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TAX TRANSPARENCY

National report of Belgium

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1. Concept of Tax Transparency and new tendencies

1.1. Concept of Tax Transparency in Belgium

1. The concept of « tax transparency » has two meanings in Belgian Tax Law. On the one side, "tax transparency" refers to the fact that the income of an association without legal personality is taxable in the name of the partners of this association as though they collected it directly (e.g. art. 29 of the Belgian Income Tax Code of 1992 – hereinafter: BITC). The so called "Cayman tax" applies this principle in a certain way (art. 5/1 BITC)[3]. This tax, which also involves a new reporting duty for taxpayers (art. 307 §1, 4° BITC) provides that founders of "offshore legal structures"[4] are liable, since fiscal year 2016, to pay tax on the income received through those legal structures as though they were receiving it directly[5].

2. On the other side, "tax transparency" involves international exchange of information, including bank data. This principle has emerged formally in Belgium under the impetus of the G20 and OECD in order to fight tax evasion and tax avoidance. The implementation of this principle in Belgian law required various legal accommodations. The most important is the gradual weakening of "Belgian bank secrecy" (see *infra* nr. 16). It should be underlined that the "Belgian bank secrecy" only applied in income taxation at the stage of tax assessment. Moreover, there are no criminal sanctions applicable in case of a breach of this "bank secrecy", unlike the Swiss and Luxembourg bank secrecy.

1.2 Recent change of the perception of tax transparency in Belgium

3. The Belgian measures undertaken in application of the international and European transparency campaign, more precisely FATCA and MCAA (see infra part 2 and part 4), did not receive a warm welcome from the financial institutions involved in the application of these measures because of the compliance costs involved. The same can be said for the companies that have to report due to the CbCR-measures. On the other hand, civil society has received these measures very well as tax transparency is considered to be an efficient tool for fighting against tax evasion and tax avoidance. Although tax fraud has always been more or less tolerated in our country [6], this attitude has changed in the last decades. Recently data leaks like « Paradise Papers » have revived the discussion about the effectiveness of the existing legislative measures against abusive tax avoidance. In this context, the question arises whether the tax and judicial authorities receive adequate

[3] BE: Program-Law of 10 August 2015.

[4] Trusts and trust-like arrangements are considered as "legal structures", as well as any other legal structure with legal personality (e.g. foundations) which are not liable to pay any income tax or the income tax they are liable to is lower than 15% .

[5] Since 17 September 2017, payments made by these "offshore legal structures" towards beneficiaries of any kind are qualified as « dividends » (Notification in the Belgian Gazette of 28 September 2017).

[6] See for example C. Perelman, *Commentaire du rapport de Mgr Ph. Delhaye in L'exacte perception de l'impôt, actes du colloque de l'Institut Belge de Finances Publiques tenu le 15 mai 1972 sous la présidence du Baron Jean Van Houtte*, p. 357 (Bruylant 1973).

funding for ensuring tax law enforcement (fighting against tax evasion and tax avoidance)[7]. Besides this, the question whether the new legal framework on more transparency (namely MCAA) will increase the effectiveness of the fight against tax fraud and tax evasion, remains to be answered. In particular, it should be checked whether tax administration may have enough financial, human and computer resources.

4. In the context of the *anouncement* of measures of tax transparency, including the weakening of the Belgian bank secrecry and the massive international exchange of information, the several « regularisation » mechanisms implemented in Belgian Law since 2003, that enable taxpayers to regularise their tax situation, have been very successful. Since these measures came into place, the success of these regularisations has decreased slightly, but in 2016, tax authorities still received 13.641.528,73 € of taxes[8] on a total amount of 33.458.990,00 € declared revenues[9].

5. Regarding the interconnection between tax transparency of the tax authorities and digitalization, we should note the creation of the gateway "*My Minfin*" (for natural persons) and "*MyMinfin Pro*" (for legal persons). This gateway enables the taxpayer, after identification, to access to a set of e-services[10] (for example "Tax-on-web" that enables citizens to submit their tax return electronically) and a set of interactive services (lodging a complaint, access to personal data, etc.). Also, these gateways allow to comply with the increasing number of reporting obligations in the framework of the evolution of tax transparency. Financial institutions must report the FATCA information on a yearly basis to the tax authorities through the gateway « My Minfin Pro » by means of « XML FATCA » files, pursuant to the agreement between Ministry of Finance and Febelfin[11]/Assuralia[12]. Moreover, an application is under construction in order to enable the online deposition of the CbCR-documentation via the gateway « My Minfin Pro » by means of « XML » files. The tax authorities have also created a simulation environment of the gateway "Tax-on-web" (called "Tax-on-web Training") in order to help teachers to familiarize citizens/students with "Tax-on-web"[13]**.** Lastly, the Ministry of Finance regularly uses social media (Facebook, Twitter, etc.) in order to enhance transparency and its relationship with taxpayers, but also to facilitate its audits (see *infra* nr. 13).

6. Besides these tendencies on the growing transparency of the tax payer and the tax authorities, there is a growing importance of a new kind of transparency, namely the tax

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[7] See namely *La fraude fiscale, priorité du politique? "Une escroquerie intellectuelle"* (words of Michel Claise, investigating judge), RTBF, 7 November 2017 (last access on 8 November 2017).

[8] Annual Report 2016 of Ruling Comission, p. 113 (available on https://www.ruling.be, last access on 1st December 2017).

[9] Professional revenues of natural persons, withholding tax of natural persons, profits of companies, capital of which the tax debt is time-barred and social contributions.

[10] Online tax return through the application "Tax-on-web" (natural persons) or "Biztax" (legal persons), online VAT return through "Intervat" and tax withholding reporting through "Prm-on-web".

[11] Belgian Financial Sector Federation.

[12] Professional union of insurance companies.

[13] Available through http://ccff02.minfin.fgov.be/towsimu/app/citizen/public/common/help.do?contentkey=application_help_0250&popupModal=false (last access on 1st December 2017).

transparency in favour of the public (and not only of the tax authorities). Various « data leaks » in tax matters have been widely reported by the Belgian media and have clear effects on the democratic debate. Belgian journalists of the ICIJ have been heard by the "Parliamentary Commission on Panama Papers". This "Parliamentary Commission on Panama Papers" has by the way recently recommended the implementation of a whistleblowing mechanism in the framework of the fight against tax evasion. Besides the public debate within this parliamentary commission, NGOs are going into action to raise awareness and to lobby for reforms. For example, the network "*Financité*" has drafted a petition entitled "Stop to tax impunity"[14].

It should be mentioned that within this whole public debate, the distinction between tax evasion and tax avoidance is often misunderstood.

2. Information procurement and data usage by the tax authorities

2.1. Principle of tax data collection pursued in Belgium

7. In Belgium, the taxation of income (personal income as well as the income of companies and other legal persons) is based on a system of self-assessment. The taxpayer has the obligation to submit a tax return on a yearly basis (art. 305 BITC). The tax assessment by the tax authorities will be based on the tax return if it complies with the legal conditions of time limits and formalities (art. 353 BITC).

