DOCTRINE

Uitwisseling van informatie: aandachtspunten, gebruik en samenwerking Belgisch rapport n.a.v. het 74ste (digitale) IFA-congres te Cancun, Mexico (4-8 oktober 2020) (Exchange of information: issues, use and collaboration)[1]

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SAMENVATTING

"Het tijdperk van het bankgeheim is voorbij" was de straffe uitspraak van de leiders van de G20 in 2009 in Londen. Hadden zij – exact 10 jaar later – ooit verwacht dat hun communicatie dergelijke grote gevolgen zou hebben? Sindsdien is België lid geworden van verschillende initiatieven inzake grensoverschrijdende samenwerking in de inkomstenbelastingen. Meer zelfs, vandaag kent België een voortrekkersrol op het internationaal niveau.

België heeft altijd een uitgebreid netwerk gekend van dubbelbelastingverdragen (101 op basis van een overzicht op het moment van publicatie van het rapport). België heeft zelfs een pioniersrol gespeeld bij de ontwikkeling van de samenwerking tussen staten door het afsluiten van bilaterale verdragen, toegegeven enkel met betrekking tot registratierechten, reeds in 1843 en 1845 met Frankrijk, Nederland en Luxemburg. Vandaag past België de meest recente zienswijze van de OESO toe met betrekking tot de toepassing van artikel 26 OESO-Modelverdrag in de verschillende dubbelbelastingverdragen. België heeft eveneens 20 TIEA's ondertekend met diverse beruchte belastingparadijzen. Dit instrument voorziet in een gelijkaardige vorm van gegevensuitwisseling als de dubbelbelastingverdragen. België heeft eveneens 11 administratieve akkoorden afgesloten om gegevensuitwisseling tussen staten nog meer aan te moedigen. De meeste van deze akkoorden zijn gebaseerd op het multilateraal verdrag inzake administratieve samenwerking in fiscale zaken.

Als lid van de Europese Unie is België verplicht om de bepalingen van de richtlijn inzake administratieve samenwerking (DAC) en haar vijf wijzigingen na te leven. België heeft de volledige richtlijn omgezet in één wetsartikel, met name artikel 338 WIB 1992. De vijfde wijziging van de richtlijn heeft betrekking op verplichte automatische gegevensuitwisseling met betrekking tot meldingsplichtige grensoverschrijdende constructies DAC 6. Op het moment van het schrijven van het rapport was de omzetting hiervan nog geen feit, maar ondertussen werd deze uitgebreid bekritiseerde richtlijn omgezet in nationale wetgeving door de wet van 20 december 2019.

Zoals de meeste landen ter wereld participeert België met de Verenigde Staten in FATCA, het bilateraal systeem van automatische financiële gegevensuitwisseling. Ter implementatie van dit systeem werd op 23 april 2014 een intergouvernementeel akkoord (IGA I) afgesloten. België past daarnaast sinds 2017 de Common Reporting Standard van de OESO toe inzake automatische financiële gegevensuitwisseling. Om een correcte verwerking hiervan te garanderen, heeft België een wet uitgevaardigd op 30 augustus 2017 die instemt met de zogenaamde "Multilateral Competent Authority Agreement".

De OESO, met behulp van het BEPS-actieplan, en de Europese Commissie, door twee wijzigingen van de richtlijn inzake administratieve samenwerking (DAC 3 en 4), trachten eveneens om gegevensuitwisseling tussen staten te bekomen inzake fiscale rulings en "advanced pricing agreements" toegepast door multinationals. België heeft deze initiatieven ondertussen reeds omgezet in nationale maatregelen. De Belgische IEOI-DT-eenheid van de fiscale administratie ziet er op toe dat de ontvangen ruling en "advanced pricing agreements" beschikbaar worden gemaakt voor de bevoegde eenheden van de fiscale administratie. Voor wat betreft de verplichtingen inzake (de implementatie van) de Country-by-Country-rapportering in België verwijst de fiscale administratie naar de uitgebreide handleiding zoals gepubliceerd op de BEPS-pagina van de OESO.

Op basis van de verplichting opgenomen in de antiwitwasrichtlijn heeft België ook een UBO-register uitgewerkt. De uiteindelijk begunstigden van iedere onderneming moesten

1. This article is a transcript of the Belgian report for the (digital) 2020 Cancun Congress of the International Fiscal Association (first published in *Cah.dr.fisc.int.* 2020, vol. 105b, p. 169-189; see pp. 17 and ff. for the scope and focus of the national reports).
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ten laatste op 1 oktober 2019 in het register opgenomen staan.

De afdeling "grote ondernemingen" van de Belgische fiscale administratie is in 2018 een tweejarig pilootproject gestart met betrekking tot "cooperative tax compliance". Het project heeft tot doel de huidige aanpak van a posteriori fiscale onderzoek te vervangen door een systeem van een proactief en constructief overleg tussen de fiscale administratie en de bedrijven. Toetreding tot het pilootproject was enkel mogelijk voor zeer grote ondernemingen. Na een initieel pilootproject met 8 landen heeft België recent eveneens besloten om ICAP 2.0 te vervoegen.

Het peer review rapport in 2018 met betrekking tot gegevensuitwisseling op verzoek concludeerde dat België in het algemeen "largely compliant" is met de standaard zoals opgelegd door de OESO. Sinds het eerste rapport van 2013, heeft België grote stappen vooruit gezet met betrekking tot de deadlines voor het ratificeren van dubbelbelastingverdragen en met betrekking tot de snelheid van reactie aangaande ontvangen verzoeken om inlichtingen van andere staten. Niettegenstaande heeft België toch enkele belangrijke aanbevelingen ontvangen.

Wanneer België een verzoek om inlichtingen verstuurt naar een buitenlandse fiscale administratie, moet de Belgische fiscale administratie de substantiële verplichtingen zoals opgelegd door de instrumenten inzake grensoverschrijdende gegevensuitwisseling respecteren. Als aangezochte staat mag België een verzoek om inlichtingen in bepaalde gevallen weigeren. In de praktijk moet de Belgische fiscale administratie als vertegenwoordiger van een Europese lidstaat de conclusies van het Hof van Justitie in de zaak Berlioz respecteren. De Belgische fiscale administratie moet ten gevolge hiervan aanvullende informatie aan de verzoekende staat vragen indien er vanuit haar oogpunt twijfel is ontstaan dat het ontvangen verzoek om inlichtingen voldoende fiscale relevantie bevat.

Op grond van artikel 322, § 4 WIB 1992 wordt een ontvangen verzoek om financiële inlichtingen steeds beschouwd als een aanwijzing van belastingontduiking. In tegenstelling tot een interne situatie mag de Belgische fiscale administratie aldus standaard de financiële inlichtingen opvragen bij de financiële instelling zelf.

In België bemerken we sinds 5 jaar een tendens naar het aanvaarden van alle soorten van bewijsmateriaal, ongeacht de wijze waarop deze informatie werd vergaard. Op het moment van het schrijven van het rapport, was strafrechtelijke vervolging op basis van informatie vergaard via gegevensuitwisseling tussen fiscale administratie enkel mogelijk in het geval van belastingontduiking. Om het succes van het onderzoek van de buitenlandse fiscale administratie te kunnen garanderen werd er een bepaling in het WIB 1992 geplaatst die in de mogelijkheid voorziet om de passieve verplichting tot openbaarheid die rust op de Belgische fiscale administratie opzij te schuiven ten voordele van een buitenlandse staat. De verplichting tot geheimhouding van de Belgische fiscale administratie met betrekking tot de ontvangen informatie van een buitenlandse staat, welke is voorzien in verschillende instrumenten inzake de samenwerking tussen staten en wordt weerspiegeld in het nationale beroepsgeheim van de fiscale ambtenaar, kan in de praktijk in conflict komen met het recht van inzage in het fiscale dossier van de belastingplichtige met betrekking tot de buitenlandse inlichtingen.

Tot slot, vandaag, is er nog geen juridisch kader in België met betrekking tot het bestrijden van belastingontwijking en -ontduiking en andere misdrijven met betrekking tot de digitale financiële markt.

