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Exchange of Tax Information: A View from Belgium

States are sovereign and may keep to themselves information of possible fiscal relevance to other states. Exchange of information is, however, organized internationally by tax treaties and, within the European Community, by national statutes implementing two directives. This article studies the coordination of various legal sources organizing exchange of information, as well as methods of exchange and the use of the exchanged information.

I. Territoriality of Tax Control

A. PRINCIPLES

Each state enacts its tax laws without practical limitations other than the wish for effectiveness in respect of assessment and collection of taxes, the theoretical respect of minimal rights for foreigners,¹ and the sovereignty of other states² as required by international law.³

As an expression of state sovereignty, taxes are territorial: One state may not impose acts of its sovereignty on the territory of another state.⁴ This principle of territoriality is, for practical purposes, identical with the principle of effectiveness, that is, there is no purpose in creating a tax that one cannot assess or recover, since there is insufficient connection between the taxpayer or the tax basis and the territory and the state enforcement powers. This sufficient connec-

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1. A. H. Qureshi, *The Freedom of a State to Legislate in Fiscal Matters under General International Law*, 41 BULL. I.B.F.D., 14, 21 (1987); LUC HINNEKENS, DE TERRITORIALITEIT VAN DE BELGISCHE BELASTINGEN IN HET ALGEMEEN EN OP DE INKOMSTEN IN HET BIJZONDER 15 (1985).

2. GILBERT TIXIER, ET AL., DROIT FISCAL INTERNATIONAL 4 (2d ed. 1979).

3. RUTSEL SILVESTRE J. MARTHA, THE JURISDICTION TO TAX IN INTERNATIONAL LAW 156 (1989).

4. G. Crezelius, *Beschränkte Steuerpflicht und Gestaltungsmissbrauch*, 1984 DER BETRIEB [DB], 530, 533.

tion may take two principal forms: If it is personal, it will concern the citizenship, the domicile, the establishment, or the residence of the taxpayer; if it is real, it will concern the source of the income, or more generally, the localization of the taxable fact.⁵ If one state enjoys fiscal sovereignty, so does the other state. The fiscal sovereignties coexist with an increasingly unified worldwide economy, thereby creating international tax problems⁶ such as double taxation and tax evasion. The only current solution is reciprocity; inverting the categoric imperative of Kant, the state agrees to do for its neighbor what it wishes the latter would do for it, including exchange of information. The topic is gaining momentum and was studied at the 1990 Conference of the International Fiscal Association.⁷

B. BELGIAN LAW

Intimately connected with enforcement, fiscal control can be carried out by the Belgian administration only on Belgian territory. Also, any evidence collected by Belgian civil servants effecting controls abroad must be considered as obtained illegally.⁸ In spite of their apparently general wording, articles 228⁹ and 229¹⁰ of the Belgian Code of Income Taxes do not allow requests for inquiries concerning a Belgian citizen to be sent to persons resident abroad and having no permanent establishment in Belgium.¹¹ As for requests for inquiries from foreign administrations, they can only be accepted by virtue of a statutory authorization.¹² This principle of territorial exclusivity can be inverted; it is improper for foreign administrations to effect controls on Belgian territory, either directly or by ad-

5. See Luc De Broe, *Internationale vestigingsbijstand tussen België, de E.E.G.-Lidstaten, Zwitserland en de Verenigde Staten van Amerika op het vlak der inkomstenbelasting en B.T.W.*, 1990 *TUDSCHRIFT VOOR RECHTSPERSOON EN VENNOOTSCHAPP* [T.R.V.] 71.

6. L. CARTOU, *DROIT FISCAL INTERNATIONAL ET EUROPEEN* 2 (1986).

7. See *International Mutual Assistance Through Exchange of Information*, 75b *CAHIERS DE DROIT FISCAL INTERNATIONAL* [CAHIERS DR. FISC. INT.] (1990); see also *Protection of Confidential Information in Tax Matters*, 76b *CAHIERS DR. FISC. INT.* (1991); André Bailleux, *L'assistance administrative*, 1990 *REVUE GENERALE DE FISCALITE* [R.G.F.] 207.

8. Arg. Court of Appeals, Antwerp, 27 Sept. 1988, *FISCALE JURISPRUDENTIE—JURISPRUDENCE FISCALE* [F.J.F.] 89/162.

9. See Article 228 reads as follows:

The Administration may, concerning a certain taxpayer, collect affidavits, hear third parties, effect investigations, and request, within the time it sets, such time to be extended for just cause, from natural or legal persons, as well as from unincorporated associations or bodies, communication of any information which it judges necessary for ensuring exact collection of the tax.

However, the right to hear third parties or to effect investigations can only be exercised by an officer with a higher rank than controller. (Translation by author.)

10. Article 229 reads as follows:

The administration may also request from natural or legal persons, as well as from incorporated associations or bodies, within the time it sets, such time to be extended for just cause, communication of information, for all or part of their business or activity, concerning any person or group of persons, even if not listed by names, with which they have been directly or indirectly in relation by virtue of such business or activity. (Translation by author.)

11. Parl. Quest. No. 318, 1988 *BULLETIN DES CONTRIBUTIONS* [B.C.] 197 (Senator De Clippele).

12. Jean-Pierre Lagae & Ignaas Behaeghe, *Internationale samenwerking tussen fiskale administraties*, in *ACTUELE PROBLEMEN VAN FISCAAL RECHT*, XVDE POSTUNIVERSITAIRE CYCLUS WILLY DELVA 1988-1989, at 285, 290 (1989).

addressing the Belgian administration. Accordingly, the Court of Appeals of Brussels was wrong in deciding that, in the absence of any treaty or statute, the Belgian customs administration could sovereignly decide to give effect to a request for international assistance.¹³ Since such isolationism can only favor fraud and cause loss of revenue, international treaties or instruments and Belgian tax statutes allow for international assistance in regard to tax assessment and, sometimes, collection.

The following section of the article examines, from a Belgian perspective, the applicable rules concerning income and wealth taxation in relation to the other Member States of the EEC, to Switzerland, and to the United States.

II. The Texts and Their Hierarchy

A. TEXTS

Belgium has signed double taxation treaties with all of the EEC Member States, with Switzerland,¹⁴ and with the United States.¹⁵ Except for the treaty with France, the conventions regulate the exchange of information in accordance with the 1963 Draft Convention or with the 1977 Model Convention of the Organization of Economic Cooperation and Development (OECD). Further, the Member States of Benelux¹⁶ are bound by the Convention pertaining to the Administrative and Judicial Cooperation in the Fields of the Regulations Pertaining to the Implementation of the Objectives of the Benelux Economic Union of April 29, 1969, and its additional protocols. For tax matters, this Convention applies to customs, excise, and turnover taxes.¹⁷ It does not, however, apply to income or wealth taxes. Recently, the OECD Council of Ministers and the Ministerial Committee of the Council of Europe jointly approved a Draft Convention on Mutual Administrative Assistance in Tax Matters.¹⁸ The text was opened for signature on January 25, 1988, and will come into force after ratification by at least five Member States. While Belgium has yet to ratify the Convention, the Belgian Government seems to view it favorably, although with certain reservations.

