The Constitutionalisation of the Economy in France, Germany and Belgium: Enshrining the Market Order, Rationalising the Social State

Abstract

In legal literature, a specific theory prevails on the issue of the economic order accepted or imposed by supreme norms: the economic neutrality of national constitutions. The constitutional orders of European states would be mostly open to various options of economic policy, be they more interventionist or more liberal, depending on the choices made by the elected lawmakers. This thesis of 'economic neutrality' is attractive: it is straightforward and consistent with the position of judicial self-restraint put forward by the constitutional courts themselves.

Nevertheless, it remains superficial – at least for the German, French and Belgian legal orders. Even leaving aside the (albeit decisive) influence of EU law, the interpretation given to both economic liberties and social rights most often reveals a neoliberal mindset. Enshrined by constitutional courts through classical economic liberties, the market order is used by these same supreme courts as a 'factual constraint' that justifies the ongoing rationalisation of the social state.

Keywords

Right to property; economic freedom; collectivisation; confiscatory taxation; market competition; economic and social rights ; proviso of the possible ; *Existenzminimum*

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Introduction – The 'economic neutrality' of national constitutions: A veil of *judicial self-restraint*

While the 'economic constitution' has become a cardinal concept in EU law studies[1], it is also increasingly used in analyses of national constitutional law[2]. However, since at least the seminal decision of the German Federal Constitutional Court (FCC) of 20 July 1954[3], the generally accepted view has been that national constitutions are 'economically neutral' – at least in Western Europe. In other words, there is no 'economic constitution', since no explicit constitutional choice has been made about the economic system. As the German Constitutional Court stated in the above-mentioned judgment:

> 'The Basic Law neither guaranteed the "economic neutrality" (*wirtschaftspolitische Neutralität*) of government and legislative powers nor a "social market economy" that could only be managed with market-compliant means (*martktkonforme Mittel*). The "economic neutrality" of the Basic Law only consists in the fact that the constituent power has not expressly taken a decision for a particular economic system.'[4]

This stance of economic neutrality of the Constitution (and of the Constitutional Court) was reiterated in the *Mitbestimmung* decision of 1 March 1979[5]. Consequently, the Constitutional Court is 'open' to the various economic orientations of the legislature, be they social(ist) or (neo)liberal. Most European constitutional courts have implicitly or explicitly followed this approach. The first decisions of the French Constitutional Council in economic matters are generally regarded to reflect such *judicial self-restraint*[6]: this court confirmed the constitutionality of the *Nationalisations* in 1981 (subject to an upward revaluation of the compensatory indemnities)[7], but also of the *Privatisations* in 1986[8]. Other constitutional courts, such as the Belgian Constitutional Court, regularly emphasise the wide 'margin of appreciation' left to the legislature in economic and fiscal matters[9], which may be seen as an implicit endorsement of the doctrine of 'economic neutrality'.

A minor caveat, which may seem self-evident, is nevertheless generally added by the constitutional courts, namely that the legislature is free... as long as it does not violate the Constitution. This is clearly expressed by the FCC in the 1954 decision: 'This enables the legislature to pursue the economic policy it deems appropriate, provided it observes the Basic Law' (*Grundgesetz*, hereafter GG)[10] – and 'in particular fundamental rights', as it added in the *Mitbestimmung* decision in 1979[11]. Since the fundamental rights cover both 'liberal' freedoms and 'social' rights, the literature argues that 'economic neutrality' is not absolute: total 'socialisation', as well as complete 'privatisation' and 'liberalisation' of the economy, would be ruled out. Between the two extremes, however, parliament is said to be free to act.

This thesis of 'economic neutrality' is attractive: it is straightforward and consistent with the position of judicial self-restraint put forward by the constitutional courts themselves. Nevertheless, it remains superficial. Even leaving aside the (albeit decisive) influence of EU law[12], the interpretation given to

[1] Streit and Mussler (1994); Joerges (2005); Hatje (2010); Kaupa (2016).
[2] Grégoire and Miny (2022).
[3] BVerfG, 20 July 1954, *Investitionshilfe*, 1 BvR 459, 484/52.
[4] *Ibid.*, §§37-38.
[5] BVerfG, *Mitbestimmung*, 1 March 1979, 1 BvR 532/77.
[6] Rabault (2000); Dussart (2015).
[7] Cons. const., 16 January 1982, *Nationalisations I*, No. 81-132 DC; 11 February 1982, *Nationalisations II*, No. 82-139.
[8] Cons. const., 25-26 June 1986, *Privatisations*, No. 86-207 DC.
[9] Cour const., 17 September 2009, No. 143/2009, B.5; 10 October 2012, No. 118/2012, B.6.2; 8 May 2014, No. 78/2014, B.5.
[10] BverfG, 20 July 1954, *Investitionshilfe*, *loc. cit.*, §38.
[11] BverfG, 1 March 1979, *Mitbestimmung*, *loc. cit.*, §141.
[12] See Grégoire (2025a).

both economic liberties and social rights most often reveals a specific 'economic referential'[13], i.e., a relatively homogeneous doctrinal model of how the economy would and should work. More precisely, a neoliberal economic referential emerges. Based on an analysis of the German, French and Belgian situations, this is what I would like to argue here[14]. These three States were chosen because their constitutional courts all subscribe, implicitly or explicitly, to the 'economic neutrality' thesis, while at the same time having specific features that can shed light on the issue under study. These dimensions of comparison are: the historical tradition regarding the balance of powers (legicentrism vs. constrained legislature); the structure of the State (centralism vs. federalism); the period of adoption of the constitution currently in force (19th century vs. post World War II); the original function of the constitutional review (arbiter of the distribution of powers vs. guardian of fundamental rights); the composition of the constitutional court ('experts' vs. 'politicians'); etc. The underlying assumption is that if a convergent way of dealing with economic issues emerges from such different legal configurations, on may infer that the cause is not primarily (or exclusively) legal, but rather has to do with extra-legal factors, including a shared worldview – an 'economic referential' – that implicitly guides the interpretation and application of constitutional law[15]. This is precisely what is argued in this paper. Enshrined by the three constitutional courts through classical economic liberties (1.), the market order is used by these very same supreme courts as a 'factual constraint' that justifies the ongoing rationalisation of the social state (2.).

1. The extension of economic liberties or the constitutionalisation of the market

There are three classic economic liberties: freedom of contract, property rights and economic freedom *sensu stricto*. As subjective rights of the economic agent, they represent, from the physiocrats to Friedrich Hayek, the essential legal pillars of the market institution. In the three legal orders studied, these classic economic liberties have been increasingly enshrined and protected by the constitution in recent decades. Although freedom of contract is also relevant, it will be left aside here, due to the practical limits of this contribution. An analysis of the development of the right to property and economic freedom is sufficient to reveal the tendency of constitutional judges to legally enshrine the market. The right to property has been continuously (re)affirmed and gradually expanded by the respective constitutional courts of the states studied, to such an extent that it has even served as a bulwark against any extensive socialisation or nationalisation of the economy, even by the indirect means of redistributive taxation (1.1.). The freedom to pursue an economic activity was also enshrined by the supreme courts, which even drew from it the existence of a constitutional duty to protect the competition order, in a kind of implicit reception of EU law (1.2.). The result, at the constitutional level, is the advent of an 'objectivised' market order (1.3.).

1.1. The right to private property: An instrument for rationalising the legislature's economic interventionism

In the liberal tradition initiated by Locke, the right to property is the foundation of individual freedom. Sieyès, the founding father of modern constitutionalism, extended this idea by making private property the source of 'active' citizenship and the foundation of a new social organisation. This explains why

[13] Muller (2010).

[14] For a more systematic analysis, see Grégoire (2025b).

[15] Other European States could have been included. Among them, two categories would have been of particular interest: the Eastern European states (of the former 'Soviet bloc'), on one hand ; and the Southern European countries, on the other hand. Some of the former adopted new constitutions in the 1990s, which explicitly refer to the (social) market economy (e.g. in Hungary and Poland). Some of the latter were subjected to the 'conditionality' and 'structural reforms' imposed by the European stability mechanisms and the Memoranda of Understanding of the Troika (i.e. the International Monetary Fund, the European Central Bank and the Commission). For instance, apart from the paradigmatic case of Greece, Italy would also have been a very relevant case to study, given its rich history of economic constitutionalism, both in terms of positive law and academic literature.

most modern constitutions have explicitly endorsed the central place of the right to private property within their own legal systems, even if only in the form of limits on expropriation. But it is the constitutional courts that have drawn out all the legal and axiological implications. On one hand, the right to property has been developed and refined: various patrimonial rights have been subsumed under the guarantee of private property, while certain restrictions have been accepted on the basis of the 'socially bound' nature of property (1.1.1.). Despite these restrictions, the 'essence' of property rights was considerably strengthened and used to limit the legislature's economic interventionism (1.1.2.), be it to limit the possibility of large-scale nationalisation or to rationalise fiscal policies by prohibiting 'confiscatory' taxation.

1.1.1. Development and constitutional refinement of the right to private property

Each of the three constitutional courts has confirmed the constitutional rank of the right to property. In France, it was affirmed in the decision *Nationalisations* (1981), through Articles 2 and 17 of the 1789 '*Déclaration des droits de l'Homme et du Citoyen*' (DDHC), which is included in the 'constitutional block' (*bloc de constitutionnalité*) built up since the 1970s[16]. In Belgium, the Constitutional Court used its 'combination method', which merges the fundamental rights protected by the Constitution and by international and EU law into an 'indissociable whole', to extend the guarantee against expropriation provided by Article 17 of the Constitution to the full protection of property offered by Article 1 of the First Additional Protocol to the European Convention on Human Rights (hereafter Art. 1P1)[17]. For its part, the FCC clarified the reasoning by which the right to property becomes an 'elementary fundamental right' and an 'axiological decision of particular importance'[18]: as an expression of human dignity (Art. 1 GG)[19], the right to property (Art. 14 GG) guarantees in the patrimonial sphere an area of individual freedom (Art. 2 GG) against possible encroachment by the community[20]. Moreover, in each of the three States, the protection of property is extended to other 'economic rights that function economically like property'[21], including rights of claim or intangible rights over intellectual creations (copyright, industrial and commercial property, etc.).

While extending the scope of the right, the three highest courts take into account new restrictions on private property, due to the evolution of the 'general interest', which must adapt to social changes. This was explicitly stated by the Constitutional Council in the landmark decision *Nationalisations*[22]. The Belgian Constitutional Court also refers to this idea when 'measuring' the 'fair balance', i.e., the proportionality, of the infringement of the right to property[23]. The German Constitutional Court agrees, but gives the reason for such limitations[24]: the 'socially bound' nature of property (*Sozialbindung des Eigentums*)[25], a legacy of Article 153 of the Weimar Constitution[26].

Despite these proclaimed limits, constitutional judges are applying increasingly strict controls, even when it's not a case of 'expropriation' (which implies deprivation) but only of 'restriction', i.e., of regulation of the use of right to property. Under the dissolving effect of the principle of proportionality,

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[16] Cons. const., 16 July 1971, *Liberté d'association*, No. 71-44 DC; 27 December 1973, *Taxation d'office*, No. 73-51 DC.
[17] Rosoux (2015), p. 53-57 and p. 136-147.
[18] BverfG, 7 August 1962, *Feldmühle-Urteil*, 1 BvL 16/60, §53.
[19] BverfG, 23 April 1991, *Bodenreform I*, 1 BvR 1170/90, §131.
[20] BverfG, 18 December 1968, *Hamburgisches Deichordnungsgesetz*, 1 BvR 638/64, §94; 1 March 1979, *Mitbestimmung*, *loc. cit*., §145.
[21] Badura (2011), p. 39. For France: Colly (2022), p. 596. For Belgium: Pâques and Vercheval (2011), p. 793.
[22] Cons. const., 16 January 1982, *Nationalisations I*, *loc. cit*.
[23] Cour const., 22 September 2011, No. 145/2011, *loc. cit*., B.56.
[24] BVerfG, 1 March 1979, *Mitbestimmung*, *loc. cit*., §§167 to 170.
[25] On this concept, see Leisner (1972).
[26] Kirchheimer (1930).

the FCC is blurring this structuring distinction[27] that it had previously helped to forge[28]. The same is true in Belgium, where 'restrictions' may give rise to compensation[29]. In France, the strengthening of control was strikingly reflected in the decision to declare unconstitutional the so-called '*Loi Florange*', which provided for a system to prevent profit-based layoffs (*licenciements boursiers*)[30]. The alleged disproportion was not only the obligation to sell (although only in cases where the business is completely shut down while still generating profits), but also, and more fundamentally, the fact that the law would substitute the judge for 'the business owner of a company, who is not in [financial] difficulty, for economic choices relating to the management and development of that business'[31].

1.1.2. Protection of the 'essence' of property as an instrument for limiting the economic action of legislative power

The fundamental right of property must be guaranteed in the constitution's very core, in its 'essence' (*Wesengehalt*), in the words of the German Basic Law (Art. 19, para. 2). Even if the use of the right can be regulated by the legislature, the owner must ultimately retain control over the (tangible or intangible) object to which the right is attached. The French constitutional judges are also familiar with this idea: the prohibition of the 'denaturation' of the right to property[32] appears to be the functional equivalent of the guarantee of the 'essence' in the German constitutional system. This threshold limit can also be found in Belgian constitutional case law[33], through the interpretation given by the European Court of Human Rights (ECtHR) to Article 1P1[34]. From this so-called 'essence' of the right to property, the constitutional judges have derived certain significant limits on the legislature's power to organise the economy: they infer a maximum threshold for nationalisation of the economy (1.1.2.1.) or 'discover' tax rates above which taxation becomes 'confiscatory' and therefore unconstitutional (1.1.2.2).

1.1.2.1. Property rights as an obstacle to nationalisation and socialisation

Today, the trend is mainly towards the privatisation and liberalisation of public services. But not so long ago, the path seemed inexorably to lead to ever wider collectivisation of national economies. Basically, such collectivisation can take two forms: either 'nationalisation', which involves the transfer of ownership and control of the company to the state; or 'socialisation', which involves the collective control of the workers over (certain) companies or branches of the economy. Each of these options of course entails a challenge to the rights of the 'owners' of the companies concerned, i.e., the shareholders[35]. Neither nationalisation nor socialisation has been addressed by the Belgian constitutional court, but the former is not unknown to the French constitutional order (Art. 9 of the 1946 Preamble) (1.1.2.1.1.). The latter is present in the Basic Law (Art. 15 LF) but has so far never been implemented, except in the watered-down form of 'codetermination' (*Mitbestimmung*) (1.1.2.1.2).

