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## Belgium

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### I. The meaning of avoidance and aggressive tax planning and the BEPS initiative

#### 1. Legal definition

In a Belgian context the distinction between tax planning and the more general principle of tax avoidance seems rather artificial. Based on the constitutional legality principle persons and goods are exempted from taxation, unless expressly provided for by law. As will be explained, this implies that 'tax avoidance' in general, to be construed as setting up a favourable tax structure, is treated in combination with the possibility of (even aggressive) tax planning. A distinction has to be made between legal tax planning or avoidance and illegal tax evasion or tax fraud.<sup>2</sup>

In general, the Belgian Constitution provides that *"no taxation can be levied to the benefit of the State, unless it has been implemented by a law"*.<sup>3</sup> Most scholars interpret the word 'by' in this phrase as demanding a formal involvement of the legislative parliamentary power that has to determine the basic aspects of any tax. Only the legislature himself can establish such taxation, which cannot be delegated to any other (e.g. executive or administrative) authority.<sup>4</sup>

This interpretation is a.o. based on a historical argument, developed from the difference in text between the 1831 Belgian Constitution and the preceding Netherlands 'grondwet' when this Region felt under the reign of the Dutch King Willem. Whereas this preceding text left the possibility to delegate (*"Geene belastingen kunnen ten behoeve van 's Lands kas worden geheven, dan uit kracht van eene wet"*), the Belgian constitution reinforced the legality principle as a reaction against abuses under the former Netherlands regime.<sup>5</sup>

Legal theory therefore generally demands a formal act of the legislative authority to establish a tax. Whenever the legislature delegates the determination of particular aspects of tax legislation to an executive authority, the Constitutional Court will verify whether this only consists of minor practical procedures.<sup>6</sup> Tax is therefore not to be presumed. Tax liabilities have to be clearly defined in a legal

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<sup>1</sup> The author especially wishes to thank M. Bourgeois for his valuable comments, insights and reflections on the topic. M. Bourgeois also recently published on this topic in M. BOURGEOIS and A. NOLLET, "General Anti-Avoidance Rules (GAARs) – A key element of tax systems in the Post-BEPS World – Belgian Report" in M. LANG a.o. (Ed.), *General Anti-avoidance rules (GAARs) A key element of tax systems in the Post-BEPS World, European and International Tax law Policy Series*, vol. 3, Amsterdam, IBFD 2016, 83-108.

<sup>2</sup> Cf. B. PEETERS, "De dunne lijn tussen belastingontwijking en belastingontduiking", AFT 2010, 4-42.

<sup>3</sup> Art. 170, 1 Belgian Constitution. (Hereafter: Const.) The same principle of legality applies with regard to taxes to the benefit of the regional and local entities. (Art. 170, §2-4 Const.)

<sup>4</sup> See e.g. E. VAN DE VELDE, *Afspraken met de fiscus: de grenzen, juridische kwalificatie en rechtsgevolgen*, Brussel, Larcier 2009, 157-160.

<sup>5</sup> This interpretation, allegedly based on the historical method, has however been questioned. According to De Groot, nothing in the Constitutional history can clearly establish that the text of the current Art. 170 Constitution. was willingly worded differently from Art. 197 of the former Netherlands Constitution, as a reaction against the latter that was perceived to give too much discretionary power to the executive authority. In addition, the Dutch constitutional law literature does not confirm that the legality principle in tax matters in the Netherlands (*"taxes imposed by the State shall be levied pursuant to Act of Parliament"* (Art. 104)) would be less restrictive than the Belgian one. See D. de Groot, "Over de invoering en het belang van het grondwettelijke legaliteitsbeginsel in fiscale aangelegenheden", *TFR* n° 360 (2009), p. 339.

<sup>6</sup> E.g. Constitutional Court 21 February 2007, nr. C-32/2007; 3 March 2016, nr. 37/2016, [www.const-court.be](http://www.const-court.be).

text, that has to be strictly construed. Taxation through analogous interpretation is prohibited in tax matters.

From this point of view the Belgian Supreme Court (Hof van Cassatie, Cour de Cassation) has derived the free choice for a tax payer to opt for the least taxed way when structuring a particular operation. Named after the first case in this context, this is called the 'Brepols doctrine'. According to the Supreme Court "*there is no prohibited simulation, and, therefore, tax evasion, where, in order to benefit from a more favourable tax treatment, and using the freedom of contract, without however violating any legal provision, the parties enter into acts of which they accept all consequences, even if the form they give thereto is not the most usual*",<sup>7</sup> or "*even if these acts are entered into with the sole purpose of reducing the tax burden*".<sup>8</sup> Tax avoidance therefore, cannot be considered a crime or administrative offence, as a taxpayer does not evade any tax legally due. As long as they accept all consequences of their legal transactions, it has to be distinguished from sham or tax evasion. The tax administration in general also will have to accept all consequences.<sup>9</sup>

Although legal, the legislator can limit the scope of this free choice through general, as well as specific anti-avoidance rules. (GAARs and SAARs). Besides, one notices that particular legal texts are deliberately construed with the purpose of combatting tax avoidance, although this was not necessarily the particular aim of the legal text at stake.

Most Belgian tax codes contain a general anti-avoidance rule. (GAAR)<sup>10</sup>

Apart from the VAT-code, these GAARs all follow the approach of art. 344, §1 BITC, as reformed by a law of 29 March 2012.<sup>11</sup> This text reads as follows:

*"The legal act or separate legal acts that realise the same operation is/are not binding on the tax authorities when the tax administration can, on the basis of objective circumstances, establish by means of presumptions or other legal items of evidence mentioned in Article 340 that tax abuse has occurred.*

*There is tax abuse where the taxpayer carries out, by means of a legal act or a series of legal acts, one of the following transactions:*

- 1. a transaction by which the taxpayer places himself, contrary to the purpose of a provision of this Code (i. e. the BITC) or the decrees implementing it, outside the scope of application of such provision; or*
- 2. a transaction through which the taxpayer claims a tax advantage provided for by a provision of this Code or the decrees implementing it, the aim of which is essentially the obtaining of such benefit, where the granting thereof would be contrary to the purpose of that provision.*

*It is up to the taxpayer to prove that the choice of the legal act or series of legal acts is justified by other motives than the avoidance of income taxes.*

*If the taxpayer does not provide this counterproof, then the taxable base and tax computation are*

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<sup>7</sup> Supreme Court, 6 June 1961, *Brepols, Pas.*, 1961, I, 1082.

<sup>8</sup> Supreme Court, 22 March 1990, *Au vieux Saint-Martin, Pas.*, 1990, I, 853.

<sup>9</sup> This point of view has been repeated by the court several times. See e.g. Supreme Court 19 October 1965, 27 February 1987, 29 January 1988, 23 December 1993, 19 May 1995, 16 October 1997, 5 March 1999, 16 October 2009, ..., [www.cassonline.be](http://www.cassonline.be)

<sup>10</sup> Art. 344,1 Belgian Income Tax Code (BITC); art. 18, 2 Code on registration duties (as applicable in Brussels and Wallonia), art. 106, 2 Inheritance Tax Code (as applicable in Brussels and Wallonia) and art. 3.17.0.0.2 Flemish Tax Code. A different text is foreseen in art. 1, §10 VAT Code.

<sup>11</sup> Program bill of 27 December 2012, Belgian Gazette 31 December 2012. Given the importance of this topic, it has been largely commented in legal doctrine. See a.o. T. AFSCHRIFT, *L'abus fiscal*, Brussel Larcier 2013, 286 p.; M. BOURGEOIS and A. NOLLET, "L'introduction d'une notion générale d'abus (de droit) fiscal en matière d'impôts sur les revenus, de droits d'enregistrement et de droits de succession", RGF 2012, 6, 4-20; X. (Ed.), *De nieuwe antimisbruikbepaling : verslagboek van het grote antimisbruik-seminar georganiseerd door Kluwer opleidingen op 10 mei 2012*, Mechelen, Kluwer 2013, 193 p..

*restored so that the transaction is subject to a tax assessment that is consistent with the purpose of the law, as if no abuse had occurred*".

Contrary to the precedent version this text contains an explicit definition of 'tax abuse', containing an objective and a subjective element.

The objective element implies the situation the taxpayer has brought himself into. As such, a taxpayer can place himself into a situation whereas he benefits from a certain tax favor, although this was not the intention of the legislator, or a taxpayer can avoid a particular charging provision, although the legislator expected to submit his behaviour to this taxation. It is important to notice the explicit reference to a particular tax code or the decrees implementing it. Each tax code has its own definition and only refers to its own legislation and executive decrees. Tax legislation that would be implemented in separate legal texts therefore would not be covered with this general text.<sup>12</sup>

Besides, the getting of a favour, as well as the exclusion of a tax, should frustrate the legislator's intention. Defining this intention can however be very difficult in practice. The Minister of Finance made a very questionable statement during the discussion of the draft bill. He asserted that tax statutes are charging provisions aimed at collecting the financial means necessary to spend in the public interest.<sup>13</sup> However this cannot be seen as the intention of each particular tax law. The specific objectives of each provision taken separately cannot be confused with or assimilated to the general purpose related to taxation as a whole. The GAARs refer to the purpose of the specific charging/relief provision that is at stake. This is ascertainable from the statute itself, the broader legal context in which the provision is included and the preparatory works (i.e. the legislative history to the GAARs). Unilateral constructions by the tax authorities (circular letters, FAQs, answers by the Minister to parliamentary questions, etc.) are irrelevant to this purpose.

The Constitutional Court has given some details about how the tax authorities can identify the objectives of the circumvented tax provisions.<sup>14</sup> First, it is necessary to prove that the effect of the taxpayer's transaction is inconsistent with the objectives of the tax provision concerned, and not just irrelevant to such objectives. Second, this requires that the objectives of the tax provisions are sufficiently clearly apparent from the wording and, where appropriate, from the legislative history to the draft bill (preparatory documents). 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. As a consequence, where the preparatory works of the circumvented charging/relief provisions are too unclear or are ambiguous, the principle *in dubio contra fiscum* should be applied (unless the objective of the circumvented tax provision can be found through a systematic approach to the legal rules at stake).