RESUME

« L'ère du secret bancaire est révolue » fut la décision abrupte des dirigeants du G20 à Londres en 2009. Mais pouvaient-ils s'attendre à ce que – 10 ans plus tard exactement – leur communication se traduise par des effets aussi importants? Depuis lors, la Belgique est membre de plusieurs initiatives de coopération transfrontalière en matière d'impôt sur les revenus. De plus, la Belgique joue aujourd'hui un rôle de pionnier au niveau international.

La Belgique a toujours disposé d'un vaste réseau de conventions préventives de la double imposition (101 sur la base d'un relevé effectué au moment de la publication du rapport). La Belgique a même joué un rôle de pionnier dans le développement de la coopération entre Etats en concluant des conventions bilatérales, certes uniquement en matière de droits d'enregistrement, mais dès 1843 et 1845 (avec la France, les Pays-Bas et le Luxembourg). Aujourd'hui, la Belgique applique le point de vue le plus récent de l'OCDE sur l'application de l'article 26 de la convention-modèle de l'OCDE dans les différentes conventions préventives de la double imposition. La Belgique a également signé 20 accords sur l'échange de renseignements en matière fiscale (Tax information exchange agreements (TIEA)) avec divers paradis fiscaux notoires. Cet instrument prévoit une forme d'échange de renseignements similaire à celle des conventions préventives de la double imposition. La Belgique a également conclu 11 accords administratifs pour encourager davantage l'échange de renseignements entre les Etats. La plupart de ces accords sont basés sur la convention multilatérale concernant l'assistance administrative mutuelle en matière fiscale.

En tant que membre de l'Union européenne, la Belgique est tenue de se conformer aux dispositions de la directive relative à la coopération administrative dans le domaine fiscal (DAC) et de ses cinq modifications. La Belgique a transposé l'ensemble de cette directive en un seul article de loi, à savoir l'article 338 CIR 1992. La cinquième modification de la directive concerne l'échange automatique et obligatoire d'informations dans le domaine fiscal en rapport avec les dispositifs transfrontières devant faire l'objet d'une déclaration (DAC 6). Au moment de la rédaction du présent document, la transposition n'était pas encore achevée, mais entretemps, cette directive largement critiquée a été transposée en droit interne par la loi du 20 décembre 2019.

Comme la plupart des pays du monde, la Belgique participe avec les Etats-Unis au FATCA, le système bilatéral d'échange

automatique de données financières. Pour mettre en œuvre ce système, un accord intergouvernemental (IGA I) a été conclu le 23 avril 2014. La Belgique applique également depuis 2017 la norme commune d'échange ou Common Reporting Standard de l'OCDE sur l'échange automatique d'informations financières. Afin de garantir le traitement correct de ces informations, la Belgique a voté une loi le 30 août 2017 qui répond aux prescrits du « Multilateral Competent Authority Agreement ».

L'OCDE, à l'aide du plan d'action BEPS, et la Commission européenne, par le biais de deux amendements à la directive relative à la coopération administrative dans le domaine fiscal (DAC 3 et 4), tentent également d'obtenir un échange d'informations entre les Etats en matière de rulings fiscaux et autres décisions fiscales ainsi qu'en matière d'accords préalables sur les prix de transfert (« advanced pricing agreements ») appliqués par les multinationales. La Belgique a déjà transposé ces initiatives en droit interne. L'équipe IEOI-DT de l'administration fiscale belge veille à ce que les rulings et les « advanced pricing agreements » obtenus soient mis à la disposition des unités compétentes de l'administration fiscale. En ce qui concerne les obligations en matière (d'implémentation de) la déclaration pays par pays (Country-by-Country-reporting) en Belgique, l'administration fiscale se réfère au manuel détaillé publié sur la page BEPS de l'OCDE.

Sur la base de l'obligation contenue dans la directive anti-blanchiment, la Belgique a elle aussi institué un registre UBO. Les bénéficiaires effectifs de chaque entreprise devaient être inscrits au registre pour le 1er octobre 2019 au plus tard.

En 2018, la division « grandes entreprises » de l'administration fiscale belge a lancé un projet pilote de 2 ans sur la « cooperative tax compliance ». Le projet vise à remplacer l'approche actuelle de la recherche fiscale a posteriori par un système de concertation proactive et constructive entre l'administration fiscale et les entreprises. L'accès à ce projet pilote n'était possible que pour les très grandes entreprises. Après un premier projet pilote avec 8 pays, la Belgique a également décidé récemment de rejoindre l'ICAP 2.0.

Le rapport d'évaluation par les pairs de 2018 sur l'échange de renseignements à des fins fiscales a conclu que la Belgique est généralement « conforme pour l'essentiel » aux normes imposées par l'OCDE. Depuis le premier rapport de 2013, la Belgique a fait des progrès significatifs en ce qui concerne les délais de ratification des conventions préventives de la double imposition et la rapidité de réaction aux demandes de renseignements obtenues d'autres Etats. Néanmoins, la Belgique a reçu quelques recommandations importantes.

Lorsque la Belgique envoie une demande de renseignements à une administration fiscale étrangère, l'administration fiscale belge doit respecter les obligations substantielles imposées par les instruments sur l'échange transfrontalier de données. En tant qu'Etat requis, la Belgique peut refuser une demande d'information dans certains cas. En pratique, en tant que représentant d'un Etat membre européen, l'administration fiscale belge doit respecter les conclusions de la Cour de justice dans l'affaire Berlioz. En conséquence, l'administration fiscale belge doit demander des informations complémentaires à l'Etat requérant si, de son point de vue, des doutes sont apparus quant à la pertinence fiscale de la demande de renseignements reçue.

Sur la base de l'article 322, § 4, CIR 1992, une demande d'informations financières reçue est toujours considérée comme un indice de fraude fiscale. Contrairement à une situation interne, l'administration fiscale belge peut donc demander les informations financières à l'établissement financier lui-même.

En Belgique, depuis 5 ans, la tendance est à l'acceptation de toutes sortes de matériels probants, quelle que soit la manière dont ces informations ont été recueillies. Au moment de la rédaction du rapport, les poursuites pénales fondées sur les informations recueillies grâce à l'échange de renseignements entre des autorités fiscales n'étaient possibles qu'en cas de fraude fiscale. Afin de pouvoir garantir le succès de l'enquête menée par l'administration fiscale étrangère, une disposition a été insérée dans le CIR 1992 qui prévoit la possibilité d'écarter l'obligation de publicité passive qui incombe à l'administration fiscale belge en faveur d'un Etat étranger. L'obligation de confidentialité de l'administration fiscale belge à l'égard des informations reçues d'un Etat étranger, qui est prévue dans divers instruments de coopération entre Etats et qui se traduit par le secret professionnel national du fonctionnaire fiscal, peut en pratique entrer en conflit avec le droit d'accès du contribuable à son dossier fiscal en ce qui concerne les informations étrangères.

Enfin, il n'existe pas encore aujourd'hui en Belgique de cadre juridique concernant la lutte contre la fraude et l'évasion fiscales et les autres délits liés au marché financier numérique.

I. Instruments and processes of international application

A. Introduction

"The era of banking secrecy is over", was the bold statement made by the G20 leaders in 2009 in London. Would they – exactly 10 years later – ever have expected their communication to have such consequences? In June 2013 the smaller meeting of the G8 leaders officially endorsed in a declaration in Lough Erne, Scotland, the principle of automatic information exchange. Since then, Belgium has been inundated with a multitude of instruments for cross-border cooperation in income taxes.

Belgium has always had an extensive network of Double Taxation Conventions. Belgium even played a pioneering role in the development of cooperation between states by concluding bilateral agreements, admittedly only in the field of registration fees, as early as 1843 and 1845 with France, the Netherlands and Luxembourg. Today, Belgium partici-

pates in all (legal) initiatives aimed at promoting cross-border cooperation between states.

