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Transfer Pricing 2025

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Belgium: Law and Practice & Trends and Developments

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Loyens & Loeff

BELGIUM

Law and Practice

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LOYENS & LOEFF
Law & Tax

1. Rules Governing Transfer Pricing

1.1 Statutes and Regulations

The Belgian legal provisions of particular relevance to transfer pricing are Articles 26, 79, 185 and 206/3 of the Belgian Income Tax Code 1992 (ITC).

- Article 26 ITC provides that the abnormal or benevolent advantages granted by a Belgian taxpayer to a non-Belgian company or establishment should be included in the taxpayer's taxable basis when granted to (among others) a non-resident related enterprise.
- Articles 79 and 206/3 ITC provide for an anti-abuse rule disallowing certain deductions that would have applied to that part of the result that arises from abnormal or benevolent advantages received by a Belgian taxpayer from a related enterprise.
- Article 185, Section 2(a) ITC governs the recognition of profits on cross-border commercial and financial transactions for Belgian taxpayers that are part of multinational groups. Any profits not recognised by an arm's length cross-border transaction are added to the taxpayer's taxable profit. Article 185 ITC is considered the codification of the OECD's arm's length principle in Belgian tax law.
- Article 185, Section 2(b) ITC allows a corresponding downwards profit adjustment for corporate income tax purposes where profits are included in the taxable basis of a related foreign company located in a treaty jurisdiction.
- Articles 321/1 to 321/7 ITC provide the obligation for taxpayers to file transfer pricing documentation if certain thresholds are exceeded (country-by-country reporting, master file and local file).

In February 2020, the Belgian Tax Administration (BTA) issued a circular letter on transfer pricing (Circ 2020/C/35) (the *"TP Circular"*). In the TP Circular, the BTA confirms adhering to the general principles included in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (the *"OECD Guidelines"*). The TP Circular:

- provides an overview of the different chapters of the OECD Guidelines (including guidance on financial transactions);
- provides guidance on the allocation of profits to permanent establishments (PEs) (based on the Authorised OECD Approach as laid down in the 2010 report on the attribution of profits to PEs); and
- includes the BTA's interpretation and preference on specific topics.

Finally, the following are also relevant in the context of transfer pricing:

- Article 49 ITC (deductibility of expenses);
- Article 54 ITC (deductibility of interest, royalties and service fees);
- Article 55 ITC (deductibility of market-based interest);
- Article 198, Section 1, 10° (deductibility of payments to tax havens in the context of *"actual and sincere transactions"*) and
- Article 344, Section 2 ITC (non-opposability of transfer of assets to an affiliated company established in a tax haven).

Since the previous CFC-rule proved to be of little relevance in practice, Belgium recently shifted its CFC-legislation from Model B (transactional approach) to Model A (entity approach). The ATAD obliged member states to implement a CFC rule and left member states the option to either:

- include non-distributed specific types of passive income in the taxable basis of the controlling taxpayer (Model A); or
- include non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage (Model B).

Model B implied that CFC income could only be taxed in Belgium if it is attributable to the *"significant people"* functions carried out by the Belgian controlling taxpayer (assessment based on the arm's length principle). By switching to Model A, the Belgian legislature disconnects the CFC-assessment from the arm's length principle.

1.2 Current Regime and Recent Changes

Years before the Belgian codification of the internationally accepted arm's length principle in Article 185 Section 2, ITC (in 2004), the BTA traditionally applied Articles 26, 79 and 206/3 ITC as a legal basis for performing transfer pricing corrections based on the principle of *"abnormal or benevolent advantages"*. Although this notion was based on the arm's length principle, Belgian case law traditionally applied a more subjective approach to the notion of *"abnormal or benevolent advantages"*, accepting that providing assistance to group entities in financial difficulties may under certain conditions not trigger the granting of an abnormal advantage. By taking the group relationship into account, Belgian case law went further than the *"separate entity approach"* followed by the OECD in the application of the internationally accepted arm's length standard.

Article 185 Section 2 ITC was introduced in 2004 to facilitate the interpretation of the notion of *"abnormal or benevolent advantage"* and thus to increase legal certainty for taxpayers. At the time, this provision was only applicable via tax rulings or mutual agreement procedures.

Following BEPS Action 13, Belgium introduced transfer pricing documentation obligations from 1 January 2016. Depending on certain thresholds, Belgian taxpayers are obliged to submit a country-by-country report (or notification), a master file and a local file with the BTA.

In addition to *"non-public"* CbCR obligations, the Law of 8 January 2024 amended the Belgian Code of Companies and Associations with respect to the disclosure of income tax information by certain companies (implementing EUR Directive 2021/2101 and commonly referred to as *"public CbCR"*). This legislation requires companies that are part of MNE groups with a total consolidated turnover of more than EUR750 million in each of the last two consecutive financial years to publicly disclose information regarding the income taxes paid and other tax-related matters, such as a breakdown of profits, revenues and employees per country. The public CbCR applies to financial years starting on or after 22 June 2024. For most Belgian entities, this implies that the new requirements will apply for the financial year starting 1 January 2025.

2. Definition of Control/Related Parties

2.1 Application of Transfer Pricing Rules

Article 26 ITC provides that when a Belgian company grants an abnormal or benevolent advantage to a non-Belgian company or establishment with which the Belgian taxpayer has *"direct or indirect relationship of interdependence"*, the advantage should be included in the Belgian taxpayer's taxable basis. The notion of *"direct or indirect relationship of interdependence"* has a broader scope than *"control"* under Belgian company law. Whether or not two entities are in a relationship of interdependence is a question of fact. This may notably be the case when:

- the boards of directors of two entities consist in majority of the same persons;
- one entity depends on the other for the supply of raw materials; or
- one entity is the other entity's sole customer.

As regards Article 185 Section 2 ITC, a circular letter dated 4 July 2006 refers to the wording used in Article 1:20 Code of Companies and Associations (CCA), according to which *"companies associated with a company"* means:

- the companies over which said company exercises a power of control;
- the companies which exercise a power of control over said company;
- the companies with which said company forms a consortium; and
- the other companies which, to the knowledge of their governing bodies, are under the control of the companies referred to in the first three bullet points above.

Under Section 1:14(1) of the CCA, *"control"* is the ability to decide the appointment of the majority of the directors or the course of corporate policy, whether de facto or de jure.

For transfer pricing documentation requirements, the term *"group"* is defined as a collection of companies that are related by ownership or control in such a way that they are either required by prevailing accounting rules to prepare consolidated financial statements for financial reporting purposes, or would be required to do so if equity interests in any of the companies were traded on a regulated market.

3. Methods and Method Selection and Application

3.1 Transfer Pricing Methods

Belgian law does not list specific transfer pricing methods that taxpayers can use.

The rules set forth in the OECD Guidelines apply to the use of transfer pricing methods within Belgium. Indeed, with reference to the OECD Guidelines, the TP Circular states that the taxpayer is free to choose a transfer pricing method, provided that the method chosen results in an arm's length outcome for the specific transaction.

3.2 Unspecified Methods

Belgian law does not specify which methods a taxpayer should use. Hence, a taxpayer is free to choose its preferred method to set prices, provided that those prices are consistent with the arm's length principle. In practice, taxpayers generally use one of the five methods listed in the OECD Guidelines, although other methods may also be accepted depending on the case (eg, valuation techniques for transactions involving intangibles).

3.3 Hierarchy of Methods

Neither the law nor the TP Circular provide for a hierarchy of methods.

According to the TP Circular, where multiple methods can be applied in an equally reliable manner, a traditional method is preferable to a transactional profit method. Moreover, if the comparable uncontrolled price (CUP) method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is preferred. This position is aligned with the OECD Guidelines.

3.4 Ranges and Statistical Measures

Belgium does not require the use of ranges or statistical measures.

In the TP Circular, the BTA recognises that transfer pricing is not an exact science, and a transfer pricing analysis will often result in a range of values in which the applicable price is situated. If the retained comparables are highly comparable and of equally high quality, each point within the full range is considered acceptable for the BTA. However, statistical methods can be used to increase the reliability of the results.