1.1.2.1.1. Property rights as an obstacle to nationalisation in France

With regard to nationalisation in France, the law of 18 December 1981, adopted shortly after François Mitterrand's accession to the presidency, led the Constitutional Council to settle the issue of the

[27] Wilhelm (2000).
[28] BVerfG, 15 July 1981, *Nassauskiesung*, 1 BvL 77/78.
[29] Cour const., 1 October 2015, No. 132/2015, B.8.1. For a fuller presentation of the Constitutional Court's reasoning, see: Rosoux (2015), p. 873-894.
[30] Cons. const., 27 March 2014, *Loi visant à reconquérir l'économie réelle*, No. 2014-692 DC. See also: Cons. const., 7 December 2000, *Loi relative à la solidarité et au renouvellement urbains*, No. 2000-436 DC.
[31] Fabre (2014).
[32] Cons. const., 29 July 1998, *Loi d'orientation relative à la lutte contre les exclusions*, No. 98-403 DC, Rec. 7.
[33] E.g., Cour const., 24 March 2004, No. 54/2004, §B6.
[34] ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, No. 7151/75, §63; ECtHR, 19 June 2006, *Hutten-Czapska v. Poland*, Req. No. 35014/97.
[35] Strictly speaking, shareholders are not the owners of companies, but only of the shares constituting the entities that give legal form to these companies.

relationship between the act of nationalisation (Art. 9 of the 1946 Preamble) and the right of private property. The *Conseil* concluded in two stages[36] that nationalisations were constitutional in principle, but that the amount of compensation had to be adjusted, which *de facto* hindered any future similar initiative, due to the excessively high cost that this would entail for public finances. To reach this conclusion, the judges neutralised the imperative nature of Article 9 of the Preamble[37], but also implicitly established a maximum threshold for nationalisation of the economy[38], although it gave no indication of the precise boundaries of the 'field of private property' that cannot be infringed. Stating the existence of such an absolute constitutional limit was the main objective set from the outset by the rapporteur of the decision, Georges Vedel[39].

However, the judges' reasoning was not self-evident. On one hand, the position of property rights in the hierarchy of norms was hotly debated at the time[40]. On the other hand, the extension of the 'expropriation' rules of Article 17 of the French Constitution to nationalisation was not as inevitable as it might seem. Conceptually, these two measures do not necessarily overlap[41]. First, the assets transferred to the State are not *a priori* the same: traditional expropriation concerned immovable properties, whereas nationalisation concerns 'enterprises', i.e., means of production involving a collective of workers. Second, the notion of 'general interest' underlying the idea of nationalisation could be interpreted more broadly than in the case of expropriation, because paragraph 9 implies an anti-capitalist conception of the economy. Third, expropriation is generally an operation of the executive power via the administration and under the control of the courts, whereas nationalisation is an act of the legislature itself, which could justify setting aside or at least restraining judicial control. This would have opened the way for a different assessment of the 'adequacy' of the compensatory indemnity, potentially downwards rather than upwards. After all, there was a very significant historical precedent in favour of this interpretation: just two months after the adoption of the DDHC on 26 August 1789, the nationalisation of the Catholic Church properties was pronounced by the very same National Constituent Assembly (on 2 November 1789), with no compensation other than the transfer to the State of the costs of worship and upkeep of its ministers[42]. From a legal point of view, nationalisation and expropriation were therefore two distinct legal mechanisms according to the author of the DDHC itself. More recently, the distinction was also drawn by the ECtHR in the *Lithgow* case regarding the nationalisation of aeronautical and naval industries by the United Kingdom in 1977[43]. According to the Strasbourg Court, nationalisation implies a broad discretion for the State as to the opportunity of the operation, but also a wide discretion in laying down the terms and conditions of the transfer, including the amount of compensation – at least when nationalisation by the State concerns the assets of its own nationals[44]. The

[36] Cons. const., 16 January 1982, *Nationalisations I*, *loc. cit*.; 11 February 1982, *Nationalisations II*, *loc. cit*.
[37] See also: Cons. const., 25-26 June 1986, *Privatisations*, No. 86-207 DC, Rec. 55-61; 9 April 1996, *Loi portant diverses dispositions d'ordre économique et financier*, No. 96-375 DC, Rec. 2-6; 16 May 2019, *Loi relative à la croissance et la transformation des entreprises*, No. 2019-781 DC, Rec. 43-47.
[38] Rivero (1982), p. 210; Luchaire (1982), p. 71-72.
[39] Archives of the Cons. const. session of 12 December 1981 (Dec. No. 81-132 DC, *Nationalisations I*), p. 4-5.
[40] Favoreu (1982), p. 43.
[41] Beaud (1994).
[42] Bodinier and Teyssier (2000).
[43] Colly (1988), p. 194-195.
[44] ECtHR, 8 July 1986, *Lithgow,* No. 9006/80, §§ 111-122. The issue is more controversial when nationalisation applies to non-nationals, who may invoke the protection of the 'general principles of international law', according to the wording of Article 1P1. But even in this case, and despite the clash between Western and developing countries on this issue, a distinction between nationalisation and expropriation seems possible, if not *in the general and abstract written rules* (UN General Assembly resolution 1803 (XVII) of 14 December 1962 : 'Permanent sovereignty over natural resources'; UN General Assembly resolution 3281 (XXIX): 'Charter of Economic Rights and Duties of States'), at least *in the practice* of international relations and *in international arbitral awards* (LIAMCO v. Libya, International Law Reports, vol. 62, 1982 , p. 140). The proliferation of bilateral investment treaties can be seen as a result of this distinction: it is precisely to prevent the circumvention of the rules on expropriation (including the amount of compensation) by acts of

Constitutional Council had solid legal bases for developing such a solution. Besides Article 9 of the Preamble, Article 34 of the Constitution gives the legislature jurisdiction over 'nationalisation of companies and the transfer of ownership of companies from the public to the private sector', as well as over the 'system of ownership' itself. It could therefore be argued that the means of production may be subject to a system of 'private' as well as 'social' or 'state' ownership. Such an interpretation would certainly not have been more ideologically neutral. Conversely, the reasoning followed by the Constitutional Council is far from 'economic neutrality'. Rather, it is part of a liberal doctrine that seeks to protect the market economy against the possible collectivisation of the economy.

1.1.2.1.2. Property rights as a limit to socialisation (and co-determination) in Germany

Large-scale collectivisation of the economy had previously been advocated by certain German intellectuals, on the basis of constitutional arguments. In the early years of the Federal Republic, Wolfgang Abendroth defended the 'socialist potential' of the Basic Law[45], based mainly on the constitutional provision devoted to 'socialisation'. Article 15 GG states that 'Land, natural resources and means of production may, for the purpose of nationalisation, be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation', provided that '[w]ith respect to such compensation the third and fourth sentences of paragraph (3) of Article 14 [dedicated to expropriation] shall apply, *mutatis mutandis*'. However, the *Bundestag* has so far never made use of this constitutional provision. Some authors suggest that Article 15 GG is no more than a 'constitutional fossil in the age of globalisation'[46], despite the fact that the housing crisis in Berlin has revived the issue[47]. Even a possible defensive effect was denied to Article 15 LF by the FCC[48], paving the way for large-scale privatisation following the reunification[49] and the privatisation of public services decided at the European level[50].

This does not mean, however, that no changes have occurred in the balance of powers within the private economic sector in Germany. In a way, the extension in 1976 of the system of 'co-determination' (*Mitbestimmung*) to all companies with more than two thousand employees represented a (much less ambitious) variation of the idea behind socialisation. Introduced in 1951 in the mining and steel industries, this system implies not giving all the power to the workers but, at the very least, to counterbalance the power of the employers by giving the employees greater influence over company decisions through their representatives on the supervisory boards[51]. In the famous decision of 1 March 1979[52], the FCC had to decide whether such an arrangement was compatible with the Basic Law, and in particular with the right to property. The Court validated the Co-determination Act, but the reasoning followed nevertheless seriously undermines the assertion of economic neutrality.

On one hand, the Constitutional Court accepts that the 'social obligation' of property ownership justifies imposing significant limitations on it[53]. From this perspective, the system of co-determination remains within the admissible limits. On the other hand, however, co-determination passes the test of proportionality because of the twofold fact that it contributes to 'politically securing the market economy', and that, on the other hand, 'the decisive influence and the right of final decision remain with

nationalisation that specific rules have been established by treaty. For an introduction to this complex issue, see Ruzza (2013).

[45] Abendroth (1954).

[46] Froese and Depenheuer (2018), §§4 et seq.

[47] Ipsen (2019); Röhner (2020).

[48] BVerfG, 7 May 1961, *Volkswagenprivatisierung*, 1 BvR 561, 579/60, 114/61, §40.

[49] Böick (2018).

[50] Albach and Witte (2002).

[51] McGaughey (2016).

[52] BVerfG, 1 March 1979, *Mitbestimmung*, *loc. cit*., §§140-141.

[53] *Ibid*., §§152-156.

the shareholders'[54]. This gives us a glimpse of the threshold beyond which a more ambitious reform of the right of property of the means of production would risk constitutional censure.

1.1.2.2. The prohibition of 'confiscatory' taxation: The 'essence' of property as an instrument of fiscal rationalisation

Rather than depriving shareholders of power over the means of production, an *indirect* collectivisation of the economy may consist in redistributing the 'purchasing power' to citizens, through 'confiscatory' taxation. Here too, the constitutional courts have intervened to limit the action of the legislature, whether in Germany, France or Belgium – albeit in varying degrees.

1.1.2.2.1. The FCC as the legislature's 'authoritarian *praeceptor*' in tax matters

Traditionally, taxes were not considered to be an infringement of property rights[55], as they represented abstract debts (not directly linked to concrete assets)[56]. However, faced with the extension of the 'fiscal state' to cover the widespread interventions of the 'social state', certain scholars, including the future constitutional judge Paul Kirchhof (1987-1999), argued in favour of limiting taxation by means of the constitutional protection of property[57]. The FCC eventually endorsed this position[58]. In a groundbreaking decision of 22 June 1995[59], drafted by Kirchhof as judge-rapporteur, the FCC relied on both the principle of equality before the law (Art. 3 FL) and the right to property (Art. 14 FL) to overturn a century-old tax: the net wealth tax, introduced in 1893 in Prussia and extended to the Reich in 1922[60]. Behind the developed arguments emerges a genuine general theory of (confiscatory) taxation in a capitalist market economy.

First, the Court decided to immunise taxpayers' existing assets: no taxation, even wealth tax, can ever be levied on acquired capital, but only on the income from that capital[61]. Moreover, it is not only the acquired capital that must be guaranteed, but also half of the taxpayers' income (from work *and* capital) must be immune from any levy. The legal basis for this decision lies in a highly controversial interpretation of the second sentence of Art. 14, para. 2 GG, according to which the property use 'shall also (*zugleich*) serve the public good'. The Court gives the adverb '*zugleich*' (literally 'at the same time') a quantitative meaning, as if the words used had been '*zu gleichen Teilen*', i.e., 'in equal shares'[62]. The Court drew from this (meager) argument an ultimate constitutional limit to the 'insatiability of the Leviathan'[63]: the 'fifty-percent rule' (*Halbteilungsgrundsatz*)[64], according to which the total tax burden on income must remain close to a fifty-fifty split between the private and public spheres[65].

Justice Böckenförde strongly denounced the implications of such a decision. He offered a fierce critique of the Court's reasoning[66]. He condemns the imposition of framework criteria on the legislature, based moreover on a provision (section 14) that was not even raised by the applicants. Echoing Justice Holmes'

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[54] *Ibid.*, §§167 to 170.
[55] BVerfG, 20 July 1954, *Investitionshilfe*, *loc. cit*., §34; 29 July 1959, *(Großer) Erftverband*, 1 BvR 394/58, §90; 10 May 1960, *Familienlastenausgleich* I, 1 BvR 190/58, §63.
[56] It could even be argued that, conceptually, tax is prior to property. As a subjective right enforceable against others, property necessarily presupposes a collective institution (the state), which itself inevitably requires a minimum pooling of resources, i.e., a (tax) 'contribution' (Murphy and Nagel, 2002).
[57] Kirchhof (1981).
[58] Kirchhof (2003).
[59] BVerfG, 22 July 1995, *Vermögensteuer*, 2 BvL 37/91.
[60] Vogel (1996); Flick and Schauhoff (1996).
[61] BVerfG, 22 July 1995, *Vermögensteuer, loc. cit.*, §§49-50.
[62] Grosclaude (2002), p. 53.
[63] Vogel (1996), p. 44.
[64] Seer (1999).
[65] BVerfG, 22 July 1995, *Vermögensteuer, loc. cit.*, §51.
[66] BVerfG, 22 July 1995, *Vermögensteuer*, dissenting opinion of Justice Böckenförde, §§83 et seq.

resistance in the US Supreme Court's Lochner decision[67], he criticised the lack of judicial self-restraint of the Court and accuses the latter of becoming an 'authoritarian *praeceptor*' for legislative power. Böckenförde then highlights the ideological nature of the reasoning followed. The specific protection of property over acquired capital would represent in this respect a 'privilege for the (very) wealthy'. The new tax dogma, which has no constitutional basis and even contradicts previous FCC case law, now leaves the State powerless 'against the inherent dynamics of accumulating capital', since the limits imposed were more or less equivalent to the existing tax rates. At the particularly critical time of German reunification, it was therefore the social state that would ultimately be jeopardised. The constitutional limitation of state (taxation) revenue implied that expenditure (including social benefits) had to be 'rationalised', i.e., curtailed.

On the very same day[68], the FCC extended its general theory of (confiscatory) taxation to inheritance law[69]. It relied on the doctrinal authority of the conservative scholar of constitutional law (and future President of the FCC) Hans-Jürgen Papier[70] to establish the principle that 'the tax burden must not make the inheritance appear economically useless (*ökonomisch sinnlos*) from the point of view of an owner thinking in economic terms (*wirtschaftlich denkenden Eigentümers*)'[71]. The Court then drew the legal consequences of this economic criterion: '[t]he burden of inheritance tax must be calculated in such a way that the continuation of the business is not jeopardised for tax purposes'[72]. Although the Court does not specify the threshold of 'economic uselessness', it is clear that private property over the means of production is the keystone of the functioning of the (market) economy in the FCC's economic referential. The close scrutiny (and subsequent invalidations) of later reforms to business inheritance tax confirm the importance of the constitutional guarantee of private property for the objective of preserving the 'competitiveness' of German (small and medium-sized) businesses in a competitive global market[73].

1.1.2.2.2. The Constitutional Council's capping of tax rates: A work of 'economic rationality'

The question of the maximum tax threshold has also been submitted to the Constitutional Council on several occasions. In a decision of 24 July 1991, the Council laid down the principle that a tax measure shall not, 'by its effects on taxpayers' assets, infringe the right of property' [74]. However, a constitutionality review has generally been carried out on the basis of the principle of equality before public burdens, set out in Article 13 of the French Constitution[75]. But this principle is in fact permeated by the right to property[76]. According to the Constitutional Council, the protection afforded by Article 13 of the DDCH entails a prohibition of 'confiscatory taxation'[77]. Yet, the possible confiscatory effect of taxation presupposes the guarantee of the taxpayer's right of property over his taxed assets and income.