First of all, of course, there are the Double Taxation Conventions that Belgium has concluded with (according to the latest overview) 101 countries all over the world.[4] The amendment of article 26 OECD Model Convention in 2005 resulted in the addition of two paragraphs to the article in question. Firstly, if states have to collect information for the benefit of another state, they should use their national investigative powers to determine income taxes, even if they do not need the information for their own taxation. Furthermore, the fifth paragraph of article 26 OECD Model Convention was introduced to prevent states from invoking national banking secrecy as a ground for refusal in order to prevent the exchange of information held by financial institutions. Belgium had entered a reservation on the fifth paragraph of article 26 OECD Model Convention. Under the influence of the OECD, Belgium lifted its reservation in 2009. As a result, Belgium has concluded additional protocols to its double tax treaties in which the fourth and fifth paragraphs of article 26 of the OECD Model Convention are reproduced verbatim. Today, Belgium is following the OECD's most recent approach to article 26 OECD Model Convention in the application of its Double Taxation Conventions.[5]

Belgium has signed 20 TIEAs with several notorious tax havens.[6] They provide for the same form of exchange of information as the Double Taxation Conventions. Belgium has also concluded 11 administrative arrangements to encourage the exchange of information between states. Most of these administrative arrangements are based on the Convention on Mutual Administrative Assistance in Tax Matters. This instrument was developed jointly by the OECD and the Council of Europe in 1988 and amended by protocol in 2010. The Convention can be seen as "the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance".[7] Belgium only ratified the Convention by law on 24 June 2000.

As a member of the European Union, Belgium must comply with the provisions of the Directive on Administrative Cooperation 2011/16/EU (DAC) and transpose them into national law. Belgium has transposed the entire directive into one article of law, namely article 338 of the Income Tax Code 1992. The Directive Administrative Cooperation has been amended five times since its introduction in 2011 in order to broaden the scope of the automatic exchange of information, with the most recent element being the obligation for intermediaries to report certain targeted cross-border arrangements to one of the tax administrations in the European Union (DAC 6).

Particular attention should be paid to the instruments which facilitate the automatic exchange of financial information. Like most countries in the world, Belgium participates with the United States in FATCA, the bilateral system of automatic exchange of financial information. In implementation of this, Belgium and the United States have already issued an intergovernmental agreement (IGA I) on 23 April 2014. In view of the tremendous success of FATCA, the OECD, at the request of the G20, has itself developed a reporting standard, namely the Common Reporting Standard (CRS), to make automatic exchange of financial information applicable worldwide. Belgium has complied with this reporting standard since 2017. In order to ensure the correct application of the Common Reporting Standard, a new instrument has been created, the Multilateral Competent Authority Agreement (the MCAA). The Belgian law on consent to the Multilateral Competent Authority Agreement dates back to 30 August 2017. In addition, the automatic exchange of financial information between the member states of the European Union is managed by Directive 2014/107/EU, a first amendment (DAC 2) to the aforementioned Directive Administrative Cooperation. This is mainly a copy of the obligations imposed by the OECD in the Common Reporting Standard.

Finally, Belgium uses bilateral administrative agreements to comply with some of the obligations in the OECD's Base Erosion and Profit Shifting (BEPS) project, namely the cross-border exchange of rulings and Country-by-Country reports.

In the following sections of the first chapter, these various instruments for promoting cross-border tax cooperation between states are discussed in more detail.

Belgium has not yet collected any information on the proceeds of cross-border administrative cooperation; however, the Court of Audit is examining the revenue from the exchange of information in direct tax matters between states and the results are expected later this year. The Belgian tax administration refers to the figures on tax regularization for the impact on combating tax evasion. For example, in 2017 alone, a yield of 590 million was achieved. The success of tax regularization is largely due to the automatic exchange of information with countries with a tradition of banking secrecy.

In a recent report of the European Commission with regard to the revenues coming from DAC1 automatic exchange of information, we notice the following numbers concerning Belgium:

4. In addition, 9 agreements have been concluded which have not yet entered into force.
5. For an extensive discussion of this 180-degree turn of Belgium with respect to cross-border cooperation between states, we refer to the published dissertation of Niels Diepvens. N. Diepvens, *De grensoverschrijdende administratiefrechtelijke gegevensuitwisseling op verzoek in de inkomstenbelastingen vanuit Belgisch standpunt*, Gent, Larcier, 410 p. (2018).
6. Of these, 15 have already entered into force.
7. www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrativeassistance-in-tax-matters.htm.

Reported as Increase in Tax Base (additional income)

Member states	Year	Employment income		Directors' fees	Pensions LIP[8]	Income from property	Total
Belgium	2017[9]	69,148,593	…	105,837	33	40,040	289,470[10]

8. Life insurance products.
9. The information was provided in 2017, with reference to the tax years 2014 and 2015.
10. EUROPEAN COMMISSION, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019, 44.

In the case of Belgium, the European Commission was told in the targeted consultation that by its estimation the tax assessed is in the order of 25% of the additional tax base. This translates to an additional tax assessed of EUR 70-75 million on tax years 2014-2015. The total compliance costs show major differences across the member states. Large expenditures totalling EUR 9.1 million are estimated by Belgium. As discussed with the tax authorities the compliance cost differences are due to a combination of factors. The factors include the different level of IT readiness of tax authorities at the start of the DAC1 exchanges, the varying level of sophistication of the IT systems implemented for automatic exchanges, and the adoption of different procurement methods (e.g. reliance on services provided by big IT consultancies vs. in-house development). In certain cases, institutional aspects (such as the involvement of subnational tax authorities) may have also played a role.[11]

B. *Treaties*

The Double Tax Conventions and the additional protocols concluded by Belgium provide for the most extensive form of exchange of information.

Firstly, we discuss the scope of the article on the exchange of information in the Belgian Double Tax Conventions. The personal scope of article 26 OECD Model Convention was expanded by the 1977 version of the Model, by adding the clause: "The exchange of information is not restricted by article 1." As a result of this amendment, the exchange of information is not only possible with regard to residents of the contracting states, but also with regard to residents of third states and entities or persons that, according to article 4 OECD Model Convention, are not subject to tax as a result of the qualification as a resident of one of the two states.[12] Most of the Belgian double tax conventions contain this clause. A few double tax conventions do not contain any provisions regarding relevant taxpayers.[13] In the classical Belgian legal doctrine, it was deduced from this that those double tax conventions only allow exchange of information on residents of their treaty partners.[14] However, the OECD takes the opposite view.[15]

The material scope of article 26 OECD Model Convention was expanded by the 2000 version of this model. The last sentence of the first paragraph of article 26 OECD Model Convention was changed to: "The exchange of information is not restricted by articles 1 and 2." The exchange of information under article 26 OECD Model Convention hence covers "taxes of every kind and description", and not only taxes on income and capital. Consequently, Belgium revised a large number of its Double Tax Conventions in line with the 2000 update (or has a protocol in place) in order to allow exchange of information for all types of taxes. The Double Tax Conventions with Macedonia and Rwanda also cover all taxes but they provide that the scope may be changed by simple agreement of the competent authorities or by exchange of letters. The Double Tax Convention with the Isle of Man covers taxes on income and capital only. The Belgian TIEA with Monaco covers only income taxes, while certain Belgian TIEAs cover all taxes.[16] A few TIEAs cover both income taxes and VAT[17] and the TIEA with Anguilla covers income taxes, VAT, registration duties and inheritance taxes. The multilateral convention of 25 January 1988 covers, as regards Belgian taxes, those that Belgium listed in the annex to the convention.

