

# The existing Belgian administrative and criminal legal landscape against VAT tax fraud

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## Abstract

This text has been developed based on a general questionnaire to compare domestic approaches of a tax administration to combat tax fraud with regard to VAT. It elucidates on the Belgian practices and sheds a light on the competences of the tax administration in an investigative phase, as well as how the tax administration is able to sanction detected violations of VAT legislation. In this context it also makes some comparisons with the domestic tax legislation with regard to income taxes, as well as on the criminal prosecution of tax fraud. The goal of the article however remains only to enlighten the tax administration's competences and not to provide a full analysis of criminal law aspects in this context.

**Keywords:** VAT; tax fraud; tax procedure.

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## 1. Introduction

VAT tax fraud is high on the European agenda. With the approval of Regulation 250/2014<sup>1</sup> the so-called 'Hercule III programme' was established considering amongst other aspects possible actions to reduce VAT tax fraud in the period between 2014 and 2020. In the meantime, as part of the Commission's VAT action plan, several proposals to strengthen administrative cooperation to help to tackle VAT fraud<sup>2</sup> were agreed between EU Member States in 2018, and came in force on 1 January 2020. Behind these coordinated initiatives however, one has to remain aware about the principal existing domestic legal framework of each individual Member State to combat (VAT) tax fraud. The current article aims to answer this question from a Belgian administrative perspective. The text therefore provides a critical overview of the Belgian tax administration's competences to

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1. Regulation (EU) No 250/2014 of the European Parliament and of the Council of 26 February 2014 establishing a programme to promote activities in the field of the protection of the financial interests of the European Union (Hercule III programme) and repealing Decision No 804/2004/EC, *OJ L 84*, 20 March 2014.
2. Extended exchange of information without prior request, joint VAT audits, strengthening of Eurofisc, ...

combat and sanction VAT<sup>3</sup> tax fraud. In order to allow comparability 11 subsequent topics are being dealt with, concerning administrative investigation procedures, as well as sanctioning possibilities for the tax administration.

## 2. Investigative competences for the VAT tax administration

When looking for administrative investigative competences with regard to VAT, one is immediately confronted with a double incoherence. Although a single investigation can enhance VAT as well as other taxes (e.g. income taxes), no uniform legislation exists: for each individual tax at least one (and sometimes even more) separate tax code exists. Besides, even when only investigating administrative competences with regard to VAT, one must also look at other tax codes: once an investigation is started under a particular tax code, this can in supplementary order be used to look for information with regard to other taxes and obtained relevant information has to be exchanged.

The first weakness to be deplored, is the lack of a uniform investigation procedure.<sup>4</sup> Only recently, as applicable from 1 January 2020, the federal Belgian legislator provided a common tax code for the recovery of (federal) tax debts.<sup>5</sup> Besides, Belgian tax law is generally regulated in different tax codes, such as an income tax code (ITC), the value added tax-code (VAT), ... Some taxes being regionalised even have different rules for each of the three Belgian regions, such as e.g. inheritance or registration taxes. Whereas material aspects of the taxes due logically differ, the same cannot be said with regard to procedural aspects. Some regions coordinated some of their regional taxes in a separate tax code, such as e.g. a Walloon decree of 6 May 1999 with regard to the establishment, the recovery and disputes concerning Walloon taxes.<sup>6</sup> or the Flemish Tax Code.<sup>7</sup> Differing rules for each region however further complicate possible cross regional investigation procedures. Notwithstanding the often to a large extent similar competences given to the tax authorities, each of the tax regulations finally has a separate framework of procedural aspects including investigative powers for the tax administration. For each tax some differences exist and similar legal texts might be differently construed. The investigative powers of the tax administration in general could therefore be described as a patchwork quilt: it lacks a unified grand design.

Despite this lack of a coordinated tax procedure, during the years 2015 and 2016, the tax administration reorganised its composition to split in departments based on particularities of a tax payer. 13 centres 'Particulieren' (responsible for individuals, without an independent economic activity), 14 centres 'KMO's' (mainly responsible for the establishment and control of tax obligations of small and medium-sized enterprises, run by natural persons, as well as legal persons and associations) and 7 centres 'Grote Ondernemingen' (exclusively responsible for big companies) were installed, further complemented with two centres for German speaking tax payers, as well as for non-resident tax payers. These departments were responsible for the establishment of taxes, the verification and control of tax declarations, the treatment of disputes, as well as defending the tax administration in front of judicial courts. Being competent for different tax matters vis-à-vis a single tax payer the tax administrator was equipped with a mixture of competences, based on the differences in the procedural regulations of the different tax codes.

3. When considered useful, however, some further analogies are being made with existing administrative competences to combat tax fraud with regard to income taxes. In general, although large similarities exist, as both procedures are regulated in separate tax codes, they do not entirely concur, as will be further illustrated.
4. This has already many times been criticized during earlier research. Cf. Report of the special commission "International tax Fraud / Panama Papers", *Parl. St. Kamer*, DOC 54, 2749/001, 51–54, (with further references) to be consulted at <https://www.dekamer.be/FLWB/PDF/54/2749/54K2749001.pdf>.
5. Wet van 13 april 2019 tot invoering van het Wetboek van de minnelijke en gedwongen invordering van fiscale en niet-fiscale schuldvorderingen, *Belgian gazette* of 30 April 2019, to be consulted at <http://www.ejustice.just.fgov.be/cgi/welcome.pl> This was announced as a first step towards a further harmonizing process. Cf. Wetsvoorstel *Parl. St. Kamer*, DOC 54, nr. 3625/001, 4, <https://www.dekamer.be/FLWB/PDF/54/3625/54K3625001.pdf>
6. (Waals) Decreet van 6 mei 1999, *Belgian gazette* of 1 July 1999 (being frequently updated).
7. Decreet houdende de Vlaamse Codex Fiscaliteit, *Belgian gazette* of 23 December 2013 (being frequently updated).

In case of a tax investigation of a tax payer combined investigative powers could be used. However, it soon became clear that complex tax cases required additional and specialised administrative support with regard to a particular tax in question and the organisation of the administration turned over again towards split specialisations for different tax matters.<sup>8</sup>

The second incoherence concerns the administrative means to obtain relevant information to verify the righteousness of VAT-tax declarations. Notwithstanding the VAT tax codes' autonomous investigation procedure, many tax codes provide for extensive exchange of information between tax administrations. E.g. under both the VAT tax code, as well as the Income Tax Code all information obtained by an administrative officer within the regular exercise of his legal competences has to be exchanged with other tax administrations when useful for the establishment or control of declarations concerning other state taxes due.<sup>9</sup> Hence, the receiving administration is legally entitled to use this information in the exercise of its particular competences.<sup>10</sup> Moreover, when regularly starting an investigation with regard to a particular tax, a federal tax official is also legally authorized to request all (useful and not excessive) information with regard to the establishment (or recovery) of any federal tax from a particular tax payer.<sup>11</sup> According to the tax administration public officials have to detect, collect and recover all taxes due by a taxpayer. The goal is to provide one common database being accessible for the establishment, collection and recovery of all taxes under the competence of the federal tax administration.<sup>12</sup> Therefore, the different tax codes have been adapted to deal with previous jurisprudence refusing the use of information obtained from a different tax investigation as a non-authorized violation of the right to privacy.<sup>13</sup> These exceptions to the purposive character of a tax investigation generate obvious connections between different tax procedures making the lack of one single procedural code all the more surprising, given the small differences in investigative powers under each procedure. One could wonder why only for the recovery of taxes and why only so recently a(n almost) common<sup>14</sup> code has been accepted.<sup>15</sup>

When elucidating the VAT-code in particular, the investigative powers of the tax administration are being dealt with in the articles 59 – 69. Besides some means of proof (a reference to all common legal procedures, completed with additional legal presumptions making VAT claimable<sup>16</sup>), these articles also attribute specific investigation competences to the VAT tax administration. These competences were recognized for both the verification of a tax payers' declaration, as well as the recovery of taxes and additional debts. As from 2020 however, with the coming into force of a separate code for the recovering of taxes, this only remains valuable for the verification of tax payers' VAT declarations. Nonetheless, in case of need, the investigative powers of the VAT tax administration

8. Algemene Beleidsnota, *Parl. St. Kamer*, DOC 54, nr. 2111/013, 13, [www.dekamer.be](http://www.dekamer.be)

9. Art. 93*quaterdecies*, §3, 1<sup>st</sup> subsection VAT and art. 335, 1<sup>st</sup> section ITC. Both Codes can be consulted at <https://eservices.minfin.fgov.be/myminfin-web/pages/fisconet/#!/#!%2F> Similar to international exchange standards, the exchange can be spontaneous, automatic or on demand.

10. Art. . 93*quaterdecies*, §2 VAT and art. 336 ITC.

11. Art. 93*quaterdecies*, §3, 2<sup>nd</sup> subsection VAT and art. 335, 2<sup>nd</sup> section ITC.

12. Cf. VAT-commentary art. 93*quaterdecies* VAT, §7, b).

13. See e.g. Court of first instance Leuven, 21 September 2007, *F.J.F.* 2008, nr. 287; Supreme Court 14 September 2007, *TFR* 2008, 19.

14. J. ENGELEN and F. SMET, "Nieuw 'Wetboek van Invordering' : wat wijzigt er ten gronde ?", *Fiscoloog* 22 mei 2019, nr. 1613, 7. The authors refer to the aim of the legislator, considering this a first step towards further harmonization, which is however not completely realized. Even with regard to the recovering process procedural rules within separate tax codes still apply as far as being compliant with this general framework.

15. Yet, one has to be aware of differing international influences with regard to the fight against fraud and tax planning. Whereas in the context of both income taxes and VAT international influences undeniably exist, both develop in clear different contexts. In this regard the OECD rather is the driving force for direct income taxes (being followed by converting proposals from the EU), the development of actions against VAT fraud and abuse is a more autonomous European topic.

16. Art. 59, 64, 65 and 68 VAT.

may still explicitly be granted to other tax administrations.<sup>17</sup>

In general, three main competences can be distinguished: the right to consult documentation and receive copies, the right to visit and the right to ask questions. All competences are however formulated in a rather broad sense. Hence, their exact scope is a continuous topic in legal disputes. Besides, finally the VAT tax administration is not allowed to participate in a judicial criminal investigation, under penalty of it being null and void.

- Right to consult information

Art. 61 VAT provides the tax administration the right to see the books, invoices, copies of invoices and all other (copies of) documents a taxpayer is required to keep in accordance with the VAT tax code. The administration may also ask for a copy of (part or all of) this documentation and keep the books at its disposal, except for ongoing book years.

The responsible person for delivering this information is not clearly defined. Art. 61 only clarifies that, in case of a VAT group consolidation, even though the Members can indicate a single representative, everybody remains required to present all information with regard to his particular situation when asked by the administration. Most discussions however concern legal persons. Although information should be obtained from a competent person, vagueness remains with regard to the burden of proof and the required level of competence. Hence, the question arises what happens when information is obtained from a person, not legally entitled to represent this entity. Whereas, in line with classical legal doctrine,<sup>18</sup> previous tax tribunals considered this a violation of art. 61 VAT,<sup>19</sup> the Brussels Court of Appeal judged differently: it could not be the responsibility of the tax administration to consult statutes of a legal person to verify whether information obtained from a cooperating person came from a competent representative. The mere cooperation of a present person, without objecting towards the administration, should suffice.<sup>20</sup> The Supreme Court confirmed that, whereas no indication was given to the tax administration that a person present at an enterprise was not competent to represent the legal person, information obtained from this person could be used in the context of art. 61 VAT, even though this person ultimately turned out to be incompetent.<sup>21</sup>

This judgment might to some extent be criticized. A distinction can be made between legal acts, causing new engagements for a legal person, and the mere cooperation with the administration, fulfilling a taxpayers' legal duties without in itself creating new legal obligations. Nonetheless, under a balanced consideration of administrative powers and a tax payers' rights, the mere absence of objections from a consulted person present at the premises of a legal person, cannot suffice to justify a consultation. At least, the tax administration should at first sight be convinced to be confronted with someone competent to deliver the requested information. When confronted with an inspection from tax administrators, many employees might be overwhelmed, and therefore not considering not to deliver the requested information, even though they lack the competence to legally represent their employer.