13. See Judgment of 17 Oct. 1977, 1978 PASIRISE [PAS.], II, 39 (Belg.). *Accord De Broe*, *supra* note 5, at 72.

14. Convention of 28 August 1978, Mon. b. 14 October 1980 [hereinafter the Switzerland-Belgium Tax Treaty]; J. Coremans, *Quelques réflexions sur la convention du 28 août 1978 entre la Belgique et la Suisse*, 1983 B.C. 1043.

15. Convention for the Avoidance of Double Taxation, 9 July 1970, U.S.-Belg., T.I.A.S. No. 7463, *as amended* by Protocol of 31 Dec. 1987 [hereinafter U.S.-Belgium Tax Treaty]. Law of 16 June 1989, MONITEUR BELGE [Mon. B.] 13 Oct. 1989 B.C. 2385).

16. Belgium, the Netherlands, and Luxembourg.

17. Article 1.2.a. of the Additional Protocol (including provisions specific to tax matters).

18. See OECD, EXPLANATORY REPORT ON THE CONVENTION ON MUTUAL ASSISTANCE IN TAX MATTERS (1989); Daniels, *Council of Europe / OECD Convention on Mutual Administrative Assistance in Tax Matters*, 1988 INTERTAX 101-11.

Domestic Belgian law contains two provisions, voted without much debate in Parliament,¹⁹ in order to implement European directives: article 244bis²⁰ of the Code of Income Taxes,²¹ implementing Directive No. 77/799 of the Council of 19 December 1977 concerning "mutual assistance by the competent authorities of the Member States in the field of direct taxation";²² and article 93terdecies of the Code of Valued Added Tax (VAT),²³ implementing Directive No. 79/1070 EEC of the Council of 6 December 1979 amending the above-mentioned Directive.²⁴

B. HIERARCHY

The exchange of information between Belgium and the United States, or between Belgium and Switzerland,²⁵ is governed only by the relevant double tax treaty. In contrast, the exchange between Belgium and another EEC Member State can be governed by the relevant treaty in addition to the specific Belgian provisions implementing the above-mentioned EEC directives. Even a careless reader will notice that, on the one hand, the Belgian statute does not fully implement the EEC directives, and that, on the other hand, both the Belgian statute and the EEC directives are substantially at variance with the bilateral conventions. Additionally, the statute and the directives allow civil servants to be sent on duty abroad, which is not provided by the treaties, creating a conflict of norms. As to VAT matters, exchange of information may give rise to conflict between the statute, the directive, and the Benelux convention.

1. *Statute and Directive*

To the extent that the statute goes beyond the directive, the conflict is solved by article 11 of the directive, which reads: "The foregoing provisions shall not

19. 1980 PASINOMIE [PASIN.] 1152, 1210.

20. The author's translation of article 244bis reads as follows:

The administration of direct taxes may exchange, with fiscal administrations of the other Member States of the European Economic Community, any information capable of enabling correct assessment of taxes on income and on wealth within this Community.

The information received from fiscal administrations of other Member States of the European Economic Community is used within the same conditions as the similar information collected directly by the administration of direct taxes.

The information destined to the fiscal administration of these States is collected in the same conditions as the similar information destined to administration of direct taxes.

The administration of direct taxes may also, pursuant to an agreement made with the competent authorities of a Member State of the European Economic Community, authorize on the national territory the presence of officials of the fiscal administration of such Member State in view of collecting any information capable of enabling the correct assessment of taxes on income and on wealth within this Community.

The information collected abroad by an official of the administration of direct taxes within the frame of an agreement made with a Member State of the European Economic Community may be used in the same conditions as the information collected within the country by the administration of direct taxes.

21. [Hereinafter C.I.R.].

22. Council Directive 77/789, 1977 O.J. (L 336) 15.

23. [Hereinafter C.T.V.A.].

24. Council Directive 79/1070, 1979 O.J. (L331) 8. A draft modifying directive was proposed by the Commission on 10 February 1989.

25. J.-M. RIVIER, *DROIT FISCAL SUISSE—LE DROIT FISCAL INTERNATIONAL* 214 (1983); Concerning the assistance between Swiss cantons, see J.-M. RIVIER, *DROIT FISCAL SUISSE: L'IMPOSITION DU REVENU ET DE LA FORTUNE* 304 (1980).

impede the fulfillment of any wider obligations to exchange information which might flow from other legal acts." To the extent the Belgian statute does not fully authorize the exchange of information prescribed by the directive, the tax administration cannot invoke the directive against the taxpayer.²⁶ The administration could, however, take advantage of the directive to infringe upon the territoriality principle in a manner that does not harm a particular taxpayer, such as the "pooling of experiences" provided by article 10 of the directive.²⁷ Conversely, if the statute poorly implemented European provisions that were meant to protect the taxpayer, one wonders whether the taxpayer could invoke the directive. In principle, the directives are addressed only to states. Case law has, however, recognized the theory of direct effect of the directives against the Member States provided that the directive creates clear and precise obligations in self-sufficient terms.²⁸

2. Law, Directive and Treaty

The hierarchy problem does not get simpler when one compares the bilateral treaties with the statute meant to implement the European directive. In a case in which the Belgian legislature attempted to escape its obligations under EEC law, a Belgian court has acknowledged the primacy of international treaties vis-à-vis subsequent domestic statutes.²⁹ The case law, however, provides no solution to the conflict between bilateral treaties and EEC directives.³⁰ If the treaty provides for a broader exchange of information than the directive, then there is no conflict.³¹ However, if the directive provides for a broader exchange of information than the applicable treaty, then the question arises: Which text prevails? The EEC Commission could bring infringement proceedings pursuant to article 169 of the Treaty of Rome against the Member States that have violated their obligations

26. Case 8/81 Becker, 1982 E.C.R. 53; Case 80/86 Criminal Proceedings Against Kolpinghuis Nijmegen Bv, 1987 E.C.R. 3969.

27. Council Directive 77/799, *supra* note 22, at 19, states:

The Member States shall, together with the Commission, constantly monitor the cooperation procedure provided for in this Directive and shall pool their experience, especially in the field of transfer pricing within groups of enterprises, with a view to improving such cooperation and, where appropriate, drawing up a body of rules in the fields concerned.

