration of the cross effects of Belgium's fiscal federalism framework and European fiscal governance. For more details, see D. Piron, *Gouverner les régions par les finances publiques—Européanisation, fédéralisation et néolibéralisme en Belgique*, Brussels, Larcier, 2019.

5 A. Alen (ed.), *Treatise on Belgian Constitutional Law*, Deventer, Kluwer, 1992, p. 297.

6 For an application of this analytical lens to federal public accounting reforms in Belgium, see D. Piron and F. Legrand, « Néolibéralisme, New public management et comptabilité(s) : Trois décennies de réformes comptables en Belgique », in B. Bayenet, M. Bourgeois and P. Rion (eds.), *Comptabilité publique : État des lieux et mise en œuvre dans les différentes entités belges*, Brussels, Larcier, 2019, pp. 65–108.

features of the SFL to highlight the economic rationalization lying at the heart of Belgium's material economic Constitution. These three features are: the deployment of regional taxing powers to foster economic competitiveness and inter-regional competition; the emphasis put on fiscal consolidation; and the pivotal role assigned to two non-majoritarian institutions – the Public Sector Borrowing Requirements Section of the High Council of Finance and the Constitutional Court – as 'guardians' of this system's precarious balance (3.). Finally, the conclusion emphasizes the main findings.

1 The Emergence and Diffusion of Neoliberalism in Belgium

1.1 *Conceptualizing Neoliberalism: A Sociological Definition*

French philosopher Pierre Dardot and sociologist Christian Laval define neoliberalism as the "new way of the world",[7] whose fundamental strategic objective lies in expanding the realm of competition to all spheres of human existence.[8] The two main theoretical sources of inspiration for contemporary neoliberalism, German ordoliberalism and Austro-American neoliberalism, share different views when it comes to the limits of competition in the social sphere. While ordoliberals adopt an ambiguous position on this issue, American neoliberals tend to defend a more radical stance, which is that of "the unlimited generalisation of the form of the market"[9] within society. Public authorities are not spared from this "attempt to decipher traditionally non-economic social behaviour in economic terms".[10] Instead, expressing sharp criticism against governmental policy from the perspective of economic rationalism is used as a method to "reengineer the state from within".[11]

7 P. Dardot and C. Laval, *The New Way of the World: On Neoliberal Society*, London/New York, Verso, 2013.

8 Hayek conceives competition as a "spontaneous" selection process of "general and abstract rules of behaviour" and the market as a network of all available and existing knowledge (*catallaxis*). See F. Hayek, *Law, Legislation and Liberty — A New Statement of the Liberal Principles of Justice and Political Economy* (1982), London, Routledge, 2013.

9 M. Foucault, *The Birth of Biopolitics — Lectures at the Collège de France (1978–1979)*, New York, Palgrave, 2008, p. 243.

10 *Ibid*., p. 246.

11 R., Van Horn and P. Mirowski, « The Rise of the Chicago School of Economics and the Birth of Neoliberalism », in P. Mirowski and D. Plehwe (eds.), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective*, Cambridge (Ma.), Harvard University Press, 2009, pp. 139–178, esp. p. 163.

Reinventing the functioning of the state is a central feature of neoliberalism[12]. In practice, the state is not only neoliberals' main target of criticism, but also stands out as a central means to carry out the reforms they promote. In other words, it is both an agent and a subject of economic rationalization. The ambition of (American) neoliberals is therefore not so much a complete withdrawal of the state, but a radical reconfiguration of its purposes and modes of action. Neoliberals seek to boost public authorities' effectiveness (i.e., the ability to reach their strategic goals) and efficiency (i.e. the quest to optimize the use of their resources). According to them, submitting public bodies to the logic of competition that is applicable to private companies is the best way to do so, as it is supposed to work as a "lever of accountability".[13]

William Davies further specifies how public action is being reshaped in the neoliberal era. According to him, neoliberalism rests above all upon "the economic rationalization of politics and the state".[14] This perspective means that the state is expected to optimize the use of its resources, i.e. to set out the most efficient, competitive, or welfare-maximizing policies while at the same time keeping its costs under control. In areas where market principles cannot be applied directly, governments generally resort to economic evaluation to make public bodies act "as if" they were subject to market constraints.[15]

12 Ed.: see also *supra* in this volume the contributions in Section 2 – *The* (*Neo*)*liberal Recapture of the Concept*.

13 See the work of the "Virginia School" on Public Choice (J. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, Ann Arbor, University of Michigan Press, 1962 ; G. Brennan and J. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution*, Cambridge, Cambridge University Press, 1980 ; G. Brennan and J. Buchanan, *The Reason of Rules: Constitutional Political Economy,* Cambridge, Cambridge University Press, 1985), as well as that of the "Chicago School" on the new classical macroeconomics (F. E. Kydland and E. C. Prescott, « Rules Rather than Discretion: The Inconsistency of Optimal Plans », *Journal of Political Economy*, 1977, vol. 85, n°3, pp. 473–491; K. Rogoff, « The Optimal Degree of Commitment to an Intermediate Monetary Target », *Quarterly Journal of Economics*, 1985, vol. 100, pp. 1169-1189).

14 W. Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition*, Los Angeles, Sage, 2017, p. 27.

15 Ordoliberal Leonhard Miksch theorized this "*Als-Ob Politik*" by applying competition law to monopolies (L. Miksch, « Die Wirtschaftspolitik des Als-Ob », *Zeitschrift Für Die Gesamte Staatswissenschaft*, 1949, vol. 105, pp. 310–338). Ed.: see also *supra* in this volume F. Marty, « Évolution des politiques de concurrence en droit de l'UE : de la *Wettbewerbsordnung* ordolibérale à la *More Economic Approach* néolibérale ? », and C. Mongouachon, « Les difficultés d'une interprétation ordolibérale de la constitution micro-économique de l'Union européenne ».

To sum up, it can be argued that in practice the central consequence of neoliberalism on public authorities does not lie so much in the outright extension of the market through waves of liberalization and privatization, as in their growing submission into a logic of economic calculation. One of the most striking features of neoliberalism is to seek "the pursuit of the disenchantment of politics by economics"[16], i.e. the widest possible eradication of normative judgments (which are nevertheless inherent to public life) and their replacement by allegedly "objective" principles of economic reasoning built by academic, economic, political, and administrative elites. In this perspective, the legitimacy of the state would hence stem from its ability to pursue "efficient" public policies in the eyes of expert economists. Such an "economization" of politics is, however, far from being natural: it requires the widespread development of performance assessment tools (such as accounting and econometrics), along with the anchoring of an economic "style of thinking"[17] within a set of binding legal or even constitutional norms – such as the SFL.

1.2 *Belgium's Neoliberal Turn: A Bird's-Eye View*

As in many other Western states, numerous public policies have undergone radical changes over the last four decades in Belgium. Since the early 1980s, countless reforms have been carried out to extend the scope of market competition to hitherto 'protected' sectors, consolidate public finance, develop the public debt market, or else preserve the so-called competitiveness of the national economy through wage moderation and corporate tax reforms.