The subjective element relates to the taxpayer's intentions. For a transaction to qualify as tax abuse, the taxpayer's concern to avoid the tax must be either the exclusive motive behind that transaction or an essential motive to such an extent that any other concerns 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.<sup>15</sup> So, the intention of the taxpayer matters. This is a sole-purpose test. Taxpayers can escape the GAAR by proving that the choice for their legal act(s) is justified by other genuine non-tax reasons than the avoidance of income tax (or registration/inheritance

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<sup>12</sup> During the legislative history, an amendment to stop this limit, has not been accepted. Cf. *Parl. St.* Kamer DOC 53, nr. 2081/016.

<sup>13</sup> *Doc. Parl.*, Chambre, session 2011-2012, n° 53 2081/16, p. 6.

<sup>14</sup> Constitutional Court, 30 October 2013, n° 141/2013, B.21.1. and B.21.2. See A. NOLLET, *La nouvelle règle anti-'abus fiscal' à l'épreuve du juge constitutionnel: une validation prévisible, des clarifications appréciables, des considérations discutables*, R.F.R.L. 2013, 296-322.

<sup>15</sup> *Doc. Parl.*, Chambre, 2011-2012, n° 53-2081/001, 114-115. This construction has been confirmed by the Constitutional Court (30 October 2013, n° 141/2013, B.20.3).

taxes). Nevertheless, non-tax reasons must be specific to the taxpayer's transaction, and not be general and inherent in all transactions of that nature. In addition, if the non-tax motive(s) is/are specific for the taxpayer's transaction, it/they should not be wholly secondary to tax motives and so insignificant that a reasonable taxpayer would not have entered into the transaction in the absence of the tax benefits.

The legislative history to the GAARs indicates that the Government was inspired to this purpose by the ECJ decisions in the *Part Service* and *Foggia* cases<sup>16</sup>. In an administrative Circular<sup>17</sup> this subjective element is further linked to the European notion of 'wholly artificial arrangement' although in a Belgian context this rather refers to the subjective intention and not to describe the objective element.

Since 2006<sup>18</sup> the Belgian VAT-Code also provides for a GAAR in art. 1, §10. This text was, when implemented, largely inspired by the European case law.<sup>19</sup> It reads as follows:

*"For the application of this Code there is supposed to be abuse when the executed transactions result in the obtaining of a tax benefit, where the granting thereof is contrary to the purposes of this Code and the decrees implementing it and the transactions basically were set up for obtaining this benefit."*

Besides GAAR's, the legislator also provides for several specific anti-avoidance rules (SAAR's) in very different contexts. This can be in particular for cross border transactions<sup>20</sup>, as well as for mere domestic tax avoidance mechanisms. Especially in a domestic context the aim of a rule can be very diverse, such as a legal requalification of taxable income causing a higher tax burden<sup>21</sup>, an additional taxation because of uncommon transactions<sup>22</sup>, non-deductibility of certain costs<sup>23</sup>, particular priority

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<sup>16</sup> ECJ, 21 February 2008, *Part Services*, C-425/06; ECJ, 10 November 2011, *Foggia*, C-126/10. However, in legal doctrine this reference has been criticized, as the definition was more in particular inspired by the Halifax and Cadbury Schweppes-cases of the Court. Cf. L. DE BROE en J. BOSSUYT, "Interpretatie en toepassing van de algemene antimisbruikbepalingen in de inkomstenbelasting, registratie- en successierechten", AFT 2012, nr. 11, 8.

<sup>17</sup> Circular nr. Ci.RH.81/616.207 (AFZ 3/2012 – AAF 17/2012 – AAPD 4/2012) of 4 May 2012.

<sup>18</sup> Program bill of 20 July 2006, Belgian Gazette 28 July 2006. This text replaced a previous anti-abuse clause implemented in art. 59, §3 VAT Code (by Law of 27 December 2005, Belgian Gazette 2005), which was more equivalent to the text of art. 344, §1 BITC, as existing at that time.

<sup>19</sup> In particular CJ 21 February 2006, C-255/02, Halifax. The text replaced an earlier anti-abuse disposition to bring the Belgian practice more in line with the European prerequisites. Cf. I. MASSIN and K. VYNCKE, "BTW-planning aan banden gelegd", AFT 2006, 12, 3-17. The previous text (art. 59, §3 VAT-Code) was comparable with art. 344, §1 BITC.

<sup>20</sup> E.g. art. 54, 198,11° and 344, §2 BITC (rebuttable presumption of non-deductibility / non-opposability of expenses in advantage of a resident in a tax haven), art. 364bis BITC (a particular exit tax for buildup pension rights when a person emigrates from Belgium), ... or inversely focusing on Belgian income of non-residents as e.g. art. 228, §3 BITC (a 'catch all clause' to tax income acquired by a non-resident deducted as a cost by a resident, whereas taxation is not excluded based on double tax conventions)

<sup>21</sup> E.g. art. 18,4 BITC (a particular thin capitalization rule, requalifying interest into a dividend for loans granted to its own company by a director or shareholder when certain limits are exceeded), art. 4 and following Inheritance Tax Code (particular goods are supposed to form a part of an inheritance submitted to taxation, although they were already during the life of the deceased transferred to final beneficiaries).

<sup>22</sup> E.g. art. 537 BITC (This temporary rule provided a favorable possibility to distribute dividends submitted to lower taxation than normally applicable. However, if a company distributed dividends under this regime and did not also continue the standard dividend distribution of the last 5 years, an additional tax of 15 % was due on the less distributed dividend, submitted to the normal tax regime. This is the so-called 'claw-back'. )

<sup>23</sup> E.g. art. 45, §1quinquies VAT Code (rejecting the deduction of input VAT for investment goods used for purposes besides an enterprises' activities).

rules in the allocation of distributions<sup>24</sup>, non-application of an exemption system<sup>25</sup>, non-opposability of legal acts accomplished by another legal subject when taxing third parties<sup>26</sup>, rules determining the application in time of new legislation<sup>27</sup>, ... Some rules apply automatically, while others contain an option to exclude the effects, if the taxpayer concerned proves justifiable economic or financial reasons for his particular behaviour.<sup>28</sup>

Particularly in recent new legislation the legislator provides for very technical punctually defined SAAR's, which will seem rather complex to respect by a tax payer or verify by a tax administration.<sup>29</sup> Given the limited explanation, as well as the rather casuistic incoherent<sup>30</sup> approach when defining SAAR's, this leads to increased legal uncertainty.<sup>31</sup>

Finally, one can refer to the application of more general legislation by the administration as a tool to combat tax avoidance. As such art. 49 BITC mentions some general conditions for costs to be tax deductible, which was however construed in a more stringent way by the administration to combat certain tax planning possibilities.<sup>32</sup> Besides art. 207, 2 BITC limits the use of tax reductions in case of transactions under 'unusual conditions'.<sup>33</sup> The administration also tried to use this article as a SAAR, but was rejected in recent jurisprudence. As both applications concern case law, they will be treated further later on.

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<sup>24</sup> E.g. a contradiction exists as two different tax rules oblige a Belgian company reducing its capital for a redistribution to its shareholders to hold this against particular equity parts of the company. Cf. Art. 537 BITC vs art. 269, §2 BITC. Therefore the tax administration accepted a choice for the tax payer between both SAAR's. Cf. Circular nr. Ci.RH.233/630.825 (AAFisc Nr. 4/2014) dd. 23 January 2014.

<sup>25</sup> E.g. art. 183bis BITC (The tax neutrality provided for business restructurings does not apply when a certain operation has as its principal purpose or one of its principal purposes tax evasion or tax avoidance.) This legal article was introduced with the implementation of the Merger Directive. Its application in Belgian legal practice is to a large extent inspired by the Court of Justice decisions in a.o. the cases of Kofoed (ECJ 5 July 2007, C-321/05) and Modehuis Zwijnenburg BV (ECJ 20 May 2010, C-352/08).

<sup>26</sup> Art. 344/1 BITC provides a text that is clearly inspired by the GAAR of art. 344 BITC, but meant to apply for legal acts of an intermediate entity, when taxing a third person participating in a so-called 'legal construction'.

<sup>27</sup> A typical clause in this context used by the Belgian legislator excludes the consequences of changing the annual accounts of a company to integrate past income in, or exclude income from a new regulation. Besides, legislation is also sometimes been enacted retroactively, which in particular circumstances has been accepted by the constitutional court. E.g. Const. Court 4 March 2008, nr. 41/2008, [www.const-court.be](http://www.const-court.be).

<sup>28</sup> E.g. art. 207, 3 and art. 292bis §2 BITC. (In case of a change in the control of a company, not justified by economic or financial needs of this company, some existing reported tax deductions are lost for future use.)

<sup>29</sup> E.g. to encourage shareholders to contribute capital in a company a lower withholding tax is foreseen on future dividend distributions. However, this rule provides that a new capital contribution cannot consist of income from a capital reduction of another company linked to this shareholder or its family. (art. 269, §2 BITC.) It seems rather difficult to control this origin of newly invested capital.

<sup>30</sup> E.g. Whereas under a previous tax favor demanding a contribution in cash also the conversion of debt was accepted by the Minister of finance, in contrast with the expectation of tax payers the same approach is no longer accepted for a new legal rule that also prescribes a contribution in cash. (art. 269, §2 BITC) Nonetheless this point of view is in contrast with the general commentary of the administration on the income tax legislation, still qualifying the conversion of debt as a contribution in cash. (Cf. Comm IB nr. 261/103)

<sup>31</sup> A recent example is art. 541 BITC. This article provides a possibility of a reduction of withholding tax on a later dividend distribution, if a company previously pays a tax of 10 %. Although this rule dates from 2015 it focuses on the companies' profits of 2013 and 2014. Although the tax of 10 % had to be paid, some doubts existed about the precise benefits qualifying for this tax favor. This caused companies to pay a 10 % tax, whereas after the expiry of the period to pay, the administration applied an unexpected rather strict interpretation of this tax rule, causing companies having paid taxes for non-qualifying income.