28. Case 41/74, Yvonne van Duyn v. Home Office, 1974 E.C.R. 1337. Some have held that certain provisions of the 1977 directive would have such direct effect, notably article 7, which provides that "all information made known to a Member State under this Directive shall be kept secret" and organizes the scope of such secret. Council Directive 77/799, *supra* note 22, at 18; *See also* De Broe, *supra* note 5, at 75.

29. Court of Cassation, 27 May 1971, 1971 PAS. I, 886 and the advice of Proc. gen. Ganshof van der Meersch; John Kirkpatrick, *Examen de jurisprudence*, 1987 REVUE CRITIQUE DE JURISPRUDENCE BELGE [R.C.J.B.] 642 (¶ 151). *Accord* article 55 of the French Constitution of 1958 and article 26 of the French Constitution of 1946.

30. On the supremacy of European regulations that are directly applicable pursuant to article 189 of the Treaty Establishing the European Economic Community 25 Mar. 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome] (also frequently called the EEC Treaty), vis-à-vis bilateral agreements, *see* Case 82/72, C. J. Walder v. Bestuur der Sociale Verzekeringsbank, 1973 E.C.R. 599.

31. Council Directive 77/799, *supra* note 22, art. 11.

under the EEC Treaty by not amending their bilateral treaty.³² In any event, one could be tempted to hold that the EEC directive automatically preempts the bilateral treaties.³³ Case law is yet to develop on this issue. If the Belgian statute has implemented the directive on an issue not settled by the applicable treaty, such as the presence of civil servants abroad, it is clear that the statute will be applied regardless of the silence of the treaty since the departure from the territoriality principle has a statutory basis.

III. Exchange of Information

International assistance usually takes the form of exchange of information. Between June 1, 1985, and June 30, 1988, Belgium sent 376 requests for inquiries or items of spontaneous information to foreign tax administrations, and received 106 from abroad.³⁴ The main exchange countries are, not surprisingly, the Netherlands and France, countries with which Belgium has the longest common borders. This article examines the scope, jurisdiction, and procedure for the exchange of information, as well as the use of information obtained in accordance with such procedures. The focus is on the rules applicable to income and wealth taxes; the treaties with the United States and with Switzerland do not provide for any exchange of information with regard to VAT. As to EEC Member States, the applicable rules are contained in the Belgian statute or in the EEC directive.³⁵

A. SCOPE

The rules define the limits within which a "petitioning state" may request information from a "petitioned state." The exchange provided for by the 1963 OECD Draft Convention is limited in scope since article 1 provides that "this convention shall apply to persons who are residents of one or both of the Contracting States." The 1977 Model Convention quashes this limitation, and article 26 provides that "the exchange of information is not restricted by article 1." The Belgian-U.S. convention follows the 1963 Draft. Although concluded on August 28, 1978,³⁶ the Belgian-Swiss treaty, in its article 27 governing exchange of information, does not include the express variance from article 1. The Belgian

32. Cf. Werner F. Ebke, *Enforcement Techniques within the European Communities: Flying Close to the Sun with Waxen Wings*, 50 J. AIR L. & COM. 685-725 (1985).

33. See Written Question No. 224/82, Answer given by Mr. Tugendhat on behalf of the Commission, 1982 O.J. (C 156) 33; K. VOGEL, *DOPPELBESTEUERUNGSABKOMMEN* art. 26, no. 59 (2d ed. 1990).

34. Parl. Quest. No. 235, 1989 B.C. 2324 (Rep. Willockx).

35. C. Scaileur, *L'assistance mutuelle entre Etats dans le domaine de la T.V.A.*, 1978 R.G.F. 285-92.

36. *Supra* note 14.

tax administration is of the opinion that exchange of information is restricted to residents.³⁷

Thus, for instance, may Belgium request from the petitioned state information concerning a person who is a resident neither of Belgium nor of the petitioned state? By hypothesis, Belgium cannot obtain the appropriate information from the state of which the person is a resident, either because Belgium has no treaty with the state or because the existing treaty does not allow the information to be exchanged. For illustration purposes, let us suppose that a Zaïrian company has sold certain products to its Belgian subsidiary, while the permanent establishment of the Zaïrian company in Ivory Coast sells the same product to an unaffiliated Swiss resident. To verify the transfer price between Zaïre and Belgium, Belgium can petition neither Zaïre, since the two countries have no double tax treaty, nor Switzerland, since the information does not fall within the terms of the Belgian-Swiss treaty. However, the agreement between Belgium and Ivory Coast allows exchange of information concerning nonresidents. Belgium is therefore in a position to find out the price invoiced by the Ivorian branch and to compare that with the price paid by the Belgian subsidiary.

Neither the directive nor the Belgian article 244bis define their personal scope. It would seem fair to conclude that the laws have no restriction, and that the directive does not even require that the subject person be a resident of another Member State.³⁸ However, most treaties between Belgium and other EEC Member States restrict the exchange of information to residents. Only the convention of 29 April 1983³⁹ with Italy clearly mentions the exception and allows exchange concerning nonresidents.⁴⁰ The statute and the treaties seem to be at odds. The Belgian tax administration considers that "Belgium complies with the European directive by the exchange of information provided within the framework of the conventions preventing double taxation."⁴¹

To say that directives and the statute always prevail over the treaties is not necessary. If the treaty does not allow exchange of information concerning nonresidents, it is because it applies only "to persons which are resident of one Contracting State or of both Contracting States." The treaty is silent with respect to nonresidents. Accordingly, the Belgian administration finds, in article 244bis, the statutory basis allowing exchange of information concerning nonresidents, and the apparent conflict is solved.⁴² By contrast, for instance, to

37. COMMENTAIRE DES CONVENTIONS [COM. CONV.] 26/11.

38. *But see* Lagae, *supra* note 12, at 314.

39. Mon. b., 28 Sept. 1989.

40. Tax Treaty, 29 Apr. 1983, Belg.-Switz., art. 26.1.

41. COMMENTAIRE DES IMPÔTS SUR LES REVENUS [COM. I.R.] 244bis/4; COM. CONV. 26/45 (author's translation).

42. For arguments in favor of this solution, see B. PLAGNET, *DROIT FISCAL INTERNATIONAL* 321, no. 632 (1986). *Contra* De Broe, *supra* note 5, at 86.

France,⁴³ Belgium did not expressly insist on reciprocity. Article 244bis is, however, drafted in a facultative manner. Thus, the Belgian administration will undoubtedly invoke article 8.3. of the directive⁴⁴ if a foreign administration requests information it would not itself be in a position to supply.

