The Inward Investment and International Taxation Review

Twelfth Edition

Editor
Tim Sanders

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THE

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Twelfth Edition

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PREFACE

In January 2021, the 11th edition identified and described two material global tax trends that emerged in 2020: the response of economies to the covid-19 pandemic and the taxation of the digital economy. These two trends evolved through 2021 and can be expected to occupy centre stage in 2022 and beyond.

In 2020 and 2021, governments sought to bolster economies hit by the pandemic through a series of measures ranging from furlough schemes, postponing tax deadlines and deferring tax payments to relaxing residence rules. In 2021 and into 2022, governments will face the difficult balancing act of continuing to support their economies and encourage growth on the one hand, while needing to raise money from damaged economies to pay for such support and reduce the size of large deficits on the other, without such tax raising stifling any recovery. Precisely how each jurisdiction will deal with this balance remains uncertain and is a key area to observe in 2022. At this stage it appears that, while we may see some limited tax rises, more rigorous tax enforcement is likely to play a material role.

On 1 July 2021, a statement was made by the G20 Finance Ministers that on 8 October 2021 resulted in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS 2) that contains details of how Pillars 1 and 2, which seek to address the issues raised by the digital economy, will be applied in practice. Pillar 1 deals with the reallocation of certain profits from very large multinational enterprises to market jurisdictions, while Pillar 2 deals with a global minimum tax. Among significant points to note is that under Pillar 1 it is intended that a new multilateral convention will be drafted and available for signature in 2022 that will remove unilateral digital services taxes and similar measures. Some jurisdictions that have applied a unilateral solution, notably the United Kingdom, Austria, France, Italy and Spain, have committed to transition from existing digital services taxes to the new multilateral approach solution. Under Pillar 2, the minimum tax rate is set at 15 per cent rather than the previously proposed rate of 'at least 15 per cent'. This has already had an impact, with Ireland announcing an increase in its minimum corporate rate to 15 per cent. While a remarkable amount of progress has been made in a short time, there are still important technical issues to be addressed quickly if the timetable, which proposes implementation in 2023, is to be adhered to. However, there is sufficient detail in the proposals for businesses likely to be affected to consider starting the process of reviewing their internal procedures and processes to ensure they can be compliant.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages.

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Tim Sanders
London
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Chapter 3

BELGIUM

Christian Chéruy and Marc Dhaene[1]

I INTRODUCTION

Belgium offers a wide range of tax-planning opportunities for companies (and Belgian branches). At first glance, the rather high corporate income tax rate (25 per cent) ought to restrain foreign investors from making an investment in Belgium; however, Belgium plays an important role in the international tax arena as a result of some advantageous features of the tax system resulting in planning opportunities for companies.

These advantageous features, further discussed in this chapter, include:

a the participation exemption, which virtually exempts income from qualifying subsidiary companies (i.e., dividends received and capital gains on shares);

b the notional interest deduction regime, which reduces the effective corporate income tax rate;

c the extensive and beneficial tax treaty network;

d the deductibility of finance costs;

e the application of the EU Parent–Subsidiary Directive to all tax treaty countries;

f the ruling practice, allowing companies to obtain a legally binding advance opinion from the Belgian tax authorities on various tax issues;

g the absence of capital tax and of a net wealth tax; and

h the innovation income deduction (IID).

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

A new Companies Code was approved by the Belgian Parliament on 23 March 2019. The new Companies Code entered into effect for new companies on 1 May 2019 and on 1 January 2020 for existing companies.

i Corporate

In Belgium, businesses generally conduct their activities through a subsidiary that adopts a corporate form. Several legal forms exist under Belgian law, but the most commonly used are the public limited liability company (NV/SA) and the limited liability company (BV/SRL).