If the tax administration wishes to change any of the declared data, a special procedure has to be followed (notification of the intended changes and the right to lodge an objection to these intentions (art. 346 BITC)). If no tax return has been submitted, or if it is late or does not comply with the legal formalities, the tax authorities can assess ex officio (art. 351 BITC) on a taxable income that can be presumed on the basis of the information the tax authorities possesses.

For a certain category of tax payers, the taxation of income is however based on a system of assessment ex officio (art. 306 BITC). This system is currently used for the assessment of tax payers with a stable fiscal situation such as retirees, persons with a certain allowance, etc.

In Belgium, an increasing group of tax payers submit an electronic tax return for personal income tax purposes through the aforementioned "Tax-on-web" system. For 2016, 78,21% of the tax returns were submitted electronically. These electronic tax returns can often be assessed *automatically*, because an increasing amount of items are already filled in (such as - since 2017 - the payments for real estate loans or life insurances), because wizards help the tax payer to submit his tax return correctly and because the "Tax-on-web" tool traces anomalies automatically[15].

[14] Petition is available via www.financite.be/fr/webform/demandez-au-gouvernement-de-stopper-limpunite-fiscale (last access on 9 October 2017).
[15] Ministry of Finance, Annual Report 2016.

8. For VAT-purposes, the system of self-assessment is the general rule. The tax payer declares the VAT due to the tax authorities himself (art. 53 VAT-Code) and pays the declared amount. No formal assessment has to be awaited. If no tax return has been submitted, the tax authorities can assess ex officio (art. 66 VAT Code) on a presumed amount of taxable acts.

2.2. Information sources of the tax authorities

2.2.1. Taxpayer

a) Regular tax return and reporting and notification obligations

9. The most important source of information is of course the tax return, that needs to be submitted for purposes of income taxation as well as for VAT-purposes.

Since 2010, there is an obligation to submit the VAT tax return electronically (via a web based tool called "*Intervat*"). Only in special situations (the tax payer has no technical means at his disposal), the tax payer can be exempted from this obligation. The same obligation exists since 2014 for companies and other legal persons (resident and non-resident companies and other legal persons) in the framework of income taxation. For natural persons there is no such obligation, although the electronic tax return is strongly encouraged. Paper tax returns are consequently scanned[16], so that the declared information is available for the tax authorities in an electronic way. There is no possibility to submit an electronical tax return for non-residents (natural persons) yet, but since 2016 these tax returns are also scanned systematically.

10. Especially in personal income taxation, the tax payer has to declare more information than is strictly necessary for the calculation of the personal income tax. It concerns information that is useful for the tax authorities as a first step to examine the tax payer. Examples are the obligation to declare foreign bank accounts, foreign life insurances, the names of the person alimony has been paid to or that has received alimony, etc.

Also in VAT matters, some declaration duties of the tax payer do not have the purpose to assess the tax payer, but to inform the tax authorities on third parties. These duties are discussed under 2.2.2.a (third party reporting obligations).

11. Besides the tax return, another method for the tax authorities to gather information from the tax payer is by using their investigative powers. In income taxation as well as in VAT, the tax payer is obliged to allow the tax authorities to examine the bookkeeping as well as all tax relevant documents (art. 315 BITC; art. 61 VAT Code), to answer any question on tax relevant information (art. 316 BITC; art. 62 VAT Code), to allow the tax authorities to visit their work places as well as their residences in some conditions (art. 319 BITC and 63 VAT Code).

b) Special procedures

[16] See www.belgium.be/nl/belastingen/inkomstenbelastingen/particulieren_en_zelfstandigen/aangifte/op_papier (last access on 1st December 2017).

12. In Belgium, there is no special procedure to enhance "voluntary disclosure" (sensu stricto) of information towards the tax authorities. However, since the summer of 2017, the Belgian government agreed to change the existing audit system. A system based on conflict between the tax authorities and the tax payer should make place for a system based on co-operation.
On the other hand, it is possible to ask for *advanced rulings* on the application of the tax legislation on a voluntary basis. During this procedure the tax payer shares information with the "Ruling Commission". Only specific information provided to the Ruling Commission, is shared with the tax departments due to a specific protocol.

13. A recently introduced special reporting duty of the tax payer is the duty to report on transfer pricing issues due to the implementation of *the CbCR-obligations,* based on Action 13 of the OECD/G20 BEPS Project (art. 321/1-321/7 BITC).

14. A last method to gain information from the tax payer, that becomes more and more of importance, is the consultation of public information of the tax payer. The tax authorities can gain information on the tax payer not only by visual observation on public places, including private places that are publicly accessible. The tax authorities can also consult internet pages such as Facebook, eBay or Google Street View in order to gather information on tax payers. In Belgian practice, we can see tax audits based on the consultation of these kind of websites. Moreover, in 2011 the Belgian government created the Belgian Internet Service Center ("BISC") that scans the internet systematically looking for suspicious internet sites and fraudulent web based commerce, using special software. The information gathered by the BISC is shared with other public authorities such as the Federal Computer Crime Unit of the federal police, the Gambling Commission, the Federal Agency for the Security of the Foodchain, etc. The BISC also shares information internationally.

2.2.2. Other sources

c) Third-party reporting obligations (banks, employers, notaries, etc.)

15. Several third parties have the duty to report information to the tax authorities on a regular basis. In income taxation, an important group of third parties are the debtors of certain categories of professional income. They have to report the size of the income and the identity of the creditor (eg. the professional income of the employee, the allowances of the retiree, ...). These third parties have to submit this information by making use of specific standardized forms on a digital platform ("*Belcotax*"). The same system is used for institutions and organisations that receive certain sums that are deductible for the debtor of the sum (eg. donations, premiums of life insurances, payments for real estate loans). This system is an important source of information for the tax authorities and allows to fill in certain codes of the digital tax return in personal income taxation. In some cases, the third party who has the duty to provide information to the tax authorities even has the duty to pay taxes instead of the taxpayer. An example are the notaries and bailiffs who have the duty to inform the tax authorities and to pay the income taxes that are due when non-residents sell real estate in Belgium (art. 177 and 301 BITC).

In the context of VAT, the tax payer has the duty to regularly submit certain listings that are meant to inform the tax authorities on third parties, like the recapitulative statement of the acquirers of intra-Community transactions and the listing of taxable acquirers of goods and services.

16. In income taxation, besides this obligation to provide the tax authorities systematically with information, third parties can also have the duty to provide information in the framework of a tax audit of a certain taxpayer (art. 322 BITC), or a more general tax audit concerning (still) unidentified tax payers (art. 323 BITC). In the context of the first obligation, the tax authorities have turned to accountants, clients and suppliers to gather information on the tax payer. But also family members or partners of directors can have the duty to provide information on the tax payer. In the context of the second obligation, large scale audits have been made possible for instance by asking travel agencies or suppliers of luxury goods to provide a client list. The legislator of 1962 who introduced this possibility, clearly had the debtors and creditors of the taxpayer in general in mind, such as – mainly – the professional clients and suppliers of the tax payer. Today the question arises however, whether the general wording of this article makes it possible to turn to e.g. energy suppliers to provide information on energy consumption (e.g. to check the actual residence of a tax payer), or to turn to parking companies to check the whereabouts of a tax payer. In VAT, third parties have a similar duty to provide information on the taxpayer in the context of a tax audit of that tax payer (art. 61 and 62 VAT Code).

