WELCOME OFFICE – INTEGRATION, INFORMATION, ADVICE

EUROPEAN UNION OFFICIALS AND TAXATION

IMPACT OF THE PROTOCOL ON PRIVILEGES AND IMMUNITIES ON THEIR TAX STATUS

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DISCLAIMER

1. This document is merely a general source of information aimed at providing an overview of the legal principles governing the tax situation of officials and other servants of the European Union. It does not set out to provide exhaustive information enabling individual situations to be settled.

2. The references to Belgian legal provisions applicable as at the date shown on this document are given for information purposes only and do not prejudge any amendments which may be introduced in the short or medium term by the regional or federal authorities. The reader should bear in mind that constitutional reforms have granted the regions autonomous regulatory powers in many areas of taxation. The tax situation of officials and other servants of the European Union may, therefore, vary according to the region in which they have taken up residence. They should inform themselves about the rules specific to their region.

3. Figures relating to the calculations and amounts of tax applicable in Belgium are given purely as an indication since they may be amended at any time by the national or regional legislator or vary from one tax year to another, particularly as a result of indexing.

4. Additional information, all regulatory and legislative tax instruments, national or regional, are accessible on the Federal Public Service of Finances web site [1].

5. The Protocol on the Privileges and Immunities of the European Union of 8 April 1965, has been replaced by the Protocol on the Privileges and Immunities of the European Union, annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union, signed in Lisbon, on 13 December 2007 [2].

   The Protocol on Privileges and Immunities of the European Union[3] has entered into force on 1st December 2009 together with the Treaty of Lisbon.

   For the understanding of the present document, the content of Articles 12, 13 and 14 of the previous version remains fundamentally unchanged, but they have been renumbered as Articles 11, 12 and 13 in the Protocol on Privileges and Immunities.

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1 http://www.fisconet.fgov.be/
http://www.belgium.be/eportal/application?origin=charterHome.jsp&event=bea.portal.framework.internal.refresh&pageid=charterDetailPage&navId=3649

2 OJ C 115 of 9 May 2008, p. 266 (consolidated version of the Treaties – Protocol nr. 7)

3 Referred hereafter to as "*PPI*" or "*Protocol*"

1. GENERAL FRAMEWORK - BELGIAN LAW

1.1 TAXPAYERS IN BELGIUM

1.1.1 Residents – Concept under Belgian law

Inhabitants of Belgium, i.e. natural persons who have established their domicile or the seat of their wealth in Belgium, are subject to personal income tax. It is an issue of fact in each case.

However, and unless they provide evidence to the contrary, individuals entered in the National Register of Natural Persons are presumed to have established their domicile or the seat of their wealth in Belgium. [4]

1. It should be noted that, unless they are Belgian, officials and other servants of the European Union will, "*together with their spouses and dependent members of their families, not be subject to immigration restrictions or to formalities for the registration of aliens*" (Article 11(b) of the Protocol on Privileges and Immunities).

   They may be exempted from the formalities of being entered in the population register of the municipality in which they reside and may have a special identity card drawn up through the Commission (DG HR).[5]

   However officials and other servants are under the statutory obligation to disclose their personal address to their own institution. [6]

   In addition, under article 15 of the Protocol on Privileges and Immunities the institution is under the obligation to notify the officials and other agents addresses to the authorities of the host Member state. [7]

2. Article 11 of the Protocol (dating back 1965…) is not applicable to partnerships, whether registered or not (e.g. French "Pacs" or Belgian "cohabitation légale"), except to partnerships that considered as "equivalent to marriage" where partner is treated as "member of the family" [8], but only to the extent that the partner is dependent on the EU official [9].

   Therefore, the provisions of the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Official Journal of the European Union L 158 of 30 April 2004), seem to guarantee a better protection to partners engaged into a "durable relationship"[10] than the Protocol…

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4 Belgian Income Tax code (CIR/92), article 2, 1°, last paragraph

5 Local authorities may carry out checks to ascertain that persons are physically and actually present before entering them in the national registers.

6 Court of Justice, judgment in Case 22/93, [1994], Campogrande v Commission, EU:C:1994:164.

7 Court of Justice, judgment in Case 22/93, cited

8 see article 3 of the Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

9 Article 11 PPI reads: «Together with their spouses and dependent members of their families [EU officials shall] not be subject to immigration restrictions or formalities for the registration of aliens".

10 On the understanding of « durable relationship » by the Belgian authorities, see the Law of 8/7/2011 (Article 2) and Royal Decree of 7/5/2008 (Article 3). It has to be noted also that Belgium has not transposed correctly the Directive 2004/38/EC and is subject to an infringement procedure launched in February 2013.

1.1.2 "Normal/habitual residence" – concept under European law

- Under European Union law, a definition of the concept of "*normal residence*" can be found in Article 6 of Council **Directive 83/183/EEC of 28 March 1983** on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals [11] as amended by Council Directive 89/604/EEC of 23 November 1989. [12]

> Article 6 reads: "*For the purposes of this Directive, "normal residence" means the place where a person usually lives, that is for at least **185 days** in each calendar year, because of personal and occupational ties or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living.*
>
> *However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence*."

- It can be found also in the provisions of the **Directive 2006/126/EC** of the European Parliament and the Council of **20 December 2006** on driving licences (Recast)[13]:

> *Article 7 - Issue, validity and renewal*
>
> *1. Driving licences shall be issued only to those applicants:*
> *…..*
> *(e) who have their normal residence in the territory of the Member State issuing the licence, or can produce evidence that they have been studying there for at least six months.*
>
> *3. The renewal of driving licences when their administrative validity expires shall be subject to:*
> *(a)…. and*
> *(b) normal residence in the territory of the Member State issuing the licence, or evidence that applicants have been studying there for at least six months.*
>
> *Article 12 - Normal residence*
>
> *For the purpose of this Directive, 'normal residence' means the place where a person usually lives, that is for at least **185 days** in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living.*
>
> *However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration.*
>
> *Attendance at a university or school shall not imply transfer of normal residence.*

- The Court of justice has ruled that the criteria to assess normal residence refer to personal links as well as professional links to a specific location, in addition to the duration and that therefore, all these criteria have to be considered in combination (see judgments of 23 April 1991, Ryborg, C-297/89, point 19, and of 17 July 2001, Louloudakis, C-262/99, point 51).

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11 OJ 1983 L 105, p. 64
12 OJ 1989 L 348, p. 28
13 OL L 403 of 30.12.2006, p. 26

The **Court** has also interpreted Article 6 of the directive 83/183/EEC of 28 March 1983 in a judgement issued on **26 April 2007** [14] :

> *"Normal residence must be regarded as the place where a person has established his permanent centre of interests (see, by analogy, Ryborg, paragraph 19, and Louloudakis, paragraph 51).*
>
> *The criterion of permanence refers to the condition that the person must be habitually resident in the place concerned for at least 185 days in each calendar year. In the case in the main proceedings, in which, according to the findings of the national court, that condition has been fulfilled, the definite duration of Mr Alevizos's posting to NATO in Italy thus does not as such exclude the possibility that during the period at issue he had his normal residence in that Member State.*
>
> *All of the relevant facts must be taken into consideration in determining normal residence as the permanent centre of interests of the person concerned (see Ryborg, paragraph 20), namely, in particular, the actual presence of the person concerned and of the members of his family, the availability of accommodation, the place where the children actually attend school, the place where business is conducted, the place where property interests are situated, that of administrative links to public services and social services, inasmuch as those factors express the intention of that person to confer a certain stability on the place of connection, by reason of the continuity arising from a way of life and the development of normal social and occupational relationships (Louloudakis, paragraph 55)".*

- The **Civil Service Tribunal** has applied these principles "in concreto" at various occasions, e.g. in a judgment of 8 April 2008 [15] and more recently in a judgment of **5 December 2012** [16]:

> *"As regards the expatriation allowance, the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests, it being understood that, for an official with the nationality of the country of employment, the fact that he has maintained or established his habitual residence there, even for only a very short period during the 10-year reference period, is sufficient to entail the loss or refusal of the expatriation allowance.*
>
> *However, temporary residence in the country of employment in the context of studies does not, in principle, imply the intention of transferring the centre of his interests to that country, unless that period of residence, taken into consideration together with other relevant facts, demonstrates that the official concerned has permanent social and occupational links with that country.*
>
> *Furthermore, although the place in which an individual exercises his occupational activities is a serious factor in the determination of his habitual residence, the mere fact that he was resident in the country of employment for a limited period purely for the purpose of performing a fixed-term contract of employment does not give rise to a presumption that he intended to transfer the permanent or habitual centre of his interests to that country".*
>
> *(see paras 28, 36, 39-40)*

The Tribunal takes the opportuinity to remind that:

> "*the registration in a municipal population register normally reveals the wish and the intention to fix the stable and permanent center of residence and interest at that place (order of 26/9/2007, F-129/06, Salvador Roldan/Commission, par. 52; judgment of 20/11/2007, Kyriazis/Commission, F-120/05, par. 53)*" [17]

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14 In case C-392/05, *Georgios Alevizos v Ipourgos Ikonomikon*, [2007]

15 In case G.G. vs Commission, F-134/06, EU:F:2008:40

16 In case B. vs Commission, F-6/12, EU:F:2012:175, see par. 28-29

17 Par. 42

1.1.3 Non-residents

Taxpayers whose tax domicile is established outside Belgium are subject to non-resident income tax. They are liable to tax on their Belgian source income, while residents are liable to tax on their worldwide income.

In the case of natural persons, there is a rebuttable presumption that persons entered in the National Register of Natural Persons are resident in Belgium.

In addition, for married persons who are not deemed to be 'single' from a tax point of view (e.g. spouses of officials), the tax domicile is established at the place where the household is established.

The following are taxable:

- income received by non-residents which is borne by a person officially classified as living in Belgium (*'habitant du Royaume'*);

- salaries borne by a non-resident in respect of an activity carried on in Belgium by a person who has resided in Belgium for more than 183/185 days during the relevant taxable period.

  ☞ External staff working for the EU institutions who do not qualify under Article 13 of the Protocol may, if they so wish claim non-resident status.

1.2 WHAT INCOME IS TAXABLE IN BELGIUM?

As there is no approximation of Member states domestic laws in tax related matters, Member states retain their exclusive competence to legislate, including when it comes to define what are the various taxable income.

'*Inhabitants*' of Belgium are liable to tax on all their taxable income, including income generated or collected abroad (subject to the application of agreements preventing double taxation and the deduction, in the majority of cases, of the portion of tax paid abroad).

Taxable income comprises all net income, minus deductible expenditure.

Total net income is equal to the combined net income from the following four sources:

1.2.1 Earned income

Earned income is income which is derived directly or indirectly from all types of gainful activity and is made up of the "gains, profits resulting from a former professional activity, remuneration and pensions" received by the taxpayer. Taxable income is any consideration resulting from pursuing an occupation.

1.2.2 Income from capital and movable assets

Such income comprises yields on movable assets, i.e. dividends and earnings from stocks and shares, interest on investments and savings accounts, income from life annuities, etc [18].

In Belgium, this tax is paid in the form of a withholding tax (*'précompte mobilier'*) on investment income (15% on savings accounts, 27% on interest produced by other investments in 2016 [19], 27% on dividends received in 2016), which provides full discharge of tax liability.

In 2017, the withholding tax rate will increase from 27% to 30%!

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[18] For the details regarding Directives 2003/48/EC, 2014/48/EU, 2014/107/EU, 2015/2060/EU… see 6.2.2. infra

[19] 15%, 21%, 25% in 2012, 15%, 25% in 2013, 15%, 27% in 2016, 15% and 30% in 2017!