The starting point of the Belgian 'neoliberal turn' can be traced back to the period 1982–1987.[18] Several austerity measures were enacted to supplement the substantial devaluation (8.5%) of the Belgian franc that occurred in February 1982. The government decided to freeze salaries, enacted three index jumps between 1984 and 1987, eased up conditions to withdraw private capital from struggling industries, and endorsed several measures aiming to restore a "favourable atmosphere for companies" (such as the first laws on competitiveness, lower corporate taxation, the creation of coordination centres, *etc.*). This period also witnessed the extensive use of a controversial legal technique, the "royal decrees of special powers". Through this, the Parliament grants the government a particularly broad authorization to regulate precisely-assigned

16 W. Davies, *The Limits of Neoliberalism, op. cit.*, p. 6.

17 I. Hacking, « 'Style' for Historians and Philosophers », *Studies in History and Philosophy of Science*, 1992, vol. 23, n°1, pp. 1–20.

18 G. Maissin, « La Belgique sur la voie du néo-libéralisme : Profil d'une politique économique », *Cahiers Marxistes*, 1997, vol. 205, pp. 11–33.

matters, for a fixed period of time, and due to exceptional circumstances.[19] Even if the legislative branch of government has to confirm the legal measures afterwards, this technique nevertheless remains outside the reach of the classical law-making process.

This neoliberal shift accelerated sharply between 1988 and 1992. These years paved the way for a macroeconomic revolution, taking the form of a new alliance between monetary policy, fiscal policy, and financial markets.[20] In June 1990, the central government decided to peg the Belgian franc to the German mark – which at the time served as the reference currency in the European Monetary System. As a consequence of this 'strong franc' policy, policy-makers were no longer allowed to resort to monetary policy to achieve their economic objectives. Their attention therefore shifted to other policy tools, especially fiscal consolidation and wage moderation policies – which had already been implemented in the previous decade. Fiscal policy was intended to be restrictive, as evidenced by the 'double standard' introduced to curb the increase of primary expenditure (i.e. excluding interest charges) to inflation and prohibit any increase of the public deficit (in real terms). The 1989 SFL, for its part, ensured that the federated entities took part in the strategy of public finance 'consolidation'[21].

In this period, public debt management was also 'modernized' to be rendered more 'dynamic'. Between 1989 and 1991, "the operating conditions of the monetary and financial apparatus [were] fundamentally modified" to transform the Belgian Treasury into "an *actor just like any other* on the financial and monetary markets".[22] The issuing of the first linear bonds in May 1989 proved to be a significant milestone in this respect. According to the then Minister of Finance, Social-Christian Philippe Maystadt, this new tool for funding debt on financial markets strove "to align Belgium's Treasury bonds with those of neighbouring countries, and also strengthen competition on the public bonds market and, let us hope, compress the cost of public debt financing".[23]

The 1990s were marked by enduring fiscal consolidation, stemming from the determination of Belgian authorities to qualify for the Eurozone. The

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19 M. Leroy, « Les pouvoirs spéciaux en Belgique », *Administration Publique – Trimestriel*, 2014, n°4, pp. 483–504.

20 For a general analysis of this new alliance, see F. Lordon, *Les quadratures de la politique économique — Les infortunes de la vertu*, Paris, Albin Michel, 1997.

21 See *infra*, Subchapter 3.2.

22 Y. Delvaux, « La dette publique. Évolution depuis 1989 », *Courrier Hebdomadaire du CRISP*, 1994, vol. 1429, pp. 1–44, esp. pp. 27–28 (emphasis added).

23 Belgian Ministry of Finance, Public Debt — Annual Report, 1990, p. 63.

"Global Plan for Employment, Competitiveness and Social Security" laid down in 1993 is emblematic of the direction (once again) taken to achieve this objective: freezing real wages; reforming the calculation of the consumer price index; reducing social security expenses; 'flexibilising' the labour market, *etc.* Excise duties and the value-added tax (VAT) were also increased to compensate for reducing employers' contributions.[24] This decade also witnessed a set of public enterprises active in the banking, postal, telecommunications, and aviation sectors being (partially or fully) privatized.[25] These reforms – euphemistically coined 'strategic consolidations' – were "an active element in the reshaping of the economy in the interest of private groups", as they ultimately extended the market logic to fields hitherto immune from it.[26]

Finally, although the first decade of the 21st century is characterized by fiscal policy easing and "the return of the deficit",[27] it is also primarily a period when Belgian authorities sought to increase the country's tax attractiveness. One of the most controversial reforms in this respect is the so-called "notional interest system", adopted in January 2006. This tax relief for risk capital, which sought to reduce alleged tax discrimination between investments financed either with equity or debt, in practice perpetuated the advantageous tax regime previously granted to the "coordination centres". The latter had been established in the early 1980s to attract multinational companies' headquarters, but had in the meantime been condemned by the European Commission in the context of state aid control.[28] Like all the above-mentioned examples, this case illustrates the profound transformation of macroeconomic policy-making in Belgium under the neoliberal era, as well as the "logic of competition" underlying it.

The remainder of this contribution investigates the characteristics of Belgium's neoliberal turn in the field of public finance. This issue is addressed by studying the cornerstone of Belgian fiscal federalism, namely the SFL. This piece of legislation has become increasingly significant over time, due to the ever-increasing amount of financial resources devolved to the federated

24 D. Piron, « Le cadre institutionnel de l'assainissement des finances publiques en Belgique », *Bulletin de Documentation*, 2013, vol. 73, n°3, pp. 139–180.

25 N. Thirion, *Les privatisations d'entreprises publiques dans une économie sociale de marché : Aspects juridiques,* Brussels, Bruylant, 2002.

26 G. Maissin, « La Belgique sur la voie du néo-libéralisme : Profil d'une politique économique », *op. cit.*

27 É. de Callataÿ and F. Thys-Clément (eds.), *The Return of the Deficit: Public Finance in Belgium over 2000–2010*, Leuven, Leuven University Press, 2012.

28 C. Valenduc, « Les intérêts notionnels : Une réforme fondamentale et controversée », *Courrier Hebdomadaire du CRISP*, 2009, vol. 2018, pp. 5–52.

entities. Consequently, the following subchapter provides a stylized genealogical analysis of the financing mechanisms of the Communities and the Regions.

2 Case Study: The Financing System of Belgium's Federated Entities

In terms of public finance, most state reforms were intended to meet pressing demands for greater financial autonomy, which particularly emerged from Flanders. This almost uninterrupted devolution of competences and financial resources to the federated entities was, among other reasons, politically justified by a desire to improve the management of public funds so as to increase the legitimacy of the institutional framework in the eyes of citizens. Three layers of financial legitimation have cumulatively been put forward in the history of Belgium's fiscal federalism:[29] vertical financial autonomy (since 1970), horizontal fiscal responsibility (since 1989), and, finally, tax autonomy (especially since 2001).

Initially, corresponding to the 1970–1988 period, the devolution of competences and financial means was intended to respond to divergent cultural, linguistic, and economic preferences and priorities throughout the country. As for this transition phase towards a genuine fiscal federalism framework, the newly created federated entities gradually received broad (vertical) financial autonomy – i.e. the power to define their own expenditure autonomously. The Communities and the Regions were granted the authority to vote on their budget annually, as well as full autonomy in the allocation of their resources (Arts. 175(2), 176(2), and 177(2) Const.). The latter nevertheless heavily depended on central grants:[30] The law of 9 August 1980, passed by ordinary majority, allocated five sources of funding to the Communities and the Regions, namely: grants from the national budget (1), transfers of the proceeds of centrally-collected taxes (2), non-tax revenues related to their competences (3), loans (4), and a general taxing power, stemming from Article 170(2) of the Constitution (5).[31]

29 D. Piron, B. Bayenet and M. Bourgeois, « Le fédéralisme financier, vecteur de renforcement de la légitimité de la gestion des finances publiques en Belgique ? » in C. Husson-Rochcongar (ed.), *La légitimité en finances publiques*, Paris, Mare & Martin, 2022.