Originally, the NV/SA was mainly seen as a vehicle for medium-sized or large undertakings, whereas the private limited liability company (BVBA/SPRL), which has been replaced in the new Companies Code by the BV/SRL, was intended to be used for small

1 Christian Chéruy is a former managing partner and Marc Dhaene is a local partner at Loyens & Loeff.

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businesses where management and ownership often coincide. To this day, the BV(BA)/S(P)RL is used most often for smaller (privately owned) businesses, but in light of the added flexibility offered in the new Companies Code to the BV/SRL in terms of governance, funding and distribution of proceeds, this may change in the future. Large multinational groups most often incorporate their Belgian subsidiaries under the form of a NV/SA (although some may opt for the BV/SRL for foreign tax transparency reasons).

From a Belgian tax perspective, an NV/SA and a BV/SRL are subject to the same corporate tax rules.

NV/SA	BV/SRL
Registered or dematerialised shares	Registered shares only but a listed BV/SRL can issue dematerialised shares
Shares are freely transferable (limitations on transferability possible but subject to statutory restrictions)	Shares are freely transferable if determined in the articles of association
Issue of profit shares, warrants and convertible bonds possible	Issue of profit shares, warrants or convertible bonds possible
One-tier board of directors or sole director or two-tier board of directors, with possibility to delegate daily management power	Board of directors with the option to delegate daily management power
Minimum capital: €61,500	No (minimum) share capital
Possibility to solicit public funds and obtain quotation on the stock exchange	Possibility to solicit public funds and obtain quotation on the stock exchange

In addition, several forms of real estate investment companies with fixed capital for investment in real estate exist; for example, the specialised real estate investment fund (SREIF).

The SREIF is dedicated to institutional investors. Its shares may be held by institutional and professional investors. It is not listed on any stock exchange but must be registered in a special list by the Federal Public Service Finance (i.e., the Ministry of Finance).

Important legal requirements for the new vehicle include the following: (1) it must have an investment policy; (2) it must be established for a minimum period of 10 years, which may be renewed by periods of five years each; (3) its accounting records must be kept in accordance with international financial reporting standards (IFRS); and (4) at least 80 per cent of its net profits must be distributed.

SREIFs are taxed in the same manner as regulated real estate companies. This means that they are subject to corporate income tax. However, the taxable base only includes exceptional or gratuitous benefits received and costs and expenditure that are not deductible as professional costs.

This means, inter alia, that dividends, interest, capital gains on real estate assets and rental income are exempt.

Dividends distributed by SREIFs to Belgian corporate shareholders arising from foreign-taxed income benefit from the participation exemption regime. Such income includes income from foreign real estate and foreign dividends.

Dividends distributed by SREIFs arising from foreign income that has been taxed in the foreign country are exempt from dividend withholding tax.

An 'exit tax' is levied on Belgian real estate attributed to a SREIF through conversion of an existing company, a (de)merger or a contribution. The tax is due on unrealised capital gains at a favourable tax rate of 15 per cent. This tax also applies if Belgian real estate assets are contributed to a SREIF.

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Management services rendered for the benefit of a SREIF will be exempt from value added tax (VAT) to the extent that these services are specific to and essential for managing the SREIF. The SREIF is subject to the annual tax on collective investment institutions. This tax is levied at a rate of 0.01 per cent of its total net assets.

ii Non-corporate

In Belgium, the use of non-corporate entities remains relatively limited. The most commonly used forms are the limited partnership, the general partnership and the partnership.

The former partnership limited by shares, which was often used in structuring succession planning, has been abolished in the new Companies Code, with the public limited liability company with a sole director as its replacement. The temporary commercial company that was used in the framework of structuring certain (development) projects, such as large construction works, has also been abolished in the new Companies Code but it is possible to tailor the partnership to achieve similar results. The same is true for the undisclosed company that was sometimes used to structure joint ventures.

The limited partnership and the general partnership have a separate legal personality and are therefore treated as non-transparent entities. Consequently, they are subject to corporate income tax at the level of the partnership.

The partnership has no separate legal personality and is treated as a transparent entity for tax purposes. Tax is, therefore, not levied at the level of the partnership, but in the hands of the different partners. Each partner will be apportioned his or her share of the profits and the losses of the partnership in accordance with the relevant provisions of the partnership agreement.

The existence of some entities that have a separate legal personality but that are nevertheless treated as tax-transparent entities should be noted.