The BTA indicates that they favour the interquartile range (IQR) approach and will accept the result if the tested party falls within the IQR. The BTA further provides that an adjustment is needed if the result of the tested party falls outside the (IQR/full) range. Such adjustment will be made to a point within the range which is aligned with the facts and circumstances of the tested transaction. If it is not possible to designate a specific point within the range, the BTA's preference is to use the median.

3.5 Comparability Adjustments

Under Belgian law, there is no strict obligation to apply comparability adjustments. However, the position of the Belgian tax administration (BTA), as outlined in the Transfer Pricing Circular, is consistent with the OECD Guidelines: comparability adjustments should only be made if they improve the reliability of the analysis.

The BTA emphasises the importance of proper documentation to support both the purpose and the reliability of any adjustment. In particular, adjustments to account for differences in working capital between the tested party and the comparables may be justified and are generally accepted.

When it comes to year-end adjustments, it is important to note that the taxable result of a Belgian company is based on its statutory accounting result. Consequently, any year-end transfer pricing adjustments must be booked before the closing of the statutory accounts in order to be recognised for tax purposes, unless the taxpayer opts to make a unilateral upward adjustment via the tax return.

Since the BTA relies on the statutory accounts to assess the arm's length nature of intercompany transactions, it is imperative that such adjustments are reflected in the accounts of the relevant financial year.

In practice, during audits, the BTA expects the arm's length character of a taxpayer's remuneration to be evaluated on an annual basis, with adjustments required if the result of the tested transaction falls outside the relevant arm's length range, unless a valid justification is provided.

4. Intangibles

4.1 Notable Rules

Belgian law does not impose notable rules specifically relating to the transfer pricing of intangibles.

The BTA generally applies the guidance included in Chapter VI of the OECD Guidelines to evaluate the arm's length character of a transaction involving intangibles. The TP Circular explicitly emphasises the importance of identifying those entities performing the so-called DEMPE functions (ie, development, enhancement, maintenance, protection and exploitation). According to the BTA, entities controlling important risks with respect to the DEMPE functions should be entitled to (part of) the overall return derived from the intangible.

According to the BTA, the most appropriate transfer pricing method for pricing transactions involving intangibles would generally be either:

- the profit split method;
- the CUP method; or
- the cost-plus method (this latter only to remunerate routine contributions – eg, development of internal accounting software).

The BTA further accepts the use of valuation techniques, such as:

- the discounted cash flows method;
- the relief from royalty method;
- the residual value method; or
- the premium profit method.

The BTA emphasises the importance of clearly documenting the reasons justifying the choice of a given method in the taxpayer's transfer pricing documentation.

4.2 Hard-to-Value Intangibles

Belgian law does not contain special rules regarding hard-to-value intangibles.

Where the BTA would want to make a transfer pricing correction, they would be bound by the ordinary statute of limitations (ranging between three and six years prior to the assessment year, depending on the case).

In its TP Circular, the BTA provides that in the case of hard-to-value intangibles, ex post results can be used as presumptive evidence to evaluate whether future developments or events having impacted on the ex post results could have been anticipated by the taxpayer, as well as to evaluate the reliability of the used assumptions when pricing the transaction.

Although the BTA considers that it can perform a price adjustment or impose a different payment structure if demonstrated that the assumptions were not correct or the future developments would have been taken into account when pricing the transaction, the BTA also recognises that no adjustment can be imposed by the mere fact that ex post results deviate from ex ante price arrangements.

4.3 Cost Sharing/Cost Contribution Arrangements

Belgium recognises cost sharing/cost contribution arrangements. No special rules are imposed. The BTA follows the OECD Guidelines in this respect.

5. Adjustments

5.1 Upward Transfer Pricing Adjustments

Upwards adjustments are necessary when there are significant deviations between projected and actual profitability, especially for entities remunerated through one-sided methods (eg, distributors or service providers).

To mitigate risks associated with adjustments processed in the following year's accounts, upwards adjustments can be temporarily reflected in the tax return by increasing the company's hidden reserves and later reversed.

It is important to note that there is no specific procedure allowing a taxpayer to perform upwards affirmative transfer pricing adjustments after filing its tax return.

Since 2018, no deduction of current year losses and deferred tax assets (eg, carry-forward tax losses) can be made on the taxable basis as adjusted as a result of a tax audit, except in relation to dividends received during the same taxable period. This applies where the BTA imposes a tax increase of (at least) 10%. Hence, a taxpayer may have an interest in spontaneously correcting its tax return and applying an upwards adjustment to its taxable basis if a transaction was not arm's length. By doing so, the taxpayer may avoid the possibility that a future adjustment upon an audit might constitute its minimum taxable basis. The recent coalition agreement provides for a partial relaxation of this rule: going forward, the limitation would no longer apply to the current year result, but only to carry-forward deductions (eg, tax losses from previous years).

A spontaneous upwards adjustment could be made in two ways depending on whether or not the tax assessment has been vested yet. As long as the tax assessment is not vested, a taxpayer could make an informal request with the competent tax service to correct its tax return. Following vesting of the tax assessment, the taxpayer can introduce a tax appeal against its own tax return within a one-year period.

5.2 Secondary Transfer Pricing Adjustments

Belgium does not have rules on secondary adjustments.

6. Cross-Border Information Sharing

6.1 Sharing Taxpayer Information

Belgium has an extensive network of treaties and agreements under which various types of tax-related information are shared either automatically or on request.

As an EU member, Belgium has implemented EU Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (as repeatedly amended) providing for various exchange-of-information mechanisms, such as:

- the exchange of information on request;
- the exchange of cross-border tax rulings;
- the exchange of country-by-country reports; and
- the exchange of mandatory disclosure reports.

The BTA actively makes use of these instruments in the framework of transfer pricing audits (eg, selecting taxpayers subject to audit based on cross-border information received, making requests for exchange of information with foreign tax authorities in the framework of an audit).

Belgium has further adhered to the various OECD initiatives on the exchange of information in the framework of the BEPS project, such as the cross-border exchange of tax rulings and country-by-country reports.

6.2 Joint Audits

Belgium participates in joint transfer pricing audits, allowing tax authorities from other EU member states to collaborate and take part in Belgian audits (and vice versa). These audits follow the same procedural rules as standard Belgian tax audits, and taxpayers retain the same rights and obligations.

This possibility stems from the implementation of the EU DAC7 Directive, which introduced a legal framework for joint audits in Belgium as of

1 January 2023. It is further supported by the provisions of applicable double tax treaties.

In addition, Belgium has adopted several enhanced transfer pricing audit initiatives, including the following.

- The International Compliance Assurance Programme (ICAP) – a voluntary risk assessment and assurance programme led by the OECD, in which Belgium participates. ICAP allows multinational enterprises (MNEs) to obtain comfort on their transfer pricing positions through pre-audit engagement, offering greater tax certainty and reducing the likelihood of disputes by fostering early cooperation with tax authorities.
- EU Joint Audit Pilot Projects – Belgium has taken part in pilot projects involving simultaneous audits of the same MNE by multiple EU member states, aiming to streamline tax compliance and improve consistency across jurisdictions.
- The Co-operative Tax Compliance Programme (CTCP) – Belgium's horizontal monitoring programme allows very large taxpayers to proactively engage with the tax authorities, reducing the likelihood of formal audits. The programme fosters close co-operation and provides the benefit of a single point of contact within the tax administration.

7. Advance Pricing Agreements (APAs)

7.1 Programmes Allowing for Rulings Regarding Transfer Pricing

With the Law of 24 December 2002, the Belgian legislature introduced a system of advance decisions that provide legal certainty for taxpayers. Within the existing system of advance decisions, a taxpayer can request a unilateral advance pricing agreement (APA) that specifically addresses transfer pricing (eg, the methodology used, comparables, critical assumptions regarding future events, etc). No separate procedure exists for APAs; they follow the same procedure as regular advance tax rulings.

An APA can be requested unilaterally, bilaterally or multilaterally. Typically, the request must be accompanied by a transfer pricing study that includes:

- a comparability analysis (including a functional analysis);
- a description of the transfer pricing method(s) used; and
- a transfer pricing benchmark.

