

# New Exchange of Information vs. Tax Solutions of Equivalent Effect

## Belgian Report EATLP Congress 2014

Prof. dr. Elly Van de Velde/ Drs. Niels Diepvens<sup>1</sup>

### 1. Introduction

1. The era of banking secrecy is over! This statement was made in the official communique of the London G20 summit of 2 April 2009 and perfectly describes the current attitude of the Belgian tax authorities. However, Belgium was rather reluctant to negotiate to negotiate agreements on the exchange of information with other countries in the past, especially those agreements that involved a clause on the information held by banks.

Belgium even made a reservation when the OECD inserted the well-known fifth paragraph in article 26 of the OECD Model Tax Convention on Income and Capital (OECD-model) in 2004, imposing the exchange of information held by banks. The Directive of 2003 on Taxation of Savings Income in the form of Interest Payments (Savings Directive) contained an alternative regime for Belgium, Luxembourg and Austria. Instead of exchanging information on interest paid by national financial institutions to citizens of other European countries, those countries preferred to withhold taxes for the country of residence of the beneficiary of the interest. As a consequence, Belgium was put as a non-cooperation country on the grey list of the Global forum of the OECD.

2. The worldwide economic crisis increased the international pressure to made Belgium change its attitude. Belgium had to sign 12 agreements, conforming to international standards of transparency, to escape the grey listing.<sup>2</sup> Furthermore, on 11 March 2009, Belgium announced that it would no longer hold its reservation to article 26, fifth paragraph of the OECD-model. Therefore, it had to change article 322 of the Belgian Income Tax Code (ITC), so that banks can share financial information with other countries. Afterwards, Belgium decided that it would no longer withhold taxes from 1 January 2010 onwards, but instead switch to the automatic exchange of information on interest payments.

3. In the last year(s) Belgium is taking giant steps towards an extensive system of (automatic) exchange of information with other countries. Belgium has written to all countries over the world to promote the signing of an agreement on the mutual exchange of tax information, preferably the automatic exchange of information. Although not all countries have responded (positively), Belgium now has an extended framework for the (automatic) exchange of information with other (third) countries. This was also noticed by the Global Forum on Transparency and Exchange of Information for Tax Purposes, when it wrote the peer reviews about the situation in Belgium. Belgium was given

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<sup>1</sup> Tax Law Research Unit, Faculty of Law, Hasselt University. The authors would like to thank the Belgian tax administration for providing valuable background information for the present report. Comments are welcome at [elly.vandavelde@uhasselt.be](mailto:elly.vandavelde@uhasselt.be) and [niels.diepvens@uhasselt.be](mailto:niels.diepvens@uhasselt.be).

<sup>2</sup> This process was completed in July 2009.

an almost perfect score of 29 points on a maximum score of 30 points, and was praised for the intensive and numerous efforts in the area of data exchange.

So it seems that Belgium, especially after the ratification of the 2010 protocol of OECD Mutual Assistance Convention of 1988 and the ratification of the Tax Information Exchange Agreements in the near future, will be one of the best students all over the world. This report will try to show this evolution and discuss the many efforts in practice.

## 2. Legal framework

### 2.1. International sources

4. Belgium used to prefer bilateral agreements regarding the exchange of information. Consequently, Belgium is party to more than one hundred double tax conventions (DTC) with a mutual assistance chapter based on article 26 OECD-model.<sup>3</sup> Because Belgium preserved its (international) right to bank secrecy for a long time, only a small number of these DTCs contain the fifth paragraph of the OECD-model about the possibility of sharing information held by bank or other financial institutions.<sup>4</sup>

The automatic exchange of information is only written down in a few DTCs, which are not always adapted to the fifth paragraph of the OECD-model. Nevertheless, according to the Belgian tax authorities it is possible that automatic exchange of information is being executed with another country, based on the DTC, without this procedure being explicitly foreseen in a written text but always with the consent of the other country.

The Belgian tax administration may claim any information related to any person or group of persons, even if not identified by name, from all types of taxpayers (natural persons, legal entities, ...), with which the latter are or have been in a (direct) business relationship.<sup>5</sup> When the information is held by a bank, the tax administration can only request this information when one taxpayer, who is the focus of an investigation, is pointed out by name to the financial institution. Belgium uses its extensive powers to discover information to the benefit of other countries. Article 338, §5 Belgian ITC prescribes that Belgium will require the requested information or conduct an administrative inquiry the same way as when it was for own benefit or on request of another Belgian authority. Yet, when looking at the DTC, it mostly depends on the relevance of the requested information. For example, the DTC with Germany states that if the requesting country confirms that the information is “relevant according to expectation” for the purpose of article 26 OECD-model, the state to which the request is addressed accepts this confirmation.<sup>6</sup> A number of DTCs specify that a request for investigation with financial institutions has to identify the specific taxpayer and name of the bank.<sup>7</sup> The admissibility of

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<sup>3</sup> To date (31 December 2013) 102 DTCs.  
<http://www.fiscus.fgov.be/interfafznl/nl/international/conventions/enVigueur.htm>

<sup>4</sup> To date (31 December 2013) 32 DTCs. For an overview at the beginning of 2013, see: Global forum on transparency and **information exchange** for tax purposes, *Peer view report, Phase 2, Implementation of the standard in practice, Belgium*, OECD, November 2013, 71-73 and <http://www.eoi-tax.org/jurisdictions/BE#agreements>.

<sup>5</sup> Article 323 Belgian ITC.

<sup>6</sup> <http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&nav=1&id=9b7aee44-edd9-4fea-9c0f-69a4c00d94a8&disableHighlightning=9b7aee44-edd9-4fea-9c0f-69a4c00d94a8/#findHighlighted>.