Until 2012, however, the Council did not use this prohibition on confiscatory taxation to invalidate a measure. It repeatedly stated that such a limit existed, while noting in the specific case that it had not

[67] US Supreme Court, 17 April 1905, *Lochner v. New York*, 198 U.S. 45 (1905).
[68] BVerfG, 22 June 1995, *Erbschaftsteuer*, 2 BvR 552/91.
[69] Vogel (1996).
[70] Papier (1994).
[71] BVerfG, 22 June 1995, *Erbschaftsteuer*, *loc. cit*., §20.
[72] See also: BVerfG, 30 October 2010, 1 BvR 3196/09, §17; 7 April 2015, 1 BvR 1432/10, §§8-9.
[73] BverfG, 7 November 2006, *Erbschaftsteuer*, 1 BvL 10/02; 17 December 2014, *Steuerprivilegien für Firmenerben*, 1 BvL 21/12. See Krumm (2015).
[74] Cons. const., 24 July 1991, *Loi portant diverses dispositions d'ordre économique et financier*, No. 91-298 DC, Rec. 25.
[75] Fouquet (2011).
[76] De Crouy-Chanel (2011).
[77] Cons. const., 29 December 1998, *Loi de finances pour 1999*, No. 98-405 DC; 19 December 2000, *Loi de financement de la sécurité sociale pour 2001*, No. 2000-437 DC; 28 December 2000, *Loi de finances rectificative pour 2000*, No. 2000-441 DC; 29 December 2005, *Loi de finances pour 2006*, No. 2005-530 DC; 16 August 2007, *Loi en faveur du travail, de l'emploi et du pouvoir d'achat*, No. 2007-555 DC.

been breached. The Council exercised its veto power and sketched out a constitutional framework for taxation that suggested the existence of a maximum tax threshold[78]. Famous mainly for having invalidated the 75% tax on very high incomes promised by François Hollande during his presidential campaign, the censure was in fact based on a technical reason. But in the same decision, other provisions were overturned on the grounds that they were excessive or confiscatory. The decisive change is now to reason on the basis of the aggregate marginal tax rate. Previously, each measure was assessed separately, on the basis of its individual marginal tax rate. Henceforth, the excessiveness of the tax measure is measured against the 'maximum marginal tax rate' obtained by aggregating the various taxes. In this case, the level obtained was close to 75% for the three invalidated measures. It is still difficult to determine the exact level of the confiscatory tax threshold used by the Constitutional Council, but the *Conseil d'État* has concluded that there is a 'risk of censure by the constitutional judge' when the aggregated marginal tax rate is 'higher than a ratio of two-thirds'[79].

Should this be confirmed over the long term, the consequences of this decision cannot be overstated. In 1924, the marginal rate on the highest incomes in France was 90%, for budgetary reasons. This was also the case in the United States under the administration of Franklin D. Roosevelt and until the mid-1960s, for social justice reasons this time. More recently, the multiple presidential candidate Jean-Luc Mélenchon, who came close to the second round in 2022, also proposed imposing a marginal rate of 90% on the part of individual incomes over €400,000 a year. Yet, according to the guidelines laid down by the Council, such a rate would be unconstitutional.

But that's not all. There also seems to be an *absolute* limit to the taxation of assets: the acquired capital. Following the example of FCC's case law, the limit could be summarised as follows: income from capital is taxable, but the capital itself is sacred. The Constitutional Council does not express this so explicitly, but its decisions on 'wealth tax' do imply this tenet[80]. Tax measures that indirectly oblige taxpayers to sell part of their assets in order to pay the amount of tax due are considered confiscatory and contrary to the principle of equality before public burdens[81]. This rule is already implied in the decision of 9 August 2012[82]. Here, the Council 'surreptitiously'[83] constitutionalised the legal method consisting in capping wealth tax by adjusting it to the income actually available after income tax, in order to immunise the net acquired capital. What is remarkable is that the Council's reasoning includes the criterion used by the FCC. As it admits in its own commentary on the decision[84], the 'economic rationality' of the taxpayer's behaviour guides the approach taken by the *Conseil*[85].

1.1.2.2.3. The (timid) recognition of a 'confiscatory' inheritance tax by the Belgian constitutional court

It was also on the basis of the principle of 'equality of citizens before public burdens', as applied to taxation (Art. 172 of the Constitution), that the Belgian Constitutional Court (then 'Court of Arbitration') came to declare a tax unconstitutional. According to some scholars, this decision paved the way for 'the establishment of a system of judicial review of confiscatory taxation[86]. The overturned provision concerned inheritance tax and provided for a marginal rate of 90% on the part of the inheritance

[78] Collet (2014a).
[79] French C.E. fr, A.G. (Finance Section), Advisory Opinion No. 387402 of 21 March 2013, *Demande d'avis relative aux conditions de constitutionnalité d'une contribution sur les très hauts revenus*.
[80] Cons. const., 30 December 1981, *Loi de finances pour 1982*, No. 81-133 DC, Rec. 4-12; 29 December 1998, *Loi de finances pour 1999*, *loc. cit.*, Rec. 24-28.
[81] Grosclaude (2002); Wanda (2005).
[82] Cons. const., 9 August 2012, *Loi de finances rectificative pour 2012 (II)*, No. 2012-654 DC, Rec. 33.
[83] Collet (2014b).
[84] Official commentary on Decision No. 2012-654 DC of 9 August 2012, p. 21. See Collet (2014a), p. 42-46.
[85] Collet (2014a), p. 42-46; Martinez (2022), p. 398.
[86] Bourgeois (2005).

exceeding €175,000 when the legatee was not related to the deceased by blood or marriage[87]. However, unlike its German and French counterparts, the Belgian Constitutional Court does not reason at an aggregate level. Instead, it focused on the marginal tax rate of the contested measure alone. Insofar as this rate exceeds 80% and is motivated solely by budgetary reasons – and not by an objective of encouraging or deterring specific taxpayer behaviours – the provision is declared incompatible with the constitutional principle of equality before the law[88]. The question nevertheless arises as to which reason the Court would have accepted: would the fight against an excessive concentration of wealth through inheritance (for all or, as in this case, solely for extra-familial inheritance) be capable of justifying such rates?

However, it cannot be denied that the Belgian Constitutional Court is far less aggressive than the FCC and the Constitutional Council when it comes to 'confiscatory taxation'… for now. In the future, though, it may well follow suit, given its tendency to embrace the interpretations of the ECtHR, which has begun to enforce[89] the prohibition of 'disproportionate and excessive burdens'[90]. As one commentator has observed, the latter is now inclined to consider that 'an excessively high tax, which undermines the economic viability of the taxpayer, would be regarded as expropriation and not taxation'[91].

If the Constitutional Court has made less use of the right of ownership and the principle of equality before public burdens to develop a strict control of taxation, it is perhaps also because it has developed other tools, especially the principle of 'economic and monetary union' between the different entities of the State (federal authority, regions and communities). Derived from a very thin legal basis, this principle helped the Court to declare unconstitutional a tax of the Walloon Region which officially pursued an ecological objective but dissimulated economic protectionism vis-à-vis the Flemish Region[92]. Rather than taking offence at this bold interpretation, the parliament strengthened its legal basis. It incorporated this new principle of 'economic and monetary union' in a quasi-constitutional norm that requires special majorities to be adopted and amended[93], together with other 'liberal' tenets: the 'free movement of persons, goods, services and capital' and the 'freedom of trade and industry'. For some authors, the consequence of the Court's decision has therefore been to 'give concrete form to the coherence of the economic system, to establish it legally' [94] – and not just any economic system: the 'market economy'[95]. Indirectly, it also contributed to elevate the legal value of the freedom of trade and industry, i.e., the second classic economic freedom that the constitutional courts have used to constrain the legislature's decisions in economic matters.

1.2 From economic freedom to free competition: Institutional protection of the market

Since the French Revolution, 'economic freedom' has gradually conquered Europe, and far beyond, under various names: freedom of trade and industry (*liberté du commerce et de l'industrie*; *Handels- und Gewerbefreiheit*), freedom to choose an occupation (*liberté professionnelle*; *Berufsfreiheit*), entrepreneurial freedom *(liberté d'entreprendre*; *Unternehmensfreiheit*) or freedom of competition (*liberté de concurrence*; *Wettbewerbsfreiheit*). Beyond the semantic distinctions, what is more important conceptually is that economic freedom has a dual dimension: on one hand, the freedom to *access* the

[87] Cour const., 22 June 2005, No. 107/2005, B.15.7.
[88] Cour const., 22 June 2005, No. 107/2005, B.15.4.
[89] ECtHR, 14 May 2013, *NKM v. Hungary*, No. 66529/11.
[90] ECtHR, 14 December 1988, *Wasa Liv Ömsesidigt v. Sweden*, No. 13013/87.
[91] Baker (2013), p. 393.
[92] Cour const., 25 February 1988, No. 47/88, 6.B.4. and 6.B.5.
[93] Article 6, §1, VI, paragraph 3 of the Special Law on Institutional Reforms (LSRI) of 8 August 1980, amended by the Special Law on Institutional Reforms of 8 August 1988. The principle of 'economic and monetary union' is also enshrined in another fundamental Special Law, i.e., the Special Financing Law of 16 January 1989 (Piron, 2022).
[94] Schoonbroodt (1990), p. 9.
[95] Yernault (2013), p. 932.

market, i.e., to set up a business and choose a profession; and on the other hand, the freedom to *operate on* the market, i.e., to be free from unfair restrictions imposed on the way we run our business or exercise our occupation.

Historically, classical liberals focused on the first dimension, assuming that free competition would follow. The various neoliberal currents then moved to the second dimension, to protect the competitive structure of the market not only against public intervention, but also against private monopolies and cartels. This shift is the result of the existential crisis of the liberal economic order in the first decades of the twentieth century, due to the democratisation of parliament and the rise of labour law, but also to the cartelisation of the economy – i.e. the abolition of the competition by endogenous market forces (capitalist firms). In response, liberal intellectuals undertook an *aggiornamento* of their doctrinal base. The key question they addressed was as follows: how could and should the mechanism of competition be guaranteed institutionally and legally? The various currents that have come to be known as 'neoliberalism(s)' were born out of this very question[96]. Despite their many differences, their common answer was that the state should not refrain from intervening in the market, but that this public intervention should be conditional on the protection of competition – i.e., not against the market, but for the market. Put simply, what distinguishes liberalism from *neo*liberalism is the shift from the defence of individual freedom to the search for a structural guarantee of competition.

A similar shift can be seen in the constitutional jurisprudence of the three States studied: the subjective dimensions of economic freedom were first enshrined (1.2.1.), and then the constitutional courts gradually developed an institutional guarantee of competition in the market (1.2.2.).

1.2.1. Enshrinement and development of 'economic freedom' by national constitutional courts

In France, the freedom of trade and industry, proclaimed by the *décret d'Allarde* of 2-17 March 1791, is even older than the establishment of the Republic. Since the beginning of the 20th century, it has played a major role in the supervision of state interventionism by the *Conseil d'État*[97]. However, this administrative control did not apply to the legislature itself[98]. The situation changed radically with the decision *Nationalisations* of 16 January 1982. The Constitutional Council 'discovered' a constitutional basis for 'entrepreneurial freedom', even though it had not been invoked by the applicants. According to the Council, this basis is to be found in the general protection of freedom set out in Article 4 DDHC[99]. This new economic freedom is then linked to the right to property (Art. 2 and 17 of the DDHC) to together provide protection against the implicit 'collectivism threshold'[100] beyond which the State could not proceed to nationalisation[101]. To some extent, this provided the 'basis for capitalist activity'[102] and the foundation for the 'market economy'[103]. Since then, the *Conseil* has made it clear that entrepreneurial freedom protects both the freedom of access to the market and the free exploitation of activity on the market[104]. Moreover, constitutional control has been considerably strengthened over time. Initially confined to a loose control of 'denaturation' or 'manifest error'[105], it then gradually evolved into a full

[96] Audier (2012) ; Audier (2022).
[97] French C.E., 29 March 1901, *Casanova*; 30 May 1930, *Chambre syndicale du commerce en détail de Nevers*; 22 June 1951, *Daudignac*; 28 October 1960, *Sieur de Laboulaye*.
[98] Savy (1977), p. 100.
[99] Cons. const., 16 January 1982, *Nationalisations I*, *loc. cit*., 16.
[100] Vedel and Delvolvé (1992), p. 640.
[101] Cons. const., 16 January 1982, *Nationalisations I*, *loc. cit*., Rec. 20.
[102] Jurion (2017), p. 78-80.
[103] Savy (1983), p. 107.
[104] Cons. const., 30 November 2012, *Storms*, No. 2012-285 QPC, Rec. 7.
[105] Cons. const., 4 July 1989, *Loi modifiant la loi n° 86-912 du 6 août 1986 relative aux modalités d'application des privatisations*, No. 89-254 DC, Rec. 5; 10 June 1998, *Loi d'orientation et d'incitation relative à la réduction du temps de travail*, No. 98-401 DC, Rec. 26-28; 13 January 2000, *Loi relative à la réduction négociée du temps de travail*, No. 99-423 DC, Rec. 24-34.

and complete control of proportionality[106], which led to the invalidation of certain legislation[107]. In 2002, the Council struck down one of the key measures of the left-wing government in charge at the time: the tightening of the legal criteria for 'economic redundancies'[108]. The reasoning was based on a very explicit market logic[109]: the measure was hindering economic expectations and the room for manoeuvre of entrepreneurs in their efforts to make their businesses more attractive in a context of increased competition. As several authors have pointed out, this decision marks the beginning of a process of 'market objectivisation'[110], whereby the market is no longer seen as a socially and legally embedded institution, but as an external (or natural) fact that precedes the legal organisation of society. In this respect, the decision *Florange* of 27 March 2014 can be analysed as a direct extension of the 2002 decision. It represents a new stage in the process of 'fundamentalisation of liberal order'[111]: the system to prevent profit-based layoffs is said to have a disproportionate impact on the ability of business owners 'to anticipate economic difficulties and to make economic trade-offs'[112]. The primacy of shareholders over other stakeholders is therefore constitutionally enshrined here[113].

The same logic, but stated even more explicitly, emerges from the judgments of the FCC. Unlike France, Germany has a constitutional provision that is directly linked to the idea of free economic activity: the guarantee of 'freedom to choose an occupation' (*Berufsfreiheit*), laid down in Article 12 GG. It is not entirely clear whether *Berufsfreiheit* was originally conceived as a generic recognition of economic freedom or not[114]. But what is clear is that the FCC made it the 'principal fundamental right of free economic activity'[115] and the 'cornerstone of the constitutional order from the economic point of view'[116]. The seminal decision is the decision on pharmacies (*Apotheken-Urteil*) of 11 June 1958[117]. Most of the principles that have underpinned the abundant constitutional case law in economic matters can already be found here. It is even the founding decision of the 'principle of proportionality', which forms the cornerstone of the German approach to fundamental rights and, by extension, of the 'global constitutionalism' that spread around the world in the second half of the 20th century[118]. After an in-depth presentation of legal history and social philosophy, the *Apotheken-Urteil* comes to the conclusion that *Beruf* ('occupation' or 'profession') is an act of individual self-determination in the economic sphere, which must therefore be particularly protected. As a result, *Berufsfreiheit* is generally considered as 'the most important right in economic life' and even an 'objective decision on constitutional values' (*objektiv-rechtliche Wertentscheidung*)[119]. Moreover, the term *Beruf* is interpreted very broadly, to include any form of economic activity, whether self-employed or employed, and whether in the private sector or the public sector. Subsequently, the freedom to choose an occupation was further extended both in terms of activities covered (professional education[120]) and of right holders (all legal entities, including corporations[121]).