The Belgian APA process is a performant system and an effective way for the taxpayer to avoid disputes with the BTA. Where a taxpayer has obtained an APA confirming the arm's length nature of its transfer pricing policy, the BTA is in principle bound by such agreement. Upon audit, the BTA may nevertheless verify whether the facts and circumstances underlying the APA have not changed and whether the transfer pricing policy confirmed in the APA has been correctly applied in practice.

The processing time for a unilateral APA application varies depending on the complexity of the file, the completeness of the information provided and the timing of submission. Nevertheless, if well prepared, it should be possible to obtain an APA within three to six months.

To obtain legal certainty concerning transfer pricing in all jurisdictions affected by a particular transaction, a bilateral or multilateral APA can be requested. There is no separate Belgian domestic legal framework for requesting a bilateral or multilateral APA. The BTA has published an FAQ document with respect to practical aspects of requesting a bilateral or multilateral APA. The number of bilateral or multilateral APA applications remains small compared to unilateral APAs. It is not possible to provide an exact timetable for the bilateral APA process as this will depend on several factors including the complexity of the case, the timely availability of information, etc. An additional factor is that a bilateral APA is a negotiation between states and timing will thus also depend on the agenda of the competent authorities and the jurisdictions concerned.

Based on the most recent statistical data, the average time to negotiate a bilateral or multilateral APA in Belgium is approximately 21 months with EU countries and 17 months with non-EU countries. While unilateral APAs are more commonly used, practice shows that the BTA also promotes bilateral or multilateral agreements and takes a co-operative stance with a view to achieving such agreements.

7.2 Administration of Programmes

Unilateral APA requests are handled by the Service for Advance Decisions (also known as the *"Ruling Commission"*), a well-functioning government body within the Federal Public Service (FPS) Finance acting autonomously from the BTA. Generally, the Ruling Commission has a co-operative attitude towards the taxpayer. The Ruling Commission is managed by a board of six leading college members, including a chairperson. Decisions are taken by a majority vote. In the case of a tie, the chairperson has a casting vote. Although decisions are taken autonomously by the Ruling Commission, other tax authorities may be consulted for advice during the ruling proceedings.

In order to examine the request as soon as possible, the Ruling Commission generally stipulates adding the following documentation to the APA request:

- identity of the parties and description of the group and its activities;
- duration of the APA;
- description of the intercompany transactions;
- details regarding the transfer pricing method;
- comparability study (if available), including a functional analysis;
- unilateral rulings concluded by the group (if any);
- the proxy of the person who filed the request;
- financial data of the concerned company; and
- references to the applicable legal provisions at hand.

Until a ruling is granted, any new information relating to the situation or transaction concerned must be added to the application.

Two phases of the unilateral APA application process can generally be distinguished: the pre-filing phase and the formal ruling application.

- In the first (and optional) phase, the formal ruling application is prepared by submitting a pre-filing application to the Ruling Commission (possible even on an anonymous basis). In this pre-filing application, the intended transaction as well as the background of the transaction are already accurately described and documented in detail. Moreover, during the pre-filing phase, consultations with the designated team within the Ruling Commission already take place. The purpose of this phase is to come to a formal ruling request to be presented to the college.
- In the second phase, the formal ruling application is submitted to the college within the

Ruling Commission, which decides on granting the ruling.

Applications are examined thoroughly, with the underlying facts as well as the assumptions being discussed through a constructive dialogue with the applicant. The applicant is expected to be fully co-operative throughout the process. The Ruling Commission can ask the opinion of the Central Income Tax Administration, but the final decision-making power remains with the Ruling Commission.

Although the BTA has published some general guidance, no specific procedure for bilateral APAs has been established in Belgium. Bilateral APAs are concluded by the Belgian competent authorities (ie, the FPS Finance, General Administration of Taxes, Central Services, Service International Relations, Division Commentary). After the written request is filed by the taxpayer, essentially a discussion/negotiation between states takes place where an agreement may or may not be reached. During the negotiation process, the competent authorities may request additional information from the taxpayer. When the competent authorities reach an agreement, the decision will be signed by each competent authority involved.

7.3 Co-Ordination Between the APA Process and Mutual Agreement Procedures

The request for a MAP must explicitly state whether the subject of the request has already been dealt with previously, in the context of a unilateral, bilateral or multilateral APA or other agreement concluded during a tax audit. If so, a copy of this APA or agreement must be handed over to the Belgian competent authority.

A taxpayer who has obtained a unilateral APA is not prevented from also submitting the aspects that were subject to the APA to the MAP. Indeed, the fact that the tax results from a unilateral APA does not, as such, allow the refusal of access to a MAP where the taxpayer considers that the taxation resulting from the APA does not comply with the applicable tax treaty.

7.4 Limits on Taxpayers/Transactions Eligible for an APA

All taxpayers subject to Belgian transfer pricing rules are in principle eligible for an APA. APAs may cover any (interpretative) issues and multiple issues at once (eg, transfer pricing and permanent establishments). However, an APA cannot be granted if:

- it would be inappropriate or ineffective because of the statutory or regulatory provisions referred to in the request;
- the request concerns application of any tax law concerning collection or prosecutions;
- at the time the application is filed, essential elements of the situation/transaction described are connected with a tax haven that does not co-operate with the OECD; or
- the operation or transaction described does not have economic substance in Belgium.

7.5 APA Application Deadlines

A unilateral APA is only valid if it is issued before the intended transactions or situations have produced effect from a tax perspective. The Ruling Commission takes the position that a situation/transaction has produced effect from a tax perspective from the moment the tax return related to the taxable period during which the situation/transaction occurred is filed. On its website, the Ruling Commission specifies that the request for a unilateral APA should be submitted at the latest by 30 November of the calendar year to which the transaction relates (or eight months before the final deadline for filing the tax return for companies who do not keep their accounts by calendar year). In practice, the Ruling Commission requires that a subsequent request for a renewal of the APA be filed at the latest three to six months before the expiry of the existing APA.

For bilateral and multilateral APAs, a roll-back is possible (see **7.8 Retroactive Effect for APAs**).

7.6 APA User Fees

APAs can be obtained free of cost from the Ruling Commission, the Belgian competent authority.

7.7 Duration of APA Cover

In general, unilateral tax rulings are valid for a maximum period of five years unless the subject of the topic allows for a different period. Following a recent policy change, transfer pricing APAs confirming the pricing of a transaction are only valid for three years (in line with the considered validity period of the underlying benchmark study).

7.8 Retroactive Effect for APAs

A formal roll-back is not possible in the context of unilateral APAs in Belgium.

For practical reasons, the Belgian competent authority authorises initiating a bilateral APA on the first day of the financial year, even if transactions have already taken place between the first day of the financial year and the date of filing the application, provided that the application is filed no later than on the last day of the financial year.

For example, a person may submit a request for a multilateral APA on 25 July 2023 in which they ask for certainty for a period of five accounting years, namely from 1 January 2023 to 31 December 2027 (inclusive). Even though transactions have taken place between 1 January 2023 and the date of request (25 July 2023), the APA can be initiated from 1 January 2023. However, if the request is submitted on 22 March 2024, the accounting year 2023 cannot be the subject any further of the prior agreement, because the request must be submitted no later than the last day of that accounting year (in this case 31 December 2023). However, if relevant facts and circumstances are identical during previous tax years, the person may ask for a roll-back, allowing for applying the outcome of the bilateral APA for the previous years. The Belgian competent authority authorises a roll-back, but only if the applicable time limits (such as assessment periods) still permit it.

8. Penalties and Documentation

8.1 Transfer Pricing Penalties and Defences

Other than penalties for non-compliance with transfer pricing documentation filing obligations, Belgium does not impose penalties specifically applicable in the transfer pricing context. The general penalties applicable in cases of corporate income tax adjustments also apply in a transfer pricing context.

Please see **8.2 Transfer Pricing Documentation** regarding the obligation to file certain transfer pricing documentation. An administrative fine may be imposed on companies in cases of non-compliance. This administrative fine ranges between EUR1,250 and EUR25,000 and may be imposed from the second infringement. If the BTA can prove bad faith on the part of the taxpayer, a fine of EUR12,500 can be imposed from the first infringement.