1.2.3 Immovable property – Belgium deliberately infringing European law

The general principle is that tax payable on income from real estate should be declared and paid in the country where the property is located. In Belgium, tax on income from immovable property is payable by the owner, long-term leaseholder, usufructuary holder (including persons benefiting from a right of use and/or residence) and beneficiaries of a building lease (Article 251 CIR/92 (Belgian Income Tax Code (1992).

For the owners who occupy their property as residence, the "taxable" income from that immovable property is the *'cadastral income'* (notional 'net normal average' income attributed to each real property by the authorities and indexed).

Where the property is let as a private dwelling, the cadastral income is increased by 40% (see Chapter 6.1.2 below).

The tax applied to income from immovable property is the '*précompte immobilier*', which is a fraction of the cadastral income.

In **March 2012**, the Commission has opened an infringement procedure against Belgium because of a discriminatory treatment in the assessment of immovable income [20].

Receiving no answer from Belgium, the Commission decided in June 2015 to refer Belgium to the Court of justice "*because of its tax legislation which provides for different methods of assessing income from property. As a result of this, the income which a Belgian resident earns from property located abroad is assessed at a higher value than that from comparable property in Belgium. Belgian law thus favours investments in certain properties located in Belgium and penalises taxpayers who choose to invest in similar property in other Member States of the EU or the European Economic Area (EEA)"* [21].

The application initiating the proceedings was lodged on 03/03/2017.

The case is registered under the reference C-110/17.

Real estate properties owned in Belgium are taxed only on the "revenu cadastral", which corresponds to a rental value arbitrarily fixed in 1975 and unchanged ever since, while properties owned abroad should be taxed on the actual rental value or the gross rental income actually cashed.

In the same context, on 10 September 2013, the Court of Appeal of Antwerp questioned the Court of Justice about the compatibility of Belgian law with European law.

On **11 September 2014**, the Court of justice already has ruled that:

> "*Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, in so far as it is liable to lead, when a progressivity clause contained in a convention for the prevention of double taxation is applied, to a higher rate of tax on income merely because the method for determining income from immovable property results in income deriving from immovable property that is not rented out situated in another Member State being assessed at a higher amount than income from such property situated in the first Member State. It is for the referring court to ascertain whether that is in fact the effect of the legislation at issue in the dispute in the main proceedings*" [22].

As Belgium has taken no step so far to amend its legislation.

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[20] Reasoned opinion of 22/03/2012, procedure n°2007/4332, violation of Article 63 TFEU

[21] Commission press release 18/06/2015 [IP/15/5201]

[22] In case *Ronny Verest, Gaby Gerards v Belgische Staat*, C-489/13, EU:C:2014:2210

1.2.4 'Miscellaneous income'

'Miscellaneous income' covers gains deriving from speculation, transactions or occasional services outside the scope of an occupation, prizes, royalties, etc.

It also covers annuities and maintenance, particularly when paid under a legal settlement (e.g. in Belgium, in the context of proceedings under Article 223 of the Civil Code before a justice of the peace or divorce proceedings).

2. THE OFFICIAL'S SITUATION – THE PROTOCOL ON PRIVILEGES AND IMMUNITIES

The tax situation of officials and other servants of the European Union can best be understood by consulting the Protocol on the Privileges and Immunities of the European Union, annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union, especially Articles 12 and 13.

2.1 BASIC PRINCIPLES

2.1.1 *Article 12 of the Protocol* – EU EMOLUMENTS ARE EXEMPT FROM NATIONAL TAXES

Article 12 of the Protocol reads:

> *Officials and other servants of the Union shall be liable to a tax, for the benefit of the Union, on salaries, wages and emoluments paid to them by the Union, in accordance with the conditions and procedure laid down by a European law. That law shall be adopted after consultation of the institutions concerned.*
>
> *Officials and other servants of the Union shall be exempt from national taxes on salaries, wages and emoluments paid by the Union.*

The purpose of this provision is to avoid double taxation, since European Union tax is levied on emoluments.

In accordance with judgments handed down by the Court of Justice European of the European Union, the following case law applies:

(a) Article 12 of the Protocol is not confined to national taxation based directly on the salaries, wages and emoluments paid by the European Union to their officials and other servants: the exemption also extends to all indirect national taxes (see *Humblet*, Case 6/60 [1960] ECR 1125, Case 260/86 *Commission v Belgium* [1988] ECR 955, ground of judgment No 10, and *Tither*, Case C-333/88 [1990] ECR I-1133, ground of judgment No 12).

(b) Article 12 of the Protocol restricts the tax sovereignty of the Member States in that it precludes any national tax, regardless of its nature and the manner in which it is levied, which is imposed directly or indirectly on officials or other servants of the European Union by reason of the fact that they are in receipt of remuneration paid by the European Union, even if the tax in question is not calculated by reference to the amount of that remuneration (see *Commission v Belgium* in above-mentioned case, ground of judgment No 10; *Tither* in above-mentioned case, ground of judgment No 12, and *Kristoffersen*, Case C-263/91 [1993] ECR I-2755, ground of judgment No 14).

(c) For the application of the conditions under which tax advantages are granted, there must be no discrimination between persons entitled under officials or other servants of the European Union and other taxpayers (see *Brouerius van Nidek*, Case 7/74 [1974] ECR 757, ground of judgment No 14).

- ☞ On the basis of the above principles, the salaries paid by the European Union are exempt from national taxation.

- ☞ Officials and other servants are under no obligation to declare such income to a national administrative department. They are not required to mention their salary in their national tax returns.

  The **Court of justice** has reaffirmed its "Humblet" case-law in an important judgment issued on **5 July 2012** [23]. The Court ruled that:

  > "*The second paragraph of Article 12 of the Protocol on the Privileges and Immunities of the European Union, … must be interpreted as meaning that it precludes national legislation… which takes account of the income, including the pensions and allowances on termination of service, paid by the European Union to its officials and other staff, or to its former officials and former staff, in calculating the cap on a tax such as the wealth tax*".

  The judgment is also important on a second aspect. The Court, expressly and for the first time, clearly stated that:

  > "*In the interest of legal certainty, **it must be held that**, given that the income paid by the Union and subject to the Union's own tax cannot be taxed either directly or indirectly by a Member State and given that it is withdrawn from the tax sovereignty of the Member States, **a person in receipt of such income is also exempt from any obligation to declare the amount of such income to the authorities of a Member State***" (paragraph 30).

  If necessary, DG HR will provide a certificate confirming your status and the existence of exempt income.

- ☞ Invalidity pensions and retirement pensions are also exempt from national taxes, as are the survivors' pensions paid by the European Union to the widows and widowers of officials and other servants.

(d) However, Article 12 does not apply to the following:

- taxes or duties imposed by the Member States in consideration of services rendered (e.g. regional tax, tax on refuse disposal, water rates, television and radio licence fees, etc.)
- vehicle registration taxes
- annual road tax
- in Belgium, *impôt foncier* (property tax)
- registration/stamp duties
- inheritance tax.

(e) Remember also that even though Member states cannot tax EU sources of income, there are circumstances where Member states can take the existence and the amount of EU sources of income into account when it comes to allocate or refuse the benefit of tax reliefs or abatements which are depending on or are conditioned by a ceiling of income or resources.

In a case involving a retired official claiming an abatement of the French dwelling tax [*taxe d'habitation*], the Court of justice in a **judgment of 21 May 2015** [24] has ruled that:

> *"…, it is clear that the national legislation at issue in the main proceedings contains no provision which prevents officials and other servants of the Union from qualifying for partial relief from residence tax on the same conditions as are applicable to any other taxpayer who may qualify for that advantage, namely that the reference taxable income should not exceed the statutorily defined threshold.*

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[23] In case *Bourges-Maunoury vs Direction des Services fiscaux d'Eure-et-Loir*, C-558/10, EU:C:2012:418

[24] Case *Pazdziej*, C-349/14, EU:C:2015:338

"That is because the reason for the exclusion from partial relief from residence tax is not the status of being an official or other servant of the Union who receives a salary which exceeds the threshold of the reference taxable income, but is a consequence of the general condition relating to the amount of income which gives rise to entitlement to the advantage at issue, a condition which applies without discrimination not only to officials and other servants of the Union but to any other taxpayer in the Member State concerned.

…, it must be observed that, as is apparent from paragraph 21 of this judgment, the tax at issue in the main proceedings depends essentially on the rental value of the residential premises and does not relate to either the taxpayer's ability to pay or the full extent of the taxpayer's assets. The taxpayer's ability to pay is taken into account only for the purposes of obtaining the tax advantage and does not constitute the actual subject of residence tax.

"In that regard, it must be stated that the system for the granting of partial relief from residence tax was introduced in order to avoid situations of injustice and represents a social policy measure which enables low-income tax households to cope with local taxes. If it were accepted that salaries, wages and emoluments paid by the Union could be excluded on the basis of the provisions of Article 12 of the Protocol, that would consequently have the effect of altering the essential nature of the social policy measure introduced.

"In the light of all the foregoing, the case in the main proceedings can be distinguished from that which gave rise to the judgment in Bourgès-Maunoury and Heintz (C-558/10, EU:C:2012:418), where the Court held, first, that the legislation on the wealth tax at issue in that case was related to the salaries, wages and emoluments paid by the Union, since those salaries, wages and emoluments are taken into account for the purposes of determining the final rate of tax and, second, that the effect of that tax was indirectly to tax the income of officials and other servants of the Union.

"In the light of the foregoing, … the second paragraph of Article 12 of the Protocol must be

Movable property *belonging to persons referred to in the first paragraph and situated in the territory of the State where they are staying shall be exempt from death duties in that State.*

Such property shall, for the assessment of such duty, be considered as being in the State of domicile for tax purposes, subject to the rights of third States and to the possible application of provisions of international conventions on double taxation.

Any domicile acquired solely by reason of the performance of duties in the service of other international organisations shall not be taken into consideration in applying the provisions of this Article."

As mentioned above, inheritance tax is outside the scope of Article 12 of the Protocol meaning that European Union officials do not enjoy any exemption in relation thereof.

2.1.2.1 Effects of the place of recruitment

In most cases, the residence for tax purposes will be the place of recruitment, although this is not automatically true.

You should be aware that problems may arise in connection with the definition of your place of recruitment and place of origin, and hence your residence for tax purposes.[25]

If you have any doubts, you should contact DG HR, Administration of individual rights).

2.1.2.2 Article 13 of the Protocol does not apply to retired officials

It is important to bear in mind that Article 13 of the Protocol applies only to officials in active service.

As a rule, retired officials are deemed to be resident for tax purposes in the country where they have their main residence (whether or not a Member State), and their 'centre of interests'.

2.1.2.3 Examples of how the residence for tax purposes is determined

(a) A Belgian official recruited in Belgium is resident for tax purposes in Belgium, and will pay Belgian tax on all earned income except his Community salary and on all income from investment, property and other sources.

(b) An Italian official who has lived in Belgium since birth and was recruited in Belgium is also deemed to be resident in Belgium for tax purposes.

(c) A Greek official recruited in Rome, where he had lived and worked for ten years, bought a house, brought up a family and paid taxes, is deemed to be resident for tax purposes in Italy.

(d) A Belgian official who was recruited in Germany, where she was brought up and educated, and then lived and worked, is deemed to be resident in Germany for tax purposes.

*2.1.2.4 **Can Officials and others agents choose their tax domicile**?*

Do Officials and other agents have the right to waive the application of article 13 of the Protocol and have a free choice of the location of their tax domicile?