With regard to subject matter, treaties generally provide for exchange of "such information as is necessary for carrying out the provisions of this convention or the ones of the domestic laws of the contracting states concerning taxes covered by the convention, in so far as the taxation thereunder is not contrary to the convention."⁴⁵ The latter phrase enables Belgium to refuse to supply information if the partner state fails to comply with its conventional obligations. The hypothesis seems rather theoretical.⁴⁶ More important is the limitation of the scope to taxes covered by the convention, which generally means income and wealth taxation, thus excluding indirect taxes, social security taxes and other taxes. The treaty with Switzerland contains a third and essential limitation: only information "necessary for a regular application of the provisions of the convention"⁴⁷ shall be exchanged. According to the Belgian tax administration,

it follows that only information that can be considered indispensable for verifying a request by a Belgian or Swiss resident for the benefit of any provision of the Convention, may be exchanged. The information which is only necessary for the correct application of the internal law of either contracting State cannot be exchanged.⁴⁸

Belgium is, therefore, in a position to ask for information concerning, for example, the prerequisites of application of the treaty (for example, residence); the Belgian withholding tax creditable in Switzerland (article 24, 2°, a), or the amount of the real estate or permanent establishment income to be exonerated in

43. CARTOU, *supra* note 6, at 304.

44. Article 8.3 provides that "the competent authority of a Member State may refuse to provide information where the State concerned is unable, for practical or legal reasons, to provide similar information." Council Directive 77/799, *supra* note 22.

45. OECD 1977 Model Convention, art. 26.1.

46. The Draft Council of Europe/OECD Convention would also allow refusal of assistance if the petitioning state intended to use the obtained information for a taxation at variance with the generally accepted taxation principles (see art. 21, § 2e), which may prove hard to interpret. See Lagae, *supra* note 12, at 323.

Article 20.3 of the French-Belgian double tax treaty allows both states to refuse to supply information meeting the following criteria:

With respect to their own citizens or to companies or legal persons incorporated pursuant to their own legislation, any information but the one necessary for apportioning the income of such taxpayer person to articles 4 and 5 [(permanent establishment)] as well as for the control of their entitlement to exemptions or tax reductions provided by the agreement (author's translation).

See also COM. CONV. 26/14. This restriction should have been abolished since it is obviously contrary to article 1.1 of the European directive, which provides that "the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital." Council Directive 77/799, *supra* note 22.

47. According to Swiss case law, such exchange of information is already permitted pursuant to the amicable procedure provisions. See Judgment of 20 Nov. 1970, Federal Court (CH), ARCHIVES DU TRIBUNAL FEDERAL [ATF] 96 I 733. See also OECD, 1977 COMMENTARY art. 26, no. 23; RIVIER, *supra* note 25, at 322 (1983).

48. Author's translation of COM. CONV. 26/11.

Belgium. It cannot ask for information in order to verify transfer prices pursuant to article 24 of the Belgian Code of Income Taxes or to determine income taxable only in the residence state.⁴⁹ By contrast, the conventions between the United States, Belgium, and Switzerland, respectively, allow exchange of information to prevent fraud or fiscal evasion. This definition of the scope comes quite close to allowing exchange for the application of domestic law.⁵⁰

Implementing article 1.1 of the directive, article 244bis of the Income Tax Code and article 93terdecies of the VAT Code allow exchange of "any information enabling correct assessment of income and wealth taxes [respectively VAT] within [the EEC]." Considering the wording of the bilateral conventions with other Member States, the only possible conflict between such statute and the convention would be the hypothesis, which is rather theoretical, where a petitioned state would refuse assistance on the grounds that the petitioning state is assessing taxes in a manner contrary to the convention.

B. JURISDICTION

The treaties provide that the exchange of information is to be made through the "competent authorities" defined by the treaty, which, as far as Belgium is concerned, often refers to the "competent authority pursuant to its national legislation"⁵¹ and sometimes to the "general director of the direct taxes"⁵² or its authorized representative.⁵³ The requests for information are made exclusively through the central administration. Local administrations are instructed to transmit to the central administration both the requests for information that they receive from a foreign authority and the ones that they propose to address to a foreign authority as well as information that they feel they have spontaneously to supply as "revealing manifestly unhabitual transactions or making plausible the possibility of an important evasion."⁵⁴ The only direct exchange permitted be-

49. Philippe F. Lebrun, *Echange de renseignements entre administrations*, 1977 JOURNAL DE DROIT FISCAL [J.D.F.] 5, 16; VOGEL, *supra* note 33, art. 26, no. 42; *contra* OECD 1977 COMMENTARY art. 26, no. 7(c). The Court of Appeals of Ghent erred by allowing information supplied by the Swiss administration to be used as evidence for rejecting deduction of interests paid and taxing the same as "special rebates" within the meaning of article 145, 4° of the Belgian Income Tax Code, and thus for purely internal purposes. See Judgment of 20 June 1986, ALGEMEEN FISKAAL TIJDSCHRIFT [A.F.T.] 1987, 195 n.; F.J.F. 87/101; Luc De Broe & Ph. Hinnekens, *De aanslag op geheime commissielonen*, 1988 TIJDSCHRIFT VOOR FISCAAL RECHT [T.F.R.] 232; Lagae, *supra* note 12, at 311. In a similar setting, the German administration considered it could not petition Switzerland for information concerning an amount paid by a German to a Swiss resident and merely deducted as an expense in Germany. See De Broe, *supra* note 5, at 84 & n.69.

50. Judgment of 23 Dec. 1970, 1972 ARCHIV FÜR SCHWEIZERISCHES ABGABENRECHT 437; *compare* Lagae, *supra* note 12, at 311.

51. Art. 3(1)(f)(ii) of the U.S.-Belgium Tax Treaty.

52. Art. 3, § 1, 7° of the Switzerland-Belgium Tax Treaty.

53. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Aug. 29, 1967, U.K.-Belg., art. 3, para 1(i)(2), 734 U.N.T.S. 37, 42.

54. Author's translation; see COM. CONV. 26/15, 26/33 and 26/35.

tween local administrations concerns farmers whose farmland straddles the Belgian-Dutch border.⁵⁵ The European directive designates as competent Belgian authority "the Minister of Finance or an authorized representative." Since the corresponding Belgian statute respectively nominates the administration of direct taxes and the one of VAT, registration, and domains, the exchange is always made at the central administrative level, even within the framework of the conventions between Belgium, Germany, France, Luxembourg, the Netherlands, and the United Kingdom, in view of an accelerated exchange of information on international labor purveyors.⁵⁶

C. PROCEDURE

1. Initiation

Both the bilateral treaties and the Belgian statute remain silent as to how the exchange procedure is initiated. Formalizing the practice spelled out in the OECD commentaries,⁵⁷ the directive clearly distinguishes the exchange on request (article 2), the automatic exchange (article 3) and the spontaneous exchange (article 4).

a. Exchange on Request

Concerning a "particular case" and after "exhausting its own usual sources of information," a state may address a request for information to another one.⁵⁸ The first condition stands in the way of what is commonly called a "fishing expedition." It constitutes a condition of admissibility. The second condition is more of an exception⁵⁹ than a condition. Article 5 of the directive provides that the competent authority of the petitioned state is to act "as swiftly as possible."