<sup>7</sup> For example the DTC with The Isle of Man (16 July 2009).

requests with respect to groups of taxpayers is examined in Belgium in the light of the OECD's studies on the subject.

5. Belgium has been very motivated during the last few years to sign tax treaties which prescribe the assistance in the collection of taxes, based on article 27 OECD-model. The Belgian authorities wrote a letter to all countries worldwide to request the signing of an agreement on the collection of taxes. As a consequence of this initiative, Belgium has currently signed – but not yet ratified – over fifty agreements based on article 27 OECD-model.

6. On an international level, Belgium has signed the OECD Mutual Assistance Convention of 1988 and the 2010 protocol. It is remarkable that it took three years, until 19<sup>th</sup> of December 2013, to ratify this protocol.<sup>8</sup>

7. We notice that this slow ratification process also occurred after the signing of the Tax Information Exchange Agreements (TIEAs) with black or grey listed countries. Belgium, wishing to disappear from the grey list, increased its efforts since March 2009 by concluding as soon as possible international agreements for the exchange of bank information. Thanks to these efforts, Belgium has, in a very short time, signed twelve agreements which provide the administrative assistance that meets the requirements of the international standards. As a result, Belgium joined the white list of states in which the international standards have already been introduced in a substantial way. The Government has continued this process in order to sign a TIEA with most countries, and in any case, with all tax havens, so that Belgium can exchange financial information for the purpose of applying its own tax law.<sup>9</sup>

However, due to the federal state concept, Belgium experiences ratification difficulties. A good example to explain the ratification problem is the TIEA with the Bahamas.<sup>10</sup> Article 3 of this TIEA makes it possible to exchange information related to all existing taxes, direct and indirect, of every kind and sort imposed by or on behalf of the parties, as well as to identical or similar taxes that will be established after the date of signature of this agreement, if the parties agree on this matter through their *competent authorities*. As far as Belgium is concerned, paragraph 3 clarifies that the agreement will apply to the taxes levied by its *political subdivisions or local authorities*, starting on the date on which Belgium informs the Bahamas through diplomatic channels. The negotiators prepared article 3 in such a way as to allow the agreement to be applicable to the *taxes imposed by the Belgian State* for its own account or for the account of the Regions and Communities. As a consequence, the *taxes imposed by the federated entities themselves* fell outside the scope of this agreement as long as the consent, in section 3, was not communicated to the Bahamas. In that respect, the conclusion of this agreement belonged to the Federal State's exclusive competence. The Regions and Communities were not involved in the negotiations. The TIEA was therefore only signed by a representative of the Government of the Federal State.

In Belgium, the closing of a 'mixed treaty' requires significantly more time than the conclusion of a treaty which falls under the exclusive competence of one government. The reason for this is to be found in the requirements imposed by the regulation introduced by the Cooperation Agreement of 8

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<sup>8</sup> <http://www.dekamer.be/FLWB/pdf/53/3114/53K3114003.pdf>.

<sup>9</sup> To date (31 December 2013), Belgium has signed 15 TIEAs.

<sup>10</sup> <http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&nav=1&id=74ec372f-f6d4-4320-9e5a-bb3a522b49d5&disableHighlightning=74ec372f-f6d4-4320-9e5a-bb3a522b49d5/#findHighlighted>.

March 1994 between the Federal State, the Communities and the Regions on the detailed rules for the conclusion of mixed agreements.<sup>11</sup> Several treaties similar to the Bahamas TIEA (agreements on exchange of information in tax matters or protocols amending the provisions on the DTCs in operation) were submitted to the advice of the Belgian Council of State during the year 2010. This institution stated that the majority of the relevant conventions are ‘mixed treaties’, which also relate to the taxes imposed by the Regions and Communities.

Taking into account the advice of the Council of State, the agreement was submitted to the ‘Mixed Treaties’ Working Group, as referred to in Article 3 of the above mentioned Cooperation Agreement. This working group has determined, at its meeting on 26 October 2010, the mixed character (Federal State / Communities / Regions) of the agreement. The proposed decision was adopted on 20 January 2011 by the Interministerial Conference ‘Foreign Policy’. Hence, the TIEA will also be presented to the parliaments of the Regions and Communities, which explains why none of the signed TIEA’s have entered into force yet.

**8.** In September 2009, the Global Forum on Transparency and Exchange of Information decided to implement a system which can be used to evaluate the extent to which the international standards are actually applied by the participating states. That system – called ‘review by peers’ (peer review), because the research is conducted, and the assessment is done by representatives of states participating in the Global Forum – provides for each state a study in two control phases.

The first phase consists of an analysis of the legal and regulatory framework provided by the state for the purpose of exchanging information. For Belgium, the first phase took place in the second half of 2010. The evaluation report was published in April 2011. The report, based on the situation in November 2010, uncovered a gap in Belgian domestic legislation pertaining to the international exchange of banking information and urged Belgium to complete the ratification procedure for a significant number of agreements as soon as possible, in order to meet the international standard. The government did not want to take the risk that the ratification procedures, with the qualification of the new treaty instruments as ‘mixed treaties’, were not completed in time and therefore changed article 322 Belgian ITC by the law of 14 April 2011 containing various provisions<sup>12</sup>; this amendment allowed the exchange of banking information with more than eighty partners in the existing network of tax treaties from 1 July 2011 onwards. At the urging of Belgium, a further report, which concluded that the legal and regulatory framework in Belgium meets the requirements, was published on 12 September 2011.

The second phase will explore how the state applies the provisions in practice. After the peer review in two phases Belgium was given 29 points on a maximum score of 30 points. The only criticism pertained to the delay in the ratification of the treaties, as discussed above. The report underlines that Belgium has a “*strong network of agreements including provisions on the exchange of information for tax purposes*”. Until now, these standards are still based on exchange of information on request, but the OECD is now giving priority to the automatic exchange of information.

