

# Exchange of Information

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## 1. Introduction

25.1. This contribution examines an astonishing measure of Belgian international tax law: the exchange of information provision of the Treaty.

The exchange of information provision of the Treaty (Art. 25) follows the format of Article 26 of the OECD Model Convention, as it has read since 2004. Most of its provisions parallel the US Model Convention that was released on 15 November 2006, shortly before the Treaty was signed. However, the provisions of the Treaty are more far-reaching than those of either the OECD Model Convention or the US Model Convention, and they are much more far-reaching than those of the Belgian Model Convention.

25.2. By signing the Treaty, Belgium waived a number of protections that are in principle granted by Belgian law to taxpayers against the tax authorities. Belgium has agreed to supply the United States with information that the Belgian tax authorities themselves could not collect for the purpose of applying Belgian taxes. The guarantees at issue concern bank secrecy and the statute of limitations on investigations.

The Belgian law of 3 June 2007 which approved the Treaty (“the Law of Appropriation”) adapted the ITC 92 on the one hand to mirror the provisions of the Treaty, and on the other hand, to enable the Belgian tax authorities to use information received from the United States under the Treaty.

The Treaty is mentioned in the Progress Report of the OECD Committee on Fiscal Affairs released on 10 July 2007 as an “improvement since 2003 in access to bank information for civil tax purposes”<sup>2</sup>.

## 2. Information that may be exchanged

### 2.1. *Taxes concerned*

25.3. The OECD Model Convention initially provided that the exchange of information and the use of information resulting from an exchange were limited

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<sup>2</sup> OECD, “Improving Access to Bank Information for Tax Purposes – The 2007 Progress Report”, Paris, 2007, p. 22. The Belgian tax amnesty policies are also mentioned as improvements (p. 27).

to the taxes covered by its Article 2 (Taxes on Income and on Capital). In 2000, the OECD Model Convention was amended to propose that treaty partners agree to exchange information regarding taxes of every kind and, as a consequence, to use such information for the purposes of applying all those taxes<sup>3</sup>. Information exchange is only excluded when the exchange request concerns a tax that is contrary to the treaty; however the only restrictions provided by the OECD Model Convention relate to taxes on income and capital in specific circumstances. The Belgian Model Convention and the US Model Convention conform to that extension of the exchange of information.

25.4. Unlike the Belgian Model Convention and the US Model Convention, the Treaty only allows the exchange of information concerning the taxes covered by the Treaty<sup>4</sup>, i.e., on the one hand, in the case of Belgium, individual income tax, corporate income tax, income tax on legal entities, income tax on non-residents, including prepayments and surcharges on these taxes and prepayments; and, on the other hand, in the case of the United States, federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes) as well as federal excise taxes imposed with respect to private foundations. The exchange provision also applies to any substantially similar taxes that would be imposed after the signature of the Treaty.

The exchange provision does not apply with respect to taxes levied by Belgian and US political sub-divisions or local authorities. Therefore, the prepayment of tax imposed in Belgium on behalf of the Regions on land and buildings and local surtaxes on individual income tax are not covered<sup>5</sup>.

25.5. However, information relating to taxes other than those covered by Article 2 of the Treaty may be exchanged under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988 (“the Mutual Assistance Convention”)<sup>6</sup>. This Convention is intended to apply between the Member States of the Council of Europe and those of the OECD<sup>7</sup>. It is effective with respect to the United States since 1 April 1995. It is effective with respect to Belgium since 1 December 2000<sup>8</sup>. Since 1 December 2000, Belgium and the United States may exchange information under the Mutual Assistance Convention on matters on which both countries have committed to exchange information with the other signatory countries and on which they have not made reservations<sup>9</sup>. The Mutual Assistance Convention does not

<sup>3</sup> *OECD Commentary* on Art. 26, Para. 10.1.

<sup>4</sup> *Cf.* also Chapter II.

<sup>5</sup> See also Explanatory Memorandum, Belgian Senate session 2006-07, 3-2344/1, p. 7 and following.

<sup>6</sup> See also Explanatory Memorandum, Belgian Senate session 2006-07, 3-2344/1, p. 42.

<sup>7</sup> The Mutual Assistance Convention is intended to apply whatever the residence or citizenship of the taxpayer concerned (Art. 1(3)).

<sup>8</sup> Belgium signed the Mutual Assistance Convention on 7 February 1992.

<sup>9</sup> The United States declared that it intended to obtain information for the purposes of the taxes levied pursuant to the Internal Revenue Code: income tax, inheritance taxes, excise duties, etc. Belgium intends to exchange information with the other partner states for the purposes of income taxes, registration duties on gifts *inter vivos*, value added tax, excise duties, etc. (declarations of Belgium and the United States, see the web page of the Council of Europe: <http://www/conventions.coe.int/Treaty>).

restrict, in any case, the opportunities to exchange information more efficiently under the Treaty<sup>10</sup>.