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[25] See for example Court of First Instance, 28/09/1999, *J v Commission*, T-28/98, EU:T:1999:180 and 27/09/2000, *Lemaître v Commission*, T-317/99, EU:T:2000 :218.

Referring to the present position of the Court of justice case-law, in the two only cases reported, the answer would be **negative**.

The Court has ruled that:

> "*Article [13] of the Protocol on the Privileges and Immunities of the European Union must be interpreted as meaning that it does not give an official of the European Union a choice as to the establishment of his domicile for tax purposes and that an official' s intention, formed before entering the service of the European Union, to transfer his domicile to the Member State of the place of performance of his duties cannot be taken into account for the purpose of considering whether he has established his residence solely by reason of the performance of his duties, unless he adduces proof that he had already taken steps to transfer his domicile irrespective of entering the service of the European Union*" [26].

The Court has confirmed that case-law in a case involving the spouse without gainful activity of an EU official:

> "*The first paragraph of Article [13] of the Protocol on the Privileges and Immunities of the European Communities, originally annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities and subsequently, by virtue of the Treaty of Amsterdam, to the EC Treaty, must be interpreted as meaning that the spouse of a person who, solely because that person enters the service of the European Union, establishes his residence in the territory of a Member State other than his Member State of domicile for tax purposes at the time when that person entered the service of the European Union is regarded as having maintained his domicile for tax purposes in the latter Member State if he is not separately engaged in a gainful occupation*"[27].

2.2 TAX SITUATION OF OFFICIALS AND OTHER SERVANTS - SUMMARY

2.2.1 Earned income

Officials and other servants of the European Union are "exempt from national taxes (solely) on salaries, wages and emoluments paid by the European Union" (Article 12 of the Protocol).

Obviously, an official recruited in the course of a year is not exempt from national taxes on the income earned before entering the service.

The same applies to any income generated by outside or extra activities, which is also taxable: for example, the earnings of an official duly authorised[28] to teach in a University are liable to tax.

In principle, an official generating income from an outside activity could be liable to pay non-residents' income tax in Belgium.

2.2.2 Investment income

Officials and other servants who do not have their tax domicile in Belgium, must declare their investment income and pay tax on it in the country of residence for tax purposes (see Article 13 of the Protocol).

If you are not resident in Belgium for tax purposes, you can apply for exemption from Belgian withholding tax on investment income (the *précompte mobilier*).

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[26] Judgment in case 88/92, M. Jansen van Rosendaal v Staatssecretaris van Financiën [1993] ECR 3315, EU:C:1999:246

[27] Judgment of 28 July 2011 in case *Lotta Gistö*, C-270/10, EU:C:2011:529

[28] For information on applications for **prior authorisation**, please refer to Article 12 ter, par. 1, of Staff Regulations.

Pursuant to Article 13 of the Protocol, however, you must declare the exempt income in the Member State of your residence for tax purposes.

2.2.3 Income from property

Officials are not exempt from tax on income from property, levied in the Member State where the property is situated. At the same time, they might be under the obligation to declare the existence of the property and –eventually- rental income to the Member state of their tax domicile.

2.2.4 Miscellaneous income

Officials and other servants must pay tax in the country where they are resident for tax purposes on any 'miscellaneous income' they may have.

2.2.5 Deduction in the Member state of the tax domicile of expenditure in respect of a household assistant incurred in another Member state

The Court of justice has confirmed, in a judgment issued on **13 November 2003** [29], that Officials and others servants are entitled to benefit of Article 39 EC (ex-48) and that in conjunction with Article 13 of the Protocol on Privileges and Immunities, that provision

> **"***precludes a situation in which officials of the European Union who are of German origin and are resident in Luxembourg, where they work as officials, and who have incurred expenditure in respect of a household assistant in the latter Member State cannot deduct that expenditure from their taxable income in Germany by reason of the fact that the contributions paid for the household assistant were made to the Luxembourg statutory pension insurance scheme and not to the German scheme***".**

The Court took also the opportunity to sum up the mechanism of Article 13 of the Protocol:

> "*It must, however, be pointed out that officials and other servants of the European Union are subject to special rules in matters of taxation that distinguish them from other workers.*
>
> *"Thus, although Mr and Mrs Schilling left their Member State of origin (Germany) in order to work as officials of the European Union in another Member State (Luxembourg), their salaries as officials are not subject to tax in either of those Member States but are, in accordance with Article 13 of the Protocol, taxed pursuant to the separate taxation system of the European Union provided for under Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Union (OJ English Special Edition 1968 (I), p. 37).*
>
> *"In accordance with Article 14 of the Protocol, the Member State of origin, in which the domicile of the official or servant is maintained for tax purposes, remains in principle competent to tax all other income of those persons and to subject that income to wealth tax and death duties.*
>
> *The officials and servants covered by Article 14 of the Protocol are for that reason entitled to apply for the tax deductions that are provided for by the national taxation scheme of the Member State of origin and that are not connected to their salaries as Community officials or servants*" [30].

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[29] Judgment in case 209/01, Theodor Schilling and Angelica Fleck-Schilling v Finanzamt Nürnberg-Süd, [2003], EU:C:2003:610

[30] Par. 29 to 31 of the judgment

2.2.6 Benefit of subsidy for the construction or purchase of owner-occupied dwelling in another Member state than the Member state of the tax residence

Under German law, natural persons liable to unlimited taxation of income in Germany could benefit of a subsidy for the construction or purchase of a dwelling in an owner-occupied house in Germany or of an owner-occupied dwelling if located in Germany only.

The benefit of the subsidy was refused for properties build or purchased in another Member state.

The Commission considered that the exclusion of persons making use of cross-border mobility from eligibility for the property subsidy was, under Articles 18 EC, 39 EC and 43 EC, incompatible with the principle of freedom of movement of persons.

Sharing the same view, the Court of justice in a judgment issued on **17 January 2008** held that: [31]

> *"… the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the European Community, and they preclude measures which might place those nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-464/02 Commission v Denmark [2005] ECR I-7929, paragraph 34; Commission v Portugal, paragraph 15; Commission v Sweden, paragraph 17; and Case C-318/05 Commission v Germany, paragraph 114).*
>
> *Provisions preventing or deterring a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned (Commission v Denmark, paragraph 35; Commission v Portugal, paragraph 16; Commission v Sweden, paragraph 18; and Case C-318/05 Commission v Germany, paragraph 115).*
>
> *In this case, the first sentence of Paragraph 2(1) of the EigZulG places at a disadvantage persons liable in Germany to unlimited taxation of income who build or purchase a dwelling for their own occupation in the territory of another Member State.*
>
> *That provision does not allow such persons to receive the property subsidy, whereas persons are entitled to it who are in the same situation with regard to income tax and who, when building or purchasing a dwelling, decide to maintain or establish domicile in Germany* [32].
>
> *… It follows that by excluding in the first sentence of Paragraph 2(1) of the Law on subsidies for owner-occupied dwellings (Eigenheimzulagengesetz),…, dwellings in another Member State from eligibility for the subsidy for owner-occupied dwellings granted to persons liable to unlimited taxation on income, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC".*

The same principles could be applied, for example, to interests paid on mortgage loans for the acquisition or the construction of properties.

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31 Judgment in case 152/05, Commission v Republic of Germany [2008], EU:C:2008:17

32 Par. 21 to 23 of the judgment

2.2.7 PROHIBITION OF TAX DISCRIMINATION ON BASIS OF THE RESIDENCE OF THE TAX PAYER OR LOCATION OF ASSETS – OBSTACLE TO FREE MOVEMENT OF CAPITAL AND CITIZENS

Upon the initiatives from the Commission or EU citizens, a constant and steady case-law of the Court of justice is now condemning any treatments discriminatory or detrimental on the basis of residence or location of assets, including in tax and inheritance matters:

1. Case C-364/01, *Barbier v Inspecteur van de Belastingdienst te Heerlen* [11/12/2003]: assessment of property value

2. Case C-104/06, *Commission c Sweden* [18/1/2007], sale of real estate property – no capital gain tax if proceed of the sale reinvested into a dwelling in Sweden

3. Case C-443/06, Waltraud-Hollmann v Fazenda Publica, Ministerio Publico [11/10/2007]: tax on capital gain

4. Case C-464/05, Geurts-Vogten v Administratie van de BTW, registratie en domeinen, Belgische Staat: transfer of family undertakings

5. Case C-256/06, *Jäger v Finanzamt Kusel-Landstuhl* [17/1/2008]: assessment of agricultural land value

6. Case C-43/07, *Arens-Sikken v Staatsecretaris van Financiën* [11/9/2008]:tax deduction of overendowment debts

7. Case C-11/07, *Eckelkamp v Belgische Staat* [30/09/2008]: deduction of secured debts on property

8. Case C-562/07, *Commission v Spain* [6/10/2009]: sale of real estate properties - capital gain tax – disciminatory treatment of non-residents

9. C-510/08, *Mattner v Finanzamt Velbert* [22/04/2010): donation & gift – tax deduction different whether donor or beneficiary resident or non-resident

10. Case C-155/09, *Commission v Greece* [20/01/2011]: first acquisition tax exemption only for residents or Greek nationals

11. Case C-450/09, *Schröder v Finanzamt Hameln* [31/3/2011]: taxation of income from the letting of immovable property –deductibility of annuities paid to a relative in the context of an anticipated succession inter vivos

12. Case C-318/07, *Hein Persche v Finanzamt Lüdenscheid* [27/01/2009]: Free movement of capital – Income tax – Deduction of gifts to bodies recognised as charitable – Deduction restricted to gifts to national bodies – Gifts in kind

13. Case C-25/10, *Missionwerk Werner Heukelbach c. Belgian State* [10/2/2011]: Gift in favor of non-profit association - Reduced death duties – Refusal to non-resident association

14. Case C-10/10, *Commission c. Austria* [26/6/2011]: Gift in favor educational or research institution – Tax relief – Refusal if institution located in another Member state

15. Case C-181/12, *Yvon Welte c. Finanzamt Velbert* [17/10/2013]: Deceased person and heir resident in a third country –Immovable property located in a Member State – Right to an allowance against the taxable value – Different treatment of residents and non-resident

16. Case-127/12, *Commission c. Spain* [3/9/2014: Inheritance - Difference in treatment between residents and non-residents

17. Case-489/13, *Commission c. Belgium* [11/9/2014]:Taxation of income from immovable property - Difference in treatment between immovable property situated in the Member State of residence and in another Member State

18. Case C-133/13, *Staatssecretaris van Financiën v Q* [18/12/2014]: Properties part of the national cultural and historical heritage — Gift tax — No exemption in respect of property situated in the territory of another Member State

19. Case C-559/13, *Grünewald v Finanzamt Dortmund-Unna* [24/02/2015]: Deductibility of support payments made in consideration for a gift by way of anticipated succession — Exclusion of non-residents

20. Case C-485/14, *Commission v France* [16/07/2015]: duty payable on gifts and legacies to public bodies or to charitable bodies - bodies located in another Member state – exemption only for bodies in MS which has concluded a bilateral agreement with France

21. Case C-589/13, *Familienprivatstifung Eisenstadt v Finanzenat Aubenstell Wien* [17/09/2015]: private foundation – refusal of right to deduct from the taxable amount gifts to non-resident beneficiaries exempt from tax in the Member State of the foundation under a double taxation convention

