Belgium

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Summary and conclusions

The most striking development in recent years in Belgium has been that of bank secrecy. Belgium has been rather slow in allowing foreign countries' requests for investigations with banks, despite the general international tendency to negotiate agreements that impose such investigations.

For example, Belgium showed little interest in the model tax information exchange agreement (TIEA) that was released by the OECD in 2002. Belgium even made a reservation when the OECD inserted a fifth paragraph in article 26 of its model double tax convention (DTC) in 2004, imposing the exchange of information (EOI) held by banks.

Under the alternative regime of the Savings Directive, Belgium preferred to withhold tax for the country of residence of the beneficiary of the interest covered by the directive instead of exchanging information on interest paid in Belgium.

The Belgian model DTC released in June 2007, although very much inspired by the OECD model DTC did not mirror its article 26(5). This did not necessarily mean that Belgium would decline to negotiate the provision in return for the adoption of a measure that Belgium wanted. As a matter of fact, Belgium agreed to lift bank secrecy in the DTC of 27 November 2006 with the USA in return for the exemption at source of dividends.

Under growing international pressure, Belgium changed its attitude. On 11 March 2009, Belgium announced that it would withdraw its reservation to article 26(5) of the OECD model DTC. This was not enough to avoid Belgium being listed as a non-cooperating country by the G20 in April 2009.

In order to escape that listing, Belgium had to sign 12 agreements conforming to international standards of transparency. This was completed in July 2009. To date (October 2012), Belgium has signed 28 DTCs or protocols amending DTCs and 14 TIEAs including an obligation on each party to investigate banks for the benefit of its treaty partner.

Furthermore, Belgium dropped the alternative regime of withholding at source for the country of residence permitted by the Savings Directive and switched over

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to the implementation of the ordinary EOI regime provided by this directive (since 1 January 2010).

Belgium also actively participated in the negotiation of the protocol open for signature in Paris on 27 May 2010, amending the Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988. Belgium signed this protocol on 4 April 2011.

The energy put into these projects by the international negotiators of the Belgian Administration of Fiscal Affairs has been overshadowed by the slow ratification process of tax treaties. When the bills for the approval of the first 12 new treaties were submitted to the Parliament, the Council of State held that those treaties came under the joint jurisdiction of the federal authorities, regions and communities because they covered tax matters exclusive to each of them. As a consequence, the Federal Parliament as well as the parliaments of the Belgian regions and communities must approve these proposed treaties before they can be ratified.

This slow process would have prevented Belgium from satisfying the requirements of the Global Forum on Transparency in time for phase 2 of the peer review (which took place in 2012). This is the reason why the Belgian government preferred to lift bank secrecy, not only for the needs of other countries but also for its own needs, by the Act of 14 April 2011.

Belgium has signed dozens of new EOI agreements in order to comply with the OECD's cooperation tests. These agreements have been patterned after the model TIEA when it was not deemed necessary to prevent double taxation. They have followed the pattern of the OECD model DTC or the Belgian model DTC, if a DTC already existed between the partners or the relationship justified it.

The Belgian model DTC and numerous agreements signed (slightly) differ from the OECD model DTC and TIEA. The reason for this is that they were negotiated at a time when Belgium still prevented investigations into bank files for the purposes of assessing income tax while the agreements should provide that such investigations will be allowed despite any contrary provision in Belgian law.

1. The Belgian background

The most striking recent evolution is the transparency of taxpayers' affairs, and not only in tax matters.

1.1. Access to information in general

In Belgium, much information on taxpayers' transactions is publicly released. Enterprises must register with the Crossroad Bank for Enterprises (*Banque Carrefour des Entreprises*) managed by the Federal Ministry of Economy.[1] Companies' deeds must be published in the official gazette (*Moniteur belge*) and are available on the internet. Enterprises' financial statements must be filed with the Central Balance Sheet Office (*Centrale des Bilans*) of the National Bank of Belgium and are also available on the internet.

[1] Act of 16 January 2003.

Belgian law is clamping down on secret holdings of assets. Belgian banks are prohibited from opening numbered accounts which would allow the account holder's identity to be hidden, except in rare and justified circumstances.[2] Resident individuals must report their foreign bank accounts in their annual tax returns.[3] Major holdings in listed companies must be published.[4] All securities in the bearer form issued in Belgium must be converted by 31 December 2013.[5]

Persons bound by professional secrecy or a non-disclosure duty are not relieved from the obligation to identify their customers and, in order to prevent money laundering, to report suspicious activities, where necessary through their disciplinary authorities, to the Belgian financial intelligence processing unit (*cellule de traitement de l'information financière*).[6]

Furthermore, taxpayers can "regularize", with the tax amnesty contact centre (*point de contact régularisation*) managed by the tax authorities, income or transactions that have not been properly reported in the past, subject to the payment of income tax or value added tax at the rate at which they should have been taxed and a penalty of 10 per cent applicable to dividends and interest. In principle, the tax amnesty provides immunity from criminal prosecution.[7]

In addition to publication required by law, the private sector also releases much information. The law on protection of privacy is designed to monitor this.[8]

1.2. Bank secrecy

Belgian bankers are not bound by professional secrecy, sanctioned by criminal law.[9] However, they are bound by a contractual duty of non-disclosure towards their customers. The Belgian treasury has traditionally acknowledged that confidentiality and, until now, has refrained, in principle, from using information it has collected during the audit of a bank for the purposes of taxing the bank's customers. This rule was enshrined in article 318 of the Income Tax Code (CIR1992).[10]

This so-called secrecy protects banks, exchange or credit institutions, credit card issuers and leasing enterprises.[11] It is still unclear whether insurance companies are also protected.[12]

This secrecy does not go further than the assessment of income tax. A bank may be requested to provide information when the tax authorities examine the merits of a tax claim (article 374 CIR1992), pursue collection of income taxes (article 319bis CIR1992) or review a request for indefinite collection suspension (article 413quater

2 CBFA's regulation of 27 July 2004.
3 Act of 10 August 2001.
4 Act of 2 May 2007.
5 Act of 14 December 2005.
6 Act of 11 January 1993.
7 Programme-Act of 27 December 2005.
8 Act of 8 December 1992.
9 Cass., 25 October 1978, Pas., 1979, I, 237.
10 It dates back from an Act of 8 August 1980.
11 Cass., 16 March 2007; Cass., 24 April 2008; Cass., 15 October 2009; Q.P. No. 398 of 24 April 1996, representative Colen, Q&R, No. 39; ComIR 318/4.
12 See Y. Bocquet, JDF, 2011, p. 327.