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1994030842&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1994030842&table_name=wet).

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=2011041406](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2011041406).

## 2.2. Domestic implementation

9. Belgium has converted Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the field of Taxation and repealing the Directive 77/799/EEC (Administrative Cooperation Directive) by the law of 17 August 2013.<sup>13</sup> Article 3 of the law of 17 August 2013 brings article 338 Belgian ITC in accordance with the Administrative Cooperation Directive. The sixth paragraph of the new article 338 Belgian ITC implements the automatic exchange of information as provided in article 8 of the Administrative Cooperation Directive. From 1 January 2014 onwards, the competent Belgian authority provides all foreign authorities automatically with the information it possesses regarding the residents of other Member States on the following specific categories of income and capital – to interpret within the meaning of the Belgian legislation:

- remuneration of employees;
- remuneration of directors;
- life insurance products not covered by other Community legislation concerning the exchange of information and other similar measures;
- pension income;
- property and income from immovable property.

10. Since 8 July 2013 article 322 paragraph 3 Belgian ITC states that each bank, exchange, credit and savings institution is obliged to make known the following data at a central point that is held by the National Bank of Belgium: the identity of the clients and the numbers of their accounts and contracts. This requirement only applies to species accounts and contracts relevant for tax purposes. The types of accounts and contracts will be specified by Royal Decree. Furthermore, this shall determine:

- the operation of the central point, and in particular the retention period of the information referred to in the first paragraph;
- the modalities and frequency of communication by the bank, exchange, credit and savings institutions of the information referred to in the first paragraph of article 322 Belgian ITC.

When the officer, appointed by the Minister of Finance, has determined that the conducted investigation has yielded one or more instructions of tax evasion, he may request the data available on that taxpayer from the central point.

The establishment of the central database has encountered some problems, but is at the moment almost finalized according to the Belgian tax administration. It seems logical that Belgium will not object to the EU Commission project for a centralized European database.

## 3. The Belgian practice

### 3.1. Exchange of information

11. Since 2009, the Belgian authorities have reorganized the exchange of information procedure in

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=2013081731](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2013081731).

order to concentrate all the information exchange programs within the central liaison for direct taxes. Furthermore, Belgium has made efforts to improve the timeliness of responses to incoming requests by hiring new staff, enhancing the support for local tax officers, creating a new database and implementing the use of the European form eFDT.<sup>14</sup>

For some years, Belgium has been very active in the field of tax information exchange. If we compare the data for 2010, 2011 and 2012, we find in most areas a significant upward trend. Belgium's most important exchange of information partners are France, Germany, Luxembourg and the Netherlands. Belgium also actively exchanges information with Argentina, Austria, Bulgaria, Canada, the Czech Republic, Greece, Hungary, Italy, Japan, Lithuania, Norway, Poland, Portugal, Russia, Slovakia, Spain, the United Kingdom and the United States.<sup>15</sup>

**12.** Belgium spontaneously exchanges information under the Administrative Cooperation Directive, as well as under its DTCs. In 2010, Belgium received 197 spontaneous exchanges and sent 186 pieces of data to other jurisdictions. In 2011, Belgium received 199 spontaneous files and sent 157 spontaneous exchanges. finally, In 2012 Belgium received only 121 spontaneous exchanges and sent not more than 103 pieces of data.<sup>16</sup> Hence, it is conspicuous that the spontaneous exchange of tax information has reduced and the focus thus shifts to other procedures for the exchange of information, as we shall see. The spontaneous exchange of information occurs mainly with Austria, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Turkey and the United Kingdom.

Belgium uses all available instruments for the exchange of information on request. In 2010, Belgium received 320 information requests from other jurisdictions and requested 234 times information from other jurisdictions (2011: 317 and 320, 2012: 364 and 393). It is fairly clear that, over the years, Belgium has been sending more and more exchange of information requests to other countries, while the received requests increased less rapidly.

Belgium is also actively involved in the automatic exchange of information. This procedure takes place based on the Savings Directive (with the exception of Austria and Luxembourg), as well as other agreements for the automatic exchange of information,<sup>17</sup> the signed DTCs and the Cooperation Directive. With regard to automatic exchange of information, Belgium has received more than two million pieces of data and sent more than four million pieces of data in the period 2010-2012. The automatic exchange usually relates to business income, employment income, director's income, pension income and other income. We can conclude that the automatic exchange of information has increased tremendously in the last few years given the numerous efforts Belgium has carried out in this area, we can only estimate that this trend will increase in the future. Automatic exchange of information will become, according to the Belgian tax administration, the norm in the near future for Belgium.

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<sup>14</sup> Global forum on transparency and exchange of information for tax purposes, *Peer view report, Phase 2, Implementation of the standard in practice, Belgium*, OECD, November 2013, 72.

<sup>15</sup> Global forum on transparency and exchange of information for tax purposes, *Peer view report, Phase 2, Implementation of the standard in practice, Belgium*, OECD, November 2013, 72.

<sup>16</sup> For all the numbers, see the annual reports of the Federal Finance Service of 2010 until 2012. <http://www.jaarverslag.financien.belgium.be/>.

<sup>17</sup> For example Anguilla, Aruba, the British Virgin Islands, Isle of Man, ...

**13.** For exchange of information to be effective, it needs to be provided in an as short as possible timeframe, which allows tax administrations to apply the received information correctly. Belgium has made many efforts to deal with information requests as soon as possible. In 2009, only 23% of the requested information was provided within 90 days, 18% between 90 and 180 days, 33% between 180 days and a year, 17% in more than a year; 9% was only partially answered or remained unanswered. When we look at the evolution, in 2011, 35% of the requested information was provided within 90 days, 25% between 90 and 180 days, 17,5% between 180 days and a year, 0,5% in more than a year and 22% was only partially answered or remained unanswered.