When exercising its right to consult, the administration has to visit the tax payer and cannot require him to send over documents to the administration's office. Foreign tax payers with a Belgian tax duty however, have to communicate a Belgian contact address to the tax administration. Legal documents can be kept in an electronical way, but if a tax payer is established in Belgium or Belgian VAT is due, the administration is entitled to see, download and make use of this informa-

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17. Art. 63 *bis* VAT.

18. Cf. J. BONNE en W. VETTERS, "Visite, visite, een huis vol visite ...", *TFR* 2014, nr. 453–454, (6) 16, with further references.

19. Cf. Rb. Leuven 13 January 2012, *Fisc. Koer.* 2012, 390 en Rb. Brussels 29 March 2002, *FJF* 2003, nr. 23.

20. Brussel 16 November 2016. Cf. J VAN DIJCK, "Kopiname : toestemming werknemer, zonder medeweten bestuurder?", *Fiscoloog* 2017, nr. 1507, 1–3.

21. Supreme Court 25 January 2019, nr. AR F.17.0039.N, Aztek Global Systems Ltd., *FJF* 2019, nr. 81.

tion. Even when it were generally kept outside Belgium, the administration is entitled to ask for a readable, comprehensible format in Belgium. When considered necessary for further verification a translation into one of Belgian's official languages (French, Dutch or German) can be asked of documents written in a foreign language. These requirements seem to go beyond art. 235 and 248 *bis* VAT-Directive.<sup>22</sup> Although art. 273 VAT-Directive allows Member States to impose additional obligations they deem necessary to ensure the correct collection of VAT and to prevent evasion, it remains questionable whether a presence at a Belgian location can be demanded. Admittedly, the preliminary considerations to Council Directive 2010/45/EU recognize a right to access invoices for control purposes,<sup>23</sup> but this does not necessarily implies a presence of a taxpayer (or its representative) on a countries territory. On the contrary art. 235 VAT-Directive seems to prefer making use of other means to exchange information between Member States. At present however, this Belgian requirement does not seem already having been challenged in court proceedings.

Art. 61 VAT refers to documents a tax payer is required to have. In support of this right tax payers are required to keep all invoices made or received by them, books and other legally required documentation<sup>24</sup> at the disposal of the administration for a time period of 7 years. Also when kept in an electronical format, it is the responsibility of the taxpayer to prove the authenticity and integrity of his documentation. This period of 7 years is extended up to 15 or 25 years in case of tangible assets for which the deduction of input-VAT can be corrected during a period of 15 or 25 years.<sup>25</sup> It goes without saying that the necessity of archiving during 25 years can be very burdensome, even with electronically kept documents.<sup>26</sup>

A finally heavily disputed topic is the scope of the electronical documentation and the way it can be consulted. The tax administration considers itself competent to ask for all electronically kept information (including emails, internal notes, ...), and to request a general copy of all documents present on a server instead of copies from particular documents.<sup>27</sup> Although being accepted in some judgments,<sup>28</sup> this point of view is criticized in legal doctrine.<sup>29</sup> In any case this seems to be at odds with the professional secrecy and confidentiality of correspondence.<sup>30</sup> Once more, discussions also arise when a taxpayer can be considered to have silently consented with such request, when a (potentially not competent) overwhelmed employee allows this access.<sup>31</sup>

- Right to visit

As a second investigation tool, the tax administration can visit the commercial premises of a tax

22. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 December 2006.

23. Cf. Preliminary consideration nr. 12 to Council Directive 2010/45/EU of 13 July 2010, OJ L 189, 22 July 2010.

24. This is further summarized in art. 60 VAT.

25. Art. 11, §4 Royal Decree nr. 3, to be consulted at <https://eservices.minfin.fgov.be/myminfin-web/pages/fisconet#!/document/cf8c51ef-859b-4739-b23f-ad43e2c74f27>

26. In a recent assessment report of the European Commission with regard to the invoicing rules of VAT, nearly 40 % of questioned stakeholders considered national rules on archiving for e-invoices burdensome and difficult to comply with. Although not being the only one, also Belgian rules definitely belong to these complex national systems. Cf. Report from the Commission to the European Parliament and the council assessing the invoicing rules of Directive 2006/112/EC on the common system of value added tax, SWD(2020) 29 final, 10 February 2020, COM(2020) 47 final.

27. A. BOUWEN, "Omtrent de onderzoeksbevoegdheden van AOIF en BBI, in het algemeen en hun bevoegdheid om kopieën te maken – zonder toelating – van gegeven van een computersysteem, in het bijzonder" *TFR* 2012, 214 e.v.

28. Courts of appeal of Ghent (13 June 2017, *Fisc. Koer.* 2017, 697), Antwerp (28 February 2012, <http://www.monkey.be> and 30 March 2001, *FJF* 2002, nr. 85), as well as Court of first Instance Brussels (17 January 2012, *TFR* 2012, 238).

29. Cf. e.g. J. ROSELETH, "Fiscus heeft geen toestemming nodig om alle computerbestanden te kopiëren", *Fisc. Act.* 2019, nr. 37, 1–6 (with further references) and S. DE RAËDT, "Repliek: de limieten van de controle van computerbestanden", *TFR* 2012, 222–230.

30. Algemene Beleidsnota, *Parl. St. Kamer*, DOC 54, nr. 2111/013, 12–13. See also S. GNEDASJ, "Enkele reflecties over waarborgen bij onderzoek computergegevens", *AFT* 2015, nr. 3, 11–23.

31. Cf. Court of appeal Liege 15 March 2016, nr. 2013/RG/1709, <http://www.fisconetplus.be>



payer at any time, under the condition the visiting tax inspector is able to prove his legal appointment when demanded thereto.<sup>32</sup> Discussions arose whether the administration should be let in or could *manu militari* force its own entrance. In a judgment of 12 October 2017, the Constitutional Court however decided in favour of the tax payer: the tax administration should request permission from the tax payer, but an unjustified refusal to cooperate can in itself be sanctioned.<sup>33</sup> Besides, when entitled to visit a particular taxpayer, according to a recent judgment of the Court of Appeal, this administrative competence does not allow the tax administration to investigate on documents of another taxpayer located in the same building.<sup>34</sup> The tax administration would not dispose of the legal entitlement, requested under art. 8, §2 ECHR, to violate the right to privacy, guaranteed under art. 8, §1 ECHR.

Other uncertainties however still remain. First of all, a distinction has to be made between commercial premises (offices, plants, factories, workshops, storage rooms, garages, as well as terrains being used for one of these purposes) and private housing. The latter can only be visited between 5.00 AM and 9.00 PM, and requires a previous judicial authorization. Authorizing this visit cannot be seen as a mere formal verification of compliance with administrative procedures. There should be previous indications of an economic activity being exercised on these premises.<sup>35</sup> Nonetheless, in a heavily criticized judgment of 8 March 2017 the Court of First Instance of Ghent considered a mere formal verification from the questioned judge sufficient, even when the visit would have been motivated in particular to verify the private housing instead of the (supposed) exercised economic activity.<sup>36</sup>

Also, the exact scope of this visiting competence remains disputed. According to the administrative point of view, this should be an additional competence, besides the right to consult information, without a preliminary question for it. Therefore, once legally entered a building, the administration considers itself being entitled to open closets, computers, ... without previous consent of a tax payer.<sup>37</sup> This is called an ‘active searching right’. The legal doctrine, however, strongly reduces this interpretation referring to, in particular, the right to privacy. According to tax representatives, the visiting right only implies the right to physically *visit* professional premises and look around, without however opening particular documents, closets, ...<sup>38</sup> As a legal exception to a general rule of privacy a strict interpretation seems to prevail. The text of the law should be foreseeable for an individual tax payer.<sup>39</sup>

This previous discussion finally reveals a substantial lack with regard to administrative possibilities to “look around”. The report of a public officer is a particular means of evidence and considered to be true until the opposite has been proven.<sup>40</sup> As long as a tax officer is looking towards a tax

32. According to the Supreme Court, a visit is rightful if the appointment has not been asked by the tax payer. An inspector does not have to show his appointment spontaneously. Cf. Supreme Court 12 September 2008, *TFR* 2009, 302; Supreme Court 15 December 2011, nr. F.10.0131.N, *FJF* 2013, nr. 174.

33. Constitutional Court 12 October 2017, nr. 116/2017, <http://www.const-court.be>

34. Court of appeal of Brussels 14 May 2019, nr. 2014/AF/303, *FJF* 2019, nr. 261.

35. Courts of appeal of Ghent (13 June 2017, *Fisc. Koer.* 2017, 697–702) and Bergen (15 September 2017, *Fiscoloog* 2017, nr. 1536, 6).

36. Court of first instance of Ghent 8 March 2017, <http://www.monkey.be>. See also F. DESTERBECK, “[Toegang tot privélokalen] Machtiging door politierechter voor huisvisitatie door fiscus zwijgrecht slechts in beperkte mate betwistbaar”, *Fisc. Act.* 2017, afl. 11, 4–6.

37. See also Court of Appeal Ghent 13 June 2017, *Fisc. Koer.* 2017, 697–702.

38. Cf. J. ROSELETH, “Fiscus heeft geen toestemming nodig om alle computerbestanden te kopiëren”, *Fisc. Act.* 2019, nr. 37, 1–6.

39. This can also be compared with art. 182 on the Belgian law with regard to customs and excise. This article explicitly empowers the customs officer to “visit and research” goods and cars. (Cf. E. VAN DOOREN, “Het visitatierecht als onderzoeksmaatregel inzake accijnzen en douanerechten”, *AFT* 2006, nr. 12, 18–32.) If the right to visit would also include further research, this additional wording would not have been necessary.

40. Art. 59, §1 VAT.

payer from publicly available places, no particular investigation act is being recognized in tax law. This however differs from criminal law, where the mere ‘observation’ is particularly regulated as an investigative technique. When the tax administration merely uses what can easily be seen from publicly available places, probably no privacy has been violated, even when a private situation is detected.<sup>41</sup> However, when a particular person is being followed repeatedly, or his premises are constantly being observed (from a public place), this could be considered an infringement to his right to privacy.<sup>42</sup> Whereas for criminal investigation procedures, this technique is in particular regulated,<sup>43</sup> no particular regulations in tax law exist.<sup>44</sup> Although some jurisprudence tries to justify these acts under the right to visit,<sup>45</sup> this seems rather unsatisfactory. A separate, clear and foreseeable legal ground, justifying under what conditions these infringements on the right to privacy can be allowed, should be integrated in the different Belgian tax codes.<sup>46</sup>

- Right to ask questions

Finally, the tax payer, is obliged to answer questions of the tax administration. Art. 62 VAT describes this investigative power in the most broad terms. Questions can be asked in written or oral form, can consider the tax payer’s or a third person’s tax situation, whereas the only general limit considers their relevance to determine the right tax establishment.

Only with regard to financial information, obtained from financial institutions as third parties for the investigation of the tax debts of another tax payer, further (small) limits are expressly being provided in art. 62 *bis* VAT. This information should previously be asked from the concerned tax payer. In case of his refusal to cooperate, officers with a certain minimal degree are allowed to request this information from a public institution in case of previous indications of tax fraud. This so-called “centraal aanspreekpunt” (Contact centre) receives its information from all the financial institutions and acts as a filter towards the tax administration. However, given the internationally extended exchange of financial information,<sup>47</sup> combined with the already mentioned exchange of relevant information between separate tax administrations, also financial information can be considered relatively easy accessible for the tax administration.