Probably disappointed by previous experience, the Belgian administration advises seeking international assistance "only if the interests at stake so warrant, and, in any event, only if the attempts to obtain in Belgium itself the necessary information have produced no satisfactory results."⁶⁰ Besides the standard cases of determining the profits attributable to a permanent establishment or of rectifying transfer prices between affiliated enterprises, the administration apparently focuses on instances where evasion can be suspected, such as use of nominees for subscribing shares or debentures or for receiving income and exaggerated purchase price without booking of corresponding credit notes.⁶¹

55. COM. CONV. 26/29.

56. COM. CONV. 26/45, and 26/46.

57. OECD, COMMENTARY art. 26, no. 7; OECD 1977 COMMENTARY, art. 26, no. 9.

58. Council Directive 79/799, *supra* note 22, art. 2.1.

59. For details see *infra* part III.D.

60. COM. CONV. 26/31.

61. COM. CONV. 26/31, 26/32.

b. Automatic Exchange

The automatic exchange, according to the directive, concerns "categories of instances" determined by the Member States within the bi- or multilateral consultation procedure prescribed by article 9. The exchange is to be initiated "regularly" and "without prior request." Pending the outcome of such consultation, the automatic exchange remains limited to the practice following from the implementation of the treaties, which means forwarding files including requests for tax reduction or exemption by beneficiaries of income having its source in the other state, such as dividends, interests, royalties, and wages of cross-border workers.⁶² France apparently automatically communicates information on royalties, commissions, or compensations exceeding a certain amount,⁶³ while France and Belgium automatically inform each other concerning any purchase of real estate by a resident of the other state.⁶⁴

c. Spontaneous Exchange

Much like automatic exchange, spontaneous exchange occurs without prior request of the other state. The difference is that it occurs in situations where the administration has "grounds for assuming" the existence of a tax fraud or evasion to the detriment of the other state. Spontaneous exchange is an exercise of judgment and no mere automatism. Until now, the Belgian practice has been restricted to instances "making likely the possibility of an important fraud."⁶⁵ Spontaneous exchange is legal, even if there is no statute implementing the treaty.⁶⁶ The directive prescribes spontaneous exchange in five instances,⁶⁷ without prejudice to the Member States extending the list within the consultation procedure. Thus, Germany has spontaneously informed Belgium that commissions had been paid to Belgian residents by means of bearer checks. Germany informed France that a payment had been made to a French resident on a Luxembourg bank account. Germany also informs partner states about situations in which German companies intervene as base companies for treaty-shopping pur-

62. COM. CONV. 26/21.

63. FISKOLOOG INTERNATIONAAL, 15 Aug. 1985, at 21.

64. GUY GEST & GILBERT TIXIER, DROIT FISCAL INTERNATIONAL § 494 (2d ed. 1990).

65. COM. CONV. 26/35.

66. For an example of an application of the German-Belgian Treaty, see Judgment of 20 Apr. 1982, Finance Court Düsseldorf, 1983 EUR. TAX'N 364. For the application of the French-German Treaty see Judgment of 20 Jan. 1988, Federal Finance Court, Bundessteuerblatt [BStBl] 1988 II 412; Killius, *Exchange of information amongst EEC-Member States*, 1988 EUR. TAX'N 226. It has been held that the Belgian-Dutch Treaty and other treaties following the 1963 OECD Draft Convention allow exchange upon request only. See C. Van Raad & E. Milders, *Uitwisseling van inlichtingen in de Nederlandse belastingverdragen en de verhouding daarvan tot andere regelingen*, 1988 MAANDBLAD VAN BELASTINGRECHT EN BELASTINGPRAKTIJK [MBB] 58, 60.

67. Tax is lost in the other state; an exemption in one state should trigger taxation in the other one; transactions are conducted through a third country; profits are artificially transferred; information interesting the other state has been found as feedback to information it supplied. Judgment of 20 Apr. 1982, Finance Court Düsseldorf, 1983 EUR. TAX'N 364; Judgment of 20 Jan. 1988, Federal Finance Court, BstBQ 1988 II 412.

poses or as nominees.⁶⁸ However, as a general rule, the Swiss administration does not spontaneously communicate information.

2. *Instruction*

a. Information and Recourse of the Concerned Person

Contrary to other countries such as Germany,⁶⁹ the Netherlands,⁷⁰ or Switzerland,⁷¹ in the absence of an express provision in the treaties and the directive, the Belgian statute does not require that the administration inform the taxpayer that it intends to request or communicate information concerning him. If the taxpayer finds out anyway and has grounds to oppose such exchange, he can try to have the request or the communication prohibited. Despite the lack of specific case law in Belgium, the president of the Civil Court, sitting in Chambers,⁷² has in multiple instances retained jurisdiction in tax matters and recently enjoined the illegal use of information collected in the books of a financial institution for purposes of taxation of its clients.⁷³ If the exchange has been effected and the taxpayer argues successfully that the exchange was illegal, the tax assessed on the basis of the illegally obtained information should be squashed. The taxpayer can also try to seek tort damages from the Belgian state, for example, for noncompliance with the principles of good administration,⁷⁴ or criminal damages from civil servants on the ground that they violated professional secrecy.⁷⁵ The court will have to determine both in fact and in law if the suffered damages constitute indemnifiable damages.⁷⁶

b. Collection of Information

The directive demands that the petitioned state shall "arrange for the conduct of any inquiries necessary to obtain [the requested] information."⁷⁷ For this

68. Axel Haelterman, 1987 FISKOLOOG INTERNATIONAAL, no. 43, at 7.

69. H. Krabbe, *Das EG-Amtshilfe-Gesetz*, 1986 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 126, 132.

70. A.H.M. DANIELS, DE GRENDOERSCHRIJDENDE GEGEVENSUITWISSELING DOOR BELASTINGADMINISTRATIES 58 (1987).

71. RIVIER, *supra* note 25, at 324.

72. BELGIAN JUDICIAL CODE art. 584 (Référés).

73. Judgment of 10 Oct. 1988, Civil Court of Brussels (in chambers), F.J.F. 89/196. The Belgian Income Tax Code restricts domestic collection of information from financial institutions. See C.I.R. arts. 224, 235(3).