25.6. The Treaty provides for the exchange of information that “may be relevant” for applying the Treaty, as well as Belgian and US domestic law. The information needs only to be relevant for the purposes of the receiving authorities; it may not be necessary for them to apply the Treaty or their domestic tax legislation. On this point the Treaty parallels the 2004 version of the OECD Model Convention, the Belgian Model Convention and the US Model Convention.

## *2.2. Taxpayers concerned*

25.7. The exchange of information intended by the OECD Model Convention (since its 1977 version)<sup>11</sup>, is not restricted to information on residents of the treaty partners. Information passed between treaty partners may concern persons that are merely taxpayers of one of those countries and who are residents of another country. The Treaty as well as the Belgian Model Convention and the US Model Convention, contains the same provision.

25.8. The United States and Belgium may also exchange information under the Mutual Assistance Convention for the purpose of taxes not covered by the Treaty. Like the OECD Model Convention, the Belgium Model Convention and the US Model Convention, the Mutual Assistance Convention does not restrict the exchange of information on the basis of the residency or nationality of the taxpayer concerned<sup>12</sup>.

## *2.3. With respect to the source of the information*

25.9. International exchanges of information remain exceptions to the “most absolute” secrecy<sup>13</sup> with which the Belgian tax authorities are bound to treat any information made available to them in the course of their duties. In principle, exchange of information provisions contain guarantees for the taxpayers concerning the use that the treaty partners can make of information exchanged.

25.10. Information received subject to such confidentiality rules cannot be passed on to the tax authorities in another country, and therefore Belgium could not pass on to the United States information it had obtained from another state under a bilateral treaty.

<sup>10</sup> Art. 27(1) of the Mutual Assistance Convention.

<sup>11</sup> The 1977 amendment to the OECD Model Convention has been presented as an explanation rather than a modification. The Committee on Fiscal Affairs considered that the amendment was only intended to phrase more accurately the equivalent provisions of the 1963 draft (Report of the Committee of Fiscal Affairs, “Echange de renseignements fiscaux entre les pays membres de l’OCDE. Vue d’ensemble des pratiques actuelles”, Para. 22 and following).

<sup>12</sup> Art. 1(3) of the Mutual Assistance Convention.

<sup>13</sup> “Le plus absolu” (Art. 337 ITC 92).

25.11. EC Directive 77/799<sup>14</sup> also prohibits Belgium from passing on information received from other EC Member States, under this directive, to the United States<sup>15</sup>. Article 338 § 8 ITC 92 only permits Belgium to forward information received from an EC Member State to another EC Member State.

25.12. The Mutual Assistance Convention allows a party that receives information from another party to forward such information to a third signatory country, provided that the party that first provided such information agrees<sup>16</sup>. However, EC Directive 77/799 supersedes the Mutual Assistance Convention in income tax matters between EC Member States<sup>17</sup>, which are expected only to apply the Mutual Assistance Convention's rules to matters not covered by EC Directive 77/799<sup>18</sup>. For this reason, the United States cannot use the Mutual Assistance Convention to claim information regarding income tax from Belgium, if that information was delivered to Belgium by another EC Member State.

### 3. Exchange procedures provided by the Treaty

25.13. The Treaty allows the United States and Belgium to exchange information automatically, spontaneously or upon request. The Treaty also allows simultaneous examination. It envisages examination abroad, i.e., examination by representatives of a treaty partner on the territory of the other treaty partner in order to collect relevant information. Those procedures are the subject matter of the administrative arrangement between the tax authorities of the two countries signed in Paris, on 30 January 2008<sup>19</sup>.

25.14. The exchange of information is managed by the central tax authorities of the treaty partners. This is supposed to reassure taxpayers that the investigations will be conducted within legal limitations<sup>20,21</sup>.

25.15. In the absence of a specific request, one treaty partner may systematically and periodically forward "bulk" information to the other (automatic or routine exchange). The country providing the information is expected to use international standard formats. Information with respect to a certain calendar year or

<sup>14</sup> Council Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States, as amended.

<sup>15</sup> Art. 7(4) of EC Directive 77/799.

<sup>16</sup> Art. 22(4) of the Mutual Assistance Convention.

<sup>17</sup> Art. 27(2) of the Mutual Assistance Convention.

<sup>18</sup> "Convention on Mutual Administrative Assistance in Tax Matters and Explanatory Report", Council of Europe Publishing, Strasbourg, 1989 § 259.

<sup>19</sup> Other similar arrangements have been concluded by Belgium with France, Italy, the Netherlands, etc. they are available on the web site of the Belgian tax authorities [www.fisconet.be](http://www.fisconet.be).

<sup>20</sup> See C. DOCCLO, "Entraide internationale: L'échange de renseignements", in *Les paradis fiscaux et l'évasion fiscale – actes du colloque du Centre de droit international de l'ULB*, Bruylant, Bruxelles, 2001, p. 397-432.