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[106] Cons. const., 20 March 1997, *Loi créant les plans d'épargne retraite*, No. 97-388 DC, Rec. 51; 27 July 2000, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, No. 2000-433 DC, Rec. 40.
[107] Cons. const., 7 December 2000, *Loi relative à la solidarité et au renouvellement urbains*, *loc. cit*., Rec. 20.
[108] Cons. const., 12 January 2002, *Loi de modernisation sociale*, No. 2001-455 DC, Rec. 47-50.
[109] Feldman (2002).
[110] Garnier (2004); Martinez (2022), p. 374-379.
[111] Sachs and Vernac (2014).
[112] Cons. const., 27 March 2014, *Loi visant à reconquérir l'économie réelle*, *loc. cit*., Rec. 19-21.
[113] Chazal (2014), p. 1102-1103.
[114] Jungbluth (2018), p. 217-218.
[115] Ossenbühl (1990), p. 5.
[116] Oppermann (1985), p. 83.
[117] BVerfG, 11 June 1958, *Apotheken-Urteil*, 1 BvR 596/56.
[118] Stone Sweet and Mathews (2008).
[119] Scholz (2022), §4.
[120] BVerfG, 18 July 1972, *Numerus clausus I*, 1 BvL 32/70.
[121] BVerfG, 4 April 1967, *Arbeitsvermittlungsmonopol*, 1 BvR 84/65, §15.

It was also in the decision on pharmacies that the FCC extended the freedom to choose an occupation to free exercise of the economic activity. It developed its constitutional review on the basis of a 'three-level theory' (*Drei-Stufentheorie*). Considerations of political expediency may intervene in the regulation of exercise (first stage), but the room for manoeuvre is restricted when it comes to limiting access to an occupation. Here, only *subjective* admission criteria (i.e., related to the educational background of candidates) are tolerated, provided they remain proportionate (second stage). By contrast, the objective criteria (over which the individual has no control, even if all the individual conditions set are met) are prohibited, unless it can be demonstrated that this 'crudest and most radical means' is the only one capable of preventing 'demonstrable or highly probable serious dangers to an overridingly important common good' (third stage). On the basis of a detailed economic analysis of the pharmacy market and of the 'rational' behaviour of pharmacists, the FCC concluded that the objective restrictions on the establishment of new pharmacies in Bavaria was disproportionate and therefore unconstitutional.

As in France, the extension of *Berufsfreiheit* is further consolidated by its link with the right to property (Art. 14, para. 1 GG), which provides a genuine guarantee of 'entrepreneurial freedom' (*Unternehmerfreiheit*)[122]. Endorsing a distinction proposed in academic circles[123], the FCC expresses the close functional association between the two 'liberal' provisions as follows: 'Art. 14 para. 1 GG protects what has been acquired, i.e., the result of the activity, while Art. 12 para. 1 GG protects the acquisition, i.e., the activity itself'[124]. Moreover, the combination of the two fundamental economic liberties give rise to new derivative freedoms: freedom of internal organisation of the business and labour management[125], freedom of production[126], freedom of advertising[127], freedom of pricing[128] and freedom to contract[129]. This deep-rooted connection between *Berufsfreiheit* and the right to property would therefore have a 'systemic significance for the economic constitution'[130].

Against this background, German *Dogmatik* deploys a colossal effort to maintain, as best it can, the theory of the 'economic neutrality' of the Basic Law. The result, however, looks more like an Orwellian exercise in 'doublethink'. It argues that the market order does not result from an objective structural choice set out in the constitution, but from a consistent application of subjective fundamental rights: the decentralised market system would be able to optimise these individual freedoms. But the schizophrenic nature of this stance is apparent even in the FCC's most important decisions. The decision *Mitbestimmung* once again provides a good illustration of the very relative economic neutrality of the Basic Law as interpreted by the Court of Karlsruhe. The constitutionality of the law depends both on the fact that the power of decision remains in the hands of the business owners and on the fact that the scope of the companies concerned is limited to large companies, where the personal aspect of self-determination is less significant for business owners than in small and medium-sized enterprises. Yet the Court might have just as well advanced another argument in support of its declaration of constitutionality: the fact that, according to its own jurisprudence, *Berufsfreiheit* is also recognised for workers, since that freedom has 'the same value and dignity for all'[131]. What is even more interesting is that the FCC mentions this, albeit very cursorily, when it states that 'the holders of the fundamental right can only exercise the guaranteed freedom with the help of others, the workers, who are also holders of

[122] Meyer (2006), p. 222.
[123] Wittig (1967), p. 2188.
[124] BVerfG, 16 March 1971, *Erdölbevorratung*, 1 BvR 52/66, §122. This dictum has been reiterated on several occasions: 24 April 1991, *Warteschleife*, 1 BvR 1341/90, §90; 10 March 1992, *Akademie-Auflösung*, 1 BvR 454/91, §73.
[125] BVerfG, 1 March 1979, *Mitbestimmung*, *loc. cit*., §§166-169.
[126] BVerfG, 8 January 1959, *Strafbarkeit der Arzneiproduktion*, 1 BvR 425/52, §30.
[127] BVerfG, 7 November 1991, *Werbung für Lohnsteuerhilfevereine*, 1 BvR 1469/86, §25.
[128] BVerfG, 17 December 2002, *Arzneimittelfestbeträge*, 1 BvL 28, 29, 30/95, §111.
[129] BVerfG, 24 April 1991, *Warteschleife*, *loc. cit*., §58.
[130] Scholz (2022), §86.
[131] BVerfG, 11 June 1958, *Apotheken-Urteil*, *loc. cit*., §52.

the fundamental right under Art. 12 para. 1 GG' [132]. However, the reasoning is immediately interrupted, probably to avoid taking the point further than intended. For, once workers are vested with the same dignity and value in their occupation, it could be assumed that they (should) have a right to an equal share in the management and direction of the means of production to which they bring their workforce. The size of the company would moreover be irrelevant here. The solution adopted is quite different: *Berufsfreiheit* guarantees shareholders' ultimate power of decision over the means of production, despite the proclaimed economic neutrality.

The 'freedom to choose an occupation' is also mentioned in the Belgian Constitution since the adoption in 1993 of an Article 24*bis* (now Article 23) dedicated to 'economic, social and cultural rights'. Despite the plea of a few scholars to infer from this a guarantee of entrepreneurial freedom[133], the Constitutional Court refused to use the provision[134]. It did so not because it refused to recognise the constitutional nature of this economic freedom, but because in the meantime it had favoured another legal basis[135].

The 'combination method' of reasoning gave the Court the possibility to constitutionalise the legislative principle of 'entrepreneurial freedom' (Art. II.3 and II.4 of the Economic Law Code) by connecting it to the principle of equality and non-discrimination (Art. 10 and 11 of the Constitution) and to the quasi-constitutional norm already mentioned (Art. 6, para. 1, VI, 3° of the Special Law on Institutional Reforms of 8 August 1980) – to which it sometimes even adds the EU fundamental freedoms of movement[136]. As the current President of the Court observes, the Court played an active role in establishing entrepreneurial freedom 'as a normative and unifying paradigm of economic activity' in Belgium[137].

Yet, while the Constitutional Court protects both the freedom to access the market and the freedom to operate on the market[138], it has so far made only very moderate use of its power of censure. Sometimes, however, the Constitutional Court does carry out a 'concrete examination'[139] of the facts of the case. For example, regarding the prohibition on tobacco advertising, the Constitutional Court used the economic analysis produced by the legislature to conclude that the measure did not jeopardise the 'financial viability of the sector'[140]. Nevertheless, cases of unconstitutionality have so far been concentrated on those 'where the entrepreneurial freedom is not simply limited, but actually suppressed or rendered practically impossible'[141]. The Belgian Constitutional Court thus left the legislature a relatively wide margin for manoeuvre concerning the regulation of entrepreneurial freedom, at least greater than that in the German and French cases.

1.2.2. From a subjective economic freedom to the institutional guarantee of the competitive order

Protection against legislative interference is only one side of the coin, the other is protection against possible infringement by other individuals. There is thus a shift from the subjective economic freedom

[132] BVerfG, 1 March 1979, *Mitbestimmung*, *loc. cit*., §198.
[133] Delpérée (1995), p. 290.
[134] Cour const., 21 May 2015, No. 66/2015, B.11.2. On Article 23 of the Constitution, *see below*, 2.
[135] Cour const., 30 April 2015, No. 50/2015, B.8. This basis has since been confirmed on several occasions: Cour const., 21 December 2017, No. 150/2017, B.11.2 to B.11.4; 5 July 2018, No. 90/2018, B.7.3; 21 January 2021, No. 10/2021, B.36.1 to B.36.4; 30 September 2021, No. 119/2021, B.11.2; 9 December 2021, No. 177/2021, B.42.4.
[136] Cour const., 22 December 2010, No. 149/2010, B.11; 18 October 2012, No. 119/2012, B.5.2; 12 December 2021, No. 177/2021, B.42.6.
[137] Nihoul (2022), p. 545.
[138] For the freedom to access the market: Cour const., 14 December 2005, No. 188/2005; 9 December 2010, No. 135/2010; 23 January 2014, No. 6/2014; 28 April 2011, No. 56/2011. For the free exercise of economic activity on the market: Cour const., 18 October 2012, No. 119/2012, *loc. cit*.
[139] Depré (2002), p. 372.
[140] Cour const., 30 September 1999, No. 102/99, B.21.2.
[141] Vanderstraeten (2015), p. 25. See e.g.: Cour const., 28 April 2016, No. 56/2016, B.12.; 6 April 2000, No. 40/2000, B.43.

to a principle of equality in competition – and the shift affects all three legal orders studied (1.2.2.1.). And that's not all: for France and Germany at least, entrepreneurial freedom and *Berufsfreiheit* seem to be gradually superseded by an institutional guarantee of competition (1.2.2.2.).

1.2.2.1. Free and fair competition as an economic implication of the principle of equality

Still latent in the decision on pharmacies, the competitive dimension of the *Berufsfreiheit* was explicitly taken into account in the decision *Erdölbevorratung* (*oil stocks*) of 16 March 1971[142]. The case concerned the obligation imposed on the oil industry to build up stocks in order to guarantee sufficient energy supplies, as required by a European directive. A number of importing companies, which lacked the infrastructure (such as refineries) possessed by companies also involved in the production process, challenged this stock-holding obligation before the FCC, as it affected their competitiveness. The FCC ruled in their favour: since the business structure of a company is linked to the freedom of internal organisation of economic activity, and since the latter is one of the freedoms derived from *Berufsfreiheit*, imposing a burden on a company that would considerably impair its competitiveness due to its own internal structure would be contrary to Art. 12 GG, read in conjunction with the principle of equality (Art. 3, para. 1 GG). The general principle of equality thus permeates the economic freedom to create a kind of principle of free and fair competition.

In France, the linking of free competition with the principle of equality[143] began explicitly in a decision of the Constitutional Council on 28 December 1998[144]. The Council then confirmed, in two decisions in 2001[145], that free competition is seen as 'an implication or corollary'[146] of the general principle of equality in the economic sphere. Without being explicitly mentioned, this 'competitive implication' of the principle of equality is also at work in the decision of 21 January 2011[147]. On that occasion, the Court used it to justify, on the basis of general interest, the restriction on entrepreneurial freedom caused by the authorisation given to the administrative authority to impose a weekly rest period on all establishments exercising the same profession in the same geographical area. A few months later, the same reasoning was applied to justify the restriction on entrepreneurial freedom resulting from the prohibition on Sunday working in Alsace-Moselle[148]. It expressly states there that 'the control of conditions of competition' is a reason of general interest. Although free and fair competition does not (yet) exist as an autonomous principle of constitutional value[149] that can be invoked directly by individuals before a court, it nonetheless permeates the constitutional case law of the Constitutional Council, leaving open the possibility of a future 'constitutionalisation' through the combination of the principle of equality and entrepreneurial freedom.

In Belgium, the principles of equality and non-discrimination (Art. 10 and 11 of the Constitution) constitute the cornerstone of the constitutional protection of fundamental rights, and freedom of enterprise is no exception. The state's intervention in the economy must therefore comply with these principles. the effect of this is 'to prevent the public authorities from taking charge of an economic activity by attaching to it means of action which are (...) likely to distort unduly or disproportionately the normal process of competition on the market'[150]. Of course, this does not mean that the legislature

[142] BVerfG, 16 March 1971, *Erdölbevorratung*, *loc. cit*.
[143] Mongouachon (2017).
[144] Cons. const., 29 December 1998, *Loi de finances pour 1999*, *loc. cit.,* 36.
[145] Cons. const., 11 July 2001, *Loi portant diverses dispositions d'ordre social, éducatif et culturel*, No. 2001-450 DC, Rec. 10; 27 November 2001, *Loi portant amélioration de la couverture des non salariés agricoles contre les accidents du travail et les maladies professionnelles*, No. 2001-451 DC, Rec. 34.
[146] Jurion (2017), p. 104.
[147] Cons. const., 21 January 2011, *Société Chaud Colatine*, No. 2010-89 QPC, Rec. 4-5.
[148] Cons. const., 5 August 2011 *Société SOMODIA*, No. 2011-157 QPC, Rec. 7.
[149] Debré (2014), p. 9.
[150] Nihoul (2022), p. 556.

cannot depart from the principle of competition, either to replace it with public services or to temper its functioning or effects for reasons of general interest. But the connection of the principle of entrepreneurial freedom to those of equality and non-discrimination implicitly makes the competitive order the rule, exceptions to which must be duly justified and remain proportionate (to the scale of values established not by the legislature but by the Constitutional Court). Moreover, as I have already mentioned, free competition further strengthens its constitutional status through its combination with the quasi-constitutional principle of 'economic and monetary union' (Art. 6, para. 1, VI, 3° LSRI) [151] and the EU's fundamental freedoms of movement[152].

1.2.2.2. The constitutional principle of competition, the heart of economic public policy

Less than a year after the *Erdölbevorratung* decision, the FCC reached a new milestone by proclaiming that 'the existing economic constitution (*sic*) contains the fundamentally free competition of entrepreneurs acting as suppliers and demanders on the market as one of its basic principles'[153]. Admittedly, the FCC concluded in this case that the prohibition on unfair competition in the headstone market remained within the bounds of the restrictions authorised by the regulation of the exercise of the economic activity. Yet the Court nonetheless affirmed in this decision the paramount importance of competition in the constitutional economic order. Abandoning the undoubtedly overly ideologically-charged expression 'economic constitution' (*Wirtschaftsverfassung*), the FCC repeated this idea five years later with the following formula: 'Within the existing *economic order* (*Wirtschaftsordnung*), the behaviour of entrepreneurs in competition is a constituent part of their professional activity'[154]. This does not prevent the State from intervening in the market, but such intervention must in principle be designed to improve competition, not to counter it. Hence the Court recognition of the essential role of the State in controlling and providing accurate information to consumers and economic operators, as a condition of free and fair competition[155].