Other than the obligations described in **8.2 Transfer Pricing Documentation**, no formal obligations are imposed by Belgian law to support the arm's length character of intercompany transactions. The burden of proof for performing a transfer pricing correction lies with the BTA. Nevertheless, in practice it is highly recommended to have supporting transfer pricing documentation for material intra-group transactions in place to mitigate the risk of discussions in this respect.

In the case of an incomplete or incorrect tax return (including a transfer pricing correction upon an audit), the tax due on the income portion corresponding to the upwards adjustment shall be augmented by a tax increase between 10% (first infringement, unless waived in specific circumstances if good faith can be proven) and 200%. To prove the good faith of the taxpayer, availing of transfer pricing documentation can be very useful. Furthermore, an administrative fine of between EUR50 and EUR1,250 may be imposed. The additional tax vested will not trigger late payment interest. If a tax increase of at least 10% is applied, no deduction of current year losses and carry-forward tax attributes can be made on the amount of the upwards adjustment as a result of a tax audit (eg, carry-forward tax losses, but excluding dividends received during the same taxable period). Hence, the amount of the correction will be the minimum taxable base (the so-called *"cash tax for audit adjustments"* principle). This rule does not apply where the BTA waives the application of the tax increase of at least 10% in the case of good faith.

This automatic sanction mechanism will be abolished by the new Belgian federal government, in light of the *"right to make an honest mistake"*. A first offence would no longer be sanctioned by a tax increase. The cash tax for audit adjustments principle will be amended and will only apply in case of repeated offences for which a tax increase of at least 10% is effectively applied. However, a limit to this principle would be implemented: any audit adjustment could only be offset with current year losses and not with carried forward tax losses, regardless of the application of a tax increase.

Please refer to **13.1 Options and Requirements in Transfer Pricing Controversies**.

8.2 Transfer Pricing Documentation

From financial year 2016, Belgian legislation requires a taxpayer to file a country-by-country report, a master file and a local file if certain thresholds are met, as follows.

- Country-by-country report – multinational enterprise groups which, for the reporting period immediately preceding the last closed reporting period, report a total consolidated revenue of at least EUR750 million in their consolidated financial statements.
- Master file and local file – any Belgian group entity which, for the financial year immediately preceding the last closed financial year, exceeds one of the following criteria, as reflected in its standalone statutory annual accounts:
  - (a) a total of EUR50 million in operating and financial income, excluding non-recurring income;
  - (b) a balance sheet total of EUR1 billion; or
  - (c) an annual average headcount of 100 full-time equivalents.

Belgium has introduced updated transfer pricing documentation requirements with respect to the master file and local file, which will apply to financial years starting on or after 1 January 2025.

The new master file requirements go beyond the OECD model, necessitating changes to the group master file to comply with Belgian legislation. These changes include, among others:

- a comparison of a profit allocation analysis based on value-creating functions and the traditional transfer pricing models in place;
- the inclusion of a six-step DEMPE analysis, as described in the OECD Guidelines; and
- the identification of all transferred and used hard-to-value intangibles including the entities that own them and have contributed to their development.

The new local file form obliges in-scope companies to file available transfer pricing documentation as an attachment to the Belgian local file, including the full OECD Model local file. In addition, CCAs, rulings and in-house insurance policies should also be attached.

9. Alignment With OECD Transfer Pricing Guidelines

9.1 Alignment and Differences

Belgian law does not contain any rules deviating from the OECD Guidelines. Although not expressly stated in the law, the OECD Guidelines are generally followed in Belgian tax practice and applied by the BTA and the Ruling Commission. An exception in this respect is the Belgian local file form, which considerably deviates from the OECD local file report under Chapter V of the OECD Guidelines (see **8.2 Transfer Pricing Documentation**).

The OECD Guidelines are consistently applied in published circulars. In the TP Circular, the BTA confirms adhering to the general principles included in the OECD Guidelines. The TP Circular provides an overview of the different chapters of the OECD Guidelines (including guidance on financial transactions) and refers extensively to several of the OECD Guidelines' paragraphs. Nevertheless, it is argued in legal doctrine that certain *"clarifying positions"* of the BTA in the TP Circular deviate from the OECD Guidelines (see **11.3 Unique Transfer Pricing Rules or Practices**).

Belgian case law has ruled on the position of the OECD Guidelines in Belgian practice. In two cases (case No 2016/AR/455 dated 8 June 2021(*"Uniclic"*), and case No 2012/AR/2901 dated 16 September 2014(*"Beaulieu"*)), the Ghent Court of Appeal ruled that the OECD Guidelines are not obligatory or enforceable but are a mere recommendation. It proceeded by stating that the OECD Guidelines do contain internationally accepted principles which can be applied by the BTA as they provide sufficient guarantees in terms of objectivity and reliability.

In addition, in the 2021 case, the court took a position on the non-retroactive application of the DEMPE concept in transfer pricing, in which it ruled that only the economical context and legal framework of the period to which the facts relate should be considered. The court stated that a tax assessment can only be vested based on a more recent version of the OECD Guidelines if the new provisions are a mere clarification of the existing guidelines.

9.2 Arm's Length Principle

Belgian transfer pricing rules do not depart from the OECD's arm's length principle as laid down in Article 9 of the OECD Model Tax Convention.

In the TP Circular, the BTA endorses the arm's length principle as the internationally accepted standard for dividing profits of a multinational group between its members.

9.3 Impact of the Base Erosion and Profit Shifting (BEPS) Project

The OECD's BEPS project has strongly affected Belgium's transfer pricing landscape.

Belgium has adopted numerous measures resulting from or inspired by the BEPS recommendations, including the following in the field of transfer pricing.

- Belgium introduced a regime for the automatic exchange of information on tax rulings (including all arrangements concerning transfer pricing and the allocation of profits to permanent establishments) issued on or after 1 January 2017.
- Belgium introduced transfer pricing documentation and reporting requirements through country-by-country reporting and the two-tiered master file and local file as a result of the implementation of EU Directive 2016/881/EU amending EU Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (BEPS Action 13). These requirements apply for financial years starting from 1 January 2016.

Upon publication of the BEPS final reports, the Belgian Minister of Finance stated that the new OECD guidance on BEPS Actions 8–10 will be applied by the BTA in transfer pricing audits. The BTA has since referred to these documents and reports published in the framework of BEPS as part of their daily practice, and has even done so in a case evaluating a prior transaction. In this respect, the Ghent Court of Appeal (No 2016/AR/455, dated 8 June 2021(*"Uniclic"*)) ruled that the application of the DEMPE functions guidance for evaluating transactions entered into prior to its publication constitutes a disallowed retroactive application of the OECD Guidelines.

The Belgian TP Circular adheres to the OECD Guidelines of 2017 and includes the OECD guidance on BEPS Actions 8–10.

9.4 Impact of BEPS 2.0

On 14 December 2023, the Belgian legislature transposed Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise (MNE) groups and large-scale domestic groups in the Union (known as Pillar II). The law includes a co-ordinated system of rules designed to ensure that large (domestic/MNE) groups with a consolidated revenue exceeding EUR750 million for at least two of the four previous years are subject to a minimum effective tax rate of 15%. The Belgian implementation of Pillar II is applicable to financial years starting on or after 31 December 2023.

In the context of the implementation of Pillar II in Belgium, the Belgian legislature has adapted the timeframe during which the Belgian R&D tax credit can be refunded (reducing it from five to four years). This would lead to the qualification of the R&D tax credit as *"qualified refundable tax credit"*, which has a more favourable impact on the effective tax rate calculations under Pillar II as compared to a non-qualified refundable tax credit.

9.5 Entities Bearing the Risk of Another Entity's Operations

Belgium follows the OECD Guidelines in relation to risk allocation. Risk will thus be allocated to the entity performing risk control functions and having the financial capacity to bear the risk. The TP Circular provides that such entity is entitled to the residual profits after having remunerated other entities on an arm's length basis. For transactions involving intangibles, the TP Circular provides that if an entity does not control any risk regarding the development of the intangible and does not manage the financial risks, such entity should only be entitled to a risk-free return.

