

IFA Congress Madrid May 2014 Tax Planning and Tax Rulings Practice in Belgium

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Agenda



1. The international scene

2. The Belgian scene

3. Tax abuse introduced by the restated GAAR

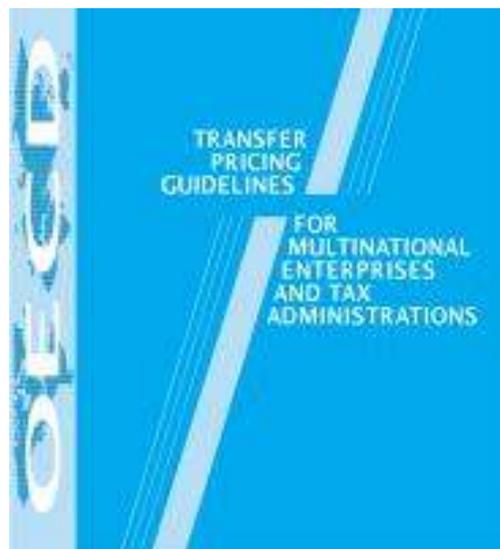
4. Risks can be managed by an advance decision

1. The international scene



1. The international scene

Belgium is one of the founding members of the OECD



1. The international scene

Base Erosion and Profit Shifting (BEPS)



1. *The international scene*

Belgium is one of the founding members of the EU

The Treaty of Rome signing ceremony on 25 March 1957



Spanish-Belgian IFA Congress
PwC /OAD

1. *The international scene*

The EU and its Institutions are watching...



1. The international scene

Guidance and direction by the EU Commission

2007: Communication of the EU Commission on the application of anti-abuse measures in the area of direct taxation within the EU and in relation to third parties (COM(2007) 785 final of 10 December 2007)

Invitation to the Member States to revise their direct tax anti-abuse rules

- to strike a proper **balance** between the public interest of **combating abuse** and the **need to avoid disproportionate restrictions on cross-border activity** within the EU where the four fundamental freedoms apply;
- for **better coordination of the application of anti-abuse measures in relation to third countries** in order to protect the tax bases of Member States



**EU Directives (e.g. Merger Directive):
direct applicability and primacy**

1. *The international scene*

Milestone cases of The European Court of Justice on tax abuse

2006: Cadbury-Schweppes case provided guidance on “wholly artificial arrangements” (Case C-196/04 of 12 September 2006)

The need to prevent tax abuse can justify a restriction on the fundamental EU freedoms, but, to be lawful, national tax rules must be proportionate:

- the taxpayer must have the opportunity to produce evidence of commercial justification.
- the burden of proof should not lie solely with the taxpayer.

and must serve the specific purpose of preventing wholly artificial arrangements:

- in this case, the ECJ provided guidance on the criteria for detecting **abusive practices**, i.e. wholly artificial arrangements
- the detection of a wholly artificial arrangement equals in effect to a **substance-over-form analysis**.

1. The international scene

Milestone cases of The European Court of Justice on tax abuse

2010: Zwijnenburg

(Case C-352/08 of 20 May 2010)

A Member State cannot deny the benefits of the Merger Directive where a merger is undertaken to avoid a tax that is not within the scope of the Directive.

- Impact in Belgium: **separate versions of anti-abuse measures** have been restated for income tax, registration duties and inheritance tax, each restricted to their respective tax advantages.

2011: Foggia

(Case C-126/10 of 10 November 2011)

A merger can have valid commercial reasons if it allows administrative and management costs to be reduced, but such cost savings are inherent to mergers because of the simplification of the group structure.

- Impact in Belgium: the **other motives** that taxpayers in Belgium can invoke to counter the application of the GAAR, **should be relevant and not inherent to the type of transaction.**

1. *The international scene*

Milestone cases of The European Court of Justice on VAT abuse

2006: Halifax

(C-255/02 of 21 February 2006)

VAT abuse:

- if a transaction results in the accrual of a tax advantage,
- the grant of which would be contrary to the purpose of the Sixth VAT Directive
- and it is apparent from objective factors that “**the essential aim**” of the transaction concerned is to obtain a tax advantage

2008 Part Services

(C-425/06 of 21 February 2008)

VAT interpretation of abuse of law was broadened

- for the finding of an abusive practice it suffices that “the accrual of a tax advantage constitutes the **principal aim** of the transaction.”