III DIRECT TAXATION OF BUSINESSES

i Tax on profits

Determination of taxable profit

Companies are subject to Belgian corporate income tax if they meet all three of the following conditions:

a they have a separate legal personality under Belgian or foreign corporate law or, if the governing foreign corporate law does not confer legal personality, they have a legal form that is comparable to a legal form that has legal personality under Belgian corporate law;
b they carry out a business or are engaged in profit-making activities; and
c they have their corporate tax residence in Belgium.

Corporate income tax is levied on the total worldwide profit realised by a company, including distributed dividends. The profits are taxed on an accruals and not a receipts basis.

Contrary to, for example, the Netherlands, Belgium does not recognise the concept of a separate fiscal balance sheet. The taxable income of resident companies is, therefore, determined on the basis of the financial accounts and the accounting rules, unless the tax laws provide otherwise (such as for transfer pricing adjustments).

In general, all business expenses are tax deductible to the extent that they are borne to obtain or preserve taxable income; however, special tax provisions limit the tax deductibility of certain items, such as fines; certain social benefits granted to employees; 31 per cent of

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restaurant expenses; some regional taxes; 60 per cent of car expenses in relation to vehicles with CO_2 emissions equal to or greater than 200g/km; up to 50 per cent of the car expenses for vehicles with CO_2 emissions lower than 200g/km (depending, inter alia, on the carbon dioxide emission factor of the car); a 40 per cent portion of the fringe benefit related to company cars (including fuel cards); granted non-arm's-length benefits; clothing costs; capital losses on shares; and write-downs on shares. In addition, the corporate income tax paid constitutes a non-deductible item.

The depreciation of establishment costs, tangible assets and intangible assets constitutes a tax-deductible item to the extent that it is necessary and corresponds to a decline in value that actually occurred during the taxable period. Belgian tax law currently only allows the use of a straight-line depreciation. Goodwill acquired from third parties may be depreciated.

Minimum taxable basis

A minimum taxable basis has been introduced as of 1 January 2018. The deduction of certain tax attributes is limited to 70 per cent of the remaining taxable result exceeding €1 million. In other words, a minimum taxable basis equal to 30 per cent of the remaining taxable result that exceeds this amount is introduced.

The minimum taxable basis is calculated as follows: first, the result of the taxable period is determined under the normal rules. Then, in the following order, dividends received deduction of the year, patent income deduction, innovation income deduction, investment deduction and the group contribution pursuant to the tax consolidation regime are deducted (i.e., 'fully deductible tax attributes'). If, after the above-mentioned deductions, the remaining taxable basis exceeds €1 million, the following deductions can only be applied to 70 per cent of the taxable basis exceeding €1 million, again in the following order: the current year notional interest deduction; carry-forward dividends received deduction; carry-forward innovation income deduction; carry-forward tax losses; and finally, carry-forward notional interest deduction. The excess can be carried forward to the following years. An exception to the minimal taxable basis exists for carry-forward tax losses incurred by start-up companies that qualify as small or medium-sized enterprises (SMEs) during the first four taxable periods.

Capital and income

In Belgium, there is no separate capital gains tax. Capital gains are, therefore, taxed as ordinary profits.

Unrealised capital gains that are recorded on certain assets remain untaxed if they are booked in a special blocked reserve account on the liabilities side of the balance sheet. Note, however, that unrealised capital gains on stocks and orders are taxable.

Capital gains realised by a company upon the sale of any asset are, in principle, included in the taxable basis of the company. Two exceptions must be mentioned in this respect.

First, capital gains realised on shares qualifying for the participation exemption regime (see below) are fully exempt from corporate income tax.

Second, it is possible to apply a deferred taxation regime on capital gains realised on fixed tangible and intangible assets that, at the time of the disposal, have been owned by the company for at least five years already. Intangible assets qualify only under the deferred taxation regime if they have been depreciated. Consequently, capital gains realised on, for example, a self-established client base cannot benefit from the deferred taxation.

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The capital gains realised on the qualifying assets will only benefit from the deferred taxation if the entire selling price (thus, not only the capital gain realised) is reinvested in intangible or fixed tangible assets that are used in the European Economic Area (EEA) and that can be depreciated (thus, for example, not in land).

