

**Restriction of the Effects of
Judgements in Cases of
Ascertainment of their Unconstitu-
tionality**

– Summary –

Comparative law analysis on the legal situation
in the Member States of the European Union

on behalf of the
Federal Ministry of Finance

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In many cases the outcome of legal proceedings of the German Federal Constitutional Court or the European Court of Justice depends on the ruling of the compatibility of statutes with Constitutional Law respectively European Community Law. The effects which such rulings of the European Court of Justice do have on the legal systems of the EU-Member States usually go far beyond the case at hand. Regarding the question under which circumstances the retroactive effects of the Federal Constitutional Courts' resp. the European Court of Justice's judgements may be limited in order to safeguard important considerations of general interest the jurisprudence of both courts varies significantly. Therefore, it was of great interest to evaluate the legal practice in the other EU-Member States regarding the possibility to limit the retroactive effects of judgements on the nullity of statutes.

A.

Starting point and problem

In many legal systems within the EU-Member States founded on the rule of law systems of judicial review of statutes can be found. In these cases courts have the competence to review the constitutionality of statutes and declare them for null respectively inapplicable. In some cases such decisions lead to the annulment of statutes with generally binding effects (*erga omnes*). In other cases the effects of such decision are limited to the parties of the respective proceedings (effects *inter partes*).

Also in regard to their temporal effects there are differences between the effects of such decisions between the various Member States. In some legal systems such decisions have retroactive effect as of the moment of coming into force of the statute concerned (effect *ex tunc*). Legal relations based on these statutes lose their legal grounds with retroactive effects and possibly have to be rescinded. In other legal systems such decisions take effect only as of the date of their publication (effect *ex nunc*). In other cases the effects of such decisions even come into force only at a future moment (effect *pro futuro*).

The legal consequence of the nullity respectively inapplicability of statutes can lead to grave consequences e.g. in cases where - following the abolition of a statute - a certain area of life suddenly lacks a legal rule and, therefore, urgent

measures for the rectification of the defects by the legislator are necessary, or when extensive administrative or financial energies are necessary in order to rescind the legal relationships now lacking their legal foundations. To reduce these harsh legal effects the courts in some legal systems have the competence to limit the temporal effects of decisions on the nullity of laws, for example by ordering an *ex nunc*-effect or even a further application of the unconstitutional law for a fixed period of time instead of the retroactive effect of such decisions.

Within the European Union the European Court of Justice has in the course of its preliminary ruling procedures the competence to interpret community-law with generally binding effect. Although this does not conform to a competence to review the national law these decisions of the European Court of Justice may factually lead to a derogation of national statutes in cases where the interpretations of the Luxemburg Court show their incompatibility with EC-law. In Germany the Federal Constitutional Court has the competence to review statutes according to the guidelines as set out in the Basic Law. The decisions of both courts take effect *ex tunc*. As well the Federal Constitutional Court as the European Court of Justice felt in the course of their jurisdiction the need to develop differentiated solutions for the restriction of the temporal effects of their judgments.

However, there are considerable differences in the prerequisites according to which both of these courts make use of these competencies. While the European Court of Justice only makes sporadically use of this possibility to limit the temporal effects of its decisions and regards this possibility as a very exceptional case the Federal Constitutional Court makes much more often use of these exceptions. Especially, in order to observe the legislative prerogative or to prevent the creation of a condition that even corresponds less to the constitutional preconditions than the timely restricted continual validity of the relevant legal provision the judges in Karlsruhe make use of this possibility.

Given that the European Court of Justice complies with the generally excepted legal principles in the circle of the Member States it is of much interest what legal practice prevails in the other EU-Member States regarding the possibility to restrict the temporal effects of decisions on the nullity of laws. The German Federal Ministry of Finance mandated the law firm NÖRR STIEFENHOFER LUTZ together with Prof. Dr. Friedhelm Hufen to write a legal opinion whether within the other EU-Member States there are competences for judicial review

and dismissal of statutes, which consequences are following out of these competences for the continuation of the statutes concerned, and whether the competent courts may under certain prerequisites limit the temporal effects of their decisions.

The contractors – with the support of the international composed Expert Committee on European Constitutional Law¹ – analysed the practice of the courts in the 27 EU-Member States and described their findings in a legal opinion under the heading “Restriction of the Effects of Judgements in Cases of Ascertainment of their Unconstitutionality”. The expert committee came together for a meeting on 22/23 September 2008 in Berlin in which the findings of their analysis were discussed and on the basis of which the expert committee adopted a joint recommendation. The material results of the legal opinion will be summarized in the following.