<sup>32</sup> E.g. the payment of management fees to an intermediate entity that immediately sources out these services to a third party for a large lesser amount. Cf. Court of first instance Antwerp 22 November 2006, as mentioned by D. GARABEDIAN, analysis of Supreme Court 10 June 2010, AFT 2011, 28.

<sup>33</sup> Cf. Supreme Court 23 February 1995 and Supreme Court 29 April 2005, [www.cassonline.be](http://www.cassonline.be).

## **2. Administrative clarifications**

Given the very technical aspects of anti-avoidance regulations combined with frequent changes, the tax administration usually attempts to clarify their meaning through the use of different techniques. First of all, when establishing legislation the text of the law is often accompanied by additional explanations about the aim of the legislator, the meaning and intended interpretation of the text and sometimes also some practical examples.

However, when further questions rise during the application of legislative acts the administration provides for answers through so-called public FAQ's, administrative Circulars, general commentaries, as well as ministerial answers on parliamentary questions. The legal value of these different tools is however rather weak. Administrative circulars, as well as particular ministerial answers on parliamentary questions are binding for the administration, but not for the individual tax payer or courts. Also general commentaries about the legislation sometimes give a very valuable insight of the administrative view, but these commentaries are not consequently updated and therefore sometimes differ from expressed views in other administrative documents.

To be able to quicker respond at questions the administration started using FAQ's published on the website of the administration, but their legal value is highly disputable: it is not recognized as a legal source, it is not always dated or signed and it is being tacitly adapted in case of changing views. Especially when points of view are being expressed that are not literally reflected in the text of the law, the legal value of such clarifications is rather doubtful.

The cited GAAR of art. 344, §1 BITC was introduced in 2012<sup>34</sup> and replaced an earlier GAAR dating from 1993. The preparatory documents for this law therefore in particular focus on the changes being expected from this new text. As the old text only applied under very stringent conditions, in practice it had a very limited impact on tax avoidance. Therefore the new text, although following the same general logic, was meant to facilitate the use of the GAAR by removing certain barriers.<sup>35</sup> This is further elucidated in some subsequent Circulars as will be summarized in this text.<sup>36</sup>

A first (federal) Circular explains in general how the new rule has to be understood and focuses on some peculiarities. In a following (federal) Circular particular transactions were described and analysed whether they would or wouldn't trigger the application of the GAAR in the context of registration duties and inheritance taxes. This latter circular has subsequently been replaced by a new list of transactions in a third circular. Although demanded by practitioners, no list has been created concerning the envisaged transactions under the BITC.

The approach of listing up transactions was also followed in the Flemish Region.<sup>37</sup>

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<sup>34</sup> Program Law of 29 March 2012, Belgian Gazette 6 April 2012.

<sup>35</sup> Cf. L. DE BROE and J. BOSSUYT, "Interpretatie en toepassing van de algemene antimisbruikbepalingen in de inkomstenbelasting, registratie- en successierechten", AFT 2012, nr. 11, 4-23.

<sup>36</sup> Circular nr. Ci.RH.81/616.207 (AFZ 3/2012 – AAF 17/2012 – AAPD 4/2012) of 4 May 2012; Circular nr. 8/2012 of 19 July 2012 being replaced by Circular nr. 5/2013 of 10 April 2013 and, as far as the Flemish Region is concerned Circular nr. 5/2013 of 10 April 2013, subsequently being replaced by Circular nr. 2014/2 of 23 December 2014 and Circular nr. 2015/1 of 16 February 2015.

<sup>37</sup> In a first Circular only transactions were listed that would trigger the anti-abuse provision. Cf. Circular nr. 2014/2, "Art. 3.17.0.0.2 van de Vlaamse Codex Fiscaliteit van 13 december 2013, zoals gewijzigd door het decreet van 19 december 2014", Belgian Gazette 23 January 2015. In a subsequent circular, to be retroactively applied from 1 January 2015, also transactions were mentioned that would not be considered to be abuse. Cf. Circular nr. 2015/1 "betreffende art. 3.17.0.0.2 van de Vlaamse Codex Fiscaliteit van 13 december 2013, zoals gewijzigd door het decreet van 19 december 2014 dd. 16.02.2015". As these Circulars largely follow the federal approach, they will not separately be further treated.

The first federal Circular<sup>38</sup> explains how the new article 344, §1 BITC has to be understood, and focuses in particular on improvements of the new text in comparison with the earlier GAAR. The following aspects are being dealt with:

-Whereas under the old GAAR the administration had to respect the acts of a taxpayer and could only change the legal qualification of the acts into a qualification with similar effects, under the new text, this is no longer the case. The acts themselves are not opposable at the administration if all further conditions are fulfilled. This applies for a single legal act, as well as for a combination of separate legal acts realising one same operation, even if these acts would be fulfilled during separate tax years.

-Contrary to the previous text, art. 344, §1 BITC now contains a particular definition of tax abuse, as already described.

-The burden of proof for both the administration and the taxpayer is more precisely described. The text leaves it up to the taxpayer to prove that the particular setting of his transaction "*is justified by other motives than the avoidance of income taxes*". This creates a system of proof and counterproof. The tax authorities must establish the objective element of tax abuse and part of the subjective element thereof. The first burden is on the tax authorities: they must demonstrate, by means of all legal means of proof (including presumptions of facts), that the taxpayer has opted for a legal act (or separate legal acts realizing the same operation) that is in contradiction with the objectives of a clearly identified tax provision and the motive behind which is to avoid the tax.<sup>39</sup> The taxpayer can then rely upon all justifications other than tax avoidance to prevent any tax adjustment following from the tax abuse qualification. Whereas the previous text demanded the tax payer to prove other economic or financial needs, the new version does no longer limit the counterproof. All motives, including purely private motives, can be demonstrated. Neither the tax authorities, nor the taxpayer should be required to provide negative evidence: the tax authorities cannot be expected to prove that the choice of the legal act by the taxpayer is *solely explained by tax avoidance motives*; the taxpayer should not be expected to establish *the absence of tax motives*. Negative evidence amounts to *probatio diabolica*, what is not required by the lawmaker.

-Because the tax administration no longer needs to requalify certain acts, she can simply 'replace the tax effect' of the abusive transactions and restore the taxable base so that the taxation becomes consistent with the objectives of the tax provisions, as if the abuse did not take place. According to the administration this can be realized against one or both parties participating in an agreement/transaction<sup>40</sup>, and does not influence other (non-tax) effects of these legal acts. It is clear that this position, causing differences in tax aspects and other legal aspects, as well as differences in the tax treatment of one unique operation towards different tax payers, can create large inconsistencies in the treatment of a transaction.<sup>41</sup> Besides, also the precise effect of the GAAR, when applied towards a tax payer, is not very clear.<sup>42</sup> The text does not demand from the administration to redefine particular

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<sup>38</sup> Circular nr. Ci.RH.81/616.207 (AFZ 3/2012 – AAF 17/2012 – AAPD 4/2012) of 4 May 2012.

<sup>39</sup> Although the administration has to prove an objective and a subjective element, it can be expected that presumptions, based on the objective act of a taxpayer, serve as a tool to proof the taxpayers intentions. Besides it can be noticed that, according to the administrative Circular, the administration considers itself limited to proving the objective element. Cf. Circular Ci. RH 81/616.207, §C.1.2.3.

<sup>40</sup> Contra B. PEETERS, "De algemene fiscale antimisbruikbepalingen", AFT 2014, nr. 5, 29-30 and L. DE BROE en J. BOSSUYT, "Interpretatie en toepassing van de algemene antimisbruikbepalingen in de inkomstenbelasting, registratie- en successierechten", AFT 2012, 14. Peeters explicitly takes the point of view that this effect can only be realized against taxpayers that have committed the tax abuse. For other parties the effect of the transactions, as being executed, should be kept. According to De Broe and Bossuyt other taxpayers should at least be able to benefit from changes, supposing a coherent approach of the administration.

<sup>41</sup> Cf. L. DILLEN, "Symmetrische of assymetrische toepassing van de fiscale algemene antimisbruikbepalingen", AFT 2013, nr. 1, 15-20.

<sup>42</sup> In this context, in particular for inheritance taxes and registration duties the text differs from the text for income taxes and only mentions that a taxation will be applied '*as if no abuse had occurred*'.

transactions or the taxpayer.<sup>43</sup> Scholars therefore discuss about the manner and extent of the readjustment of a taxpayer's position. The administration, as well as certain scholars<sup>44</sup>, argues that the GAAR changes the scope of a circumvented provision. There is a discrepancy between the text of a legal provision and the lawmaker's objective that underlies this specific provision. The material scope of the latter would thus be extended (charging provision) or restricted (exemption/relief provision) so that the taxpayer's avoidance scheme can be taxed (charging provision) or excluded from the tax benefit (exemption/relief provision). However, other authors argue that the GAAR allows the tax authorities to redefine the taxpayer's legal act(s) to enable tax assessment in line with the objectives of the tax provision at stake.<sup>45</sup>

The Circular further focuses on particular questions, such as the combination with SAAR's, possibility for tax rulings, ... that will be dealt with further in the respective sections. However, one particular comment is remarkable. Although the Circular explicitly confirms that the application of the GAAR is not a sanction against tax fraud and that a tax payer does not breach any tax rule, it nonetheless accepts that the administrative penalties (tax majorations) may be imposed on tax payers, subject of this GAAR.