22. Case C402/14, *Viamar — Elliniki Aftokiniton kai Genikon Epicheiriseon AE v Elliniko Dimosio* [17 December 2015]: Customs duties of a fiscal nature — Charges having equivalent effect — Levying of a tax on motor vehicles at the time of their import into the territory of a Member State —Tax linked to registration and potential putting into circulation of the vehicle — Refusal to refund the tax where the vehicle is not registered

23. Case C342/14, *X-Steuerberatungsgesellschaft v Finanzamt Hannover-Nord* [17 December 2015]: Recognition of professional qualifications -Tax consultancy company established in a Member State and providing services in another Member State — Legislation of a Member State requiring the registration and recognition of tax consultancy companies - Discrimination

24. Case C479/14, *Sabine Hünnebeck v Finanzamt Krefeld*, [8 June 2016]: Gift tax — Gift of immovable property situated within national territory — National law providing for a higher tax-free allowance for residents than for non-residents

25. Case C586/14, *Vasile Budișan v Administrația Județeană a Finanțelor Publice Cluj* [9 June 2016]: tax levied by a Member State on motor vehicles at the time of their first registration or of the first transfer of the right of ownership — Fiscal neutrality as between second-hand motor vehicles imported from other Member States and similar motor vehicles available on the domestic market

26. Case C478/15, *Radgen v Finanzamt Ettlingen,* [21 September 2016]: exemption of income derived from part-time employment as a teacher with a legal person governed by public law established in a Member State of the European Union or in a State to which the Agreement on the European Economic Area of 2 May 1992 applies — Legislation of a Member State excluding from that exemption income derived from such employment with a legal person governed by public law established in Switzerland

27. Case C-503/14, *European Commission v Portuguese Republic* [21 December 2016]: taxation of natural persons on capital gains resulting from a share exchange, from a transfer of all the assets used in the exercise of a business or professional activity — Exit taxation of individuals — Difference in treatment between natural persons who exchange shares and maintain their residence in the national territory and those who make such an exchange and transfer their residence to the territory of another Member State of the European Union or the European Economic Area

28. Case C-98/16, *European Commission v Hellenic Republic* [4 May 2017]: duty payable on gifts and legacies to public bodies or to charitable bodies - bodies located in another Member state excluded from reduced rate – reduced rate only for bodies in MS which has concluded a bilateral agreement with Greece

2.2.8 TAX ALERTS!

1. Directive 2010/24/EU of 16.3.2010 (OJ L84 of 31.3.2010) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

The directive provides for a mutual assistance procedure whereby the requested authority may supply the applicant authority with the information which the latter needs in order to recover claims arising in the applicant Member State and notify to the debtor all documents relating to such claims emanating from the applicant Member State.

Compared to previous similar instruments, Article 2 extends the scope of the Directive to:

(a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union;

…

2. The scope of this Directive includes:

(a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities;

(b) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties;

(c) interest and costs relating to the claims for which mutual assistance may be requested in accordance with paragraph 1 or point (a) or (b) of this paragraph.

The directive came into force on 1/1/2012

2. Directive 2011/16/EU of 15.2.2011 (OJ L64 of 11.3.2011) on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

The Directive completes the Directive 2010/24/EU and reinforces the mechanisms of exchange of information between Member states. It came into force on 1/1/2013.

Article 2 of the Directive extends its scope to "**all taxes of any kind levied by, or on behalf of, a Member State or the Member State's territorial or administrative subdivisions, including the local authorities**".

Article 8 of the Directive establishes a mandatory automatic exchange of information between Member states:

"The competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State, information regarding taxable periods as from 1 January 2014 that is available concerning residents in that other Member State, on the following specific categories of income and capital as they are to be understood under the national legislation of the Member State which communicates the information:

(a) income from employment;
(b) director's fees;
(c) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures;
(d) pensions;
(e) ownership of and income from immovable property.

The Directive has been amended and "integrated" into **Directive 2014/107/EU of 9 December 2014** (JO L 359 of 16/12/2014, p. 1), amending Directive 2011/16/EU, as regards mandatory automatic exchange of information in the field of taxation [33].

3. Regulation(EU) 2015/847 of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006

The objective of the regulation is to ensure the full traceability of transfers of funds throughout the payment chain.

It aims at reinforcing the prudential obligations of financial institutions to check information on payer, beneficiary payee and origin of the funds for any transfer equal or in excess of … 1.000 €!

It will come into force on 1st January 2017.

Forewarned is forearmed…

4. Recent CASE-LAW in relation to the exchange of information

- In a case related to the extent and limits of the right for a public administration to exchange personal data with another public administration without informing the persons whose data was being exchanged and processed, the **Court of justice ruled on 1st October 2015** that:

> *Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing." [34].*

- In another case, the issue was to know whether the German legislation requiring credit institutions to notify the tax authorities of deceased customers' assets for purposes related to the collection of inheritance tax could be extended and applied to branches established in another Member State (Austria) in which banking secrecy prohibits, in principle, the disclosure of such information. The **Court of Justice ruled on 14 April 2016** that:

> *« Article 49 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.» [35] .*

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33 See paragraph 6.3.3.

34 Case C‑201/14, *Smaranda Bara e.a. v Președintele Casei Naționale de Asigurări de Sănătate, Casa Națională de Asigurări de Sănătate, Agenția Națională de Administrare Fiscală (ANAF*), ECLI:EU:C:2015:638

35 Case C‑522/14, *Sparkasse Allgäu v Finanzamt Kempten*, ECLI:EU:C:2016:253

3. THE SPOUSE OF AN OFFICIAL

3.1 THE SPOUSE IS NOT IN EMPLOYMENT

The spouse is governed by Article 13 of the Protocol.

His or her domicile for tax purposes is normally the Member State which is the domicile for tax purposes of the official.

3.2 THE SPOUSE IS IN EMPLOYMENT IN BELGIUM

If the spouse is in employment in Belgium, his or her domicile for tax purposes will be Belgium.

The Belgian law of 6 July 1994 fixes the domicile for tax purposes of married persons as the place where the household is established.

At the same time, since, for tax purposes, the spouse of an official is regarded as a single person, there is in tax terms no household.

The spouse of an official will be treated for income tax purposes as not being married [36].

- If the spouse is employed, he or she will be subject to tax (application by the employer of the social security provisions, deduction of income tax), while, as a single person, benefiting, where applicable, from an increased exempt slice for dependent children [37].

- However, the law of 22 December 2008 (M.B. of 29/12/2008) has suppressed the benefit for the working spouse of EU officials of a personal right to an additional slice of income exempt from taxation.

  The spouse alone will make an income tax return as "single".

- If the spouse is self-employed, he or she will be subject to tax and will have to make social security contributions to a Fund for self-employed workers and pay tax through quarterly advance payments.

3.3 BELGIAN *'quotient conjugal'*

The Belgian "quotient conjugal" issue, which has been the subject of considerable discussion, was settled by a judgment of the Court of Justice given on 14 October 1999. The *'quotient conjugal'* means that part of the income of one spouse is taxed as if it belonged to the other spouse if that spouse's own earned income does not exceed [270.000 BEF [38]] (Articles 87 and 88 CIR/92).

Under Article 128 CIR/92,[39] Belgium refused to apply the *'quotient conjugal'* to the spouses of Community officials.

In its judgment,[40] the Court ruled that:

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36 see Article 126, § 2, 1st par., 4° CIR/92

37 Articles 131 and 132 CIR/92

38 10.290 € in 2016

39 *For the purposes of applying this section and calculating the tax, married persons shall not be regarded as such but as single people: ... 4. where a spouse receives earned income which is exempt under an agreement and is not included in the calculation of the other income of the household provided such income exceeds [*8.330,00 EUR*]. In such cases, taxation is calculated separately and the tax is determined for each party on the basis of his or her own income and the incomes of the children whose legal guardian they are.*

40 Judgment in case 229/98, *Vander Zwalmen and Massart v. Belgian State* [1999] ECR 7113,EU:C:1999:501

"*Article 13 of the Protocol does not preclude a Member State, which grants tax relief to households with a single income and to those with two incomes, the second of which is less than the index-linked sum of BEF 270 000, from refusing that benefit to households in which one spouse is an official or other servant of the European Union where his salary exceeds that amount*."

As already explained, even though Member states cannot tax EU sources of income, there are circumstances where Member states can take the existence and the amount of EU sources of income into account when it comes to allocate or refuse the benefit of tax reliefs or abatements which depend on a ceiling of income or resources.

However, in a judgment of **29 March 2012**, the Belgian Constitutional court has reminded that a tax payer who earns professional income exempt from taxation by international convention [e.g. an EU official] but who at the same time earns taxable professional income from other sources can offset part of these other professional income by transferring them [or part of them] to his/her spouse who does not benefit of any professional income [41].

3.4 THE SPOUSE IS IN EMPLOYMENT ABROAD

Various cases are possible:

(a) THE SPOUSE OF A BELGIAN OFFICIAL, RECRUITED IN BELGIUM, IS IN PAID EMPLOYMENT ABROAD

In this case, the tax administration will normally presume that the spouse is domiciled for tax purposes of the spouse is Belgium and will tax his or her total income, in Belgium and abroad, subject to deduction of the amount of foreign tax and application of double taxation agreements.

(b) THE SPOUSE OF AN OFFICIAL RECRUITED IN ANOTHER MEMBER STATE AND COVERED BY ARTICLE 13 OF THE PROTOCOL IS IN PAID EMPLOYMENT ABROAD

For example, the spouse of a Danish official continues to work as an air hostess for SAS, which recruited her in Copenhagen.

☞ Essential precaution, under no circumstances should the spouse agree to be entered on the Belgian population register in order to avoid the 'presumption' by the tax authorities that people who register in that way elect tax domicile in Belgium.

If the spouse's tax domicile continues to be another Member State, determination of his or her tax position and the rates of tax may prove complex and require the application of international or bilateral double taxation agreements, which goes beyond the scope of the general information given here.

This is an issue of fact which has to be considered on a case-by-case basis.

(c) THE SPOUSE OF A BELGIAN OFFICIAL, RECRUITED IN BELGIUM, IS SELF-EMPLOYED ABROAD.

In this case, the tax administration will normally presume that the spouse is domiciled for tax purposes in Belgium and will tax his or her total income, in Belgium and abroad, subject to deduction of the amount of foreign tax and application of double taxation agreements.

(d) THE SPOUSE OF AN OFFICIAL RECRUITED IN ANOTHER MEMBER STATE AND COVERED BY ARTICLE 13 OF THE PROTOCOL IS SELF-EMPLOYED ABROAD

[41] Judgment of 29 March 2012, n° 51/2012, registry number 5146

Examples include a spouse who directs a company which has no head office, permanent establishment or activity in Belgium and a spouse who works as a consultant in another Member State.

- ☞ Essential precaution, here too, the spouse should under no circumstances agree to be entered on the Belgian population register in order to avoid the 'presumption' by the tax authorities that people who register in that way elect tax domicile in Belgium.

In certain cases, however, even a spouse who retains his or her domicile for tax purposes in another Member State, may be regarded by the Belgian administration as having a stable establishment in Belgium and be taxed in the income generated in Belgium, while taxable income generated elsewhere is taxed in the country of domicile for tax purposes, without prejudice to the application of double taxation agreements.

Once again, this is an issue of fact which has to be considered on a case-by-case basis.

3.5 LIVING TOGETHER AND COHABITATION UNDER LAW

Unless there is provision to the contrary in the law of the Member States, living together or cohabitation under law[42] does not affect the tax position of the partners.