1. The international scene

European Human Rights Treaty / Court

1952: First Protocol, article 1

Taxes infringe the property rights and can only be imposed if there is:

- a legal basis (legality principle),
- a public interest, and
- a right balance between the public interest and the protection of individual human rights

Necessity of good quality law, which is accessible, precise and predictable *

- based on the principles of good governance and trust (legitimate expectations)
- in case of doubt, the most favourable interpretation should be chosen (“*in dubio contra fiscum*”).

* Ukraine **Serkov** case of 7 July 2011 of European Court for Human Rights



2. The Belgian scene



2. The Belgian scene

1830: Liberal Constitution

Reaction against arbitrary taxation and privileges during “Ancien Régime”: (tax) legality and equality principles



Farmer crushed under the weight of the tax

Tax legality principle (art. 170, Constitution):

- No tax to the benefit of the State may be introduced than by a law.
 - The law is the sole source of state taxes, deductions and exemptions.
 - All persons, things, facts and acts are therefore fundamentally exempt from tax, unless otherwise provided by law.

2. The Belgian scene

1919: Belgian Income Tax Code (BITC) (reformed in 1962, harmonised in 1992)

Tax evasion (fraud) is a crime (art. 449 BITC)



Violation of the tax legislation (material element) in order to **evade taxation** (intentional element)

- violation can occur through **simulation** (sham) where parties perform an ostensible act whose effects they agree to alter or qualify by concluding a secret side agreement.

2 The Belgian scene

1961: Legal reality prevailed

The choice of the least taxed way was confirmed by the Supreme Court (Brepols Case of 6 June 1961)

Parties can set up a transaction to avoid taxation (intentional element)

- based on the contractual freedom and the constitutional legality principle
- if they accept all legal consequences of their acts
- without violating tax laws or other public policy laws (**no material element**)

2. *The Belgian scene*

1990: Legal reality confirmed against economic reality

Supreme Court rejected the “economic reality” doctrine developed by the Tax Authorities

According to the economic reality doctrine

- parties do not only have to accept all legal consequences of their agreements,
- but the agreements also have to be sincere and have to correspond to the economic reality

The Supreme Court * rejected the economic reality doctrine

- by confirming that simulation only depends on the fact whether or not the parties accept all juridical consequences of their agreements
- and the Court confirmed that reduction of taxes may be the sole objective

“Au Vieux Saint-Martin” case of 22
March 1990



The past freedom of the choice of the least taxed way

Au Vieux
St Martin



€ 100



only to avoid income tax

2. The Belgian scene

1991-1993: reaction from Parliament against negative jurisprudence

1991: specific anti-abuse rule for change of control

The requirement of “legitimate financial or economic needs” for reorganisations as condition for tax losses recovery after change of control was introduced as a **specific anti-abuse rule** (art. 206 BITC).

1993: first version of general anti-abuse Rule (GAAR)

A general anti-avoidance rule was introduced in income tax
(art. 344, § 1 BITC)



Creation of the Rulings Commission effective 1 January 1993 by the Act of 20 July 1993 => Independent **Rulings Office** since 2005

2. The Belgian scene

2004-2007: Belgian milestone court cases rendered the GAAR ineffective

2004: Constitutional Court case of 24 November 2004

The GAAR was not a “blank standard” allowing the tax authorities to tax on the basis of the real economic situation of the parties involved

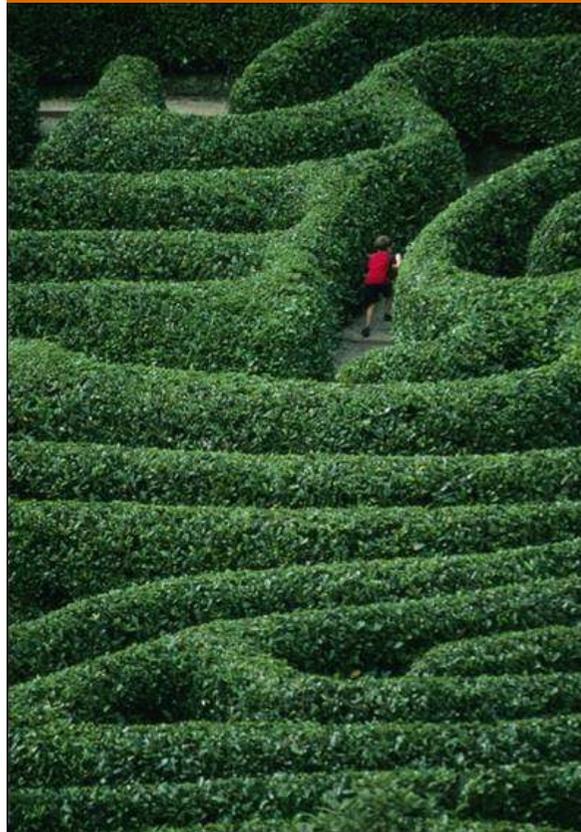
2007: Supreme Court case of 22 November 2007