The subsequent federal Circulars<sup>46</sup> do not deal with the general interpretation of the GAAR, but list examples of tax planning techniques that are considered not to be qualified as tax abuse, or are in particular considered to be tax abuse (unless counterproof delivered by the tax payer).

As mentioned these Circulars only list examples of registration and inheritance duties. Although the BITC contains largely the same GAAR-text, and although it would also give some guidance for direct taxation cases, this is not illustrated. The circulars repeat that, because all possible arguments can be used as counterproof, the GAAR also applies in private contexts as far as inheritance taxes are concerned.

Also the GAAR in art. 1, §10 VAT-Code has been substantially commented in a Circular.<sup>47</sup> The approach is however based on the European jurisprudence and not particularly corrected for a Belgian context. Therefore, it will not be further analysed in this Belgian report, although it can be questioned whether the rather partial legal implementation, combined with an extensive interpretation is in line with the legality principle.<sup>48</sup>

As for the GAAR, also SAAR's and particular interpretations of legal articles are being further explained in administrative commentaries, as well as other means of clarification. However, especially when these clauses form part of a general regulation the comments are integrated within this particular topic.<sup>49</sup> Again these instructions are only binding for the tax administration and not for individual

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<sup>43</sup> Cf. L. DE BROE en J. BOSSUYT, "Interpretatie en toepassing van de algemene antimisbruikbepalingen in de inkomstenbelasting, registratie- en successierechten", AFT 2012, nr. 11, 12. These authors however further distinguish between simply refusing certain tax benefits and applying an additional taxation. (Cf. p. 14)

<sup>44</sup> Cf. T. AFSCHRIFT, *L'abus fiscal*, Brussel, Larcier 2013, 140-167; D. GARABEDIAN, "La nouvelle règle fiscal anti-abus et les "ensembles d'actes juridiques réalisant une même operation", JDF 2013, 206.

<sup>45</sup> Cf. M BOURGEOIS and A. NOLLET, "La réécriture de la mesure 'générale anti-abus' applicable en matière d'impôts sur les revenus de droits d'enregistrement et de droits de succession", J.T. 2012, 500 and 503; B. PEETERS, "De algemene fiscal antimisbruikbepalingen", AFT 2014, nr. 5, 16.

<sup>46</sup> Circular nr. 8/2012 of 19 July 2012 being replaced by Circular nr. 5/2013 of 10 April 2013.

<sup>47</sup> Circular nr. AFZ/2006-0604 (AFZ 14/2006) of 24 August 2006.

<sup>48</sup> Cf. L. DE BROE, "The Belgian rule against abusive practices in VAT matters – General Community Law Principle, inverse direct effect of the Sixth Directive, directive compliant interpretation of domestic law or the constitutional principle of legality: which one trumps the other?", in L. HINNEKENS and Ph. HINNEKENS (eds.), *A vision of taxes within and beyond European Borders – Festschrift in honour of Prof. Dr. F. Vanistendael*, Alphen aan den Rijn (NL), Kluwer Law International, 2008, 111-149.

<sup>49</sup> E.g. being confronted with perceived abuses of the Belgian notional interest deduction a Circular explains how the tax administration will react against these tax planning structures. Cf. Circular Ci.RH.840/592.613 (AOIF 14/2008) of 3 April 2008, followed by two further addenda of 2 June 2008 and 20 June 2011.

taxpayers. Especially in case not all comments are updated and conflicts or contradictions arise amongst the different administrative views, this causes legal uncertainty.

### **3. Tax rulings**

Given the unavoidable uncertainty concerning the application of a GAAR, the possibility to get an advance ruling from the tax administration on whether (and how) they would apply this rule in a particular context is very valuable. In 2002 a Ruling Commission (Service des décisions anticipées / Dienst voorafgaande beslissingen) has been installed to provide for a system of anticipated decisions in federal tax cases.<sup>50</sup> Rulings can be delivered concerning the establishment of all taxes falling under the competence of the Federal tax authorities, as well as those being recovered by the federal tax administration.<sup>51</sup>

However, a Royal Decree limits the scope of topics that can be submitted to the Ruling Commission.<sup>52</sup> In particular it excludes *a.o.* rulings concerning the use of means of proof or legal remedies.<sup>53</sup> This has caused a doctrinal debate concerning the competence of this Ruling Commission as far as the GAAR is concerned. Effectively, when questioned about the constitutionality of art. 344, §1 BITC, the Constitutional Court considered this GAAR to be ‘a procedural rule’ (means of proof), that would however make it possible to determine the factual tax base.<sup>54</sup> Also, when judging about its predecessor, the Constitutional Court considered art. 344, §1 BITC to be a means of proof for the administration to judge individual particular situations in a determined context.<sup>55</sup>

Therefore, when introducing the new art. 344, §1 BITC the legislator considered the competence of the Ruling Commission limited to judging whether the taxpayer could provide valuable counterproof.<sup>56</sup> However, as the Minister of Finance confirmed, such interpretation leads to the strange effect that, when a taxpayer consults the Ruling Commission, it could seem as if he implicitly confirms that the objective element of tax abuse would have been present.<sup>57</sup> This could not be the aim of the legislator. At present, Belgian scholars do not agree whether, given the mentioned limits of the Royal Decree, the Ruling Commission is competent to take a position on the entire application of the GAAR.<sup>58</sup>

In practice however, the Ruling Commission follows the point of view of the Minister of Finance. It has already delivered a considerable amount of rulings on the question whether in a particular case the demanded counterproof of a taxpayers’ motives would be accepted<sup>59</sup>, as well as on the entire non-

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<sup>50</sup> Law of 24 December 2002, Belgian Gazette 31 December 2002.

<sup>51</sup> A decree of 17 July 2015 (Belgian Gazette 14 August 2015) installed the same system in the Flemish Region for demands for a preliminary ruling that concern exclusively tax matters being dealt with in the Flemish tax Code. (Cf. art. 3.22.0.0.1 and 3.22.0.0.2 Flemish Tax Code)

<sup>52</sup> Royal Decree of 17 January 2003, Belgian Gazette 31 January 2003.

<sup>53</sup> Art. 1, 3° Royal Decree. The same exclusion is implemented in art. 3.22.0.0.1, §3, 2°, c) Flemish Tax Code.

<sup>54</sup> Constitutional Court 30 October 2013, nr. 141/2013, [www.const-court.be](http://www.const-court.be).

<sup>55</sup> Constitutional Court 24 November 2004, nr. 188/2004, 2 February 2005, nr. 26/2005 and 16 March 2005, nr. 60/2005, [www.const-court.be](http://www.const-court.be).

<sup>56</sup> MvT Parl. St. Kamer 2011-2012, nr. 53-2081/1, p. 112. See also Circular nr. Ci. RH.81/616.207 (AFZ 3/2012) of 4 May 2012.

<sup>57</sup> Parl. Vr. nr. 190 Wouters, Vr. en Antw. Kamer 2012-2013, nr. 124, 498-501.

<sup>58</sup> Cf. Most explicitly are M. BOURGEOIS (“La bombe du ruling sur l’abus fiscal”, *L’Echo* 25 april 2014) considering that without legal corrections the provided rulings are unconstitutional vs L. DE BROE, (“Rulingdienst is bevoegd om rulings af te leveren over toepasselijkheid algemene antimisbruikregels”, *Fisc. Act.* 2014, nr. 24, 1-3.) confirming the legal competence of the Ruling Commission. Other authors confirm that, at least, it would serve legal certainty if the legislator would amend the mentioned Royal Decree. Cf. B. PEETERS, “De algemene fiscale antimisbruikbepalingen”, *AFT* 2014, nr. 5, 30-32.

<sup>59</sup> E.g. Preliminary rulings nr. 2012.011, 10 July 2012; nr. 2012.496, 8 January 2013; nr. 2013.568, 10 December 2013; nr. 2013.500, 17 December 2013; nr. 2015.491, 20 October 2015; nr. 2015.613, 15 December 2015; nr.

application of the GAAR of art. 344 BITC itself<sup>60</sup>. This proves at least that in practice the Ruling Commission fulfils an important role in clarifying whether this GAAR would be applicable.<sup>61</sup> Also as VAT legislation is concerned, the Ruling Commission already delivered some rulings concluding that certain transactions are not considered to be abusive, although it seems that the number of rulings is lesser.<sup>62</sup>

Besides these rulings on the application of a GAAR in particular cases, the Ruling Commission also published some general opinions on how it deals with particular frequently raised questions. In this context some general opinions also explain how the GAAR could, according to the Ruling Commission, be applied in the commented behaviour.<sup>63</sup>

Finally, the Ruling Commission also provides legal certainty concerning the application of specific anti-abuse rules. In this context, it already had to pronounce itself on countless occasions whether certain costs are tax deductible<sup>64</sup>, whether a taxpayer could be considered to have valid economic or financial needs to act in a particular way<sup>65</sup>, whether a transaction is at arms length<sup>66</sup>, ... Although a positive ruling can provide some legal certainty for an individual taxpayer, in this context it is clear that the Ruling Commission often demands particular conditions from the taxpayer before delivering a positive ruling. In this context one could wonder whether the Commission does not exceed its competences, especially when particular demands are not literally being foreseen in the tax legislation itself.

#### **4. Existing case law on the meaning of tax avoidance**

GAAR's, as well as SAAR's are often used by the tax administration in practice and challenged for the courts. However, to determine the general applicable notions of 'abuse', 'tax avoidance', ..., it seems less interesting to mention this particular case law. Within this section therefore only the general point of view as it can be deduced from the case law of the superior Courts will be summarized.