17. In Belgium, banks and other financial institutions have always taken a special place in tax audits for income tax purposes. Belgium still holds on to the principle of bank secrecy, although the possibilities for the tax authorities to gather information from banks have increased thoroughly. A first situation that allows the tax authorities to gather information from banks in income taxation, is the situation in which a previous tax audit demonstrates specific elements on the basis of which the existence or preparation of a mechanism of tax fraud can be presumed (art. 318 § 2 BITC). The tax authorities rarely use this legal possibility to perform a bank investigation. A second possibility to perform a bank investigation is introduced more recently (Law of 14 April 2011) and is more successful. The tax authorities can also ask banks to provide information on certain tax payers, when a previous tax audit demonstrates one or more indications of tax fraud or signs and indicants that the actual income is higher than the declared income (eg. large expenses) (art. 322 § 2 BITC). Several formalities have to be fulfilled before the tax authorities can start this kind of bank investigation (amongst others, the tax payer should get the possibility to provide the bank information himself). To facilitate these bank investigation, the legislator established a special department within the Belgian National Bank that can provide the tax authorities with de numbers of the Belgian bank accounts of each tax payer. The Belgian financial institutions have to provide the identity of their clients as well as the number of their bank accounts to this department every year. Recently the government announced it wants to make this department more efficient by introducing a system that will organise the flow of information to this department on a real time basis. Besides that, every taxpayer has to inform this department (since fiscal year 2015) on his foreign bank accounts. The official of the Ministry of Finance authorized to perform a bank investigation can consult the database of this department. A third possibility to perform a bank investigation is when another state asks for information (art. 322 § 4 BITC). This request for information is considered as an

indication of tax fraud that allows a bank investigation to take place (see infra nr. 24). Lastly, a bank investigation can also be performed in the context of the examination of an objection of a tax payer to the tax assessment (art. 374 BITC). In the context of a VAT audit, there is no bank secrecy (art. 62 bis VAT-Code).

d) Information obtained from courts, other branches of authorities, central databanks

18. In Belgium, there is a free flow of information within the Ministry of Finance (art. 335 BITC, art. 93 quaterdecies § 3 VAT Code and analogue articles in other federal tax codes) since 2009. The several tax authorities within the Ministry of Finance have a duty to cooperate with one another. The cooperation duty is not limited to tax authorities within the Ministry of Finance. Every department within the Ministry (eg. the mediation department, Ruling Commission17, ...) has the duty to cooperate with the tax authorities. This cooperation duty does not imply a prior request of a tax authority. The free flow can thus be spontaneously (on a case by case basis) or automatically and systematically. In this context, it is worth mentioning that an automatic and systematic exchange of information risks disproportional sharing of personal data. It is clear that information that is relevant and proportionate for one department within the Ministry of Finance is not necessarily proportionate for another department. For example, certain private information such as information on family members or private expenses can be relevant for the department responsible for income taxation as the calculation of the income taxation is partly based on this information, whereas this same information is not relevant for the department responsible for customs. Moreover, the fact that several departments within the Ministry of Finance can share information with other departments while the receiving departments could never have gathered this information using their own investigative powers, seems problematic. It is worth mentioning that there is no transparency on what information is shared, nor is there any transparency on how this information is shared (eg. systematically or not).

19. Other public authorities have a similar obligation to cooperate with the tax authorities (art. 327 BITC and art. 93quaterdecies § 1 VAT Code), whenever the tax authorities ask for tax relevant information. Spontaneous sharing of information is not allowed, although the Belgian case law illustrates that spontaneously sharing of information does take place18. Some public authorities share information with the tax authorities in an electronic and sometimes systematic way. It is clear that along with the developments on e-government, the other public authorities (on every level of the governmental organisation, in Belgium: federal level, regional level, communal level) become more important sources of information for the tax authorities.

[17] Although the free flow of information between the advanced ruling department and the tax departments is limited due to a protocol, see *supra* 2.2.1.b.

[18] E.g. BE : Court of Antwerpen, 27 October 2009, rol nr. 2008/3183 (concerning circulation taxes), www.monkey.be (last access on 1st December 2017) ; BE : Tribunal of Brussel, 30 June 2008, Fiscal Actualiteit nr. 2008/32, pp. 1-3; Tribunal of Hasselt, 26 May 2004, Tijdschrift voor Fiscaal Recht 2006, p. 152.

20. Beside from this duty to cooperate with the tax authorities on their demand, there is a limited access of the tax authorities (special officials) to the "Central Register of Penalties" which is a part of the Ministry of Justice (art. 589 Criminal Investigation Code). The access is limited to certain convictions relevant to the tax authorities such as offenses against property like theft or fraud.

21. Finally, some public authorities have a duty to report elements that indicate tax fraud, such as the "Belgian Gambling Commission" (art. 327 § 6 BITC) and the Belgian Financial Intelligence Unit (see *infra* e).

22. The public prosecutors, the police and the courts, have a similar duty to cooperate with the tax authorities as the public authorities whenever the tax authorities demand for information (art. 327 BITC, art. 93*quaterdecies* § 1 VAT Code). When the information is part of an existing judicial file, the access to this information has to be explicitly authorized by the public prosecutor. Although this condition stands for every judicial file, the tax authorities are mostly interested in the access of criminal files. In order to facilitate the access to criminal files, the public prosecutor has the obligation to report indications of tax fraud (direct taxes or indirect taxes) to the Ministery of Finance (art. 2 Law of 28 April 1999). Another, less formal way for the public prosecutor to inform the tax authorities, is the so called "una via" deliberation. In Belgium, the public prosecutor can formally deliberate with the tax authorities on the question whether a specific case will be further subject to a criminal investigation and prosecution by the public prosecutor or subject to an administrative (tax) investigation and tax assessment by the tax authorities ("una via")(Law of 20 September 2012). Although this deliberation is intended for the situation wherein the tax authorities report criminal (tax) fraud to the public prosecutor, the public prosecutor can as well report relevant information to the tax authorities (see also the circular letter of College of Principal Public Prosecutors 11/2012 of 22 October 2012), because of his abovementioned reporting duty due to the Law of 28 April 1999.

e) Information gathered for other purposes like prevention of money laundering, tackling terrorism, bribery control

23. The Belgian FIU examines the information that it receives from several professionals with AML reporting duties, such as financial institutions, insurance companies, notaries, bailiffs and lawyers in certain cases. The federal and regional organs that authorise the voluntary regularisation of unofficial income (see *supra* n°. 3) have also the duty to report to the Belgian FIU (art. 79 § 2, 5° Law of 18 September 2017)[19]. After examination, Belgian FIU reports serious indications of money laundering or terrorist financing to the public prosecutor's office (art. 82 § 2 Law of 18 September 2017). When this report contains information on the laundering of money coming from offenses that are of any influence for serious tax fraud, Belgian FIU reports this information to the Ministry of Finance (art. 83 § 2 Law of 18 September 2017).

[19] https://www.nbb.be/doc/cp/moniteur/2017/20171006_loi_2017_09_18.pdf (last access on 1st December 2017).