30 G. Stienlet, « De institutionele hervormingen en de financiering van gemeenschappen en gewesten (1980–1990) » in Institut belge des finances publiques (ed.), *Histoire des finances publiques en Belgique : la période 1980–1990*, Gand, Academia Press, 1993, pp. 27–68.

31 Art. 1 Special Law of 8 August 1980 on institutional reforms (O.G. 15 August 1980).

However, the scope of the Communities' and Regions' autonomous taxing power has been strongly restricted in practice. Article 170(2), second subparagraph of the Belgian Constitution establishes the primacy of federal tax law over regional and community tax decrees.[32] On this basis, the *ordinary* law of 23 January 1989[33] set up a *non bis in idem* principle in the field of taxation, according to which the federated entities are not allowed to levy taxes in matters already taxed by the federal level of government. Throughout the 1980s, various Flemish politicians and academics more generally were willing to denounce the limited extent of the federated entities' taxing powers. According to some calculations, the latter amounted to only 3% of total regional revenues, a situation which illustrated their "almost total dependence"[34] on the central government in this respect.

A second period started in 1989. Since then, debates regarding the financial organization of the federal system have markedly extended to the horizontal allocation of resources, i.e. the criteria according to which the resources allocated by the federal government are shared among the federated entities. This issue has led to a trade-off between financial 'responsibility' and solidarity. The concept of financial responsibility refers to the idea that an entity should 'reap the fruits' (*de vruchten plukken*) of its economic dynamism. It is portrayed as a 'fair return' principle,[35] i.e. the reward for supposedly audacious economic and tax policies. Such discourse strongly resonates with the Flemish side as it gives a clear advantage to the northern part of the country. This distribution method certainly favours entities whose residents are better-off and hence contribute more to public revenue. French-speaking politicians, who represent less prosperous territories and citizens, insist for their part upon the need for adequate financial solidarity among all the component units of the Belgian Federation.

The SFL, as adopted in January 1989, paved the way to a genuine model of fiscal federalism in Belgium. The fact that intergovernmental financial relations are organized through a special majority law is politically significant as this legal instrument was originally designed as a minority protection mechanism in the field of institutional matters. It conveys a 'locking in' (*grendel*) logic,

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32 This provision states that "the law determines, with respect to the taxes referred to in the first subparagraph, the exceptions that are proved to be necessary".

33 Art. 1 Law of 23 January 1989 relating to the tax competence referred to in Article 110(1–2) of the Constitution (O.G. 24 January 1989).

34 V. Van Rompuy and E. Heylen, *Openbare financiën in de deelgebieden van federale landen,* Leuven, Acco, 1986, p. 225.

35 This expression elicits Margaret Thatcher's famous quote: "I want my money back". It means it is considered 'fair' for an individual, region, or country to receive an amount of expenditure equivalent to the payments it makes.

which the SFL extended to fiscal arrangements. In practice, any amendment to the federated entities' financing system requires the support of a two-thirds majority in each House (the House of Representatives and the Senate), but also of a majority in the two (French and Dutch) linguistic groups that compose them.[36] From a formal legal perspective, this special majority requirement represents the main reason to define the SFL as a crucial component of Belgium's material economic Constitution.

The SFL introduced two new major financing mechanisms for the federated entities: federal grants from national tax incomes, and the devolution of additional taxing power to the Regions.[37] Firstly, most competences transferred to the federated entities in the 1988–1989 State Reform were funded by annual grants paid out from the two main taxes collected by federal administrations: the personal income tax (PIT) and the value-added tax (VAT). These grants, whose 'basic amount' was pegged to the price index, were distributed according to two distinct rationales. On one hand, the competences devolved to the three Regions (the Walloon Region, the Flemish Region, and the Brussels-Capital Region) were funded by PIT grants, allocated on the basis of their relative share in PIT revenue. The adverse consequences of this so-called 'fair return' criterion were nevertheless partly compensated by an explicit equalization scheme introduced at the behest of the Francophones. This mechanism, known as the 'national solidarity contribution', aimed to increase the resources of Regions where the PIT revenue per capita was lower than the national average (Art. 48 SFL).

On the other hand, the financing of the two largest Communities (the French and Flemish Communities) almost exclusively rested upon federal VAT and PIT grants.[38] The distribution of both grants was based on distinct methods of calculation. A 'VAT grant' was designed to finance education policy,

36 The special-majority law is defined as follows in Art. 4(3) Const.: "a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast".

37 M. Installé and M. Peffer, « Le financement des communautés et des régions dans l'accord gouvernemental de mai 1988 », *Courrier Hebdomadaire du CRISP*, 1988, vol. 1209–1210, pp. 3–70; W. Moesen, D. Heremans, P. Van Rompuy and M. Eyskens, « Bedenkingen bij de nieuwe financieringsvoorstellen voor gewesten en gemeenschappen », *Leuvense Economische Standpunten*, 1988, vol. 47, pp. 1–50.

38 The financing of the smaller German-speaking Community is governed by the (ordinary) law of 31 December 1983 on institutional reforms for the German-speaking Community (O.G. 18 January 1984), regularly amended in order to be (broadly) aligned with the financing mechanisms of the other two Communities.

which absorbed approximately 80% of Community expenditure at the time. It was allocated according to the financial 'needs' of both Communities, estimated on the basis of their schools' pupil ratios (Art. 39(2) SFL). This noticeable derogation from the 'fair return' principle has generally been depicted as an *implicit* solidarity mechanism between the Communities, justified by the argument that "a (Francophone) child is worth just as much as a (Flemish) child". By contrast, the Communities do not benefit from any explicit solidarity mechanism, as the latter has solely been provided for the Regions – even though a share of Community competences has also been funded by PIT grants allocated according to the 'fair return' criterion.

Secondly, the SFL devolved additional taxing power to the Regions – but not to the Communities. It partially transferred revenue-raising powers for seven taxes to the regional authorities, the proceeds of which were previously transferred by the federal authority. These are: the tax on gambling and betting, the tax on automatic amusement devices, the tax on the opening of drinking establishments, inheritance duties, the real estate tax, registration fees on real estate transfers, and the road fund tax on automobiles. The Regions were – to some extent – allowed to modify the basis, the tax rate, and the exemptions from these 'regional taxes'; they were also empowered to take over their collection. Given the lack of a territorial basis on the bilingual territory of the Brussels-Capital Region, there the two main Communities are *de facto* devoid of such taxing autonomy. The respective share of PIT revenues and school pupils in that Region is therefore calculated by an established 80/20 distribution key (Arts. 38(4) and 44(2) SFL).