CIR1992). This secrecy cannot be relied on in other tax matters (VAT, inheritance taxes, tax on stock exchange transactions, etc.).

Article 318 CIR1992 is the reason why, until recently, the Belgian tax authorities were bound to decline a foreign country's request for investigations with banks (see section 3.6 below). This is also how Belgium was listed as a non-cooperating country by the G20 in April 2009.

The ratification of the numerous treaties, overriding the prohibition of investigations with banks, signed since then, was delayed (see section 2 below). To remedy the slowness of the process, the federal government proposed, on 11 February 2011, new legislation to amend article 318 CIR1992 and enable the tax authorities to investigate with Belgian banks.[13] This proposal did not achieve its objective and, in the end, bank secrecy was lifted by the new article 322 CIR1992 introduced by the Act of 14 April 2011.

Now the tax authorities may ask a bank about one of its customers if they have reason to believe there has been fraud, if they intend to adjust that customer's tax situation according to signs of wealth or if they must satisfy a foreign country's request pursuant to an international agreement. A strict procedure must be followed.[14]

In addition, the Act of 14 April 2011 provides for the creation of a central contact service (*point de contact central*) managed by the National Bank of Belgium, to which banks, exchange, credit and savings institutions will have to report information on their customers' identities, account and contract numbers (article 322, §3, CIR1992).

1.3. The Belgian legislature's attitude towards tax havens

Traditionally, according to Belgian standards, a tax haven was viewed as a low-tax jurisdiction. A number of provisions in the CIR1992 are geared towards transactions conducted in or with such countries.[15] The characterization tests are, however, disparate.

For example, for the application of the participation exemption (RDT), a foreign company is treated as benefiting from a favourable tax regime if it is taxed at a nominal rate of less than 15 per cent or if its actual tax burden is less than 15 per cent; the Belgian tax relief does not apply to dividends that such a company distributes to another company (article 203, §1(1), CIR1992). Fifty-one tax havens are listed in article 73/4quater AR/CIR1992 for the purpose of this measure. On 27 January 2010, the Council of Ministers decided to reduce the list to 26 countries.[16] To date[17] the list of the AR/CIR1992 remains unchanged.

On the other hand, for the purposes of the obligation to spontaneously report payments of more than EUR 100,000 made to companies established in tax havens, the test is the taxation of the recipient at a nominal rate of less than 10 per

13 Draft omnibus Act, Doc. parl., Chambre, 53-1208/001.
14 See circular No. Ci.RH.81/616.308 of 5 March 2012.
15 See C. Docclo, *Cahiers*, 2001, Vol. 86b, p. 399.
16 Court of Audit, *Coopération internationale des administrations fiscales belges*, Report of 2 February 2011 (Report CC), p. 28.
17 October 2012.

cent (article 307 CIR1992). Thirty tax havens are listed in article 179 AR/CIR1992 (of 6 May 2010).

Riding the international wave, the Belgian legislature has adopted another test: a tax haven may also be a non-cooperating country for EOI purposes. Payments of more than EUR 100,000 to companies established in such countries should also be spontaneously reported by Belgian companies (article 307 CIR1992). No country, however, has yet been identified as non-cooperating for the purposes of this measure, pending the results of the Peer Review Group of the Global Forum on Transparency.[18]

In the same vein, dividends paid by a Belgian company to its parent established outside the European Union are exempt from withholding tax only if the parent is established in a country with which Belgium has a DTC and an agreement on EOI (article 105, §5, AR/CIR1992).

Traditionally, Belgium has not negotiated tax treaties with tax havens. To avoid being listed as a non-cooperating country, Belgium has signed agreements on EOI with a multitude of countries since spring 2009; as part of the process, Belgium has even signed DTCs with countries that it still considers as tax havens for the purposes of articles 203 and 307 CIR1992 mentioned above.[19]

2. Recent Belgian international relationships in EOI matters

The most striking development in recent years in Belgium's international relationships has been that of bank secrecy. Belgium has been rather slow in allowing foreign countries' requests for investigations with banks, despite the general international tendency to negotiate agreements that impose such investigations.

For example, Belgium showed little interest in the model TIEA that was released by the OECD in 2002.[20] Belgium has even made a reservation when the OECD inserted a fifth paragraph in article 26 of its model DTC in 2004, imposing the exchange of information held by banks.[21]

Under the alternative regime of the Savings Directive,[22] Belgium preferred to withhold tax for the country of residence of the beneficiary of the interest covered by the directive instead of exchanging information on interest paid in Belgium.

The Belgian model DTC released in June 2007, although very much inspired by the OECD model DTC, did not mirror its article 26(5). This did not necessarily mean that Belgium would decline to negotiate the provision in return for the adoption of a measure that Belgium wanted. As a matter of fact, Belgium agreed to lift

18 Circular No. AAF 13/2010 of 30 November 2010; see also QP No. 485 of the representative Ducarme of 10 March 2010, Q&R, Ch. 2009-2010, No. 103, p. 233.

19 See Report CC, p. 28; Belgium has signed TIEAs with numerous other countries.

20 OECD model TIEA.

21 Com. OECD, 2005, art. 26, No. 25 and Com. OECD, 2008, art. 26, No. 26.

22 Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

bank secrecy in the DTC of 27 November 2006 with the USA in return for the exemption at source of dividends.

Under growing international pressure, Belgium changed its attitude. On 11 March 2009, Belgium announced that it would withdraw its reservation on article 26(5) of the OECD model DTC. This was not enough to avoid Belgium being listed as a non-cooperating country by the G20 in April 2009.

In order to escape that listing, Belgium had to sign 12 agreements conforming to international standards of transparency. This was completed in July 2009. To date (October 2012), Belgium has signed 28 DTCs or protocols amending DTCs and 14 TIEAs including an obligation on each party to investigate with banks for the benefit of its treaty partner.

Furthermore, Belgium dropped the alternative regime of withholding at source for the country of residence permitted by the Savings Directive and switched over to the implementation of the ordinary EOI regime provided by this directive (article 338bis CIR1992 applicable since 1 January 2010).