10. Relevance of the United Nations Practical Manual on Transfer Pricing

10.1 Impact of UN Practical Manual on Transfer Pricing

The UN Practical Manual on Transfer Pricing does not have significant impact on Belgian transfer pricing practice. To the authors' knowledge, there is no legislation, regulations, rulings or case law referring to this guidance. Belgium, being an OECD member country, follows the guidance provided by the OECD Guidelines. Belgium's tax treaties generally include a transfer pricing provision based on Article 9 of the OECD Model Convention and the OECD Guidelines are usually applied in practice to evaluate the arm's length character of transactions.

11. Safe Harbours or Other Unique Rules

11.1 Transfer Pricing Safe Harbours

Belgian law does not include safe harbours for transfer pricing purposes.

The BTA accepts the OECD's simplified approach for determining the arm's length remuneration of low value-adding intra-group services. Under this approach, the service provider can apply a profit mark-up of 5% on all costs related to the services (other than disbursements) and is subject to less detailed documentation requirements. The TP Circular explicitly clarifies which types of services may be within the scope of the simplified approach, in line with the OECD Guidelines.

Although Belgium is part of the OECD Inclusive Framework, no official position has been taken yet as regards the implementation of Amount B; ie, the simplified and streamlined approach for pricing baseline marketing and distribution activities.

11.2 Rules on Savings Arising From Operating in the Jurisdiction

Belgium has no specific rules governing savings that arise from operating in its jurisdiction. The TP Circular refers to the OECD Guidelines on how to deal with location savings in a transfer pricing analysis.

11.3 Unique Transfer Pricing Rules or Practices

Belgium does not have unique rules applicable in the transfer pricing context.

In its TP Circular, the BTA takes in the following notable positions (among others).

- If, during a 12-month period, a participant in a cash pool has held a given (minimum) amount as a deposit or as borrowing, such an amount can no longer be priced as a cash pool transaction, but should be priced as a loan. The reclassification of a structural cash pool deposit or borrowing in a term loan is a frequently observed topic during audits.
- According to the BTA, it is a rebuttable presumption that the cash pool leader is a mere service provider and that its remuneration could generally be determined using a cost-based approach.

- In the framework of a business restructuring of *"limited risk"* entity remunerated with a transactional net margin method, the BTA considers that restructuring costs should be re-charged to the foreign group entity that made the decision to restructure and/or that benefits from the restructuring.
- According to the BTA, if the actual result of a company falls outside the range of arm's length outcomes, an adjustment should be made to the median of that range unless specific arguments are available to justify another point within the range.
- Synergies obtained through centralised procurement should be reallocated to the group and a centralised procurement company should be remunerated with a cost-plus method (unless it can be demonstrated that another method is more appropriate given the added value generated by the entity).

The Ruling Commission delivered a negative ruling on the transfer pricing consequences of a VAT refund for limited risk distributors of subsidised pharmaceutical products. This ruling reflects the position of the BTA on this specific topic, which has been the subject of controversy during recent years. The case concerned two companies subject to compensatory contributions on turnover regarding subsidised medicines, paid to the Belgian National Institute for Health and Disability Insurance (NIHDI). Both reached an agreement with the Belgian VAT administration accepting that these contributions result in a reduction of the taxable amount for VAT, entitling them to a refund of the VAT included in the contributions effectively paid to the NIHDI. The companies wished to obtain confirmation that these VAT refunds can be included in the calculation of the operating margin remuneration under the TNMM that both companies should realise for their routine distribution activities. The Ruling Commission and BTA take the position that this is not the case as only Belgian distributors are entitled to such refund, which should therefore be included in their taxable basis on top of the ordinary operating margin.

Finally, reference can be made to the anti-abuse rule in Articles 79 and 206/3 ITC disallowing certain deductions that would have applied to that part of the result that arises from abnormal or benevolent advantages received by a Belgian taxpayer from a related enterprise (see **1.1 Statutes and Regulations**).

11.4 Financial Transactions

In Belgium, there is no specific legislation regulating the transfer pricing aspects of intra-group financial transactions.

However, with reference to **1.1 Statutes and Regulations**, Article 55 ITC provides a legal framework for limiting the deductibility of interest that exceeds *"normal"* market rate. If paid interest exceeds what would be considered at arm's length (ie, above *"normal"* market rates), the excess portion is non-deductible. The borrower has the burden of proof to demonstrate that the interest rate is not excessive.

This provision provides for a safe-harbour rate for non-collateralised loans without a fixed term (eg, a classic current account). The safe harbour rate equals the MFI rate published by the National Bank of Belgium for loans up to EUR1 million with a variable rate and an initial term up to one year, granted to non-financial companies in the month of November of the calendar year preceding the year to which the interest rate relates, plus 2.5%. This *"safe harbour"*, however, does not apply to cash pool arrangements.

For other loans (eg, with a fixed term), the market rate is taken as the benchmark. This rate is not defined, but according to the law, it must be determined by considering the specific characteristics of the transaction, such as the associated risk, the financial condition of the debtor and the loan's maturity.

The TP Circular is largely consistent with Chapter X of the OECD Guidelines. However, certain preferences expressed by the BTA in the Circular may go beyond what is set out in Chapter X or provide additional insights into the BTA's specific interpretation. Examples include the following.

- The BTA considers that a cash pool position which remains unchanged for more than 12 months should be reclassified and priced as an intercompany loan, rather than as a short-term cash pool borrowing. Although this position has been heavily criticised, it is still applied by the BTA during audits (see **11.3 Unique transfer pricing Rules or Practices**).
- In the context of cash pooling, the TP Circular assumes that all participants have the same credit rating, based on the presumption that they effectively guarantee one another.
- The TP Circular refers to the concept of *"implicit support"* within an MNE group, which may impact the credit rating of a borrower.
- For the pricing of guarantee fees, the BTA expresses a preference for the yield approach, whereby the fee is determined by comparing the interest rate applicable to a borrower with and without a guarantee.
- In the context of intercompany financing, the debt capacity of the borrower should be taken into account to assess whether the borrower could have obtained similar financing from an independent lender.

12. Co-Ordination With Customs Valuation

12.1 Co-Ordination Requirements Between Transfer Pricing and Customs Valuation

Belgium does not require co-ordination between transfer pricing and customs valuation.

However, transfer pricing adjustments can have a material impact on customs values when the latter are based on the company's transfer prices. The Court of Justice of the European Union recently ruled (C-529/16, dated 20 December 2017(*"Hamamatsu"*)) that transfer prices cannot be used to determine customs values if they are subject to retroactive transfer pricing adjustments.

The Belgian VAT authorities have not taken a position in light of this recent case law. It is nevertheless advisable for companies to obtain confirmation from the Belgian VAT authorities on the application of transfer prices on customs values in the event of retroactive transfer pricing adjustments. In this way, the possibility of overpaid customs duties not being recoverable can be avoided. In their circular letter 2018/C/9 on customs valuation, the Belgian customs authorities set out their position regarding the acceptability of an intra-group price as customs value and amendments to the customs value based on a transfer pricing adjustment.

13. Controversy Process

13.1 Options and Requirements in Transfer Pricing Controversies

Taxpayers can challenge the results of a transfer pricing audit in administrative proceedings. If the proceedings in the administrative phase do not lead to the desired outcome, judicial proceedings can be initiated.

Administrative Proceedings
Taxpayers have a period of 12 months after receiving the tax assessment to initiate administrative appeal proceedings. The appeal can be lodged by filing a tax complaint, which will be examined by the General Adviser (*Adviseur-Generaal/Conseiller Général*) who issues a decision of notice. This decision is binding on the BTA, and does not allow an appeal by the BTA. In general, a decision may be expected within six months after filing the tax complaint.

It is important to note that the taxpayer can only initiate judicial proceedings after having received a (negative) decision from the regional tax service. By way of exception, a petition with the court can be lodged if the regional director does not provide its decision within six months after filing the tax complaint.