As already mentioned, the Constitutional Court had to express itself whether the GAAR<sup>67</sup>, as well as its predecessor<sup>68</sup>, was in conformity with the Belgian constitutional legality principle, as well as the constitutional distribution of competences between the federal and regional entities. The Court considered the GAAR a particular means of proof for the federal tax administration when recovering taxes due. Although for some taxes the Regional authorities have the exclusive competence to determine tax base, tax rate and possible exemptions, being a procedural rule for recovering taxes, the federal GAAR does not violate this distribution of competences, as far as the taxes concerned are to be

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2015.667, 26 January 2016; nr. 2016.080, 15 March 2016; nr. 2016.085, 5 April 2016; nr. 2015.433, 12 April 2016, [www.ruling.be](http://www.ruling.be).

<sup>60</sup> E.g. Preliminary rulings nr. 2013.162, 30 April 2013; nr. 2013.178, 28 May 2013; nr. 2013.568, 10 December 2013; nr. 2013.642, 18 February 2014; nr. 2015.404, 1 December 2015, [www.ruling.be](http://www.ruling.be)

<sup>61</sup> The procedure for receiving such a ruling in Belgium starts with a so-called pre-filing procedure. In this procedure the taxpayer can ask what the position of the Commission would be, in case he would demand for a ruling. As, in case of a negative decision, the taxpayer will not continue the procedure, delivered and published rulings are positive about the non-application of the GAAR.

<sup>62</sup> E.g. preliminary rulings nr. 2013.570, 11 February 2014; nr. 2014.256, 29 July 2014, [www.ruling.be](http://www.ruling.be)

<sup>63</sup> E.g. the commission published a general opinion on the application of anti-abuse provisions in case of business restructurings and adapted a previous opinion on the realization of capital gains on shares by a shareholder-natural person. Both opinions can be found on the website of the commission: [www.ruling.be](http://www.ruling.be)

<sup>64</sup> E.g. preliminary ruling nr. 2016.141, 12 April 2016.

<sup>65</sup> E.g. preliminary ruling nr. 2015.085, 10 March 2015.

<sup>66</sup> E.g. preliminary ruling nr. 2015.376, 15 September 2015.

<sup>67</sup> Constitutional Court 30 October 2013, nr. 141/2013, [www.const-court.be](http://www.const-court.be).

<sup>68</sup> Constitutional Court 24 November 2004, nr. 188/2004, 2 February 2005, nr. 26/2005 and 16 March 2005, nr. 60/2005, [www.const-court.be](http://www.const-court.be)

collected by the federal tax administration. Neither do these rules, according to the Constitutional Court, violate the legality principle. Given the very strict limitations and conditions for its application, the GAAR only limits the free choice of a taxpayer to opt for the least taxed way. Given the general phenomenon of tax abuse, it would not be possible for the legislator to define more precisely how this rule should be applied.

In this context, it might be interesting to refer to some judgments of the Court of Justice concerning particular Belgian SAARs. The most recent case deals with art. 54 BITC, denying the deduction of a.o. interest costs, salaries and license payments paid to a foreign taxpayer or a foreign PE, in case these persons are not submitted to income taxation or the payments benefit from a seriously more advantageous tax treatment compared to the Belgian tax treatment of such income. Deduction of the costs will only be allowed if the Belgian taxpayer proves that the payments concern real and genuine transactions and do not exceed the normal limits. When determining its compatibility with the European freedom to provide services the Court of Justice noticed a difference with the general presumption of deductible costs, making it more difficult for a foreign taxpayer to provide the same services. This restriction could be justified by objectives of preventing tax evasion and avoidance and of preserving both the effectiveness of fiscal supervision and the balanced allocation between Member States of the power to impose taxes. However, the Court considered the rule to be framed in such vague terms that do not make it possible, at the outset, to determine its scope with sufficient precision, causing its applicability to remain a matter of uncertainty. Therefore, the rule could not be considered proportionate to these objectives and the mentioned justifications were not accepted.<sup>69</sup>

In an earlier judgment the Court considered art. 26 BITC in line with the European freedom of establishment.<sup>70</sup> This rule also offers the tax administration the possibility to raise the taxable income of a Belgian taxpayer with the amount of unusual or gratuitous advantages being accorded to a related foreign company, whereas for domestic entities this rule generally does not apply. This limits the freedom of establishment, but can be justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States. Because the initial burden of proof as to the existence of an ‘unusual’ or ‘gratuitous’ advantage<sup>71</sup> rests with the tax administration, after which the taxpayer still has an opportunity to provide counterproof, the Court considered this rule not to be disproportional.

Finally in an older case, the Court had to consider art. 18, 4° BITC<sup>72</sup>. This concerns a Belgian thin cap-rule requalifying deductible interest payments into non-deductible dividends, if the interests are paid to a director and exceed a defined limit. Belgian companies, acting as a director of another company are excluded from this regulation. The distinction between Belgian and foreign companies acting as a director was considered a restriction on the freedom of establishment and could not be justified. The objective of preventing tax avoidance was not accepted, because the threshold for requalification was based on a purely mathematical calculation. The tax administration did not need to prove the unusual character or that it exceeded market conditions.<sup>73</sup>

Finally the legislator installed a new GAAR, because of the extreme strict conditions for the previous rule to be applicable, as determined in the case law of the Supreme Court.<sup>74</sup> According to the Court, under the old GAAR, the tax administration could only requalify a legal act (or a series of linked acts), if the ultimate legal effects of this new qualification (of act or acts) would be similar to the initial qualification used by the taxpayer. As this caused this article to be rather difficult to apply in practice,

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<sup>69</sup> ECJ, 5 July 2012, SIAT, C-318/10.

<sup>70</sup> ECJ, 21 January 2010, SGI, C- 311/08.

<sup>71</sup> A notion being further definable, as explained by the Court. (Cf. §4).

<sup>72</sup> At the time of the case, this art. was placed under art. 18, 3° BITC.

<sup>73</sup> ECJ, 17 January 2008, Lammers & Van Cleeff, C- 105/07.

<sup>74</sup> Cf. Supreme Court 21 April 2005; 4 November 2005; 22 November 2007; 11 December 2008; 10 June 2010, [www.cassonline.be](http://www.cassonline.be)

the GAAR was replaced with the new rule, as already explained in this report.

Besides this strict interpretation of the (previous) GAAR however, the Supreme Court applied a rather extended approach under some other rules, creating new possibilities for the tax administration to combat (abusive) tax avoidance.

E.g. Art. 207, 2 BITC provides that the taxable income of a company<sup>75</sup> obtained from unusual or gratuitous advantages cannot be reduced with certain mentioned tax deductions. In this context the Supreme Court defined ‘unusual’ not only as transactions that were not at arms’ length, but also applied this rule to income obtained under transactions at arms’ length, but outside of the usual economic activities of a certain company.<sup>76</sup> This jurisprudence was heavily criticized in legal doctrine. Although the tax administration recently tried to apply this doctrine in other contexts, the jurisprudence does not follow this point of view.<sup>77</sup>

Also art. 49 BITC has been applied in certain situations as a particular anti-avoidance rule. This article determines the general requirements for a cost to be tax deductible. According to this article, costs are only deductible when made during a taxable period to gain or maintain taxable income and the taxpayer has to proof the reality of the cost, as well as the declared amount. In recent jurisprudence the Court deducted from this article that in case of management costs also the reality of delivered services had to be justified. A mere written contract between a company and its director would not suffice.<sup>78</sup>

## **5. Different bodies with judicial competence**

As mentioned, for delivering a ruling, the Belgian Ruling Commission sometimes demands additional aspects/conditions that are not literally figuring in the tax legislation as such. However, this does not has to cause a conflict: a ruling is only to provide legal certainty when a certain operation has been planned, but not yet executed. Therefore, this does not conflict with jurisprudence on particular cases, even if the point of view, as defended by the Ruling Commission, would not be considered obligatory in posterior jurisprudence. Nonetheless, in this context it is useful to mention the Ruling procedure, as for registration and inheritance taxes the Flemish Region installed its own Ruling Commission.<sup>79</sup>

Although the legislation on anti-abuse, as well as the clarifying circulars are very similar to the federal system, nonetheless this splitting leads to the risk of different interpretations in particular context. While the federal anti-avoidance system still applies for the Walloon and Brussels region, the interpretation could differ from the qualification given to transactions by the Flemish Ruling Commission.

As far as judicial competence is exercised, Belgium applies a unitary system to deal with cases of tax avoidance. In this context it is important to repeat the difference between legal (but combatted) forms of tax avoidance and illegal forms of tax fraud. The latter one can be dealt with in tax legislation or in criminal prosecutions. For this topic however, reference is made to the report of the 2015 EATLP congress.<sup>80</sup>

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<sup>75</sup> Art. 79 BITC provides a similar limitation for personal income taxes. However, given the difference in tax deductions for natural persons and companies, this article only forbids the deduction of previous losses.

<sup>76</sup> Cf. Supreme Court 23 February 1995 and 29 April 2005, [www.cassonline.be](http://www.cassonline.be) See also L. KETELS and E. VANDINGENEN, “Artikel 207, lid 2 WIB 1992: antimisbruikbepaling voor de notionele interestaftrek ? Enkele kritische bedenkingen” *AFT* 2014, 4, 45-51.

<sup>77</sup> Cf. A. HUYGHE, “NIA ook als vennootschap weinig substantie heeft: opnieuw bevestigd”, *Fiscoloog* nr. 1462, 4; S. GNEDASJ, “Kritische beschouwingen bij de rechtspraak over misbruiken met de notionele interestaftrek”, *Fisc. Act.* 2015, 34, 6 and P. VAN ROMPAEY, L. HERREMAN, “Abnormale of goedgunstige voordelen in de vennootschapsbelasting” in *Fiscaal praktijkboek 2015-2016 – Directe belastingen*, Kluwer Mechelen 2015, 56. Court of appeal Liege 26 June 2015, *Fisc. Koer.* 2015, nr. 16, 801

<sup>78</sup> Supreme Court 15 October 2015, [www.cassonline.be](http://www.cassonline.be). See also B. COOPMAN and I. PELGRIMS, “Koste wat het kost ... de grabbelton van rechtspraak over artikel 49 WIB 1992”, *TFR* 2015, 103-114.