The Court of First Instance of the European Union held that, except where there are legal provisions to the contrary, cohabitation could not be regarded as marriage and could not have the effects of marriage.[43]

It should be noted that in Belgium since financial year 2005 (income for 2004), 'cohabitants under law', as defined by the law, are regarded as married.[44]

However, the tax position of the partner of an official should not be different from that of the spouse of an official, since such a spouse is considered single for tax purposes.

3.6 TAX RELIEF FOR DEPENDENT CHILD AND CHILD CARE

3.6.1 DEPENDENT CHILD

Following certain refusals by the Belgian authorities to grant to the officials' spouses the tax reduction for dependent child, the Commission was forced to send a formal notice, based on the violation of Article 12 of the Protocol [45].

Under the Belgian law, the non-separate married spouses can both benefit from the tax reduction for dependent children.

In addition, the court of arbitration has, in a judgment of **8 May 2001**, decided that in the case of taxpayer taxed as a "single" (the spouse of official), Belgian law providing that only the parent exercising in fact the direction of household is entitled to claim tax relief for dependent child, considering that this concept not being defined by the law, insofar as the parents decide of common agreement which of them assume, *in fact*, the direction of household, it is not to administration to interfere with taxpayer's private life.

It is up to the taxpayers to communicate to the administration which of them has to be regarded as "*head of household*" and that "*the cohabitant's choice belongs to themselves*".

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42 « Cohabitant légaux » in the French language

43 Judgment of 28 January 1999, *D v Council of the European Union,* Case T-264/97, EU:C:1999:13.

44 Article 2(2) Belgian CIR/92, as replaced by Article 2 of the Law of 10 August 2001 (Belgian Official Gazette of 20September 2001).

45 Administrative Notices (n° 20-2001); Administrative Notices (n°41-2002)

The Belgian tax authorities have accepted this point of view and the principle that the spouses designate themselves to which of them the dependent children shall be attached to for tax purposes.

Consequently, since only the spouse of a Community official mentions dependent children in its income tax return, no problem should arise and the interested party should benefit from the increase of the share exempted for "common supported children" and from the deduction of nursery school expenses of these children [46].

The Belgian tax authorities propose henceforth that the taxpayers fill out a document by which parents are invited to indicate which of them exerts the household's direction.

3.6.2 TAX RELIEF FOR DEPENDENT CHILDREN – SEPARATED PARENTS – SHARED CUSTODY

Article 132bis of the Belgian Tax code, introduced by the law of 27 December 2006, authorizes nowadays that in case of shared custody, based on a judgment or a registered agreement, the tax relief for dependent children will be equally split between the two parents.

So, it does not matter anymore to which of the parents the child is domiciled.

The principle is also applicable the reduction of the property. A divorced father was refused the reduction of the property tax while exercising shared custody on the motive that the children where "domiciled" with their mother.

The Constitutional Court has ruled that the discrimination was incompatible with Articles 10 and 11 of the Constitution [47].

In a further judgment of **13 December 2012**, the Constitutional Court has annulled Article 136 [48] of the Belgian Tax code:

> "*read in combination with Articles 257 and 258…, as long as they do not allow in any manner tax payer who exercises shared custody to benefit of part of the reduction of property tax in relation to the property that he occupies" [49]*

In a judgment of **12 March 2010**, the Belgian *Cour de cassation* had already ruled that:

> "*The existence of a household in the sense of Articles 257 and 258 of the Tax code is a matter of fact without the necessity of the existence of a legal relationship between its members*".
>
> "*Therefore, the Court of appeal was right in allowing the reduction of the property tax on the entire cadastral value of the property owned and occupied by two non married cohabitants and their children, despite the fact that Article 259 of the Tax code prohibits the reduction of the property tax to the part of the dwelling occupied by persons who are not part of the "head of family" household*" [50].

The tax administration considered wrongly that for the household to exist, parents had to be married.

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46 Administrative Notices (n° 021-2003); Administrative circular of the Belgian Minister for Finance (n° Ci.RH.331/517.844) for 20 November 2002

47 Judgment of 5 May 2011, n°63/2001, R.G. n°4939

48 Which gives the definition of « dependent » children

49 Judgment n°153/2012, registry n° 5302

50 Judgment n° F.09.0023.F

3.6.3 CHILD CARE

Belgian law of July 6th, 2003 [51] modified and extended the right to tax relief related to expenses incurred for the nursery care of one or several children supported by the tax payer. These expenses are now deductible from professional income under following conditions:

1° the expenses must be exposed for children under 12 years old
2° the tax payer must benefit of professional income;
3° the expenses must be paid:

- to institutions recognised, subsidised or controlled by the "*Office de la Naissance et de l'Enfance*", by « *Kind en Gezin* » or the "*Exécutif de la Communauté germanophone*" ;
- to independent nursing families or to "crèches", placed under the supervision of these institutions;
- to "*maternelles*" or primary schools;

Official's spouse or partner who enjoys taxable professional income in Belgium should take advantage of these advantages.

The maximum deductible amount is equivalent to 11,20 EUR per day of care and per child.

However, the frame-law of 28 December 2011 has suppressed the right to deduct 100% of the expenses from the taxable income and replaced it by a mere tax relief equivalent to 45% of the total expenses.

3.6.4 SPOUSE TAXABLE IN BELGIUM AS "NON-RESIDENT" TAX PAYER

Belgian tax authorities were refusing to grant tax reduction for dependent child and additional tax reduction for child care to spouses of EU officials when they were not unlimited tax payers in Belgium but taxed as "non-residents expats" on ground that the benefit of the related tax relieves should be asked in the Member state of the tax residence.

The Court of first instance of Namur, by a judgment of **7 February 2008** [52], held the refusal contrary to community law on following grounds:

- *the general practice consisting in depriving spouses of EU officials from the considered tax relieves by mere reference to the level of respective professional income has been already held contrary to art. 12 of the Protocol (see developments under 3.6.1.)*

- *said practice was also infringing art. 39 CE and discriminating against the "non-resident" tax payer, as the latter in the particular case had no taxable income in the Member state of his tax residence and therefore could benefit of any tax relief* [53].

4. SECONDED NATIONAL EXPERTS

The Commission is not the employer of seconded national experts. Throughout the period of their secondment, national experts remain in the employ of their national civil service or other employer of origin, which continues to pay their remuneration and social security contributions, the Commission simply providing a separate 'allowance'.

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51 Art. 2, M.B. 5.8.2004 ; voir aussi articles 104, alinéa 1er, 7° et 113, § 1er CIR/92

52 in case *M. v Belgian State*, not published, R.G. n° 1374/04

53 Reference to judgment of the Court of justice of 14 February 1995, in case C-279/93, *Schumacker*, [1994] ECR 225, EU:C:1995:31 and judgment of 1 July 2004, in case C-160-03, *Wallentin*, [2004] ECR 6443, EU:C:2004:817

This means that seconded experts remain members of the social security scheme which applied to their original employment.

It also means that seconded experts remain subject to taxation in their Member State of origin.

As soon as they arrive, such experts must register in the municipality where they have taken up residence.

5. INHERITANCE TAXES [54]

5.1 GENERAL

Inheritance taxes are levied on the occasion of a death or similar event, on the value of all or part of the goods making up the estate of the deceased person.

5.2 APPLICATION OF ARTICLE 13 OF THE PROTOCOL

5.2.1 General principle

Under Article 13 of the Protocol, the movable property belonging to officials and other servants, their spouses not engaged in gainful employment and their dependent children situated in the territory of the country where they are staying is exempt from death duties there.

For the purposes of that tax, they are considered to be located in the country where they have their domicile for tax purposes, subject to the rights of non-member countries and the application of any international double taxation agreements.

To the contrary, immovable property forming part of an estate is subject to the legislation of the place where it is located.

This means that, irrespective of the nationality or residence of the deceased person, any immovable property located in Belgium which he or she owned is subject to [Belgian tax law] [55].

Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession came into force in August 2015 [56].
However, taxation is excluded from the scope of the Regulation.

5.2.2 The official's spouse – dependent children

Provided he or she is not in gainful employment, the spouse and dependent children of a deceased official may benefit from Article 13 of the Protocol. However, in the present version of the Protocol, the cohabiting partner of such an official may not invoke that Article.

5.2.3 Retired officials

Retired officials may not invoke Article 13 of the Protocol. Their succession is normally opened in the place where they are living or have their domicile when they die.

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54 For more information on these matters, please refer to « Inheritance in Belgium & the European Union – General Principles » available at the Welcome Office (66600).

55 Inheritance matters have been regionalised and fall nowadays within the competence of the Regions

56 OJ L 201 of 27/7/2012, P. 107

For more information on the subject, please refer to "***INHERITANCE in Belgium and the European Union***", available on the Intranet and at the Welcome Office.

5.3 INHERITANCE TAX IN BELGIUM

- In Belgium, the law distinguishes, in the case of individuals, between the *'droit de succession'*, which applies to inhabitants of Belgium, and the *'droit de mutation par décès'*, which applies to those not living in Belgium.

- Although for income tax purposes, an official and his or her spouse are regarded as subject to separate taxation,[57] they are still regarded as married for the purposes of inheritance tax.

The inheritance tax code contains no provision similar to Article 126, § 2, 4° CIR/92.

- In Belgium, inheritance taxes are a regional matter [58].

The Flemish Region has made use of its powers to alter the tax rates [59].

In Flanders, people who have been living together for at least one year are now treated in the same way as married couples [60].

In the Flemish Region, since **1 January 2007**, there are no more inheritance duties to be paid by the surviving spouse or cohabitants on the family dwelling located in Flanders [61].

Brussels and Wallonia has also exercised its powers, but by regarding as surviving spouses only cohabitants who make a declaration of cohabitation under Article 1476 of the Civil code [62].

Since **1st January 2014**, the Brussels Region copying Flanders exonerates the surviving spouse/registered partner from inheritance tax on his/her share on the family house (joint common residence) [63].

Registered partnership in Belgium has a limited effect on the estate devolution.

However, since 2007, article 745octies of Belgian civil code allows a right of *usufruct right* to the surviving legal partner on the property that was affected to the family main residence, including on the furniture garnishing the premises [64].

A partner is therefore strongly advised to establish a will in favour of the other partner to whom he wants to leave his legacy.

- Article 18 of Belgian Inheritance code in relation to the *"droits de mutation par décès"* [65] has been ruled incompatible with community law.

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57 Using the terminology introduced by the Belgian Law of 10 August 2001 (Article 28, replacing Article 141 CIR/92).

58 Art. 3(4) of the special Law of 16 January 1989 concerning the financing of Belgium's European Union and Regions.

59 Decree of 20 December 1996 (Belgian Official Gazette of 31/12/1996), as last amended by the Decree of 21 December 2001 (Belgian Official Gazette of 29/12/2001).

60 Decree of 1 December 2000 (Belgian Official Gazette of 11/1/2001), applicable from 1/1/2001.

61 Decree of 7 July 2006 (Belgian Official Gazette of 20/9/2006), applicable from 1/1/2007.

62 Decree of 14 November 2001 (Belgian Official Gazette of 29/11/2001), applicable from the date of publication.

63 Decree adopted on 10 January 2014, entered into force retroactively on 1/1/2014.

64 Law of 28 March 2007, entered into force on 18 May 2007.

65 « «*Le droit de mutation par décès est dû sur l'universalité des immeubles situés en Belgique, appartenant au défunt ou à l'absent, et ce sans distraction des charges.»*

When the deceased is not a Belgian resident at the time of his death, inheritance taxes are levied on the gross value of the real estate property that the deceased owned in Belgium without the right to deduct any charges or debts vested on said property (e.g. mortgage loan).