The entry into force of the SFL subjected the French Community to foreseeable financial distress. However, its Flemish counterpart did not experience the same situation; since the merging of Flemish regional and community institutions, their financial resources have also been pooled (Art. 1(3) SFL). At the request of French-speaking political parties, the so-called 'Saint-Michel agreements' (1992) provided for a refinancing of federated entities – in exchange for the devolution of new competences, as requested by Flanders by means of *quid pro quo*.[39] As this refinancing proved scarce, a new round of institutional bargaining began at the turn of the century. It was concluded by the Lambermont agreements (2001), which marked the transition to a third stage in the history of Belgian fiscal federalism. Since the early 2000s, endeavours to improve public finance management have resulted in the transfer of increasing tax powers to the Regions. These new revenue-raising powers are

39 Special Law of 16 July 1993 completing the federal structure of the State (O.G. 20 July 1993).

supposed to enable them to more effectively tie their resources to their policies – even though this situation also increases the likelihood of inter-regional tax competition[40].

In financial terms, the fifth State reform of 2001 was based on two elements. The first was a new refunding of the Communities in order to resolve the underfinancing of the French Community. In addition, regional tax autonomy was increased at two levels. On one hand, the Regions received new tax instruments: radio and television licence fees, vehicle registration fees, and the Eurovignette (which was replaced by a so-called 'kilometre charge' on large goods vehicles in 2016). On the other hand, their prerogatives on regional taxes were also harmonized. As a result, regional governments now have complete jurisdiction over all regional taxes. Accordingly, they can autonomously set the basis of, the rate of, and the exemptions on these regional taxes; they are also entitled to collect their proceeds in full.[41]

The fifth State reform also extended the Regions' competence in terms of PIT. It enabled them to collect general (proportional) surcharges and allow general (lump sum or proportional) reliefs on the PIT levied on their territory, as well as to implement general tax reliefs and increases in line with their competences. However, this taxing power was strictly circumscribed: the Regions could not reduce the progressiveness of the PIT, nor engage in unfair tax competition[42]. In addition, such surcharges or reliefs could not exceed a margin set to 6.75% of federal PIT revenues raised on their territory.

Despite this reform, the main Flemish political parties further advocated for greater regional tax autonomy throughout the 2000s. They emphasized the need to strengthen the federated entities' 'responsibility' ('*verantwoordelijkheid*' in Dutch, '*responsabilité*' in French) during the community negotiations that took place in 2007–2008 and resumed after the June 2010 elections. This highly polysemic term, which blends tax, political, economic, and fiscal aspects, is crucial in debates over the financing of the Communities and the Regions. In such discourse, increasing the Regions' *tax responsibilities* by granting them direct access to part of the PIT (or even corporate tax) is supposed to increase the *political accountability* of regional representatives *vis-à-vis* citizens. The latter would then be allowed to express their preferences not only on fiscal policy (the allocation of public expenses), but also on tax policy (the collection of revenues). From an *economic* perspective, the concept

40 See *infra*, Subchapter 3.1.

41 Art. 6 Special Law of 13 July 2001 concerning the refinancing of the Communities and extension of the tax powers of the Regions (O.G. 3 August 2001).

42 See *infra*, Subchapter 3.3.

of responsibility refers to curbing (positive and negative) spillovers between political authorities. Expressed in its purest form, it implies that political entities only bear the consequences of their own policies, without carrying the weight of (or benefiting from) decisions adopted by other (levels of) government(s). Finally, when it comes to *fiscal* aspects, the responsibility principle upholds a strictly linear relationship between regional economic performance and regional resources. In particular, it supports amplified recourse to the 'fair return' criterion to distribute financial means among the federated entities.

Drawing on French philosopher Émilie Hache,[43] one could nevertheless rephrase the rhetorical question "who would not want to be responsible?", dear to neoliberals as well as advocates of greater regional taxing powers, and ask instead: "who really has the means to exercise such responsibility?" In this sense, the issue at stake in the long-lasting conflict between the Flemish and the Francophones comes down to tracing the origins of the economic gap between Flanders and Wallonia – with the assessment of Brussels' situation proving even more controversial. Does this situation stem from Francophone leaders' inappropriate choices? Or is this rather the result of economic, social, historical, and demographic trends largely beyond their field of intervention?

After eighteen months of community negotiations, a new institutional agreement was made in October 2011. The sixth State reform considerably altered the relative weight of Belgium's constituent authorities by transferring competences worth more than €20 billion to the Communities and the Regions in areas such as family allowances, health care, the labour market, tax expenditures, *etc.* When it came into force in 2015, the Communities and Regions' resources respectively increased by approximately 50% and 20%. This broad devolution of competences occurred alongside a thorough revision of their financing system. The reform of the SFA not only organized the funding of newly decentralized competences, but also revised the parameters used to fund the federated entities, and amended the equalization scheme to eradicate the 'perverse effects' regularly denounced by (Flemish) economists. In addition, a temporary transition mechanism was established to compensate for the positive or negative consequences of the new funding system (Title V/1 SFL). At the end of the whole bargaining process, a mechanism was eventually designed to involve the Communities and the Regions in public finance consolidation[44].

43 É. Hache, « La responsabilité, une technique de gouvernementalité néolibérale? », *Raisons Politiques*, 2007, vol. 28, n°4, pp. 49–65.

44 See *infra*, Subchapter 3.2.

The sixth State reform further decentralized taxing powers and increased regional tax autonomy. Concerning the financing of the Regions, the previous system of PIT grants, optionally complemented by surcharges and reliefs on the PIT, was replaced by a system of regional piggy-back PIT (Title III/1 SFL). In practice, the Regions currently levy 'extended proportional surcharges' ('*opcentiemen*'/ '*centimes additionnels*') of 33.257% on the federal PIT – which was reduced accordingly. In other words, about a quarter of overall PIT revenue was thus transferred to the Regions. Depending on their fiscal margins and tax policy goals, they are now allowed to define the rate of their surcharge autonomously and without any quantitative limit, as well as to implement reliefs on their proportion of the PIT.[45] They can even increase, but also decrease, the progressiveness of the PIT – under given conditions. Additionally, the Regions obtained exclusive taxing powers over a series of tax expenditures related to their competences, including property taxation[46].

Yet, this widening of regional tax autonomy also bears some contradiction, as among other factors it creates interference between federal tax policies and regional resources. The 'reduced federal PIT' is the sole basis for the calculation of regional surcharges. As a consequence, federal PIT reforms directly affect the PIT surcharges actually collected by the Regions – which is one of their main revenue items.[47] Through this channel, *federal* decisions thus directly impact (i.e. increase or decrease) *regional* financial resources, a position unseen since the creation of the SFL in 1989. The Regions that are willing to compensate for adverse fiscal consequences of federal tax policy are entitled to increase their surcharges. Yet, this does not alter the actual primacy of the federal government in the field of direct taxation. Other features of this new 'inter-federal' PIT management framework support this assertion. An example thereof is that the collection of the PIT – including regional surcharges – is kept at the federal level, as a competence of the Federal Public Service Finance.

45 K. Algoed and F. Denil, « Fiscal Federalism: The Transition to a New Model of Fiscal Relations », in É. de Callataÿ and F. Thys-Clément (eds.), *The Return of the Deficit: Public Finance in Belgium over 2000–2010*, Leuven, Leuven University Press, 2012, pp. 241–289, esp. pp. 249–255.