Redefinition can only occur where the **redefined act has legal consequences that are similar to the ones of the original act**



De facto, this restricted interpretation had reduced the application of the GAAR to step-by-step transactions (separate acts realising one single transaction linked by unity of intent).

3. Tax abuse introduced by the restated GAAR



3. Tax abuse introduced by the restated GAAR

2005-2008: VAT abuse was introduced first

Parliament follows outcome of European VAT Court Cases

In 2005, despite the restrictive attitude of the Supreme Court, **the income tax GAAR was copied into the VAT Code**

(art. 59, §3).

As from 7 August 2006, the VAT Code has been restated in line with the outcome of the Halifax case:

- If an abusive practice is found, transactions involved must be redefined so as to re-establish the situation in the absence of the abusive transactions.
- The burden of proof is on the tax authorities.

3. Tax abuse introduced by the restated GAAR

2009-2012: Growing political consensus in favour of an effective GAAR

2009: Parliamentary Committee of inquiry of the major tax fraud cases (report of 7 May 2009)

Recommendations to determine

- Whether the need existed to tighten the GAAR and to introduce the concept of tax abuse but without creating legal uncertainty
- To facilitate the application of our anti-abuse rules in the light of the practice in neighbouring countries.

2011: Political coalition agreement: General policy note tackling social and fiscal fraud (22 December 2011)

As regards the GAAR, the new legislation **will allow the administration to redefine** one or more acts, **without having to demonstrate that identical or similar legal consequences under civil law arise.**

3. Tax abuse introduced by the restated GAAR

2012: First attempt to restate the GAAR

Inspired by the specific anti-abuse measure of the EU Merger Directive

- allowing to redefine transaction(s),
- even if the legal effects and consequences are not identical or similar to the effects and legal consequences of the classification given by the parties.

But criticized by the Council of State

The designed system of redefinition should be subject to a further investigation,

- with particular efforts to be made for greater compliance with the **legality principle** mentioned in art. 170 of the Constitution.

3. Tax abuse introduced by the restated GAAR

2012: The final: GAAR restated for income tax, registration duties and inheritance tax

In the framework of Belgium's tax reform, the 29 March 2012 Programme Act restated the GAAR for income tax (art. 344, § 1 BITC) as from assessment year 2013 and for registration duties (art. 18, § 2 Reg. Code) and inheritance tax (and 106, 2nd paragraph, Inheritance Tax Code).

- Introduction of the notion of **tax abuse**.
- If the Tax Administration demonstrates that there has been tax abuse, the onus is on the taxpayer to prove that the choice of his legal act(s) is justified by other motives than tax avoidance.



An advance ruling can be applied for to obtain upfront legal certainty

TAX ABUSE

Through the legal act(s) that the taxpayer has carried out, the taxpayer has brought himself in a position that is **contrary to the objectives of the income tax provision:**

I. By avoiding a taxable position

Through the legal act(s) that the taxpayer has carried out, he has realised a transaction

1. placing himself in a position
2. contrary to the objectives of a provision of the BITC or the Decrees implementing the BITC,
3. outside the scope of that provision.

II. By claiming a tax advantage

Through the legal act(s) that the taxpayer has carried out, he has realised a transaction on which basis

1. he claims a tax advantage under a provision of the BITC or the Decrees implementing the BITC and
2. the granting of that advantage would be contrary to the objectives of that provision and
3. the essential purpose of the transaction is to obtain that advantage.