The total reinvestment must, in principle, be implemented before the end of the third year following 1 January of the year during which the assets were sold. The term for reinvestment is increased to five years in the case of reinvestment in real estate (other than land), planes or ships.

If the reinvestment is made in qualifying assets and in due time, the capital gain realised is only taxable in proportion to the annual depreciation on the fixed assets in which the reinvestment is made. If the total selling price is not reinvested within the aforementioned terms, the capital gain realised will be taxable in the tax year during which the reinvestment period has expired.

Losses

Losses incurred by a Belgian company can be carried forward without limitation. They cannot, however, be carried back. An exception applies to the agricultural sector, where an optional carry-back system allows companies to deduct the losses made because of damage to agricultural crops caused by adverse weather conditions from the professional income for the three taxable periods prior to the taxable period in which the damage was definitively established.

Losses carried forward may be proportionally reduced (or even cancelled) if the company is involved in a tax-neutral restructuring (merger, spin-off, etc.).

The losses carried forward will, moreover, be cancelled upon a change in control over the company that does not correspond to legitimate financial or economic needs. For these purposes, 'control over a company' is defined as the ability to exercise a decisive influence on the appointment of the majority of the directors or on the orientation of the company's policy.

Even if there is a change in control, the losses carried forward will not be cancelled if it can be established that the change in control corresponds to legitimate financial or economic needs. With respect to the presence of the latter, one can request an advance ruling from the Belgian tax administration. From a number of published advance rulings, one can deduct that legitimate financial or economic needs will be deemed present if the following conditions are (cumulatively) met:

a the change in control forms part of an (international) reorganisation of the group that has the objective of rationalising or simplifying the group structure in view of the development of new activities or the strengthening of the market position; and

b the transactions envisaged (causing the change in control) are aimed at ensuring the continued existence of the company, maintaining the present employment, and continuing or even expanding the present activities of the company.

The crucial criterion in this discussion seems to be the maintenance of the activities and the employment after the change of control.

Tax losses incurred by a permanent establishment (PE) of a Belgian company or with respect to assets of such a company located abroad and of which the income is exempt in Belgium by virtue of a double tax treaty cannot be deducted from the Belgian taxable basis. The tax treatment of these losses in the foreign state is irrelevant. An exception is made for definitive losses within the EEA. Definitive losses are losses that exist in a certain Member

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State upon the final termination of the activity or possession of the asset if these losses have not been deducted in that state and cannot be deducted by another tax subject in that state. If an activity is restarted within three years after the termination, there is a recapture of the losses deducted from the Belgian taxable basis.

Capital losses

Losses originating from the transfer of assets are first set off against other positive income. If these losses exceed the positive income, they are treated as ordinary losses.

Capital losses on shares are, in principle, not tax deductible. The only exception to this rule is that the loss incurred on the liquidation of a company in which shares are held remains deductible up to the loss realised on the fiscal paid-up share capital represented by those shares. The scope of application of this tax non-deductibility is limited to capital losses realised on shares. Capital losses realised on other securities (e.g., bonds) or derivatives (e.g., options) are fully tax deductible.

Rates

The standard corporate income tax rate is 25 per cent. SMEs benefit from a reduced rate of 20 per cent on the first tranche of €100,000 taxable income. The definition of 'SME' for the purpose of the reduced rate refers to companies that fulfil all of the following conditions:

a in accordance with Article 1:24, Sections 1–6 of the new Belgian Companies Code, the company may not exceed more than one of the following criteria: (1) annual average number of 50 employees; (2) annual turnover of €9 million (excluding VAT); and (3) a total balance sheet of €4.5 million (if applicable to be determined on a consolidated basis);

b the company pays a minimum annual remuneration of €45,000 (or, if lower, at least the amount of the taxable income of the company), from the fifth taxable period following the establishment of the company, to at least one company manager that is a natural person;

c more than 50 per cent of the company's shares are held by natural persons;

d the company is not an investment company; and

e the company does not hold participations for an acquisition value that exceeds 50 per cent of either the revalued paid-up capital or the paid-up capital, taxed reserves and recorded capital gains (participations of at least 75 per cent being excluded for the calculation).