B. Summary of the findings

I. Jurisprudence of the European Court of Justice

The rulings of the European Court of Justice in the context of preliminary ruling procedures have principally legal effects *ex tunc*, i.e. they produce retroactive effects from the point in time at which the law in question came into force. Since its *Defrenne II* decision the European Court of Justice is in the position to restrict the temporal effects of its judgements by analogy with article 231 para. 2 EC Treaty.

Precondition for such a restriction is on the one hand, that there must have been an objective uncertainty regarding the interpretation of the relevant legal rule of European community law within the Member State involved in that proceedings. On the other hand, the retroactive application must let expect considerable and far reaching financial consequences for the Member State. Finally, the

¹ The members of the Expert Commission for European Constitutional Law are: Prof. Dr. Rainer Arnold (United Kingdom), Prof. Dr. David Capitant (France), Prof. Dr. Emilio Castorina (Italy), Prof. Dr. Kostas Chryssogonos (Greece), Prof. Dr. Dr. Santiago González-Varas Ibáñez (Spain), Prof. Dr. Friedhelm Hufen, Chairman of the Expert Commission (Germany), Prof. Dr. Joakim Nergelius (Sweden), Colm O’Cinneide, LL.M. (Ireland), Prof. Dr. Patricia Popelier (Belgium), Attorney at law Dr. Holger Schmitz (Germany), Prof. Dr. Werner Schroeder (Austria) and Prof. Dr. Mirosław Wyrzykowski (Poland).

European Court orders such a restriction of the effects of the judgement only upon request of a Member State.

The mentioned preconditions are construed very strictly by the European Court of Justice, so that such restrictions are only applied in exceptional cases. In particular, in its consistent jurisprudence, the Court of Justice finds that restrictions of the temporal effects of its judgements are not justified alone by the fear of serious financial consequences.

The European Court of Justice applies a restriction only than if it finds on the interpretation of a certain rule of law for the first time.

II. Jurisprudence of the German Federal Constitutional Court

In its consistent jurisprudence, the Federal Constitutional Court differentiates between nullity and the incompatibility of laws with the constitution. The declaration of nullity leads automatically to the elimination of a law from the legal system. In the event of declaration of incompatibility the Federal Constitutional Court disposes of a discriminating scope for action. By that the Federal Constitutional Court has the possibility to make an exception of the principal of retro-active activity of its judgements or even order that the law continues to be valid (for a limited period of time).

The Federal Constitutional Court regularly makes use of the possibility of a declaration of incompatibility if this is necessary to preserve a legislative manoeuvre or to prevent the creation of a condition that even corresponds less to the constitutional preconditions than the timely restricted continual validity of the relevant legal provision.

With respect to unconstitutional tax laws the Federal Constitutional Court generally does not issue a declaration of nullity if otherwise reliable finance and budget planning would be jeopardized or a constant administrative performance would be impeded. Hence, the Federal Constitutional Court considers in its consistent jurisprudence the administrative and fiscal consequences of its judgements and endeavours by doing so, not to impair the functionality of the state by declaring indiscriminately on constitutional laws as null and void. At the same time it also pays regard to the legislative procedures in the framework of directing that the relevant law continues to be valid for a limited period of time and

regularly concedes the parliament a sufficient margin of time for the correction of the legal deficiencies.

In the light of these material differences between the legal practice of the European Court of Justice and the Federal Constitutional Court the question gains importance which solutions prevail in other Member States for comparable situations.

III. Legal systems of other Member States

Similar to the situation in Germany, the legal systems of almost any other EU-Member State provide for the possibility of an assessment of the constitutionality of a law by the courts.

Only in the United Kingdom and in the Netherlands, as a consequence of a strict interpretation of the principle of the separation of powers, the courts are not competent for a review of laws. In a small number of the remaining Member States (Denmark, Finland, Greece and Sweden) judicial review competences are existent but actually only of minor importance. Again, a reason for that is the strict observation of the principle of separation of powers and high weighting of the parliamentary sovereignty.

However, in the overwhelming majority of the Member States, the courts are competent for a review of laws (with a more or less distinct generally binding effect). In most countries (Constitutional) Courts are competent for the issue. In some states where “diffuse” or “mixed” systems of review of statutes do exist also the ordinary courts are competent for the review and declaration of nullity of laws.

Overview of systems of judicial review of statutes in the EU-Member States	
Member States without judicial review of statutes	Great Britain, Netherlands
Member States with a „diffuse“ systems of judicial review	Denmark, Finland, Ireland, Sweden
Member States with a „mixed system“	Estonia, Greece, Malta, Portugal
Member States with a concentrated system of judicial review	Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxemburg, Poland, Romania, Slovakia, Slovenia, Spain

IV. Temporal effects of nullity of law decisions in the Member States

In Member States which opted for a judicial law review with generally binding effect (*erga omnes*) a strong tendency for the establishment of an *ex nunc* effect of judicial review decisions can be observed. Only in six Member States decisions on the nullity of laws have principally an *ex tunc* effect.