The advent of the principle of competition can also be observed in France. Here, the protection of the 'competitive functioning of the market'[156], as well as 'the need to maintain a balance in commercial relations'[157], is deduced from the broader constitutional objective (*objectif à valeur constitutionnel*) of preserving the 'economic public order'[158]. It was on this basis that provisions were validated that were particularly prejudicial to entrepreneurial freedom in the French territory of New Caledonia (obligation of prior authorisation for mergers, possible injunction to sell off assets, etc.)[159]. A very high degree of economic 'concentration' and the formation of 'economic powers' led to 'insufficient competition in many markets', so that the State was deemed to be entitled to act to protect 'economic public order'. On the other hand, the Constitutional Council ruled that the legislative intervention to impose the 'competitive functioning of the market' may under no circumstances go so far as to oblige 'to modify, supplement or terminate agreements or acts, or to dispose of assets even though the dominant position of the company or group of companies may have been acquired *on its merits* and no abuse has been

[151] Cour const., 2 February 1995, No. 4/95, B.5.7. See also: Cour const., 10 November 2011, No. 166/2011, B.10; 28 April 2011, No. 56/2011, *loc. cit*., B.8.2.
[152] Cour const., 25 April 1995, No. 37/95, B.7.3; 21 December 2000, No. 136/2000, B.49; 4 November, No. 2015/159, B.12.
[153] BVerfG, 8 February 1972, *Steinmetz*, 1 BvR 170/71, §19.
[154] BVerfG, 12 October 1977, *Direktruf*, 1 BvR 216/75, §45.
[155] BVerfG, 26 June 2002, *Glykol-Fall*, 1 BvR 558/91, §59.
[156] Cons. const., 12 October 2012, *Société Groupe Canal Plus et autre*, No. 2012-280 QPC, Rec. 11.
[157] Cons. const., 13 May 2011*, Société Système U Centrale Nationale et autre*, No. 2011-126 QPC, Rec. 5.
[158] Pez (2015); Laget-Annamayer (2018).
[159] Cons. const., 1 October 2013, *Loi du pays relative à la concurrence en Nouvelle-Calédonie*, No. 2013-3 LP, Rec. 11-15. For other examples, see: Cons. const., 11 December 2015, *Syndicat réunionnais des exploitants de stations-service et autres,* No. 2015-507 QPC, Rec. 8; 7 November 2019, *Loi relative à l'énergie et au climat*, No. 2019-791 DC, Rec. 6-12.

found'[160]. Otherwise, there would be a risk of 'manifestly disproportionate' interference in entrepreneurial freedom (and the right to property). The provision of the so-called 'Macron law' of 2015, which gave the regulatory authorities the power to tackle dominant positions in the retail sector, regardless of the existence of any abuse, was therefore declared unconstitutional. Yet, this defence of 'competition on the merits' is a far cry from the claimed 'economic neutrality'. Forged in Germany in the 1930s[161], the concept of 'competition on the merits' (*Leistungswettbewerb*) refers to a set of discussions that drive theoretical controversies among neoliberals and that have permeated European competition law[162].

Whether or not the members of the Constitutional Council are aware of the ideological underpinning of their reasoning, they are in any case gradually incorporating the principle of competition as the fundamental constitutional principle governing the economic order. Of course, constitutional objectives other than the preservation of the competitive functioning of the market may justify a restriction of entrepreneurial freedom – for example, the protection of employment[163], health[164] or, more recently, the environment[165]. It is also true that the objective of preserving the competitive functioning of the market can only be used by the legislature to justify an infringement of entrepreneurial freedom, but it cannot be invoked directly by individuals to challenge the economic intervention of public authorities. However, the many recent decisions mentioned above suggest that competition may soon be formally recognised as an autonomous 'constitutional requirement' (*exigence constitutionnelle*)[166], thereby providing a genuine 'constitutional matrix' for 'competition law'[167]. A former member of the Constitutional Council, who was still in office at the time he spoke, even admitted that in the eyes of the Council members, their task is to 'set limits' and 'determine the conditions for the efficiency' of the legislature in its work to 'preserve the structures of the market and protect it against abusive or collusive behaviour'[168]. What is more, according to the same judge, this task of protecting competition, driven by EU law, would have an implicit major effect: it would overturn the 'economic neutrality' of the Constitution. This does not mean that free competition is now the only principle governing the economic constitutional order, but it does at least suggest a general trend towards the constitutional enshrinement of the competitive market economy.

By contrast, the Belgian constitutional court does not seem to have developed an explicit independent conception of the principle of competition. But it simply has little need to do so, given its much greater openness to European law[169], which offers it, via the 'combination method', a tailor-made legal framework in this area. Its review has nonetheless a dissuasive and 'prudential' effect on legislative action[170]. By gradually 'constitutionalising' the different aspects of economic freedom, it has established the essential basis for controlling government action in economic matters.

1.3 Intermediate outcome: An 'objectivised' market order

At the present stage of our analysis, it appears that both of the classic economic liberties that underpin

[160] Cons. const., 5 August 2015, *Loi pour la croissance, l'activité et l'égalité des chances économiques*, No. 2015-715 DC, Rec. 32 (emphasis added).
[161] Nipperdey (1930); Böhm (1933).
[162] Mongouachon (2015).
[163] Cons. const., 10 June 1998, *Loi d'orientation et d'incitation relative à la réduction du temps de travail*, *loc. cit*., cons 26-28.
[164] Cons. const., 4 August 2016, *Loi pour la reconquête de la biodiversité, de la nature et des paysages*, No. 2016-737 DC, Rec. 39.
[165] Cons. const., 31 January 2020, *Union des industries de la protection des plantes*, No. 2019-823 QPC, Rec. 4.
[166] Martinez (2022), p. 427-432.
[167] Martucci (2015).
[168] Canivet (2014), p. 158.
[169] Verdussen (2011).
[170] Vanderstraeten (2015).

the market system have been endowed with well-established constitutional status. Far from being particularly 'open' or 'neutral' in economic matters, the case law of the three legal orders studied convey a neoliberal referential, albeit to varying degrees. Even if the constitutional judges are probably not consciously endeavouring to translate into legal terms a specific economic theory, they convey a certain economic *Weltanschauung* based on a competitive market order that must be organised and guaranteed by the public authorities. A maximum threshold for the collectivisation of the economy must be imposed. Income from economic activities must be protected from confiscatory taxes. Acquired capital must be immune from any levy. The rational expectations of business owners seeking to maximise their investments in a competitive environment must be preserved. The competitive structure of the market itself must be guaranteed, if necessary against private powers attempting to abuse their dominant positions.

The protection of economic liberties has therefore led to the advent, at constitutional level, of a competition paradigm, which has become the core of 'economic public order'. However, these classic economic liberties represent only one side of national economic constitutions. The economic and social rights constitute another, which must also be analysed if we hope to draw up an overall assessment of the way in which national constitutional judges interpret (and condition) the legal ordering of the economy.

2. The limitation of economic and social rights or the rationalisation of the social state

Social constitutional thought can take two main paths, potentially cumulative: on one hand, it can be derived from an objective principle identifying the state as 'social'; on the other hand, it can be expressed through subjective fundamental rights, via a catalogue of 'economic and social rights' (2.1.). However, beyond their gradual recognition, their scope is limited on both sides by the three constitutional courts. The justiciability of the social state principle or economic and social rights remains partial, notably due to a liberal reinterpretation of the idea of solidarity, which leads the constitutional courts to endorse the current rationalisation of the social state (2.2.).

2.1. Paths of the social state: Objective meta-principle or subjective fundamental rights

From Lorenz von Stein in the nineteenth century to Hermann Heller in the first decades of the twentieth century, the idea of 'social state' (*Sozialstaat*) was particularly conceptualised in Germany. It found its first concrete expression in the economic section of the Weimar Constitution, in which the fundamental principles of economic liberalism, though confirmed, were embedded and enclosed in objectives of (distributive) social justice[171]. After the Nazi tragedy, the 'social' nature of the new Federal Republic of Germany was reaffirmed by the Parliamentary Council responsible for drafting the new 'basic norm'. Introduced in Art. 20 para. 1 and Art. 28 para. 1 GG, the 'meta-principle' of the 'social state'[172] is binding on all public authorities, whether federal or federated (Art. 20, para. 3 GG). Besides, this 'social statehood' (*Sozialstaatlichkeit*) also extends to the constitutional legislator, since the principles set out in Articles 1 and 20 GG are rendered intangible by the 'eternity clause' (Art. 79, para. 3 GG), as confirmed by the FCC[173]. But due to the almost unanimous reluctance of the Parliamentary Council to include a catalogue of social rights, the Basic Law contains very few provisions giving concrete form to the social state[174]. It therefore fell to the FCC to gradually define the constitutional implications of the social state. On one hand, 'liberty-rights' were recognised for workers: the freedom of coalition[175],

[171] Grégoire (2022).
[172] Heuschling (2013).
[173] BVerfG, 23 April 1991, *Bodenreform I*, *loc. cit*., §131; 14 May 1996, *Sichere Drittstaaten*, 2 BvR 1938/93, §209; 30 June 2009, *Lissabon*, 2 BvE 2/08, §249.
[174] Niclauß (1974).
[175] BVerfG, 30 November 1965, *Dortmunder Hauptbahnhof*, 2 BvR 54/62, §20.

the (derived) freedom of collective bargaining (*Tarifautonomie*)[176] and the right to 'industrial dispute' (*Arbeitskampf*)[177] (Art. 9, para. 3 LF). On the other hand, the 'radiating effect' (*Ausstrahlungswirkung*) of the social state principle on traditional fundamental rights has specific legal implications, including the strengthening of existing guarantees[178] or even the recognition of genuine 'claim-rights' or 'rights to benefits'[179] – which must first have been implemented by the legislature[180].

The 'social' character of the Republic is also proclaimed in the French Constitution of 1958, in the very first sentence of its first Article. However, this principle of the 'Social Republic' has been largely neglected, both by legal literature and by the Constitutional Council. The reason for this omission lies in the fact that, unlike Germany, a catalogue of economic and social rights exists in France, *via* the Preamble to the 1946 Constitution, which has been recognised by the Constitutional Council as part of the '*bloc de constitutionnalité*' since the seminal decision *Liberté d'association* in 1971[181]. Therefore, as Alain Supiot has observed, 'the Social Constitution of the Fifth Republic is to be found in the 1946 Preamble, which sheds light on the concept of the "Social Republic"' [182], thereby dispelling the 'obscure' and 'enigmatic' character of the latter[183]. Besides the duty of nationalisation set out in Article 9[184], the Preamble of 1946 contains a list of several economic and social rights. These rights are of two kinds: first, the economic rights of workers[185], which focus on individual 'liberty rights' but exercised collectively (collective bargaining[186], right to strike[187] and trade-union freedom[188]); second, the social rights of citizens[189], which take the form either of 'principles of social policy' (public health[190], employment[191] and housing[192]) that may justify legislative interference with (liberal) fundamental rights, or of 'claim rights' that may be invoked by individuals to guarantee a minimum level of 'material

[176] BVerfG, 18 November 1954, *Hutfabrikant*, 1 BvR 629/52, §25; 30 November 1965, *Dortmunder Hauptbahnhof*, *loc. cit*., §20; 1 March 1979, *Mitbestimmung*, *loc. cit*., §205. See: Sodan (1998).
[177] BVerfG, 6 May 1964, *Hausgehilfinnenverband*, 1 BvR 79/62, §40; 26 June 1991, *Aussperrung*, 1 BvR 779/85, §35; 4 July 1995, *Kurzarbeitergeld*, 1 BvF 2/86, §§112-116.
[178] BVerfG, 18 July 1972, *Numerus clausus I*, *loc. cit*., §67 (right of admission to university education); 28 February 1980, *Versorgungsausgleich I*, 1 BvL 17/77; 16 April 1985, *Krankenversicherung der Rentner*, 1 BvL 5/80, §124 (protection of specific social security benefits, including pensions, based on the right to property); 7 October 1980, *Präklusion I*, 1 BvL 50/79*,* §61 (equal distribution of social security benefits).
[179] BVerfG, 18 June 1975, *Waisenrente II*, 1 BvL 4/74, §44; 29 May 1990, *Steuerfreies Existenzminimum*,1 BvL 20/86, §104; BVerfG, 6 December 2005, *Gesetzliche Krankenversicherung*, 1 BvR 347/98; 9 February 2010, *Hartz IV*, 1 BvL 1/09; 18 July 2012, *Asylbewerberleistungsgesetz*, 1 BvL 10/10; 5 November 2019, *Sanktionen im Sozialrecht*, 1 BvL 7/16.
[180] BVerfG, 18 July 1967, *Jugendhilfe*, 2 BvF 3/62, 2 BvR 139/62, §87.
[181] Cons. const.,16 July 1971, *Liberté d'association*, *loc. cit.*
[182] Supiot (2021), p. 144-145.
[183] Rabault (2015).
[184] See above, 1.1.2.1.1.
[185] Ogier-Bernaud (2003); Gay (2014).
[186] Cons. const., 5 July 1977, *Loi portant diverses dispositions en faveur de l'emploi des jeunes et complétant la loi n°75-574 du 4 juillet 1975 tendant à la généralisation de la sécurité sociale*, No. 77-79 DC.
[187] Cons. const., 25 July 1979, *Loi modifiant les dispositions de la loi n°74-696 du 7 août 1974 relatives à la continuité du service public de la radio et de la télévision en cas de cessation concertée du travail*, No. 79-105 DC.
[188] Cons. const., 20 January 1981, *Loi renforçant la sécurité et protégeant la liberté des personnes*, No. 80-127 DC.
[189] Gay (2020)
[190] Cons. const., 22 July 1980, *Loi sur la protection et le contrôle des matières nucléaires*, No. 80-117 DC, Rec. 4; 8 January 1991, *Loi relative à la lutte contre le tabagisme et l'alcoolisme*, No. 90-283 DC, Rec. 5-15.
[191] Cons. const., 28 May 1983, *Loi portant diverses mesures relatives aux prestations de vieillesse*, No. 83-156 DC, Rec. 4; 16 January 1986, *Loi relative à la limitation des possibilités de cumul entre pensions de retraite et revenus d'activité*, No. 85-200 DC, Rec. 4.
[192] Cons. const., 29 May 1990, *Loi visant à la mise en œuvre du droit au logement*, No. 90-274 DC, Rec. 13; 19 January 1995, *Loi relative à la diversité de l'habitat*, No. 94-359 DC, Rec. 5-7; 29 May 2015, *Société SAUR SAS*, No. 2015-470 QPC.

benefits' attached to Articles 10 and 11 of the Preamble[193].

In Belgium, the 'social' nature of the State has never been explicitly enshrined in the Constitution. For a long time, the 'economic and social rights' therefore remained outside the scope of this 'model constitutional state'[194] of nineteenth-century liberalism. It was not until 31 January 1994 that a specific constitutional clause was adopted: Article 23 (Art. 24bis at the time). This provision states that:

> 'Everyone has the right to lead a life in keeping with human dignity.
>
> To this end, the [federal] laws [and] federate laws […] guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them.
> These rights include among others:
> 1° the right to employment and to the free choice of an occupation within the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
> 2° the right to social security, to health care and to social, medical and legal aid;
> 3° the right to decent accommodation;
> 4° the right to the protection of a healthy environment;
> 5° the right to cultural and social fulfilment;
> 6° the right to family allowances.'

Here again, the provision contains both certain 'liberty rights' for workers and social 'claim rights' for all citizens. Moreover, the wording 'among others' implies that the list is not exhaustive.

However, in each of the three legal orders, the issue is not only that of the recognition of such 'economic and social rights' by the constitutional courts (whether directly in a catalogue or indirectly through a meta-principle), but also that of their concrete effects, i.e., their justiciability.