Administration

Federal taxes, such as corporate income tax, are handled by the Federal Public Service Finance. Companies must file their corporate income tax return with the tax office responsible for the area in which they are established. In principle, tax returns must be filed by the date mentioned on the official return forms that are sent to each company. The filing period may not be longer than seven months following the end of the financial year. However, the tax administration may deviate from these time limits. In practice, the date mentioned on the forms is often nine months after the closing of the financial year. Corporate income tax returns must be filed using an online application, BizTax. Paper returns are no longer allowed.

Companies must, in principle, estimate their corporate income tax liability during the financial year and must pay the tax in advance. If insufficient tax is paid in advance, a tax increase is applied.

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The statute of limitations is three years. In the event of (alleged) fraud, it is extended to seven years. Even longer audit and assessment periods are possible; for instance, in case the tax authorities spontaneously receive information from foreign tax authorities. Tax audits may take place within these terms, but there is no regular routine audit cycle. A tax audit is in most cases preceded by a request for information. The taxpayer must, in principle, reply within one month to this request for information, but extensions are often granted.

If the tax administration wants to change the filed tax return upon a tax audit, it must send a notice of change of tax return. The taxpayer can reply to this notice within one month. If the tax administration does not agree with the position taken by the taxpayer and intends to assess the company on a modified tax return, it must send another notification by registered mail to the taxpayer.

If a taxpayer disagrees with an assessment imposed after a tax audit, it may file a notice of objection. This notice, which must include specific grounds for the objection, must be filed within six months following the date on which the assessment was sent. If the tax administration fails to make a decision within six months, the taxpayer may challenge the assessment before court. If the taxpayer waits for the decision or if the tax administration makes a negative decision within the time frame mentioned above, the taxpayer can still challenge this decision before court within three months after notice of the director's decision was given to the taxpayer.

To stimulate taxpayers to fulfil their duties in the field of corporate income tax compliance, no deduction of current year losses and deferred tax assets (e.g., carried-forward tax losses) is allowed against a taxable basis determined as a result of a tax audit. An exception is made for the participation exemption for dividends received during the same taxable period. This rule does not apply for infractions committed negligently and for which no tax increases are applied. In an M&A environment, this rule is a point of attention in the framework of a tax due diligence.

Tax grouping

Until recently, the taxable income of resident companies was determined on an individual basis. A corporate income tax consolidation regime was, however, introduced as of assessment year 2020 (relating to the taxable period starting at the earliest on 1 January 2019) and allows the transfer by a Belgian taxpayer of taxable profits to another loss-making qualifying taxpayer via a group contribution agreement. Certain taxpayers that benefit from a special tax regime are excluded. A qualifying taxpayer is a Belgian company or a foreign company established in the EEA that:

a is the parent company, subsidiary or sister company of the Belgian taxpayer owning at least 90 per cent of the capital. In the case of sister companies, this implies that a parent company should own 90 per cent of the capital of both the Belgian taxpayer and the qualifying taxpayer; and

b is affiliated to the Belgian taxpayer for an uninterrupted period of at least five taxable periods (including the current one). Provisions have been introduced that determine the consequence of a restructuring in which one (or both) of the parties to the agreement was involved.

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Tax consolidation is achieved via a group contribution agreement that should be filed together with the income tax return. Parties to the agreement are the Belgian taxpayer and either a Belgian qualifying taxpayer or the Belgian PE of a qualifying foreign taxpayer. All of the following conditions should be respected:

a the agreement relates to one and the same assessment year;

b the agreement mentions the group contribution. The (loss-making) qualifying Belgian taxpayer or the Belgian PE of a qualifying foreign taxpayer should include the amount of the group contribution in the income tax return as a profit of the taxable period concerned; and

c the Belgian taxpayer (that transfers its taxable profits) pays a contribution to the loss-making qualifying taxpayer in the amount of the tax saving resulting from the group contribution. This payment is not tax deductible in the hands of the payer and not taxable in the hands of the payee (i.e., the payment is fiscally neutral).

