# The Payment of Fiscal and Social Debts with Seized Money, that Has to Be Reimbursed, in Belgium

## Where Treasury, Social Security, and Justice Meet

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**Article**

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By law of 27 March 2003, the Central Office for Seizure and Confiscation (COSC) was created in Belgium. The new institution, established within the Office of Public Prosecutors, assists the judicial authorities in criminal matters in the areas of seizure of assets, the implementation of criminal procedure with a view to the confiscation of assets, and the enforcement of final and conclusive sentences and orders involving confiscation of assets.[1]

One of the forms of assistance consists of the management of all cash, seized in criminal matters all over the country.

By law of 20 July 2005, a new provision was inserted into the COSC law.[2] The new Art. 16*bis* authorized the COSC to inform those public servants of the federal government, the communities, and the regions responsible for the collection of taxes and those institutions responsible for the collection of social security contributions with regard to the data at the COSC's disposal.

In practice, this competence is exercised when seized money has to be reimbursed, either as the result of a decision of the magistrate dealing with the case or as the result of an acquittal by the court.

The person or institution that is informed of the data verifies whether the beneficiary owes an amount of money. If this is the case, the debt of the beneficiary is paid off.

On the occasion of the enactment of the law of 20 July 2005, the remark was made that, by insertion of the new Art. 16*bis* into the COSC law, an entirely new competence was given to the Office.[3]

From 2007 to 2009, a yearly amount of approximately 2,5 million € was paid to the Treasury by virtue of the new provision. In 2010, an amount of 10 million € was paid. This was the result of the closing of a number of exceptionally important cases.

Payments to the institutions responsible for the collection of social security contributions have only been taking place since 2009. The Royal Decree, required in order to execute these payments effectively, was not adopted until 2009[4].

In this contribution, I will indicate first how the technique of payment of fiscal and social debts with sums of money seized in criminal matters emerged. This is mainly due to the "multi agency" approach, which is typical for the COSC.

Subsequently I will clarify what line of action is followed in practice to pay fiscal and social debts with seized money that has to be reimbursed. In this area, a development can be seen. The procedure that was initially used, the procedure of garnishment, was replaced in 2007 by the procedure of statutory compensation, which is much easier.

# I. The "Multi Agency" Approach of the Office

## 1. General

The practical implementation of the key tasks of the COSC lies partly in the scope of various other public services. One of the main aims of the Office was precisely to improve cooperation between the judiciary and the different agencies that intervene in the execution of seizures and confiscations in criminal matters.

Thus, seizures in criminal matters are generally carried out by the police, be it that the police act under the responsibility of the public prosecutor or the investigating judge in charge of the investigation.

When it comes to confiscations, the Belgian law enables only criminal confiscations, which are the result of a decision of a criminal judge. When a criminal judge passes an order of confiscation, the sentence is executed by the administration of the Patrimonial Services of the Federal Public Service Finance,[5] by order of the public prosecutor. The main task of this administration is the sale of assets that are private property of the State.

In most cases, the execution of a confiscation order in practice comes down to selling the confiscated assets for the benefit of the State. The execution of confiscation orders thus follows naturally from the traditional field of activity of Patrimonial Services.

In order to exercise its multitude of powers as efficiently as possible, the COSC has opted for a "multi agency" approach from the outset. In concrete terms, this means that the Office cooperates with liaison officers from government services who are charged with the execution of seizures and confiscation orders. The liaison officers are still part of their administration or service of origin. However, they are employed in the offices of the COSC where they have their own databases at their disposal. Their cooperation with the Central Office is organized by law.[6]

## 2. The Six Liaison Officers

At present, the COSC makes an appeal to the services of six liaison officers. Two of them belong to the police and four to the Federal Public Service Finance. Two of the four are part of the Patrimonial Services, the other two belong to the "Taxes and Tax Levy" administration.[7]

Relying on the cooperation of two police officers and two civil servants from the administration of the Patrimonial Services seems logical. The cooperation with two civil servants of the "Taxes and Tax levy" administration seems less obvious at first glance.

Nevertheless, the presence of these civil servants is also highly important for the execution of confiscation orders.

We know that seizure and confiscation are two different concepts,[8] and yet they are somehow connected.

When an asset has been seized during a criminal investigation, the execution of the confiscation order entails no special difficulties. The seized asset is transferred to Patrimonial Services by the judicial services. The confiscated asset is subsequently to be sold in a public auction in practice. However, this is not always the case. The confiscation, which, according to Belgian law, is always the result of the verdict of a criminal judge, means that the property of the seized asset is transferred to the patrimony of the State. The State can dispose of the asset as the new owner. Hence, confiscated real estate can, for example, be used as an office building.