The Belgian tax administration gave different reasons for the delay in answering incoming requests: the increase of the workload, the complexity of the requests, the time required for translation.<sup>18</sup> As regards the high percentage of unanswered requests in 2011, the tax administration communicated that all these requests came from one partner. These requests sought information about people that do not live in Belgium. Belgium warned the treaty partner, replied that it had nothing to add to the requests, thus these requests are considered closed for the Belgian tax administration.<sup>19</sup>

Today, the Belgian tax administration has communicated unofficially that more than 80% of the incoming requests are handled within 90 days. Concerning the missing 20%, not less than 95% of those requests are handled between 90 and 180 days. Given that Belgium now also advises the requesting partner of the status of a request when a response cannot be provided within 90 days, we can conclude that Belgium has become one of the most active and trustworthy partners for the exchange of information, both on request and automatically.

### 3.2. Anti-money laundering

**14.** Directive 2005/60/EC of 26 October 2005 (third directive against money laundering), and the execution measures in Directive 2006/70/EC of 1 August 2006 were transposed into Belgian law by the Law of 18 January 2010 amending the Law of 11 January 1993 on the prevention of the use of the financial system for money laundering and terrorist financing, and the Companies Code.<sup>20</sup> On the other hand, the Law of 18 January 2010 also takes into account the results of the evaluation of the Belgian system to combat money laundering and the financing of terrorism, made by the FAG in June 2005 in order to determine whether the system conforms to the recommendations and to test its effectiveness. Among several measures, the Law of 18 January 2010 has expanded the powers of the FIU (Financial Intelligence Unit in Belgium), the Belgian preventive system to combat money laundering and terrorist financing.

The FIU, founded by the Law of 11 January 1993, is the central link in the system to combat money of criminal origin and the financing of terrorism laundering. The FIU is an independent administrative body with legal personality, supervised by the Ministers of Justice and Finance. The FIU is responsible for handling suspicious financial facts and transactions related to money laundering and the financing of terrorism, which are reported by persons and firms designated by law.

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<sup>18</sup> Global forum on transparency and exchange of information for tax purposes, *Peer view report, Phase 2, Implementation of the standard in practice, Belgium*, OECD, November 2013, 85.

<sup>19</sup> Global forum on transparency and exchange of information for tax purposes, *Peer view report, Phase 2, Implementation of the standard in practice, Belgium*, OECD, November 2013, 85.

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=2010011805](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2010011805).

FIU will be in charge of processing and providing information in order to combat money laundering and the financing of terrorism.<sup>21</sup> The FIU is also responsible for seeing to it that there is consultation and efficient cooperation among the national government bodies that are directly or indirectly involved in combating money laundering and terrorist financing, taking into account the powers specific to each body.

**15.** Article 22 (under the law since 1994) thus makes it possible for the FIU to exchange information with other bodies concerned with combating fraud and money laundering. We notice that this interaction is increasing.<sup>22</sup> In 2010, the FIU and the public prosecutor exchanged 814 times information, or via other forms of cooperation, to the Belgian special tax inspection (so called “BBI”), while 830 times in 2011 and 970 times in 2012. On the other hand the FIU and the public prosecutor asked the special tax inspection 490 times for information in 2010, while 471 times in 2011 and 501 times in 2012.

**16.** We can be brief about the negative impact of such an exchange of information on the free movement of capital and the individual’s right on privacy. There is, according to Belgian authorities no negative impact on the freedom of capital. Especially in these difficult economic times, it is increasingly difficult to accept that through money laundering no taxes are paid. Article 63 of the Treaty on the functioning of the European Union states that *“all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited”*. On this principle restrictions can be provided. We think of national security, public defense, fiscal coherence, anti-money laundering, ... So when Belgium, commissioned by the European Union, promulgates legislation on the prevention of the use of the financial system for money laundering and terrorist financing, it seems compatible with the free movement of capital.

**17.** The second question was if the individual’s right on privacy could be violated by such an exchange of information. This discussion seems stripped of its usefulness as the European Court of Human Rights (ECHR) has ruled on 6 December 2012 that the obligation on lawyers to report ‘fraudulent’ behavior did not interfere disproportionately with legal professional privilege since lawyers were not subject to the requirement when defending litigants.<sup>23</sup> Thus the European money laundering directives are compatible with the right on privacy in article 8 of the European Convention on Human Rights (ECHR), notwithstanding the importance of the confidentiality of lawyer-client relations and of legal professional privilege. Although the case relates specifically to French lawyers, we can expand the application to the reporting requirements for the detectors in general.

**18.** The international cooperation with foreign countries generally happens on the basis of cooperation agreements between the various Finance Intelligence Units (Memorandum of Understanding or MOU).<sup>24</sup> Sometimes FIUs, with whom no MOU was concluded, will nevertheless be questioned when it is operationally useful and provided the exchange of information is protected by strict confidentiality. It is important to emphasize that the exchange of information is always

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<sup>21</sup> Article 22 Law of 18 January 2010 amending the Law of 11 January 1993 on prevention of the use of the financial system for money laundering and terrorist financing, and the Companies Code.

<sup>22</sup> For all the numbers, see the annual reports FOD finance 2010 until 2012. <http://www.jaarverslag.financien.belgium.be/>.

<sup>23</sup> ECHR, *Michaud v. France*, 2012.