2.2. The limited justiciability of economic and social rights

A distinction is traditionally drawn between 'objective' and 'subjective' justiciability: The former concerns a dispute over the validity of a standard and leads to a judicial review of conformity with higher provisions and rules; the latter is used to guarantee individual exercise of a right (*via* financial or in-kind compensation)[195]. Even if the question is highly controversial in legal literature, the courts and tribunals usually consider that constitutional social and economic rights only entail an 'objective' justiciability. Because of their 'programmatic' nature and their alleged lack of 'direct effect', they should be first implemented by the legislature to gain 'subjective' justiciability, at least when it concerns 'claim rights' providing material benefits to individuals. But there is more: even the precise contours of 'objective' justiciability are difficult to determine. Two main effects, which may be cumulative, can be expected: prohibiting (in principle) any regression in the protection of economic and social rights previously recognised by the legislature ('standstill' effect'); accepting some regression but establishing a minimum threshold of protection that the legislature may under no circumstances cross ('essence' or 'hard core').

Only the Belgian Constitutional Court has followed the first path (2.2.1.), although in reality this does little to hinder the legislature in its efforts to 'rationalise' public social spending. As in France and Germany, a 'proviso of the possible' appears, which gives priority to budgetary considerations over the

[193] Cons. const., 18 December 1997, *Loi de financement de la sécurité sociale pour 1998*, No. 97-393 DC, Rec. 33 (family allowance); 23 July 1999, *Loi portant création d'une couverture maladie universelle*, *loc. cit.* (healthcare insurance); 14 August 2003, *Loi portant réforme des retraites*, No. 2003-483 DC (retirement pensions); 29 December 2009, *Loi de finances pour 2010*, No. 2009-599 DC, Rec. 101 (social assistance); 15 November 2018, *Loi portant évolution du logement, de l'aménagement et du numérique*, No. 2018-772 DC, Rec. 36 (disability allowance).
[194] Marx and Engels (1848a and 1948b).
[195] De Schutter (2013).

implementation and defence of economic and social rights (2.2.2.). The sole exception concerns the second effect mentioned, i.e., cases where the 'essence' or the 'hard core' of a right is affected, but this has so far only been put into practice in Germany – and albeit very tentatively (2.2.3.).

2.2.1. The *standstill* obligation, a principle of (relative) non-regression: The Belgian exception

The standstill effect is the main tool for 'the legal effectiveness of the enshrinement of economic, social and cultural rights'[196] in Belgium. Also known as the 'ratchet effect' (*effet-cliquet*), it involves an 'obligation not to reduce the level of protection already guaranteed by the laws'[197], i.e., a prohibition on 'the public authorities from legislating against the guaranteed rights, and thus reducing the level of protection acquired' [198]. The legislature may therefore amend the legislative framework implementing economic and social rights, but it must maintain a substantially comparable level of guarantees[199]. On the contrary, a reduction in the level of guaranteed rights means, in principle, that any person affected has the right to have the legal provision in question invalidated (or, at least, not applied in the case). The Constitutional Court has gradually deployed the standstill effect to all the rights covered by Article 23 of the Constitution: the right to social assistance[200], to a healthy environment[201], to decent accommodation[202], to legal aid[203], to work and to fair remuneration[204], to social security and family allowances[205], as well as, more recently, to the protection of collective negotiation[206] or to cultural and social fulfilment[207]. In addition, rights not explicitly mentioned in Article 23 of the Constitution could be given a standstill effect in the future, since the list is not exhaustive.

The principle of non-regression applies to both legislative and executive norms[208]. This is of prime importance in the field of social security, which is largely shaped by royal or ministerial decrees. The problem, however, is to determine which norm should be weighed against the contested norm, in other words to define the 'point of reference' from which the ratchet effect operates. Should the comparison be made with the rules in force in 1994, when Article 23 of the Constitution was adopted ('fixed point' theory[209]), or with the rules in force as they existed immediately prior to the adoption of the new contested legislation ('mobile point' theory[210])? The Constitutional Court has vacillated between the two solutions: first it took the adoption of Article 23 as the point of reference[211], then it finally adopted the 'mobile point' theory[212]. Each new piece of regulation in the field of economic and social rights should thus create an additional detent in the 'ratchet', a new 'non-return barrier' in the protection provided[213].

However, the reasoning is not flawless, because irreversibility is relative in two respects. On one hand, only 'substantial' or 'significant' deteriorations of the protection are prohibited[214]. On the other hand,

[196] Fierens (2000).
[197] Vandeburie (2008), p. 40.
[198] Hachez (2000), p. 30.
[199] Maes (2006).
[200] Cour const., 27 November 2002, No. 169/2002, B.6.4.-B.6.6.
[201] Cour const., 28 September 2006, No. 145/2006, B.5.1.
[202] Cour const., 10 July 2008, No. 101/2008.
[203] Cour const., 14 February 2013, No. 7/2013, B.68.3.
[204] Cour const., 17 July 2014, No. 107/2014, B.22-B.23; 19 March 2015, No. 36/2015, B.15.1-B.15.3.
[205] Cour const., 13 October 2016, No. 130/2016, B.15.1; 13 October 2016, No. 129/2016, B.20.2.
[206] Cour const., 14 May 2020, No. 67/2020, B.33.
[207] Cour const., 30 September 2021, No. 117/2021, B.26.1 and B.27.1.
[208] Cour const., 17 March 2016, No. 42/2016, B.13.3.
[209] Brems (1995); Van Drooghenbroeck (1997).
[210] De Feyter (1994); Hachez (2000).
[211] Cour const., 27 November 2002, No. 169/2002, B.6.5; 14 January 2004, No. 5/2004, B.14.6 and B.25.3.
[212] Cour const., 28 July 2006, No. 123/2006, B.14.3; 28 September 2006, No. 145/2006, B.5.1.
[213] Hachez (2008), p. 360-362.
[214] Cour const., 14 September 2006, No. 137/2006, B.7.3 (healthy environment); 27 July 2011, No. 135/2011, B.4.-B10 (assistance to asylum seekers); 30 June 2014, No. 95/2014, B.5.-B.12 (assistance to asylum seekers); 1 October 2015,

even these 'substantial' or 'significant' deteriorations may be validated if they are justified by reasons of general interest. It is thus up to the constitutional court to assess the proportionality of the measure. But this review appears to be anything but consistent: sometimes it checks only for the existence of a reason of general interest (and always endorses the one given by the legislature) before validating the deterioration[215], sometimes it carries out the aptitude test but not those of necessity and proportionality in the narrow sense[216]. Against this background, the 'mobile point' theory may paradoxically lead to a lower level of protection than the 'fixed point theory', if several reforms are undertaken to (significantly) lower the overall level of protection of an economic and social right but in small successive (and individually non-significant) reductions. This situation is not merely hypothetical: it was the scenario in the case of the two-stage restriction on material aid to asylum seekers[217]. Hence the call from some scholars to use as the 'point of reference' the one that provided the highest level of protection (regardless of when it was adopted and whether or not it is still in force) and not the law in force before the adoption of the contested norm[218]. So far, however, the Constitutional Court has always refused to do so.

The question of the existence of a principle of non-regression also arose in the two other states under scrutiny, but it was answered negatively by both the Constitutional Council and the FCC. In France, the debate focused on the effects to be given to the prohibition of 'depriving constitutional requirements of legal guarantees', as stated by the Council when it reviews possible infringements of the rights to material benefits derived from Articles 10 and 11 of the Preamble (family allowances, health insurance, pensions, etc.)[219]. In certain isolated decisions dating from the 1980s and 1990s[220], the Council seemed to recognise a sort of 'ratchet effect' with regard to freedom of communication[221] and the right of asylum[222]. But then it backed down and abandoned this 'standstill obligation' in subsequent decisions[223]. Since then, the rejection of such a principle is clear and has been expressed many times: the legislature may lower the level of protection, provided however – and here lies the absolute limit – that it does not purely and simply deprive legal guarantees attached to a constitutional right or objective. The ultimate (and only true) guarantee attached to 'claim-rights' derived from economic and social rights is therefore solely the protection of a 'minimum content', i.e., of its 'essence' or intangible 'hard core'…yet to be defined, as we shall see below. But the recent example of pensions can give an indication of the (weak) scope of such protection: because of the lack of a 'standstill effect', the Council approved the gradual extension of the statutory retirement age from 60 to 64, despite the reduction in the social right to retirement that it implies[224]; by contrast, extending it to an age close to the average life expectancy or reducing the amounts allocated (after a full career) to a level well below the poverty line should probably

No. 133/2015, B.7.1 (assistance to foreigners legally residing in the territory); 18 May 2017, No. 61/2017, B.10.1 (assistance to foreigners legally residing in the territory); 23 January 2019, No. 6/2019, B.8. (assistance for seniors).

[215] Cour const., 19 March 2015, No. 36/2015, *loc. cit*., B.15.3; 27 January 2016, No. 12/2016, B.5.3; 14 May 2020, No. 67/2020, *loc. cit*., B.33; 30 September 2021, No. 117/2021, *loc. cit*., B.27.3.

[216] Cour const., 30 June 2014, No. 95/2014, *loc. cit*., B.5.-B.12

[217] Cour const., 27 July 2011, No. 135/2011, *loc. cit*., B.4.-B10; Cour const., 30 June 2014, No. 95/2014, *loc. cit.*, B.5.-B.12. See: Hachez and Vincent (2015).

[218] Hachez (2008), p. 361-362; Dumont (2017), p. 80.

[219] Boyer (2011).

[220] Cons. const., 11 October 1984, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, No. 84-181 DC, Rec. 37; 13 August 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*, No. 93-325 DC, Rec. 81.

[221] Cons. const., 11 October 1984, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, No. 84-181 DC, Rec. 37.

[222] Cons. const., 13 August 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*, No. 93-325 DC, Rec. 81.

[223] Cons. const., 29 July 1986, *Loi portant réforme du régime juridique de la presse*, No. 86-210 DC; 22 April 1997, *Loi portant diverses dispositions relatives à l'immigration*, No. 97-389 DC, P. 6271.

[224] Cons. const., 9 November 2010, *Loi portant réforme des retraites*, No. 2010-617 DC; 14 April 2023, *Loi de financement rectificative de la sécurité sociale pour 2023*, No. 2023-849 DC.

be regarded as a 'deprivation of legal guarantees' of a constitutional requirement (national solidarity) – and therefore declared unconstitutional.

Just before the issue began to be discussed in France, the FCC had already settled the question by stating that, given the 'breadth and vagueness' of the social state principle, 'it is not possible to infer from it that social benefits must be granted to a certain extent', except when the 'minimum conditions for living in human dignity' are at stake[225]. It thus endorsed the view of the legal philosopher Robert Alexy who argued that, because of the need to 'balance' (*Abwägung*) conflicting principles, there could be no 'ratchet effect' (*Rückschrittsverbot* or *Verschlechterungsverbot*) in the German constitutional order that would prevent the legislature from rolling back social and economic rights, including existing 'rights to benefits'[226].

2.2.2. The 'proviso of the possible' or the primacy of budgetary constraints

The denial of any 'standstill obligation' in France and Germany is actually the consequence of a 'proviso of the possible', i.e., a kind of 'reality principle' conceded by the constitutional courts, whereby 'the state cannot be forced to comply with its obligations in the framework of social rights if it does not possess the economic means to do so'[227]. Such a 'proviso of the possible' (*Vorbehalt des Möglichen*) stems from the FCC's decision of 18 July 1972 concerning the *numerus clausus* for medical studies and was from the outset explicitly linked to the requirements of macroeconomic equilibrium set out in Art. 109, para. 2 LF[228]. The right to access university education, granted with one hand, has therefore been partially withdrawn with the other, as some scholars have sarcastically pointed out[229]. The FCC has then used this 'proviso of the possible' on several occasions[230], including in cases on allowances for disabled children[231] and on tax exemption for minimum living incomes[232]. The state of public finances thus becomes a criterion of constitutionality – and sound budgetary management a valid reason for reducing the guarantees of 'claim-rights'. The 'proviso of the possible' thus operates as a 'precept of judicial self-restraint'[233] with regard to policies of public expenditure rationalisation.

The French Constitutional Council also quickly acknowledged the necessity of curbing healthcare costs as a reason of general interest justifying restrictions on the rights enshrined in the 1946 Preamble[234]. It even endorsed 'the financial equilibrium of social security' as a constitutional requirement derived from Article 11 of the Preamble[235]. Various measures have suffered the consequences of this constitutional incorporation of financial equilibrium. Regarding successive increases in the retirement age, from 60 to

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[225] BVerfG, 29 May 1990, *Steuerfreies Existenzminimum*, *loc. cit*., §§88 and 104.
[226] Alexy (1986), p. 454-472.
[227] According to the formula used by the ECtHR (*Da Silva Carvalho Rico v. Portugal*, 1 September 2015, No. 13341/14, §44).
[228] BVerfG, 18 July 1972, *Numerus clausus I*, *loc. cit*., §70. On this 'proviso of the possible' in German constitutional law, see: Munaretto (2022).
[229] Isensee (1980), p. 372.
[230] BVerfG, 7 July 1992, *Trümmerfrauen*, 1 BvL 51/86, §122; 10 March 1998, *Kindergartenbeiträge*,1 BvR 178/97, §58; 8 October 1997, *Integrative Beschulung*, 1 BvR 9/97, §§71-72; 3 April 2001, *Pflegeversicherung III*, 1 BvR 1629/94, §46; 9 November 2004, *Opferentschädigungsgesetz*, 1 BvR 684/98, §§51 and 61; 19 November 2021, *Bundesnotbremse II (Schulschließungen*), §§53-56.
[231] BVerfG, 18 June 1975, *Waisenrente II*, *loc. cit*., §44.
[232] BVerfG, 29 May 1990, *Steuerfreies Existenzminimum*, *loc. cit.*, §94. For other examples of the 'proviso of the possible', see also: 7 July 1992, *Trümmerfrauen*, 1 BvL 51/86, §122; 10 March 1998, *Kindergartenbeiträge*, 1 BvR 178/97, §58; 8 October 1997, *Integrative Beschulung*, 1 BvR 9/97, §§71-72; 3 April 2001, *Pflegeversicherung III*, 1 BvR 1629/94, §46; 9 November 2004, *Opferentschädigungsgesetz*, 1 BvR 684/98, §§51 and 61, 19 November 2021, *Bundesnotbremse II (Schulschließungen)*, §§53-56.
[233] Gaier (2013).
[234] Cons. Const., 16 January 1991, *Loi portant dispositions relatives à la santé publique et aux assurances sociales*, No. 90-287 DC.
[235] Cons. Const., 18 December 1997, *Loi de financement de la sécurité sociale pour 1998*, *loc. cit*., Rec. 25; 12 August 2004, *Loi relative à l'assurance maladie*, No. 2004-504 DC, Rec. 5, 8 and 48.