Given the lack of further legal limits, this investigation tool is in particular limited by means of fundamental rights of a tax payer. In case of a criminal procedure he has the right not to incriminate himself, the administration should offer a reasonable period of time to answer questions, as a principle of good governance general phishing expeditions (research via general questionnaires sent to tax payers to discover potentially relevant aspects) are not allowed.

- Cooperation in criminal investigation procedures

41. The administration was considered entitled to make use of the observation that a taxpayer disposed of a jacuzzi in his garden, which could be seen from a public place. (Cf. Court of First Instance Antwerp 14 October 2016, nr. 15/1573/A, <http://www.monkey.be>)

42. Twice the court of appeal of Bergen concluded that a right to privacy was concerned. (Cf. Bergen 15 November 2017, nr. 2016/RG/544, <http://www.monkey.be> (when the administration officially registered at 200 different moments during 2 years a car being parked in front of a house) and Bergen 16 December 2016, *RGCF* 2017, nr. 2, 141 (when the administration, shadowing a tax payer, followed his car). However, 18 different observations during three years from the public road were not considered to breach an individuals right to privacy. (Cf. Ghent 27 June 2017, nr. 2015/AR/3385, <http://www.monkey.be>.)

43. Cf. art. 47 *sexies* – *septies* Criminal Procedural Code.

44. Although the Constitutional Court accepted that the right to privacy was at stake, and the rules under the criminal procedure could be relevant as guiding principles for the tax administration (Cf. Constitutional Court 27 January 2011, nr. 10, <http://www.const-court.be>, the Ghent Court of Appeal referred to differences between a tax and a criminal investigation, to conclude that these rules should not necessarily fully be transposed. (Cf. Ghent 2 May 2017, nr. 2016/AR/390 and Ghent 27 June 2017, nr. 2015/AR/3385, both to be consulted at <http://www.monkey.be>)

45. E.g. Court of Appeal Ghent 23 October 2018, nr. 2017/AR/974.

46. Cf. T. SAS, “Observatie: (nog) geen ‘bom’ in het fiscaal recht”, *Fisc. Act.* 2018, nr. 41, 1–4.

47. See e.g. the several subsequent amendments of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

As far as the judicial authority is concerned, investigative competences are generally developed in the Belgian criminal procedure Code. The VAT Code forbids tax inspectors to participate in a criminal investigation procedure under penalty of it being null and void.<sup>48</sup> They can only be heard as a witness. However, some tax inspectors are employed for (or temporarily put at the disposal of) the criminal prosecutor. During this period they no longer qualify as a tax inspector.<sup>49</sup> Nonetheless, such civil servants cannot be involved in legal cases where they previously took part as a tax administrator.

Besides, based on the so-called first ‘una via’- regulation, the Criminal Prosecutor discusses together with the tax administration the prosecution procedures that will be applied in a particular case. This consultation process is not considered to violate the basic distinction between both administrations.<sup>50</sup> It will be further analysed under paragraph 4.

### 3. Specific guarantees for inspected VAT taxpayers

When it comes to VAT tax law in particular, specific protective guarantees for an individual tax payer seem rather poor. Only a few details emerge from legal dispositions in the VAT Code.

As mentioned, concerning the right to consult, it is up to the tax administration to come to the tax payer and not otherwise. Requesting information with regard to other taxes is allowed, but cannot be ‘excessive.’<sup>51</sup> When books of a taxpayer are asked, the administration can only keep a VAT taxpayers’ books of closed book years and not for running periods.<sup>52</sup> When asking financial information from financial institutions this should first have been asked from the tax payer himself and further requires a particular procedure.<sup>53</sup> And, when visiting private houses, a time slot (5.00 AM – 9.00 PM) and a prior judicial approval apply.<sup>54</sup>

A final aspect, worthy of being mentioned in this context, is the professional secrecy. With regard to members of the tax administration, art. 93 *bis* VAT, installs this duty to remain silent about information obtained in the exercise of their profession. This also protects the privacy of a concerned VAT taxpayer. However, this only applies to these members “acting outside the exercise of their function.”<sup>55</sup> On the other hand, one could also consider the professional secrecy of a particular taxpayer. With regard to income taxes, a particular procedure, involving the intervention of a disciplinary commission, has been installed.<sup>56</sup> However, in VAT, this procedure has not been foreseen, causing a difficult balance when the administration investigates a tax consultant, accountant or other professional invoking his duty to professional secrecy.<sup>57</sup>

48. Art. 74 *bis* VAT.

49. Art. 74 *bis* VAT.

50. art. 74 *bis* VAT and 29 Belgian Criminal Procedure Code.

51. Art. 93quaterdecies, §3 VAT. As the general legal limitation that collected information has to be “adequate, useful and not excessive.” These legal limitations however remain rather vague and hardly seem to limit administrative investigations. Cf. K. SPAGNOLI, “Ambtenaar mag ook onderzoek doen voor zusteradministratie”, *Fisc. Act.* 4 Februari 2010, nr. 5, 4–8.

52. Art. 61, §2 VAT. Although, given most bookkeepings are being kept electronically, obtaining a copy remains possible.

53. Art. 62 *bis* VAT.

54. Art. 63 VAT.

55. The Antwerp Court of Appeal considered the reference to information considering other tax payers in documents exchanged with a tax payer not a violation of the professional secrecy. The same reference to actions outside the exercise of their function figures in art. 337 ICT. Therefore, according to the court, as long as public officials are acting as a tax administration, they could not violate this professional secrecy. (Cf. Antwerpen 14 May 2013, *FJF* 2014, nr. 139 and 3 January 2017, *FJF* 2018, nr. 134.)

56. Art. 334 ITC.

57. In a judgment of 2016 the Court of Appeal of Bergen solved this case by concluding which information could be sent over to the tax administration and was sufficient to investigate the VAT-tax declaration, without however breaching the professional secrecy. Cf. Bergen 1 April 2016, *Fisc. Koer.* 2016, 685–691.



An, in practice, more important limitation might be the prescription to establish taxes. In general, the administration has 3 years to establish taxes due,<sup>58</sup> which can be prolonged to 7 years in several cases referring to the existence of tax fraud.<sup>59</sup> However, discussions arose whether during this additional delay the administration could also investigate on these previous 7 tax years. Whereas, with regard to income taxes, this has been explicitly confirmed in art. 333 CIT, the VAT tax Code does not provide particular investigation delays. Nonetheless, in a judgment of 27 April 2012, the Belgian Supreme Court explicitly confirmed this right to execute additional investigations.<sup>60</sup> In addition, art. 84 *ter* VAT obliges the administration to previously inform the tax payer in case the administration “plans to apply the particular delay of 7 years” because of tax fraud. The mentioned vagueness concerning additional investigation powers of the administration led in this context to a new discussion, whether the administration should previously inform a taxpayer when planning additional investigations<sup>61</sup> or whether the taxpayer should only previously be informed when additional taxes were established.<sup>62</sup> In a judgment of 27 March 2015 the Supreme Court confirmed the latter interpretation of the legal text.<sup>63</sup> Although with regard to income taxes the administration is required to previously inform the taxpayer, when additional investigations are planned during an extended delay, no analogy exists for VAT purposes. According to the Constitutional Court, this distinction is neither discriminatory, as the legislator is not obliged to maintain a full equivalence for different taxes.<sup>64</sup> Whereas in income taxes different time limits exist with regard to verification and establishment of taxes, in VAT only a time limit with regard to the establishment of taxes exists. Therefore both regimes differ and no analogy in spite of a literal interpretation of the text should be applied.<sup>65</sup> A VAT taxpayer has no positive right of injunction enforcing the tax administration to execute investigative acts. This has also been confirmed by the Court of Justice.<sup>66</sup> Based on art. 31 Regulation 904/2010 on administrative cooperation and combating fraud in the field of value added tax<sup>67</sup> only the verification of the validity of the VAT identification of a contracting party exists. This legislative focus on tax fraud and abuse in VAT tax law seems in line with the primary (European) legislative focus with regard to other taxes.<sup>68</sup>

58. Art. 81 VAT.

59. Art. 81 *bis* VAT.

60. Supreme Court 27 April 2012, *FJF* 2012, nr. 266. See subsequently also Court of First Instance Leuven 3 October 2014, *FJF* 2016, nr. 21 and Court of Appeal Antwerp 12 February 2013, *RABG* 2013, 1378.

61. See e.g. Court of First Instance Leuven 3 October 2014, *FJF* 2016, nr. 21.

62. Cf. H. Vandebergh, “Nog eens over de verlengde vorderingstermijnen in zake BTW en de toepassing van artikel 84ter WBTW”, *TFR* 2012, 431; B. VANERMEN, “Moet de toepassing van de verlengde aanslagtermijn in geval van fraude worden aangekondigd voor elke onderzoeksdaad buiten de gewone aanslagtermijn?”, *TFR* 2011, 725; J. MOTTE, “Voorafgaande kennisgeving inzake BTW-fraude moet volgens het hof van beroep te Brussel elke onderzoeksdaad voorafgaan”, *RABG* 2013, 1360; V. SEPULCHRE, “Verjaring van de BTW” in *Fisc. Doc. Vandewinckele*, nr. 2000.111, p. 37; W. PANIS & M. HENDRIKX, “Verjaringstermijnen inzake de vordering tot voldoening van de BTW: stand van zaken na het cassatiearrest van 27 april 2012” in *Fiscaal Praktijkboek 2012–2013 – Indirecte belastingen*, p. 114–115; J. Van Dijk, “Voorafgaande kennisgeving inzake BTW: vooraf aan wat?”, *Fisc.* 2006, nr.1048, p. 7; P. RENIER en K. LIOEN, “Hof holt verplichting tot voorafgaande kennisgeving uit”, *Fisc.Act.*, 2011, nr. 14, p. 7; D. JAECQUES en E. MALFAIT, “Bewijskrachtige gegevens vergen geen bijkomend onderzoek”, noot bij *Rb. Gent*, 27 september 2010, *TFR* nr. 397, 21.

63. Supreme Court 27 March 2015, *R.G.C.F.* 2015, nr. 3, 208, note B. ORBAN; *Fisc. Koer.* 2015, 669–672, note. See also J. VAN DIJCK, “Kennisgeving fraude moet onderzoek inzake BTW niet voorafgaan”, *Fiscoloog* 2015, nr. 1428, 1–2.

64. Const. Court 19 January 2017, nr. 5/2017, <http://www.const-court.be>

65. Cf. D. THIJSS, Conclusion added to Supreme Court 27 March 2015, <http://jure.juridat.just.fgov.be>

66. CJ 27 September 2007, C-184/05, Twoh International and CJ 22 April 2010, C-536/08 and C-539/08, X and Fiscale Eenheid Facet Facet Trading, <http://www.curia.eu>.

67. *OJ L* 268, 12 October 2010, 1.

68. In particular several initiatives have been developed to increase exchange of information for the detection of tax fraud or abuse (Cf. several consecutive amendments of Directive 2011/16/EU on administrative cooperation in the field of taxation) and to combat tax avoidance (Cf. Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market). The protection of tax payer’s interests however, was rather left to the judiciary.

Given the rather scarce particular dispositions protecting a taxpayers' interests, he has to rely on fundamental legal principles and rights recognized in other domestic, European and international legislation. They are indeed fully applicable with regard to VAT procedures.<sup>69</sup> When dealing with the investigative powers of the tax administration, some rights (privacy, confidentiality of mail, right to the domicile, right of silence, ...) were already mentioned as they can limit the administration in its investigations. However, it would go beyond the scope of this text to list up all possible guarantees applicable to a taxpayer, as a legal subject in general.<sup>70</sup> Therefore, only two further aspects are described: the right to silence and the use of illegally obtained evidence.