The situation is different when the confiscated asset could not be seized during the criminal investigation. In this case, the confiscated asset has to be traced among the property of the condemned person. When a sum of money is confiscated but not seized, it has to be collected by a means of a civil procedure.

Furthermore, in addition to the "direct confiscation" method, the Belgian law also provides for a form of value-based confiscation, the "confiscation by equivalent."[9] This is the confiscation of a sum of money that corresponds with the value of the criminal property of the condemned person. Unlike the result of a direct confiscation, a confiscation by equivalent does not result in an immediate transfer of the confiscated sum of money to the State. The confiscation by equivalent sets in motion a claim on the part of the State to the property of the condemned person. Here, a concurrence of creditors (*concursus creditorum*) can arise between the State and other creditors of the offender.

In the case of confiscation by equivalent, assets seized during the criminal investigation are not directly transferred to the property of the State, but serve as collateral for the claim by the authorities.

It is the responsibility of the liaison officers of the "Taxes and Tax Levy" administration to provide assistance to their colleagues in Patrimonial Services with regard to the execution of the confiscation of assets that could not be seized during the criminal investigation and to confiscations by equivalent.

However, it is precisely the efforts of the civil servants of the "Taxes and Tax Levy" administration, who are specialists in the recovery of taxes, that has provided the know-how that is necessary to enable the payment of fiscal and social security contributions with seized money that has to be reimbursed.

# II. The Procedure

As mentioned above, the procedure for paying fiscal and social debts has evolved over time. Initially, the traditional technique of garnishment was used. Since 2007, this technique has been replaced by a system of statutory compensation.

## 1. Garnishment

### a) General

In every European country, real estate has repeatedly been the focus of attention by the legislator in tax matters, not only as the subject of all types of taxes but also as security for the payment of due taxes.

The Belgian law assigns the treasury a right of mortgage on the real estate of a specific taxpayer, and his or her spouse or children, to the extent that the payment of his taxes can be the subject of prosecution against these relatives' assets.

Initially, this right of mortgage was *obscure*, which means that the right existed even if it was not registered in the register of mortgages. At the same time, the right was temporary in the sense that it guaranteed only the payment of the taxes during the year they were established and the following year.

By law, the right of mortgage expired when the tax collector did not use his right of mortgage to recover the taxes due.

In case of sale of the mortgaged assets, the notaries[10] were under the obligation to pay the taxes that had not yet been paid by the taxpayer. The amount due was deducted from the purchase price and paid directly to the treasury. In order to know the amount of the due taxes, the notary was obliged to notify the treasury of the intended sale.[11]

### b) The statutory obligations of the notaries

The statutory right of mortgage of the treasury still exists. Over the years, however, the system was conformed to modern standards, and nowadays there are practically no longer any differences between the right of mortgage of the treasury and conventional mortgage, as is common in the commercial credit system. The mortgage of the treasury must be registered in the register of mortgages and, just as for other mortgages, it is ranked in accordance with the date of registration.

A relic of the obscure right of mortgage from former years still remains, however, and is to be found in the obligations that have to be met by notaries when they sell real estate.

A notary who is requested to draw up the act of sale of real estate is obliged to notify the competent tax and VAT collectors as well as the institutions responsible for the collection of social security payments. The collectors and institutions have a period of 12 days at their disposal in which they can inform the notary of the amounts that are due by the vendor if they deem this necessary. The notified amounts are due peremptorily, and it must be legally possible to take out a mortgage for the amounts due.

The message of the collector or institution functions as a notice of garnishment for the notary, regarding the funds he receives as a result of the sale. In addition, the notification obliges the notary to hand over the proceeds he disposes of as a result of the sale, corresponding to the amount due.

The notification of the collector or institution does not prevent the sale itself. After the sale, two possibilities exist. The first possibility is that the revenue of the sale is sufficient to pay off all the vendor's debts, including the notified fiscal and social debts. In this case, the notary is obliged to pay the fiscal and social debts with the profits of the sale. The second possibility is that the revenue of the sale is not sufficient to pay the fiscal and social debts. In this case, the notary is obliged to notify the collector and institution a second time.

From the moment of this notification, the competent authorities have a period of eight working days to take out a mortgage on the sold real estate – as if no sale had taken place.

Nowadays, such notifications, laid down in the law, are exchanged electronically. Initially, the system was designed for direct taxes. Later on, the implementation of the system was copied for uses in matters concerning VAT and social security.[12]

### c) The procedure initially used by the COSC

The system that was initially used served as a model for the new provisions of the law of 20 July 2005, giving the COSC a new competence. Its application in practice was easy because no real estate was involved.