A taxpayer can file a request for mediation with the tax mediation service during the phase of administrative proceedings, meaning before the regional director has rendered its decision of notice or before initiating judicial proceedings when the administrative phase can be deemed otherwise exhausted. The tax mediation service can only facilitate mediation between the concerned parties and can only result in a non-binding proposal.

Judicial Proceedings
Where the taxpayer wishes to initiate judicial proceedings after exhausting the administrative appeal, a petition must be filed before the court of first instance. The petition must be filed within three months after the decision of notice by the General Adviser (*Adviseur-Generaal/Conseiller Général*).

The judgment of the court of first instance is open for appeal. Appeals must be brought before a court of appeal within one month after the judgment of the court of first instance is served.

Finally, the taxpayer can bring the judgment of the court of appeal before the supreme court (Court of Cassation). This should be done within three months after the judgment of the court of appeal was served. The Court of Cassation only decides on points of law, and will not reconsider findings of facts.

14. Judicial Precedent

14.1 Judicial Precedent on Transfer Pricing
Belgian transfer pricing case law is presently still quite limited (around five to ten relatively recent cases with significant practical relevance based on the current framework), but is gaining importance. As the number of transfer pricing audits is substantially increasing, this may lead to more case law in the future.

There is nevertheless extensive established case law on the interpretation of the notion of *"abnormal or benevolent advantage"*. Applying this notion under Articles 26, 79 and 206/3 ITC, the Belgian courts have traditionally advocated for a subjective and pragmatic approach. Therefore, the courts have accepted more subjective arguments to determine the arm's length character of transactions, such as the global balance at group level, the specific characteristics of the group relationship and financial difficulties of group companies. In this respect, the Belgian courts have also accepted direct and indirect set-offs based on the economic reality in a group context.

14.2 Significant Court Rulings

The following recent cases are of particular relevance for Belgian transfer pricing practice.

Ghent Court of Appeal, 8 June 2021, No 2016/AR/455 ("Uniclic")

This case concerned the arm's length character of a royalty-free licensing arrangement between a domestic manufacturing company acting as a licensee of patented technology (in the flooring industry) owned by a foreign related company located in Luxembourg. The BTA considered that the Belgian entity performed certain functions and managed certain risks in relation to the foreign company's licensing activity and thus contributed to the foreign company's profits resulting from the exploitation of the patents without receiving any remuneration.

The BTA claimed, with reference to a functional analysis, that the Belgian domestic company performed all DEMPE functions (ie, development, enhancement, maintenance, protection, exploitation) in respect of the patents and also managed all important risks. Accordingly, by applying Article 26 ITC, the BTA included a significant part of the foreign company's profits in the domestic company's taxable base. The court ruled against the BTA, making several interesting statements with respect to:

- the burden of proof (ie, on the BTA);
- the working in time and the value of the OECD Guidelines (ie, mere recommendations which in principle cannot be applied with retroactive effect – see **9.1 Alignment and Differences**); and
- clarifications regarding the allocation of DEMPE functions.

Antwerp Court of Appeal, 20 June 2017, No 2015/AR/2583 ("Philip Morris International")

This case dealt with the valuation of shares sold by a Belgian company to a Dutch related company. The BTA considered that the valuation of shares based on a discounted cash flow (DCF) method was too low and thus resulted in the Belgian seller granting an abnormal advantage to its Dutch parent company. The BTA used an alternative valuation method based on which the BTA arrived at a higher valuation.

The court recognised that the BTA did not question the appropriateness of the DCF method as such, but merely that the discount rate used would be too high (and consequently lead to a lower price). The court ruled that the BTA did not prove that the discount rate used would be incorrect or arbitrary and concluded that when several valuation methods are available, the BTA cannot conclude that an abnormal or benevolent advantage is granted when it appears that the method applied by the taxpayer is appropriate and was correctly applied, even if an alternative valuation leads to a different result. In other words, the mere fact that the BTA arrives at a different price by applying a different method does not prove that an applied price is abnormal.

Antwerp Court of Appeal, 5 March 2019, No 2017/AR/1640 ("Opel")

This case dealt with the remuneration method of a Belgian entity acting as a manufacturer of cars sold to a German related entity. Here, the BTA argued that the profit split method used to distribute profits between the Belgian entity and the German related company was inappropriate as the Belgian entity had to be classified as a contract manufacturer acting on behalf of the German principal, and should therefore be entitled to a cost-plus remuneration (rather than a share in the overall loss based on the profit split method).

The court ruled that a mere reference to the OECD guidelines to prove that another transfer pricing method is more appropriate is not sufficient to meet the burden of proof that lies with the BTA with respect to transfer pricing corrections. The court ruled against the position of the BTA as the BTA could not provide a transfer pricing study showing that, considering the Belgian entity's functional and risk profile, a different transfer pricing method should have been applied. Furthermore, the BTA could not provide a benchmarking study in support of the proposed cost-plus remuneration. A reference to arm's length remunerations accepted in previous APAs was not accepted here.

Brussels Court of First Instance, 20 June 2023, No 2021/2991/A

In this case, the court reviewed and assessed a Belgian company's credit rating for determining the arm's length interest rate under an intercompany loan from a related Swiss lender. The loan had a floating interest increased with a credit margin dependent on the Belgian company's credit rating, which was determined by using Standard & Poor's *"Corporate Methodology"* (*"S&P methodology"*). The BTA argued that S&P methodology was not correctly applied and considered that the credit rating of the Belgian company was understated, resulting in excessive interest payments.

The court concluded that the BTA successfully demonstrated that the taxpayer incorrectly applied the credit rating method but failed to prove the arm's length interest underlying the tax correction. Subsequently, the court conducted its own analysis to come up with a different credit rating, taking into account the impact of implicit group support. It then allowed the BTA to determine a new interest rate based on the outcome of the court's credit rating analysis and to issue a new tax assessment on that basis. The court hereby brings some nuance to the (high) twofold burden of proof to the BTA – ie, the BTA should demonstrate that:

- the method applied by the taxpayer does not lead to an arm's length outcome (either because the method is inappropriate or was incorrectly applied); and
- another method providing another price is appropriate.

This gives the BTA a second chance to come up with the correct price based on the court's properly determined credit rating.

15. Foreign Payment Restrictions

15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions

Belgium does not have legislation on capital controls and does not impose other restrictions on outbound payments relating to uncontrolled transactions (except in exceptional situations, such as with UN sanctions).

Belgium levies withholding tax on payments of movable income (interest, dividends, royalties) subject to various exemptions and treaty reductions.

Belgian tax law further includes various rules denying the tax deductibility of certain outbound payments in specific situations (eg, payments to tax havens).

15.2 Restrictions on Outbound Payments Relating to Controlled Transactions

Belgium does not have legislation on capital controls and does not impose other restrictions on outbound payments relating to controlled transactions (except in exceptional situations, such as with UN sanctions).

As previously stated, Belgium levies withholding tax on payments of movable income (interest, dividends, royalties) subject to various exemptions and treaty reductions. Belgium also levies withholding tax on certain types of outbound service fees to related companies.

Belgian tax law also includes various rules denying the tax deductibility of certain outbound payments in specific situations (eg, payments to tax havens).

15.3 Effects of Other Countries' Legal Restrictions

Belgium does not have rules regarding the effects of other countries' legal restrictions.

16. Transparency and Confidentiality

16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes

Unilateral APAs are published on a no-name basis. The Ruling Commission publishes a report annually which includes a summary of the most relevant advance rulings rendered in the course of the year (including negative rulings). Bilateral APAs are currently not published by the Belgian competent authority.

The final decision of a procedure under the Dispute Resolution Directive is published in its entirety to the extent that the affected parties agree with such publication. If the affected parties or the Belgian competent authorities do not agree with such publication, an abstract of the final decision will be published.

A MAP under the Arbitration Convention will only be published if the competent authorities agree to publish the decision and if the affected persons consent thereto.

A MAP under a double tax treaty will not be published as the notes of the competent authorities and the decision are deemed to be confidential.

The outcome of transfer pricing audits is not published.