Belgium has also actively participated in the negotiation of the protocol open for signature in Paris on 27 May 2010, amending the Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988.[23] Belgium signed this protocol on 4 April 2011.[24]

The energy put into these projects by the international negotiators of the Belgian Administration of Fiscal Affairs has been overshadowed by the slow ratification process of tax treaties. When the bills for the approval of the first 12 new treaties were submitted to Parliament, the Council of State held that those treaties came under the joint jurisdiction of the federal authorities, regions and communities because they covered tax matters exclusive to each of them. As a consequence, the Federal Parliament as well as the parliaments of the three Belgian regions and three communities must approve these proposed treaties before they can be ratified.[25]

This slow process would have prevented Belgium from satisfying the requirements of the Global Forum on Transparency in time for phase 2 of the Peer Review (which took place in 2012).[26] In phase 1 of the Peer Review, this inertia was described as "the major shortcoming" in the Belgian framework.[27] This is the reason why the Belgian government preferred to lift bank secrecy, not only for the needs of other countries but also for its own needs, by the Act of 14 April 2011.

23 Hereinafter the convention of 25 January 1988.

24 To date (15 October 2012), the protocol is in force regarding 18 countries (Belgium is not one of them) and has been signed by 19 other countries.

25 See for example the opinion of the Council of State on the proposed bill for approving the protocol of 24 June 2009 to the Belgium–UK treaty, Doc. parl., Sénat (2010–2011), 5-965/1, p. 46; see also the 11 other proposed Acts, Doc. parl., Sénat (2010–2011), No. 5-961 to 972.

26 See, for more detailed information, Hearings on the lifting of bank secrecy, 23 March 2011, Doc. parl., Ch., 53-1312/001; the reply to joint questions of MMrs. Gilkinet and Arens, 19 January 2011, CRVI 53 COM 098, p. 15; explanatory memorandum to the above proposed Act of 11 February 2011 with miscellaneous provisions, Doc. parl., Ch., 53-1208/001, p. 36.

27 OECD (2011), Global Forum on Transparency and Exchange of Information for Tax Purposes, peer reviews: Belgium 2011: phase 1, OECD Publishing, p. 7.

3. Current Belgian situation with respect to EOI

3.1. Introduction

The general reporter focuses on the exchange of information held by banks. To date (October 2012) the sole agreement in force regarding Belgium, which specifically provides for the lifting of bank secrecy for the purposes of international exchange, is the DTC of 27 November 2006 with the USA.

Aspects other than bank secrecy are nevertheless of more immediate importance to Belgian taxpayers. This report sets out to cover all the relevant aspects. Belgian practice in the matter of EOI is based on existing international instruments in force and (newly adopted) domestic provisions.

3.2. Preference for bilateral negotiations

Belgium prefers bilateral agreements regarding EOI. As a consequence, Belgium is party to bilateral conventions with dozens of countries.[28]

Belgium has ratified one multilateral convention only: the Convention of the Council of Europe of 25 January 1988.[29] This convention organizes a procedure common to all signatory countries; however, two signatories will exchange information between them, pursuant to this convention, only for the purposes of taxes that both have elected.[30] The 1988 convention works as a double-entry table with respect to its scope.

Belgium also participates in EOI organized by the European Union (that it must have implemented, when necessary).[31]

3.3. Priority rules between the relevant instruments

The first priority rule between the instruments available is the primacy of the most efficient instrument.[32] Nevertheless, the European Union's instruments supersede the convention of 25 January 1988.[33]

When Belgium initiates an EOI, it invokes every instrument available so that the most efficient can be applied. In income tax matters, Belgium combines references to bilateral DTCs and Directive 77/799, when it requests a European Union country, or adds in some cases the convention of 25 January 1988 to the applicable DTC, when it requests another signatory country of this convention.

28 http://fiscus.fgov.be/interfafznl/fr/international/conventions/enVigueur.htm.

29 To date (October 2012) the other signatory countries apply this convention *vis-à-vis* Belgium ignoring the protocol of 27 May 2010, since it has not yet ratified the latter.

30 See the annex to the convention.

31 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, implemented by art. 338 CIR1992, Savings Directive, Council Regulation (EU) No. 904/ 2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

32 Directive 77/799, art. 11.

33 Convention of 25 January 1988, art. 27, §2.

3.4. The Belgian practice

Statistics available on the volume of exchanges are only indicative because each Belgian "competent authority" uses specific units of measurement and the European Commission redefined the unit of measurement in mid-2009. Statistics do not reflect the importance of the exchanged information. For example, the "Liechtenstein list" of 2008, handed over by the German treasury, was counted as one single exchange, whereas it led to the collection of revenues amounting to EUR 6,570,000 as of 24 February 2010.[34]

Belgium exchanges information mainly with countries with which it has substantial economic ties. It has, however, concluded cooperation administrative agreements with 12 countries to date (October 2012),[35] although neighbouring countries are its favoured partners. France receives more than half of the information sent out by Belgium, the Netherlands, around 10 per cent.[36]

Foreign languages are no longer an impediment to international exchange. The use of attachments to foreign answers may, however, be more difficult when they are written in the language of the country of origin.[37]

The most frequently used form of exchange in Belgium is the exchange on request. Automatic exchange is gaining in importance, in particular since the Savings Directive has promoted such exchanges. In an exchange on request, the requested country must supply information relating to a particular case to the requesting country which has specifically requested it, it being understood that the regular sources of information available under the domestic procedure of the requesting country have been exhausted before the request for information is made. Belgium addressed 289 requests abroad pursuant to bilateral conventions in 2009; 235 in 2010; and 208 in 2011. Most of them were sent to EU Member States. Belgium received 264 requests from abroad pursuant to bilateral conventions in 2009; 134 in 2010; and 247 in 2011.[38]

In the absence of a request, a country may routinely send bulk information, without prior selection, concerning specified items of income or capital to another country if it has undertaken to automatically exchange information. Since September 2009, with the application of Belcotax-on-web for international purposes, salary, pension, fee and royalty slips are automatically transferred. In 2011, Belgium sent 2,567,169 files relating to income of the years 2008 through 2010 to 27 countries in application of the DTC (OECD format) and received 1,073,566 files from 22 countries relating to the income of the years 2008 through 2010. The Savings Directive has also increased the volume of automatic exchanges. The Savings Directive triggered the sending of 387,295 files (2010 income) and 379,290 files (2011 income) to 26 countries and 7 associated and dependent territories. Under the Savings Directive Belgium received 215,914 files (2009 income) from 26 countries and 2 territories and 252,073 files (2010 income) from 26 countries

34 Report CC, p. 53.
35 Canada, Denmark, Estonia, the USA, France, Italy, Lithuania, the Netherlands, Rwanda, the Czech Republic, Ukraine; http://fiscus.fgov.be/interfafznl/fr/international/cooperation/administration.htm.
36 Report CC, pp. 40, 50; see also 2010 SPF Finances Chiffres, p. 110.
37 Report CC, p. 54.
38 See also *ibid.*, p. 56.