- Right to silence

A first difficulty has arisen concerning the confrontation of the duty to cooperate in tax matters and the right to silence in criminal matters. Non-cooperation with the tax administration is autonomously sanctioned: the administration is allowed to apply a 'de officio taxation', reversing the burden of proof<sup>71</sup>, and a non-proportional fine between 50 and 5.000 EUR can be levied.<sup>72</sup> This clearly conflicts with the right not to incriminate oneself.<sup>73</sup> Even during a preliminary procedure that might trigger a criminal procedure the ECHR considered that fundamental rights, such as the right not to self-incriminate, should be respected.<sup>74</sup> However, every administrative investigation procedure might lead to a criminal procedure. The consequences of this judgment hence caused diversified jurisprudence. Whereas the Liege Court of appeal recognized a taxpayers' right not to respond to a question concerning the existence of foreign bank accounts and income related therewith, and hence refused to apply the claimed additional administrative sanction,<sup>75</sup> the Court of Appeal of Antwerp sanctioned the refusal of the taxpayer to provide requested invoices.<sup>76</sup> To reconcile both positions, a distinction could be made between existing data, irrespective of the intentions of a taxpayer, and data that can only be provided with the cooperation of the tax payer. Nonetheless, even after a recent EHRM case of 16 June 2015, in which the Court accepted the obligation of a taxpayer to provide the information demanded by the (Dutch) tax administration under threat of a non-compliance penalty payment,<sup>77</sup> uncertainties remain. Following this approach, the Belgian Constitutional Court also acknowledged the duty of a taxpayer to cooperate in case of an administrative visit and the administrations' right to sanction non-cooperation.<sup>78</sup> However, the Constitutional Court also confirmed the right to silence in case of a criminal charge. The exact alignment between both procedures hence remains vague. In a judgment of 2016 the Court of Appeal of Liege however concluded that a violation of the right not to incriminate oneself could not be simply invoked in an abstract sense: a real violation of this right in a particular context should be proven. Judging differently would make it after all impossible for the tax administration to collect

69. Cf. Const. Court 19 January 2017, nr. 5/2017, <http://www.const-court.be>.

70. In a Belgian context, for a general study, cf. M. MAUS, *De fiscale controle*, Brugge, die Keure 2005, 695 e.v. With regard to the right to privacy in particular, cf. S. DE RAEDT, *De draagwijdte van het recht op privéleven bij de informatie-inzameling door de fiscale administratie*, Gent, Larcier 2017, 804 p.

71. Art. 66 VAT.

72. Art. 70, §4 VAT.

73. C. DILLEN and V. VERCAUTEREN, "De Panama Papers-slinger slaat volledig door", *Fisc. Act.* 2018, nr. 34, 1–5. For a detailed analysis, M. MAUS, "De moeilijke verhouding tussen de meewerkverplichting en het zwijgrecht in fiscale (straf)zaken", in J. Rozie, S. Rutten en A. Van Oevelen (eds.), *Zwijgrecht versus spreekplicht*, Antwerpen, Intersentia, 2013, 244; C. VANDERKERKEN, *Fiscale Strafvervolgning en Rechtsbescherming : wapengelijkheid, zwijgrecht en bewijslastverdeling*, Gent, Larcier 2006, 539 p.

74. ECHR, 5 April 2012, Chambaz, <https://hudoc.echr.coe.int>

75. Liege 19 September 2012, *Fiscoloog* 2012, nr. 1313, 10.

76. Antwerp 20 March 2012, *Fiscoloog* 2012, nr. 1302, 8.

77. ECHR 16 June 2015, Van Weerelt, *FJF* 2017, nr. 10. Cf. I. DE TROYER, "Fiscus mag dwangsom laten opleggen aan wie weigert informatie te geven", *Fisc. Act.* 2015, nr. 32, 1–5.

78. Constitutional Court 12 October 2017, nr. 116/2017, <http://www.const-court.be>. See further T. JANSEN, "Kijken mag, aankomen ook", *Fisc. Act.* 2017, nr. 36, 1–6.

information in the context of an administrative investigation.<sup>79</sup>

- Use of illegally obtained evidence

A second aspect, worthy of mentioning, considers the value of illegally obtained evidence. In this context, domestic tax procedures have been influenced by a doctrine previously developed in criminal law procedures,<sup>80</sup> known as the ‘Antigoon’-doctrine.<sup>81</sup> According to this doctrine illegally obtained evidence generally does not nullify a criminal procedure, neither should it be excluded from the evidence offered by the administration in front of the Court. This only applies if a legal rule explicitly provides nullity, if the illegality would violate the right to a fair trial, or if the reliability of the evidence is in itself contaminated due to this illegal obtaining. The Belgian Supreme Court also applied this doctrine in several cases concerning tax procedures: illegally obtained evidence can still be used in front of the Court, unless the acquisition happened in such a violation of the principles of good governance that its use should in any circumstances be considered unacceptable, or if the use would violate a taxpayer’s right to a fair trial.<sup>82</sup> This doctrine should however be limited to the validity of obtained information and cannot be applied to justify violations of other procedural rules.<sup>83</sup> However, in particular with regard to VAT law, this doctrine has been challenged following a judgment of the European Court of Justice.<sup>84</sup> Although still heavily debated in Belgian doctrine,<sup>85</sup> some authors interpreted this judgment as requiring in a legal trial the full disregard of evidence obtained in violation of fundamental rights of a taxpayer.<sup>86</sup> It seemed as if no margin of appreciation should be left with the judge to further evaluate a possible use of the obtained evidence. This made other Courts of Appeal refuse a further application of the Antigoon-doctrine in Belgian tax law.<sup>87</sup> Given the remaining uncertainties,<sup>88</sup> the Belgian Supreme Court referred a prejudicial question to the Court of Justice with regard to the consequences of this judgment. What should happen with information obtained by the tax administration because of the violation of a lawyer of his professional secrecy?<sup>89</sup> Although the subsequent case concerned income

79. Court of appeal Liege 25 March 2016, *FJF* 2017, nr. 157. This position substantially differs from its previous position mentioned in footnote 75.

80. Initially developed in case law, for criminal law this doctrine has subsequently been integrated in art. 32 of the Criminal Procedure Code.

81. Cf. T. JANSEN, “Cassatie omarmt fiscale Antigoontoets bij beoordeling onrechtmatig verkregen bewijs”, *Fisc.Act.* 2015, afl. 21, 1–5.

82. A first judgment was Supreme Court 22 May 2015, <http://jure.juridat.just.fgov.be>. This subsequently has been repeated by the Supreme Court in judgments of e.g. 18 January 2018, *FJF* 2018, nr. 61 and 4 November 2016, *FJF* 2017, nr. 74. Also Belgian Courts of appeal followed this line of reasoning. Cf. e.g. Court of Appeal Antwerpen 4 April 2017, *FJF* 2017, nr. 260.

83. Cf. Supreme Court 19 January 2016. (The initiation of a legal procedure through a declaration of a non-competent member of the tax administration was wrongly excused by the Brussels Court of Appeal. The mere possibility for a taxpayer to still defend its position with all legal means could not regularize this administrative error).

84. CJCE 17 December 2015, C-419/14, *WebMindLicenses*, <http://www.curia.eu>.

85. Cf. S. DE RAEDT, “Het Hof van Justitie en de Belgische Antigoon-leer: drie redenen om minder enthousiast te zijn”, *TFR* 2016, nr. 502, 471–474; I. LEJEUNE, L. VERMEIRE en N. DUTRE, “De grondrechten van de unie en de bescherming van de belastingplichtige”, *AFT* 2016, nr. 6–7, p. 34–38; A. BELLENS, “Onrechtmatig verkregen bewijs: genuanceerde Antigoon-leer in fiscale zaken”, *RABG* 2017, nr. 9, p. 734–737 en P. DE VOS en D. VERBEKE, “Beperkt het handvest van de grondrechten van de EU de toepassing van de Antigoon-doctrine in fiscalibus?”, *TFR* 2016, nr. 499, p. 356–362.

86. See in particular S. GNEDASJ, “Impact van het arrest *WebMindLicenses* op de fiscale en strafrechtelijke Antigoon-doctrines”, *AFT* 2016, nr. 8–9, p. 33–50.

87. E.g. Court of Appeal Brussels 14 May 2019, *FJF* 2019, nr. 261.

88. This also led to a call to the legislator to clarify. Cf. M. DELANOTE, “Antigoon: moet de wetgever niet optreden?”, *Fisc.Act.* 2017, nr. 14, p. 7.

89. Cf. P. RENIER and L. CASSIMON, “Antigoon vs. beroepsgeheim: beschermt Cassatie onze grondrechten?”, *Fisc. Act.* 2018, nr. 5, 1–5. According to these authors, even under application of the Antigoon-criteria the information could not be used, as the communication of a lawyer, in violation of his duty to professional secrecy, would inevitably violate the fundamental right to a fair trial.

taxes, the Supreme Court explained it would apply similar procedural consequences for VAT and income taxes. Nonetheless, the Court of Justice replied that even the exclusion of evidence in VAT cases was not based on particular EU legislation. Hence, lacking a reference to EU legislation in the subsequent case concerning income taxation, the question of the Belgian Supreme Court was considered inadmissible.<sup>90</sup> At present, the validity of illegally obtained evidence for Belgian tax procedures with regard to VAT therefore still remains blurred. Is the entire process void, is an exclusion of the obtained information always necessary or can the evidence still be used? Even if the Antigoon-criteria do apply, a judge still has to evaluate their consequences in each particular case.

#### 4. Coordination of administrative and judicial investigation procedures: the *una via*-interlude

Although the VAT code provides for criminal, as well as administrative sanctions, art. 74, §1 VAT explicitly requires the public prosecutor for a criminal prosecution. This cannot be left to the tax administration. If, a member of the tax administration is confronted with criminal facts, he has to inform the public prosecutor, but only after approval of the superior Director.<sup>91</sup> The Ministry of public, being informed by a non-authorized tax administrator, cannot start a criminal prosecution.<sup>92</sup> Also in case of indications of severe tax fraud,<sup>93</sup> the Public prosecutor has to be informed. Subsequently, art. 29, §3 Criminal Procedural Code provides for a further consultation between both administrations in this case.<sup>94</sup> The decision whether or not to initiate a criminal prosecution is subsequently up to the public prosecutor, who has to decide within 3 months. Although being its exclusive competence, advice can be asked from the tax administration, who has to respond within 4 months after receiving this question.<sup>95</sup> During the criminal procedure itself members of the tax administration can only further be involved in this procedure as a witness.<sup>96</sup> They cannot further investigate. This was to prevent members of the tax administration acting in a single case simultaneously as judge and legal party.<sup>97</sup>

Besides these criminal procedures, the tax administration also autonomously investigates the tax compliance of a taxpayer, as previously explained, and can eventually penalize violations with administrative sanctions. To coordinate both investigative procedures, and to avoid double sanctioning, a Law of 20 September 2012<sup>98</sup> had introduced a so-called '*una via*'-concept. It aimed to install a consultation between the Public Prosecutor and the tax authorities, when one of both found out a particular tax fraud. It was then up to the Public Prosecutor to decide whether he was going to prosecute certain acts, but in the meantime the administrative prosecution was suspended. If a case was brought in front of the criminal court, administrative sanctions were definitively no longer claimable. If the case was not brought in front of the criminal courts (e.g. because investigation

90. CJCE 24 October 2019, C-469/18 and C- 470/18, IN and JM vs. Belgian State, <http://www.curia.eu>.

91. Art. 29, §2 Criminal Procedure Code.

92. Art. 74, §2 VAT.

93. This has been further described in a Royal Decree of 9 February 2020, *Belgian Gazette* 24 February 2020. However, in practice the notion remains vague. Cf. F. DESTERBECK, "Una via: KB over 'ernstige fraude' gepubliceerd", *Fisc. Act.* 2020, nr. 10, 8–10.

94. Nonetheless, as a reference to a legal definition was made applicable as from 1 January 2020, before the outcome of the Royal Decree further communication between the criminal prosecutor and the tax administration was considered no longer possible. Cf. F. DESTERBECK, "Una via'-KB niet op tijd klaar: overleg tussen fiscus en parketten over ernstige fraudegevallen opgeschort", *Fisc. act.* 2019, nr. 41, 14–15.