46 See *infra*, Subchapter 3.1.

47 Such regional spillovers of federal tax policy are far from purely theoretical, as illustrated by the "tax shift" reform implemented by the federal government led by Charles Michel (2014–2018). This policy reduced social security contributions and the PIT by about €3.45 billion by 2020 to support employment (L. Simar, « Le "tax shift" ou glissement fiscal », *Courrier Hebdomadaire du CRISP*, 2016, vol. 2319–2320, pp. 5–62). In practice, the federal government unilaterally transferred about a quarter of this bill to the Regions, corresponding to the share of this tax that they have received since the sixth State reform.

Moreover, the latter is also entrusted with estimating down-payments to be made to the Regions and calculating budgetary settlements between the federal and regional governments (Art. 54/1 SFL).

In spite of these limits, the growing regionalization of the PIT nevertheless represents a noticeable step towards greater regional tax autonomy, on top of the wide range of regional taxes. As a consequence, regional authorities are nowadays endowed with significant tools to consolidate their own tax system, as well as their administrative capacity in this field.

3 Three Neoliberal Features of Belgium's Material Economic Constitution

After having outlined a theoretical definition of neoliberalism and traced the history of the SFL, the third part of this contribution argues that the financing system of Belgian federated entities can be seen as yet another example of economization of the state, which typically characterizes neoliberalism. Such economic rationalization of (regional) public policies takes different, yet complementary forms in the context of Belgium's fiscal federalism. On one hand, the Regions put growing emphasis on *economic competitiveness and tax competition* when it comes to implementing their tax competences (3.1.). On the other hand, the federated entities are also expected to ensure *strict fiscal consolidation* (3.2.). The control of this prescriptive legal framework has been delegated to two non-majoritarian institutions, which emerged as a result of the state's federalization, namely the Public Sector Borrowing Requirements Section of the High Council of Finance and the Constitutional Court (3.3.).

3.1 *Regional Tax Policies between Economic Competitiveness and Inter-Regional Competition*

In a global economy, public authorities struggle to increase their economic competitiveness.[48] In this context, the SFL contributes to the propagation of a competitive spirit in the conduct of tax policy. From a Flemish perspective, regionalizing (a growing part of) the PIT can first be viewed as a 'defence mechanism' aiming to safeguard the competitiveness of their regional economy. It was deemed necessary in case the Federal Council of Ministers, which

48 W. Davies, *The Limits of Neoliberalism, op. cit.,* chapter 4, pp. 108–147. Ed.: see also *infra* in this volume, M.M. Mohamed Salah, « La mise en concurrence internationale des ordres juridiques nationaux », and T. Biscahie & S. Gill, « Three Dialectics of Global Governance and the Future of New Constitutionalism ».

"is composed of an equal number of Dutch-speaking members and French-speaking members" (Art. 99 Const.), would be tempted to address its budgetary challenges by increasing taxes. In this context, further decentralizing of regional taxing powers can be seen as a way to partly protect Flemish companies and citizens from such increases.

Moreover, the Regions can also use their regional taxes and PIT tools to boost their employment rate and economic growth. For instance, Flanders allowed a flat-rate relief on the PIT of €125–200 per year to all workers living on its territory between 2007 and 2010 (the so-called '*jobkorting*'). In accordance with the prescriptions of supply-side economics, this measure – though since repealed for budgetary and (in)efficiency reasons, as well as failure to comply with European law – was intended to financially reward low-income workers and to get the unemployed back to work.[49]

However, the competitive logic embedded in the SFL is even more obvious at the inter-regional level. Between 1989 and 2014, PIT grants, which used to be the Regions' main financial resource, were distributed according to the yield of this tax on each regional territory. Although tempered by notable exceptions (such as the explicit equalization scheme and the 'needs-based' approach followed to fund the Communities' education expenses), this 'fair return' principle undoubtedly put the three Regions in competition with each other when it came to sharing their largest funding envelope.

Inter-regional tax competition was reinforced by the ever-growing regionalizing of the PIT in the wake of the fifth and sixth State reforms. Today, the Regions can autonomously decide to adjust the rate of their large PIT surcharges to attract wealthier taxpayers, and hence increase their tax revenue. While the SFL lays out some safeguards in this regard[50], regionalizing the PIT – like many other tax levies – is likely to further constraint regional tax policies, given how straightforwardly the three regional regimes can be compared. In this sense, it is symptomatic of the system that auditing and consultancy firms regularly assess each Region's attractiveness for taxpayers, for instance by comparing how similar households would be taxed should they live in close municipalities located in different Regions – e.g. in and around Brussels.[51]

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49 A. Decoster and P. Vanleenhove, « In-work Tax Credits in Belgium: An Analysis of the Jobkorting Using a Discrete Labour Supply Model », *Brussels Economic Review*, 2012, vol. 55, n°2, pp. 121–150.

50 See *infra*, Subchapter 3.3.

51 The press regularly relays these analyses. For example, it stressed that Flanders was " 'the place to be' for households" (I. Dykmans, « La Flandre est actuellement 'the place to be' pour les ménages », *L'Écho*, 2014, November 16, p. 4) or that Brussels' inhabitants were the "biggest losers in the tax race" (J.-Y. Klein, « Les Bruxellois, grands perdants de la course

This inter-regional tax competition hypothesis is quite effective when it comes to the taxation of individuals. The sixth State reform provided the Regions with numerous tax and non-tax tools in the area of real estate. From a tax point of view, their ability to levy extended surcharges on the PIT went along with new competences to implement tax reliefs and tax credits on tax expenditures related to their material competences. In particular, this list includes expenditure incurred for the acquisition or renovation of one's own home, which previously benefitted from various tax reliefs – commonly known as the 'housing bonus' ('*woonbonus*'/'*bonus logement*').

The 2014–2019 parliamentary term marked the entry into force of the sixth State reform. During this period, the three regional entities took advantage of their broad real estate tax prerogatives to redesign home ownership support policies. For instance, the Brussels-Capital Region reformed property taxation within the framework of a more comprehensive tax reform, which explicitly aimed to attract higher-income residents in order to increase its PIT surcharges.

As soon as it was in place in 2014, the Brussels government publicly announced its intention to implement "a shift from labour taxation to property taxation" so as to "encourage new tax-paying residents to settle in the Brussels Region".[52] This reform, among others, abolished the 1% agglomeration tax on the PIT and the flat-rate regional tax (amounting to €89 per year and per household), and reduced the PIT surcharges collected by the Region by 0.5%. These new tax reliefs are financed by a series of measures, including an increase of the estate tax – itself offset by a bonus for owner-occupiers. The Brussels regional authorities also decided to compensate the abolition of the 'housing bonus' and regional tax relief for long-term saving as of January 2017 by significantly increasing tax reliefs on registration fees to be paid when acquiring one's own residence (from €60,000 to €175,000).

Noteworthy conclusions can be drawn from this first meaningful reform of regional PIT surcharges. Even though its scope remains limited and many non-tax parameters come into play when choosing to settle in one of the country's three Regions, its rationale is nevertheless symptomatic of the inter-regional tax competition resulting from the successive revisions of the Regions' financing system. This could also explain why all Regions abstained from compensating the loss of revenue caused by the reduction of the federal PIT implemented by the right-wing government headed by liberal Prime Minister, Charles Michel.

fiscale des Régions », *L'Écho*, 2015, November 2, p. 23) that was started by the Regions after the sixth State reform.