Since the (late) implementation of the Directive 2015/849 on Anti-Money Laundering by the Law of 18 September 2017, Belgium has established a Central Register on the Ultimate Beneficial Ownership (UBO-Register)(see *infra* n°. 34). This Register gathers information on the beneficial ownership of corporate and other legal entities as well as of trusts and other legal arrangements having a structure or functions similar to trusts. This register shall be accessible to competent authorities (e.g. : tax authorities) and the Belgian FIU without restrictions.

f) Information from private stakeholders

24. Some media in Belgium report on an increased amount of anonymous complaints on tax fraud[20]. For these cases of voluntary reports of information (anonymous or not anonymous), Belgium does not provide in any system of protection for the "whistle blower". Nevertheless, the Parliamentary Commission "Panama Papers" has just recommended the establishment of a general whistle blower protection.

In these cases, as in any legal system, the question of the evidential value arises. Moreover, the question arises whether the whistle blower has obtained this information in an illicit way or not. In Belgium, this could influence the acceptance of the information as evidence or not in the light of the "Antigoon" case-law, that will be discussed later in this text (see also infra n°. 30), read in compliance with the ECJ judgement "WebMindLicenses"[21]. The Belgian tax authorities nevertheless seem to take little risk as this kind of leaks are mostly seen as nothing more than an inducement to start a new tax investigation in order to obtain (confirmation of) the reported/leaked information through legal methods[22]. In any case, the denunciation as such cannot have evidential value in tax matters or in criminal matters[23].

2.3. International exchange of information

25. The Directive 2011/16/EU (DAC 1) on the administrative cooperation in the field of taxation has been implemented in Belgian Law through the Law of 17 August 2013. The Directive 2014/107/EU amending Directive 2011/16/EU (DAC 2) on the automatic exchange of financial information has been implemented in Belgian Law through the Law of 16 December 2015 and the Law of 31 July 2017. Belgium will receive the same financial information that is shared between the EU member states from a set of other countries due to the OECD's MCCA, that has been signed by Belgium on 4 April 2011. De information the central tax authorities gather through DAC 1, FATCA, DAC 2 and MCCA CRS are transformed

[20] See namely *Verklikkingen bij fiscus op weg naar record*, De Tijd 28 August 2015 ; *Le fisc a reçu plus de 2.700 dénonciations l'an dernier: voici les fraudes le plus souvent dénoncées*, RTL Info 4 January 2017 (last access on line 12 November 2017).

[21] M. Bourgeois and C. Verscheure, *« Antigone » en droit fiscal : quelle évolution ? in Le droit fiscal en 2017. Questions choisies,* pp. 211-245 (I. Richelle and M. Bourgeois eds., Anthemis 2017) ; S. De Raedt, *Het Hof van Justitie en de Belgische Antigoonleer: drie redenen om minder enthousiast te zijn*, Tijdschrift voor Fiscaal Recht, 2016, pp. 471-472.

[22] *Verklikkingen bij fiscus op weg naar record*, De Tijd 28 August 2015 (last access on line on 12 November 2017).

[23] A. Lachapelle, *La dénonciation de faits d'intérêt fiscal : entre Big Brother & Robin Hood in Liber Amicorum Yves Poullet* (E. Degrave, C. de Terwangne and S. Dussolier eds., Larcier, to be published in Spring 2018).

into pdf-files that are at the disposal of the tax departments. Besides that the information will be available for the tax payer through the abovementioned gateway MyMinfin.

26. Under the influence of the evolution of the international exchange of information, some changes are made to procedural tax rules.

First, the time limit for tax investigations is extended with four years to a total time limit of seven years whenever the Belgian authorities receive a request for information from a foreign authority (art. 333 § 3 BITC). This extension of the time limit aims to allow the Belgian authorities to fulfil their international obligation to search within their borders for the requested information within the time limits of a tax investigation. The taxpayer is not informed of the extension of the time limit.

The evolution of the international exchange of information in 2011, has – secondly - been an extra boost to weaken the Belgian bank secrecy in income taxation (see *infra* 2.2.2.a.).

A last adaption of the Belgian legislation in the context of the international exchange of information is the impossibility for the taxpayer to have access to certain parts of his tax file, namely the request for information of the foreign authority, the answer of the Belgian tax authorities, and every correspondence between the Belgian authorities and the foreign authority. This is an explicit exception to the Public Access Act (see *infra* part 4). The access to these elements of the personal tax files will be denied for the duration of the foreign tax investigation and insofar as the access can harm the investigation (art. 337/1 BITC).

27. The Directive 2015/2376 on the exchange of rulings (DAC 3) and the Directive 2016/881 on the CbCR (DAC 4) has been implemented in Belgium partly through the Program-Law of 1st July 2016 and partly through the Law of 31 July 2017. As the first exchange of rulings took place on 30 September 2017 for advanced rulings of the first semester of 2017, no specific experiences on the field can be mentioned.

2.4. Legal or practical obstacles for the information procurement

28. A first legal obstacle for the information procurement is, in some specific circumstances, the right to remain silent (or the privilege against self-incrimination) enshrined by the article 6 ECHR[24]. Due to this right, the tax payer involved in a tax audit can refuse to give information to the tax authorities in certain limited circumstances. The right to remain silent can only be invoked in case of a criminal charge. In the Belgian case law, a lot of administrative tax sanctions have been treated as criminal sanctions in the sense of article 6 ECHR[25]. Literature and the case law discuss when a tax audit becomes a criminal charge in

[24] This right to remain silent is not a constitutional right in Belgium, so the legal basis of this right is article 6 ECHR.

[25] BE : Constitutional Supreme Court, 24 February 1999, Tijdschrift voor Fiscaal Recht, 1999, p. 385, (recognition of the criminal caracter of VAT-fines); BE : Cassation Supreme Court, 25 May 1999, Fiscale jurisprudentie — Jurisprudence fiscale, 1999, p. 323; BE: Constitutional Supreme Court, 18 June 2008, nr. 91/2008 (concerning tax fines in income taxation). All decisions of the Constitutional Supreme Court are available on www.const-court.be. All decision of the Cassation Supreme Court are available on www.cass.be.

the sense of article 6 ECHR[26]. This discussion revived with the CHAMBAZ-judgment of the ECHR of 5 April 2012[27].

29. A second legal obstacle to provide information to the tax authorities in income taxation as well as in VAT matters, is the professional secrecy. It will – mostly – protect certain third parties involved in a tax audit. Medical professions, lawyers, notaries, bailiffs and (external) accountants seem to be the most important professions that need to respect a professional secrecy in tax matters.

30. A third legal obstacle is the bank secrecy. As mentioned before, Belgium still holds on to the principle of bank secrecy in the context of income taxation, although the possibilities for the tax authorities to gather information from banks and other financial institutions have increased in the last few years (see *supra* 2.2.2.a). In the context of VAT-audit, there is no bank secrecy.