<sup>24</sup> For a list of these MOU, [http://www.ctif-fiu.be/website/index.php?option=com\\_content&view=article&id=118&Itemid=123&lang=nl](http://www.ctif-fiu.be/website/index.php?option=com_content&view=article&id=118&Itemid=123&lang=nl).

protected. The information provided should not be used without prior consent of the supplying FIU and permission will only be granted on the basis of reciprocity.

### 3.3. Joint audits

**19.** The 2010 OECD Joint Audit Report defines the 'joint audit' as a new form of coordinated action between tax administrations which goes far beyond the traditional simultaneous tax examination procedures.<sup>25</sup> So two or more countries form a single audit where the requested country invites foreign officials and – to a certain extent – loses control over the investigations in its own territory. On the basis of the available data, Belgium has not yet participated in a joint audit, but according to the tax administration, it supports the project.

However, Belgium is a member to multilateral audit for tax under the EU Fiscalis Program, or other programs. In 2010, 59 Belgian officials participated in visits to other Member States, while 48 foreign officials had chosen Belgium for their work visit (2011: 32 and 37, 2012: 21 and 24).<sup>26</sup> Furthermore, article 338 Belgian ITC provides for the possibility of multilateral controls, based on the administrative cooperation directive.

In 2008, Belgium has established the pilot project Belgium-the Netherlands for simultaneous controls in the border region. In 2009, because of the success, Belgium selected, in consultation with France, a number of files for simultaneous controls in the border region. Beside the border region controls, Belgium has achieved significant results with the other member states of the European Union, in particular in the context of fight against fraud. In 2010, 69 files were simultaneously audited (2011: 69, 2012: 24). In addition, the Belgian tax authorities has concluded advance agreements with other countries, in which a number of criteria were defined, in order to find a correct transfer price between associated companies (advance pricing agreements). In 2010, Belgium concluded four advanced pricing agreements (2011: 4, 2012: 11).

## 4. The new era of the automatic exchange of information

**20.** Following the publication on 17 January 2013 of the final version of the FATCA- legislation ("Final Regulations"), the Belgian tax authorities sent to the U.S. tax authorities a first draft intergovernmental agreement between the United States and Belgium. This project was largely inspired by the model published in July 2012 by the five Member States of the EU (Italy, France, Germany, Spain and the United Kingdom) and the United States. An annex specifically adapted listed entities, accounts and products that are considered excluded or very unlikely to be used by U.S. persons to evade U.S. taxes, and should therefore be excluded from the scope of application of the FATCA rules, to the Belgian situation. This appendix has been developed in close consultation with FEBELFIN (the Belgian Federation of the Financial Sector) and ASSURALIA (the Professional

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<sup>25</sup> <http://www.oecd.org/tax/administration/45988932.pdf>.

<sup>26</sup> For all the numbers, see the annual reports Federal Finance Service 2010 until 2012. <http://www.jaarverslag.financien.belgium.be/>.

Association of Insurance Companies) since the information will be transmitted by these sectors to the administration.<sup>27</sup>

In July 2013, The Belgian tax administration prepared a customized draft text that reflects the FATCA agreements reached in the meantime by other European countries and the updated version of IGA I model (with annex II) published in May 2013 by the U.S. Treasury. To date (31 December 2013), the FATCA-agreement is almost ready and, according to the tax administration, it will be signed in the coming month. The effective exchange of data under the FATCA-agreement will normally start on 1 January 2015.

In parallel, the Belgian tax administration is also preparing a number of adaptations of national law necessary to enable the implementation of the IGA-FATCA. One of the most important changes will be the obligation for all the financial institutions, pension funds etc. to provide all the financial information necessary for the execution in practice of the IGA I agreement.<sup>28</sup>

After the necessary adaptations, Belgium believes that there will be no conflict between FATCA and the national data protection laws, nor between FATCA and the civil laws with respect to the requirements to terminate certain customer relationships. Furthermore, the impact of the FATCA regulation on the free movement of capital and the individual's right to privacy can be compared to the anti-money laundering legislation. In conclusion, we can say that the tax administration is preparing a bill for the government, concerning the protection of the privacy for the taxpayers. In cooperation with the privacy committee, a system of protection with appropriate safeguard will be constructed. For the time being, we will have to await the conclusion of the FATCA-agreement and the adaptation of national law to know if there will be any conflict between the agreement and the national legislation.

**21.** Belgium supports the initiative of the five EU Member States (Italy, Spain, Germany, France and the United Kingdom), who have sent a letter to the EU Commission on 9 April 2013, manifesting their will to promote a multilateral system of automatic exchange of information through intergovernmental agreements, going beyond article 8 of administrative cooperation directive and the savings directive. Moreover, Belgium is one of the more than 30 countries that have made a joint statement in which they strongly support the development of the single global standard for automatic exchange of information between tax authorities.<sup>29</sup> Therefore, these countries announced their commitment to an early adoption of the Common Reporting Standard (CRS) being developed by the OECD, and joined the initiative first launched by the five EU Member States. Normally, The CRS will be released in February 2014. The CRS is based on the FATCA regime and contains the reporting and due diligence standard, that supports the automatic exchange of financial account information within the countries joining this initiative.<sup>30</sup> The joint statement also announces the role of the Global Forum in this initiative. The Global Forum will monitor and review the implementation of the CRS, including the need for confidentiality and proper use of the exchange of information.<sup>31</sup>

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<sup>27</sup> <http://www.presscenter.org/fr/pressrelease/20130709/lutte-contre-la-fraude-fiscale-international-fatca?setlang=1>.

<sup>28</sup> This legal amendment is expected in February 2014.

<sup>29</sup> <http://www.fsitaxposts.com/wp-content/uploads/2013/12/Joint-Statement.pdf>.