52 Government of the Brussels-Capital Region, « Government Agreement (2014–2019) », 2014, p. 95.

However, a number of factors aim to reduce the scope of inter-regional tax competition. For instance, the federal government has exclusive jurisdiction over the PIT tax base. It is also responsible for the most mobile tax bases: movable income (dividends, interest, fees, *etc.*) (Art. 5/1(3) SFL). Moreover, the progressiveness of the PIT cannot be reduced as a rule – although it allows for exceptions (Art. 5/6 SFL). Finally, various mechanisms seek to prevent harmful tax competition between the Regions. For example, Articles 1*bis* and 1*ter* SFL foresee information exchange on the way that Regions exercise their taxing powers, as well as annual consultation on tax policy between the Federal government and the Regions. In addition, the Constitutional Court must ensure compliance with the 'federal loyalty' principle and guarantee the absence of 'unfair' tax competition between the Regions.[53]

3.2 *The Substantive Constitutionalization of Orthodox Budgetary Policy*

Whereas states abundantly rely on financial markets to finance themselves, they also enact many rules related to public finance management. Such measures aim to build and strengthen 'consolidation states',[54] committed to fiscal discipline with a view to improving their borrowing conditions on the market. Public authorities (including regional governments) therefore voluntarily submit themselves to a 'debt order',[55] which is primarily intended to convince public debt holders that their return-on-investment expectations will be met – over the demands of citizens if needed. This 'logic of discipline' finds a striking illustration in various provisions of both primary and secondary European laws overseeing national public finance.[56] In order to protect creditors against the inherent uncertainties of democratic processes, the set of rules known as 'European fiscal governance', for instance, seek to transform fiscal policy into a "forbidden territory" for the exercise of political sovereignty, i.e. an area "above popular influence".[57]

53 See *infra.*, Subchapter 3.3.

54 W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*. London/New York, Verso, 2014.

55 B. Lemoine, *L'ordre de la dette : Enquête sur les infortunes de l'État et la prospérité du marché*, Paris, La Découverte, 2016.

56 G. Grégoire, « Le marché, instance disciplinaire des États dans le cadre de l'Union économique et monétaire : Des théories économiques aux cadres juridiques », *Politeia. Revue semestrielle de droit constitutionnel comparé*, 2019, vol. 35, pp. 53–119; A. Roberts, *The Logic of Discipline: Global Capitalism and the Architecture of Government*, Oxford, Oxford University Press, 2010.

57 *Ibid.*, p. 12.

A similar – albeit less systematic – approach also runs through Belgium's fiscal federalism. By the late 1980s, the federal government sought to fund a growing share of the (large) Belgian public debt under favourable conditions. As a consequence, it carried out a number of initiatives to increase its creditworthiness on international capital markets. The repeated implementation of so-called 'fiscal consolidation plans' over the last decades perfectly demonstrates how Belgian authorities came to champion the cause of fiscal orthodoxy. For example, the 1988–1989 State reform was being negotiated in this context of public finance consolidation, and the federal government firmly intended to carry on with its restrictive budgetary policy.

Moreover, the SFL extended this commitment to fiscal orthodoxy at regional and community levels through several mechanisms designed to ensure that federated entities would also be compelled to participate in public finance consolidation. More precisely, the financial means vertically allocated to the federated entities were reduced in three distinct ways in order to save money.[58] A first, one-off sum was withheld from the 'basic amounts' transferred to them during fiscal year 1989: the VAT grant allocated to the Communities underwent an "exceptional and non-recurring" reduction of about 3.6% (Art. 38(2) SFL), while some basic amounts of the PIT grant allocated to the Regions were reduced by about 2% (Arts. 13(3) and 22(2) SFL). A second, recurring sum was also deduced from the new competences transferred to the Regions: through a complex system of partial reimbursements, the federal government managed to structurally save around 2% of current expenses it had transferred (Arts. 16(3) and 23(2) SFL). In the case of capital expenditure, this amount rose up to 14.3% – i.e. the share of current expenditure then financed through borrowing. Finally, the annual adaptation of the basic amounts allocated to the federated entities was only tied to the consumer prices index during a transition decade. In other words, the PIT grants allocated to the Communities and the Regions were frozen in real terms between 1989 and 1998.

In 1993 and 1999–2001, amendments were introduced to ease the budgetary constraints on the federated entities. Yet, the sixth State reform introduced new recurring revenue withholding measures to involve the Communities and the Regions in fiscal consolidation. As was the case two decades before, the sixth State reform was being negotiated in challenging fiscal conditions: in the aftermath of the financial crisis, Belgium's public deficit rose to over 5% of GDP in 2009. In January 2010, the Council of Ministers of the European Union

58 M. Daerden and W. Dumazy, *Les finances publiques de la nouvelle Belgique fédérale*, Brussels, Labor, 1992, pp. 346–347 and 366–369.

launched an excessive deficit procedure (EDP) against Belgium.[59] In this context, some political parties were eager to adjust the recently adopted SFL to conform to "the debate on public finance consolidation that should bring Belgium back to a balanced budget".[60]

After having reached an initial agreement on the distribution of fiscal targets for 2013, the presidents of all political parties associated with the institutional reform agreed upon the inter-federal distribution of the mid-term budgetary framework in July 2013. This compromise required an additional €250 million effort to be made by the federated entities in 2014 (Art. 81*quinquies* SFL). It also established a recurring withholding on the resources to be devolved in the wake of the sixth State reform. The majority of this amount, totalling €2.5 billion, was borne by the Regions (70%), and the rest (30%) by the Communities. The institutional agreement also involved the federated entities in fiscal consolidation in a second way, by requiring them to fund a growing share of their civil servants' pensions.

The content of this agreement was directly anchored in the SFL, as the basic amounts and adaptation parameters set to calculate the grants to be transferred to the federated entities were structurally reduced. This technique met the demands of some negotiators, who wanted to reassure both the financial markets and European authorities that all component units of the Belgian Federation were genuinely committed to orthodox fiscal policy – even though they were led by different political majorities.[61]

3.3 *The High Council of Finance and the Constitutional Court as Guardians of Belgian Fiscal Federalism*

It is one thing to create a legal framework that encourages economic competitiveness, inter-regional tax competition, and public finance consolidation – it is quite another to ensure compliance with it. Public authorities often rely on regulatory bodies to guarantee the rigorous application of the rules they commit themselves to follow. A common technique to this end is to transfer the management of entire public policy sectors from democratically-elected governments to independent technocratic bodies. This concern about reducing the room for exercising popular sovereignty is being strongly echoed at the

59 Council Decision of 19 January 2010 on the existence of an excessive deficit in Belgium, Official Journal of the European Union, 21 May 2010, L 125/34.

60 Belgian Federal Government, Institutional Agreement on the Sixth State Reform — "A More Efficient Federal State and More Autonomous Entities", 2011, p. 69.

61 D. Piron, *Gouverner les régions par les finances publiques, op. cit.*, pp. 219–222.

European level,[62] where a wide range of non-majoritarian institutions (NMIs) coexist. This concept refers to "governmental entities that (a) possess and exercise some grant of specialized public authority […] but (b) are neither directly elected by the people, nor directly managed by elected officials".[63] Such technocratic institutions, endowed with wide discretionary powers, come in various forms: regulatory agencies, specialized authorities, standardization offices, *etc.*

This strategy that aims to delegate large powers to technocratic bodies in economic, fiscal, and tax areas is often portrayed as a way of guaranteeing the prudent management of public affairs. It is being extended to the national level, where such institutions are created, either autonomously or at the behest of European institutions. Two non-majoritarian institutions born out the federalization of the country play a central role in Belgium's fiscal federalism: the Public Sector Borrowing Requirements Section of the High Council of Finance (hereafter referred to as "the Section") and the Constitutional Court.