31. As for the inviolability of the home, the BITC as well as the VAT Code allow the tax authorities to visit the business premises and the residence of the tax payer (art. 319 BITC and art. 63 VAT Code). This right to visit business premises and residences has been subject to an intense debate in Belgium due to the (recent) broad interpretation that is given to this right by the tax authorities (eg. the right to open closets to search for the bookkeeping or other documents, the right to copy the hard disk, ...). Recently the Belgian Constitutional Court clarified that the right to visit the business premises of the tax payer does not imply the right to enter the premises without permission of the tax payer, nor does it imply the right to force access to the bookkeeping or other documents whenever the tax payer resists. For this and other reasons the Belgian Constitutional Court assess that the legal provision of the tax visits are compatible with the right to private life as guaranteed by the Belgian Constitution (article 22) as well as article 8 ECHR[28].

Finally, there are no clear restrictions on using *unlawfully acquired information* in a tax procedure. The Belgian Court of Cassation clarified in a decision of 22 May 2015 that judges can decide to use unlawfully acquired information in a tax procedure. The same decision had

[26] See namely BE: Tribunal of Mons, 28 April 2004, Fiscale jurisprudentie — Jurisprudence fiscale nr. 2005/281; BE: Tribunal of Liège, 30 November 2004, Tijdschrift voor Fiscaal Recht, 2005, p. 590 ; BE: Tribunal of Hasselt, 1st April 2010, Tijdschrift voor Fiscal Recht 2010, p. 704 ; BE: Tribunal of Liège, 9 February 2012, Fiscoloog nr. 2012/1313, p. 10; BE: Court of Luik, 19 September 2012, Fiscoloog nr. 2012/1313, p. 10; BE: Luik 19 September 2012, Fiscoloog, 2012, nr. 1313, p. 10. See also V. Dauginet and K. Spagnoli, *Het zwijgrecht van de belastingplichtige in De fundamenrele rechten van de belastingplichtige. Capita Selecta* p. 166 *(*L. Huybrechts, J. Malherbe, H. Hertoghs, V. Dauginet and B. Coopman eds, CED Samsom 1998); B. Coopman and K. Lammens, *Zwijgrecht, mildering van boetes, redelijke termijn: naar een concrete invulling van de mensenrechten van belastingplichtigen*, Tijdschrift voor Fiscal Recht 2002, p. 739; M. Maus, *De fiscale controle* p. 718 *(*Die Keure 2005) ; C. Franssen and E. Traversa, *La demande de renseignements adressée au contribuable à l'impôt sur les revenus et le droit de se taire*, Revue Générale du Contentieux Fiscal nr. 2012/1, pp. 44-45; T. Afschrift, *Le droit du contribuable au silence in Alabaster 1938-2013* p. 327 (C. Docclo eds., Anthemis 2013).

[27] CH: ECHR, 5 April 2012, *Chambaz v. Switzerland*. See namely N. Muyshondt, Zwijgrecht in fiscale zaken: wat zijn wilsafhankelijke gegevens?, Fiscoloog nr. 2012/1302, p. 6; M. Maus, Zwijgrecht en wapengelijkheid in fiscale zaken: al small step for a man, a giant leap for mankind, Fiscaal Actualiteit nr. 2012/15, p. 1; F. Koning, Cour. Eur. DH., Chambaz contre Suisse, 5 april 2012. Prohibition de l'auto-incrimination en matière fiscale et égalité des armes, Revue Générale du Contentieux Fiscal 2012, p. 409.

[28] BE: Constitutional Supreme Court, 12 October 2017, nr. 2017/116.

already been made for criminal cases in 2003 ("Antigoon" case law)[29]. In criminal procedures, unlawfully obtained evidence is not always excluded. Only if the acceptance of the evidence would infringe the right to a fair trial, the exclusion of the evidence is compulsory. In tax matters, the Belgian Court of Cassation made clear in its decision of 22 May 2015 mentioned above, that judges have to exclude unlawfully obtained evidence when the acceptance of the evidence would infringe the right to a fair trial or if the use of the unlawfully obtained evidence would be a breach of the principles of good governance. Although the latter criterion to evaluate unlawfully obtained evidence seems to allow the exclusion of unlawfully obtained evidence in a larger way than in criminal matters (eg. when the evidence is obtained by infringing a fundamental right)[30], it still remains unclear in which cases unlawfully obtained evidence will be accepted. When the authorities that gathered the information (tax authorities or criminal authorities) did not commit any illegality or irregularity, and the irregularity or illegality is committed by a third party, the evidence is mostly accepted as the case law considers this information as a mere indication for the tax authorities to start their own investigation and collect the confirmation of the (unlawfully obtained) information in a lawful way[31]. In order to give legal certainty, the "Parliamentary Commission on Panama Papers" recommends to regulate unlawfully obtained evidence by the Law[32].

2.5. The usage of the information in the tax authorities, especially in regard of automatization and digitalization of the tax assessment procedure

32. As mentioned before, most tax returns have to be submitted electronically (see 2.2.1.a.). For natural persons there is no such an obligation, although most resident tax payers now submit their tax return by using the "Tax on web" application. Paper tax returns are scanned, so the declared information is available for the tax authorities in an electronic way.

33. Besides using this information for the tax assessment, the information that is gathered by the tax return is also systematically added to the *data warehouse* of the Ministry of Finance that is used to create risk profiles that are helpful in preparing tax audits (see authorisation FO n°. 08/2015 of the Sectoral Committee for the Federal Government of 19 March 2015). Besides tax returns, the data warehouse also contains the information gathered through the Belcotax system mentioned above (see *supra* 2.2.2.a.) as well as public information, like the information published in the Belgian and Luxemburg Official Gazette.

34. In terms of digitalization and organisation of databanks, the SITRAN database of the tax authorities is worth mentioning. This databank is also part of the "*data warehouse"*

[29] BE: Cassation Supreme Court, 14 October 2003.
[30] S. De Raedt, *De draagwijdte van het recht op privéleven bij de informatie-inzameling van de fiscale administratie* (Larcier 2017).
[31] Recently: BE : Cassation Supreme Court, 28 February 2017. See also A. Lachapelle, La dénonciation de faits d'intérêt fiscal : entre Big Brother & Robin Hood in Liber Amicorum Yves Poullet (E. Degrave, C. de Terwangne and S. Dussolier eds., Larcier, to be published in Spring 2018).
[32] Special Commission on International Tax Evasion/*Panama Papers*, Report about Panama Papers and International Tax Evasion, 31 October 2017, Preparatory documentation, nr. 54-2749/001, pp. 61-62, recommandation nr 76.

mentioned above and it gathers information of so called “authentic data sources”. These are data sources that are the *unique* source of the information and the holder of the databank has the responsibility of keeping the data accurate and up to date. An important example of such an authentic data source is the National Identity Register, containing the identification information, including the identification information of all Belgian residents. Other authentic data sources are the “Crossroad bank of enterprises”, the “Crossroad bank of Social Security” and the Centre of annual accounts of the Belgian National Bank. The tax authorities have access to these authentic sources in an automatic day to day basis. An update of the National Identity Register will therefore be reported automatically to the tax authorities, that gather this information in their SITRAN databank. The tax authorities complete this data bank with own information such as a second name for a company, a tax residence, etc.