74. Pierre Van Ommeslaghe, *Droit commun et droit fiscal*, 1989 J.D.F. 5, 25.

75. Belgian Criminal Code art. 438; C.I.R. art. 244.

76. The damage following from the fines inflicted on a French resident for a breach of the exchange control regulations is not indemnifiable if the latter misdemeanor has been discovered due to the violation of the professional secrecy of a Swiss bank employee. Federal Court (CH), Judgment of 14 Feb. 1989, Federal Court (CH) 1989 REVUE DE LA BANQUE 607. For a curious instance in which where the Belgian taxpayer could have successfully argued that the Belgian state wrongfully exchanged information and caused loss of customers, see Lagae, *supra* note 12, at 322, 324 n.278; Bailleux, *supra* note 7, at 213.

77. Council Directive 77/799, *supra* note 22, art. 2.2.

purpose, the Belgian administration uses the investigation powers vested with it respectively by the Income Tax Code and the VAT Code. The information destined for the foreign tax administration is to be collected "within the same conditions as the similar information destined to the Belgian administration."⁷⁸ Article 6 of the directive under the heading "Collaboration by officials of the State concerned" introduced an important innovation. The text provides that the Member State may, within the framework of the consultation procedure, agree "to authorize the presence in the first Member State of officials of the tax administration of the other Member State. The details for applying this provision shall be determined under the same procedure."⁷⁹

The Belgian statute accordingly allows the concerned administration to make agreements with the competent authority of another Member State and to authorize the presence in Belgium of foreign civil servants, "in view to collect any information"; conversely, it allows the use in Belgium of "information collected abroad" by a Belgian civil servant within such framework. Until the administration makes such agreements,⁸⁰ and considering the discretion left by the directive concerning the details of implementation, it seems premature to wonder about the degree of involvement of the foreign civil servant. Will he be merely present; will he collaborate in the collection of information, or is he to play a leading part therein?⁸¹ The agreements should decide which law applies to the investigation. However, it seems reasonable to apply the local law. Within the Benelux framework, for customs and excise purposes only, the civil servants of one country can be detached abroad either for collecting information in the offices of the foreign administration, or for accompanying the local civil servants during their inquiry. In the latter case, the civil servant of the foreign country may collaborate with the local civil servants in such inquiry.⁸²

One should not confuse collaboration with the mere presence of tax civil servants detached to embassies, notably French ones, with the agreement of the welcoming state. These civil servants may not, under any circumstances, have contact with the local Belgian tax administration.⁸³ However, since 1970, Germany, France, the United States and Great Britain have cooperated in an effort to gain simultaneous control of multinational groups.⁸⁴

78. According to C.I.R. arts. 221 *et. seq.*

79. Council Directive 77/799, *supra* note 22, art. 6.

80. *But see* 1989 B.C. 2324 (the answer of the Belgian Minister of Finance, implying that controls have already been made according to such procedure).

81. Lagae, *supra* note 12, at 308; P. Dekker, *Netherlands Cross-border Information under Tax Law*, 1987 EUR. TAX'N 111.

82. OECD Convention on Mutual Administrative Assistance in Tax Matters, art. 6(3) Additional Protocol art. 6. *See sources cited supra* note 18.

83. Belgian Administrative Circular CiRH 81/375750; FISKOLOOG INTERNATIONAAL, 15 Dec. 1986, no. 37, at 2.

84. CARTOU, *supra* note 6, at 310.

D. EXCEPTIONS

Pursuant to both the treaties and the directive, the assistance is compulsory. The petitioned state must supply the required information or effect automatic or spontaneous exchange in the provided instances. From this point of view, the Belgian statute is misleading since it states that the administration "may exchange . . . all information." The legislature probably used a clumsy technique for incorporating the exceptions to this duty of information since they are not specifically spelled out.

1. *Exhaustion of Internal Sources*

One should remember that

the competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilized, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.⁸⁵

This constitutes a rule of good conduct for the petitioning state, and the petitioned state will have to assume that it is petitioned for a reason. This rule is not stated explicitly in the treaties, but appears to be implicit therein.

2. *Legislation and Administrative Practice*

The treaties permit a refusal to supply information in contravention not only of the legislation of the petitioned state, but also of its administrative practice or of the legislation or practice of the petitioning state. As a commentator has noted, "the field of the assessment assistance is restricted to the exchange on the basis of the more restrictive of both legislations"⁸⁶ and of the more restrictive of both administrative practices. Depending on the concerned treaty, such limitation shall be compulsory or optional. Thus, the Swiss administration has refused to communicate information in the authenticated form required to make it admissible in evidence in U.S. criminal procedures.⁸⁷ The petitioned administration will have to use its investigative power even if that power has been vested with it in order to determine national taxes and even if the information concerned is not useful for assessing such a tax; otherwise, the assistance organized by the treaty would be without substance.⁸⁸

The directive states, in somewhat different terms, the reservation allowing the petitioned state to take refuge behind its legislation or its administrative prac-

85. Council Directive 77/799, *supra* note 22, art. 2.1.

86. TIXIER, *supra* note 2, no. 508 (translation by author of this article).

87. Judgment of 16 May 1975, Federal Court (CH), 1975 ARCHIV SCHWEIZ. ABGABENRECHT 210.

88. Judgment of 20 Feb. 1979, Federal Finance Court (D), BStBl II, 269; Judgment of 23 Dec. 1970, Federal Court (CH) 1972 ARCHIV SCHWEIZ. ABGABENRECHT 437.

tice⁸⁹ or to refuse exchange when the petitioning state would not be in a position, as a matter of fact or law, to communicate equivalent information.⁹⁰ The rule of limitative cumulation finds its basis in reciprocity, the cornerstone of international relations. Needless to say, the Belgian administration is not to collect information in a manner that violates the Belgian statute. A refusal on the basis of the Belgian administrative practice or of the foreign statute or administrative practice, however, seems to be optional.⁹¹ As for information coming from abroad, it should not be allowed as evidence if it has been collected in breach of the applicable foreign statute.⁹² The question appears more delicate if it concerns information obtained legally abroad but which could not have been obtained in Belgium. The Belgian statute only provides that the information is "used [under] the same conditions as . . . similar information collected directly by the [Belgian] administration."⁹³ The courts may analyze this issue on a case-by-case basis and show more leniency toward information legally collected abroad for the collection of which the Belgian administration would have been time barred. Perhaps courts will also want to censor instances where the Belgian administration purposely sought to obtain information abroad that it was not in a position to obtain in Belgium because of a protected professional secret.