In addition, Belgium has an optional system of VAT grouping. No VAT is charged between the members of a VAT group, as they are considered as a single taxable person. This system provides interesting perspectives for optimising the VAT position.

ii Other relevant taxes

Value added tax

VAT is levied at each stage in the production chain, and on the distribution of goods and services. The tax base is the total amount charged for the transaction excluding VAT, with certain exceptions. Owing to deductions in previous stages of the chain, VAT is not cumulative. Every taxable person is liable for VAT on their turnover (the output tax), from which the VAT charged on expenses and investments (the input tax) may be deducted. If the balance is positive, tax must be paid to the tax authorities; if the balance is negative, a refund is received. The tax paid by the ultimate consumers of the goods or services is not tax deductible. The tax is based on the VAT rate applicable to the VAT-exclusive price of the goods or services received.

The general VAT rate is 21 per cent. A reduced rate of 6 per cent applies to the supply, import and acquisition of foodstuffs, some real estate services and medicines. A reduced rate of 12 per cent applies to certain goods and services, such as social housing and certain restaurant services. An exemption applies to the intra-community supply of goods or to the export of goods outside the European Union. In business-to-business relationships, goods destined for another EU Member State will be subject to VAT in the EU Member State to which they are transported.

Capital tax

In principle, the contribution of cash or other assets to a Belgian company is only subject to a fixed fee of €50.

Net wealth tax

Belgium does not levy a net wealth tax.

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Transfer taxes

Transfer tax is levied on the transfer of ownership of immovable property located in Belgium. The tax is levied at a rate of 3 per cent or 12.5 per cent, depending on the nature and use of the property. The transfer of new immovable property is subject to VAT and not to transfer tax. The sale of shares of a company owning Belgian real estate is in principle not subject to transfer tax.

Securities tax

Transfers of public securities for consideration that are concluded or executed through a professional intermediary, whether or not established in Belgium, are subject to Belgian stock exchange tax. The standard rate per party amounts to 0.35 per cent, which is levied on the purchase price (brokers' fees excluded) if due by the transferee and on the sales price (brokers' fees included) if due by the transferor. The standard rate applies to all types of securities that do not qualify as, among others, bonds or shares held in real estate companies (0.12 per cent) or a buy-back of capitalisation shares in investment companies (1.32 per cent). The total amount of the securities tax, per party and per transaction, is, however, capped at €1,600.

Tax on securities accounts

The tax on securities accounts is an annual levy of 0.15 per cent on taxable financial instruments held on a securities account with an average value of €1 million or more during the reference period. It applies to securities accounts held worldwide by Belgian residents and Belgian establishments (corporates and individuals). It also applies to securities accounts held by non-residents with Belgian financial intermediaries (but not with their foreign establishments) unless the application is prevented by the applicable tax treaty. The tax on securities accounts applies not only to shares, but also to, for example, bonds and derivatives that are held on a securities account.

The tax is to be levied, reported and paid by the financial intermediary, unless the account is held with a non-Belgian institution. In the latter case, the tax is reportable and payable by the account holder, unless the account holder proves that the tax was already reported and paid by a Belgian or foreign intermediary.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

A company is a resident of Belgium if it has its main establishment or place of effective management in Belgium. If a company has its statutory seat in Belgium, it is assumed to also have its main establishment or place of effective management in Belgium. This assumption is refutable if the company can establish that it is tax resident in another state according to the tax legislation of that state.

The statutory seat of a company (registered office) can be defined as the official address of the company as included in the articles of association and as mentioned in the registration at the Companies' Register.

According to the official administrative commentary, the term 'main establishment' is quite similar to the notion of 'place of effective management and control'. Both notions refer

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to the place where the company is generally managed; that is, where the principal directors meet, where the shareholders' meetings are held, where the ultimate management of the company takes place and where the impulse in the company is given.

As a consequence of the above, one can conclude that the main criterion to determine whether or not a company is a resident of Belgium for Belgian income tax purposes is the place of effective management and control of the company.