3. Protection of the taxpayer

3.1. Constitutional law (also in comparison to human rights)

35. The most important fundamental right protected by the Belgian Constitution in the framework of the legal protection of the tax payer in the context of the gathering of information gathering by the tax authorities, seems to be the right to private life (article 22 of the Belgian Constitution). Article 22 of the Belgian Constitution provides a stronger legal protection than article 8 ECHR, as article 22 of the Belgian Constitution prescribes that for every interference in private life by a public authority there should be a decision of a parliament, whereas the ECHR as interpreted by the ECtHR only prescribes a legal basis in the material sense of the word. Other fundamental rights guaranteed by the Belgian Constitution that are important for the legal protection of the tax payer are the principle of legality and non-discrimination (articles 10, 11 and 172 of the Belgian Constitution), the right to property (article 16 of the Belgian Constitution) and the right to public access (article 32 of the Belgian Constitution), although these rights seem of less importance in the framework of information gathering.

36. As article 8 of the ECHR, article 22 of the Belgian Constitution forbids every interference by a public authority in private life unless three conditions are fulfilled. Besides the above mentioned condition of a legal basis, the condition of necessity of the interference in order to obtain a legitimate aim needs to be met. This condition of necessity implies that the interference is proportionate with the legitimate aim. This condition is of great importance for the gathering of information by the tax authorities as most legal provisions in Belgium that allow the gathering of information, prescribe that the information should be relevant. The condition of necessity is stronger than the condition of relevancy. Moreover, the condition of necessity is not only of importance for the kind of information that is gathered, but also for the way it is gathered.

3.2. Tax secret

37. In most federal tax codes, every official of the Ministry of Finance has the duty to assure absolute discretion on every information known in the context of his assignment (eg.

art. 337 BITC and 93bis VAT Code). There is, however, a major exemption to this general rule: there is no infringement of the professional secrecy when information is shared with other public authorities (in the most general sense of the concept), nore when information is shared with judicial authorities. The law stipulates that the same duty of discretion has to be assured by the officials of the public authorities the tax information is being shared with. The law also stipulates that there is no infringement of the professional secrecy when information is shared with the spouse of the tax payer when tax debts are being claimed from this spouse. Therefore, in general, the obligation of discretion is only of importance towards third parties, other than public or judicial authorities and other than the spouse mentioned above. Even this duty of discretion towards third parties is subject to exemptions. The duty of discretion of officials does not violate the duty to give public access to official documents as stipulated in the Belgian Public Access Act and as guaranteed as a fundamental right in article 32 of the Belgian Constitution (see infra part 4)33. Third parties can therefor ask for access to the personal tax file of a tax payer if they can prove personal interest (art. 4 of the Public Access Act).

38. There are no specific sanctions for the official who did not respect the tax secrecy. The Belgian State is however responsible for every violation of the law by an official and has the duty to compensate every damage caused by this violation.

3.3. Data protection laws

39. At this moment the Belgian Law on the Protection of Personal Data of 1998 (hereafter, the "General Data Protection Law") is applicable on the processing of personal data by the tax authorities. This General Data Protection Law is the implementation of the Directive 95/46. As from 25 May 2018 the Regulation 2016/679 will come into force and will in general be applicable on the processing of personal data by the tax authorities.

40. Beside this General Data Protection Law, the Law of 3 August 2012 regulates several specific matters of data protection in the context of information gathering by the tax authorities.

41. First, some general issues are regulated, such as the appointment of the controller (Ministry of Finance) (art. 2 Law of 3 August 2012). Also, some pre-existing preventive measures are being formalized, such as the system of authorizations to access personal data by the officials determined by individual access profiles (art. 10 Law of 3 August 2012) and the establishment of a privacy department governed by the Ministry of Finance with tasks on the protection of personal data (art. 8 Law of 3 August 2012).

42. A second issue regulated by the Law of 3 August 2012 concerns the free flow of information between the different departments of the Ministry of Finance (see *supra* 2.2.2.b.). The Law of 3 August 2012 makes the sharing of information between the several

[33] BE: State Suprem Court, 5 November 1996, Goose, nr. 62.921. All decisions of the State Suprem Court are available on www.raadvst-consetat.be.

departments of the Ministry of Finance subject to an authorization of a special data protection department34 within the Ministry of Finance itself. This special department has to check whether the sharing of information meets the proportionality principle of the data protection regulation. The law also stipulates that a protocol has to be established describing the procedures of access and sharing of information. Until today, there is no such a protocol. As this verification on the proportionality principle is internal, there is no public scrutiny. Moreover, and as mentioned before, there is no transparency on the data that freely flow between the several departments of the Ministry of Finance.

43. A third important issue that is regulated by the law of 3 August 2012 is the external flow of information towards and to the Ministry of Finance. This issue is important as more and more information flows from other authorities to the tax authorities (and vice versa). As the increasing information flow came hand in hand with the developments on e-government, these two issues cannot be discussed separately. Along with the developments on e-government, there has always been a certain privacy concern. In Belgium the tension between the protection of private life and the free and automatic flow of information within the government, has been solved in – at that time - a unique manner in the context of social security in the 90s. In 1990 the Social Security "Crossroad Bank" was established, a public authority that is responsible for the secured sharing of personal data between all the relevant institutions (public and private) that are involved in the execution of the social security regulation. Instead of creating a huge databank containing all the relevant personal data, all institutions keep their own information and a network is created between these institutions. Information is only shared through the Social Security Crossroad Bank that operates in the centre of this network. It checks whether the sharing is authorized by the Belgian Privacy Commission, and if the authorization is present, electronically forwards the information to the demanding institution. This Social Security Crossroad Bank became the model of the so called "service integrators" that are developed recently to govern the flow of information in a more general way. In Belgium, service integrators have been established at multiple governmental levels, the first being the federal service integrator created by the Law of 15 August 2012. Besides the secured sharing of data (including the verification of the authorization of the flow of data by the Privacy Commission), the service integrator also unlocks available data within the network in an integrated manner. This means that the service integrator can make a combination of data of several public departments that are member of the service integrator's network and then share the result of the combination with the demanding public department. The Ministry of Finance can be a member of the federal service integrator (just like every federal department; including the federal police) if it unlocks or collects information through the service integrator. At this moment the Ministry of Finance still scarcely uses the service integrator to *collect* information, namely only to collect information of the "Crossroad bank of enterprises", a data bank with information on companies and enterprises. An important principle within the system of service integrators, is the principle of unique data collection and of authentic information sources. This means that the government – in principle - can only collect certain information once from the

[34] The Royal Decree of 27 March 2015 appointed the president of the committee of the directors of the Ministry of Finance as responsible for these authorizations, who is assisted for this task by a special privacy department.

citizens or companies[35] and that information should be kept in information sources that are only governed by one public department that is responsible for keeping the information accurate and up to date (see for an example the National Identity Register mentioned above). Despite the limited use of the federal service integrator by the Ministry of Finance, it is clear that this system of service integrators can be a guarantee for the compatibility of information sharing with the principles of data protection. The federal service integrator only *communicates* personal data when the authorization of the Privacy Commission[36] is present. This authorization is an obligation of the General Belgian Data Protection Law (art. 36 bis) for every electronic communication of personal data *by* a federal public authority. For the Ministry of Finance, this authorization principle has been confirmed in the Law of 3 August 2012 mentioned above. Moreover, this Law confirms that the Ministry of Finance can only *receive* personal data whenever the communicating government is authorized to do so[37]. Although these authorizations are published on the website of the Privacy Commission[38] and the Ministry of Finance, it is this not easy to get a clear view on the data flows from the Ministry of Finance towards other public authorities and vice versa, for the simple reason that there is no search engine of any kind. A chronological overview of a big amount of authorizations is therefore not a transparent presentation of the flow of personal data.