<sup>79</sup> Cf. art. 3.22.0.0.1 and 3.22.0.0.2 Flemish Tax Code

<sup>80</sup> J. MALHERBE, B. PEETERS and G. GALEA, “Chapter 13: Belgium” in R. SEER and A.L. WILMS, *Surcharges and penalties in tax law*, IBFD Amsterdam 2016, 207-258 (in particular p. 239-242)

## **6. External influences**

As already mentioned, art. 1, §10 Belgian VAT code replaced the (only one year existing) art. 59, §3 BVAT, to implement a clause more in line with the European jurisprudence as following from the Courts judgements in cases as Halifax<sup>81</sup>, Kofoed<sup>82</sup>, Part Service<sup>83</sup> and Weald leasing<sup>84</sup>.

As far as the GAAR in the context of income taxes is concerned, as already mentioned, scholars discussed about the precise meaning of the text. Some considered it an integration of the Dutch 'fraus legis'-doctrine in the Belgian tax system<sup>85</sup>, while according to some other authors this would severely limit the scope of this provision<sup>86</sup> and other scholars do focus on perceived differences with the Dutch doctrine.<sup>87</sup>

Besides the legislator mentioned to be influenced by the European jurisprudence, but the reference to the mentioned case law (Part Services and Foggia) is disputed.<sup>88</sup> At least, it can be noticed that the government seems to consider it necessary to add an additional particular provision for the implementation of the anti-abuse provision of art. 1, §2 -§3 Parent subsidiary directive<sup>89</sup>, and the burden of proof differs from the new proposal in art. 6 of the anti-tax avoidance directive, as will be illustrated in the next chapter.

## **II. The meaning of avoidance and aggressive tax planning and the BEPS initiative**

### **1. European demand for domestic General Anti-avoidance Rules (GAARs)**

As already explained, as far as income taxes, registration duties and inheritance taxes are concerned the definition of tax avoidance is included in the text of the GAAR, as this text has been amended in 2012. The previous text, leaving a possibility for the administration to requalify certain acts under the very stringent conditions set in jurisprudence to maintain a qualification with similar effects, was rather hard to apply for the administration and therefore ineffective.

Under the new rule, in line with recommendation 8806 of 6 December 2012, as well as art. 6 of the Anti-tax avoidance directive, the administration no longer has to requalify given facts into an applicable legal qualification with similar legal consequences, but only has to respect the given facts to which other legal consequences can be confined. However, it is clear that the precise consequences of the treatment possibilities for the tax administration are not completely cleared out. Whereas all three texts recognize the power of the administration to ignore abusive arrangements, the formulation of the consequences attached thereto differs. Under the 2012 EC-recommendation a tax treatment should be applied "*by reference to their economic substance*". The anti-tax avoidance directive refers to a calculation "*in accordance with national law*". The Belgian text provides a restoration to submit the arrangement to "*a taxation in line with the aim of the particular tax provision, as if the abuse did not have taken place*". Nonetheless, all three formulations

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<sup>81</sup> ECJ 21 February 2006, C-255/02, Halifax.

<sup>82</sup> ECJ 5 July 2007, C-321/05, Kofoed.

<sup>83</sup> ECJ 21 February 2008, C-425/06, Part Service.

<sup>84</sup> ECJ 22 December 2010, C-103/09, Weald Leasing.

<sup>85</sup> Cf. S. VAN CROMBRUGGE, "Fraus legis of wetsontduiking in het Belgisch fiscaal recht anno 2012", *TRV* 2012, 537-562.

<sup>86</sup> Cf. B. PEETERS, "De algemene fiscale antimisbruikbepalingen. Een commentaar in het licht van de rechtspraak van het Grondwettelijk Hof", *AFT* 2014, 5, 20.

<sup>87</sup> T. AFSCHRIFT, *L'abus fiscal*, Brussel, Larcier 2013, nr. 141.

<sup>88</sup> Cf. supra note 15.

<sup>89</sup> Cf. Preliminary draft, as being discussed in *Fiscoloog* nr. 1478, 1.

leave a certain unavoidable scope for the tax administration to fill in. As being described, the Belgian administration hereby offers itself a large autonomy, which is disputed in Belgian legal doctrine.

When the definition of abuse under the three rules is compared, there are some differences. All provisions consider the possibility that one act, as well as a series of acts can constitute tax abuse. However, as mentioned, the Belgian GAAR requires the administration to prove an objective element (a taxation being avoided or a tax favour being obtained, in contrast with the purpose of the particular legal provision), and the start of a subjective element (operation is organized to obtain this tax effect). Given that both aspects can be demonstrated by all legal means, it might be assumed that the objective element will function as a presumption for the subjective element, although both aspects form separate parts of the notion of tax abuse. It will be up to the tax payer to demonstrate other (economic, financial or private) motives that made him apply this particular legal setting. The European provisions seem to make a less clear distinction between an objective and a subjective element, as the subjective element helps to describe the objective element. This causes the initial burden of proof being left over more to the tax administration. The objective element ('an artificial arrangement avoiding taxation and leading to a tax benefit' vs 'non-genuine arrangement(s) causing the acquirement of a tax advantage') has to be the purpose for the taxpayer. However, where the 2012 recommendation required the tax avoidance to be the essential purpose of the arrangement(s), for the new directive it suffices if obtaining a tax advantage is one of the main purposes. The mere formulation of other (financial, economic or private) purposes besides tax avoidance seems not necessarily sufficient to exclude the GAAR. Nonetheless, if "*valid commercial reasons which reflect economic reality*" are present, arrangements are not presumed to be non-genuine. In this formulation, as well as §11 of the preceding statements in the directive, only valid *economic* (including financial) reasons seem to be accepted. Private reasons are not mentioned as such.

Finally, §11 of the Directive explicitly accepts the possibility for Member States to apply penalties, in case a GAAR is applicable. Although criticized by Belgian scholars, as mentioned, the Belgian tax administration also considers this to be possible under art. 344 BITC.

## **2. Subject-to-tax rules to deal with double non-taxation**

Art. 156 BITC provides a particular unilateral remedy against double taxation of Belgian resident persons earning foreign taxable income: the Belgian income taxes linked to this income are cut in half. However for some categories (e.g. professional income), this rule only applies if the foreign income has been 'taxed' under a foreign tax system. In a famous decision of 1970, the Belgian Supreme Court however considered an explicit legal exemption to be considered as 'taxed' for the purposes of this article.<sup>90</sup>

This interpretation has raised a particular attention in Belgian tax practice to the precise wording of the exemption method in art. 23 of the double tax conventions, in case Belgium is a residence state of a taxpayer. The tax administration makes a distinction between income which '*may be taxed/is taxable in the source state*' (meaning that Belgium is always applying the exemption method, without verifying the treatment in the source state), income which '*is taxed in the source state*' (meaning that a particular legal exemption has to be foreseen in the source state's domestic legislation, in which case Belgium will exempt) and income which '*is effectively taxed in the source state*' (meaning the income has to be submitted to income taxation, before Belgium applies the exemption method.)<sup>91</sup>

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<sup>90</sup> Supreme Court 15 September 1970, *Pas.* 1971, I, 37.

<sup>91</sup> Cf. Circ. nr. Ci.R 9.Div./577.956 (AOIF 21/2006) of 11 May 2006 and AFZ nr. 4/2010 of 6 April 2010. See also L. DE BROE en N. BAMBENS, "Interpretation of Subject-to-Tax clauses in Belgium's Tax Treaties – Critical analysis of the 'Exemption vaut impôt' Doctrine", *Bull.IBFD* 2009, 68-73.

This interpretation however has to be completed with the OECD solution for conflicting interpretations leading to a double non-taxation, as expressed in the Partnership-report and repeated under action 2 of the BEPS action plan. It also has to be noticed that this administrative point of view is not always followed in jurisprudence<sup>92</sup> or legal doctrine<sup>93</sup> and in some treaties the contracting States provide a particular interpretation.<sup>94</sup> The Belgian 2010 Model Convention therefore expressly provides that “*Belgium shall only exempt such income from tax to the extent that such income is effectively taxed in ...*”. As far as the words ‘taxed’ are used, §6 of an additional protocol provides that subjection to the normally applicable tax system is enough.

As far as Belgium is the source state of income falling under the ‘other income’-article, until 2010 Belgium made an observation that, as a source state it would be able to tax the income, unless it had been taxed in the residence state.<sup>95</sup> This observation has been removed in the OECD Commentary of 2014. The Belgian 2010 Model convention however, expressly adds this subject to tax requirement in an additional paragraph to the other income article.

### **III. The meaning of avoidance and aggressive tax planning and the BEPS initiative**

#### **1. Transfer pricing rules**

Based on the legality principle, the Belgian tax rules are based on a ‘legal reality’, which cannot be changed by interpreting actions with concepts such as an ‘economic reality’. However, as far as transfer pricing is at stake, conditions of transactions are verified, whether they are ‘at arm’s length’. Some rules could be considered to be in between of SAARs and TP-regulations<sup>96</sup>, but in general anti-avoidance rules focus on the transactions themselves, whereas TP-aspects merely correct the economic conditions of certain transactions.

Two judgements of the Belgian Supreme Court have already been mentioned that apply art. 207, al. 2 BITC in a context to combat tax abuse. However, where the tax administration tried to apply this same analysis in recent case law, lower court’s judgments do not follow this approach.<sup>97</sup>

#### **2. Particular clauses in double tax conventions**

Belgium has no particular LOB clause in its model convention. If at present such clause has been added in the convention (see e.g. art. 21 of the double tax convention with the US) it is because of an initiative of the other contracting state.