and 9 territories.[39] Information is collected with Belgian banks according to the J. Monnet protocol agreed between them, Febelfin and the Federal Ministry of Finances.[40]

In the absence of a specific request, one country may also pass on information obtained during the examination of a taxpayer's affairs or otherwise, which might be of interest to another country (spontaneous exchange). Belgium received 167 spontaneous exchanges from other OECD member countries in 2010; 195 in 2011. It sent 144 items in 2010 and 151 in 2011. Such spontaneous exchanges mostly occur with EU Member States.[41]

A simultaneous examination is an arrangement between countries to examine simultaneously each in its own territory, the tax affairs of a taxpayer or taxpayers in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain. Belgium has conducted a pilot project of simultaneous audits with the Netherlands. Following the success of this cooperation, a similar programme has been organized with France too.[42] Simultaneous examinations have taken place with other European countries specifically to combat fraud. In 2010, 69 income tax files were simultaneously audited.[43]

In exceptional circumstances, a country may permit authorized officials of another country to enter its territory to interview taxpayers or examine books and records or to be present at such interviews or examinations carried out by its tax authorities in its territory in accordance with its procedures. The country that allows foreign officials to attend a tax audit keeps control of that audit.

In the framework of the European programme Fiscalis,[44] there were, in 2010, 59 secondments of Belgian officials abroad and 48 secondments of foreign officials to Belgium, for periods of one to ten days.[45] On the agendas were, for example, the common methodology used to determine transfer pricing, risk management, datamining and simultaneous audits.[46]

"A joint audit is where two or more countries join together to form a single audit team to examine an issue(s) or transaction(s) of one or more related taxable entities or persons."[47] This is the only form of cooperation where the requested country invites foreign officials and loses control over the investigations led in its territory. Belgium has not yet participated in such audits.

[39] See also the reply of 17 February 2012 to question No. 103 of the representative Van der Maelen, QRVA 53 053, p. 591.

[40] http://minfin.fgov.be/portail2/fr/e-services/index.htm#C2.

[41] See also Report CC, p. 56.

[42] For the purposes of those agreements, the term "competent authorities" has been extended to officials of local services.

[43] In the aggregate, there were 78 simultaneous audits among which 69 were related to direct taxes and 77 were related to VAT (2010 SPF Finances Chiffres, p. 113).

[44] The Fiscalis programme has been introduced by Decision No. 1482/2007/EC of the European Parliament and of the Council of 11 December 2007 establishing a Community programme to improve the operation of taxation systems in the internal market. Other exchanges are organized by Belgium.

[45] 2010 SPF Finances Chiffres, p. 113.

[46] *Ibid.*, p. 114.

[47] In the meaning of the Istanbul Communiqué of the Sixth Meeting of the OECD Forum on Tax Administration, 15–16 September 2010.

3.5. Taxes and taxpayers covered

Almost all DTCs provide for EOI for the purpose of assessment of the taxes that they cover (taxes on income and on capital).[48] Others limit the exchange to the enforcement of treaty provisions.[49] The DTC with the former USSR (which still applies in dealings with a number of states resulting from the break-up of the USSR) simply makes no provision for any EOI for the purposes of a specific taxpayer's taxation.

The convention of 25 January 1988 covers, as regards Belgian taxes, those that Belgium listed in the annex to the convention.

Most of the DTCs provide that they do not restrict exchange on the grounds of taxpayers' residence. The DTC with France, however, explicitly provides the opposite (only residents of the treaty partners are targeted). A number of DTCs are silent on the specific scope of the exchange provisions regarding relevant taxpayers.[50] One may infer that those DTCs only allow EOI on residents of their treaty partners.[51] The OECD is, however, of another opinion.[52]

Directive 77/799 and the convention of 25 January 1988 target all taxpayers, regardless of residence.[53]

3.6. Compliance with domestic procedures

Traditionally, countries do not undertake to conduct investigations that their own laws do not allow. They reserve the right to decline to process a request if the other country has not carried out the necessary investigations to find the requested information or when the requesting country's own rules prevent it from conducting such investigations.[54]

The Peer Review of the Global Forum on Transparency has stated that "there is no provision in Belgian legislation or in its information exchange agreements that sets out clear conditions governing the exchange of information, other than those included in article 26 of the OECD model DTC or the OECD model TIEA".[55]

Nevertheless, it is because the tax authorities' powers of investigation are restricted under Belgian law that Belgium did not conduct investigations with banks for another country and that Belgium was listed as a non-cooperating country. For the same reason, Belgium could not request another country to investigate with banks for its own needs. Because of the reciprocity principle, the other countries would not have satisfied its request.

48 DTCs with Brazil, Canada, Ghana and Rwanda.

49 DTCs with Kuwait and Switzerland.

50 DTCs with Austria, Bulgaria, Republic of Korea, Denmark, India, Ireland, Israel, Japan, Kuwait, Luxembourg, Malaysia, Malta, Morocco, the Philippines, Portugal, the United Kingdom, Singapore and Switzerland.

51 J.-P. Lagae, I. Behaeghe, "Internationale samenwerking…" in *Actuele problemen*, 1989, p. 314; A. Bailleux, *Cahiers*, 1990, Vol. 75b, p. 233; Ph. Malherbe, JDF, 1991, p. 328.

52 Com OECD, 1996, art. 26, No. 4.

53 Art. 1 of Directive 77/799; Convention of 25 January 1988, art. 1(3).

54 Art. 26(3) of the OECD model DTC; arts. 1 and 5(5)(f) of the model TIEA, art. 338, §3, CIR1992.

55 Peer review, p. 61.

Belgium has not mirrored article 26(5) of the OECD model DTC in its own DTCs currently in force (October 2012). There was thus no possible derogation from the above principle before the lifting of bank secrecy under Belgian law. The DTC with the Congo of 23 May 2007 provides for the exchange of bank information but it does not compel a treaty partner to investigate with banks if one of them protects bank secrecy.[56] On the other hand, the DTC with the USA does mirror article 26(5) of the OECD model DTC and even goes much further.