In a judgment issued on **11 September 2008** [66], the Court of justice ruled that:

> *"Where national legislation places the heirs of a person who, at the time of death, had the status of resident and those of a person who, at the time of death, had the status of non-resident on the same footing for the purposes of taxing an inherited immovable property which is situated in the Member State concerned, that legislation cannot, without giving rise to discrimination, treat those heirs differently in the taxation of that property so far as concerns the deductibility of charges secured on it.*
>
> *By treating the inheritances of those two categories of persons in the same way (except in relation to the deduction of debts) for the purposes of taxing their inheritance, the national legislature has in fact admitted that there is no objective difference between them in regard to the detailed rules and conditions relating to that taxation which could justify different treatment (see, by analogy, in relation to the right of establishment, Case 270/83 Commission v France [1986] ECR 273, paragraph 20, and Case C-170/05 Denkavit Internationaal and Denkavit France [2006] ECR I-11949, paragraph 35; and, in relation to the free movement of capital and inheritance duties, Case C-43/07 Arens-Sikken [2008] ECR I-0000, paragraph 57)".*

And the Court to conclude:

> *"The combined provisions of Articles 56 EC and 58 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, concerning the assessment of inheritance and transfer duties payable in respect of an immovable property situated in a Member State, which makes no provision for the deductibility of debts secured on such property where the person whose estate is being administered was residing, at the time of death, not in that State but in another Member State, whereas provision is made for such deductibility where that person was, at that time, residing in the first-mentioned Member State, in which the immovable property included in the estate is situated".*

6. SPECIFIC CASES

Since 1st January 2015, under the "6th Belgian state reform", important parts of tax competences have been transferred from the federal authority to the regions [67].

6.1 INCOME FROM IMMOVABLE PROPERTY (REVENU CADASTRAL (CADASTRAL INCOME) – *PRÉCOMPTE IMMOBILIER* (TAX ON IMMOVABLE PROPERTY)

6.1.1 PRINCIPLES OF BELGIAN LAW – PRÉCOMPTE IMMOBILIER/ONROERENDE VOORHEFFING

Land tax consists of the *précompte immobilier/onroerende voorheffing*, which is levied on 'income' from immovable property situated in Belgium and is expressed as a proportion of the cadastral income (see below).

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66 Hans Eckelkamp e.o. c. Belgische Staat [C-11/09], EU:C:2008:489

67 For more detail see chapter 6.14 below.

The *précompte immobilier/onroerende voorheffing* is payable by owners, holders, leaseholders, superficiary owners, and users of taxable property.

Officials who own property in Belgium are not exempt from payment of the tax.

It should be recalled that the *précompte immobilier/onroerende voorheffing* on a rented building or part of a rented building may not be charged to the tenant where the latter uses the premises as his or her principal residence (Law of 22 December 1989 and Article 5 of the Law of 20 February 1991). Any clause in a contract derogating from this is automatically null and void.

Under the Law of 16 January 1989 on the funding of Belgium's language European Union and Regions, the taxable amount is determined by central government, whereas the rate of tax and exemptions from the tax are determined by the Regions.

6.1.2 Determining the 'income' from immovable property

(a) In the case of **property other than rented property the 'income' is the *cadastral* income**, i.e. the average net income which immovable property can, under normal conditions, produce in one year.
(b) The cadastral income is normally determined - by the cadastral department - based on the net rent which the property would produce (…in 1975!), less a flat-rate amount (40%) to cover the cost of maintenance and repairs.

(b) For **rented property the income is equal to 140% of the cadastral income** [68] if the property is rented to a natural person who does not use it in connection with his or her work.

In this case, the income from the immovable property is taxed not on the actual amount of rent collected but on the re-evaluated cadastral income only.

(c) For property rented for **occupational purposes** (professional or commercial), the **income from immovable property consists of the rent collected, less a 40% abatement** to cover flat-rate charges (provided the said abatement does not exceed 2/3 of the re-evaluated cadastral income).

(d) For property rented furnished and otherwise stated in the lease agreement, 40% of the actual rental income, reduced by 50% [flat rate expenses], will have to be declared and be subject to a 25% withholding tax, pursuant Articles, pursuant Articles 17, 3°, 261, 1° et 269, 1° CIR/92 (Belgian Tax Code).

6.1.3 Family residence - précompte immobilier/onroerende voorheffing - abatement

In the Brussels Region, the *précompte immobilier/onroerende voorheffing* on the premises occupied by a head of household is, at that person's request, reduced by 10% for every dependent child and by 20% for every disabled person dependent on the head of household where on 1 January the said household includes two or more living children or one disabled person, including the spouse.

In Flanders the reduction has been automatic since the 1999 tax year (1998 incomes).
It is a flat-rate amount based on the number of children.

In the case of rented accommodation (residential lease) the reduction in the *précompte immobilier/onroerende voorheffing* goes to the tenant. It may even be deducted from the rent.

Officials who are owners or tenants are entitled to the same reductions in the *précompte immobilier/onroerende voorheffing* as are Belgian taxpayers (see above).

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[68] Since the 1998 tax year (Article of the Law of 20 December 1996, Belgian Official Gazette of 31 December 1996).

It should be recalled that a Member State may not discriminate against officials by reason of the fact that they are officials.

In **Case C-260/86** ***Commission v Belgium*** [1988] ECR 955, the Court of Justice held that, by refusing to grant reductions in the *précompte immobilier* where the tenant or his or her spouse is an official or other servant of the European Union and, in that capacity, exempt from national taxes on salaries, wages and emoluments paid by the European Union, Belgium had failed to fulfil its obligations under Article 12 of the Protocol [69].

6.1.4 TAXATION ON IMMOVABLE PROPERTIES HELD IN BELGIUM BY THE MEMBER STATE OF THE TAX DOMICILE

Without prejudice to the benefit of bilateral conventions on prevention of double taxation, the Member state where the Official or other agent's tax domicile is located is entitled to levy taxes on properties owned or occupied by the Official or other agent in Belgium [or elsewhere], e.g. in taking into account the rental value of the property in order to assess a tax on wealth.

The Court of justice has ruled that:

> *" The first paragraph of Article 14 of the Protocol on the Privileges and Immunities of the European Union must be interpreted as meaning that officials and other servants of the European Union who are covered by that provision may be liable to pay income tax in their original country of domicile on the basis of the rental value of the home which is occupied and owned by them in another Member State.*
>
> *" The second paragraph of Article 13 of that Protocol must be interpreted as meaning that the application of income tax in the original country of domicile on the basis of the rental value of the home belonging to the official or servant in relation to immovable property situated in another Member State and owned by officials and other servants of the European Union does not constitute indirect taxation of the salaries, wages and emoluments paid by the European Union" [70].*

It has to be reminded that the **Directive 2011/16/EU** organising a compulsory and automatic exchange of information between Member states has come into force on 1st January 2013, as amended by the **Directive 2014/107/EU** of 9 December 2014 that came into force on 1st January 2016.

6.2 "PRÉCOMPTE MOBILIER/ROERENDE VOORHEFFING" (WITHHOLDING TAX)

6.2.1 BELGIAN WITHHOLDING TAX - PRINCIPLE

Withholding tax is payable on income from capital (i.e. from deposits, bonds and transferable securities but also from dividends).

It is a flat-rate tax and currently stands at 15% (savings) and 27% (since 1st January 2016) depending on the nature of income.

By virtue of Article 13 of the Protocol, officials and other servants are exempt from the tax if, at the time of entering the service of the European Union, their domicile for tax purposes is situated outside Belgium. They are deemed to be paying the tax in their Member State of origin and Belgium will exchange the information to their member state.

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69 Judgment of 24 February 1988, Commission vs Belgium, C-260/86, EU:C:1988:91

70 Judgment of the Court of 25 May 1993, in case 263/91, *Niels Kristoffersen v katteministerie,* [1993 ECR 2755], EU:C:1993:207

Officials and other servants covered by Article 13 of the Protocol can obtain exemption by means of a **HIS 276** form issued by their bank in Belgium.

The form is to be sent to the 'Privileges and Immunities' department, which will forward it to the Ministry of Finance.

The exemption applies to interest only, not to dividends.

6.2.2 INTEREST - DIRECTIVE 2003/48/EC OF 3 JUNE 2003 [71]

The **Directive 2003/48/EC** of the Council, of 3 June 2003, on taxation of savings income in the form of interest payments, came into force on 1 July 2005 [72].

The ultimate aim of this Directive, transposed into Belgian law by the law of May 17, 2004 [73], was to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.

The system laid down by the directive can be summed up as follows:

1. The automatic exchange of information between Member states.

The competent authority of the Member State of the paying agent [the bank] communicates the information [identification of beneficial owner, bank account number, amount of interest paid] to the competent authority of the Member State of residence of the beneficial owner. The communication of information is automatic and takes place at least once a year, within six months following the end of the tax year of the Member State of the paying agent, for all interest payments made during that year.

2. Transitional period (Luxembourg & Austria).

During the original transitional period three Member States (Belgium, Luxembourg and Austria) applied different arrangements consisting in levying a withholding tax [74] on interest payments paid to beneficiaries having their tax residence in another Member state. The rate of this withholding tax has been 15% in the first three years with effect from 1 July 2005, then 20% after 1st July 2008 and finally 35% since 1st July 2011.

3. 31/12/2009: end a Belgium transitional period

Belgium has decided to shift from the transitional period onto the exchange mechanism as to the 1st January 2010. It means that no withholding tax has been levied on interest produced by "non-resident" bank accounts in 2010. Since 2011, the beneficiaries of these bank accounts have been reported to the Member state of their tax domicile. Luxembourg followed and started exchanging information on 1st January 2015.

Austria will be part of the automatic exchange process from 2018.

4. Consequences of the Directive for serving EC officials and other servants

Directive 2003/48/EC does not alter in any way the implementing provisions for Articles 12 and 13 of the PPI in the case of serving EC officials and other servants.

The Belgian tax authorities apply for their own account a withholding tax ("*précompte mobilier*") on the

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71 For more information, please visit http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/rules_applicable/index_en.htm

72 OJ L 157 , 26/06/2003, p.38 - 48

73 Belgian Official Gazette of 27.5.2004

74 Called in the text « PER » or Précompte de l'Etat de Résidence despite the fact that this expression is used in Belgium only

income from Belgian savings [75] received in Belgium. Serving EC officials and other servants may be exempted from payment of "*Belgian*" withholding tax if they present form HIS 276 [76] which specifies that their residence for tax purposes is in a European Union country other than Belgium, and implies that they will declare the exempted income in the country in which they are resident for tax purposes.

However, the Directive applies to all serving officials and other servants who receive interest payments in a Member State other than their country of tax residence.

6.2.3 DIRECTIVE 2014/107/EU OF 9 DECEMBER 2014

On 24 March 2014, the Council adopted the Directive 2014/48/EU, amending the Directive 2003/48/EC and reinforcing the European rules regarding exchange of information in relation to savings income. The Directive 2014/48/EU was repealed even before coming into force by the Directive 2015/2060/EU of 10 November 2015. The directive 2003/48/CE has been replaced by the Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU about mandatory automatic exchange of information in the field of taxation. Can you follow?

The Directive 2014/107/EU provides for an automatic and mandatory exchange of information in a much larger scope than the directive 2011/16//EU in line with the worldwide standard (CRS) published by the Council of the OECD in July 2014 to "*ensure a coherent, consistent and comprehensive Union-wide approach to the automatic exchange of information in the internal market*". The Directive enlarges also the scope of directive 2003/48/EC, reflecting changes to savings products and developments in investor behaviour since it came into force in 2005.