However in its action plan, formulated in December 2015, the Belgian Minister of Finance accepted that, in light of the BEPS initiatives, additional clauses could be added in existing treaties and new

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<sup>92</sup> Cf. Rb. Bergen 19 February 2008, *FJF*, No. 2010/216; Rb. Bergen 11 September 2013, *TFR* 2014, afl. 459, 364 and Brussels 8 March 1988, *FJF*, No. 1988, 205. The term ‘taxed’ was understood to refer to a real taxation.

<sup>93</sup> W. HEYVAERT, “Artikel 23” in B. PEETERS, *Het Belgisch-Nederlands dubbelbelastingverdrag*, Brussels, Larcier, 2008, 627-636.

<sup>94</sup> E.g. The Belgian double tax conventions with the Netherlands and Hong Kong use the term ‘taxed’, which is to be understood as effectively taxed.

<sup>95</sup> §16 OECD Comm. on art. 21. (2010).

<sup>96</sup> As such e.g. art. 26 BITC corrects the result when abnormal or gratuitous advantages are being accorded. The application becomes more severe in case of transactions between related parties or favors for a party in a tax haven. As mentioned the ECJ accepted this rule, being justified as a means against tax avoidance.

<sup>97</sup> See footnotes 76 and 77.

treaties would contain more anti-avoidance clauses. In particular the ‘principal purpose test’<sup>98</sup>, as well as a ‘Limitation on benefits-clause’ and a particular reaction against conduit-companies were considered possible options.<sup>99</sup>

This has to be distinguished from the use of domestic anti-avoidance rules when a tax treaty is at stake. In this context on the one hand an abusive use of a tax treaty cannot be combatted with a domestic GAAR, because, as already mentioned, the scope of each GAAR is limited to the tax code where it has been implemented. Therefore art. 344, §1 BITC e.g. could only be applied when internal rules of the BITC, that further implement the functioning of a tax treaty, are circumvented. However, as Belgium has a monistic system, treaties are immediately applicable in the domestic law order, without further implementation. The effect of a domestic anti-avoidance rule will therefore be very limited.<sup>100</sup> On the other hand the question rises whether through domestic rules, the functioning of a treaty can be changed (because of a different qualification, tax rate, ...). In this context Belgium adheres to the OECD Commentary as changed in 2003. In short, this leads to the conclusion that, if the taxing power is accorded to Belgium, it can also apply its GAAR, causing a higher tax burden. However, the division of tax powers cannot be changed with a domestic GAAR.

### **3. CFC-legislation**

Until a few years ago, Belgium hardly had any kind of particular CFC-reglementation. Art. 344, §2 BITC limited the effect of a transfer of rights, licenses or other forms of intellectual property, as well as amounts of money in case of a transfer to a foreign taxpayer residing in a tax haven. This was not binding for the tax administration, unless a taxpayer proved he obtained the market value in exchange or the transaction corresponded with justifiable financial or economic reasons.

An important additional rule was installed by Law of 23 December 2009.<sup>101</sup> As from 1 January 2010 corporate taxpayers have to declare to the tax administration all direct or indirect payments to a person residing in a qualified country. 2 possible categories are mentioned. On the one hand, this rule targets payments to countries that, after a phase 2 review of the OECD Global Forum Committee, are considered to be non-compliant with the exchange of information on request standard for the entire tax year.<sup>102</sup> On the other hand a Belgian list is provided in art. 179 Royal Decree executing the BITC.<sup>103</sup> Payments have to be declared, once the total of payments exceeds 100.000 EUR. If a payment is not declared, it is generally not tax deductible.<sup>104</sup> If a payment is declared, a taxpayer needs to proof that it is a genuine, economically valid transaction and not being set up with an artificial legal structure. This rule has been interpreted in a very broad way by the tax administration, as far as the notions of ‘payment’ or ‘residency’ in a qualified country are

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<sup>98</sup> E.g. art. 27 of the recent convention with Russia of 19 May 2015.

<sup>99</sup> Cf. “Plan ter bestrijding van de fiscale fraude”, December 2015, [http://vanovertveldt.belgium.be/sites/default/files/articles/Plan%20ter%20bestrijding%20van%20de%20fiscale%20fraude\\_2015.pdf](http://vanovertveldt.belgium.be/sites/default/files/articles/Plan%20ter%20bestrijding%20van%20de%20fiscale%20fraude_2015.pdf)

<sup>100</sup> One could think e.g. for art. 155 BITC, implementing a progression reservation on exempted income, or art. 466bis BITC, giving municipalities the possibility to tax exempted income.

<sup>101</sup> Belgian Gazette 30 December 2012.

<sup>102</sup> <http://www.oecd.org/tax/transparency/exchange-of-information-on-request/#d.en.368658>

<sup>103</sup> Art. 307 BITC refers in general to countries with a nominal tax rate less than 10 %.

<sup>104</sup> Art. 198, 10 ° BITC. In a more recent Addendum of 3 September 2015 the Administration accepts that the mere non-declaration cannot cause a non-deductibility, if Belgium has a double tax convention providing a non-discrimination clause for expenses or if the free movement of capital applies. Cf. C. BUYASSE, “Niet-aangifte betalingen aan Luxemburg : geen automatische verwerping aftrek”, *Fiscoloog* nr. 1442, 4.

concerned.<sup>105</sup> As such a payment does not necessarily has to be a deductible cost, but can be any transfer of economic value, on its own behalf, as well as for third parties<sup>106</sup>. The link with a qualified country is fulfilled, if this is the residence of a person, or if the payment is to a bank account situated in these countries (unless the taxpayer proves a residency elsewhere).

Finally, as from tax year 2014, natural persons had to declare the existence of a so-called 'juridical construction' if they participated in this construction or benefitted from certain advantages. Whereas this legislation started with a mere declaration<sup>107</sup>, as from tax year 2016 this has been further elaborated into the so-called 'Cayman-tax'<sup>108</sup>: a 'juridical construction'<sup>109</sup> is considered to be tax transparent and its income is taxed at the level of Belgian settlors or beneficiaries<sup>110</sup>. This transparency not only applies to natural persons<sup>111</sup>, but also to non-commercial legal entities<sup>112</sup>. Such juridical construction can be an entity without legal personality<sup>113</sup>, or a legal entity not being submitted to an income tax regime or being taxed at a tax rate of less than 15 %, calculated according to Belgian tax legislation. For this second category two royal decrees further determine the scope. As far as entities are located within the European Union, a Royal Decree of 18 December 2015<sup>114</sup> provides an exhaustive list. For entities outside the EU an illustrative, more extensive list is provided in a Royal Decree of 23 August 2015.<sup>115</sup> Besides technical provisions for the functioning of this transparency, the legislator also added an additional GAAR<sup>116</sup> stating that the acts of such an entity are not opposable to the tax administration, when taxing the taxpayers behind the entity under the transparency regime. This final CFC regulation has raised a lot of criticism from legal doctrine, as the precise functioning, boundaries and application still leave a lot of questions unanswered.<sup>117</sup> It might be expected that this will be further adapted and inspired by the new proposal of art. 7-8 of the the anti-tax avoidance directive.

#### 4. Linking rules

As already explained in its double tax conventions Belgium, as a residence state, applies the exemption method. In this context it often demands income to be taxed in the source state or at least being integrated in tax legislation. Also the advantageous tax legislation of another country will often be a criterion for particular anti-avoidance rules to apply, such as e.g. a deduction refusal, the transparency regime of the Cayman tax, or a thin cap-regulation.

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<sup>105</sup> Circular nr. AFZ nr. 13/2010 of 30 November 2010, completed with two addenda of 27 July 2011 and 22 November 2012.

<sup>106</sup> An exception has been accepted for payments of financial institutions executed for third parties.

<sup>107</sup> Law of 30 July 2013, Belgian Gazette 1 August 2013.

<sup>108</sup> Program law of 10 August 2015, Belgian Gazette 18 August 2015.

<sup>109</sup> Cf. art. 2, §1, 13° BITC.

<sup>110</sup> Both categories are extensively defined in art. 2, §1, 14° and 14°/1 BITC.

<sup>111</sup> Art. 5/1 BITC

<sup>112</sup> Art. 220/ BITC.

<sup>113</sup> It is defined as a legal settlement, whereby the property is being governed by a director-legal owner, although it is separated from this person's personal belongings, according to certain defined criteria. The legal text does not mention it as such, but this definition seems to focus primarily on a trust.

<sup>114</sup> Belgian Gazette 29 December 2015. This decree enumerates: Foreign reverse hybrid entities earning Belgian income, 2 legal entities of Liechtenstein (Anstalt and Stiftung) and two Luxemburg entities (Société de gestion patrimoine familiale and Fondation Patrimoniale). Also excluded financial entities are reintegrated, when being kept by one single shareholder.

<sup>115</sup> Belgian Gazette 28 August 2015.

<sup>116</sup> Art. 344/1, al. 1 BITC.

<sup>117</sup> See a.o.N. APPERMONT, "De kaaimantak: geen paradijselijke maatregel", AFT 2015, 11, 5-37; G. GOYVAERTS, "De kaaimantaks, een kritische beschouwing", TFR afl. 490-491, 865-924 and A. VAN ZANTBEEK, "Naar een efficiënte en effectieve Kaaiman", TFR afl 490-491, 859-864.

Also, to avoid an economic double taxation of distributed dividends, the Belgian exemption method requires that the dividend distributing company has been submitted to taxation.<sup>118</sup>

However, Belgium does not yet apply technical linking rules, such as been described in the BEPS action 2. Even more, although art. 4,1 of the parent-subsidiary directive provides that this had to be foreseen before 1 January 2016, the Belgium exemption system still hasn't been brought in line with these prerequisites. A proposal thereto has been discussed at ministerial level and is expected to be implemented soon.

## **5. Limits on the deduction of interest**

Besides the general prerequisites for a cost to be deductible figuring in art. 49 BITC, several rules further limit the deduction of interest costs in the income tax legislation.