<sup>30</sup> [http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency\\_G8report.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf).

<sup>31</sup> <http://www.fsitaxposts.com/wp-content/uploads/2013/12/Joint-Statement.pdf>.

22. At present there is a complete stalemate on the proposal to extend the Savings Directive. Luxembourg and Austria have blocked progress, because they believe Switzerland and other third countries must first agree to similar measures.<sup>32</sup> The Belgian tax administration does not foresee any problems if and when the amended proposal will be finally accepted. Firstly, there is the obligation for the paying agents to share information under the anti-money laundering legislation. Secondly, there is the already discussed adaption of national law, with the obligation for all the financial institutions, pension funds etc. to provide all the necessary financial information.

## 5. Tax solutions of equivalent effect alternative to exchange of information

### 5.1. Alternative techniques to obtain information

23. Before discussing the use of illegally obtained evidence in tax law, it is necessary to discuss the treatment of illegally obtained evidence in criminal law. The Law of 24 October 2013 (entered into force on 22 November 2013)<sup>33</sup> secures the so called “Antigoon” case law developed by the Supreme Court since 2003.<sup>34</sup> According to this law, there are three cases in which irregularly obtained evidence is invalid and cannot be used. Firstly, if the legislator has expressly provided that the evidence is invalid because a formal requirement is not met. Such is the case with the procedural conditions for wiretap, intrusive surveillance and mail confidentiality.

Secondly, if the irregularity affects the reliability of the evidence, the unlawfully obtained evidence is void. Such is the case when a given statement is made under torture, for example.

Finally, improperly obtained evidence is also void if its use is contrary to the right to a fair trial. In all other cases, the evidence obtained improperly is not void, and can be used to prove a crime.

In the second and third cases, the court must, before it decides that the evidence is void, in concrete and in the light of the case, examine whether the reliability of the evidence was actually affected and whether its use would effectively undermine the fairness of the process. For the latter case the Belgian Supreme Court has proposed in its case law some sub-criteria, such as:

- whether or not the formal error was intentional;
- the seriousness of the crime;
- whether or not the irregularity has an impact on the guilt question.<sup>35</sup>

Neither the Belgian Constitutional Court nor the ECHR has considered this case law of the Supreme Court to be in conflict with the European Convention on Human rights.<sup>36</sup>

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<sup>32</sup> <http://www.cid.org.nz/news/eu-leaders-postpone-action-on-tax-and-transparency/>.

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=2013102414](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2013102414).

<sup>34</sup> Supreme Court 14 October 2003, AR P.03.0762.N, [www.cass.be](http://www.cass.be). This entitlement has its origins in the code name that the police had given to a later shown unlawful operation.

<sup>35</sup> Supreme Court 23 March 2004, AR P.04.0012.N; Supreme Court 2 March 2005 P.04.1644.F; Supreme Court 10 March 2008, AR S.07.0073.N, [www.cass.be](http://www.cass.be).

The question is whether illegally obtained evidence is void under the Belgian “Antigoon” law. Some judgments of the Supreme Court dating from before the “Antigoon” case law were very clear. Thus, the evidence obtained from committing a crime, theft of correspondence, was unlawful.<sup>37</sup> The proof is irregular if it has been obtained through an offense or irregularity committed by the authorities in charge of the detection or determination of a crime.<sup>38</sup>

A recent judgment of the Supreme Court confirms this line of thought even after the “Antigoon” case law.<sup>39</sup> In this case of the controllability of a wiretap taken abroad, the defendant could not verify whether it was taken legally. The Supreme Court stated that when the applicant is not allowed to challenge the regularity of concrete evidence collected by a measure taken abroad, it violates the applicant’s rights of defense. This implies that not only the unauthorized obtaining of evidence abroad, but even the impossibility to verify the validity of the evidence, can make the evidence void under the (strict) “Antigoon” case law.

**24.** Now the question is whether and to what extent we can apply the “Antigoon” case law to the tax law. The case law and legal literature is divided on this subject.<sup>40</sup> We believe that investigative powers do not exist, unless they are carried out regularly. When intelligence is obtained abroad, evidence should be submitted that it is properly obtained there, according to the tax laws; otherwise it should be excluded in Belgium. On the other hand, the Belgian tax authorities want to use irregularly obtained evidence in a national procedure, based on the “Antigoon” criteria.

Thus, the tax administration in Belgium believes that illegally obtained evidence, including stolen CD-ROMs, should be able to be used in a national procedure. In Belgian tax law, there is no legal basis in order to verify the possible use of the illegally obtained data. The only tax case to date where there was stolen financial data, is the KB-Lux affair. In this case there were turbid contracts between the police investigators, former bank employees and the informant, and there was uncertainty about the proper course of action with respect to the 2.995 stolen documents from the bank. The criminal court decided on 8 December 2009 that the claim of the prosecution had to be declared inadmissible because of the tampering by the police and the courts.<sup>41</sup> It notes that the prosecution has failed its duty to ensure the regularity of the evidence. As a result of the bias with which the research was conducted and the withholding of important information to the trial judge, the prosecution was inadmissible. Furthermore, nobody can determine what happened to the 2.995 pieces of the bank, whereby the defense is deprived of its right to check the regularity of the proceedings. This implies a gross violation of the defense’s rights, in particular the right to a fair trial. Because of the violation the 2.995 documents will be kept from the file, the charges lose all ground.

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<sup>36</sup> Constitutional Court 22 December 2010, n. 158/2010, [www.const-cour.be](http://www.const-cour.be); ECHR, *Lee Davies v. Belgium*, 2009.

<sup>37</sup> Supreme Court 16 September 1974, *Pas.* 1975, I, 48, [www.cass.be](http://www.cass.be).