The exchange of information provision contained in a Double Tax Convention can provide for a basis for the exchange of information which is relevant for carrying out the provisions of a treaty or for the administration or enforcement of the domestic laws of the contracting states. This is what is referred to as a big (or major) exchange clause. It is also possible that a double tax convention only allows information exchange for carrying out the provisions of the treaty itself, i.e. a small (or minor) exchange clause.[18] Almost all of the Belgian Double Tax Conventions provide for exchange of information for the purpose of administration or enforcement of the domestic laws of the contracting states. The Double Tax Conventions with Kuwait limits the exchange to the enforcement of treaty provisions. The Double Tax Con-

11. European Commission, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019, 35.
12. E. Nijkeuter, "Exchange of information and the free movement of capital between member states and third countries", 20 *EC Tax Rev.* 2011, 5, 238.
13. Double Tax Conventions with Austria, Bulgaria, Republic of Korea, Denmark, India, Ireland, Israel, Japan, Kuwait, Luxembourg, Malaysia, Malta, Morocco, the Philippines, Portugal, the United Kingdom, Singapore and Switzerland.
14. Ph. Malherbe, "Le contrôle de l'impôt dans le contexte européen", *JDF* 1991, 328; J.-P. Lagae and I. Behaeghe, "Internationale samenwerking tussen fiscale administraties", *Actuele problemen*, 1989, 314.
15. Com OECD, 1996, art. 26, No. 4; C. Docclo and S. Knaepen, "Belgium", *IFA Cahier*, vol. 2, 2013, 142.
16. Antigua and Barbuda, Bahamas, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines.
17. Andorra, Belize, Dominica, Gibraltar, Grenada, Liechtenstein, Montserrat.
18. R. Seer, "Recent Development in Exchange of Information within the EU for Tax Matters", *EC Tax Rev.* 2013, 2, 66.

vention with the former Union of Soviet Socialist Republics has no provision for any exchange of information for the purposes of a specific taxpayer's taxation.[19]

Belgium is plagued by the slow ratification process of Double Tax Conventions and Tax Information Exchange Agreements. When the bills for the approval of the 12 new treaties were submitted in 2010 to Parliament, the Belgian Council of State held that those treaties came under the joint jurisdiction of the federal authorities, regions and communities because they covered tax matters exclusive to each of them.[20] As a consequence, the Federal Parliament as well as the parliaments of the 3 Belgian regions and 2 communities must approve these proposed treaties before they can be ratified.[21] The OECD Global Forum also criticized Belgium for this in the second phase of the peer review report on "implementation of the standard in practice" (see below).[22]

Treaties with an identical subject concluded between the same contracting states can give cause for non-correspondence.[23] The majority of these non-correspondences are being settled by the contracting states themselves. When international agreements differ from each other, preference must be given to the agreement which has the possibility to reach the intended objectives in the most efficient manner. According to the Commentary on the OECD Model Tax Convention, article 26 does not limit the possibilities set out in existing international agreements with regard to the cooperation on matters of direct taxation between contracting states.[24] On the other hand, international agreements do not limit the possibilities defined in article 26 of the OECD Model Tax Convention. This principle is also laid down in article 12 of the Model TIEA. Article 27, paragraph 1 of the multilateral convention states explicitly that the possibilities of exchange of information envisaged by this treaty do not limit nor are being limited by the possibilities set out in existing or prospective international agreements. This provision thus allows the contracting states of the multilateral convention to use the most proper (i.e., efficient) instrument in a concrete situation.

The Large Enterprises Division of the Belgian tax administration started in 2018 a 2-year pilot project on cooperative tax compliance. The project aims at transforming the approach of *a posteriori* tax investigations towards a system of proactive and constructive dialogue on the tax affairs of corporations. The pilot project was only open for very large enterprises (revenue EUR 750 million or more; balance sheet total EUR 1.5 billion or more; staff of more than 1,000). In order to get access to the pilot project, companies:

- must have filed timely tax returns in the past;
- may not have been engaged in tax evasion;
- may not have violated tax law or demonstrated major shortcomings during the last 3 years;
- must have paid all taxes due;
- must have a robust tax control framework in place.

C. *Regulatory framework*

As a member of the European Union, Belgium must comply with (the obligations in) the European directives. The Directive Administrative Cooperation 2011/16/EU (DAC) governs cooperation in (direct) tax matters between the different member states. The directive provides for mandatory exchange of five categories of income and assets: employment income, pension income, director's fees, income and ownership of immovable property and life insurance products. Contrary to some other member states, Belgium has not provided for specific legislation with regard to the exchange of information, but has literally transposed the entire directive into one article of law, namely article 338 of the Income Tax Code 1992.

The directive has been extended five times since its adoption. The scope of the mandatory exchange has later been extended to cross-border tax rulings and advance pricing arrangements (DAC 3), country-by-country reporting (DAC 4) and tax planning schemes (DAC 6). DAC 5 ensures tax authorities have access to beneficial ownership information collected pursuant to the anti-money laundering legislation through the use of exchange of information on request. The amendments were said to have been necessary in order to make the automatic exchange of information between member states more efficient. According to the European Commission, these amendments which extend the application of the original directive are loosely based on the common global standards agreed by tax administrations at the international level, notably at the OECD: "However, they sometimes go further and importantly they are legislative rather than being based on political agreement without legislative force."

Belgium, as an EU member state, could be confronted with a plethora of rules regarding the international exchange of information. Therefore, the coexistence between the different instruments can be threatened by potential conflicts.[25] When Belgium initiates an exchange of information, it invokes every instrument available so that the most efficient can be applied.[26] In income tax matters, Belgium combines referenc-

19. Which still applies in dealings with a number of states resulting from the break-up of the USSR. C. Docclo and S. Knaepen, "Belgium", *IFA Cahier*, vol. 2, 2013, 142.
20. C. Docclo and S. Knaepen, "Belgium", *IFA Cahier*, vol. 2, 2013, 138; N. Diepvens, *De grensoverschrijdende administratiefrechtelijke gegevensuitwisseling op verzoek in de inkomstenbelastingen vanuit Belgisch standpunt*, Gent, Larcier, 2018, 52.
21. *Doc. parl.*, Sénat, 2010-2011, No. 5-961 to 972.
22. Global Forum, Peer Review Report. Phase 2. Implementation of the standard in practice. Belgium, Paris, OECD, 2013, 71.
23. N. Diepvens and F. Debelva, "The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure", 24 *EC Tax Rev.* 2015, Issue 4, 214.
24. Commentary art. 26 OECD Model Tax Convention, 2012, para. 5.5.
25. N. Diepvens and F. Debelva, "The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure", 24 *EC Tax Rev.* 2015, Issue 4, 214.
26. C. Docclo and S. Knaepen, "Belgium", *IFA Cahier*, vol. 2, 2013, 139.

es to bilateral Double Tax Conventions and Directive Administrative Cooperation, when it requests information from a European Union country.

European Union law overrides in principle the international treaties concluded by the member states.[27] However, this does not imply that every legal act of the European Union law will be immediately enforceable in the national legislation. A distinction must be made between a regulation, which becomes immediately enforceable as law in all member states, and a directive, like the Directive Administrative Cooperation, which at least in principle[28] needs to be transposed into national law. Article 27 of the Multilateral Convention states that the EU member states can apply in their mutual relations the possibilities for the exchange of information provided for by the convention in so far as they would allow a more extensive cooperation than the possibilities for the exchange of information offered by the applicable EU rules. Article 1 of the Directive Administrative Cooperation states that there will be no prejudice to the fulfilment of any obligations of the member states in relation to wider administrative cooperation ensuing from other legal instruments, including bilateral or multilateral agreements.

The above-mentioned EU Directive 2011/16/EU was recently extended for the fifth time. This amendment to Directive 2011/16/EU relates to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. DAC6 imposes mandatory information exchange for certain structures and transactions of a cross-border nature involving an EU member state. A structure or transaction should be reported when it possesses "hallmarks" mentioned in the directive and, in some cases, one of the main expected benefits is a tax advantage. The reported cross-border structures and transactions will then be automatically exchanged with all other EU member states via a common communication network (CCN), which the EU is setting up. Although the directive will only enter into force on 1 July 2020, qualifying transactions must be reported from 25 June 2018, once the directive has entered into force. At the time this report was drafted, Belgium had not yet implemented the directive. However, a second draft version of national legislation was approved by the Council of Ministers. The directive foresees that the implementation must take place by 1 January 2020.

D. BEPS related measures

The OECD, through the BEPS action plan, and the European Commission, through DAC 3 and DAC 4, tries to impose exchange of information regarding tax rulings and advanced pricing agreements applied by multilateral enterprises. Belgium has already transformed these legal instruments into national measures. The Belgian IEOI-DT unit of the tax administration (see further) sees to it that received decisions on rulings and advanced pricing agreements are made available to the designated competent departments.