In this connection the relative recent constitutional history in the new Member States of Eastern Europe is of particular interest. The constitutional shaping in those countries was influenced to a large extent by the constitutions of the “old” Member States and partly developed with the active cooperation of western experts. In this connection, special attention must be granted to the observation that all of those “new” Member States, except Estonia, opted for the establishment of an *ex nunc* effect of rulings on the nullity of laws. That suggests a trend growing to the general conviction, to waive retroactive effect of nullity of law decisions issued by the courts and to give principally those decisions (only) effect from the date of the pronouncement of the judgement.

This trend continues in a recent amendment of the French Constitution. By the said amendment, the repressive judicial review of the constitutionality of an Act was for the first time attributed to the French Constitutional Council. It equally provides the *ex nunc* effect of such decisions of the Constitutional Council.

Overview of the effects of nullity of law decisions in general	
<i>Ex tunc</i>	Belgium*, Estonia**, Germany, Ireland, Portugal*, Spain
<i>Ex nunc</i>	Austria, Bulgaria, Cyprus*, Czech Republic, France***, Greece**, Hungary, Italy, Latvia, Lithuania, Luxemburg****, Malta****, Poland, Romania, Slovakia, Slovenia
Depending on each individual case, because of inter partes-effect	Denmark, Finland, Sweden
No system of judicial review	Great Britain, Netherlands

*limited to proceedings of abstract judicial review, ** concerning decisions of the Estonian State Court respectively the highest special Court in Greece, *** after the passing of a executive law by the French parliament **** only with *inter partes*-effects, but with strong precedent effect.

In almost all Member States in which there is a possibility of a judicial review with generally binding effect the courts may deviate from the existing principle of the occurrence of the temporal effects of decisions on the nullity of laws.

Those deviation possibilities are based on a legal concept or on the development of the law by judicial interpretation. Again, special reference is made to the legal situation in the “new” Member States in Eastern Europe. In all constitutions or laws on the Constitutional Court in these states provisions can be found according to which the courts may order deviation from the usual point of time of the occurrence of the effects of the ruling or according to which the postpone-

ment of the occurrence of the effects of the ruling in the future is provided as a legal rule.

Furthermore, special consideration merits the fact that in all Member States which opted principally for an *ex tunc* effect of their rulings on the nullity of laws there are arrangements for deviations of the principle of retroactivity. Especially in those countries such exemption regulations are in part developed very far reaching and they allow the courts to refrain from retroactivity or to postpone the occurrence of the effects of the rulings to the future.

In the aggregate, most of those Member States in which exist judicial review competences with general binding effect, postponing of the occurrence of the effects of rulings on the nullity of laws is left to the discretion of the courts or is provided as a legal rule.

The instruments by means of which the courts of the Member States may order such deviations from the usual point of time of the occurrence of the effects of rulings are defined in various ways.

In part there are explicit legal regulations allowing the courts to modify the point of time of the occurrence of the effects of the rulings. In other countries, the courts refrain – similar to the German Federal Constitutional Court – from a declaration of nullity of the relevant laws and have rather the possibility to postpone – via the declaration of incompatibility – the point of time of the occurrence of the effects of the ruling. A third possibility consists in appeal decisions in which the courts explain the circumstances which lead to the unconstitutionality of law, without repealing the law but rather call upon the legislator to correct those legal deficiencies.

V. Reasons for the restriction of the temporal effects of judgements in the jurisdiction of the Member States

Like the Federal Constitutional Court many other courts in the Member States take possible effects on the functionality of the states into account before declaring statutes as unconstitutional. On the one hand this refers to the administrative and financial effects such decisions may have. Therefore, courts often make exceptions from the retroactive effects of judgements, if it is foreseeable that the declaration of unconstitutionality of statutes with immediate or retroactive effect will have substantial financial consequences or detrimental effects on

the functioning of the state. In some of these cases the courts also declare the preliminary continuance in force of unconstitutional norms in order to prevent the unwelcome effects on the functionality of the state and, additionally, to provide the legislators with a sufficient margin of time to correct the norms concerned.

On the other hand there are a number of other significant reasons which regularly induce the courts to restrict the temporal effects of judgements declaring the unconstitutionality of norms. Even if these reasons may be very distinctive in their details, they can be summed up under a certain number of generic terms. Often a restriction of the effects of judgements occurs for the sake of legal certainty and, especially, Courts also do declare unconstitutional norms to be further applicable for a given period of time to protect the legislators' prerogative powers to design the law. By doing this courts avoid interferences with the primary areas of competences of the legislator, at the same time, by setting a fixed time-limit for the further applicability of the norms concerned, they put pressure on the legislator to actually repeal the unconstitutional condition of the norm affected.