<sup>38</sup> Supreme Court 14 February 2001, AR P.00.1350.F, [www.cass.be](http://www.cass.be).

<sup>39</sup> Supreme Court 3 April 2012, AR P.10.0973.N, [www.cass.be](http://www.cass.be).

<sup>40</sup> For example, Antwerp 9 October 2012, A 12/0759, [www.monkey.be](http://www.monkey.be); Brussels 24 Mai 2012, *Fisc. Act.* 2012, afl. 27, 4; Brussels 17 January 2012, *Fisc. Koer.* 2012, 259; Liège 20 March 2002, *Fisc. Koer.* 2002, 327; Antwerp 15 January 1996, *AFT* 1996, 221; Antwerp 27 September 1988, *FJF* 1989, 299.

<sup>41</sup> Corr. Brussels 8 December 2009, *FJF* 2010, 185.

On 10 December 2010, the Court of Appeal of Brussels confirmed the ruling of the criminal court.<sup>42</sup> The Court of Appeal held that the police have sought a manner to remove illegally stolen pieces from the bank on a regular basis and add them to the criminal file. Furthermore, it held that the investigation was conducted in an unfair manner and that the rights of the defense were violated seriously and irrevocably. This deprives the accused the right to a fair trial.

On 31 Mai 2011, the Supreme Court upheld the decision of the Court of Appeal of Brussels and thus the KB-Lux affair ended.<sup>43</sup> As long as there is no certainty about the application of the “Antigoon” case law in tax matters and there is no legal basis in tax law provided for the possible use of illegally obtained data, we cannot compare current practice in Belgium to ECHR sentence N.K.M. v. Hungary of 14 May 2013. The KBC-Lux affair is only one example. We do not know how the Supreme Court would have ruled if the police services would have treated the illegally obtained data abroad in a correct way. We believe that there cannot be any use in a national process of illegally obtained documents abroad. The tax authorities must thus be able to present the evidence that the information is lawfully obtained abroad. For pure criminal affairs, we have seen that the ECHR has accepted that the “Antigoon” case law is in accordance with the provisions of the European Convention on Human Rights. With the first domiciliary visits conducted by the public prosecutor, based on the information obtained from the stolen CD of HSBC, it will be very interesting to follow in the near future the inevitable court decisions about the lawfulness of these procedures based on illegally obtained information abroad.

Additionally, it is important to point out the possibility for the so called special tax inspection (the Belgian “BBI”) to handle these cases themselves. So instead of referring the cases to the prosecutor, the special tax inspection held 405 cases, based on the stolen financial information from the HSBC case, in 2013. At the end of 2013, no less than 180 of these cases have already been handled, equivalent to a claim of 367 million euros.

## 5.2. Offshore Amnesty programs

**25.** Belgium does not have official offshore voluntary disclosures,<sup>44</sup> but has a long standing tradition of (offshore) amnesty programs. In 2004, Belgium has the so called “one-off liberating declaration”. When subject to the payment of a liberating contribution of 6% or 9%, every Belgian taxpayer who regularizes his capitals (bearer securities or assets in offshore accounts), enjoys a limited triple immunity: fiscal, social and in criminal matters.<sup>45</sup> This tax amnesty brings the Treasury in a year 498 million euros.

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<sup>42</sup> Court of Appeal Brussels 10 December 2010, 2011/N87.

<sup>43</sup> Supreme Court 31 May 2011, AR P.10.2037.F, [www.cass.be](http://www.cass.be).

<sup>44</sup> On the other hand, the taxpayer can always regularize spontaneously through his local tax administration or at the special tax inspection (the Belgian “BBI”). It is obvious that they will apply at least the legally provided tax and tax increases (no less than 50% in the case of fraud). We have to warn taxpayers that there is no legal security, so there is always a risk of arbitrariness in the application of the tax increases or fines. Moreover, taxpayers will not be able to grant criminal immunity.

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=2003123130&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2003123130&table_name=wet).

**26.** The second round is called the “permanent tax regularization” and includes the period from 2006 to 15 July 2013.<sup>46</sup> The taxpayers have the opportunity to regularize unreported amounts or income, subject to payment of the tax due, usually plus a penalty of 10% depending on the sort of non-stated income at the Contact Point Regularizations. This regularization campaign brings the State over the period from 2006 to 2012 more than 500 million euros. When it was informed that the existing regime will be abolished and a new and more expensive scheme will be introduced from 15 July 2013, the first six and a half months of 2013 brought the Belgian State more than 1 milliard euro.

**27.** This new scheme of regularization was announced by the government to be the last one. As of 1 January 2014, it will no longer be possible to regularize via the Contact Point Regularizations. The new scheme was thus applicable from 15 July 2013 to 31 December 2013.<sup>47</sup> This procedure of regularization was also one-off. The new system is, however, open to taxpayers who have regularized through the system of permanent regularization since 1 January 2007. The new system is not only more expensive than the system of permanent regularization, it also has a broader scope.

This time, not only individuals and companies can use the procedure, but also the nonprofit organizations who pay taxes under the income tax on legal entities, instead of under the corporate income tax, can regularize. In contrast to the system of permanent regularization, the new system allows regularization of the income obtained from serious and organized fraud setting in motion complex mechanisms or procedures with an international dimension.

In the new system there is a subdivision whether or not the administrative prosecution of the fraud has expired. When the fraud has not expired, we have different rates depending on the type of income. For earned income you have to pay the tax due and an increase of 15 or 20 percent, depending on whether it is about ordinary tax fraud or serious and organized tax fraud. For ‘other income’ (for example interests or dividends) we notice a similar regime. When the fraud has expired, it is quite easy. There will be a transfer of 35% of the total capital.