The scope of the Directive includes:

- Financial accounts (current accounts, deposits, equity, debt interest, cash value insurance, annuity contract, etc…)
- Account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year
- Total gross financial income (interest, dividends, bonds, etc…)
- Total gross proceeds from the sale or redemption of financial assets paid or credited
- Depository account: the total gross amount of interest paid or credited to the account
- Identification of the account holder: Name, address, TIN (if any), date and place of birth

Tax authorities, using a "look-through" approach, will be required to take steps to identify who is benefiting from interest payments.

The Directive came into force on 1st January 2016.

6.2.4 BELGIAN ISSUE - SAVINGS ACCOUNTS ABROAD – DISCRIMINATION

A **judgment** of the Court of justice of **6 June 2013** has condemned Belgium for maintaining a discrimination in the tax treatment of savings accounts held in other Member states.

Savings accounts held in Belgium enjoy a threshold of [1.880 € in 2015] while no threshold was granted to savings held in other Member states with the consequence that interests were taxed from the first euro.

The Court of justice held that:

> "*By introducing and maintaining a system of discriminatory taxation of interest payments by non-resident banks, resulting from the application of a tax exemption reserved only to interest payments by resident banks, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU and Article 36 of the Agreement on the European Economic Area of 2 May 1992*".

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[75] Accrued therefore on accounts opened in Belgian banks and on debt certificates issued in Belgium

[76] replacing the former 276 EUR form

In the meantime, Belgium has amended its legislation.

6.2.5 DIVIDENDS

Dividends are very often taxed at the source through a withholding tax levied by the paying agent.

The tax does not as such provide full discharge and does not exonerate the beneficiary from declaring the income to the Member state of the tax domicile. When it concerns individual tax payers, the Court of justice does not consider that double taxation constitutes a violation of the free movement of capital.

- In a case related to Belgian tax burden on dividends from shareholdings in companies established in another Member State and the absence of possibility in the State of residence to set off income tax levied at source in another Member State, the Court has ruled that Article 56(1) [77] of the EC Treaty:

> *…does not preclude legislation of a Member State which, in the context of tax on income, makes dividends from shares in companies established in the territory of that State and dividends from shares in companies established in another Member State subject to the same uniform rate of taxation, without providing for the possibility of setting off tax levied by deduction at source in that other Member State.*
>
> *Consequently, it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice. The purpose of the France-Belgium Convention is essentially to apportion fiscal sovereignty between the French Republic and the Kingdom of Belgium in those situations… However, that convention is not at issue in the preliminary reference at hand"* [78].

- The **Court of justice** has confirmed its views in a judgment of **16 July 2009** [79] in following terms:

> "*In so far as Community law, in its current state and in a situation such as that at issue in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community, Article 56 EC does not preclude a bilateral tax convention, such as that at issue in the main proceedings, under which dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, and which does not provide that the Member State in which the shareholder resides is unconditionally obliged to prevent the resulting juridical double taxation".*

- Unfortunately for the European tax payer, the Court of justice has maintained its line of reasoning in a judgment of **4 February 2016**[80] :

> « *…… les dividendes distribués par une société établie dans un État membre à un actionnaire résidant dans un autre État membre sont susceptibles de faire l'objet d'une double imposition juridique lorsque les deux États membres choisissent d'exercer leur compétence fiscale et de soumettre lesdits dividendes à l'imposition dans le chef de l'actionnaire (arrêt Haribo Lakritzen Hans Riegel et Österreichische Salinen, C-436/08 et C-437/08, EU:C:2011:61, point 168 et jurisprudence citée).*

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77 Articles 63 and 65 TFEU

78 Judgment of 14 November 2006, *Mark Kerckhaert, Bernadette Morres v Belgische Staat* , C-513/04,

79 Judgment of 16 July 2009, *Jacques Damseaux vs Belgian State*, C-128/08

80 C-194/15, *Baudinet e.a. c.Agenzia delle Entrate – Direzione Provinciale I di Torino*, not yet available in English version

> *« …les désavantages pouvant découler de l'exercice parallèle des compétences fiscales des différents États membres, dans la mesure où un tel exercice n'est pas discriminatoire, ne constituent pas des restrictions interdites par le traité (arrêt Haribo Lakritzen Hans Riegel et Österreichische Salinen, C‑436/08 et C‑437/08, EU:C:2011:61, point 169 et jurisprudence citée).*
>
> *« … il y a lieu de relever que conformément à la jurisprudence de la Cour, dès lors que le droit de l'Union, dans son état actuel, ne prescrit pas de critères généraux pour la répartition des compétences entre les États membres s'agissant de l'élimination de la double imposition à l'intérieur de l'Union européenne, la circonstance que tant l'État membre de la source des dividendes que l'État de résidence de l'actionnaire sont susceptibles d'imposer lesdits dividendes n'implique pas que l'État membre de résidence soit tenu, en vertu du droit de l'Union, de prévenir les désavantages qui pourraient découler de l'exercice de la compétence ainsi répartie par les deux États membres* (arrêt Haribo Lakritzen Hans Riegel et Österreichische Salinen, C‑436/08 et C‑437/08, EU:C:2011:61, point 170 et jurisprudence citée) ».

And to conclude :

> *Articles 49 TFEU, 63 TFEU and 65 TFEU must be interpreted as not precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which, when a resident of that Member State, a shareholder in a company established in another Member State, receives from that company dividends taxed in both States, that double taxation is not remedied by the grant in the shareholder's State of residence of a tax credit at least equal to the amount of tax paid in the State of the source of those dividends.».*

Member states maintaining deliberately double taxation on the same income, one can wonder about the effectiveness of the right for persons and capital to "*move freely*" and the ideal of « *mobility* » advocated all the time but not materialised for the citizens in a such important field as taxation.

6.3 LOCAL AND REGIONAL TAXES

Local taxes relating to the supply of services (e.g. flat-rate charge for garbage collection or the Brussels regional tax to be soon suppressed) are payable by officials[81], in so far as they do not apply to business income and do not, therefore, correspond to a slice of exempt business income.

Officials are, however, exempt from payment of the *décimes additionnels* (+/- 10% surcharges, often referred to as *'taxes communales'*, on personal income tax)[82].

6.4 MOTOR VEHICLES

6.4.1 OBLIGATION TO REGISTER

The Royal Decree of 20 July 2001 in relation to car registration makes compulsory the registration of a vehicle prior it is used on a regular basis in Belgium, even though the vehicle is already registered in another country.

That obligation is not incompatible with community law.

The Court of justice has ruled that:

> *"… registration appears to be the natural corollary of the exercise of those powers of taxation. It facilitates supervision both for the Member State of registration and for the other Member States,*

[81] See examples at 2.1.1. on page 6.
[82] See Written Question No C 581/96 to the Commission (OJ C 217 of 26.7.1996, p. 74).

for which registration in one Member State constitutes proof of payment in that State of taxes on motor vehicles.

Therefore, in a situation such as that at issue in the main proceedings, namely where a vehicle leased from a company established in one Member State is actually used on the road network of another Member State, the latter may impose an obligation for that vehicle to be registered in its territory" [83].

However, a recent case-law of the Court of justice has drawn the limits to the power of a Member state to impose the registration of a vehicle [and the payment of a registration tax], in deciding that:

"Articles 49 EC to 55 EC do not preclude the domestic legislation of a Member State, such as that at issue in the main proceedings, from prohibiting a person who resides and works in that State from using, in that State, a vehicle which he has rented from a leasing company established in another Member State, when that vehicle has not been registered in the first State and it is intended that it should be used there essentially on a permanent basis or is, in fact, used in that manner" [84].

Judged also that:

"*Article 56 EC must be interpreted as meaning that it precludes legislation of a Member State which requires residents who have borrowed a vehicle registered in another Member State from a resident of that State to pay, on first use of that vehicle on the national road network, the full amount of a tax normally due on registration of a vehicle in the first Member State, without taking account of the duration of the use of that vehicle on that road network and without that person being able to invoke a right to exemption or reimbursement* ***where that vehicle is neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way***" [85].

6.4.2 OBLIGATION TO CANCEL REGISTRATION ON DEPARTURE

If the vehicle is no longer being used the *DIV* (*Direction des Immatriculations des Véhicules* (Vehicle Registration Directorate), 155 rue de la Loi (*Résidence Palace*)) must be notified and the number plate returned. Only cancellation of the entry in the *DIV* register puts an end to the requirement to pay the tax.

Failing this, the person in whose name the vehicle is registered may still be liable to the tax - in some cases without being aware of it - for years after effectively ceasing to use the vehicle in Belgium.

This was the case of an official seconded to Germany. He left Belgium, taking with him his car, which was registered in Belgium. Although after moving to Germany he had to pay the German tax on motor vehicles (*'Kraftfahrzeugsteuer'*), the Belgian tax authorities still required payment of the Belgian annual road tax. The vehicle was still registered with the *DIV*.

He appealed against this double taxation, invoking the EEC Treaty. The Brussels Court of Appeal rejected his claim, because the double taxation resulted only from his failure to ask for the registration to be cancelled.

He opted to continue driving with Belgian plates, pending the outcome of a dispute vis-à-vis the German authorities as to the possibility of obtaining registration in Germany outright, without the car having to

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83 Judgment of 21 March 2002 in case C-451/99, *Cura Anlagen & Auto Services GmbH,*EU:C:2002:195

84 Order of 30 May 2006 in case C-435/04, *Sébastien Leroy*, EU:C:2006:347

85 Judgment of 19 April 2012, *Staatssecretaris van Financiën vs van Putten* (C-578/10), *Mook* (C-579/10), *Frank* (C-580/10), EU:C:2012:46; see also the judgment of 24 October 2008, *Vandermeir vs Etat Belge-SPF Finances*, C-364/08, EU:C:2008:593 and Order of 10 October 2013, *Ferenc Tibor Kovács vs Vas Megyei Rendőr-főkapitányság,* C-5/13, EU:C:2013:705

undergo a prior roadworthiness test ('MOT'). His claim for exemption from the Belgian road fund tax was rejected.[86]

6.4.3 REGISTRATION TAX (TAXE D'IMMATRICULATION)

Registration taxes imposed onto new or used vehicles are also compatible with community law.

Ruled that:

> *"Article 1 of Directive 83/183 must be interpreted as not precluding, in connection with a transfer of residence of the owner of a vehicle from one Member State to another, a tax such as that laid down by the Law on Car Tax from being charged before the registration or bringing into use of the vehicle in the Member State to which residence is transferred. However, having regard to the requirements deriving from Article 18 EC, it is for the national court to ascertain whether the application of national law is capable of ensuring that, as regards that tax, that owner is not placed in a less favourable situation than that of citizens who have been permanently resident in the Member State in question and, if necessary, whether such a difference of treatment is justified by objective considerations independent of the residence of the persons concerned and proportionate to the legitimate aim pursued by national law" [87].*

Ruled also that:

> *"Article 110 TFEU must be interpreted as not precluding a Member State from introducing a tax on motor vehicles which is levied on imported second-hand vehicles at the time of their first registration in that Member State and on vehicles already registered in that Member State at the time of the first transfer, within that Member State, of the ownership of those vehicles" [88];*

Subject that registration tax is levied on non-discriminatory basis [89].

6.4.4 ROAD TAX

An annual tax is payable on *motor and steam-driven vehicles*. It is normally payable by any person who uses one or more vehicles for private or business purposes, whether the said vehicles are owned or held by that person, or are permanently or habitually available to that person under a hire contract or other form of agreement.

In the event of a change of residence the official or other servant concerned must inform the municipal authorities and ask for the address on the certificate of registration of the vehicle to be changed.