62 and then from 62 to 64, the Council considered that 'by adopting the law under review, the legislature wished to preserve the pay-as-you-go pension system, which is facing major funding difficulties', due in particular to the increase in life expectancy[236]. It was also on this basis that the successive reductions in the system of access to healthcare for illegal aliens (state medical aid) were also validated by the Constitutional Court[237]. The latter now recognises the 'constitutional objectives of proper use of public funds and fight against social protection fraud'[238]. Behind these various formulas lies the idea of 'proviso of the possible'[239]. Although implicit in the Council's decisions, this 'reality principle'[240] emerges expressly in the words of the former President of the Council, Pierre Mazeaud. At a meeting of the Venice Commission in 2005, he delivered a speech on 'the place of extra-legal considerations in the exercise of constitutionality review'[241]. On that occasion, he set out, in the clearest possible terms, the Council's reasoning on social rights:

> 'Several rights or principles expressly mentioned in the 1946 Preamble (or deduced from it) have been described as "constitutional objectives". […] Conferring such a qualification on these rights has served to temper their effect, despite the affirmation of their constitutional status. They must be regarded as not being absolute in nature, as not being directly applicable and as being addressed not to individuals but to the legislature, for whom they constitute obligations of means and not of result. In particular, they are not subjective rights with direct justiciability. *Realism has obviously dictated this solution: as the level of benefits provided by the "welfare state" is conditioned by the economic situation*, it would be unreasonable to fix it rigidly at constitutional level.'[242]

Regressions in social benefits (health, unemployment, pensions, etc.) are therefore justified by the legislature and endorsed by the Constitutional Council on the basis of an objectivised 'economic situation' characterised by the alleged need for austerity in times of 'permanent crisis'[243].

Even in Belgium, the standstill obligation is of little use in the face of successive reforms designed to rationalise the cost of the social state[244], particularly under the ongoing pressure of the European Semester[245]. As mentioned above, it covers neither non-significant reductions nor significant ones justified by reasons of general interest. Yet, the latter also include sound budgetary management and the desire to combat social fraud or abuse of social aid. Hence the approval of numerous reforms relating to assistance for immigrants[246] or minimum social assistance[247], as well as the validation of the new sliding-scale allowance system for unemployment insurance[248] or the 'index jump' involving the temporary

[236] Cons. const., 9 November 2010, *Loi portant réforme des retraites*, No. 2010-617 DC, *loc. cit*., Rec. 9 (see Bernaud, 2011); 14 April 2023, *Loi de financement rectificative de la sécurité sociale pour 2023*, No. 2023-849 DC, Rec. 92.
[237] See: Cons. const., 29 December 2003, *Loi de finances rectificative pour 2003*, No. 2003-488 DC, Rec. 14-20; 28 December 2010, *Loi de finances pour 2011*, No. 2010-622 DC, Rec. 31-37.
[238] Cons. const., 27 December 2019, *Finance Act for 2020*, No. 2019-796 DC, Rec. 123-129, especially Rec. 126.
[239] Gay (2020), p. 422.
[240] Ribes (2008).
[241] Mazeaud (2005).
[242] Emphases added. Regarding the 'realism' of the Constitutional Council: Ribes (2007).
[243] Borgetto and Lafore (2019), p. 294-312.
[244] Schoukens (2016).
[245] Detienne (2024).
[246] Cour const., 17 January 2002, No. 17/2002, B.4.3.-B.4.4; 30 June 2014, No. 95/2014, *loc. cit*., B.5.-B.12. See: Hachez and Vincent (2015), p. 77-80.
[247] Cour const., 14 January 2004, 4/2004; 28 July 2006, No. 123/2006, *loc. cit*.
[248] The legal framework for unemployment insurance is contained in a Royal Decree and implemented by a Ministerial Decree, so that the reforms were not referred to the Constitutional Court but to the Council of State. The latter dismissed the action for annulment on the basis of lack of legal interest of the applicants (Belgian C.E., 20 December 2012, *Vlaams netwerk van verenigingen waar armen het woord nemen t. Belgische Staat*, No. 221.853, unpublished), using an extremely formalistic argument (Dumont, 2013).

neutralisation of the automatic indexation of wages and social benefits to inflation[249]. The standstill principle serves above all as an 'instrument for rationalising the legislative process in social matters'[250]: the less justified the reforms are, the stricter and more rigorous the review will be; the clearer they are motivated, the greater the judicial self-restraint of the constitutional court will be[251]. In other words, the effect of the Court's decisions would be to 'encourage a form of evidence-based lawmaking'[252] regarding the conversion of the so-called prodigal 'welfare state' into a financially sound 'social state'. However, the strict proportionality control attached to this kind of 'duty of thoroughness' (*devoir de minutie*) in social reforms[253] is only applied to symbolic measures that have limited budgetary consequences. Once a more fundamental measure (potentially) restricting economic and social rights comes into consideration, the Court maintains a position of deference vis-à-vis the legislature, as in the 'index jump' case[254]. Here, the Court refused to verify the existence of a significant reduction in the protection of the right to fair remuneration and the right to social security. It only points to the fact that the reason of general interest invoked (improving the competitiveness of Belgian companies in a context of international competition) is legitimate and that it would not be for the Constitutional Court to supersede the legislature's assessment in economic matters.

The reason why the Belgian Constitutional Court grants parliaments so much room for manoeuvre in social matters lies in its very particular conception of solidarity. The decision of 28 April 2016 on the Treaty on Stability, Coordination and Governance (TSCG) in the Economic and Monetary Union[255] represents a prime example of the neoliberal interpretation given by the Court to this idea. A number of citizens and NGOs had brought an action against this treaty imposing the adoption of a national balanced budget rule coupled with an automatic correction mechanism. In their view, the strict budgetary objectives set out in the TSCG could result in the public authorities no longer being able to meet their constitutional obligations with regard to fundamental social rights. The Court dismissed the applicants' claims for lack of legal interest, but nevertheless endeavoured to develop several elements tending to justify the merits of the TSCG in the light of Belgian constitutional law. Besides the fact that 'the legislature has a broad discretionary power when determining its socio-economic policy, in particular as regards the budget and debt management', the Court mentioned a quite original argument: intergenerational solidarity[256]. Yet, while the concept is enshrined in a new Article 7*bis* of the Constitution adopted in 2007, this provision was not intended to protect fiscal discipline but to ensure 'sustainable development'. Even more surprising is the fact that the Court actually turned the applicants' argument against them, since they had invoked this Article to support the unconstitutionality of the measure, because of the limits on public investment that the new 'budgetary straitjacket' would inevitably impose[257]. In so doing, but without any supporting evidence from the preparatory work of the law of assent, the constitutional judges unexpectedly altered the ecological and social rationale underpinning Article 7*bis*. Instead, it explicitly endorses the neoliberal idea of 'budgetary' intergenerational solidarity[258], according to which public debt must be seen as a burden imposed on future generations (and not, for example, as the counterpart of bequeathed infrastructures)[259]. Hence the

[249] Cour const., 13 October 2016, No. 130/2016.
[250] Dumont (2019a and 2019b).
[251] Cour const., 1 October 2015, No. 133/2015, *loc. cit*.; 18 May 2017, No. 61/2017, *loc. cit*.; 6 May 2021, No. 70/2021.
[252] Dumont (2019b), p. 627.
[253] Remiche (2017), p. 251-255 and 296-327.
[254] Cour const., 13 October 2016, No. 130/2016, *loc. cit*., B.17.2.-B.17.4.
[255] Cour const., 28 April 2016, *TSCG*, No. 62/2016.
[256] Cour const., 28 April 2016, No. 62/2016, *loc. cit*., B.8.4-B.8.6. See: Behrendt and Miny (2018), p. 22-23.
[257] For the impact of these new rules on the investment strategies of public authorities, see: Piron (2024).
[258] El Berhoumi *et al.* (2017), p. 573-575.
[259] Buchanan (1957), p. 31-47.

conclusion that strict budgetary discipline is not a threat to current economic and social rights, but the necessary condition for their preservation over time.

Even more striking, the judges also refer here to the 'economic context' as a factual constraint that requires the legislature to self-impose the 'golden rule of fiscal policy'. Any possibility of an alternative Keynesian policy is thereby eliminated. In support of its reasoning, the Court here adds a reference to the 'corresponding obligations' of economic and social rights, as provided for in Art. 23 para. 2 of the Constitution. It reiterated this argument in its decision on the law of 16 March 2021 approving the decision on the EU system of own resources[260]. From this point of view, the need to reduce the budget in order to achieve financial equilibrium would ultimately be the collective counterpart of the individual economic and social rights. The problem is that the Court ignores the two conditions it had previously laid down justifying the strengthening of these 'corresponding obligations', namely that they contribute to the general objective of human dignity (enshrined in Art. 23 para. 1 of the Constitution) and that they are proportionate to that objective[261]. While it is difficult to find a legal argument for this 'omission', it is easier to understand the practical reason behind it: the link between the austerity measures and the guarantee of human dignity is very thin, to say the least, so the easiest (or only) solution for the Court was simply to overlook these conditions[262]. As a result, 'corresponding obligations' are tending now to become the constitutional basis for the shift 'towards an active social state'[263]. This is further confirmed in the Court's recent decisions on 'structural pension reforms'[264].The neoliberal reversal of the idea of 'solidarity' is thus matched by a growing emphasis on individual responsibility as a prerequisite for access to economic and social rights, at least when it concerns rights to benefits.

2.2.3. Guarantee of the essence and right to minimum benefits: A (timid) limit to the rationalisation of the social state?

Although it is used by contemporary German ordoliberals[265], the 'intergenerational argument' has not (yet) entered the German constitutional order, despite several calls for it to do so[266]. However, the FCC's enshrinement of 'intergenerational equity' regarding climate issues[267] may well pave the way for a revolution in fundamental rights dogma in many areas, including economic and social matters[268]. On the other hand, the Court very clearly endorsed the shift towards individual responsibility initiated by the legislature in the field of social assistance. Underway since the 1970s, the shift was accentuated in the early 2000s with the adoption of the Hartz reforms, which implemented a vast programme to make the labour market more flexible and to contain social spending[269]. Among various new regulations, the 'fourth Law for Modern Services on the Labour Market' (Hartz IV) was specifically aimed at simplifying the unemployment benefit system. This system was reduced to two pillars: on one hand, benefits financed by contributions in proportion to the unemployed person's previous salary, based on the 'social insurance' model (*Arbeitslosengeld I*, ALG I); on the other hand, benefits financed by taxation, provided once eligibility for ALG I has expired, based on the 'public assistance' model

[260] Cour const., 30 September 2021, No. 127/2021.
[261] Cour const., 10 July 2008, No. 101/2008, *loc. cit*., B.33.1. and B.33.2.
[262] Dermine (2016), p. 471-472.
[263] Dumont (2008). See: Cour const., 27 July 2011, No. 135/2011, *loc. cit*., B.8.3.3.; 30 June 2014, No. 95/2014, *loc. cit*., B.7.
[264] Cour const., 28 September 2017, No. 104/2017, B.13.1; 6 May 2021, No. 70/2021, *loc. cit.*,. B.6.; 29 September 2022, No. 117/2022, B.14.4.
[265] Vanberg (1994); Goldschmidt (2009).
[266] Kahl (2014); Schlegel (2021).
[267] BVerfG, 24 March 2021, *Klimaschutz*, 1 BvR 2656/18, §148. See: Lenz (2022); Grosche (2022).
[268] Hailbronner (2022).
[269] Trube (2004).

(*Arbeitslosengeld II*, ALG II)[270]. ALG II was a flat-rate monthly allowance: €345 for the beneficiary, €311 for dependent adults and €207 for dependent children up to the age of 14. These amounts were in fact equal to social assistance (*Sozialhilfe*), provided for people who are totally unable to work and support themselves and their families[271]. The idea was therefore to provide temporary support for unemployed people, but at a much lower level than a (low) wage, in order to encourage them to return to work[272]. This retreat of the welfare state, justified on budgetary grounds, nevertheless raised serious constitutional objections. Although the FCC has never recognised any 'ratchet effect', it does seem to have established a 'floor effect', i.e., a threshold in the form of 'minimum conditions for living in human dignity' that must be maintained for every individual[273]. In a sense, this represents the 'social' expression of the guarantee of the 'essence' (*Wesensgehaltsgarantie*) of fundamental rights (Art. 19, para. 2 LF).

After a first validation of the reform by the Federal Social Court (*Bundessozialgericht*)[274], the FCC had to review the constitutionality of Hartz IV. More specifically, it had to assess the method used to determine the amount of ALG II, as well as the adequacy of this amount to the vital needs of beneficiaries[275]. From the outset, the Constitutional Court confirmed the existence of a 'fundamental right to the guarantee of a subsistence minimum in line with human dignity' (*Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums*)[276]. Based on Article 1 GG, it gives rise to a genuine 'right to benefits' of two kinds: the 'minimum [physical] subsistence' *sensu stricto* (food, clothing, housing, heating, health, etc.); the 'socio-cultural subsistence' ensuring the 'possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life'. On the other hand, the Court takes great care to directly set out the limits of this right it has just created: the *Existenzminimum* 'only covers those means which are vital[277] to maintain an existence that is in line with human dignity'. It limits its scope even further by adding that, as this right is inevitably imprecise, it must necessarily be 'safeguarded by a statutory claim' (*gesetzlichen Anspruch*), thus determined 'by a parliamentary statute which contains a concrete benefit claim on the part of the citizen towards the competent benefit institution', in order to 'cover social reality in a manner that is appropriate to the present day and realistic'[278].

As a result, the FCC confines itself to a limited review regarding the amount of benefits, but not regarding the calculation methods. They are subject to meticulous verification, since 'the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation'[279] – which are themselves open to continuous reassessment according to the actual basic needs of individuals. As in Belgium, the legislature's obligation is therefore transformed into a

[270] On the shift from the 'social insurance' model (*Versicherung*) to the 'public assistance' model (*Fürsorge*) brought about by the Hartz IV reform, see: Knuth (2006).
[271] In addition to the basic flat rate benefit, there may also be other allowances for housing, heating or more occasional assistance.
[272] It should be noted that at the time there was no uniform statutory minimum wage and the decision was left to collective bargaining in the various sectoral branches on the basis of Article 9 LF. However, a law of 11 August 2014, introduced as part of legislation to strengthen collective bargaining, changed the situation by enshrining a minimum wage. Starting at €8.5 gross/hour, it has since been raised several times by decree following agreements reached within the Minimum Wage Commission (on which both unions and employers are represented). Since October 2022, it has been set at €12 gross/hour, i.e., around 60% of the German median wage, through further intervention by the legislature, before the Commission again became responsible for subsequent determinations.
[273] BVerfG, 18 June 1975, *Waisenrente II*, *loc. cit.*, §§44-45; 29 May 1990, *Steuerfreies Existenzminimum*, *loc. cit.*, §104. See: Neumann (1995).
[274] BSG, 23 November 2006, B 11b AS 1/06 R. See: Giesen and Ricken (2006).
[275] BVerfG, 9 February 2010, *Hartz IV*, *loc. cit*. See: Seiler (2010); Egidy (2011).
[276] *Ibid.*, §§133-135.
[277] In the German version, the words used are '*unbedingt erforderlich*', which literally means 'strictly necessary'.
[278] *Ibid.*, §136-138.
[279] *Ibid.*, §142.

constitutional requirement for extensive methodological justification[280]. Once these abstract principles had been applied to the concrete case, the FCC validated both the amounts of the ALG II and the method of calculation[281]. There were nevertheless two minor criticisms levelled by the Court against the reform: first, the legislature deviated from the chosen method on several occasions, without justification and without any solid substitutable criteria; second, only the usual vital needs were taken into account, whereas specific occasional needs may exist[282]. It is therefore the 'random estimates' that have been declared unconstitutional[283], in particular the 40% haircut applied to children up to the age of 14, without any empirical basis, as if they were 'small adults', whereas they actually have specific needs, for instance in terms of schooling[284].