Other reasons for the restriction of the temporal effects of judgements are based on the interest to safeguard general welfare as well as to avoid gaps in the legal order which could arise from the declaration of unconstitutionality of all law with immediate or retroactive effect.

The interest to safeguard the legislators' prerogative to design the law prevails also in the Member States where there is no power of the courts to review statutes and determine their constitutionality, or where such judgements only have effects *inter partes*. Especially, this is mirrored in the principle of Sovereignty of Parliament as known in the Anglo-Saxon jurisdiction.

In general the considerations for the limitation of effects of judgements can be assigned to the following generic terms:

- safeguarding of legal certainty,
- avoidance of regulatory gaps,
- respect for the principle of the separation of powers,

- safeguarding of interests of the states, among others consideration of grave effects on the states budgets and financial planning's or safeguarding of uniform administrative procedures,
- other important reasons of the common good/considerations of equity.

C.

Berlin Declaration of the Expert Commission on European Constitutional Law for the Protection of the Interests of Member States

The international Expert Commission on European Constitutional Law², established by the Federal Ministry of Finance and consisting of twelve constitutional lawyers, makes the following proposals for the taking into account of the interests of Member States in preliminary ruling proceedings before the European Court of Justice. The result of a comprehensive expert analysis of legal practice of the 27 Member States of the European Union was the basis for the conference held on 22 and 23 September in Berlin³.

Proposals

We welcome the established jurisprudence of the European Court of Justice, commencing with the *Defrenne II* judgement (1976), that grave interests of the Member States should be taken into account in the preliminary ruling proceedings by the modification of the effects of the judgements. This corresponds to the European Law

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² "Restriction of the effects of rulings in case of the Declaration of the unconstitutionality of laws" prepared by the law firm NÖRR STIEFENHOFER LUTZ together with the members of the Expert Commission European Constitutional Law, delivered to the German Ministry of Finance on the occasion of the meeting of the Expert Commission.

principles of loyalty, proportionality and subsidiarity and the principle of recognition of the identity of Member States.

In observance of the general principles of community law derived from the national legal systems, grave interests of the Member States should continue to be taken into account in judgements in the future even more so than in the past. We regard the following interests as especially significant, particularly in the non-harmonized areas:

- the maintenance for the national legislators of possible alternative actions in compliance with EU law,
- legal certainty and the avoidance of regulatory gaps,
- protection of the confidence of the citizens,
- protection against disproportionate administrative efforts,
- the avoidance of serious losses to state budgets and to the security of financial planning also in regard to the budgetary deficit limits under European law, and
- other important reasons of the common good.

In order that these interests be taken into account we propose for these cases that the effects of judgements be limited to the time *ex nunc* or that it be ordered that their coming into effect be postponed to the future or that the legislator be required to itself correct the situation which is in conflict with European law.

Grounds for Proposals

In almost all Member States of the European Union, there is the possibility of judicial review of statutory provisions often linked to the power to disapply statutes which are unconstitutional. While in interpreting EU law in the course of preliminary ruling proceedings before the European Court of Justice, no review of national statutes takes place, its legal and factual effects are, however, comparable with the Member States judicial review procedures. Both judgements of Member State courts as well as those of the European Court of Justice could result in gaps in regulation and legal uncertainty also unfavourable to the citizens or unreasonably restrict existing alternative actions of Member States legislators in conformity with European law and result in serious losses to the state budgets often in terms of billions. They could also lead to

almost insoluble implementation problems in particular if tax or social law provisions are affected.

Only a few Member States have opted for judgements to have retrospective effect to the time of the coming into effect of the relevant statute (*ex tunc*). In the majority of Member States, judgements disapplying statutory provisions, have effect *ex nunc*. In addition, there is also a tendency in many Member States to address problems of balance and proportionality by means of *pro futuro* orders. Almost all Member States' constitutional courts have, on the basis of constitutional provisions or case law, the possibility to change the time of the coming into effect of their judgements or to appeal to the legislator to make the relevant legislative amendments in order to protect important public interests.

The general legal principle that the effects of judgements disapplying statutory provisions can be modified if they would be expected to lead to inappropriate effects, can be deduced from the general constitutional understanding of the Member States.

This legal principle is a source of community law and is reflected in the jurisprudence of the European Court of Justice since the *Defrenne II* judgement. It is based on the principle of loyalty, proportionality, legal certainty, the rule of regard for the identity of Member States and of subsidiarity and should continue to characterize the jurisprudence of the European Court of Justice.