95. Art. 74, §2 VAT.

96. Art. 74 *bis* VAT.

97. These rules are based on a so-called 'Charter of the tax payer,' dating from a Law 4 August 1986. Cf. F. DESTERBECK, "Charter' is voorbijgestreefd, zegt minister, maar er gebeurt niets", *Fisc. act.* 2018, nr. 25, 12–13.

98. *Belgian gazette* of 22 October 2012.

courts did not refer the case to the criminal court), the administrative procedure (and sanctions) could be continued.<sup>99</sup> Hence, the idea was developed to prioritize to some extent criminal prosecutions, which however only were meant to deal with severe cases of tax fraud, based on a principle of subsidiarity.<sup>100</sup> The ‘una via’-dialogue between both administrations in practice proved to be frequently applied and was considered useful.<sup>101</sup> However, besides some other failures, technically the ‘una via’-law only functioned in one direction: a criminal public procedure suspended an administrative investigation procedure and excluded it in case of a final criminal judgment. If a taxpayer was already administratively convicted and punished, he could still be subjected to a criminal procedure. Some articles of the broad ‘una via’-law were hence considered discriminatory and unconstitutional, and therefore annulled by the Constitutional Court.<sup>102</sup> Whereas the Court annulled the rules because of a remaining double prosecution, its judgement had a paradoxical effect: only the possibility for consultations remained, but the criminal procedure no longer suspended administrative procedures. Meanwhile, both the European Court of Human Rights,<sup>103</sup> as well as European Court of Justice<sup>104</sup> have accepted the possibility to combine administrative and criminal sanctions under certain circumstances. This has subsequently also been followed by the Belgian Courts.<sup>105</sup> Hence, at present, the philosophy no longer seems to exist to explicitly opt for one single procedure and in practice the ‘una via’-dialogue was merely used for severe tax fraud, whereas minor cases were being dealt with on an administrative level by the tax administration. This practical approach has subsequently been legally integrated with a (new ‘una via’-) Law of 5 May 2019,<sup>106</sup> applicable as from 1 January 2020. However, the tax administration is not sanctioned when cases of severe tax fraud are not being mentioned to the Public Prosecution officer and is neither limited in its own research. Legal doctrine therefore wonders whether this legislation will install a renewed una via.<sup>107</sup> As information is exchanged between administrations, it nonetheless seems that at least in practice a taxpayer is not asked to deliver the same elements twice.

## 5. Exchange of information between the tax administration and other public administrations

In general every public authority, when it becomes aware of a crime or felony in the exercise of its professional activity, is obliged to inform the Public Prosecutor and deliver all obtained information.<sup>108</sup> However, as already mentioned, for tax officers an additional filter is installed, as they have to be authorized by the superior director. Information obtained without this authorization cannot lead to a criminal prosecution. The violation of this procedural rule cannot be overruled with the Antigoon-doctrine.

Alternatively, all public servants are required to inform the tax administration of all information

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99. Art. 72 VAT, as applicable before its subsequent annulation.

100. The further context of this balance was set out in an administrative Circular. (Circular AFZ nr 9/2012 of 23 October 2012, AFZ/2012-0629).

101. Cf. F. DESTERBECK, “‘Una via’-KB niet op tijd klaar: overleg tussen fiscus en parketten over ernstige fraudegevallen opgeschort”, *Fisc. act.* 2019, nr. 41, 14–15.

102. Constitutional Court 3 April 2014, nr. 61/2014, <http://www.const-court.be>.

103. ECHR 15 November 2015, A & B vs Norway, <https://hudoc.echr.coe.int>.

104. CJCE 20 March 2018, C-524/15, Luca Menci, <http://www.curia.eu>.

105. Supreme Court 21 September 2017, *RW* 2017–18, 1610 and Court of Appeal Antwerp 14 February 2017, *FJF* 2017, nr. 154.

106. *Belgian Gazette* 24 May 2019. Cf. F. DESTERBECK, “Nieuw wetsvoorstel past strafrechtelijke vervolging in fiscale zaken toch aan”, *Fisc. act.* 2019, nr. 9, 7–9.

107. J. VANDEN BRANDEN and K. HENS, “De wet van 5 mei 2019: (non) bisnummer voor het una via-principe”, *AFT* 2020, nr. 2, 4–19.

108. Art. 29, §1 Criminal Procedure Code.



in their possession, when being asked by the tax administration.<sup>109</sup> This rule, however, does not allow phishing expeditions. It is a complementary aspect, meaning that the tax administration should already dispose of particular indications of irregularities in advance. This ‘passive’ support is further activated for Public Prosecutors. They spontaneously have to inform the tax administration in case of indicia of tax fraud in criminal cases when a criminal investigation detects them.<sup>110</sup> The information can also concern third parties, not being submitted to the criminal investigation. In case of access to particular information, further limitations might apply. E.g. with regard to judicial information a specified authorization of the Public prosecution service is required. The scope of this required authorization is however discussed.<sup>111</sup>

## 6. Information required from financial institutions for VAT purposes

Financial institutions fulfill a particular role in criminal, as well as tax procedures. This historically stems from an existing banking secrecy, which has been progressively eliminated during the last decade.<sup>112</sup> As already mentioned, the tax administration’s right to ask questions also applies with regard to financial institutions, but is further limited. The same information first has to be asked from the taxpayer, informing this latter that in case of no cooperation, the information will be asked from the Contact Centre (het “centraal aanspreekpunt”).<sup>113</sup> This can be contacted after authorization of the administrative director and only in case of pre-existing indicia of fraudulent acts. A particularly motivated request is required. Financial institutions are required to inform the Contact Centre about their clients, financial accounts, assets, ...

Besides however, also additional informing obligations for financial institutions have continuously been added the last decade. This largely stems from the implementation of international<sup>114</sup> and European<sup>115</sup> initiatives with regard to the fight against tax fraud and tax evasion or avoidance. Besides it is also useful to mention a Law of 11 January 1993 on preventing the use of the financial system for purposes of money laundering and terrorist financing.<sup>116</sup> Financial institutions (and other persons participating professionally in the context of financial transactions) are obliged to identify their clients in a very detailed way. In case of defined suspected transactions they have to inform a ‘Cel voor financiële informatieverwerking’.<sup>117</sup> This institution can also contact the already mentioned Contact Centre (“Centraal aanspreekpunt”) or notify transactions to authorities.<sup>118</sup>

109. Art. 93quaterdecies, §1 VAT. (Public) financial institutions are excluded from this general rule.

110. Previously art. 2 Law of 28 April 1999, *Belgian Gazette* 25 June 1999. As from 1 January 2020 this text has been integrated in art. 29 *bis* Criminal Procedure Code, also explicitly confirming that a subsequent administrative procedure (based on this information) does not necessarily exclude the possibility to also continue a criminal procedure.

111. In this context the Tribunal of First Instance of Leuven considered an authorization to be *in personam*. The delegation of access to another tax official made the evidence irregularly obtained. (Cf. Leuven 6 May 2011, *Fiscoloog* 2011, nr. 1255, 11). The Court of Appeal of Ghent however considered that tax officials could always delegate their investigation to another person themselves. (Cf. Court of appeal Ghent 20 September 2016, not published.)

112. Cf. K. JANSSENS, “Fiscaliteit in niemandsland”, *Fisc. Act.* 2020, nr. 1, 1–9.

113. Art. 322, §2 ITC and 62 *bis* VAT.

114. E.g. exchange of information standards have been developed and their application is monitored through peer review controls and public reports from the OECD. Although focusing on information countries have to exchange, this also requires tax administrations to obtain information from financial institutions. Cf. <http://www.oecd.org/tax/exchange-of-tax-information/>.

115. See in particular the several subsequent changes of Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, *OJ L* 64, 11 March 2011. (DAC 1 – 6), as well as Council Regulation (EU) nr. 904/2010 on administrative cooperation and combating fraud in the field of value added tax, *OJ L* 268, 12 October 2010.

116. *Belgian Gazette* 9 February 1993.

117. Art. 22 ff Law of 11 January 1993.

118. Art. 36 *bis* Law of 11 January 1993.

## 7. Limitation period to conduct investigations

As already mentioned, in contrast with income taxes, the VAT code only provides a limitation period for the establishment of taxes: a general period of 3 years (after the year during which the tax became due) is prolonged to 7 years in case of non-declaration of certain taxable acts, persuasive indications noticed to the tax administration of incorrect application of exemptions or tax deductions, or intentional violations of the tax code.<sup>119</sup> The possibility for the administration to also further investigate during this additional delay has been disputed, but finally accepted by the Supreme Court. The indications should not necessarily date from the tax year for which additional taxes will be established. Even an indication from a later tax period can justify the establishment of taxes from previous tax years,<sup>120</sup> but the indications should clearly illustrate the concerned tax years.<sup>121</sup> This however demands a *de facto* evaluation. As such, two rather similar cases existed in which the administration had indications of a *systematic* use of fraudulent invoices and wanted to extend the delay for investigations in cases concerning income taxes. 2 court of appeals judged differently with regard to the sufficiency of the indication.<sup>122</sup>

With regard to VAT-cases, a taxpayer should not be previously informed about further investigation acts, but only when taxes are finally established. Differing from procedures with regard to income taxes, this point of view has been confirmed by the Minister of Finance,<sup>123</sup> as well as the Supreme Court.<sup>124</sup> In addition, even when third parties are investigated for income tax purposes, this previous notification to the tax payer is still required.<sup>125</sup> With regard to VAT, as only the establishment of taxes is notified a tax payer would analogously not be informed of investigations at third parties.

In addition however, one has to be aware that an investigation of a tax year is linked to all VAT aspects applied during this year. This not only concerns acts being fulfilled during this tax year. Whereas the deduction of VAT from immovable investment goods can be revised during 15 years, a taxpayer inevitable has to be able to prove the righteousness of a VAT deduction for every year. In 2019 this delay has even been extended as, when implementing an option to submit leasing or letting of immovable property to VAT, a revision of 25 years has been added.<sup>126</sup> This extends the period a taxpayer should cover within his bookkeeping, even though the administration's investigation period (only) lasts 3 or 7 years.

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119. Art. 81 *bis* VAT.

120. This has explicitly been confirmed with regard to income taxes by Supreme Court 17 May 2018, F.16.0116.N, <http://jure.juridat.just.fgov.be/> Cf. T. JANSEN en K. JANSSENS, "Aanwijzingen uit later aanslagjaar kunnen onderzoekstermijn openen m.b.t. voorgaande jaren", *Fisc. Act.* 2018, nr. 34, 5–7.