After an initial pilot project with 8 countries, Belgium recently decided to join the ICAP 2.0 (International Compliance Assurance Programme). Companies participating in the program had to register before 30 June 2019. At the time of the conclusion of this report, no practical data concerning this program were known yet.

Belgium has established an UBO Register pursuant to the Anti-money Laundering Law. The UBOs of every company had to be registered before 1 October of 2019, but the Belgian tax administration will not impose any sanctions with regard to a non-registration until the end of December 2019.

E. Global Forum related measures

Belgium has accepted the standard forms of administrative cooperation between states: exchange of information on request, automatic exchange of information, spontaneous exchange of information, group requests, simultaneous tax examinations and visits of authorized representatives of the competent authorities of foreign states.

Belgium applies the traditional grounds for refusal to exchange information, namely sovereignty, reciprocity, trade and professional secrecy, and public order. Under pressure from the OECD's Global Forum, Belgium has abolished its national banking secrecy in the case of international requests for information and increased the investigative powers of the Belgian tax administration in such situations (see further).

The 2018 Peer Review Report on the Exchange of Information on Request concludes that Belgium is overall largely compliant with the standard. Since the 2013 report, Belgium has made progress with regard to the deadlines for ratifying tax treaties and relating to the efficiency of replies. Nevertheless, Belgium has received a few key recommendations. The Belgian authorities must ensure that the new obligation that companies keep an up-to-date register of beneficial owners is effectively put in place and the tax administration effectively has access to such information (see above). Furthermore, they must ensure the implementation in practice with regard to access to information relating to a previous tax year without notification of indications of tax fraud, as well as in in relation to exceptions to the notification of "serious indications of tax fraud" sent to the taxpayer when information is requested from a financial institution, and that it is consistent with an effective exchange of information (see below). The Belgian tax administration is also recommended to ensure that all elements that must be kept confidential remain so. Finally, the Belgian tax administration must ensure it has sufficient means to tackle cases in which the holder of requested information has shown reluctance to provide it.

27. ECJ C-235/87, *Matteuci*, 1988; ECJ C-270/83, *Commission / France*, 1986.
28. A provision of a directive can be immediately enforceable when sufficient clear and unconditional. For example, ECJ C-44/84, *Hurd and Jones*, 1986.

F. Financial information

Belgium has committed to the automatic exchange of financial information within the Framework of the Global Forum on the basis of the Standard for Automatic Exchange of Financial Account Information in Tax Matters (Common Reporting Standard). The first exchanges took place in September 2017. As a European country, Belgium applies the first amendment to the Directive Administrative Cooperation DAC 2, for automatic financial exchange of information with other European Countries. With the United States, Belgium has implemented a Model I Intergovernmental Agreement.

Given that the exchanges had just started in September 2017, it is natural that most of the DAC2 compliance costs consist of development costs (92% of the total). The expenses for DAC2 for Belgium are just one-tenth of what was spent for DAC1.[29] The stakeholders in Belgium felt that DAC2 placed a considerable burden on the financial sector. This was particularly the case for commercial banks, whereas investment funds and insurance companies were much less affected. While no estimate was provided, the total cost was deemed to be substantial. The total cost of CRS for the Belgian banking sector is certainly several million euro, and it could even be dozens of millions.[30]

G. Administrative cooperation

Belgium is not a member of JAHGA or JITSIC. The only joint audits are carried out through a European framework with neighbouring countries. For the time being, this is an exceptional phenomenon, and there are only about ten joint audits a year. In practice, the presence of foreign officials in the country's own territory remains a sensitive issue. The simultaneous controls, which do not involve the presence of the official on foreign territory, are proving to be more successful in practice. For example, there were 202 simultaneous controls in the period between 2013 and 2017.[31]

II. Incorporation of the instruments and processes into domestic legislation

A. Domestic adoption

The obligations imposed at the European and international level are literally incorporated into national measures. The various versions of the Directive Administrative Cooperation have all been transposed into article 338 of the Income Tax Code 1992. All the multilateral instruments and FATCA are accepted by law on the one hand and the subject of bilateral administrative agreements with the countries concerned on the other.

1. Particularly with respect to CbCR

The EU Directive 2016/881 has been implanted in Belgian domestic tax law by the law of 31 July 2016 and is applicable as from financial year 2016.

As far as a manual for implementation is concerned, the Belgian tax authorities refer on the relevant website[32] to the BEPS Guidance on Implementation of CbC Reporting. They refer to this report in the interest of a consistent implementation and legal certainty for both tax administration and taxpayer, as this guidance is periodically updated. Additionally, they provide information (further clarification) on the Belgian application of the OECD guidelines. Furthermore, an explanatory note was prepared, and a list of frequently asked questions was published.

In addition to a prior consultation with the industry, an e-mail address was also made available where taxpayers can ask questions.[33] Belgium does not have a provision requiring the reporting of foreign (subsidiaries, branches, head offices) entities located in jurisdictions that are not compliant with CbCR. In case the Belgian entity is required to notify the Belgian tax authorities that the group is subject to the preparation of a CbC Report, i.e. by submitting a specific notification form, it has to indicate that the ultimate parent is not subject to submit a CbC Report and/or the country of residence of the ultimate parent does not have a qualifying agreement/treaty with Belgium. In (amongst others) these cases, the notification form should include the group entity that will submit the CbC Report (i.e. the so-called "surrogate parent" in principle).

As far as foreign direct investment is concerned, there has not been a major impact to our knowledge since Belgium has implemented CbCR in a way that is comparable to that of many other (competing) countries. Preparation of CbCR (and notifications) increased the administrative burden for companies in Belgium. However, such incremental administrative burden currently is broadly comparable to other (competing) countries that have implemented CbCR if it does not concern the first-time compliance effort. Indeed, Belgian taxpayers falling within the compliance requirements need to file the notification forms on a per entity basis. Nevertheless, once a notification has been done, and the information remains unchanged, no further action is required.

29. European Commission, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019, 36.
30. European Commission, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019, 99.
31. European Commission, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019.
32. www.financien.belgium.be/nl/ondernemingen/internationaal/verrekenprijzen-beps-13#q2.
33. *BEPS13@minfin.fed.be.*

It can further be considered that there is an increased level of transparency for the Belgian tax authorities. They have more, albeit very high-level, information available in case CbCR data is available for groups. The Belgian tax administration (informally) has made public (in conferences) that they are still in the process of analyzing the data they received and are still deciding how to use such intelligence, whilst acknowledging that the value of the data stems from multi-period variances rather than the data for an individual year.

Given that there was an increase in the administrative burden, there has indeed been an increase in the cost of doing business in Belgium.

The information available to tax authorities is not made public. Belgium will exchange information in case it has concluded an accord with the relevant countries. Note that Belgium approved the Multilateral Competent Authority Agreement for the Automatic Exchange of CbCR.

In fact, there is no exchange of information bilaterally between member states, but under DAC3 the relevant information from tax authorities' decisions is uploaded in the Central Directory managed by the Commission, where it can be seen and extracted by all member states. Moreover, the amount of information to be exchanged is much smaller than in the case of DAC1 and DAC2 (at most a few thousand rather than millions of records). This reduced the complexity of the IT systems and procedures that were put in place by the member states, and thereby resulted in lower costs. The development costs account for three-quarters of the total expenses. However, there are a few countries in which the recurrent costs account to at least 50% of the total costs. The larger share of recurrent costs can be explained by the information shared with other member states, as the advance tax rulings and transfer pricing arrangements (ATR/APA) may need more manual intervention, for example for drafting the summaries to be uploaded to the Central Directory. While the absolute values are generally low, there are significant differences in total compliance costs among member states. Belgium displays costs above EUR 700,000.[34]

B. *Tax administration authority*

In Belgium, for almost 30 years there has been a debate in case law as to whether sending a request for information to a foreign tax administration constitutes an investigative act.[35] In a judgment of 20 May 2016, the Court of Cassation stated very clearly that sending a request for information to a foreign tax administration constitutes an investigative act.[36] Consequently, the tax administration must send a notification to the taxpayer if the latter sends a request for information to a foreign tax administration during the extended 4-year investigation period. As a result, the Court of Cassation has provided additional protection for the taxpayer in the event of an international exchange of information between states.