The draft directive modifying article 8.2 attempted, within the perspective of the single financial market that opened on July 1, 1990,⁹⁴ to eliminate the reserve deduced from the administrative practice when presumptions exist that a resident of the petitioning state "directly or through another country transfers important funds in the petitioned State without the corresponding income having been declared." This was a text tailor-made for Luxembourg, whose banking secrecy was based on pure administrative practice. Less than one month after the publication of the draft, the Luxembourg banking secrecy was molded in the Grand Ducal decree of March 24, 1989, which specified "banking secrecy in tax mat-

89. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial, or professional secret, or of a commercial process, or where it would be contrary to public policy. Council Directive 77/799, *supra* note 22, art. 8.1.

90. *Id.* art. 8.3.

91. The French-Belgian treaty however provides for exchange "under condition of reciprocity" (art. 20.1) and allows for—without imposing—a refusal of exchange of information which, by virtue of its nature, could not be obtained in the other contracting state on the basis of the tax legislation of such other contracting state (art. 23). Herein lies an antinomy: is reciprocity a condition, in which event the second text should have provided for a prohibition, or merely an aspiration? France can refuse assistance when the statute of limitations has run in either state or when the banking secrecy of the other state would prohibit exchange of similar information. See PLAGNET, *supra* note 42, at 320, no. 629). In the relations between Belgium and France, is the refusal on the basis of the absence of reciprocity compulsory? For an affirmative answer, see De Broe, *supra* note 5, at 90).

92. De Broe, *supra* note 5, at 88.

93. C.I.R. art. 244bis, al. 2.; C.T.V.A. art. 93terdecies, al. 2.

94. Claude Lempereur, *Harmonisation du droit des valeurs mobilières et intégration des marchés de valeurs mobilières dans la Communauté*, in L'INSTAURATION DU MARCHÉ INTERIEUR 147–205 (1989).

ters and defin[ed] the investigation right of the tax administration."⁹⁵ Such a decree is a statutory instrument that the draft directive does not block. To date, the draft directive has not been adopted or modified.

3. *Business Secrets and Public Policy*

Both the treaties and the directive allow, in similar terms, the refusal of information that would reveal a commercial, industrial, or business secret, or the divulgence of which would be contrary to public policy. The treaty with France even prohibits exchange of information susceptible of affecting a commercial or industrial secret.

Except for professional secrets, which logically fall under the legislation exception, the notions of commercial or industrial secrets or of public policy appear practically devoid of content, particularly within a European process of unification. Where shall one find in tax information a possibility of "considerable damage to the economy of the [petitioned] State"?⁹⁶ This concern with protection against foreign competition is similar to the preoccupation with public policy, but, "in practice, the public policy clause appears to be in fact an easy way [of] allowing the petitioned State to deny information without justification."⁹⁷ The Belgian-Swiss treaty protects banking secrecy,⁹⁸ which may, however, in Swiss internal law and according to the international criminal assistance rules, be lifted in case of tax fraud.⁹⁹

4. *Restrictions on Use*

The directive allows the denial of information if the legislation or the administrative practice of the petitioned state more narrowly restricts the use of the

95. Cf. FISKOLOOG INTERNATIONAAL, 15 July 1989, no. 68, at 1.

96. Judgment of 20 Feb. 1979, BStBl 1979, II, at 268; Judgment of 20 April 1982, 1983 EUR. TAX'N 364.

97. TIXIER, *supra* note 2, nos. 516, 519 (translation by author of this article). It seems that German courts have refused administrative assistance when the taxes in the petitioning state were abnormally high (Judgment of 29 June 1987, Finance Court Hannover, 1987 RIW 88) or when the exchange would have exposed the concerned person in the petitioning state to criminal prosecution of a nonfiscal nature, e.g., in exchange control matters. See Killius, *supra* note 66, at 266.

98. On banking secrecy in Belgium, see Judgment of 25 Oct. 1978, Court of Cassation, 1979 JOURNAL DES TRIBUNAUX [J.T.] 371 (noted by A. Bruyneel); Marc Dasse, *La banque, le client et le fisc dans la vie quotidienne*, in LA BANQUE DANS LA VIE QUOTIDIENNE 247 (1986); H. R. Depret, *Le secret bancaire dans le cadre des pouvoirs d'investigations du fisc*, 1981 FISCALITE EUROPEENNE [FISC. EUR.] 21. See also Belgian statute of 17 July 1990, Mon. b., 15 Aug. 1990, on money laundering and Council Directive 91/308 of 10 June 1991, 1991 O.J. (L 166), on prevention of the use of the financial system for the purpose of money laundering.

99. P. Neyroud, *Entraide judiciaire internationale en matière pénale*, in L'ENTRAIDE JUDICIAIRE INTERNATIONALE 31 (1986); Luc De Broe, *De internationale rechtshulp in fiscale strafzaken*, 1989 T.F.R. 348. For provisions applicable in the relations between Switzerland and the United States, see RIVIER, *supra* note 26, at 320 (1983).

information than does the directive, and if the petitioned state does not undertake to comply with such limits.¹⁰⁰

E. USE OF THE INFORMATION

1. *Secrecy*

Secrecy is the first principle, stated by both the treaties and the directive, that the administration must adhere to. Although poorly drafted, article 244bis, section 2, of the Belgian Code of Income Taxes introduces a stricter secrecy policy in the international setting than the one organized by articles 243 and 244 of the Code for internal purposes.¹⁰¹ In its wisdom the Belgian administration prescribes that the information coming from abroad is to be filed separately.¹⁰² Obviously, if information is exchanged, it is destined to be used. The secrecy is accordingly subject to exceptions.

2. *Assessment*

The first type of use, allowed by both the treaties and the directives, is the assessment of taxes on income and wealth. In the European framework one may add assessment of VAT, which, according to the Belgian administration, should allow exchange between the two Belgian administrations involved, the administration of income tax and the administration of VAT.¹⁰³ Consequently, the administration considers that the directive preempts the treaty, while the latter provides for an express prohibition. Assessment is to be made in compliance with the Belgian rules, including statute of limitation¹⁰⁴ and admissibility of evidence. Except for a more permissive provision in the treaty, which is allowed by article 7.3 of the directive, use of the collected information for assessing other taxes or for assessing social security contributions does not appear to be allowed.