<sup>21</sup> This is an improvement when compared to the "Qualified Intermediary" regime imposed by the United States tax authorities on Belgian banks (see H. TORRIONE, "Retenue à la source USA 2001 l'intermédiaire financier comme auxiliaire du fisc américain", *J.D.F.* 2000, p. 321-350).

period is expected to be transmitted as soon as possible after the end of that year or period<sup>22</sup>.

**25.16.** One treaty partner may also supply information that could be relevant to the other treaty partner and that has not previously been requested (spontaneous exchange), in the following circumstances (but not limited to them): one state has reasons to suspect that there may be a loss of tax revenue to the other state; a taxpayer obtains a reduction of, or an exemption from tax in one state which would give rise to an increase in tax or to liability to tax, in the other state; dealings between a taxpayer of one state and a taxpayer of the other state are conducted through one or more countries in such a way that questionable savings in tax may result in one or both states; one state has reasons to suspect that a questionable savings of tax may result from artificial transfers of profits within groups of enterprises; information forwarded to one state by the other state has enabled to obtain further information, which could be relevant in assessing tax in the other state<sup>23</sup>.

**25.17.** If a treaty partner submits a request for information concerning a specific, named, taxpayer or a specific transaction, the requested state must provide the information on file and, as the case may be, investigate as necessary in order to supply the requested information. The requested authorities are expected to respond to requests for information within six months of receipt<sup>24</sup>. The exchange upon request under the Treaty is particularly far-reaching. This issue is examined below.

**25.18.** The treaty partners could also agree to make inquiries simultaneously and independently, each on its own territory, concerning the tax affairs of taxpayers in which they have a common or related interest, with a view to exchanging any relevant information which they obtain as a result from these inquiries<sup>25</sup>.

Simultaneous tax examinations may concern transfer pricing issues, apparent tax avoidance or tax evasion techniques, manipulations or tax shelters, tax aspects of money laundering, corruption practices, kickbacks, bribes, etc.<sup>26,27</sup> The central tax authorities may charge their respective agents with investigation duties for the purposes of simultaneous examinations and enable them to communicate amongst themselves directly (by telephone, fax, electronic mail or by

<sup>22</sup> Administrative arrangement of 30 January 2008; see also the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes approved by the OECD Committee on Fiscal Affairs on 23 January 2006.

<sup>23</sup> Administrative arrangement of 30 January 2008.

<sup>24</sup> Administrative arrangement of 30 January 2008.

<sup>25</sup> Definition provided by the Recommendation of the Council concerning an OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations.

<sup>26</sup> Administrative arrangement of 30 January 2008.

<sup>27</sup> According to the OECD Council, the automatic exchange of information is also a mechanism to combat corruption of officials in international deals and is able to discourage kickbacks and bribes by publicly disclosing them (Explanation on the Council Recommendation on the use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax purposes of 22 March 2001 (C(2001)28)).

meeting each other in person). Nevertheless, the exchange of any given piece of information must be confirmed by letter from the central authorities<sup>28</sup>.

**25.19.** The Treaty also provides that representatives of one treaty partner will be allowed to enter the territory of the other treaty partner to make inquiries, subject to the conditions agreed upon by the treaty partners. A basic rule of international law is the prohibition for a state to exercise its jurisdiction on another state's territory, unless permission is given<sup>29</sup>. In the absence of a specific agreement on the presence of foreign agents in Belgium, the Belgian tax authorities do not allow this presence, unless the taxpayer himself requests the visit of foreign officials<sup>30</sup>. Although Belgium is generally unwilling to allow the presence of foreign officials on its territory, Belgium has already concluded several arrangements on the visit of foreign countries' officials<sup>31</sup>.

The administrative arrangement of 30 January 2008 delimits the powers of the visiting officials within the visited country's procedural limitations. Information obtained by the visiting state during an examination carried out in the visited state must not be used before the visited state's competent authority has officially confirmed the information at issue<sup>32</sup>.

#### 4. Limits on the exchange of information

**25.20.** The exchange of information provision of the Treaty does not impose on a treaty partner the obligation to carry out administrative measures at variance with its laws and administrative practice or those of the other party; or to supply information that is not obtainable under its laws or normal practice or those of the other party; or to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (Art. 25(3)). This provision parallels the OECD Model Convention (since its draft of 1963), the US Model Convention and the Belgian Model Convention.

This provision is mainly relevant when a country requests the other country to provide information and, as the case may be, to conduct investigations.

**25.21.** Precisely, the Treaty significantly deviates from its Article 25(3) with respect to exchange upon request. This is the next topic.

<sup>28</sup> Administrative arrangement of 30 January 2008.

<sup>29</sup> PCIJ 7 September 1927, *Lotus* case.

<sup>30</sup> Instruction of 27 November 1996, Para. 65.

<sup>31</sup> See the arrangements published on the web page [www.fisconet.be](http://www.fisconet.be).

<sup>32</sup> Administrative arrangement of 30 January 2008.