The Section was created in 1989. The third State reform, which had just quadrupled the federated entities' financial resources, deeply altered the balance of fiscal power. The federal government – heavily dependent as it was on financial markets – feared trouble in 'consolidating' Belgium's public finance due to a potential shortage of budgetary coordination. It therefore created the Section to ensure intergovernmental fiscal coordination and protect fiscal orthodoxy. This advisory body is made up of twelve members, appointed by virtue of "their special competence and experience in the financial and economic field" (Art. 49(6) SFL) and distributed according to linguistic and institutional parity. The Section is thus composed of an equal number of Dutch-speaking and French-speaking members. In addition, six of them represent Entity I (made up of the Federal Authority and the Social Security), while six others sit on behalf of Entity II (made up of the Communities, the Regions, and Local Authorities).[64]

The Section is responsible for issuing an annual opinion on the distribution of fiscal targets among governments. It proposes a budgetary trajectory, which serves as a starting point for negotiations between representatives of

62 At the European level, the three most powerful non-majoritarian institutions are probably the European Central Bank (ECB), the Directorate-General for Competition, and the Court of Justice of the EU. All three epitomise a form of "governance by experts and elites" that is preferred by neoliberals (D. Harvey, *A Brief History of Neoliberalism*, Oxford, Oxford University Press, 2005, p. 75).

63 M. Thatcher and A. Stone Sweet, « Theory and Practice of Delegation to Non-Majoritarian Institutions », *West European Politics*, 2002, vol. 25, n°1, pp. 1–22, esp. p. 2.

64 OECD, « Belgium », *OECD Journal on Budgeting*, 2015, n°2, pp. 65–76.

each component unit of the Belgian Federation. This takes place within the Inter-Ministerial Conference on Finance and Budget, an informal coordination forum bringing together federal, regional, and community Ministers of Finance and Budget. The agreements reached in this forum are subsequently ratified by the Consultative Committee.[65] On its own initiative or upon request from the federal Minister of Finance or Budget, the Section can also issue an opinion on the advisability of restricting the borrowing capacity of one or more public authorities to "preserve the economic union and monetary union" and avoid "a structural deterioration of the borrowing requirements" (Art. 49(6) SFL). However, it does not seem to have implemented this competence so far, probably because of the "massive political turmoil"[66] this would undoubtedly create.

The Section has played a fundamental role in fiscal coordination within the Belgian Federation. In the 1990s, it strongly supported the orthodox budgetary strategy which enabled Belgium to meet the 'convergence criteria' set out in the Maastricht Treaty, hence to join the Eurozone.[67] Even though its influence waned during the first decade of the 21st century, it currently assumes the role of translating European budgetary requirements within an ever more federalized Belgium. This is partly due to the closer monitoring of both national and regional fiscal policies carried by European institutions in response to the European public debt crisis.[68]

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also known as the 'Fiscal Compact'), which was transposed into Belgian law by a cooperation agreement of December 2013,[69] transformed the Section into an independent fiscal council. In addition to its tasks related to fiscal coordination, the Section is now also in charge of overseeing compliance by the federal and the federated entities with the fiscal path they

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65 D. Piron, « Rôle et influence de la section 'Besoins de financement des pouvoirs publics' du Conseil supérieur des Finances », *Pyramides*, 2013, vol. 25, n°1, pp. 123–153.

66 L. Coene and G. Langenus, « Belgium: Promoting Fiscal Discipline in a Federal Country » in G. Kopits (ed.), *Restoring Public Debt Sustainability: The Role of Independent Fiscal Institutions*, Oxford, Oxford University Press, 2013, pp. 142–165.

67 Ed.: see *supra* in this volume, F. Martucci, « Les racines historiques et théoriques de l'Union économique et monétaire ».

68 D. Piron, « Rôle et influence de la section 'Besoins de financement des pouvoirs publics' du Conseil supérieur des Finances », *op. cit*.

69 Art 4(1) Cooperation Agreement of 13 December 2013 between the federal government, the Communities, the Regions, and the Community Commissions concerning the execution of Article 3(1) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (O.G. 18 December 2013). See also the Royal Decree of 23 May 2018 on the High Council of Finance (O.G. 31 May 2018).

agreed upon and transmitted to European institutions. In the event of "significant observed deviations" from either the medium-term objective or the adjustment path towards it, a correction mechanism is automatically triggered to eradicate the deviation within eighteen months. In such cases, the Section assesses whether this gap stems from exceptional circumstances, determines the extent of the corrective action to be undertaken, and overlooks its effective implementation.[70]

With respect to the revenue side of the budget, Article 1*ter*(1) SFL currently imposes five restrictions upon regional tax autonomy: (1) compliance with the general framework of the economic and monetary union; (2) the principle of federal loyalty; (3) the prohibition of unfair tax competition; (4) the free movement of persons, goods, services, and capital; and (5) the prohibition of double taxation.[71] The Constitutional Court enforces respect for these principles. The latter is another non-majoritarian institution closely linked to Belgium's transformation into a federal state: it was created in the wake of the second State reform to resolve potential disputes between the federal, regional, and community legislatures on the allocation of powers. This 'arbitrator' role is explicitly displayed in its initial name, the "Court of Arbitration". It was only afterwards that its jurisdiction extended to the protection of individual rights and freedoms (set out in Part II of the Belgian Constitution).

Peeters and Mosselmans stressed the crucial role played by the Constitutional Court in enforcing the principles governing the relationships between the federal government, the Communities, and the Regions.[72] According to them, the Court "supports a broad interpretation of the community and regional powers", as it has tended to take the autonomy of the federated entities "as its starting point". Yet this general approach has not prevented it from imposing a major limitation on the constitutional power of the Regions to impose tax, namely the economic and monetary union. The requirement to respect this general framework emerged as early as 1986 in the case law of the Belgian Court of Arbitration,[73] before being formalized in a landmark decision two

70 High Council of Finance, « Trajectoire budgétaire en préparation du programme de stabilité 2014–2017 », 2014, pp. 21–25.

71 The last principle, which is directly aimed at protecting taxpayers, differs from the first four principles, which regulate relations between the various component units of the Belgian Federation.

72 P. Peeters and J. Mosselmans, « The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and Regions », in N. Aroney and J. Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists?*, Toronto, University of Toronto Press, 2017, pp. 69–102, esp. p. 91.

73 Court of Arbitration, No. 11, 25 February 1986.

years later. Reviewing a case related to a Walloon tax levied on water export to the other two Regions, the Court ruled that ensuing from the 1970 and 1980 State reforms, "the new structure of the Belgian state is vested in an economic and monetary union, by which it is meant that the institutional framework of an economy is built on constituent units and is characterized by an integrated market (the so-called economic union) and a single currency (the so-called monetary union)".[74] Concerning economic matters, Belgium's constituent units are required to guarantee the free movement of goods and factors of production between them. Any rule likely to hinder this freedom of movement (such as internal customs duty) is therefore deemed incompatible with the economic union and, consequently, contrary to Belgium's federal structure.[75]

This seminal decision provides a typical example of the "Europe-friendly stance" displayed by the Belgian Constitutional Court.[76] Directly inspired by the Court of Justice of the European Union case law, it transposed the requirements applying to *inter*state relations within the European Union to *intra*state relations within the Belgian Federation.[77] The audacity of this – now broadly accepted – position should be appreciated: at the time, institutional legislation did not contain such a principle, which nevertheless drastically limited the federated entities exercise of their economic and tax competences.[78] During the 1988–1989 constitutional reform, the principle of economic and monetary union was officially enacted in Article 6(1) of the Special Law of 8 August 1980 on institutional reforms and in the SFL. Since the sixth State reform, this principle explicitly applies to all regional tax powers.