If Belgium does not have the requested information available in its files, it conducts investigations according to its own rules, including the statute of limitation on investigations,[57] provided that the requesting country is not time barred in relation to the same investigations. The DTC with the USA derogates from that rule and imposes on Belgium the obligation to conduct investigations for the USA regardless of Belgian statutes of limitation on investigations.[58]

The Belgian tax authorities may use all means available to them under Belgian law. Penalties provided by Belgian law *vis-à-vis* non-cooperating taxpayers or business partners also apply if the Belgian tax authorities are acting at the request of a foreign country. The DTC with the USA provides that domestic penalties apply to persons failing to give information.[59] This may have been useful when banks could decline assistance to the treasury under domestic legislation.[60] This is no longer necessary since banks are compelled to provide assistance like other business partners (subject to the above procedural rules).[61]

3.7. "Fishing expeditions"

In order to assess income taxes, the Belgian tax authorities may require taxpayers to provide any information relating to any person or group of persons, even if they are not identified by name, with which the former are or have been in a business relationship (article 323 CIR1992). Such investigations are not allowed with banks which must provide information only when the tax authorities are able to pinpoint one taxpayer who is the focus of an investigation. A bank must only provide information when the tax authorities specifically designate by name the taxpayer that is the object of the inquiry.

The tax authorities do not use their wide powers to discover information for the benefit of another country. Belgium considers that other country's request is legitimate only if the case so justifies, i.e. if it concerns a given taxpayer or a given transaction, and if the requesting country has thoroughly exhausted its own lines of enquiry for the requested information.[62] If the requesting country has made suffi-

56 This DTC does not deviate from the above principle. See, however, the rash statements in the explanatory memorandum of the bill for the approval of the treaty (Doc. Parl., Sénat (2007–2008), 4-946/1, 14).

57 Information available in the tax authorities' files may be handed over after the statute of limitation on investigation has run.

58 Art. 25(6).

59 Art. 25(7).

60 See for example the opinion of the Council of State on the bill on the approval of the protocol amending the DTC with Australia, Doc. parl., Sénat (2010–2011), 5-962/1, p. 36.

61 See for example the report of the Commission of Foreign Affairs on the bill on the approval of the protocol amending the treaty with the UK, Doc. parl., Sénat (2010–2011), 5-965/3, p. 6.

62 Report CC, p. 20; also art. 338, §§4 and 5, CIR1992.

cient investigation, Belgium acknowledges that the request focuses on "necessary" or "relevant" information within the meaning of article 26(1) of the OECD model DTC (depending on the version).[63]

Regarding bank investigations, Belgium made a specific reservation in the commentary to the OECD model DTC in 2008:

> "Belgium reserves the right not to include paragraph 5 in its conventions. Where paragraph 5 is included in one of its conventions, the exchange of information held by banks or other financial institutions is restricted to the exchange on request of information regarding both a specific taxpayer and a specific financial institution."[64]

This reservation has no longer been mentioned since the 2010 OECD commentary. The protocol to the USA–Belgium DTC of 27 November 2006, however, still makes such an explicit reservation.[65]

3.8. Notice given to the taxpayer

When the tax authorities initiate investigations within the ordinary three-year period, they are not requested by law to notify the taxpayer that they are doing so. They must notify the taxpayer if they have indications of fraud and if they intend to use the extraordinary seven-year look-back period applicable in such a case (article 333 CIR1992).

Whenever the tax authorities want to conduct bank investigations (in cases of signs of fraud or signs of wealth, see section 1.2 above) they must first request information from the taxpayer itself and announce that they intend to request banks if it does not satisfy the request for information within a month (articles 322 and 333/1 CIR1992).

However, since the Act of 7 November 2011 that "repaired" the Act of 14 April 2011, the Belgian tax authorities are relieved from notifying the taxpayer when they are requested to conduct investigations with a bank for the benefit of a foreign country, although they are still obliged to notify in advance when they investigate with banks for their own needs (article 333/1 CIR1992).

These are the only instances in which the tax authorities notify the taxpayer of the possibility of an investigation with his (its) bank in the absence of an appropriate answer. The tax authorities must follow the same procedure when they envisage requesting bank information from another country. This notification is not required when the tax authorities use information spontaneously supplied by a foreign country.[66]

When a request is received from foreign tax authorities, the Belgian tax authorities inform the taxpayer if they must conduct an investigation after the expiration

63 In the draft prior to 2004, reference was made to "necessary" information; since 2004, reference is made to "relevant" information.

64 Com. OECD, 2008, art. 26, No. 26.

65 Art. 7.

66 Mons, 29 May 2009, Fiscalnet.

of the ordinary three-year look-back period, and notify the taxpayer of signs of fraud specified by the requesting country, as they would have to do when they investigate for their own needs.

The Belgian tax authorities inform the taxpayer in exceptional circumstances when information requested by another country may affect commercial secrets (this may be the case when the investigations cover hidden fees or admissible bribes). The taxpayer is not, however, informed if the requesting country specifies that the investigations might be jeopardized if the taxpayer is aware of them.

3.9. Issues relating to the maintenance of data banks

The Act of 8 December 1992 mentioned above on the protection of privacy deals in particular with data bank processing. The Act of 3 August 2012 serves to introduce into this framework the processing of personal data by the tax authorities. One of the questions that this law raises is that the taxpayer is denied the rights to access and to amend data collected by the tax authorities when his tax affairs are audited (article 11).[67] Another question is whether an inquiry for the benefit of a foreign country also triggers such a denial of rights.

States usually take care to ensure the protection of taxpayers' privacy by their partners to which they send information. As opposed to other countries, Belgium has not yet included specific provisions to that end in its agreements.

3.10. Confidentiality of exchanged information

International agreements ensure that information transferred to or by another country will not be disclosed in an inappropriate manner.[68] Such information must be held secret in the same manner as domestic source information. In Belgium, evidence received from abroad is kept in a separate file entitled "confidential: information from abroad". Access to information from abroad is limited to duly authorized officials.

Information exchanged on the internet between EU Member States is protected by a secured computer network made available by the European Commission (common communication network or CCN). Encrypted CD-ROMs are also used to share information. The domestic network on which the (same) information is passed on between the Belgian authorities is less secure.

The Act of 11 April 1994 on the transparency of the administration allows taxpayers to see their administrative files.[69] However, that Act also allows the administration to deny a taxpayer the right to access his file for reasons of Belgian international relationships or professional secrets (article 6, §1(3) and §2(2)). Such a divergence from article 32 of the Constitution merits very serious thought.[70]

[67] Opinion of the Council of State, Doc. parl., Chambre, 53-2343/001, p. 21; see also the opinion of the Council of State on the expired proposed bill of 4 April 2007, Doc. parl., Chambre, 51-3064/001, p. 62.

[68] Art. 26(2) of the OECD model DTC and art. 8 of the model TIEA.