121. Supreme Court 27 June 2019, nr. F.18.0100.F, <http://jure.juridat.just.fgov.be/>

122. Cf. L. CASSIMON, "Valse facturen: voldoende aanwijzing van fraude of niet?", *Fisc. Act.* 2017, nr. 10, 1–5, comparing Gent 24 February 2015, nr. 2013/AR/2804 with Antwerp 31 May 2016, nr. 2015/AR/141. In its judgment of 9 April 2019, the Antwerp Court of Appeal considered again that substantial irregularities of particular tax years made it sufficiently probable that the same acts would also have been committed in previous tax years. Cf. Antwerpen 9 April 2019, nr. 2017/AR/1993, <http://www.monkey.be>

123. Parliamentary question nr. 119 (Gilkinet) of 20 January 2015, *Vr. en Antw. Kamer* 2014–2015, nr. 016, 204–209, <http://www.dekamer.be>

124. Supreme Court 27 March 2015, nr. F.12.0029.N, <http://jure.juridat.just.fgov.be>

125. Supreme Court, 20 May 2016, nr. F.15.0175.F, <http://jure.juridat.just.fgov.be> Also (less explicitly) Supreme Court 12 February 2016, nr. F.14.0316.F, <http://jure.juridat.just.fgov.be>. With this jurisprudence the Supreme Court reversed its prior point of view that a taxpayer would only have to be informed for investigative acts at the taxpayer in person. Cf. Circular 2017/C/34 of 8 June 2017 betreffende de voorafgaande kennisgeving van aanwijzingen van belastingontduiking, <http://www.fisconetplus.be>

126. Art. 48, §2 VAT.

## 8. Possible sanctions

When it comes to sanctioning detected infractions, the most common sanctions are a fine, imprisonment or a combination of both. However when further describing their characteristics and functioning, a distinction is made between administrative and criminal sanctions. All sanctions in the VAT code are legally considered administrative sanctions, except for the following 3 specifically mentioned criminal sanctions.<sup>127</sup>

1. Fraudulently and willingly contravening a legal obligation is sanctioned with imprisonment for a period between 8 days and 2 years and/or a fine between 250 and 500.000 EUR.<sup>128</sup>
2. In case of forgery to commit one of the previous acts, an imprisonment between one month and 5 years and/or a fine between 250 and 500.000 EUR applies.<sup>129</sup>
3. When a professional intermediary or representative for tax purposes is involved in the previous acts, his professional activity can be suspended or the full establishment can be closed. Subsequently not respecting such suspension or closure is sanctioned with an imprisonment between 8 days and two years and/or a fine between 250 and 500.000 EUR.<sup>130</sup>

These three sanctions are also submitted to the legal indexation mechanism for criminal penalties.<sup>131</sup> This avoids all legal sanctions having to be revised regularly. At present the mentioned amounts have to be multiplied by 8. In case a fine is not paid a judge can also declare a replacing imprisonment.

The most important administrative sanctions are proportional and non-proportional fines. The non-proportional fines concern an amount between 50 and 5.000 EUR for each individual infraction of the VAT code.<sup>132</sup> Proportional fines consist of twice the VAT due, with often a further minimum amount of 50 EUR.<sup>133</sup> Even for proportional fines a combination of fines is possible, even if acts are committed under one united aim. If however for one single offence both the general administrative sanction of art. 70, §1 VAT, and a particular sanction provided for in subsequent paragraphs is applicable, only the latter can be applied.

The administration is authorized to reduce these administrative fines in a particular case. To this end, particular Royal Decrees mention percentages/amounts of the fines due depending on further circumstances. With regard to proportional sanctions, decree nr. 41 provides several percentages (5, 10, 20, 50, 100 and 200 %) of the applicable VAT, depending on the particular offence. Whereas until 31 March 2019 the imposed fine was<sup>134</sup> raised with 50 %, in case the administration needed a court order,<sup>135</sup> this article has been abolished in 2019.<sup>136</sup> Decree nr. 44 mentions different amounts such as 25, 50, 100, 150, 400, 1.000, 3.000 EUR. Some amounts rise in case of repetition, within a

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127. Art. 72 VAT.

128. Art. 73 VAT. In case of serious tax fraud, both sanctions are inevitably cumulated and the imprisonment can last up to 5 years.

129. Art. 73 *bis* VAT.

130. Art. 73 *quater* VAT.

131. Art. 73 *quinquies*, §3 VAT.

132. Art. 70, §4 VAT.

133. Art. 70, §1–3 and art. 71 VAT. A particular exception considers art. 70, §5 VAT. In case an expert has been asked to evaluate the value of a transaction and the difference at least equals 1/8 of the declared value, the administrative sanction equals to one time the additional taxes due.

134. In contrast with the text, the Supreme Court concluded that this did not apply automatically. It would be up to the court to judge whether the refusal of a taxpayer to pay the administrative fine was based on good grounds. Cf. Supreme Court 25 April 2002, nr. C.00.0464.N, <http://jure.juridat.just.fgov.be>.

135. Art. 2 Royal Decree nr. 41.

136. Royal Decree of 17 March 2019, *Belgian Gazette* 8 April 2019, applicable for warrants as from 1 April 2019.

period of 4 years.<sup>137</sup> In case of an intention to evade VAT the maximum amounts are doubled, but topped on 5.000 EUR for each individual act.<sup>138</sup>

In the exercise of its competence, also art. 109 of a Law of 4 August 1986 should be mentioned. This article demands a particular motivation from the administration when imposing an administrative fine to a tax payer: the administration has to mention the facts causing the infringements, the reference to the applicable legal texts, and its motivation to ultimately determine the administrative fine due. According to the Court of appeal of Antwerp, this entire motivation has to figure in the initial notification and cannot be corrected at a later stage.<sup>139</sup>

Besides a mere fine, some other administrative sanctions can also be applied. First of all financial sanctions can also be levied on persons not respecting the VAT legislation, although they are not responsible for the payment of the VAT. In this context, art. 70, §4 VAT further provides that these persons, when having committed an infraction, become also severally liable for the VAT debt and interests due on the transaction. This difference in treatment for VAT taxpayers, compared to other (civil) procedures, is not discriminatory, according to the Belgian Constitutional Court.<sup>140</sup> Besides a bookkeeper, tax consultant or similar professional can further be prohibited to exercise his activities for a period between 3 months and 5 years.<sup>141</sup>

Finally, with regard to the judgment pronouncing an imprisonment, as well as the prohibition to exercise an activity or the closure of an establishment, a judge can demand the public notification in the way he determines, at the expenses of the convicted person.<sup>142</sup>

## 9. Legal consequences of the difference between administrative and criminal sanctions

As mentioned, the VAT code distinguishes between administrative and criminal sanctions, although both can consist of the payment of a fine. However, whereas administrative fines sanction a rather objective outcome that violates VAT rules, criminal fines require a specific intent ('*dolus specialis*') from the person who contravenes knowing and willingly the VAT regulations.

Although envisaging objective situations, administrative sanctions are nonetheless further mitigated by subjective appraisals: different articles exclude the sanction in case of fortuitous cases.<sup>143</sup> This seems in line with recent case law of the Court of Justice, accepting a 'substance-over-form-approach' to allow deductibility of VAT, even in case of clearly erred invoices.<sup>144</sup> However, the recently installed so-called quick fixes rather seem to strengthen a more formalistic approach.<sup>145</sup> Besides, in case of a so-called spontaneous rectification of VAT duties, i.e. before any intervention of the tax administration, proportional fines are entirely remitted.<sup>146</sup> This however requires a full spontaneity, before any administrative intervention. If an investigation is announced, even though

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137. Art. 3 Royal Decree nr. 44.

138. Art. 2 Royal Decree nr. 44.

139. Antwerpen 6 September 2016, (not published).

140. Constitutional Court 12 June 2002, nr. 97/2002, <http://www.const-court.be>.

141. Art. 73ter VAT.

142. Art. 73septies VAT.

143. E.g. although sanctioning wrong invoices, this sanction does not apply in case of a small number of erred invoices with little importance compared to the rest of the activities of a tax payer (art. 70, §2 VAT). The same applies with regard to import-documents. (art. 70, §3 VAT)

144. Cf. CJCE 15 September 2016, C-518/14, Senatex GmbH and CJCE 15 September 2016, C-516/14, Barlis, <http://curia.europa.eu>

145. E.g. An invoice mentioning a wrong VAT number for a further correctly happened transaction no longer suffices to deduct VAT.

146. Art. 3 Royal Decree nr. 41 of 30 January 1987.

not yet executed, judges and administration are rather reluctant to consider rectifications of a taxpayer still spontaneous.<sup>147</sup> Also when its director is investigated, the Antwerp Court of Appeal considered that also the legal person was aware of the discovery of irregularities and could no longer spontaneously rectify.<sup>148</sup>

Whereas the objective description of the infraction is adapted to a more subjective treatment, also the objective application of administrative sanctions is further corrected on subjective grounds: the administration is authorized to reduce or cancel these fines, based on the good faith of a VAT taxpayer. This differs from proportional sanctions already considering a possible range: the administration is allowed to reduce a sanction, even below the legal minimum. The legal ground for this grace has evolved. Initially foreseen in art. 84 VAT, this article has been abolished when a renewed tax procedure was installed. Nonetheless, based on an ancient Decree of 1831 the Ministry of Finance was still entitled for all taxes to cancel fines. Also with regard to VAT, this general right of mercy could hence still be applied. However, in 2018, with regard to income taxes the federal legislator considered, instead of leaving this competence with the Ministry of Finance, it rather should be attributed to the federal Mediation services. A law of 29 March 2018 hence abolished the competence of the Ministry of Finance to hand it over to the federal Mediation Services.<sup>149</sup> However, this transfer only applied for income taxes and some particular taxes. For VAT, it remained the competence of the Ministry of Finance. This was, hardly convincing, motivated by referring to differences in the process to determine VAT-penalties.<sup>150</sup> To nonetheless provide objectivation in the application of this particular right of mercy, the Minister of Finance subsequently issued a federal instruction to its administration listing the conditions under which it can be applied,<sup>151</sup> and the limited number of infringements for which it can still be applied.<sup>152</sup> The more logical application would evidently be to also hand over this competence to the specialized department of the federal Mediation services.

Although being an administrative competence, the exercise of the administrative right of mercy can be challenged in front of the courts. The exact borders of this judicial control remain however unclear. In any case a judge can verify whether the administrative application was in line with fundamental principles of good governance and in conformity with the (scarce) regulation concerning this right of mercy. However, it remains disputed whether a judge can offer grace, based on a consideration of the proportionality himself.<sup>153</sup>

The previous discussion cannot be confused with the international or European qualification of a sanction. Indeed, the domestic qualification as an administrative sanction does not exclude the application of art. 6 ECHR. Based on its general application, the prescription of a particular behavior, the repressive character of the fine and the level of the sanction even administrative fines can qualify as a criminal sanction and be submitted to the fundamental rights of art. 6 ECHR.<sup>154</sup> For

147. K. HEYRMAN, "Strafbepalingen" in H. VANDEBERGH, *BTW-Handboek Editie 2019*, volume II, Intersentia, Brussel 2020, p. 1816

148. Antwerpen 10 January 2000, *TFR* 2000, 702.

149. Law of 29 March 2018 extending the mission and enforcing the role of the Federal Mediation Services, *Belgian Gazette* 13 April 2018.

150. Cf. G. CALLAERT, "Na 187 jaar kan de Wetstraat geen fiscale gratie meer verlenen", *Fisc. Act.* 2018, nr. 15, 1–7.

151. A first similar infringement in a period of 4 years, committed in good faith (whereas bad faith has to be proven by the administration), all VAT due must have been paid and all declarations have to be completed, and finally an individual and motivated request for mercy should be send over to the particularly competent administration.

152. Internal instruction nr. 2018/I/41 of 13 June 2018.

153. In a judgment of 15 May 2008, the Constitutional Court admitted the competence for a judge to reduce sanctions, instead of merely verifying a correct administrative application. However, as the case concerned an administrative sanction qualified as a criminal sanction under art. 6 ECHR, it remains unclear whether this judicial competence would also be recognized for mere administrative sanctions. Cf. Constitutional Court 15 May 2008, nr. 79/2008, <http://www.const-court.be>.

154. Cf. ECHR 24 February 1994, *Bendenoun v. France*, subsequently being repeated several times. E.g. in a Belgian context: ECHR 25 September 2007, *Loncke v. Belgium*, <https://hudoc.echr.coe.int>.



administrative VAT fines in particular, this has been confirmed by the Belgian Supreme Court,<sup>155</sup> as well as the Constitutional Court<sup>156</sup> Subsequently, also the lower Belgian courts do apply these principles.

Once qualified as a criminal sanction several fundamental principles are applicable, such as e.g. the right to silence, the right of being heard,<sup>157</sup> a treatment within a reasonable time and the retroactive application of the lesser sanction.