However, the situation is less clear when we compare the sending of a request for financial information to a foreign tax administration with the sending of a request for information to a Belgian financial institution. In the latter case, the competent tax officer must comply with the graduated procedure laid down in article 322 of the Income Tax Code 1992. This procedure requires the tax officer to request prior the financial information in question from the taxpayer himself. In his request for information, he must explicitly state that, in the event of concealment or refusal to transfer the requested information, the tax authorities may contact the financial institution directly to obtain the information in question. The foregoing only in a situation where the investigation carried out a possible application of the procedure of "signs and indications" or one or more indications of tax evasion have emerged. The question now is whether the tax administration must follow the graduated procedure in the event that a request for financial information is sent to a foreign tax administration. Despite the fact that the law remains silent, the answer can be found in an administrative circular of 27 November 1996.[37] It follows that if the Belgian tax administration turns to a foreign tax administration to obtain financial information, it must send a notification to the taxpayer at the same time as the request for information on the basis of article 333/1 of the Income Tax Code 1992. In the case of automatic financial information, this obligation to notify has been transferred to the Belgian financial institution, which raises the necessary questions regarding the legal protection of the taxpayer.

When drawing up a request for information to a foreign tax administration, the Belgian tax administration must take into account the substantive requirements imposed by the cross-border exchange of information instruments. The tax administration can only request information that has foreseeable relevance for the application of the national income tax legislation, after it has first tried to obtain the information itself. It is important that the Belgian tax authorities clearly demonstrate the relevance of the information requested in the request itself. Compliance with these substantive requirements prevents the Belgian tax authorities from carrying out so-called fishing expeditions.

As a requested state, Belgium may decline a request for investigation. The test remains the relevance of the requested information. Based on the Commentary on article 26 of the OECD Model Convention, it is generally accepted that the requirement of foreseeable relevance is met if the requesting state states explicitly so. The double tax convention with

34. European Commission, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019, 37.
35. N. Diepvens, *De grensoverschrijdende administratiefrechtelijke gegevensuitwisseling op verzoek in de inkomstenbelastingen vanuit Belgisch standpunt*, Gent, Larcier, 2018, 67-74.
36. Cass. 20 May 2016, F.15.0175.F, 2.
37. Ci.R9.Div.460.792, 27 November 1996.

Germany is a clear example of that (unspoken) rule. Furthermore, a number of double tax conventions provide that a request for information which requires an investigation at a financial institution must precisely identify a taxpayer and a financial institution.[38] In general, Belgian TIEAs include the protocol for the purpose of testing the relevance included in article 5 (5) of the model TIEA (but only for certain provisions). The amended multilateral convention also provides for the precise identification of the taxpayer (art. 18).

In practice, the Belgian tax administration has to take into account the conclusions of the Court of Justice in the *Berlioz* case.[39] Although cooperation between states is based on mutual trust, the Belgian tax administration, as representative of the requested state, must verify that the information requested is not deprived of all relevance to the investigation carried out by the requesting tax administration. The factors relevant to this assessment are included in article 338, § 23 of the Income Tax Code 1992. These include, firstly, the information that the requesting tax authority must provide – in particular, the identity of the person subject to the investigation and the tax purpose for which the information is requested – and, secondly, where relevant, the identity of persons who are presumed to be in possession of the information requested and other information that simplifies the collection of the information by the Belgian tax authority. The Belgian tax authorities should ask for additional information in order to rule out, from their point of view, any obvious lack of foreseeable relevance with regard to the information requested.

Where protection has increased when sending a request for information, it has been severely reduced under pressure from the OECD in the case of receiving a request for information. First of all, when a foreign request for information is received, it should be possible to extend the existing investigation powers of the Belgian tax administration, so that the questions asked can be answered effectively and that the administration is not forced to refuse to response purely because of internal restrictions. Article 333, third paragraph of the Income Tax Code 1992 therefore now provides that where investigations are carried out at the request of a foreign state, the examination period is extended by the additional period of 4 years (until 7 years) for the sole purpose of answering the question referred to above. However, if the request for information received from a foreign tax administration relates to information from a period earlier than 7 years from 1 January of the tax year, the Belgian tax administration cannot respond to the request for information because, in view of the application of sovereignty, it cannot obtain this information itself in the light of a national tax investigation. Moreover, contrary to the internal situation, the investigation period is extended by 4 years without prior notification to the taxpayer.

Secondly, after a very long ordeal with even the annulment of an earlier version of article 333/1 of the Income Tax Code 1992 by the Belgian Constitutional Court, the national banking secrecy was lifted in the case of a foreign request for financial information. On the basis of article 322, § 4 of the Income Tax Code 1992, a foreign request for financial information is always considered equivalent to an indication of tax evasion. As a result, contrary to an internal situation, the Belgian tax authorities may contact the Belgian financial institution directly to obtain the information requested. The simultaneous notification to the taxable person required in the case of a national enquiry shall be adapted to a *post factum* notification no later than 90 days after the information is sent to the foreign state. If the foreign tax administration proves that it has already sent a notification to the taxpayer, or if the request for information from the foreign administration shows that there are serious indications of tax fraud and this foreign state expressly asks not to inform the person under investigation of this question, no notification is made (*post factum*).

C. *Institutional framework*

The Belgian tax system is administered by the Federal Public Service Finance, which is divided into 6 general administrations: General Administration of Taxes (AGFisc), General Administration of Special Tax Inspectorate, Tax and Tax Collection Administration, Treasury General Administration, Patrimonial General Administration and Customs and Excises General Administration. Between 2013 and 2016, an in-depth restructuring of the General Administration of Taxes took place, as services are no longer organized by type of tax but by target group: individuals, small and medium-sized enterprises and major enterprises.

The Belgian Minister of Finance has delegated the role of competent authority for exchange of information in direct taxes to the Federal Public Service Finance. In 2016, the DLO service (central liaison office for direct taxes) was divided into 2 services: EOS-Int and IEOI-DT. EOS-Int – Operational Expertise and international relations support – remains as part of AGFisc central services where it continues to represent Belgium in international bodies and has drawn up directives on the exchange of information for use by government services. IEOI-DT – International Exchange of Information-direct taxes – is a service in the small and medium-sized enterprises administration and deals with the requests for information whatever the target group related to the exchange of information request: natural person, small and medium-sized enterprise or large company.[40]

In 2014, Belgium installed a new digital system for exchange of information, more specifically "STIRInt". By digitizing the requested searches and the exchange of information, the Belgian tax administration can respond better and faster to the request for information and thus better manage the fol-

38. DTCs with China, the Isle of Man and the Seychelles.
39. ECJ 16 May 2017, C-682/15, *Berlioz / Luxemburg*.
40. Global Forum, Peer Review Report. Phase 2. Implementation of the standard in practice. Belgium, Paris, OECD, 2013, 22-23.

low-up of the exchange itself. The Belgian tax administration also uses the digital system for the processing of international VAT refunds and administrative cooperation in the field of VAT, collection and recovery of taxes. The information is provided by the foreign tax administration in XML in most cases. STIRInt automatically links the received data with the national databases. In this way, a risk analysis of the files should be carried out in practice.

The matching, i.e. the success rate in identifying the taxpayer concerned, by the different European member states was further investigated by the European Commission. In the case of wages, pensions and directors' fees, in 2017, Belgium and 5 other member states were the best matchers, achieving almost full matching for at least two types of incomes/assets. According to the European Commission, interviews with tax authorities underlined that the accuracy of matching improves over time, thanks to a learning process built into the algorithms, which leads to partly automated matching especially with repeated exchanges about the same taxpayers, for example in case of pensioners.[41] This shows the great success of the STIRInt application.