[69] Case law is not unanimous. See the reports of the Commission for the access and use of administrative documents, the decisions of the Council of State and Cass., 23 October 2000.

[70] See Council of State, No. 215,251, 20 September 2011.

3.11. The use by Belgium of information received from abroad

Under domestic legislation, EOI between the domestic tax authorities is a rule (articles 335 and 336 CIR1992). This is not true with respect of information received from abroad. Information received from another country can be used only for the purposes of the taxes covered by the exchange provision (see section 3.5 above); if the relevant exchange provision covers income tax and tax on capital, information may be used for the purposes of assessing those taxes only; if the provision covers all taxes, information may be used for the purposes of assessing all taxes.

As outliers, the DTCs with Chile and the Netherlands provide for exchange for income tax purposes, but seem to allow the use of information received for the purposes of all other taxes.

The DTC with Rwanda of 16 April 2007 provides that information may be used for other purposes when the laws of both countries permit such use and when the country providing the information authorizes such use.[71] Such a provision was already included in the convention of 25 January 1988.[72]

Since DTCs are binding on two countries only, information received from a treaty partner cannot be passed on to a third country, even if the country receiving the information and that third country are also bound by an EOI agreement.

The convention of 25 January 1988 allows each signatory partner to use information received under that convention for assessing taxes for which it has undertaken to provide information (article 22(3)). The Belgian tax authorities do not allow the use of information relating to income tax received pursuant to Directive 77/799 for the purposes of VAT.

A party to the convention of 25 January 1988 may pass on information received from another party to a third party only with the consent of the party that provided it (article 22(4)). Directive 77/799 also allows an EU Member State to pass on information received from another Member State to a third Member State, only with the consent of the former that provided it (article 7(4)).

Belgian law allows taxation of income which has not been declared for the last five preceding years and that has been identified as taxable through an investigation conducted abroad.[73] Such hidden items of income may be taxed within an additional 24-month period from the receipt of information from the authorities that carried out the investigation.[74] This is one of the longest look-back periods under Belgian law for the purposes of assessing income tax. In the absence of an investigation abroad, this extraordinary statute of limitations does not apply; therefore, it is not clear whether this applies in the case of automatic exchange.

71 The same language was included afterwards in the Belgian model DTC of 2010 and, since its revision of July 2012, in art. 26 of the OECD model DTC.

72 Art. 22(4).

73 As in Belgium income is reported in the year following that during which it is earned, this amounts to saying that information relating to the six years preceding the exchange may be used. Whether this measure complies with EU law is not examined in this report (see European Court of Justice, 155-157/08, 11 June 2009).

74 Art. 358, §3, CIR1992.

3.12. The efficiency of information received from abroad

Of course, information for taxation purposes is only effective if the taxpayer to whom it relates can be identified. Taxpayers are generally identified on the basis of their names, domicile or registered office.

In 2011, only 55 per cent of automatically exchanged information could be related to identified taxpayers.[75]

The identification process is probably the most developed in the framework of the Savings Directive. In this context, the taxpayer's identity includes his tax identification number (TIN). A number of EU countries use the TIN. Since 1 January 2012, Belgium has obliged its banks to identify their customers using their TIN.[76]

Of information relating to 2007 collected under the Savings Directive 76.51 per cent has been identified; 58.23 per cent relating to 2008, 70.01 per cent relating to 2009; and 62.64 per cent relating to 2010. For 2007, 2,924 files were opened and amendments to reported income were made for an aggregate amount of EUR 61,266,206 (with the taxpayers' consent) and EUR 4,770,017 (without their consent); 364 files resulted in amendments to taxpayers' returns regarding other items of income than interest, amounting to EUR 12,686,978 (with consent) and EUR 592,993 (without consent).[77]

Another issue is that of the effectiveness of information received from foreign tax authorities which was obtained through processes that the Belgian tax authorities could not have used.[78] The issues of acceptability and weight of evidence must be distinguished.

In matters other than tax matters, the *Cour de cassation* has held that, except in cases where a formality is required, failing which the evidence is null and void, evidence which is illegally obtained can only be set aside if the manner in which it was obtained casts doubt on its credibility or adversely affects the right to a fair trial.[79] Neither the Constitutional Court nor the European Court of Human Rights has considered this case law as being in conflict with the European Convention on Human Rights.[80] The *Cour de cassation* has not yet been called upon to take a decision on a similar issue in tax matters and lower courts are not unanimous.

(Lower) courts' decisions in the *KBLux* cases have shown that an admissible item of evidence could lack evidentiary authority.

3.13. The use by the requested country of information sought by a requesting country

Nothing in Belgian law prevents the Belgian tax authorities from using information collected during an investigation conducted at the request of another country. Obviously, they may only use it before the statute of limitation on assessment has run.

75 Report CC, p. 55.
76 Circular No. Ci.R.9.Div./602.285 of 12 March 2010 (add. 28 June 2011).
77 Reply of 16 July 2012 to question No. 430 of representative Van der Maelen, QRVA 53,075, p. 102.
78 The issue of the use of information received under the Savings Directive before Belgian law allowed bank investigations has been raised too (cf. C. Docclo, JDF, 2010, p. 27).
79 Cass., 14 October 2003, 23 March 2004, 2 March 2005, 10 March 2008.
80 C. Const., No. 158/2010, 22 December 2010; ECHR, 28 July 2009.

The bill of approval of the DTC with the USA tempers this rule: Belgium cannot, for the purposes of taxing its own taxpayers, use information obtained by the US tax authorities from Belgian banks.[81]

Finally, let us note that the convention of 25 January 1988, as well as the DTCs and TIEAs patterned on the OECD models, prevent a country from declining a request from another country solely because it has no domestic interest in the requested information.[82] Belgium has never sought to decline to supply information solely on the grounds that it could not use it for its own purposes.[83]

3.14. Swifter EOI

The Peer Review of the Global Forum on Transparency has stated that Belgian law neither imposes a time limit on supplying information requested by another country nor prevents information being supplied within 90 days.[84] However, Belgium remains bound by its statute of limitations on investigations. The amendment, by the Act of 7 November 2011, to the process of accessing bank files (see section 3.8 above) avoids the Global Forum considering that domestic procedures preceding bank investigations slow down EOI.

The Court of Audit has stated that the average time needed to answer a request from abroad was 76 days in 2008 and 140 days in 2009.[85] Despite this statement, the response times are coming down. The answers to inquiries by a foreign country within 90 days went from 23 per cent in 2009 to 35 per cent in 2011 (29 per cent in 2010). Answers sent within 180 days went from 18 per cent in 2009 to 25 per cent in 2011. Obviously, the number of responses sent later has decreased. The proportion of unanswered requests has, however, also increased (from 9 per cent in 2009 to 22 per cent in 2011).