Of course, the most obvious reason for a seized sum of money is its confiscation. If a criminal judge confiscates a sum of money managed by the Central Office, the confiscated sum is immediately transferred in its entirety to the Patrimonial Services of the Ministry of Finance.

In some cases, however, seized money must be returned to the person. For example, this could involve the case of an acquittal or simply a case where a public prosecutor or an investigating judge acted too eagerly and found, after seizure, that it happened erroneously.

In such cases, the liaison officers of the Office, who have the respective databases at their disposal, verified whether the beneficiary of the reimbursement had fiscal or social debts. If this was the case, the tax collector was informed in order to give the liaison officers the opportunity to seize the amount due to the treasury. Of course, the beneficiary of the reimbursement was also informed.

If the act of seizure was not contested before the competent court by the beneficiary of the reimbursement, the procedure continued, and the fiscal debt was effectively paid with the amount of the reimbursement.

It should be remarked that hardly any court cases were started against this procedure.

### d) The disadvantages of the execution procedure

Nevertheless, this procedure also had its disadvantages. Even when the procedure is carried out electronically, it necessitates an extensive management system. Time-consuming delays have to be taken in consider-

ation. The formalities can cause errors that eventually have to be resolved in a judicial procedure. Therefore, the cost and length of a judicial procedure must be taken into consideration.

The most significant disadvantage, however, is that other creditors of the seized person can also exercise their rights to the funds that are the subject of the garnishment. When several creditors assert their rights on the same asset or sum of money, a special procedure must be initiated to divide the funds between the creditors who claim parts of it.

## 2. Statutory Compensation

The number of implementations of the new Art. 16*bis* of the COSC law increased exponentially immediately after its introduction. The new system was applied in practice 48 times in 2005, 86 times in 2006, and 129 times in 2007. This caused an additional workload but no additional budget was put at the Office's disposal.[13]

Consequently, it became essential to take appropriate measures. A practical solution was found by the introduction of the statutory compensation *in fiscalibus*, which was made possible by the Belgian legislator in 2004.

Statutory compensation was introduced in the COSC law by law of 27 April 2007,[14] in substitution of the former technique of garnishment.

### a) Compensation in Belgian civil law

As with most legal systems, the Belgian civil law uses compensation as a means of termination of contracts.[15] Under certain conditions, the debt of a person is cancelled out by a claim on the same person, either according to the law, a judicial decision, or an agreement between the parties concerned.

The Belgian Court of Cassation, however, always ruled against the application of the rules of statutory compensation *in fiscalibus*.[16] This point of view excluded not only the application of the rules of compensation between mutual debts and claims of the treasury and the taxpayer, but also resulted in it being impossible to compensate debts and claims between the various administrations of the Federal Public Service Finance.

Thus, a collector of direct taxes who wanted to settle the debt of a certain taxpayer by means of a VAT credit of the same person had no other choice but to seize the amount of the VAT credit in the possession of his colleague at the VAT administration.

### b) The Program Law of 27 December 2004

All of this changed when the Belgian legislator enabled the compensation of reciprocal debts and claims with regard to direct taxes and VAT.[17]

Furthermore, the new law prescribed that statutory compensation continue to be applicable in the case of seizure, transfer, concurrence, or insolvency procedures.

The validity of this provision was challenged several times before the Belgian Constitutional Court because of alleged violations of the constitutional principle of equality, more specifically the equality between creditors.[18] However, the Court dismissed the appeals. The Constitutional Court ruled that the legislator had created an objective difference, depending on whether the Treasury was a creditor or not. In the opinion of the Court, this difference was justified, considering the objectives of the law, namely the fight against arrears in tax matters, and the prevention of situations where taxes were paid back to persons who still owed other taxes.

At the end of 2008, the application of statutory compensation in tax matters was extended to all tax administrations.[19]

### c) The limits of compensation

Statutory compensation in tax matters is only possible for the non-disputed part of the claim of the treasury against a taxpayer.

Thus, compensation cannot be carried out when an income tax demand is disputed. With regard to VAT, the administrative guidelines set out that the person in question has to agree with the claim of the treasury, e.g., by stating the debt in his tax form or by expressly acknowledging the debt.