3. *Collection*

Curiously, the directive does not provide for the use of the information in order to collect taxes. Since the direction allows the petitioned state to permit a broader use than the one provided by the directive,¹⁰⁵ the treaty clauses allowing communication to the authorities entrusted with the collection should be granted full effect.¹⁰⁶ The information obtained by the administration of direct taxes should

100. Council Directive 77/799, *supra* note 22, art. 7.2; see also text *infra* part III.E.

101. For VAT, the corresponding provisions are C.T.V.A. arts. 93terdecies, al. 2; 93quaterdecies, § 2; 93bis.

102. COM. CONV. 26/13.

103. COM. I.R. 244bis/43.

104. C.I.R. arts. 240, 259.

105. Council Directive 77/799, *supra* note 22, art. 7.3.

106. Collection assistance is organized for agricultural claims (refund, intervention, levy), for customs duties and for VAT Council Directive 76/308, 1976 O.J. (L 73), modified by Council Directive 79/1071, 1979 O.J. (L 331).

normally not be used for collecting VAT, nor conversely. The Belgian-U.S. convention expressly provides for assistance in collection, subject to certain limitations.¹⁰⁷

4. *Criminal Prosecution in Tax Matters*

Article 7.1 of the directive further allows that the information

may in addition be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing the tax assessment and only to persons who are directly involved in such proceedings; such information may, however, be disclosed during public hearings or in judgments if the competent authority of the Member State supplying the information raises no objection.¹⁰⁸

The recitals state that "the Member States receiving such information should not use it, without the authorization of the Member State supplying it, other than for the purposes of taxation or to facilitate legal proceedings for failure to observe the tax laws of the receiving State."¹⁰⁹ The correct interpretation of these texts is, in our view, that the information cannot be used for initiating the tax criminal procedure but once it has been initiated, the information can be transmitted to the prosecutor's office.

The petitioned state cannot oppose such use, unless it has otherwise agreed before the communication, possibly in a double tax treaty, and its law or its administrative practice prohibits such use. What the petitioned state may oppose is that the information be used during public hearings or in judgments. In our view, the directive does not change much. Either the treaties prohibit the use for tax criminal purposes, and the prohibition remains valid pursuant to article 7.2 of the directive, or the treaties allow the communication to judicial authorities with a view to criminal prosecution, and such clause is to be granted full effect pursuant to article 7.3 of the directive.¹¹⁰ What changes is that the treaty clause prohibiting any use for criminal purposes is contrary to the directive where the law and the administrative practice of the petitioned state allow use of information obtained by the administration for the tax criminal purposes allowed by the directive, which is the case in Belgium.¹¹¹ Belgium accordingly will have to adapt its treaties on this point. What might change is that, since the broadening of the scope of use allowed by article 7.3 is only permitted if the internal law of the petitioned state allows a use "for similar purposes . . . in the same circum-

107. U.S.-Belg. Tax Treaty, *supra* note 15, arts. 26.1, 27.

108. Council Directive 77/799, *supra* note 22, art. 7.1.

109. *Id.* recital.

110. The communication for criminal prosecution is, within the EEC framework, allowed by the conventions between Belgium and Germany, Denmark, Greece, Italy, and Portugal. The convention between Belgium and Italy only refers to *poursuites* (prosecution), while the other texts expressly mention criminal prosecution. The Belgian-Italian treaty, however, made in 1983, actually follows the OECD 1977 Model, which was an innovation on this point when compared with the 1963 Draft. The possible ambiguity of the French word *poursuites*, which may refer to both civil and criminal prosecution, exists also in the Dutch text (*vervolging*) and in the Italian text (*procedimenti*).

111. C.I.R. art. 244; C.T.V.A. 93bis.

stances," the broad treaty clause would be illegal in the hypothesis where the treaty goes further than the internal law. Although this is not the case in Belgium, it could be in certain of the partner states.

As for the Belgian-Swiss and Belgium-U.S. conventions, they allow use for purposes of tax criminal prosecution. Even though the exchange of information between Belgium and Switzerland is restricted to information necessary for a regular application of the treaty, it is possible that the information would be relevant for tax criminal purposes. In our view, it is not necessary that the crime triggering prosecution be itself a crime against the treaty—which would be impossible since the treaty does not provide for criminal sanctions.¹¹²

5. General Criminal Prosecution

The exchange of information might be useful for furthering nontax criminal prosecution, for example, prosecution for forgery, false balance sheet, or breach of exchange control regulations. The directive provides that the information "shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing the tax assessment."¹¹³ This prohibition can however be lifted in the instances provided by article 7.3. The treaties that differ from the OECD model by allowing use for general criminal purposes should accordingly receive effect. They should not, however, be used in place of specific international instruments that exist to deter criminal activity, such as the European Treaty of April 20, 1959, concerning the judicial assistance in criminal matters or the Benelux treaty of June 27, 1962, for extradition and judicial assistance in criminal matters.¹¹⁴ Switzerland, however, refuses to allow information supplied pursuant to criminal assistance to be used for tax purposes.¹¹⁵ Information irregularly obtained must be disregarded by criminal jurisdictions.¹¹⁶

6. Transmission to Third States

The directive does not allow transmission of information to a third state, except with the agreement of the competent authority that originally supplied the information.¹¹⁷ In case of subsequent transmission to a fourth state, it appears logical to also require the agreement of the first petitioned state. The treaties do not provide for such transmission.

112. This author's view is not shared by De Broe. See *supra* note 5, at 94–95; see also Lagae, *supra* note 12, at 316 n.215.

113. Council Directive 77/799, *supra* note 22, art. 7.1.

114. Mon. b., 24 Oct. 1967.

115. Judgment of 9 Oct. 1981, Federal Court (CH), 1982 J.D.F. 350 (noted by Jacques Malherbe).

116. Judgment of 28 Oct. 1988, Crim. Court of Brussels, F.J.F. 89/43; Judgment of 30 Oct. 1986, Court of Appeals of Antwerp, 1986-1987 RECHTSKUNDIG WEEKBLAD 1402 (noted by Marc Huybrechts); De Broe, *supra* note 99, at 348; M. Wisselinck, *Strafrechtelijke bijstandverdragen en belastingfraude*, 1982 MBB 175, 177.

117. Council Directive 77/799, *supra* note 22, art. 7.4.

IV. Conclusion

The exchange of information between tax administrations appears normal when one admits that international tax law must remedy not only double taxation, but also double nontaxation achieved by fiscal evasion. The EEC directives constitute a first rather timid step toward reinforcing this exchange within a framework that is meant to be increasingly federal, or at least confederal, which brings to the fore the question of retaining reservations in regard to business secrecy on public policy. New steps have been taken with the two directives and the EEC treaty, all of July 23, 1990.¹¹⁸

Regretfully, article 11 of the European directive on exchange of information has only bypassed the problem of coordination with existing, mostly bilateral, treaties. Also, and even more regretfully, the Belgian legislature has elected to implement the EEC principles "en trompe-l'oeil." As a result, a reader of the Belgian Income Tax Code who is unaware of the directive cannot perceive the bearing and the limitations of the powers and obligations of the administration.

118. Council Directive 90/434 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchange of shares concerning companies of different Member States, 1990 O.J. (L 225) 1.

Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 1990 O.J. (L 225) 6.

Council Directive 90/435, the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 1990 O.J. (L 225) 10.