Belgium has undertaken to supply information to the US treasury within six months from the date of request.[86] On 14 June 2012, the USA declared that Belgium had complied with its commitments.

The disparity between the computer systems used by different countries sometimes slows down the transfer of information, because files must be converted into a format that can be used by the recipient.[87]

Exchanges are not processed directly by local tax services: requests and answers flow through the “competent authorities” appointed by each country.[88] This process does nothing to accelerate the exchanges. For this reason, Belgium has concluded agreements with the Netherlands and France to grant the status of competent

81 Art. 6.
82 Art. 26(4) of the OECD model DTC, art. 5(2) of the model TIEA.
83 The equivalent of art. 26(4) of the OECD model DTC is sometimes to be found in the protocol to the DTC signed by Belgium. The DTC with Chile is an example.
84 Peer Review, p. 61.
85 Report CC, p. 57.
86 Administrative arrangement of 30 January 2008.
87 The OECD allows the use of two different systems.
88 In Belgium, a range of services qualify as “competent authorities”: the Direct Taxation Liaison Office, the Special Tax Inspection (ISI), the Administration of Fiscal Affairs, the processing and coordination service and the “Anti-tax haven” task force.

authority to certain officials of the border area and to allow simultaneous audits by local services of the border area. This does lead to swifter EOI.[89]

The time needed to automatically exchange information obviously depends on the time needed to collect it. In Belgium, returns (salary slips and others) reach the tax authorities several months after the end of the period covered by those returns.

4. The future of information exchange in Belgium

4.1. Introduction

Belgium has signed dozens of new EOI agreements in order to comply with the OECD's cooperation tests. These agreements have been patterned after the model TIEA when it was not deemed necessary to prevent double taxation. They have followed the pattern of the OECD model DTC or the Belgian model DTC if a DTC already existed between the partners or the relationships justified it.

The Belgian model DTC and numerous agreements signed (slightly) differ from the OECD models DTC and TIEA. The reason for this is that they were negotiated at a time when Belgium still prevented investigations into bank files for the purposes of assessing income tax while the agreements should provide that such investigations would be allowed despite any contrary provision in Belgian law.

4.2. Preference is given to bilateral agreements

Except for the protocol of 27 May 2010, amending the convention of 25 January 1988, every new Belgian agreement is bilateral, even though the OECD model TIEA also favours multilateral negotiations.

Belgium will also have to implement the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

Directive 2011/16/EU requires a Member State that provides wider cooperation to a third country than that provided for under the directive to provide the same wider cooperation to other Member States (article 19). The European Commission considers that Belgium must extend to other Member States the wide cooperation provided for in the DTC with the USA.[90]

The priority between these instruments goes to the most efficient. European instruments no longer supersede the convention of 25 January 1988, as amended.

4.3. Taxes and taxpayers covered

Although the OECD model DTC covers all taxes, the model TIEA covers mainly direct taxes.

89 See section 3.4 above.

90 *Auditions sur la levée du secret bancaire*, 23 March 2011, Doc. parl., Chambre, 53-1312/001, p. 69; see also CRIV 53 COM 071, p. 14.

The new DTCs or protocols to existing DTCs cover all taxes in general. However, the DTC with the Isle of Man covers taxes on income and capital only. The DTCs with Macedonia and Rwanda also cover all taxes but they provide that the scope may be changed by simple agreement of the competent authorities or by exchange of letters. The DTC with the Netherlands extends the agreement to "measures related to income".

Certain TIEAs cover all taxes;[91] others, income taxes and VAT,[92] or only income taxes;[93] others, income taxes, VAT, registration duties and inheritance taxes.[94]

4.4. Compliance with domestic procedure

DTCs as well as the convention of 25 January 1988 allow a requested country to decline assistance when the requested investigations are not permitted under its own law or the law of the requesting country. They all include an exception related to information held by banks, nominees, agents, persons acting in a fiduciary capacity, as the OECD model provides. The DTC with China restricts this exception to information held by banks.

Most Belgian DTCs extend the exception to information held by a trust or a foundation, as the Belgian model DTC does.[95] However, Belgian law contains no specific rules regarding information held by trustees (the concept of a trust does not even exist under Belgian law).

The Belgian model DTC adds the following language to article 26(5) of the OECD model DTC:

> "To the extent necessary to obtain such information, the tax administration of the requested Contracting State shall have the power to require the disclosure of information and to conduct investigations and hearings notwithstanding any contrary provisions in its domestic tax laws."

Numerous DTCs contain the same provision.[96] Such a wide wording allows the statute of limitations to be overridden in the context of an investigation with the banks of the requested country. As for the DTC with Germany, it sets aside the procedures of the requested country in general, and not just for the purposes of investigations with banks.[97]

The proposed bills of approval of the new DTCs include, as did the bill of approval of the DTC with the USA, a provision overriding article 318 CIR1992 in order to satisfy those commitments.[98] As a consequence of the introduction of

91 Antigua and Barbuda, Bahamas, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines.

92 Andorra, Belize, Dominica, Gibraltar, Grenada, Liechtenstein, Montserrat.

93 Monaco.

94 Anguilla.

95 DTCs with Germany, Congo, the Republic of Korea, Denmark, Spain, Finland, France, Greece, the Isle of Man, Iceland, Japan, Malta, Norway, the Netherlands, the Czech Republic, the UK, Rwanda.

96 DTCs with Austria, Australia, Bahrain, China, Congo, the Republic of Korea, Denmark, Spain, Finland, France, Greece, the Isle of Man, Iceland, Japan, Malaysia, Malta, Norway, the Netherlands, the Czech Republic, the UK, Rwanda, San Marino, Singapore.