First of all interest is only deductible in as far as it does not exceed regular market conditions.<sup>119</sup> This limit does not apply to payments of financial institutions, as well as payments to these institutions (unless in the latter case, this entity is a directly or indirectly related company with the debtor of the interest).<sup>120</sup> Besides interest payments to a foreign taxpayer or a foreign PE are not deductible, in case these persons are not submitted to income taxation or the payments benefit from a seriously more advantageous tax treatment compared to the Belgian tax treatment of such income.<sup>121</sup> This rule has already been mentioned under I.4, as the Court of Justice considered this rule to violate the European freedoms because of its vague terms.<sup>122</sup>

Finally, two more particular thin cap rules further limit the deduction of interest costs. A first rule focuses in particular on debts accorded by shareholders or directors<sup>123</sup>. If they borrow to their company an amount exceeding the equity of the company<sup>124</sup> or at an interest rate above market conditions, the paid interest is requalified as a dividend. This requalification applies as well for the receiver of the payment (taxed as a dividend), as for the paying company (non-deductible dividend).

Besides an additional limit of 5 times the equity applies for loans from related parties<sup>125</sup> or entities resident in a tax haven.<sup>126</sup> For each category interest paid on the exceeding amount is not deductible. This limit was tightened by Law of 29 March 2012.<sup>127</sup> It reduced the previous limit of 7:1 and extended the category of receivers to related companies. In a subsequent Law of 22 June 2012<sup>128</sup> a correction has been foreseen for so-called cash pooling-companies within a group of companies.<sup>129</sup>

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<sup>118</sup> Art. 203 BITC.

<sup>119</sup> Art. 55 BITC.

<sup>120</sup> Art. 56 BITC.

<sup>121</sup> Art. 54 BITC.

<sup>122</sup> ECJ, 5 July 2012, SIAT, C-318/10.

<sup>123</sup> Art. 18, 4° BITC. As far as shareholders are concerned, this limit is only applicable to natural persons (and their partner and children under their custody). For directors, this also applies to companies, although Belgian companies, submitted to the Belgian corporate income tax are excluded. As mentioned, because Belgian companies are excluded, the Court of Justice neither accepted this rule to be applied towards foreign European director companies. See I.4. Cf. ECJ, 17 January 2008, Lammers & Van Cleeff, C- 105/07.

<sup>124</sup> Defined as the sum of the 'taxed reserves at the beginning of the tax year and the paid-up capital at the end of the tax year'.

<sup>125</sup> Although loans from third parties are not included, a particular anti-abuse provision provides for the inclusion of such loans, if they are guaranteed or supported by a third related party. Cf. art. 198, §3, 2 BITC.

<sup>126</sup> Art. 198, §1, 11° BITC. Interest paid to financial institutions is excluded from this limit.

<sup>127</sup> Belgian Gazette 6 April 2012.

<sup>128</sup> Belgian Gazette 28 June 2012.

<sup>129</sup> Art. 198, §4 BITC. These are companies that fade out the liquid assets of companies belonging to the group, by borrowing from those having excesses and lending to those in need of liquid assets.

Although the same borrowing capacity applies, to calculate the proportion of non-deductible interest of the cash pooling company, only the difference between supported interest and received interest is taken into account.

In particular the second thin cap-rule largely differs from the interest limitation rule of art. 4 of the proposal for an anti-tax avoidance directive. This latter rule calculates the deductible interest costs on the taxable income instead of the equity and exempted income would be excluded. Moreover, this rule seems to apply a larger definition of interest costs and is also applicable for costs paid to third parties<sup>130</sup>. However, as it focuses on 'exceeding borrowing costs' netting calculations will still remain possible.

Despite these differences, according to the Belgian Minister of Finance, Belgium could apply for the delay until 1 January 2024 (or an agreement between the OECD members), as its domestic legislation is 'equally effective' to this rule.<sup>131</sup>

## 6. Other particular SAARs

As already mentioned in the first chapter of this report, the definition of tax avoidance appears through particular legal provisions because of the constitutional legality principle. In SAARs all particular kinds of 'abusive acts' are mentioned in a combative reaction. Given the very casuistic approach, it is sometimes questionable how to interpret these clauses, whereas it lacks general coherence.

E.g. because of the link between a director and his company, the possible transactions between those related parties are often submitted to additional limits. E.g. this report already mentioned an additional thin cap-rule<sup>132</sup>, but a director is also excluded from a particular tax reduction for shareholders investing equity in a startup-company<sup>133</sup>. However, whereas the thin cap-rule explicitly refers to a director, as well as his direct family relatives (spouse and children), this extension only partly appears in the tax reduction. As such this investment is not possible in a company that owns the immovable property being used by its director, spouse or children<sup>134</sup>, but as far as the investment in the company is considered, only the director himself is excluded.<sup>135</sup>

This exclusion for additional tax benefits when investing equity in a company is not foreseen in art. 269, §2 BITC that provides for a lower withholding tax on dividends to attract shareholders for new investments in a company. However, for this tax favor to apply, the new investment cannot come from a capital reduction of another company being linked to the person that invests or being linked to his relatives (described not only as spouses and children, but also referring to the parents of the investing person).<sup>136</sup>

In a recent tax support for debt investments, directors are not excluded at all.<sup>137</sup>

Another example concerns tax advantages for an employer engaging new workers. Under certain conditions 25% of the withholding tax on salaries does not have to be transferred to the tax treasury. This rule distinguishes in two categories<sup>138</sup>, whether the company qualifies as an SME based on

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<sup>130</sup> But art. 4, 3 leaves the possibility to exclude the first costs up to 3.000.000 EUR and to exclude standalone entities.

<sup>131</sup> "Anti Tax Avoidance Directive is een win-win geworden. België stemt in.",

<http://vanovertveldt.belgium.be/nl/anti-tax-avoidance-directive-een-win-win-geworden-belgi%C3%AB-stemt>

<sup>132</sup> Art. 18, 4 BITC.

<sup>133</sup> Art. 145/26 BITC.

<sup>134</sup> Art. 145/26, §3, 1, 5° BITC.

<sup>135</sup> Art. 145/26, §3, 3, 2° BITC.

<sup>136</sup> Art. 269, §2, al. 9 & 10 BITC.

<sup>137</sup> Art. 21, 13° BITC.

<sup>138</sup> Art. 275/8 and 275/9 BITC.

European criteria.<sup>139</sup> Only for the big companies an anti-abuse rule is provided, determining that this favor will not apply if the same activity has been exercised by this company in another EU Member State and has been stopped within two years before the new engagement or if the employer does not confirm that he will stop a similar activity within two years<sup>140</sup>. It is not clear why this anti-abuse clause (especially as far as previous cancelling is concerned) only applies to big companies.

Besides differing, SAARs sometimes even contradict each other. This was the case with different provisions that provided for a reduced withholding tax on dividends, if shares were being kept for at least a certain delay. Both rules mentioned that in case the liberated capital of the company was reduced this reduction primarily had to be imputed on the particularly favored capital.<sup>141</sup> As no further legal indications existed how both rules could be combined, the administration accepted that a taxpayer could freely opt between both rules.<sup>142</sup>

As already mentioned, in new legislation, the legislator very often adds some particular SAARs. However given their very technical and punctual character and lack of general coherence, this causes legal uncertainty about their application in practice. Taxpayers are the first that have to deal with these rules, whereas the tax administration verifies the application during subsequent tax years. Although the struggle against tax avoidance can be considered legitimate, this imbalance leads to a similar level of uncertainty as being created with a GAAR. Whereas for a GAAR this cannot be avoided, for SAARs the legislator should try to limit this uncertainty for as much and as quick as possible.

#### **IV. Combination of GAARs and SAARs**

As mentioned the formulation of a GAAR is necessarily vague, because of its particular scope to deal with transactions within a legal context, but outside the aim of the tax legislation. This is opposed to the often much more precisely defined SAARs reacting towards a particular technique.

In its first general Circular about art. 344 BITC<sup>143</sup>, the administration therefore confirmed that a GAAR would be applicable by way of last resort, in case neither the mere interpretation of a tax rule, its technical application provisions, the provided SAARs or the legal doctrine of tax fraud (simulation), could help to obtain the aimed taxation. However, this formulation can be questioned as it combines several different topics that have nothing to do with a GAAR.

As explained, a GAAR is meant to react against situations, whereby the strict text of the law is literally objectively followed, but with the intention to obtain a result, that was not expected by the legislator. This differs from simulation, whereby a disguised operation is being fraudulently presented as something different. If a SAAR literally reacts against a certain technique, the text of the law as such is changed to avoid it being abused. There is no real hierarchy between those three different concepts.

Finally, the question rises whether a GAAR can be used in case a SAAR has been technically avoided. This seems to depend on the character of the SAAR, as well as the abuse. E.g. if a SAAR allows to borrow 5 times the amount of equity, this barrier will be accepted and cannot be further limited based on a GAAR. However, where family members of a director are not literally mentioned in a

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<sup>139</sup> Balance sheet of max. 43 million EUR or annual turnover of max. 50 million EUR, and workers equivalent of less than 250 FTE. These criteria have to be fulfilled for at least 2 years in the preceding three years.

<sup>140</sup> Art. 275/9, §3, al. 5 BITC.

<sup>141</sup> Art. 269, §2, al. 11 vs. art. 537, al. 5 BITC.

<sup>142</sup> Circ. nr. Ci.RH.233/630.825 (AAFisc 4/2014) of 23 January 2014.

<sup>143</sup> Circular nr. Ci.RH.81/616.207 (AFZ 3/2012 – AAF 17/2012 – AAPD 4/2012) of 4 May 2012, in particular C.2.3.

SAAR limiting the possibilities of a director of a company towards his company, it might be expected that a director circumventing the SAAR through the use of a family member risks to be confronted with the GAAR to apply the effects of a particular SAAR, outside its literal scope. It remains however clear that, given the vague formulation of a GAAR, necessarily the link with a SAAR will also to a certain extent remain vague.