The most disputed consequence however concerns the right of access to a judge with full competences. Which considerations can a judge take into account to reduce an administrative sanction when it qualifies as a criminal sanction under art. 6 ECHR? Two decades ago the dominant Belgian view defended a mere legality control for judges. Although the Constitutional Court accepted the judicial competence to challenge the opportunity of an administrative sanction,<sup>158</sup> the Supreme Court limited the judicial control to a mere legality control. Even after a judgment of the ECHR concerning a Belgian context,<sup>159</sup> this limiting interpretation was still maintained. According to the Supreme Court a judge could not, based on his own particular considerations, reduce an administrative sanction. He is only authorized to verify whether the administration respected a certain proportionality, and needs to recognize a large margin of appreciation for the administration.<sup>160</sup> The lower courts nonetheless did not always follow this point of view and even literally criticized the position of the Supreme Court as a violation of art. 6 ECHR.<sup>161</sup> However, even after a repeated positioning of the Constitutional Court<sup>162</sup> and a consenting opinion of the Court of Justice,<sup>163</sup> the Supreme Court maintained its position, although slightly nuancing: a judge can verify whether the administration has appreciated the opportunity of a sanction, but cannot replace the administrative judgment by its own subjective appreciation of particular facts of a case. Nonetheless, whereas in the past several judgments of the Courts of Appeal reducing administrative sanctions were annulled, in practice more recent judgments judging about the proportionality of (proportional and non-proportional) administrative fines seem to pass the legality control of the Supreme Court.<sup>164</sup>

Other legal aspects linked to criminal sanctions however, were not recognized for administrative sanctions, regardless of their 'criminal' qualification under art. 6 ECHR. This first considers the unity of intent: when different criminal acts are being committed in one united aim, only the heaviest sanction applies.<sup>165</sup> The Constitutional Court accepted that in case of 'wrong invoices' such application would limit too much the possibility to sanction and challenge the dissuasive effect of the sanction.<sup>166</sup> A cumulation of sanctions based on the number of invoices was hence accepted by

155. E.g. Supreme Court 25 May 1999, *FJF* 1999, nr. 26.

156. E.g. Constitutional Court 12 June 2002, nr. 96/2002, <http://www.const-court.be>.

157. Although the ECHR confirmed that in particular cases the possibility of a written intervention could suffice. Cf. ECHR 23 November 2006, *Jussila v. Finland*, <https://hudoc.echr.coe.int>. Cf. T. JANSEN, "Ook geringe fiscale sancties vallen onder artikel 6 EVRM ... maar niet noodzakelijk met alle proceswaarborgen", *Fisc. Act.* 2008, nr. 10, 6–9. The author suggests that also other protective measures might be reduced, in case of minor administrative sanctions that nonetheless qualify for art. 6 ECHR.

158. Constitutional Court 24 February 1999, nr. 22/99, <http://www.const-court.be>.

159. ECHR 4 March 2004, *Silvester's Horeca Service vs Belgian State*, <https://hudoc.echr.coe.int>

160. Cf. e.g. Supreme Court 21 January 2005, nr. C.020572.N; 11 March 2010, nr. C.09.0096.N; 11 March 2011, nr. F.10.0069.N; and 18 April 2013, nr. F.11.0142.F, <http://jure.juridat.just.fgov.be>.

161. Cf. e.g. Court of First Instance Namen on 16 March 2005, nr. 1398/2004, *FJF* 2005, afl. 10, 960; 25 October 2006, nr. 2014/2004, *RGCF* 2007, afl. 2, 121.

162. Constitutional Court 15 May 2008, nr. 79/2008, <http://www.const-court.be>.

163. CJCE 20 June 2013, C-295/12, *Plovdiv*, <http://curia.europa.eu>

164. Cf. e.g. Supreme Court 18 January 2018, *FJF* 2018, nr. 85 and Supreme Court 17 May 2013, *RABG* 2014, 696.

165. Art. 65 Criminal Code.

166. Constitutional Court 12 June 2002, nr. 96/2002, *A.F.T.* 2003, 344, note D. JAECQUES.

the Court of Appeal of Brussels, considering that it was not disproportional.<sup>167</sup> However, particularly in case of cumulating, the possibility to judge the proportionality of the (combined) sanctions becomes all the more important. Second, when judging a criminal case, a judge can also delay a sanction<sup>168</sup> or even suspend his conviction.<sup>169</sup> Given the evolution of administrative processes towards an equalization with criminal processes, already a decade ago legal doctrine pleaded to also offer these possibilities to individualize the application of sanctions.<sup>170</sup> With regard to the option to *delay* a sanction, the Constitutional Court considered it discriminatory if a judge would not have this competence with regard to VAT fines.<sup>171</sup> This judgment however caused judicial uncertainty. Whereas some judges granted delay,<sup>172</sup> others considered it an assignment to the federal legislator. Although violating the constitution, they would not be competent to delay a sanction without legal ground. Would this unconstitutionality also make art. 70 VAT, providing the administrative sanction (without an option to delay), inapplicable? The Supreme Court relaunched this question to the Constitutional Court confirming that a judge cannot grant delay without a legal ground. This led the Constitutional Court to a rather technical solution<sup>173</sup>: the legal sanction still does apply, but a judge should always evaluate whether or not he would grant delay, if this option had been foreseen by the legislator. In case he would not grant this favor, he can still apply the legal sanction. In case he would be inclined to grant delay, he is incompetent, making the legal sanction unconstitutional and therefore no longer applicable. As subsequent jurisprudence confirmed, this final approach installed the granting of an unconditional waiver in VAT cases. Whereas in other criminal cases delay can be submitted to conditions an offender has to fulfill during a time, in VAT cases it would imply an immediate remission of the fine.<sup>174</sup> Only when the legislator introduces the possibility of delay in the VAT tax code, this can be subject to the respecting of conditions during a period of time. With regard to the option to *suspend* the conviction, the Constitutional Court accepted that a judge can not apply this favor, when judging about an administrative sanction. The judicial process is only about verifying the administrative sanction and does not concern the offence itself.<sup>175</sup> Therefore, it is not discriminatory, that a judge, verifying an administrative sanction with regard to VAT, can no longer grant a suspension of the conviction.<sup>176</sup>

So far however, even after more than a decade of constant jurisprudence, it is unfortunate to notice that the legislator still remains reluctant to deal with all the intolerable consequences of the domestic legal differences between administrative and criminal sanctions. If for each separate

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167. Court of Appeal Brussels 22 May 2013, *FJF* 2014, nr. 173.

168. Although being convicted, the pronounced sanction is not due, if the convicted person respects some conditions during a certain period of time.

169. Although facts are considered to be proven, nonetheless the conviction itself will not be pronounced, if the offender respects particular conditions during a certain period of time.

170. N. MUYSHONDT, "Kan fiscale rechter «voorwaarde-lijke straf» opleggen?", *Fisc. Act.* 2008, nr. 41, 9–12.

171. Constitutional Court 6 November 2008, nr. 157/2008, <http://www.const-court.be>.

172. E.g. Court of Appeal Antwerp 7 September 2010, *FJF* 2011, 146.

173. Constitutional Court 21 February 2013, nr. 13/2013, <http://www.const-court.be>. This was subsequently repeated (with regard to income taxes) in Constitutional Court 27 March 2014, nr. 55/2014, *TFR* 2015, 87, note BALLON and (for another administrative sanction with regard to VAT) in Constitutional Court 20 February 2020, nr. 32/2020, *Fisc. Koer.* 2020, 4, 91.

174. Cf. Supreme Court 12 January 2018, *JLMB* 2018, afl. 24, p. 1121, note PARMENTIER and MOINEAU. See also Court of First Instance Liege 21 March 2019, *FJF* 2019, nr. 170 and Court of appeal Ghent 3 February 2015, *RGCF* 2015, 479.

175. Therefore Desterbeck cannot be followed where he assumes that the lack of alternative sanction would not be considered unconstitutional. Whereas in a criminal process a judge can apply alternative sanctions (such as e.g. an anklet or community service), these options are neither foreseen for the verification of administrative sanctions (qualifying as criminal under art. 6 ECHR). The author defends a parallelism with the exclusion of the option to suspend. Cf. F. DESTERBECK, "Grondwettelijk Hof herhaalt: uitstel voor boetes moet kunnen", *Fisc. Act.* 2020, nr. 7, 10–11. However, these alternative sanction once more consider the sanction and not the offence itself. Thinking of alternative sanctions could therefore offer a refreshing view.

176. Constitutional Court 21 February 2013, nr. 13/2013, <http://www.const-court.be>.

administrative sanction with regard to a particular tax legislation the same questions have to be asked to the Constitutional Court<sup>177</sup> or a tax payer has to rely on “creative judges” ...

## 10. Multiplicity of (legal or natural) convicted persons

In general, a legal entity can also be convicted for committing VAT fraud. Legal persons can also be sanctioned.<sup>178</sup> Possible sanctions are a fine, the confiscation of goods, the dissolution of the entity, a (temporary or final) prohibition to exercise certain activities, the (temporary or final) closing of one or more of its establishments and the public notification of a judgment.<sup>179</sup> Whereas behavior is sanctioned with imprisonment, this is turned into a fine (multiplied with the legal factor) according to different formula.

Besides, also a combined conviction of accomplices and partners in crime can be imagined. If a natural person is acting for the interest of the legal person, both can be convicted together. In most cases, however, it will be up to the judge to decide who committed the biggest offense. Multiple persons can nonetheless all be sanctioned, but if they are criminally convicted for a same act, they cannot be considered civilly liable for the criminal sanction.<sup>180</sup>

In addition, accomplices are jointly and severally responsible for all taxes and interests due by the initial taxpayer.<sup>181</sup> Even in case of delay of the sanction, suspension of the conviction or a mere guilty verdict without sanction, as well as in case of prescription of the criminal procedure, this common responsibility is maintained.<sup>182</sup> It applies automatically without having to be pronounced by a judge. Meant to guarantee the recovery of tax debts, it is not considered to be punitive, but only curative. Hence, further modalities with regard to criminal sanctions (delay, suspension, taking into account mitigating circumstances, ...) are not applicable.<sup>183</sup> which is not considered unconstitutional.<sup>184</sup>

A particular responsibility further exists for natural and legal persons with regard to both administrative and criminal VAT-fines pronounced against their appointees, directors, business managers or liquidators acting in the exercise of their function. They are jointly and severally responsible for the payment of these fines.<sup>185</sup>

Finally, it can be noticed that the internationally accepted ‘ne-bis-in-idem’-principle only envisages a same person being convicted twice. This has been confirmed in judgments of the ECHR,<sup>186</sup> the CJCE<sup>187</sup> and also been accepted by the Belgian Supreme Court.<sup>188</sup> The criminal prosecution of a legal person does not avoid a natural person being administratively sanctioned and *vice versa*. Nonetheless however, lower courts, when deciding on the proportionality of administrative sanctions of a legal person, also took into account previous criminal sanctions of a natural person, even

177. Cf. E.g. Court of First Instance Namen 27 February 2019, *FJF* 2019, nr. 263.

178. Art. 5 Criminal Code.

179. Art. 7 Criminal Code.

180. Art. 50 *bis* Criminal Code.

181. Art. 73 *sexies* VAT.

182. Art. 73 *sexies* VAT has been replaced by Law of 26 March 2018 to make this more explicit.

183. Supreme Court 20 January 2009, *FJF* 2009, nr. 271.

184. Constitutional Court 9 July 2009, nr. 105/2009; 16 July 2009, nr. 117/2009 and 20 October 2009, nr. 159/2009, <http://www.const-court.be>.