6.5 RADIO AND TELEVISION LICENCE

Officials and other servants of the European Union are not exempt from payment of the radio, car radio and television licence fees.

Please note that in Belgium responsibility for the licences has now been transferred to the Regions.

Flanders has already decided that it will no longer collect the fees from 2002. The Brussels Region has included the tax into the "Regional tax" [90] which is payable by Officials and other servants.

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[86] Brussels Court of Appeal, 29 September 1995

[87] Judgment of 15 July 2004 in case C-365/02, *Marie Lindfors,* EU:C:2004:130; judgment of 17 June 2003 in case C-383/01, *De Danske Bilimportører and Skatteministeriet, Told- og Skattestyrelsen,* EU:C:2003:352

[88] Judgment of 9 June 2016 in case C-586/14, *Vasile Budișan v Administrația Județeană a Finanțelor Publice Cluj*; ECLI:EU:C:2016:421

[89] Judgment of 10 December 2007, *Piotr Kawala c. Gmina Miasta Jaworzna*, in case C-134/07, EU:C:2007:770*;* judgment in case C-365/02 op. cit.

The Walloon region remains the only one maintaining a licence.

6.6 MAINTENANCE PAYMENTS

By virtue of Article 12 of the Protocol, family allowances paid direct to the person concerned, in particular under Article 67 of the Staff Regulations, are not subject to national taxes.

Maintenance payments by officials to members of their family are in principle taxable only in the country of residence of the beneficiaries (save as otherwise provided for in bilateral agreements) [91].

In Belgium, 80% of the actual maintenance payments are deductible from the payer's net income, and 80% of the actual amount received by the payee is taxable as miscellaneous income.

This is the "*communicating vessels*" or "*correspondence*" principle. What is taxable in one respect is tax-deductible in another, although it is generally added that the taxation of maintenance payments received by the payees is not tied to and does not depend on whether or not the payers are in fact able to deduct the payments from their income. [92]

We should note also that:

- Under Belgian law, where the maintenance payments are made by a person who is not 'officially classified as living in Belgium' (*'habitant du Royaume'*), the exempt slice of income corresponding to the tax on the maintenance payments is halved. [93]

- Under Article 241 of Belgium's *CIR/92* (Income Tax Code (1992)), a 'non-resident' may deduct 80% of the maintenance payments only if the latter are paid to a person officially classified as living in Belgium.

  As we see it, however, this provision is contrary to Community law.

- Maintenance payments by residents to, or secured for, non-residents are subject to withholding tax (Article 270 *CIR/92* and Article 87(4) of *AR/CIR/2*), except if the amounts concerned are ring-fenced under an agreement on the prevention of double taxation.

  There are some doubts as to whether this provision is compatible with Article 12 of the Protocol.
- The Belgian tax authorities do not allow officials' spouses to deduct for tax purposes maintenance payments to family members (in the strict sense of the term) other than spouses (e.g. maintenance payments to the official's parents), except where such payments are made following a court order.

6.7 VAT ON THE SALE OF SECOND-HAND VEHICLES

The profit-margin arrangements applicable to used goods, works of art, collector's items and antiquities has been introduced in Belgian positive law under Council Directive 94/5/EEC of 10 February 1994.

Please note that the private sale of used goods (i.e. goods that are not regarded as new), including motor vehicles, is not subject to VAT. By virtue of Directive 94/5/EEC a motor vehicle is no longer regarded as new if it is supplied three months or more after the date of first entry into service and has travelled more than 6 000 kilometres.

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90 « Taxe Régionale » which disappeared in 2016

91 See, for instance, the agreements between Belgium and Denmark, Portugal and Canada.

92 See judgement of the Court of 12 July 2005, in case C-403/03**,** *Egon Schempp v Finanzamt München V*, [2005], EU:C:2005:446; judgment of the Court of Appeal of Brussels of 26 June 2003, RG n° 1998/FR/467, Mrs F.M. v Belgian state, can be downloaded from http://www.fisconet.fgov.be/fr/?bron.dll&root=v:\sites\FisconetFraAdo.2\&versie=04&file=bronnen\bniarr&zoek=000000000&name=B%2003/2&rgl=-1&

93 Article 156, 3°, c) CIR/92

The purchase of a used vehicle from a trader registered for tax purposes is subject to VAT, the latter being normally calculated on the basis of that trader's profit margin.

6.8 VAT ON CAR PARK LETTINGS

The letting of parking spaces, etc. for vehicles is in principle a service which is subject to VAT. Anyone who engages in such a transaction is in principle required to pay the tax.

Persons who, even in the framework of the management of their private assets, let a parking space against payment may become chargeable for VAT. Being chargeable for VAT carries with it both the right to deduct from the tax and a requirement to pay VAT [at 21%] on the amount received.

There are, however, two cases in which the VAT is not charged:

Case One: lettings in connection with an exempt property lease

The letting of space for a vehicle is not chargeable for VAT if it is closely tied to a property lease that is exempt from VAT (lease covering a building intended for another use, e.g. residential or commercial).

This is intended to cover lettings that are part of a single economic transaction, e.g. the letting of parking space in blocks of flats or offices reserved solely for the joint owners or tenants.

Case Two: € 15.000,00€ allowance [94]

Taxable persons with an annual turnover of less than € 15.000,00€ [tax year 2016], are not required to pay the tax.

The landlord can opt for a special exemption regime. However, the landlord must require a VAT number but is exempt from charging the VAT to the tenant and from filling a quarterly declaration.

N.B.: Officials who are asked by a lessor to pay VAT should first check whether the latter is payable by them.

6.9 REGISTRATION DUTY *(Droits d'enregistrement)* ON LEASES

A tax known as a *droits d'enregistrement* is payable in respect of a written commercial lease.

In relation to rental agreements for residence purpose, since 1st January 2007, the landlord is exclusively responsible to register a residential lease agreement which is free of charge.

For other leases (commercial or office leases), it is 0.20% of the cumulative total rent payable during the period covered by the lease.

6.10 REGISTRATION DUTY *(Droits d'enregistrement)* ON COURT ORDERS

From the experience of a recent case [95], it must be reminded that the loosing party in a court dispute is liable to registration duty following decisions of Belgian courts and tribunals ordering payment of money or liquidation of securities.

The duty is set at 3% in respect of decisions of courts and tribunals, given in all matters, ordering payment of money or liquidation of securities, whether final, provisional, principal, subsidiary or conditional, including court decisions determining priority for creditors in respect of such money and securities.

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94 Royal Decree n° 19 of 29 December 1992, art. 1

95 Judgment of the Court of 26 October 2006, in case C-199/05, *Commission v Belgian state*, [2006], EU:C:2006:678.

6.11 TAX-FREE IMPORTATION AND RE-EXPORTATION OF FURNITURE AND OTHER PERSONAL EFFECTS

Under (d) of Article 12 of the Protocol, officials have the right to import their furniture and effects free of duty at the time of first taking up their post in the country concerned, and the right to re-export their furniture and effects free of duty on termination of their duties in that country.

However, a general exemption has been granted by the Directive 83/183/EC of 28 March 1983 on tax exemptions applicable to permanent imports from a member state of the personal property of individuals, as amended by Directive 89/604/EC of 23 November 1989 [96].

6.12 IMPORTING AND RE-EXPORTING A MOTOR VEHICLE

By virtue of (e) of Article 12 of the Protocol, officials have the right to import a motor car for their personal use free of duty, acquired either in the country of their last residence or in the country of which they are nationals on the terms ruling in the home market in that country, and to re-export it free of duty [97].

6.13 'VLAAMSE ZORGVERZEKERING' [98]

Officials and other servants of the European Union covered by the Joint Sickness Insurance Scheme (JSIS) are not required to contribute to the *zorgverzekering* collected by the Flemish Community since 1 January 2000.

Officials, temporary agents, contract agents, or retired are primarily covered by JSIS, and can be exempt (together with their spouse/partner and dependents aged of more than 25) from paying this contribution.

To authorise JSIS (your settlement's office) to act in your name and to confirm the Vlaamse Zorgkas your right to be exempt, please:

- Complete and sign the form "Consent Form" , in the language of your choice: en - fr - nl
- Send the document to your Settlements Office (address on the form).
  For more information, please send an e-mail, mentioning your name and personnel/pension number to: PMO-CAISSE-MALADIE-VLAAMSE-ZORGKAS@ec.europa.eu

  Members from the Council : helpline.assmalweb@consilium.europa.eu

The Flemish “care insurance scheme” limits affiliation and entitlement to the benefits provided by that scheme solely to persons :

(1) either residing in the territory of the Flemish Region or the Brussels Region
(2) either pursuing an activity in that territory but residing in another Member State but
(3) excludes from the benefit citizens residing in the territory of the Walloon Region.

The Court of justice has held in a judgement issued on **1 April 2008** that the Flemish legislation falls within the scope of Regulation(EEC) 1408/71[99] and therefore that exclusion is contrary to articles 39 EC and 43 EC [100].

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96 OJ 1983 L 105, p. 64; OJ 1989 L 348, p. 28

97 On the difficulties which can arise in this respect, see the judgment of the Court of First Instance in Case T-77/99, *Girish Ojha v Commission* [2001] ECR II-293, EU:T:2002:58.

98 http://myintracomm.ec.europa.eu/hr_admin/en/sickness_insurance/sources/Pages/flemish_care.aspx

99 Regulation(EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community

100 In case C-212/06, *Government of the French Community and Walloon Government v Flemish*

6.14 FINDING ONE'S WAY IN THE 2017 BELGIAN TAX LABYRINTH!

Since 1st January 2015, the Regions have received extended tax competences. It has become more and more difficult to apprehend the complexity, fragmentation and lack of coordination of Belgian tax law.

Following competences have been transferred to the regions:

- additional tax to personal income tax (in favour of territorial units),
- stamp duties (e.g. levied on real estate transactions in relation to the acquisition of a main residence, amended in Flanders in 2015, in Brussels in 2016)
- inheritance and estate tax (rules amended in the 3 regions),
- gift tax (rules amended in the 3 regions),
- annual property tax (rules amended in the regions)
- "accommodation bonus" (tax relief granted when acquiring a real estate property for main residence purpose),
- car registration tax,
- water tax,
- gas tax,
- electricity tax,
- service-vouchers and related tax relief,
- radio/television licence
- wealth tax

The federal authority keeps competence only for:

- the determination of the tax basis; the federal authority keeps exclusive competence in relation to tax reliefs applied to gross income (professional expenses, deductions for investments, etc…); territorial units cannot grant tax reliefs under a form that would reduce the taxable basis,
- VAT on real estate transaction (including reduced tax rates),
- stamp duties on lease registration,
- taxation of movable income (in relation to dividends, interests, licence fees, capital gains on financial instruments transactions),
- withholding tax,
- withholding tax on professional income (levied at the source by employers),
- tax service (but Flanders has taken over collecting property tax in 1999, stamp duties and inheritance tax on 1st January 2015),

On top of this, additional competences are left to:

- The provinces (e.g. additional tax on property tax)

- The municipalities (e.g. additional tax on property tax, tax on second residence, tax on swimming pool and tennis court, tax on renting furnished rooms and studios, tax on mobile telephony antennas, tax on cash machine, tax on office spaces and parking, tax on abandoned or unoccupied property, tax on pub waiters, tax on commercial surfaces, tax on terraces, tax on racing horse, etc…

- The Brussels Region (e.g. addition income tax on property tax, tax on abandoned or unoccupied property, etc…)

Government, [2008], EU:C:2008:176