Taking into account the above, a foreign company should avoid having its place of effective management in Belgium if it does not want to become subject to Belgian corporate income tax. The place of effective management is a factual discussion. No clear administrative guidelines or conclusive case law exist in this respect.

ii Branch or permanent establishment

A foreign entity that envisages making an inward investment in Belgium may opt not to incorporate a subsidiary, but rather to establish a branch or PE in Belgium.

The taxable income of a branch (taxed at 25 per cent) is generally determined in a similar way to the taxable income of resident companies. However, expenses are only deductible if they are attributable to the Belgian taxable income. The participation exemption applies to dividends received by a PE of a non-resident company, under the same conditions as for resident companies.

The theory of the force of attraction is not applicable in Belgium. Only the profits that are realised through the activity of the Belgian branch are taxable in Belgium.

Under certain circumstances, it is possible to obtain beneficial (transfer pricing) rulings regarding the determination of the branch's taxable income. Known examples are rulings granted to branches that carry out activities as a service or distribution centre.

No withholding taxes are levied on the remittance of branch profits to the head office. Furthermore, no branch profit tax applies.

Most of the Belgian tax treaties are generally in line with the Organisation for Economic Co-operation and Development (OECD) Model Convention and, therefore, offer the international recognised protection at the level of tie-breaker rules, exemption of PE profits, etc.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

i Holding company regimes

The holding regime (participation exemption regime) is part of the general corporate income tax system. It is not a special regime as such. Under the participation exemption, both dividends received and capital gains realised on shares are fully exempt from Belgian corporate income tax.

The application of the participation exemption is subject to the following conditions:

a the company in which the Belgian company holds shares meets the 'subject-to-tax requirement'. The Belgian Income Tax Code defines this condition in a negative sense by setting out eight exclusions. The two last exclusions were introduced in 2016 and aim at countering hybrid mismatches (qualifying payments that are deductible for the paying entity) and abuse of the participation exemption regime;

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b the participation is held for an uninterrupted period of 12 months; and
c the participation amounts to at least 10 per cent of the nominal share capital or, alternatively, has a historic acquisition price of at least €2.5 million.

ii IP regimes

In accordance with the Lisbon strategy that has insisted on the promotion of 'research' within the European Union, Belgium encourages the R&D culture. In this regard, the patent income deduction (PID) enacted in 2007 was introduced to encourage entities to sustain and promote technological innovation in Belgium. Coupled with other tax (and non-tax) incentives (e.g., tax credit, investment deduction, foreign tax credit on royalties), the PID was to make Belgium a tax-friendly environment for R&D.

In 2016, the PID regime was replaced with the IID regime that is in line with the OECD modified nexus approach, requiring a link between expenses made for the development of IP and the IP incentives received with respect to that IP. The deduction has increased from 80 to 85 per cent. As a result thereof, the effective tax rate on qualifying income can be as low as 3.75 per cent taking into account the 25 per cent headline rate. Moreover, the scope of the IID has been substantially extended and can apply to income derived from the following IP of which the company or branch has the full ownership, co-ownership, usufruct or licence, or rights to use on:

a patents and supplementary protection certificates;
b breeders' rights requested or acquired as from 1 July 2016;
c orphan drugs (limited to the first 10 years) requested or acquired as from 1 July 2016;
d data and market exclusivity granted by the competent authorities (e.g., market exclusivity for orphan drugs or data exclusivity for reports with respect to pesticides, clinical studies of generic or animal drugs); and
e IP of copyrighted software and adaptations thereof resulting from a research or development project as defined for the purposes of the partial exemption of wage withholding tax for R&D, to the extent that it has not yet generated income before 1 July 2016.

The new deduction applies to royalty income or embedded royalties as well to process innovation gains, indemnities and capital gains. Concerning capital gains, the following conditions need to be met:

a the IP right must have been created during the previous tax year or, in the case of an acquired right, the acquisition must have taken place in the previous 24 months; and
b the deduction only applies if the realised capital gain is reinvested within five years (or before the professional activities stop) in R&D projects that have the objective of obtaining other IP rights.

iii State aid

In principle there is no state aid. Some sectors, however – such as the shipping industry – benefitted from a special tax regime that was notified to the European Commission. On 20 September 2019, the General Court concluded in this respect that the aid scheme exempting Belgian ports from corporate income tax constitutes illegal state aid. The law of 29 May 2018 already subjected Belgian ports to corporate income tax as of 2018 and provided for transitional provisions. Because the General Court did not annul the decision of the European Commission, the law remains applicable.