97 See Peer Review, p. 47.

98 For example, the proposed bill of approval of the DTC with the UK, Doc. parl., Sénat (2010–2011), 5-965/1.

article 322 CIR1992, such a provision no longer served a useful purpose and was deleted in the proposed bills.[99]

Numerous TIEAs differ from the OECD model TIEA. The rule concerning the protection of the rights and safeguards afforded to taxpayers by the laws of the requested party (article 1 of the model) is not mirrored in several TIEAs.[100] Where the model TIEA provides that the parties must ensure that their competent authorities have the authority to conduct requested investigations (article 5(4)), some TIEAs simply provide that the requested investigations will be conducted notwithstanding any contrary provisions in the laws of the requested country.[101] Among the latter, some nevertheless include the provision requiring the parties to amend their legislation to give effect to their TIEA (article 10).[102]

Amazingly, TIEAs do not allow the requested party to decline a request on the grounds that the requesting party itself would not be able to obtain the requested information under its own laws, although this does appear in the model TIEA (article 7(1)) which even provides that a request for information must include a statement of the requesting party that the request is in conformity with its own laws (article 5(5)(f)). Article 7(1) is not included in most of the TIEAs.[103] A number of them even specifically provide the contrary,[104] and sometimes even in the transitional provisions.[105] The statement of conformity with the laws of the requesting country is not required in Belgian TIEAs.

Those derogations from the models, dating back to a time when bank secrecy had not yet been lifted in Belgium, were designed to enable Belgium to obtain from its partners information held by foreign banks, even though it was not allowed to collect such information on its own territory. These derogations go far further, however.

4.5. "Fishing expeditions"

As was the case previously, a country may still decline a request for investigation. The test remains the relevance of the requested information. The DTC with Germany states that information is relevant if the requesting country declares that it is. A number of DTCs provide that a request for investigation with banks must precisely identify a taxpayer and a financial institution.[106] By exchange of letters, Belgium and Luxembourg have agreed upon a testing protocol to verify the relevance of the requested information, which is similar to that included in the model TIEA.

In general, TIEAs include the protocol for the purpose of testing the relevance included in article 5(5) of the model TIEA, but for certain provisions (see above concerning article 5(5)(f)).

The convention of 25 January 1988 (as amended) also provides for the precise identification of the taxpayer (article 18).

99 Report of the Commission of Foreign Affairs on the proposed bill of approval of the DTC with the UK, Doc. parl., Sénat (2010–2011), 5-965/3.
100 TIEAs with Andorra, Belize, Monaco.
101 TIEAs with Andorra, the Bahamas, Belize, Monaco, Montserrat.
102 Bahamas, Montserrat.
103 TIEAs with Andorra, Antigua and Barbuda, the Bahamas, Gibraltar, Montserrat, Saint Kitts and Nevis.
104 TIEAs with Belize, Monaco.
105 TIEAs with Saint Lucia, Saint Vincent and the Grenadines.
106 DTCs with China, the Isle of Man and the Seychelles.

The admissibility of group requests (regarding groups of taxpayers) is reviewed in the light of the OECD's studies.

4.6. Confidentiality of information received from abroad

Confidentiality of information from abroad receives the same attention in the new instruments as it did in the former ones.

Certain TIEAs have the particularity of specifically referring to article 199 of the Economic Partnership Agreement of 15 October 2008 between the Cariforum States and the European Community and, therefore, reiterate the limits on the use of information according to the purpose of its transmission.[107]

4.7. The use by Belgium of information received from abroad

As previously, information received under a DTC may be used for the purposes of the taxes covered by the EOI provision of this DTC (see section 4.3 above).

The Belgian model DTC has added language to the OECD model DTC of 2010 similar to that already included in the convention of 25 January 1988, providing that: "information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both Contracting States and the competent authority of the supplying State authorizes such use". This clause is included in numerous new DTCs.[108]

It has also been included in the OECD model DTC on the occasion of the update of article 26 in July 2012.

Directive 2011/16/EU addresses the exchange between Member States of information received from a third country and the reverse situation (article 24).

4.8. Swifter exchanges of information

Time limits have become a test to measure standard cooperation.

Directive 2011/16/EU provides for a maximum response time of six months (article 7).

The model TIEA invites the requested country to ask for additional information on the request within 60 days and report on the reasons for the delay if it cannot provide the answers to the request within 90 days (article 5(6)). This does not appear in certain TIEAs,[109] nor does it appear in the OECD model DTC or the Belgian model DTC.

4.9. The costs of exchange

The model TIEA deals briefly with the costs incurred in providing assistance. It provides for an agreement between the parties (article 9). Certain TIEAs include

[107] TIEAs with Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines.

[108] DTCs with Germany, Austria, Australia, Bahrain, Congo, Denmark, Spain, Finland, Greece, Iceland, Luxembourg, Malta, Norway, the Netherlands, the Czech Republic, the UK, Rwanda.

[109] TIEAs with Andorra, the Bahamas, Belize, Gibraltar, Liechtenstein, Monaco.

the same provision.[110] Others either do not deal with the issue at all,[111] or, in some cases, develop the point quite extensively.[112]

5. Digression: Rubik

Switzerland made a proposal to Germany, Austria and the United Kingdom that a withholding tax be levied as a waiver of reporting obligations and preserving taxpayers' confidentiality as to their tax situations *vis-à-vis* those countries (Rubik agreements).

Belgium applied a similar mechanism when it implemented the alternative regime of the Savings Directive. At that time, it withheld a tax for the country of residence instead of sending information about the recipients of interest paid by Belgian paying agents.[113] The Savings Directive has provided that the rate of such withholding tax would increase over time, to ultimately reach 35 per cent. The Minister of Finances declared from the outset that Belgium would shift to the ordinary regime of automatic exchange provided by the directive before the withholding tax rate reached 35 per cent.[114] Unlike Rubik agreements, the alternative regime of the Savings Directive does not apply to past situations and does not relieve taxpayers from their obligations relating to previously unreported income.

In spring 2012, the European Union expressed reservations about the Euro-compatibility of Rubik agreements between Switzerland and Germany, Austria and the United Kingdom.

Belgium is observing the outcomes of the Rubik agreements concluded by the other countries.[115] The possibility that Belgium might conclude such an agreement inflamed political debates in September 2012.

6. Digression: Foreign Account Tax Compliance Act (FATCA)

Financial institutions and Febelfin have shown an interest in concluding a protocol, similar to the J. Monnet protocol, with the Federal Ministry of Finances[116] in order to satisfy the requirements of the US Internal Revenue Service in the information mechanism of the FATCA.

[110] TIEAs with Anguilla, Grenada, Saint Lucia, Saint Vincent and the Grenadines.
[111] TIEAs with Antigua and Barbuda.
[112] TIEAs with Andorra, the Bahamas, Belize, Dominica, Gibraltar, Liechtenstein, Monaco, Montserrat, Saint Kitts and Nevis.
[113] See section 2 above.
[114] *Financiele Economische Tijd* of 5 June 2003.
[115] Response of 16 January 2012 to question No. 58 of the representative Mathot, QRVA 53,049, p. 89.
[116] Section 3.4 above.