16.2 Use of "Secret Comparables"

Although there is no legislation or guidance prohibiting it, the BTA does not make use of *"secret comparables"* in transfer pricing assessments.

Trends and Developments

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Loyens & Loeff is a leading law firm and a legal and tax partner for clients doing business in or from the Netherlands, Belgium, Luxembourg and Switzerland. Its 1,000 advisers are based across its offices in the Benelux, Switzerland and other key financial centres around the world. Thanks to its full-service practice, sector-specific experience and thorough understanding of the market, the firm's advisers comprehend exactly what clients need. The transfer pricing team consists of experts from various tax areas, offering a fully integrated approach to transfer pricing matters. Expertise ranges from advice on strategy, documentation and interaction with other tax and legal issues to negotiations with (international) tax authorities and dispute resolution. Given the ongoing actions taken by the G20, OECD (BEPS) and the EU, transfer pricing has become more important than ever, and Loyens & Loeff is well equipped to provide seamless service both on tax and on legal aspects.

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Introduction

In recent years, transfer pricing has become a key focus area for the Belgian tax administration (BTA) and has gained increasing importance in Belgian tax practice. In 2020, the BTA published a circular letter (the *"TP Circular"*) providing a comprehensive overview of transfer pricing principles in the Belgian context. The TP Circular is of practical relevance and offers valuable insights into the BTA's views. In addition to a longstanding ruling practice, recent years have seen the emergence of case law that applies existing rules to concrete factual situations. This increase in case law is a direct result of the significant audit activity carried out by the BTA's dedicated transfer pricing cell. In this contribution, we highlight the latest developments in Belgian legislation, case law and administrative practice.

Legislative Updates

Public country-by-country reporting

On 8 January 2024, Belgium transposed Directive 2021/2101 on public Country-by-Country Reporting (Public CbCR) into national law by amending the Belgian Code of Companies and Associations.

As a rule, the Belgian ultimate parent entity (UPE) must file the Public CbC Report in Belgium. A Belgian subsidiary exceeding a certain size threshold is only required to file if no other group entity – whether in the EU or elsewhere – files such a report. As a result, Belgian subsidiaries will generally only have a reporting obligation if they act as the EU holding company of a non-EU group or if no other EU group entity files a Public CbC Report. For non-EU headquartered groups, an exemption applies if the non-EU UPE voluntarily files a compliant Public CbC Report. Belgian branches of non-EU companies may also be subject to reporting if they exceed EUR9 million in annual turnover for two consecutive years.

The content of the Public CbC Report largely mirrors the OECD CbC Report, except for the exclusion of stated capital. However, unlike the OECD version, data must be disclosed per jurisdiction only for EU member states and countries on one of the following lists: (i) the EU list of non-cooperative jurisdictions, (ii) the Belgian tax haven list, or (iii) the OECD list of non-compliant jurisdictions. Data for all other countries may be aggregated.

The report must be filed with the National Bank of Belgium (NBB) within 12 months of the end of the financial year. It must also be published on the group's website, free of charge and accessible for at least five years, unless the NBB publication exemption applies.

The new rules apply to financial years starting on or after 22 June 2024. For calendar-year companies, this means the first report will cover the 2025 financial year and must be filed by 31 December 2026.

Updated transfer pricing documentation requirements

On 15 July 2024, Belgium introduced legislation updating the TP documentation requirements applicable to in-scope Belgian corporate taxpayers. New forms were published for the filing of the Master File, Local File and CbC Notification, bringing important changes that multinationals should consider going forward.

The new Belgian Master File goes beyond the OECD model, which will require changes to the group Master File to comply in Belgium. A notable new obligation is to perform a profit allocation analysis based on value creating functions which should then be compared with the outcome of the traditional transfer pricing model or models in place. The outcome of such analysis can in our view only be interpreted as a mere indication of alignment or non-alignment of profits with value creating activities, but not as a basis to perform a TP adjustment. Furthermore, a six-step DEMPE analysis and an identification of all transferred and used hard-to-value intangibles will need to be included in the Master File. This illustrates the particular focus of the Belgian tax authorities on transactions involving intangibles as perceived in audit practice.

The new Belgian local file requires to file available transfer pricing documentation as an attachment to the Belgian form, including the OECD local file. In addition, CCAs, rulings and in-house insurance policies should also be attached to the Belgian local file. In principle, the Belgian company has the right to indicate that it does not avail of this documentation. However, the absence of the documentation may increase the probability of a transfer pricing audit.

Pillar II

On 14 December 2023, the Belgian legislature transposed Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (known as Pillar II). The law includes a co-ordinated system of rules designed to ensure that large (domestic/MNE) groups with a consolidated revenue exceeding EUR750 million for at least two of the four previous years, are subject to a minimum effective tax rate of 15%. The Belgian implementation of Pillar II is applicable to financial years starting on or after 31 December 2023.

The law includes multiple TP aspects and provides for an adjustment of GloBE income in case cross-border transactions between related entities were not priced at arm's length. An adjustment is also foreseen under certain conditions with respect to transactions between entities within the same jurisdiction.

Coalition Agreement

On 31 January 2025, a new federal government was formed which published a government agreement including major tax policy changes. Below is an overview of announced measures relevant to transfer pricing. Please note that these changes are proposals and still need to be converted to (draft) legislation.

Investigation and assessment periods

The new government intends to shorten the investigation and assessment periods, which were recently extended. The standard period would remain at three years, for complex and semi-complex cases (including entities subject to TP documentation filing) the period would be lowered to four years and for cases of tax fraud the period would be lowered to seven years.

Abolition of the (quasi) automatic tax increase and cash tax for audit adjustments

Under the current rules, any additional taxable basis imposed at the occasion of a tax audit where a tax increase of at least 10% is imposed, constitutes a minimum taxable basis which cannot be offset with current-year or carried-forward deductions (the so-called *"cash tax for audit adjustments"* principle). Such tax increase is very often applied by the BTA in case of a unilateral TP adjustment.

This automatic sanction mechanism will be abolished by the new government, in light of the above-mentioned *"right to make an honest mistake"* and a first offence would no longer be sanctioned by a tax increase. The cash tax for audit adjustments principle will be amended, so that it only applies in case of repeated offences for which a tax increase of at least 10% is effectively applied. Mere administrative inaccuracies should not be subject to this sanction. However, a limit to this principle will be implemented: any audit adjustments would only be offset with current year losses, and not with tax losses carried forward (the agreement does not mention any other current-year or carried-forward tax deductions), regardless of the application of a tax increase. Hence, any additional taxable basis imposed after a first offence in good faith shall (i) not lead to a tax increase, and (ii) be able to be offset against current-year losses, but not against carried-forward losses.

Transfer pricing documentation

The coalition agreement states that the new government will simplify transfer pricing documentation, more specifically for small-and medium sized enterprises. It is still unclear what this will mean in practice.

Recent Case Law

Abnormal or benevolent advantage received

When a Belgian company receives an abnormal or benevolent advantage from a related entity, the amount of that benefit constitutes its minimum taxable base, against which no losses or other deductions can be offset. While this anti-abuse rule was originally intended to target profit shifting to loss-making entities, it is increasingly applied in the context of transfer pricing adjustments, even in the absence of any clear tax avoidance intent. A notable example is a recent judgment by the Antwerp Court of Appeal, which held that the sale of receivables at nominal value by a Belgian company to a Dutch group entity amounted to an abnormal or benevolent advantage, given the poor financial condition of the French related debtor. As a result, a significant taxable amount was assessed as the minimum tax base – even though no actual profit was realised – based solely on the notion of an *"avoided capital loss"* stemming from the intra-group transfer of a receivable at book value.

Credit rating analysis to price intragroup debt

In a recent ruling, the court of first instance of Brussels reviewed and assessed the credit rating of a Belgian company for determining the arm's length interest rate under an intercompany loan provided by a Swiss related lender. The case sheds light on how the BTA and courts approach the credit rating determination process, making use of credit rating agencies' established methodologies and considering the impact of implicit group support.