Legal scholarship regularly likens the general framework of the (internal) economic and monetary union to a specific application, in economic and tax areas, of another guiding principle of Belgian (fiscal) federalism: the principle of federal loyalty. The Constitutional Court has regularly claimed jurisdiction over this principle – enshrined since 1993 in Article 143(1) of the Constitution. It does so in conjunction with the principles of reasonableness

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74 Court of Arbitration, No. 47, 25 February 1988.

75 X. Delgrange (ed.), *L'union économique et l'unité monétaire en Belgique*, Bruges, Die Keure – La Charte, 1993.

76 P. Popelier and K. Lemmens, *The Constitution of Belgium – A Contextual Analysis*, London, Hart Publishing, 2015, p. 213.

77 Ed.: regarding the logic of interstate federalism, see *supra* in this volume, H. Lokdam & M. A. Wilkinson, « The European Economic Constitution in Crisis : A Conservative Transformation ? ».

78 M. Bourgeois, « La régionalisation partielle de l'impôt des personnes physiques après la sixième réforme de l'État : Analyse juridique », *Revue de Fiscalité Régionale et Locale*, 2014, vol. 4, pp. 247–296.

and proportionality.[79] According to the Court, federal loyalty implies "the obligation not to alter the balance of the whole federal construction when exercising one's own competences"[80]. The Court's judicial overview of this polysemic term is not limited to the "sole exercise of competences", but extends to the "spirit" in which the latter ought to be implemented:[81] when exercising its exclusive competences, each legislature should avoid rendering "the exercise of their competences by other legislatures impossible or extremely difficult".[82] This case law was confirmed on the occasion of the sixth State reform, which expressly extended the jurisdiction of the Constitutional Court to the federal loyalty principle.[83] Moreover, this principle was also inserted into Article 1*ter* SFL, which circumscribes regional tax autonomy. Just like the federal government, the Regions are thus required to comply with this principle when exercising their powers. However, the concrete impact of this legal requirement has so far remained unpredictable.

When it comes to taxing powers, compliance with the principle of federal loyalty seems redundant with regard to another restriction on regional tax autonomy, namely the prohibition of unfair tax competition. This provision was inserted into the SFL during the fifth State reform (2001) in order to restrict the use of regional surcharges and reliefs on the PIT. On the occasion of the sixth State reform, it was even extended to all regional tax prerogatives. However, the concept of 'unfair tax competition' is neither defined in the SFL nor in preparatory works. The legislator therefore implicitly delegated this task to the Constitutional Court.

To summarise, the Constitutional Court presently has ample room for manoeuvre to interpret the legal safeguards of Belgian fiscal federalism. This is partly due to its judicial activism, as it creatively interpreted some of the main principles circumscribing regional tax autonomy. For instance, the principles of (internal) economic and monetary union and federal loyalty were first laid down in the Court's case law, before being enacted in the SFL. When not acting on its own initiative, the Constitutional Court might also be called upon to fill the vacuums in (special) legislation, as illustrated by the example of unfair tax competition. The Court's power of interpretation is further bolstered by the

79 P. Peeters and J. Mosselmans, « The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and Regions », *op. cit.*, p. 99.

80 Court Const., 28 October 2010, No. 124/2010, B.39.1.

81 *Ibid.*

82 Court Const., 13 June 2013, No. 83/2013, B.3.3.

83 Arts. 1(3) and 26(1) of the Special Law of 6 January 1989 on the Constitutional Court (O.G. 7 January 1989).

vagueness of many key concepts – which are sometimes not even mentioned in the Constitution nor in special laws. Through its case law, the Constitutional Court has therefore put itself in a position to define the extent to which the Regions can effectively engage in tax competition. However, no firm conclusion can yet be drawn regarding its stance on competition. Nevertheless, the stakes are far from being low as its case law could starkly impact how federal and regional governments exercise their taxing powers.

Conclusion

In a similar way to its institutional structure, Belgium's fiscal federalism framework is constantly evolving. Since 1989, its functioning has been enshrined in the SFL. The SFL is an essential component of Belgium's material economic Constitution, due to the ever-increasing political, legal, and financial authority acquired by the federated entities. This piece of legislation strikes a (painstaking and temporary) balance between two opposing trends regarding Belgium's institutional structure: while Flemish political parties petition for further regional fiscal responsibility and tax autonomy (which is favourable to Flanders), French-speaking officials fiercely stand against any reform that is likely to impoverish the other component units of the country.

As State reforms have passed, Belgium's federated entities have acquired substantial budgetary resources (proportionally the highest in Europe). Meanwhile, the Regions were also granted pronounced tax autonomy, following a given pattern: taxes formerly collected by the central government before being redistributed to the Regions were gradually transformed into regional taxes, over which the Regions now have full jurisdiction. Since 2001, regional authorities' taxing powers have also included surcharges and reliefs on the PIT. The sixth State reform greatly increased their capacity in this respect. Institutional reforms therefore appear to be key moments in redefining Belgium's material economic constitution, by delineating not only possible, but also legitimate fiscal and tax policies.

As a result of these successive reforms, the Belgian fiscal federalism framework is characterized by two distinct, yet complementary neoliberal features: economic competitiveness and inter-regional tax competition on the revenue side, and fiscal consolidation on the expenditure side. Both purposes have notable exceptions, and are also limited by various safeguards. Yet they undoubtedly reflect the neoliberal stance underlying the two main reforms of the federated entities' financing mechanisms adopted so far: the 1988–1989 and 2010–2011 State reforms, both durably anchored in an orthodox economic stance in the tax and fiscal arrangements of the SFL. Moreover, two non-majoritarian institutions born out of the gradual federalization of Belgium, the Public Sector Borrowing Requirements Section of the High Council of Finance and the Constitutional Court, are responsible for ensuring the proper application of these principles. The recent evolution of the Section also provides a telling example of the increasing role delegated to technocratic institutions in public finance management. The Constitutional Court's case law, for its part, is likely to decisively impact the degree of (un)fair tax competition that the Regions might carry out in the future.

From a theoretical perspective, this article has sought to empirically demonstrate the added value of the sociology of neoliberalism to shed new light on a fundamental fragment of Belgium's material economic constitution. This approach shows that, beyond its seemingly scattered and technical nature, the SFL manifestly aims to convert Belgian federated entities into core neoliberal features: economic competitiveness, tax competition, and public finance consolidation. Further research is now needed to accurately describe, compare, and contrast the effects of this "new way of the world" on public finance management, as well as other public policy fields within the various component units of the Belgian Federation.

Acknowledgments

The author thanks Guillaume Grégoire and Norman Vander Putten for their suggestions on earlier versions of this contribution.

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