A second limit was clarified recently by the jurisprudence. In the case of bankruptcy, compensation of a tax debt dating before the bankruptcy with a tax credit, resulting from the continuation of the activity of the person involved by the *curator bonis*, is impossible.[20]

### d) Some final remarks as a conclusion

The present text of Art. 16*bis* § 2 of the COSC law reads as follows:

*The Central Office may, without the necessity of further formalities, place any sum, due to be returned or paid, at the disposition of civil servants responsible for collection of taxes and to the institutions responsible for the collection of the social security contributions (...) for the purposes of paying such sums of money as may be owed by the beneficiary of said return of payment*.

*The first paragraph remains applicable in the case of seizure, transfer, concurrence or insolvency procedure.*

With this text, a fair balance is achieved between the payment procedure for fiscal and social debts with seized sums of money that have to be reimbursed and the legal protection of the beneficiary of the reimbursement.

There are no formalities and terms to be taken in consideration even though the person whose debts are paid is evidently informed of the compensation in writing.

Compensation is only possible, however, with debts that are definitively due, which of course implies that all possible disputes concerning the debt in question have already taken place.

Consequently, it comes as no surprise that the actual system of compensation, in spite of its wide application in practice, never gave rise to any legal claim or difficulty.

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1. Art. 3 § 2 of the law concerning the establishment of a Central Office for Seizure and Confiscation and containing provisions for the value-safeguarded administration of seized goods and the enforcement of certain financial sanctions (*Official Gazette*, 26 March 2003 – since then repeatedly modified – hereafter "COSC law").↩
2. *Official Gazette*, 8 September 2005.↩
3. *Parlementary Documents*, Belgian Senate, 2004-2005, 3-1305/2, p. 3, www.senate.be.↩
4. Royal Decree of 12 July 2009 regarding implementation of Art. 16*bis* § 3 of the Law of 23 March 2009 concerning the establishment of a Central Office for Seizure and Confiscation and containing provisions for the value-safeguarded administration of seized goods and the enforcement of certain financial sanctions (*Official Gazette,*12 August 2009).↩
5. In Belgium, Ministries are called Federal Public Services.↩
6. Art. 19 COSC-Law.↩
7. The cooperation with the institutions responsible for the collection of social security contributions is provided for by e-mail.↩
8. With reference to Art. 1 of the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances, Art. 2 of the 2000 UN Convention against Transnational Organized Crime and Art. 2 of the 2003 UN Convention against Corruption, we can define "freezing" or "seizure" as the temporary prohibition of the transfer, conversion, disposition, or movement of property, or the temporary assumption of custody or control

of property on the basis of an order issued by a court or a competent authority. "Confiscation" can be defined as the permanent deprivation of property by order of a court or other competent authority.↩

9. "Verbeurdverklaring bij equivalent" (Dutch) or "confiscation par equivalent" (French).↩
10. According to Belgian law, the sale of real estate always requires the intervention of a notary. Other institutions are competent only as an exception. The sale of government buildings, for instance, requires the intervention of the Ministry of Finance. Hereinafter, what is said about notaries also applies to the other institutions that can intervene.↩
11. An example of such regulation is found in Arts. 72 and 73 of the Royal Decree of 9 August 1920 that introduced a system of income taxes for the first time in Belgium (*Official Gazette*, 14 August 1920).↩
12. Art. 433-437 Code direct taxes; Art. 93*ter*-93*septies* Code VAT; Art. 23 § 1 to 6 of the Royal Decree no. 38 dd. 27 July 1967 concerning the organization of the social statute of the self-employed (*Official Gazette*, 29 July 1967); and Art. 41*quater* § 1 to 6 of the law of 27 June 1969, revision of the law of 28 December 1944 concerning the social security of employees (*Official Gazette*, 25 July 1969).↩
13. *Parliamentary Documents,* Chamber of Deputies, Doc 51 3058/014, p. 7, www.dekamer.be.↩
14. *Official Gazette*, 8 May 2007.↩
15. Art. 1289-1299 Belgian Civil Code.↩
16. Court of Cassation, 29 November 1923, *Pas*, 1924, 52; Court of Cassation, 29 May 1973, *J.T.*, 1973, 656.↩
17. Art. 334 Program Law of 27 December 20045 (*Official Gazette*, 31 December 2004).↩
18. Constitutional Court, judgment 54/2006 of 29 April 2006 (*Official Gazette*, 26 September 2006) and judgment 107/2006 of 21 June 2006 (*Official Gazette*, 15 September 2006).↩
19. Art. 194 Program Law of 22 December 2008 (*Official Gazette*, 29 December 2008).↩
20. Constitutional Court, judgment 55/2009 dd. 19 March 2009 (*Official Gazette*, 20 May 2009); Court of Cassation, 24 June 2010, judgments C.09.0365.N and F.09.0058.N, www.cass.be.↩



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