Despite this methodological objection, the FCC refused to 'determine a specific amount of benefit on its own on the basis of its own assessments and evaluations'[285]. It gave the legislature until 31 December 2010 to adjust its methods of calculation, but stated it was not 'obliged under constitutional law to set higher benefits' as long as the procedure was well justified[286]. According to the FCC, the core of the Hartz IV reform is therefore constitutional, but the details can be improved. And, indeed, after the methodological corrections made by the legislature, it fully endorsed the ALG II regime[287].

This raises the question of the true significance of the *Hartz IV* decision for the constitutional principle of social statehood. Some wonder whether the declaration of unconstitutionality does not ultimately represent a 'Pyrrhic victory'[288] for the *Existenzminimum*, since the FCC did approve the (very low) amounts of 'vital needs' estimated. Others draw the conclusion that the social state is 'reduced to its most basic form: people should not starve in Germany'[289]. Above all, at the methodological level, i.e., the only one where the Court really exercises its review, the statistical model used (and approved by the FCC) is a snake biting its own tail: the amount of the minimum subsistence level is deducted from the consumption expenditure of the poorest households (excluding those benefiting from social assistance). But there is no guarantee that they are not already living below the threshold of human dignity. In addition, before the introduction of a minimum wage[290], this method gave rise to the risk of a 'race to the bottom'. The reduction in the amount of social benefits under ALG II was likely to lead to a decrease in the wages of the working poor, since even underpaid jobs (but exceeding ALG II) were made 'attractive' to the 'reserve army' of jobseekers. And this income decrease could then have a negative impact on the consumption expenditure of the working poor, and subsequently on the estimated level of the *Existenzminimum*, leading to a possible downward adjustment of wages on the unqualified labour market – and so on. Hence the self-congratulation of 'social-democrat' Chancellor Gerhard Schröder in 2005 at the World Economic Forum in Davos, where he boasted of having 'built up one of the best low-wage sectors in Europe'[291]. In the end, the only category of vulnerable individuals to benefit indirectly from the Hartz IV decision was asylum seekers (and other foreigners with a temporary right of residence). The FCC obliged the legislature to increase their allowances, which were more than 35% lower than the minimum social assistance benefits for the explicit purpose of discouraging

[280] *Ibid.*, §§137 and 144.
[281] *Ibid.* at §§151-156 and §§159-169.
[282] *Ibid.*, §146.
[283] *Ibid.*, §§171-182, especially §171.
[284] *Ibid.*, §§190-198.
[285] *Ibid.*, §212.
[286] *Ibid.*, §211.
[287] BVerfG, 23 July 2014, *Sozialrechtliche Regelbedarfsleistungen*, 1 BvL 10/12; 27 July 2016, 1 BvR 371/11.
[288] Butterwegge (2011), p. 19.
[289] Rammer (2010).
[290] See above, footnote 272.
[291] Schröder (2005).

immigration[292].

The tension between the protection of the *Existenzminimum* and the liberal shift of the welfare state towards individual responsibility reaches its climax when ALG II beneficiaries do not respect the obligation to cooperate. The sanction consisted of a temporary reduction (for three months) of 30% of the amount granted, then 60% for the second breach, before outright withdrawal in the event of a further breach. Here too, the FCC was attempting to strike a balance[293]. On one hand, the 30% haircut was approved, except insofar as it provided for a fixed period of three months, regardless of the subsequent cooperation of the sanctioned recipient. On the other hand, the harsher provisions were declared incompatible with the Basic Law, given the 'lack of compelling evidence regarding the suitability and necessity of a reduction in benefits on this scale', which 'extends far beyond the minimum subsistence guaranteed by fundamental rights'[294]. Two readings of the decision are possible. Some point to the fact that the judgment proves that the *Existenzminimum* is truly effective and binding on the legislature[295]. Others are quite surprised that the legislature is authorised to go beyond the limit of the *Existenzminimum*, yet supposed to express the essence not only of the principle of social state, but also of the (no more) intangible right to human dignity[296]. While acting as the guarantor of a minimum 'right to benefit', the FCC therefore endorses the idea that the protection of human dignity has to be earned – and thereby confirms the 'activating' inflection of the social state.

The reaction of the German public authorities to Covid-19 may give the impression of a 'solidarist' realignment of the social state, which has proved to be of 'systemic importance' in the face of the crisis. And it is true that the FCC systematically rejected actions against the many restrictions introduced by the German Protection Against Infection Act (*Infektionsschutzgesetz* - IfSG), including measures to close businesses[297], schools and crèches[298], or to impose social distancing[299], curfews[300] and compulsory vaccinations[301]. The Court then gave final approval to the measures taken, in particular regarding freedom of movement and children's right to education[302], emphasising that they were also subject to the 'proviso of the possible'. Above all, the legislature has lifted the debt brake to be free to inject hundreds of billions into the economy to prevent a complete collapse[303]. However, the recent decision, on 15 November 2023, to invalidate the reallocation of 60 billion euros of unused funds for pandemic-era aid to the climate and transformation fund (*Klima- und Transformationsfonds* - KTF)[304] demonstrates the FCC's determination to restore – whatever it takes – economic orthodoxy[305].

Despite all that, the fact remains that, through the *Existenzminimum*, the FCC has at least given concrete form, albeit modestly, to the guarantee of the 'essence' of economic and social rights. The French Constitutional Council has not gone so far. Of course, the French Parliament has never carried out such a far-reaching rationalisation of the social state as the *Bundestag* did with the Hartz reforms. The guarantee of the essence seems nevertheless to exist in the French constitutional order. The prohibition

[292] BverfG, 18 July 2012, *Asylbewerberleistungsgesetz*, *loc. cit*. See: Tiedemann (2012); Schreiber (2018).
[293] BverfG, 5 November 2019, *Sanktionen im Sozialrecht*, *loc. cit*. See: Nettesheim (2020).
[294] *Ibid.*, §§189-209, especially §190 and §200.
[295] Gantchev (2020).
[296] Schmidt (2020).
[297] BVerfG, 28 April 2020, 1 BvR 899/20.
[298] BVerfG, 9 June 2020, 1 BvR 1230/20.
[299] BVerfG, 15 July 2020, 1 BvR 1630/20.
[300] BVerfG, 5 May 2021, 1 BvR 781/21.
[301] BVerfG, 10 February 2022, 1 BvR 2649/21.
[302] BVerfG, 19 November 2021, *Bundesnotbremse I (Ausgangs- und Kontaktbeschränkungen)*, *loc. cit*., p. 223; 19 November 2021, *Bundesnotbremse II (Schulschließungen)*, *loc. cit*.
[303] Dorn *et al.* (2020).
[304] BVerfG, 15 November 2023, *KTF*, 2 BvF 1/22.
[305] Meickmann (2023).

of 'depriving constitutional requirements of legal guarantees' set by the Constitutional Council regarding the rights to benefits derived from Articles 10 and 11 of the Preamble (family allowances, health insurance, pensions, etc.) correspond to a threshold below which the legislature is not allowed go. Nevertheless, this threshold currently remains purely theoretical. The Constitutional Court has invalidated certain legal provisions for breach of the equality principle in access to social benefits, but never for breach of the 'essence' of the right contained in paragraph 11 of the Preamble. In other words, the legislature is 'authorised to replace existing provisions with less protective ones, provided that they do not fall below a minimum threshold of protection... which has yet to be defined'[306].

The situation is much the same in Belgium. Because of its double relativisation, we already know that the standstill obligation 'does not, strictly speaking, guarantee the preservation of the social acquis'[307]. But is there an absolute limit to the possible erosion of economic and social rights? Does Article 23 of the Constitution entail, alongside the 'ratchet effect', a 'floor effect', i.e., a protection of the 'essence' of economic and social rights? Some authors suggested this idea by claiming the existence of a right to irreducible minimum benefits, on the basis of the human dignity protected by Art. 23, para. 1[308]. Other legal scholars have argued that each of the economic and social rights recognised in Article 23 contains a 'hard core' which cannot be affected, even when the standstill obligation failed to prevent the reduction of the rights[309]. Nevertheless, at the present time, the Constitutional Court has never referred to such an *Existenzminimum* or to the guarantee of the 'essence' of the economic and social rights as a possible limit to the rationalisation of social spending. Yet, the 'combination method' would provide a powerful argument for this guarantee: Article 4 of the United Nations International Covenant on Economic, Social and Cultural Rights[310], as well as the European Committee of Social Rights[311], include the protection of the 'hard core' of these rights.

Conclusion – The economy as a 'factual constraint' ordered by Constitutional courts

Stone by stone, decision by decision, each of the three national constitutional courts has built up a body of case law outlining the contours of a social state based on economic and social rights, albeit using different reasoning and interpretative methods. However, rather than the advent of effective protection of economic and social rights, social constitutional jurisprudence tends mainly to accommodate and marginally adjust the rationalisation of welfare state costs. In each of the constitutional orders, a 'proviso of the possible' emerges, which surreptitiously reduces economic and social rights to their alleged programmatic status. Even the standstill obligation, recognised in Belgium, is of little use against 'budgetary imperatives'. The legislature is all the more justified in undertaking reforms on the grounds of the 'economic context' that the very idea of solidarity is shifting in favour of an intergenerational equity reduced to its financial expression, i.e., balanced budgets. To ensure its long-term sustainability, the social state should be reoriented towards 'activation' of aid recipients – something that constitutional judges accept without further difficulty through the 'corresponding obligations' of economic and social rights or via the principle of 'individual responsibility'.

It could be argued, though, that in so doing the constitutional courts are merely exercising judicial self-restraint, in accordance with the economic neutrality of national constitutions. This argument might be convincing if it did not obscure the practice of double standards vis-a-vis classic economic liberties.

[306] Bauduin (2020), p. 5.
[307] Hachez (2015a), p. 313 and p. 322.
[308] Jamoulle (2001); Fierens (2015).
[309] Vogel-Polsky (1995); Dumont (2017).
[310] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/C.12/2000/13, 2 October 2000), No. 56.
[311] ECSR, 23 May 2012, *GENOP-DEI and ADEDY v. Greece*, No. 65/2011; 23 May 2012, *GENOP-DEI and ADEDY v. Greece*, No. 66/2011. See: Hachez (2014).

Apart from the requirement for 'methodological justification', the 'proviso of the possible' is used to validate all the social state reforms. In contrast, the 'economic context' is simply ignored at the other end of the ideological spectrum of fundamental rights, that is, the right to private property and economic freedom. Yet these classic economic liberties too have a significant cost[312], which is never mentioned and even less taken into account.

In France, nationalisations are reduced to simple expropriation without any explanation of the reasoning behind the decision, even though the nationalisation of the property of the clergy provided a historical precedent. The judge here substitutes his own assessment of the 'fair value' of the compensation without hesitation. Similarly, the Constitutional Council substitutes its assessment for that of the legislature as to whether the socio-economic context justifies a system to prevent profit-based layoffs. According to the Council, the judge cannot take the place of the business owners… but it can take the place of the legislature, apparently. Finally, the tax increase on the wealthiest, based on the principle of solidarity (which is supposed to be strengthened in times of economic crisis), was censured because of a new constitutional threshold for taxation. Here, the 'essence' of the fundamental right does not appear to be merely an abstract principle. The same phenomenon can be seen even more clearly in Germany, where the basic norm is interpreted in a very creative way, to say the least. The FCC has identified a fourfold prohibition: depriving shareholders of the ultimate power of decision within their companies; taxing net acquired capital; taxing income (from work and capital) at more than 50% (*Halbteilungsgrunsatz*); taxation on inheritance or gifts in a way that 'appear economically useless from the point of view of an owner thinking in economic terms'. In the end, only the Belgian Constitutional Court seems (at first glance) to have maintained a certain consistency in its judicial self-restraint, even if it is not exempt from innovative interpretations in order to define the (broader) contours of a 'confiscatory tax' on inheritance or to pull out of its hat a constitutional principle of 'economic and monetary union' within the Belgian territory, in order to counter any protectionist impulses.

In any case, there is no trace of any 'proviso of the possible' in the protection of classic economic liberties. On the contrary, the interpretation given to the latter suggests that the market order is the only real horizon of possibility for the legislature. It appears as an extra-legal (natural) fact in the various national constitutional jurisprudences. Whatever denomination is chosen to describe this phenomenon ('objectivisation', 'factualisation' or 'naturalisation'), it operates at two levels. On one hand, normative consequences are deduced from these objectivised economic 'facts': net acquired capital, which is the core element of capitalist economy, should be immune from any form of taxation; a company's dominant position obtained 'on its merits' cannot be forced to sell its assets; the competitive context of the economy implies that the business owner should always be able to 'anticipate economic difficulties and make economic trade-offs', which means that it is constitutionally impossible for the legislature to impose a judicial assessment of the appropriateness of profit-based layoffs – or to prescribe a genuinely equal sharing of decision-making power with the workers; etc. On the other hand, the 'economic impact' of legal norms is taken into account when assessing their constitutionality: the validation of nationalisations depends on the degree of collectivisation of the economy they induce; the 'continuation of economic activity' and the 'economic usefulness of the transfer' become a criterion for judging the appropriateness of the level of business inheritance taxation; etc. Moreover, it is not just any kind of market that is being objectivised: it is the *competitive* market order. Competition is considered now as 'one of the fundamental principles of the economic constitution' (Germany), or at least as the core of 'economic public order' (France).

Ultimate 'cunning of reason' in economic constitutionalism: narrowing the scope for legislative (fiscal) intervention in the economy contributes, indirectly but inevitably, to extending the budgetary limit of

[312] Holmes and Sunstein (2000).

the ‘proviso of the possible’ imposed on the social state. The new constitutional dogma in fiscal matters inevitably affects the State’s potential for social correction and wealth redistribution, as the German judge Böckenförde rightly pointed out. In a European context already marked by the framework for budgetary discipline within the Economic and Monetary Union, this constitutional ‘proviso of the possible’ is far from being economically neutral – as demonstrated by the Belgian constitutional court’s decision on the TSCG.

One thing seems therefore to be clear: the economic neutrality of national constitutions is a *myth*. Albeit that it is true that national constitutional texts are open to a variety of interpretations and are, in this sense, relatively ‘open’, the ‘authentic interpreters’ have considerably curbed the room for manoeuvre of the legislature, revealing a specific economic ‘referential’. The stance of judicial self-restraint adopted by the judges is easily explained, either by their concern to conceal their creative power in the absence of an explicit choice laid down by the *pouvoir constituant*, or by their genuine belief in the objectivity or naturalness of the economic world-view that they hold – for a choice is not supposed to be legally circumscribed if it is only factually constrained. However, such a stance does not stand up to analysis, provided that the various positions adopted by constitutional courts are linked and compared, depending on whether they apply to the guarantees of the market order or of the social state. In a nutshell, the founding norms of the market are granted normative primacy over social provisions at the constitutional level. The former are the principle, the latter the exception. Behind this statement, there is no denying the ‘factual’ constraint placed nowadays on society and the State by the market. But the decisive point is that such ‘market constraints’ ultimately stems from contingent legal frameworks. Yet, despite path-dependency, these frameworks are never immutable… not even if they are constitutional.

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