DECISION TREE FOR THE APPLICATION OF THE 2012 GAAR

The Tax Administration (TA) determines in due time that the taxpayer has carried out some legal act(s)

The TA invokes the GAAR

1. The TA demonstrates that, in the framework of the legal act(s) carried out by the taxpayer, there is "**TAX ABUSE**"

Ruling is optional

2. Can the taxpayer prove that the **choice for his legal act(s) is justified by other motives than the avoidance of income taxes?**

YES

GAAR is not applicable

NO

GAAR is applicable: the tax administration restores the taxable base and the tax computation so that the transaction is subject to a taxation that is consistent with the objectives of the income tax provision as if the abuse did not take place

3. Tax abuse introduced by the restated GAAR

Green light by the Constitutional Court



In 2012, some taxpayers and a “league of taxpayers” launched two appeals for annulment of the restated 2012 GAAR on income tax and on indirect taxes.



In 2013, the Court ruled that the new anti-abuse provisions are **not violating**

- the power-defining rules as applicable between the Federal State and the Regions
- the constitutional principles of **legality and equality** in tax matters (Constitutional Court Ruling cases nos. 5487 and 5497, no. 141/2013 of 30 October 2013).

3. Tax abuse introduced by the restated GAAR

Green light by the Constitutional Court

The ruling: no violation of the legality principle

The federal legislative authority has not infringed the fiscal principle of legality: what is involved here is not a reversal but an adaptation of the burden of proof.

The application of the new anti-abuse provisions is subject to strict conditions:

1. first, it is required that the act or set of acts accomplishing the same transaction is **aimed at escaping the tax**;
2. a **definition of "tax abuse"** is enclosed, as opposed to the earlier provisions;
3. the system is not a reversal but an **adaptation of the burden of proof.**

3. Tax abuse introduced by the restated GAAR

Green light by the Constitutional Court

Important considerations of the Court: no violation of the legality principle

- The contested measure is thus **not a general enabling provision allowing the tax authorities**, as a general measure, **to determine the tax base themselves**;
- it is instead a means for assessing special situations individually in concrete cases, under the control of the court.
- The constitutional principle of **legality in tax matters does not require the legislative authorities to determine the substantive conditions** for the application of the measure in more detail since **that is impossible** because of the very nature of the phenomenon that they are trying to counter.

3. Tax abuse introduced by the restated GAAR

Green light by the Constitutional Court

Important considerations of the Court in respect of the subjective element of tax abuse

it is apparent from both the wording and the preparatory parliamentary documents of the contested provisions that, for a transaction to qualify as tax abuse, **the concern to avoid the tax must be either the exclusive motive behind that transaction or an essential motive** behind that transaction to such an extent that **any other objectives should be regarded as negligible or purely artificial**, not only in economic terms but also with regard to other relevant considerations, particularly personal or family considerations.

The first evidence is on the tax authorities: they must demonstrate that the taxpayer has opted for a legal act or a set of legal acts accomplishing the same transaction that is **in contradiction with the objectives of a clearly identified tax provision and whose decisive, if not exclusive, motive is to avoid the tax.**

3. Tax abuse introduced by the restated GAAR

Green light by the Constitutional Court

Important considerations of the Court in respect of the notion of tax abuse

*It is also necessary that the effect of the transaction is **inconsistent with the objectives of the tax provision concerned**, and not just foreign to such objectives.*

*This **requires that the objectives are sufficiently clearly apparent from the wording and, where appropriate, from the parliamentary preparatory documents of the applicable statutory provision.***

*Elements to be taken into account by the tax authorities in this respect include the general context of the relevant tax law, **the practices usually prevalent at the time of the entry into force of the tax provision concerned and the possible existence of specific provisions already aimed at countering certain abuses of the tax provision concerned.***

The current freedom of the choice of the least taxed way, with "tax abuse" roadblocks



+ other relevant non tax reasons

Rulings Office



Tax audit  € 100

Au Vieux St Martin



to avoid income tax

Brepols



4. Risks can be managed by an advance decision



4. Risks can be managed by an advance decision

Rulings Office

Organ

- Board
 - Véronique Taiï (Chair)
 - Luc Batselier - José Vilain - Luc Saliën – Philippe Dedobbeleer
 - appointed by the head of State - period 5 years, renewable
 - recruited from the tax authority
- Assistants (+/- 120)
 - High level
 - selection procedure executed by board
 - appointed by Minister of Finance - period 5 years, renewable
 - recruited from the tax authority

4. Risks can be managed by an advance decision

A GAAR must be coupled with an option for advance clearance

Initially, a pragmatic solution was applied

- Rulings on the use of means of evidence by the Tax Administration are out of scope (Royal Decree)
- At the start-up of the rulings practice regarding the 2012 GAAR, it was considered that the Rulings Office (RO) could not commit itself in advance as to the question whether or not the Tax Administration would apply the GAAR.
- But a ruling could provide upfront confirmation that the choice for the legal act(s) was justified by other motives than income tax avoidance and such confirmation implied that the choice could no longer be questioned on the basis of the GAAR, insofar as all acts were carried out as set forth in the ruling (DOC 53 2081/001, p. 112).