D. *Confidentiality and data protection*

In Belgium, there is a tendency towards the acceptance of all types of evidence, regardless of the way in which the information was obtained. Traditionally, however, the jurisprudence was much more restrictive. For example, an unlawful act committed during the exchange of information on request procedure automatically led to the nullity of the information obtained from the foreign tax authorities.[42] In view of the application of the doctrine of the fruits of the poisonous tree, the entire subsequent taxation by the Belgian tax administration was also declared null and void. The entry of the notorious "Antigone figure" into tax law has considerably expanded the possibilities for the Belgian tax administration to use illegally obtained evidence. Since the judgment of the Court of Cassation on 22 May 2015, evidence obtained unlawfully is only excluded:

- where the tax legislator provides for a special sanction (for example art. 333, third paragraph Code Income Tax 1992);
- when the proof was obtained in a way that conflicts with what may be expected from a properly acting government to such an extent that its use must be deemed inadmissible under any circumstances;
- when its use jeopardises the right of the taxpayer to a fair trial.[43]

In evaluating the infringement of the right of the taxpayer to a fair trial, a judge can take into account such possible factors as the purely formal nature of the unlawfulness, its effect on the right or freedom protected by the violated rule, the intentional nature of the unlawfulness, and a situation where the infringement is so serious that it surpasses the unlawfulness by far.[44] However, with regard to taxes inspired by European Union law (such as VAT), the Court of Justice has ruled that a violation of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union constitutes grounds for the exclusion of evidence.[45]

Illegal evidence in the field of direct and indirect taxation is thus subject to a different legal assessment. On the basis of this distinction, the Belgian Court of Cassation submitted a preliminary question to the Court of Justice on 28 June 2018.[46] Advocate General Kokott delivered her opinion on 11 July 2019.[47] In that opinion, the Advocate General states that the Court of Justice is not competent to answer the question referred for a preliminary ruling. First of all, the Advocate General considers that the Charter of Fundamental Rights of the European Union only applies if European Union law is implemented. For income tax purposes, this only happens on an *ad hoc* basis (e.g. Parent-Subsidiary Directive). As regards the use of evidence with regard to the establishment of income tax, the assessment of the fundamental rights of the European Union is therefore not at issue and the Court of Justice has no jurisdiction. As a subsidiary point, should the Court consider itself competent, the Advocate General points out that European Union law does not provide for rules on the collection and use of evidence in the context of criminal proceedings in respect of VAT. That means that, in principle, it falls within the procedural and institutional autonomy of the member states. This applies *a fortiori* to the use of evidence for the purposes of income tax where such evidence has been gathered in the course of an investigation into VAT-related offences. In short, European Union law does not preclude the application of the fiscal Antigone with regard to the use of the evidence for income tax purposes, even if that evidence has been obtained in the context of a VAT investigation. It remains to be seen what the final position of the Court of Justice will be in this case.

In Belgium, there is currently an ongoing debate with regard to the possibilities for the criminal use of the information obtained through the exchange of information in direct taxes between states. On the basis of the various legal instruments, the Belgian Public Prosecutor's Office is of the opinion that the information obtained through the exchange of information can be used not only to prosecute tax evasion but also for anti-money laundering purposes. However, on the basis

41. European Commission, Commission Staff Working Document. Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/ECC, SWD (2019) 328 final, Brussel, 12 September 2019, 20.
42. Liège 20 March 2002; Antwerp 15 January 1996, *FJF* 1996, 84.
43. Cass. 22 May 2015.
44. Based on the *Antigone* jurisprudence in criminal matters.
45. CJEU 17 December 2015, C-419/14.
46. Cass. 28 June 2018.
47. Concl. Adv. Gen. Kokott, C-469/18 and C-470/18.

of a reply from the Minister of Finance, the Belgian tax authorities are convinced that the information obtained should not be used for the purposes of criminal proceedings in respect of anti-money laundering. This is due to the fact that there are sufficient opportunities in criminal law instruments to work across borders, such as letters rogatory, on the basis of which the necessary information can be obtained by the Belgian Public Prosecutor's Office. To date, therefore, criminal prosecution on the basis of the information obtained under administrative exchange of information is only possible in the event of tax evasion.

To ensure the effectiveness of the investigations of the foreign tax administrations, a provision has been inserted in the Income Tax Code waiving the passive publicity obligation incumbent on the Belgian tax administration concerning exchange of information requests, the replies sent to the requesting foreign tax administrations and the correspondence between the competent authorities, unless the foreign tax administration has expressly authorized such disclosure.[48]

The relationship between the taxpayer and the Belgian tax administration has also become less transparent with regard to the information received from foreign tax administrations. The duty of confidentiality of the Belgian tax authorities with regard to the information received, which is included in the various legal instruments and is reflected in the national professional secrecy of the tax official, comes into conflict with the taxpayer's request to be able to consult the information obtained from abroad in his tax file. In Belgium, there is a general constitutional right that gives every citizen the right to consult the content of an administrative document. Only certain exceptions laid down by law can override this constitutional right, such as the federal economic or financial interest. However, the Belgian Council of State has clearly stated that these restrictions on the fundamental right must be interpreted restrictively.[49] In a series of judgments concerning information obtained from the French tax administration, the Council of State decided that the decisions of the Belgian tax administration to reject the taxpayer's request for access to his tax file should be suspended.[50] The taxpayer must be able to respond in full knowledge of the facts to the Belgian tax authorities with regard to information that could lead to decisions that are unfavourable to him.

Most recently, the Belgian data protection authority has raised some questions with regard to the "foreseeable relevance" requirement in a few recent Double Tax Conventions and the adequate data protection with regard to exchange of information with third countries. With regard to all double tax conventions, the conventions must specify how the requirement regarding "foreseeable relevance" will be used and applied and, in the absence of such a justification, ensure that the controller(s) give sufficient reasons why any information is expected to be relevant before communicating or requesting it from third countries, as such a justification is admissible on a case-by-case basis because it is not an example of automatic exchange of tax information. Also, the storage periods of the data must be specified in more detail in the Double Tax Conventions. The Belgian legislator must ensure that Belgian taxpayers are clearly informed of the data controller(s) with whom they can exercise their rights (in particular the rights of access, rectification and deletion). Belgium must ensure that the controller(s) assess the appropriate safeguards for the transfer of data towards third countries from the European Union, taking into account all the circumstances of the processing, including the legislation of the country of destination of the data and its impact on the protection of personal data, taking into account their accountability within the meaning of article 5, 2. and recital 74 of the AVG. The Belgian tax administration must ensure that the data subjects are clearly informed about the transfer of their personal data to a third country and about whether or not appropriate safeguards exist in this respect.

With regard to the agreements with Uganda, Cayman Islands and Uzbekistan, the controller should provide for appropriate safeguards, on the basis of article 46, in the event that the planned exchange of information is massive and/or systematic, and:

- the agreements themselves provide for appropriate safeguards with regard to the rights of the persons concerned, including right of appeal;
- justify any exceptions to the rights of the data subjects, so that they comply with the provisions of article 23 of the AVG;
- reserve the right to terminate the exchange of information in the event of a change in the regulations in the host country or following the occurrence of circumstances in the country of destination, such as a manifest violation by the third country of the data subjects' rights under the AVG;
- clarify that in no case may the agreement be interpreted as obliging a contracting state to supply personal data by derogating from its legislation on the protection of personal data, in particular the AVG and national legislation on the protection of personal data, such as the WVG.

III. Impacts of digitalization on the established frameworks

In this report we focus on cryptocurrencies as this is the only aspect of the digital financial market to which attention has already been paid in Belgium. The Belgian Financial Services and Markets Authority (FSMA) defines virtual money as "any form of unregulated digital money without legal force

48. Global Forum, Peer Review Report. Phase 2. Implementation of the standard in practice. Belgium, Paris, OECD, 2013, 25.
49. RvS 18 June 1997, nr. 66.860.
50. RvS 3 October 2011, nr. 215.514.

of payment".[51] At first glance, nothing in the system connects crypto coins to individuals. There is no identification with a financial institution nor is a supervisor required. The identities of the users cannot be found in the digital accounts.