185. Art. 73 *sexies*, al. 4 VAT.

186. ECHR 20 May 2014, *Pirttimäki v. Finland*, <https://hudoc.echr.coe.int>.

187. CJCE 5 April 2017, C-217/15 and C-350/15, *Massimo Orsi and Luciano Baldetti*, <http://curia.europa.eu>

188. Supreme Court 3 January 2012, nr. P.11.0894.N and 27 March 2013, nr. P.12.1945.F, <http://jure.juridat.just.fgov.be>

though accepting that the ‘ne-bis-in-idem’-principle technically did not apply, as two different persons were being sanctioned.<sup>189</sup>

## 11. Combination of administrative and criminal sanctions

When considering a coordination of administrative and criminal sanctions, one should consider the ‘ne-bis-in-idem’-principle. This has been recognized as a fundamental principle of Belgian law.<sup>190</sup> However, both in the domestic, as well as in an international context, the interpretation of this principle has evolved during the last decade.<sup>191</sup>

In a Belgian context, the initial prohibition of a double sanction was interpreted rather strictly. Even the combination of a criminal and administrative penalty of a same person for the same facts was considered acceptable, if a judge, when determining the proportionality of a criminal sanction, took into account previously applied administrative sanctions.<sup>192</sup> Subsequently, as already mentioned with regard to the combination of investigation procedures, a Law of 20 September 2012<sup>193</sup> introduced a so-called ‘una via’-concept. This law not only envisaged investigation procedures, but also applicable sanctions. It aimed to suspend administrative procedures, in case of a criminal prosecution. In line with this reasoning art. 72 VAT provided the suspension of administrative fines, once a criminal procedure started. In case of a criminal judgment, administrative fines were definitively no longer due. If the charges were dropped, the administrative procedure (including fines) could recontinue. However, as mentioned, parts of the una via-law were considered discriminatory and annulled by the Constitutional Court. The relevant parts of art. 72 VAT were also abolished.

Internationally also an evolution can be noticed. In the cases *Zolotukhin*<sup>194</sup> and *Ruotsalainen*<sup>195</sup> the ECHR broadened the scope of the ‘non bis in idem’-principle not requiring a similar technical qualification of an infraction. The principle already applied when a person would be prosecuted for substantially the same facts, when being already punished with a criminal sanction, as defined under art. 6 ECHR. The Court of justice however accepted a combination of an administrative (tax) sanction and a criminal sanction, as long as the first sanction did not qualify as a criminal sanction.<sup>196</sup> Domestic jurisprudence hence declared administrative (tax) sanctions, internationally qualified as a criminal sanction, inadmissible, if a person was already criminally prosecuted and sanctioned. In case of final tax sanctions, a further criminal procedure was considered inadmissible.<sup>197</sup>

This approach was further adapted in the cases *A. & B. v. Norway*<sup>198</sup> and *Luca Menci*.<sup>199</sup> Both the ECHR and the CJCE accepted the cumulation of an administrative and criminal procedure, even if the administrative sanction internationally qualified as a criminal sanction. This could however

189. E.g. Court of First Instance Ghent 29 September 2014, *TFR* 2015, 473.

190. Cf. Supreme Court 22 March 2016, P.15.0736.N; 14 October 2015, P.15.0609.F; 25 February 2014, P.13.1409.N., <http://jure.juridat.just.fgov.be>. See also S. GNEDASJ and H. VANHULLE, “Not even God judges twice for the same act ...and tax offence”, *TFR* 2014, nr. 466, p. 643–686.

191. Cf. K. HEYRMAN, “Strafbepalingen” in H. VANDEBERGH, *BTW-Handboek Editie 2019*, Gent, Intersentia 2020, p. 1819 ff.

192. Supreme Court 5 February 1999, nr. C970441N and nr. C980398N, <http://jure.juridat.just.fgov.be>.

193. *Belgian gazette* of 22 October 2012.

194. ECHR 10 February 2009, <https://hudoc.echr.coe.int>

195. ECHR 16 September 2009, <https://hudoc.echr.coe.int>.

196. CJCE 26 February 2013, C-617/10, Aklagaren, <http://curia.europa.eu>

197. E.g. Court of Appeal Antwerpen 27 June 2012, *TFR* 2013, 978.

198. ECHR 15 November 2015, <https://hudoc.echr.coe.int>.

199. CJCE 20 March 2018, C-524/15, Luca Menci v. Procura della Repubblica, <https://hudoc.echr.coe.int>.

only be accepted in case of a close connection between both procedures with complementary goals, when there has been taken care of a close alignment, and under which the total burden of sanctions is not disproportionate with regard to the seriousness of the committed infractions. Both procedures could be qualified as two parts of a single integrated sanction mechanism. According to Gnedasj, in a Belgian context, the cumulation of administrative and criminal penalties would not fulfill these conditions: both sanction a certain behavior and therefore do not serve a complementary goal. Besides, although when judging about proportionality previous sanctions can be taken into account, but this was not legally required.<sup>200</sup> This last criticism has however subsequently been covered: as from 1 January 2020 all federal tax codes provide that a judge, when determining a criminal sanction, has to take into account previous fines and tax increases.<sup>201</sup> In the subsequent case *Johannesson vs Iceland*<sup>202</sup> the ECHR applied its own criteria to a combination of a tax penalty with a criminal sanction and concluded that the 'ne-bis-in-idem'-principle had been violated: both sanctioning procedures coexisted unconnectedly with regard to e.g. produced evidence or time periods. They could therefore not qualify as connected procedures. Based on this jurisprudence Gnedasj concludes that, given the autonomy of both procedures, also the Belgian cumulation of administrative (tax) penalties and criminal sanctions, would still violate the 'ne-bis-in-idem'-principle.<sup>203</sup>

Nonetheless, after the A.&B. case, also domestic jurisprudence has accepted a combined administrative and criminal prosecution,<sup>204</sup> or the cumulation of a tax increase (an administrative sanction in income taxation) with an administrative VAT-fine for substantially the same facts.<sup>205</sup>

## 12. Prescription period for interests and sanctions

VAT-debts can generally be recovered during a period of three years after the year in which they have arisen. This also applies for interests and/or administrative sanctions. In case of incorrect declarations, no declarations or (domestic or foreign) indications of a higher VAT debt being due, the prescription period extends to 7 years (again for VAT, interests and administrative penalties).<sup>206</sup> Whereas according to the Supreme Court the mentioned indications to prolong the prescription period had to emerge within the first three year period,<sup>207</sup> the text of the law has been adapted as from 14 July 2016. From then off the text explicitly mentions that indications arising after this initial three year period can also trigger the 7 year period to charge VAT, interests and apply administrative sanctions. Besides, also a particular two year prescription period applies for the recovery of the tax debt, interests, administrative sanctions and procedural costs in case the tax base has been raised as a result of a value estimation of an expert.<sup>208</sup> An additional option for the tax administration to recover damages, caused by tax fraud, does not apply with regard to interests or sanctions and will therefore not further be analyzed.<sup>209</sup>

The starting point of the prescription period demands careful attention. When a VAT declaration is corrected and additional VAT is levied, this VAT might also be deductible. However, in that case,

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200. Cf. S. GNEDASJ, "EHRM opent achterpoortje voor dubbele bestraffingen in fiscale en strafzaken. Grijpt België weer naast de prijzen?", *Fisc. Act.* 2016, nr. 40, 2–12.

201. Art. 73 *bis* 1 VAT and 450 *bis* ITC. Cf. F. DESTERBECK, "Nieuw wetsvoorstel past strafrechtelijke vervolging in fiscale zaken toch aan", *Fisc. Act.* 2019, nr. 9, 7–9.

202. ECHR 18 May 2017, <https://hudoc.echr.coe.int>

203. S. GNEDASJ, "Ne bis in idem na het arrest A en B t. Noorwegen: alive and kicking!", *Fisc. Act.* 2017, nr. 20, 6–11.

204. Supreme Court 21 September 2017, F.15.0081.N, , <http://jure.juridat.just.fgov.be>

205. Court of Appeal of Antwerp 14 February 2017, *FJF* 2017, nr. 154.

206. Art. 81 *bis* VAT.

207. Supreme Court 27 April 2012, F.11.0069.F, , <http://jure.juridat.just.fgov.be>

208. Art. 81 *bis*, §2 VAT.

209. See in this context, N. DE BECKER, note under Supreme Court 13 November 2019, *Fisc. Koer.* 2020, 17–23.



the three year period to levy sanctions only starts from the moment of the correction and asked deduction, and not from the moment of the initial operation.<sup>210</sup>

All mentioned prescription periods can be rebounded or suspended according to the common applicable rules of civil law.<sup>211</sup> In case of a bounce a new time period of 5 year starts, irrespective of the preceding period (2, 3 or 7 years). This can be because a tax payer freely accepts to renounce (before the first period has ended), or because a matter is brought before the Court. A VAT declaration, as well as not reimbursing a VAT-tax credit to a taxpayer, are also considered to bounce the limitation period.<sup>212</sup> An act against one debtor immediately bounces the limitation against all severally liable debtors.<sup>213</sup>

However, with the introduction of a common tax code for the recovery of (federal) tax debts as applicable from 1 January 2020, the mere notification of a payment order send by a lawyer or bailiff, has been explicitly excluded. This nonetheless still bounces the prescription, as it has been reintegrated in art. 24 of this new common code. In addition art. 83, §1 VAT has also been supplemented. Henceforth, it explicitly provides for the suspension of the delay in case of any legal procedure with regard to the application or the recovery of the taxes, interests or sanctions, brought before the court by the administration, the taxpayer or any other interested party. Besides, the prescription period is neither running in case a creditor cannot legally claim his debts.<sup>214</sup> This could for instance be the case if the tax collector participates in a procedure of bankruptcy of a tax payer.

These administrative time-limits differ from the prescription to apply a criminal sanction. As far as criminal sanctions are concerned, VAT contraventions qualify as 'misdemeanors'. This implies a limitation period of 5 years to sanction, starting from the time the misdemeanor has been committed.<sup>215</sup> However, also this term can be bounced or suspended by the administration through investigation or prosecution acts taking place within the first period.<sup>216</sup> Particular attention further is required in case of forgery. Being considered a continuous misdemeanor, as long as the use of false documents resorts effect, the time-limit is supposed not to take off. However, such interpretation would avoid any prescription. Therefore this point of view is challenged in legal doctrine, but has not yet been fully cleared out in jurisprudence of the Supreme Court.

### 13. Conclusion

Whereas VAT is based on a European directive, rules concerning procedures to establish the tax, as well as sanctioning possibilities are almost entirely left to the individual Member States. Only the last decade, as the fight against VAT fraud has become one of the focus points at a European level, the necessity of a more coordinated approach becomes clear and new initiatives emerge in the fight against tax fraud. In order to develop such more harmonized approach, it is necessary to get an understanding of the rules applicable in each individual Member State.

This article answered this question from a Belgian approach. Even though not focusing on too particular technical details, but rather describing the general common lines, it becomes clear that procedural rules with regard to investigative and sanctioning competences of the tax administration continuously remain under debate and are often changed in reaction to new evolutions. Although not disposing of one general procedural code (except for the most recent project with regard to

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210. CJCE 9 July 2009, C-483/08, *Stade Luc Varenne vs. Belgian State*, <http://curia.europa.eu> confirming the point of view of the Belgian Court of First Instance of Mons.

211. Art. 83, §1 VAT.

212. Supreme Court 25 October 2013, F.12.0072.F, , <http://jure.juridat.just.fgov.be>.

213. Art. 2249, §1 Civil Code.

214. Art. 2251 Civil Code.

215. Art. 21, 4° Criminal Procedure Code.

216. Art. 22 Criminal Procedure Code.

the recovery of tax debts), Belgian domestic investigation procedures and sanctioning competences tend to harmonize between the different taxes. This might justify leaving the centre of gravity for tax procedures at a domestic level, but inevitably complicates coordinated reactions against cross border tax fraud.

At least still interesting challenges lie ahead of us, regardless of whether a rather domestic, or common European answer will be formulated to deal with them. One particular aspect in this context seems the protection of a taxpayer. Whereas the last decade in particular strengthens the administration to act against VAT-fraud, one may not neglect fundamental principles to protect the taxpayer, guarantee a fair trial and a proportionate sanctioning in case of conviction. Several challenges in this respect have been illustrated in this article.

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