44. A fourth issue that is regulated by the Law of 3 August 2012 is the possibility of data mining. The Directive 95/46 grants the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him (art. 15 of the Directive 95/46, see similar right in art. 22 of the Regulation 2016/679). This automated processing used to decide on personal aspects is allowed if it is authorized by the law which lays down measures to safeguard the data subject's legitimate interests. The Belgian Law of 3 August 2012 is unclear on this matter. Article 5 § 1 of the Law allows the Ministry of Finance to "bring together in a "data warehouse" all the personal data that it has gathered in the performance of its tasks, in order to – on the one hand – conduct targeted searches on the basis of risk-indications and – on the other hand – to analyse relational data coming from the different departments of the Ministry of Finance". Although it is clear that the tax authorities wish to create risk profiles by establishing this data warehouse, the above cited provision does not give a clear and thus foreseeable legal basis on automated decisions on the basis of such profiling methods. Therefore, a decision to start a tax audit solely on the basis of these automated profiling mechanisms seems forbidden in Belgium if there is no substantial human intervention. There is however no transparency on the existence of this human intervention. The Law of 3 Augustus 2012 stipulates however that the addition of a category of data in the "data warehouse", has to be authorized by a

[35] This principle was confirmed in a general way in the Law of 5 May 2014, the so called "Only Once-Law"

[36] To be precise it is a special committee within the Privacy Commission that gives these authorizations, namely the so called Sectoral Comittee of the federal government. It is not clear whether these special committees will keep on existing after the Regulation 2016/679 comes into place.

[37] This authorization can be given by the federal Privacy Commission if the information is communcated by a federal authority, but it can also be a regional authority, competent for authorizing data flows from that region, such as the Flemish Toezichtscommissie.

[38] Or their regional counterpart, such as the Flemish Toezichtscommissie.

special committee within the Belgian Privacy Commission (namely the Sectoral Committee on the federal government[39])(art. 5 § 2).

45. A last important issue regulated by the law of 3 August 2012[40] is the creation of an exception to the general *rule of access* to personal data, guaranteed by the European data protection regulation. There is no right of access to personal data governed by the Ministry of Finance during the period the data subject is subject of a tax audit or any preparatory activity, in so far the access could harm the tax audit or the preparatory activity and only for the duration thereof. The preparatory activities can take no longer than one year counting from the request for access. Whenever this interruption of the right to access ends, the special privacy department will inform the tax payer of the motivation of the refusal of the access. This exception to the right to access is based on the general exception rule of article 13 of the Directive 95/46 and is acceptable insofar this provision is interpreted in a strict way, which means that specific reasons have to be present to fear that the access can harm the tax audit. A general consideration that access of personal data harms the tax audit seems incompatible with the condition of necessity of article 13 of the Directive 95/46. Moreover, as the general exception rule of article 23 of the Regulation 2016/679 seems more severe than article 13 of the Directive (article 23 of the Regulation 2016/679 prescribes the specific issues that need to be clearly regulated when a member state makes use of this exception rule), the Belgian exception on the right to access seems problematic and needs further clarification on the scope and delimitation of the period of interruption.

3.4. Compensation for damages and judicial protection

46. A judicial review of the information gathering from the tax payer is possible, not only when the information is already used in a tax assessment, but the majority of the Belgian case law accepts that the tax payer can introduce a judicial procedure before the tax assessment (so called "pre-taxation procedure"), for example to object to a certain form of information gathering that violates the right to private life. This pre-taxation procedure is not open to the tax payer when his right to private life is violated through the gathering of his personal information from third parties or public authorities, as the tax payer will not be informed of this information gathering. An exception is the gathering of information from banks and financial institutions (art. 322 § 2 BITC). The tax payer has to be informed of the elements that justify the request to the bank on the same moment as the request is send to the bank. The Belgian Constitutional Court confirms that this notification facilitates a pre-taxation procedure41.

47. Besides lodging an objection against the gathering of information by the tax authorities in a judicial tax procedure, a tax payer can also start a judicial civil procedure against the Belgian State and claim compensation for the damage as a result of the violation of the Law or a fundamental right (eg. the violation of the right to private life). As there is no

[39] As mentioned before, it is not clear whether these special committees will keep on existing after the Regulation 2016/679 comes into place.
[40] The law has been amended on this point by article 96 of the Law of 17 June 2013.
[41] BE: Constitutional Supreme Court, 14 March 2013, n°. 39/2013.

published case law on his matter, we can assume that tax payers rather apply for tax procedures then for these civil procedures.

4. Transparency of the tax authorities

4.1 Publication habits of the tax administration

48. The tax administration publishes tax and legal documentation on a platform called "*Fisconetplus*". The following documentation is classified by type of tax: laws and regulations, administrative directives and comments, tax rulings, case law and parliamentary questions.

49. The process of risk management is partly open. The tax authorities state clearly, in the administrative contract 2016-2018, that there will be an oriented approach of "target groups on the basis of an automated risk assessment"[42]. Risk indicators are however not disclosed. Nonetheless, the tax authorities announce the types of audits that will be carried out[43] on their website, as part of an approach that is called « *Citizen Relationship Management* »[44] (« CRM »)[45].

50. "Advanced tax rulings"[46] must be published in anonymous form on the aforementioned platform "*Fisconetplus*" or directly on the website of the Ruling Commission[47] (Royal Decree of 30 January 2003, art. 5). Since 2015, each ruling should be published on an individual basis. Previous years, rulings could be published on a collective basis[48]. However, if discretion cannot be assured in case of individual publication, the ruling is subject to a collective publication through the publication of the annual report.

51. The results of a mutual agreement in tax matters due to a mediation procedure, are currently not published due to a confidentiality principle[49] but this principle is currently under discussion[50]. Nevertheless, the recent Law of 10 July 2017 that strengthens the role of the tax mediation department maintains this confidentiality principle (art. 5).

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[42] Ministry of Finance, Administration contract 2016-2018, art. 27, pp. 33-34.

[43] For an example, see the announcement of 21 April 2015 which refers namely to company managers who have deducted their real professional expenses(https://finances.belgium.be/fr/Actualites/150421-fod_financi_n_kondigt_controleacties_aan_met_het_oog_op_een_verhoogde_spontane_naleving_van_de_fiscale_verplichtingen?referer=tcm:307-266048-64 (last access on 4 October 2017)).

[44] This approach tends to maintain contacts with citizens, companies and partners, and improve them (Ministry of Finance, Administration contract 2016-2018, part 13, p. 75).

[45] Ministry of Finance, Administration Plan 2016, art. 28, p. 13.

[46] By « advanced tax ruling », it should be understood, in Belgian Law, « the legal act by which the tax authorities rule, in compliance with the provisions in force, how the law shall apply to a situation or a particularly operation wich has not already produced effects in tax matters » (free translation) (Annual Report 2016 of Ruling Comission, p. 14).