The BTA claimed that the Belgian borrower should be considered *"core entity"* under the S&P Group Rating Methodology, as a result of which it should have the same credit rating as the group to which it belongs. The BTA concludes that the credit rating of the Belgian borrower was understated resulting in excessive interest payments to the Swiss lender.

In this judgment, the court confirms that the BTA bears the burden of proof to demonstrate the validity of a transfer pricing adjustment. Earlier leading case law confirmed that the burden of proof is twofold: the BTA should demonstrate that (i) the method applied by the taxpayer does not lead to an arm's length outcome (either because the method is inappropriate or was incorrectly applied), and (ii) another method providing another price is appropriate. In the case at hand, the court concludes that the BTA successfully demonstrates that the taxpayer incorrectly assessed the borrower's creditworthiness but fails to establish an arm's length interest rate itself (ie, the second step in the burden of proof was not met).

The court, however, did not end its assessment there but instead conducted its own analysis to come up with a different credit rating. Indeed, as based on the court's analysis, not all criteria of the S&P Group Rating Methodology were met (referring among others to the Belgian borrower's relative profitability and the group annual reports), the court concluded that the Belgian borrower should be classified as *"highly strategic subsidiary"*, of which the stand-alone credit rating should be one notch below the credit rating of Group. The court then allowed the BTA to determine a new interest rate based on the outcome of the court's credit rating analysis and issue a new tax assessment on that basis. The court thereby brought some nuance to the (high) twofold burden of proof on the BTA by giving the BTA a second chance to come up with the correct price based on the credit rating as determined by the court.

Share capital contribution

In a ruling of the court of appeal of Brussels, it was confirmed that the taxable base of a Belgian company can be adjusted in respect of a non-arm's length benefit granted in the context of a share capital contribution to which the company was not legally a party. The case concerned a capital increase by a Luxembourg grandparent through the contribution of a receivable to its Belgian indirect subsidiary. The court decided that the Belgian parent company granted a non-arm's length benefit to its Luxembourg parent as it agreed to a capital increase at a price per share well below the market value thereof. It stated that as a result, the Belgian parent's wealth decreased through the dilution of its participation in its Belgian subsidiary and the Luxembourg grandparent's wealth increased as it acquired a participation at a value exceeding that of the contributed receivable. Based on the foregoing, the court concluded that the transfer of value from the Belgian parent to the Luxembourg grandparent constitutes a non-arm's length benefit to be added to the Belgian parent's taxable basis.

DEMPE approach

A recent ruling concerned a Belgian company that paid a 12.5% royalty on turnover for the licence of a brand to a related Luxembourg company. According to the BTA, the Luxembourg licensor did not perform any DEMPE functions relating to the brand and should therefore only be entitled to a cost-plus return. The court rejected this approach and considered the tax assessment as arbitrary. The court notably considered that a tax assessment cannot be solely based on OECD Guidelines as these are not mandatory law. In addition, the tax assessments relate to FY2015 and 2016; ie, the years prior to the publication of the 2017 OECD Guidelines incorporating the DEMPE concept (ie, prohibition of retroactive application of new versions of the OECD Guidelines). Finally, inspired by the EU Amazon case, the court rejected the position that the Luxembourg licensor was merely acting as a passive IP owner as, according to the court, by licensing its IP, the licensor indeed actively exploits the IP and should receive a market-based consideration in return.

Noteworthy Rulings

Ruling on hard-to-value intangibles

The Ruling Commission rendered a ruling about the licensing of intellectual property (IP) which is still in its development phase and qualifying as a hard-to-value intangible (HTVI) according to the OECD Guidelines and the TP Circular.

The ruling applicant performed a provisional IP valuation by using the discounted cash flows approach based on forecasted cash flows derived from the use of the IP by the licensee. A price adjustment mechanism is factored in, providing for a new valuation based on actuals and updated forecasts following the first year of commercialisation of the IP. In case the newly calculated value deviates by more than 20% from the originally agreed price, a retroactive price adjustment will take place.

The Ruling Commission confirms this approach and agrees that the IP will no longer qualify as an HTVI following the first year of exploitation.

Ruling on dual principal model

The ruling validates a dual principal (co-entrepreneur) model within a centralised business model (CBM), where two group entities act as principals with distinct but complementary roles: one assumes the role of the operational principal, overseeing the day-to-day management of the supply chain, production, and sales execution, while the other functions as the strategic principal, responsible for developing, steering and adjusting the group's overall strategy through its executive committee and key personnel. The ruling confirms that the application of a profit and loss split method, supported by a CUP analysis for strategic services, is consistent with the arm's length principle. The allocation of entrepreneurial profit is based on a RACI-driven functional and risk analysis reflecting the shared responsibility over key value drivers. The remuneration for strategic services is also confirmed as tax-deductible under domestic law. This ruling demonstrates that a well-substantiated co-entrepreneur model, with clearly delineated strategic and operational roles, can be compliant with the arm's length standard.

Rejection of IFRS as basis for transfer pricing calculations

In a recent ruling request, the Belgian Ruling Commission reaffirmed its position that IFRS-based figures are not an acceptable standard for determining transfer pricing outcomes. Although the applicant proposed to use IFRS management reporting figures at legal entity level to calculate arm's length remuneration for local group entities, the ruling commission rejected this approach. It emphasised the need to avoid timing differences and mismatches with the statutory accounts used to determine the Belgian taxable base. This confirms the BTA's (criticized) view that only statutory accounting standards (BE GAAP) should form the basis for transfer pricing calculations in a Belgian tax context.

Audit Practice

Transfer pricing cell within BTA

The BTA avails of a dedicated transfer pricing unit which initiated a new wave of TP audits in 2025. In recent years, there has been a noticeable increase in both the number of TP audits conducted, and the number of specialised TP auditors within the transfer pricing unit of the BTA. The transfer pricing unit has grown from 35 inspectors at the beginning of 2022 to nearly 55 inspectors today. In addition, specially trained officials within the Large Enterprises division and the Special Tax Inspection conduct transfer pricing audits. This creates a climate of thorough investigation and enforcement that is also observed in other countries.

A Belgian business outlet recently reported that in 2024, the transfer pricing unit within the BTA claimed a record EUR1.17 billion in additional taxes, of which EUR981 million allegedly stems from exceptional files involving a very small number of large multinational groups. Overall, the total amount the BTA seeks to recover has quadrupled compared to 2023.

Unlike previous circulars, the TP Circular does not provide specific indications regarding the cases in which transfer pricing audits are most likely. Companies are typically selected through an internal data mining process based on a risk assessment analysis, the indicators of which remain confidential. Nevertheless, we understand the probability of becoming subject to an audit notably increases in case of declining or volatile results, structural loss-making positions, high debt-to-equity ratios, the presence of a permanent establishment, the involvement in business restructurings, and payments to low-tax jurisdictions. Next to this, non-compliance with TP documentation obligations is considered in the selection process.

Information request and pre-audit meeting

A transfer pricing audit typically begins with a standard broad questionnaire consisting of around 30 questions regarding among others the Belgian company's organisational structure, supply chain, segmented P&Ls per business units, functional and risk profile, financial transactions, and transactions involving intangibles. A recently observed trend is that the transfer pricing unit of the BTA sometimes opts for a more customised questionnaire based on available information or immediately sends a request for a so-called pre-audit meeting. Such a meeting allows the BTA to gain initial insights into how the Belgian company operates within the group and its applied transfer pricing policy. Even upon receipt of a questionnaire, the taxpayer can usually request a pre-audit meeting before responding in writing, which allows for discussing the questions orally and delineating the parameters of the audit.

Focus on certain topics during audit

It can be observed that certain topics are frequently and thoroughly investigated during audits. For instance, the BTA tend to carefully review among others the reconciliation of the transfer pricing policy with the annual accounts, the alignment of the applied TP model with the functional profile. the origin of losses, the allocation of synergies related to procurement activities, the DEMPE functions in relation to IP, the arm's length nature of intra-group service fees, including the cost base in a cost-plus remuneration, etc. Moreover, the BTA particularly focuses on financial transactions – eg, the applied interest rate to remunerate intercompany debt, the arm's length character of a company's intragroup debt level, as well as the arm's length character of cash pool arrangements.