4. Risks can be managed by an advance decision

A GAAR must be coupled with an option for advance clearance

The intention of the legislative authorities ?

- According to the Minister of Finances, it is logical that the RO should be able to determine whether there may be tax abuse, before talking about the quality of the defence by the taxpayer (P.Q. No. 190 of 7 March 2013).
- This position is challenged.
- But supported by others
 - based on the long established practice of rulings in respect of the 1993 GAAR,
 - the hybrid character of the 2012 GAAR (it is more than just means of proof)
 - and the wording (*the use of...*)

4. Risks can be managed by an advance decision

What is an advance decision (ruling) in Belgium

Binding legal act by the Federal Public Finance Department via the independent Rulings Office stating **in accordance with the tax provisions** in force how the law will apply to a **particular situation or transaction** that has **not yet produced an effect from a tax point of view**

- not an agreement
 - decision is not signed by the applicant
- not contra legem interpretation (not valid)
 - but can provide binding interpretation in case of doubt
- only binding towards the applicants for the particular situation or transaction covered



Competent Authorities are in charge of bilateral and multilateral APAs but with support from RO for transfer pricing files

4. Risks can be managed by an advance decision

Main purposes of the tax ruling policies

To provide advance legal certainty to (potential) investors, for a period not exceeding 5 years, but exceptions are possible

e.g. rulings valid during entire depreciation period of investments

The ruling is only void if:

- granted “contra legem” (upfront non-conformity with treaty provisions, community law or internal law)
- the conditions to which the ruling is subject are not met;
- relevant elements of the description are incomplete or inaccurate;
- relevant parts of the transaction are not carried out in accordance with the case presented by the applicant;
- change of treaty provisions, European law or Belgian law applying to the transaction or situation (no grandfathering)

4. Risks can be managed by an advance decision

Cooperation between taxpayers and Tax Administration

Based on mutual trust

- Flexible and open approach during pre-filing meetings (can be anonymous)
- Paperless filing of draft requests and attachments (exhibits in English accepted)
- The RO can ask questions and require more information
- Post-filing meetings are possible



Transparent process (not a black box) with feedback on chance of success and possibility to withdrawn in every stage before the final decision

4. Risks can be managed by an advance decision

How does the RO interact with the local and central tax Authorities?

During pre-filing (no-name or name based): the local inspector and the Central Administration are not informed

Formal ruling request: the local inspector receives a copy via the contact point at the Central Administration

- the RO asking advice from Central Administration for requests:
 - relating to new legislation
 - involving issues of a general nature and administrative guidelines incomplete
 - relating to complicated (financial) products/transactions
 - when the RO considers that the existing administrative guidelines should be amended



When no consensus can be reached, RO informs Head of Taxes but takes decision (independence) (after 10 days)

4. Risks can be managed by an advance decision

Transparent practice

All decisions are published in summary on a no name base on www.fisconetplus.be

Notification/Publication

- The decision is notified to the applicant
- The local tax inspector receives a copy of the decision for potential verification of the correct implementation
- Publication of the decision on a no-name basis



Concept form of decision can be requested before publication for files which could disclose the identity

4. Risks can be managed by an advance decision

Tax rulings: a useful risk management tool for lawful tax planning

A positive ruling eliminates tax exposures and is part of good Corporate Governance

It is an excellent tool – at no charge - allowing to combine all tax aspects in one application at one central and independent office before undertaking risks allowing proactive collection of necessary documentation, provided:

- the topics are within the scope of the ruling practice and still advance
- the outcome of a costs/benefits analysis is positive
- the chance to obtain a positive decision is realistic



It is vital that the applicant can disclose all relevant information and has no hidden agenda

Many thanks for your kind attention !



José Vilain



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