[47] https://www.ruling.be (last access on 1st December 2017).

[48] Ruling Commission, Annual Report 2016, p. 25.

[49] Mediation department, Annual Report 2016, Ministery of Finance, p. 9, available through https://finances.belgium.be (last access on 3 October 2017).

[50] Ruling Commission, Annual Report 2016, p. 14, available through www.ruling.be (last access on 3/10/17).

52. Belgium publishes its proper black list of tax havens (art. 179 Royal Decree of BITC)[51]. Like all tax documentation, the text is available on the platform "*Fisconetplus*". But its access is not easy as a keyword search is impossible: the access to the list involves that the citizen knows that a "tax haven" is defined, in Belgium law, like a state with a non-existent or low taxation as referred to article 307, § 1, al. 5, b, of BITC.

4.2 Transparency towards the taxpayer

53. After identification, each taxpayer has free and safe access to "basic personal information" of his tax file through the aforementioned gateways "*MyMinfin*" and "*MyMinfin Pro*". The access is maintained even in case of investigation since this information is general and distinct from "the information necessary for tax investigation"[52]. The access to this last information can be denied (see *supra* n°. 27 and *infra* n°. 55).

"Basic personal information"[53] covers general information consolidated in the "unique tax file", such as information that the data subject provides himself to the tax authorities (data of tax return, annexes related to donations, etc.), documents sent by the tax authorities to the data subject (tax assessment etc.) and the data subject's real estate information. "Information necessary for tax investigation" covers information provided by third parties, foreign states, other Belgian administrative and judicial authorities and the results of a data mining procedure.

54. Besides this access to basic personal information of the personal tax file, article 32 of Belgian Constitution and the abovementioned Public Access Act (Law of 11 April 1994) guarantee that everyone has the right to consult each administrative document and to receive a copy. The access can only be refused when, in case of access to a personal document, the interest is lacking, or when one or more grounds for exceptions, as referred to article 6 of the Public Access Act. In tax matters, the most common ground seem to be privacy[54] (art. 6 § 1, 2° Public Access Act). The access may also be denied if there are *specific* circumstances to believe that the access could allow the taxpayer to avoid, totally or partly, or postpone the payment of tax claims (art. 6, § 1, 6° Public Access Act). Article 337/1 BITC provides also an exception (suspension of the right) in case of an information request of a foreign authority (see *supra* n°. 27). If the tax authorities deny the access, the citizen can repeat his request to the "Commission of Access to Administrative Documents". In 2016, the Commission received 132 requests for consultation. On the 134 advices given in 2016, 27 concerned the tax authorities and were especially related to the access to a tax file [55].

[51] Note that Belgium also uses the OECD and the UE list of tax havens.

[52] Project of the Law "portant des dispositions fiscales et financières et des dispositions relatives au développement durable", 17 April 2013, Preparatory documentation, nr. 53-2756/001, p. 58.

[53] E. Degrave and A. Lachapelle, *Le droit d'accès du contribuable à ses données à caractère personnel et la lutte contre la fraude fiscale* (comment under Constitutional Supreme Court, 27 March 2014), Revue Générale du Contentieux Fiscal nr. 2014/5, pp. 331-332.

[54] See the opinions by the Commission of Access to Administrative Documents (http://www.documentsadministratifs.be).

[55] Commission of Access to Administrative Documents, Annual Report 2016, pp. 2-23.

Opinions are published on the website of the Commission (http://www.documentsadministratifs.be). As discussed before, there is also a right to access personal data due to data protection regulation. In practice, citizens rarely use this right towards the tax authorities[56].

55. Besides these possibilities for the tax payer to have access to information, the tax payer should receive information spontaneously from the tax authorities in several situations. On the one hand the data protection regulation forces the authorities to inform the data subject whenever personal data are gathered from the data subject. The data subject should be informed on the purposes of the processing of his personal data, of the recipient of his data, etc. For this reason, a (general) privacy statement is included in the explanatory notes of the tax return. On the other hand, and when personal data is gathered from other parties then the data subject himself, data protection regulation enables the authorities to avoid informing the data subject. So, if the tax receives information from other countries, from other Belgian authorities or from other (private) third parties, there is no notification duty in the framework of data protection regulation.

There are however two situations in which there is a notification duty in income taxation maters, due to tax legislation. The first situation is the situation in which the tax authorities want to expand the time limit of a tax audit with four years in case of the violation of the tax code with fraudulent intentions (article 354 al. 2 BITC). In that case, the tax authorities have to notify the indications of fraud (article 333 al 3 BITC). In case of an international request for information, the time limit of a tax audit can be expanded with four years as well, this however without notification duties (article 333 al 3 BITC)(see 2.3).

The second situation in which there is a notification duty is the situation in which the tax authorities plan to ask a financial institution for information about a tax payer in case a previous tax audit demonstrates one or more indications of tax fraud or signs and indicants that the actual income is higher than the declared income (e.g. large expenses) (article 322 § 2 BITC) (see *supra* n°. 17). In that case, the tax authorities have to notify the tax payer of the abovementioned indicants at the same moment as the request for information is sent to the financial institutions, unless the rights of the State treasury are in jeopardy. Then, the notification can be post factum (art. 333/1 § 1). In case the tax authorities plan to request a financial institution for information due to an international request for information (art. 322 § 4 BITC), the tax payer will also be notified post factum, unless the foreign state proves that it already notified the tax payer or unless the request for information of the foreign state demonstrates strong indications of tax fraud and the foreign state specifically requests not to inform the taxpayer (art. 333/1 § 1 al. 4 BITC).

In case of transfer of information of the tax payer to foreign tax authorities or to other Belgian authorities, there is no notification duty.

[56] E. Degrave, *L'e-gouvernement et la protection de la vie privée. Légalité, transparence et contrôle*, p. 411, nr. 338 (Larcier 2014).

56. Some private third parties however, that have to report information to the tax authorities on a regular basis (for example, financial institution report on payments for real estate loans or insurance companies report on premiums of life insurances) (see *supra* nr. 7, 10, 15), do have the duty to notify the tax payer.

4.3 Usage of information towards the public, especially naming & shaming approach

57. Belgium has not adopted a "*naming & shaming approach*" what so ever. This approach is more common in the states of Common Law and/or Protestant tradition. Nonetheless and as mentioned before, mentalities are changing in the light of a transparency and whistleblowing movement. In this context, civil society is demanding for big companies to publish their tax return.

58. The recently introduced CbCR does not involve any publication towards the public As things stand, only credit institutions and investment firms must publish a CbCR as referred in article 89 of the Directive 2013/36/EU[57].

59. The Belgian legislator recently implemented the fourth AML European Directive (see *supra* n°. 22). The Law of 18 September 2017 lays down the creation of the Ultimate Beneficial Owner Register » ("*UBO register*"). This register is not public, but it will be largely accessible to competent authorities and the Belgian FIU without restrictions; to obliged entities, within the framework of their costumer due diligence, and to all persons and organisations which may demonstrate a legitimate interest.

60. Publication of information on tax subsidies and tax-exempt organizations is not foreseen in Belgian Law. None is there a possibility to disclose tax information on demand of public interest groups and of competitors.

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