The effects of regularization under the new system are largely: tax immunity, criminal immunity<sup>48</sup>, exemption from punishment (not from prosecution) for perpetrators of a number of accessory offenses with tax fraud, such as forgery, abuse of corporate assets and abuse of trust. When the declarant, prior to the submission of the regularization file, was informed in writing that the tax administration has started specific research actions or when an investigation or an inquest has been opened, the regularization has no effect. Some instances are automatically informed about the regularization: the local tax inspector (in the case of earned income); the FIU (the FIU in Belgium) gets a copy of the file, with the exception of the fraud scheme.

Because of the wider scope and the fact that it is (normally) the last chance to regularize, the third round of regularization has also been a great success. To date, the last and third round of fiscal regularization provided public revenues around 800 million euros.<sup>49</sup>

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[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=2005122730](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2005122730).

<sup>47</sup>

[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=2013071101&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013071101&table_name=wet).

<sup>48</sup> For tax fraud and the money laundering offense arising out of the material benefits of tax fraud.

<sup>49</sup> There are still about five hundred files that need to be handled, so the public revenue will most likely end above on 1 billion euros.

### 5.3. Special kind of agreements

**26.** In 2012, Switzerland declared that the Belgian citizens had no less than 30 billion euros on Swiss bank accounts. In the aftermath, Switzerland proposed a “Rubik” agreement to Belgium. A “Rubik” agreement is an agreement whereby Switzerland will hold a one-time withholding tax of 34 per cent on black funds, in exchange for anonymity. This withholding tax is then anonymously donated to the State of residence of the account holder. This residence receives tax payment from Switzerland, but gets no further insight into the identity of the account holders. This will further guarantee the tax anonymity for the account holders at Swiss banks.

At that time, Belgium was divided on the matter. Besides the political discussion, also some legal burdens were mentioned. Firstly, there is the possible conflict between the “Rubik” agreement and the obligations in Europe under the Savings Directive. Secondly, in Belgium there could be a constitutional problem with respect to the principle of equality. It is probably impossible to grant only those taxpayers with black funds in Switzerland a “Rubik” agreement, so that a similar agreement will have to be given to all taxpayers with black funds in tax havens. Nevertheless, Switzerland has already signed some “Rubik” agreements, for example with the United Kingdom and Austria.

As discussed previously, Belgium has made a big turn in its way of thinking. Today, there is a general consensus that instead of signing a “Rubik” agreement with Switzerland, preference will be given to the exchange of information with other countries and especially to the automatic exchange of information.

**27.** Finally, there is the Liechtenstein and United Kingdom TIEA and Memorandum Of Understanding (MOU), signed on 11 August 2009.<sup>50</sup> The MOU represents a new approach to tax cooperation. A specific disclosure program, The Liechtenstein Disclosure Facility, has been made available to United Kingdom’s taxpayers having assets in Liechtenstein. This Disclosure Facility gives the United Kingdom taxpayers the opportunity to disclose all hidden assets and settle under advantageous conditions. Belgium has also signed a TIEA with Liechtenstein (not yet in work), but this TIEA does not have a procedure corresponding to the Liechtenstein Disclosure Facility.<sup>51</sup>

## 6. Conclusion

**28.** As we had anticipated in our introduction, it is clear from our research that Belgium has become one of the best students of its class regarding the international exchange of information. After having been put on the grey list of countries that do not respect the international standards in tax transparency less than five years ago, Belgium has made an impressive curve towards the exchange of information and international transparency. It has declared an end to its (international) bank secrecy, signed DTCs (adapted to the fifth paragraph of the OECD-model) and TIEA’s, and has implemented the Administrative Cooperation Directive of 2011 and the 2010 Protocol of OECD Mutual Assistance Convention of 1988.

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<sup>50</sup> <http://www.atu.li/portals/0/download/fachartikel/provisions-tiea-mou-fl-uk-ireland.pdf>.

<sup>51</sup> <http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&nav=1&id=4b9ad63e-1c94-4e07-9a72-ae444d5d3951&disableHighlightning=4b9ad63e-1c94-4e07-9a72-ae444d5d3951/#findHighlighted>.

**29.** As regards the tax solutions of equivalent effect alternative to exchange of information, Belgium has already shown an active history. Since 2004 there has always been a procedure of tax amnesty, with the possibility for the taxpayer to receive “salvation” in the form of a (permanent) regularization. The Government has however declared that the regularization from 15 July 2013 until 31 December 2013 has been the last opportunity for the taxpayer to regularize his black funds. Since 1 January 2014, everything is possible when the tax administration discovers the illicit origin of the hidden income. Because of the increasing exchange of tax information in Belgium, and especially the use of automatic exchange, the probability of detection has become overwhelming, which explains the success and the great income for the treasury out of the last regularization period.

Finally, the tax administration is not afraid to use illegally obtained data in a national process (cf. KB Lux affair). It is still not clear how the courts will judge the regularity of this evidence in the future. Therefore, it will be interesting to follow its development in the putative “HSBC”-case, in which the first raids based on the illegally obtained data have started in the last months.

**30.** From our communication with the Belgian tax authorities, it has become quite clear that they believe that the automatic exchange of information will be the principal practice in the future. According to them, it is a train that no longer can be stopped and will change the whole landscape for (possible) tax offenders. Belgium plans to be one of the driving forces behind this (r)evolution: the help at the preparation of the Common Reporting Standard, and the declaration of war against those who believe that they can hide their revenue from the tax administration testify to this. The intensive use of the automatic exchange of information will make the use of illegally obtained data needless in the future. We can only hope that the rights of the taxpayer and the fair standards of this process will not be overlooked in the race for gathering as much information as possible in other countries throughout automatic exchange.