The nonetheless considerable anonymity with regard to cryptocurrencies may explain their popularity, for example for criminal organizations, and why these coins are often portrayed negatively.[52] In Belgium, according to Minister of Employment, Economy and Consumer Affairs Kris Peeters, in 2018 an estimated 130 million euros of damage had been incurred in relation to counterfeit bitcoins. The Federal Public Service Economy, in collaboration with Belgian Financial Services and Markets Authority, has therefore launched an initiative with a corresponding website ("too good to be true") to warn citizens about bitcoin fraud.[53] Recently, fraudulent websites have even been using the names of Belgian celebrities to encourage the purchase of bitcoins.[54] However, it is not so much the cryptocurrency itself, but rather the unauthorized use that is problematic. To this extent, it can be compared with cash transactions: it may be suspicious, but the legality of the means of payment is not called into question.[55]

Today, the cryptocurrency market appears to be legitimate in Belgium. With the exception of the prohibition with regard to the marketing of products derived from cryptocurrencies for non-professionals[56], the market is not specifically regulated. Nor, as in most other countries, is there any specific financial regulation with regard to virtual money available in Belgium.

For the time being, Belgium has not (yet) installed a legislative framework to combat tax avoidance, tax evasion and other tax crimes with regard to the digital financial services market. An interesting discussion in Belgium however concerns the taxation of capital gains made on the sale of bitcoins. In the case of individuals, three tax scenarios are possible:

- capital gains may constitute professional income;
- capital gains, or part of them, can be qualified as miscellaneous income. However, there must be "'some' accomplishment, transaction or speculation";
- capital gains may also be exempt from tax. This concerns capital gains from "normal operations of management of private assets", which are not taxable miscellaneous income.

In concrete terms, therefore, in every case it will be a question of whether or not all the transactions fall within the "normal management of the private assets".[57] If that is the case, no taxes will be due on any realized profits. If, on the other hand, the transactions are of a speculative nature, without being professional, the capital gain is taxable as miscellaneous income at a rate of 33%. This added value concerns only the net capital gain, i.e. after realized losses have been deducted from the realized profits. If a taxpayer works regularly and professionally with the trading in cryptocurrencies, these gains can be considered to be professional income. This income is subject to the progressive rates of the personal income tax. Of course, it will always be a matter of facts to determine whether or not a certain transaction is part of the normal management of someone's private assets. In any case the totality of the facts will have to be taken into account at all times. According to the administrative commentary, in many cases, it is key to take into account the frequency, the organization and size of the transactions, the time lag between purchases and sales, the use of professional knowledge and experience and the financing of purchases.[58]

The Belgian Ruling Commission has also addressed this issue on a number of occasions.[59] According to the Ruling Commission, the capital gain made on the sale of bitcoins will be taxable in case of speculation. Two conditions must be met for speculation: the taxpayer must take a significant risk at the time of the purchase; and the intention to realize significant profits must be clearly present at the same moment in time. In May 2018, the Ruling Commission distributed a questionnaire that applicants have to fill in if they request a ruling on bitcoins.[60] The answers should enable the Commission to make an informed assessment of the tax regime applicable to capital gains in the case of the sale or conversion of bitcoins. The questionnaire consists of 17 questions:

- How did you come into possession of the bitcoins (e.g. through inheritance, donation, personal investment, reinvestment of estranged movable or immovable property)?
- For how many years have you been investing in bitcoins?
- What is the (total) amount you have already invested in bitcoins?
- What is the frequency of your buying and selling transactions in bitcoins, in other words how many times a year do you make transactions (once, daily, weekly, monthly, several times a year, ...)? Please provide details of all transactions carried out from the start to the present (purchases, sales, conversions from one crypto-

51. Art. 1, 6° van het reglement gevoegd aan het koninklijk besluit van 24 april 2014 tot goedkeuring van het reglement van de Autoriteit voor Financiële Diensten en Markten betreffende het commercialiseringsverbod van bepaalde financiële producten aan niet-professionele cliënten (*BS* 20 mei 2014).
52. X, "Miljarden euro's crimineel geld in cryptomunten", *De Tijd*, 12 February 2018.
53. www.temooiomwaartezijn.be/fraude/fraude-met-cryptomunten.
54. www.vrt.be/vrtnws/nl/2019/09/04/wij-klikten-op-de-nepadvertenties-met-philippe-geubbels-en-kwame/.
55. A. Henkes, "Over grensoverschrijdende fiscaliteit en de bijdrage van het Hof, het 'Brussels International Business Court' en 'bitcoins'", *Mercuriale* 2018, 55.
56. Koninklijk besluit van 24 april 2014 tot goedkeuring van het reglement van de Autoriteit voor Financiële Diensten en Markten betreffende het commercialiseringsverbod van bepaalde financiële producten aan niet professionele cliënten (*BS* 20 mei 2014).
57. D. Mussche and H. Putman, "Meerwaarden op bitcoins: een fiscaal dubbeltje op drie kanten?", *Fisc.Act.* 2018, 2, 4-5.
58. *Com.IB 1992*, No. 90/8.4 and No. 90/8.8.
59. Ruling Nos. 2017.852, 2018.310, 2018.688, 2018.709, 2018.710.
60. www.ruling.be/nl/downloads/vragenlijst-cryptomunten.

currency to another, ...), stating the dates and the amounts.
- How long have the bitcoins you wish to transfer been in your possession?
- What is your investment strategy in relation to the bitcoins? (- buy and hold, holding the bitcoins for a long period of time, -trending, trading on the basis of a technical analysis of market prices or trends, -active trading/day trading, -scalping, making small profits by keeping the positions open for a very short period of time, -arbitration, buying and selling on different stock exchanges in order to take advantage of the price differences on those exchanges).
- Are you mining via your own mining rig or a mining pool? If so, please explain further.
- Do you buy or sell bitcoins via an automated process or via automatic software? Did you design this process/this software yourself? Please explain further.
- What is your current professional activity? What studies have you done? Did you learn about bitcoins in your professional activity? Have you invested in a cryptocurrency saving fund? Please explain this.
- Are you active on fora, through blogs in the cryptocurrency community? Do you give lectures on this topic? Please explain this.
- What percentage of your total (movable) assets have you invested in bitcoins? Do you also invest in other movable goods (e.g. shares, bonds, paintings, gold, ...)? If this is the case, please specify in which movable property you have invested and indicate the ratio of your investment in bitcoins in relation to those other investments?
- Do you use special equipment (e.g. hardware wallet) to protect your bitcoins? If so, please explain.
- Do you also invest in bitcoins for other people? If so, for whom and for what amount?
- Have you used a loan to finance your purchases of bitcoins? If so, for what amount and from whom?
- What is the current (market) value of your bitcoin portfolio (please mention the date)?
- Do you call on the advice of professionals from the financial and/or information sector for your investments in bitcoins?

As rightly pointed out in the legal doctrine, the questions are similar to those that one could ask to assess whether a certain income (in general) has to be qualified as a professional, miscellaneous or exempt income in the Belgian income taxes. "Although this questionnaire will give the taxpayer a clear idea of the criteria on which the Ruling Commission will base its decision, it remains unclear how much weight the Commission attaches to each criterion and which answers are decisive for taxing or exempting certain income" and "This current approach of the Ruling Commission seems difficult to reconcile with the requirement of administrative equality" because many other (even rather complex and ingenious) forms of investment are almost never taxed as miscellaneous income in practice. The approach outlined above therefore seems to be primarily inspired by the "extra-traditional" nature of the investment form, and by the high volatility of the "virtual values".[61]

In practice, it will therefore be up to the courts and tribunals to clarify this issue. However, this debate will lead to factual discussions, in which the subjective opinion of the judge will play an important role.[62] It therefore seems necessary for the tax legislator to intervene. In this case, following the example of certain authors, it may be advisable to link the taxable date to the moment at which the final objective of the investment decision is achieved, in particular in the event of the return to the real world of euros.[63]

61. M. Delanote and P. Smeyers, "Belasting van cryptomunten: rulingdienst doet poging om meer duidelijkheid te scheppen", *Fisc.Act.* 2018, 20, 3.
62. A. Henkes, "Over grensoverschrijdende fiscaliteit en de bijdrage van het Hof, het 'Brussels International Business Court' en 'bitcoins'", *Mercuriale* 2018, 69.
63. M. Delanote and P. Smeyers, "Belasting van cryptomunten: rulingdienst doet poging om meer duidelijkheid te scheppen", *Fisc.Act.* 2018, 20, 4.