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Note that the European Commission has held that certain transfer pricing methodologies applied by certain large companies (the 'excess profit rulings'), which were explicitly allowed by the Belgian ruling committee, constitute state aid. While the Belgian government has filed an appeal with the European Court of Justice against that decision, the practice of these rulings has been put on hold since the beginning of 2015. On 14 February 2019, the General Court annulled the European Commission's *State Aid* decision of 11 January 2016 on Belgian excess profit rulings on the formal ground that the Belgian rules did not constitute an aid scheme. The General Court did not take a position on whether or not the 'excess profit' rulings gave rise to illegal state aid but found that the European Commission had failed to establish the existence of a scheme. The European Commission appealed on 24 April 2019 against this decision. Because the General Court argued that the compatibility of the tax rulings with EU state aid rules needs to be assessed individually, the European Commission also opened separate in-depth investigations into the individual tax rulings granted by Belgium to 39 multinational companies between 2005 and 2014. On 16 September 2021, the European Court of Justice has, however, set aside the General Court's judgment and decided that the Belgian legal framework for excess profit rulings did qualify as an aid scheme. The case has now been referred back to the General Court for a second review of the substance of the case (i.e., whether these rulings provided an unlawful selective (tax) advantage to their beneficiaries).

iv General

Notional interest deduction

The notional interest deduction regime (NID) was introduced to encourage Belgian companies to strengthen their equity position, and to reinforce the attractiveness of Belgium as a location for treasury and finance centres, capital-intensive companies and headquarters.

It entitles all companies subject to Belgian corporate income tax, and all non-Belgian companies with either a Belgian establishment or immovable property located in Belgium (or related rights), to annually calculate a fictitious interest expense on their aggregate equity amount, thus reducing their taxable basis. Prior to 2018, the deduction was calculated by multiplying the adjusted accounting equity ('risk capital') at the end of the preceding financial year by a fixed percentage, determined by the government on the basis of the average of the monthly reference indices of the interest rate on 10-year linear government bonds in the third quarter of the second year preceding the assessment year. Although the percentage remains, the calculation basis is amended as of assessment year 2019 (relating to taxable periods starting the earliest on 1 January 2018) and will equal one-fifth of the positive difference between the risk capital at the beginning of the taxable period and the risk capital at the beginning of the fifth preceding taxable period. This implies that no NID can be applied if the difference is negative. Adjustments during the taxable period are not taken into account.

The rate for assessment year 2022 (financial year 2021 for most companies) is zero per cent or 0.34 per cent for SMEs. In assessment year 2022, only SMEs will thus benefit from the NID.

The starting point to calculate the risk capital is the company's aggregate equity amount as determined in accordance with Belgian generally accepted accounting principles, and comprises the share capital and share premium, the various retained earnings and carry-forward losses, and the revaluation surpluses and capital subsidies.

Once this base amount has been determined, the following items (among others) must be deducted:

a the net fiscal value of own shares;

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b the net fiscal value of shares held as financial fixed assets;
c the net fiscal value of shares, the income of which qualifies under the participation exemption;
d the book value of assets when expenses related thereto exceed reasonable business needs and assets held as an investment when these items do not normally produce taxable recurrent income. This exclusion aims at assets such as jewellery, gold and works of art that usually qualify as private assets, but the tax administration has also applied this exclusion to shares for which the by-laws state that no dividend distribution is possible;
e the net fiscal value of immovable property used as a personal dwelling by directors of the company or their family; and
f revaluation reserves and capital subsidies.

Several new anti-abuse provisions were introduced mid-2018. First, a capital contribution by an affiliated company will be excluded from the calculation basis if the contribution was financed with a loan and the affiliated company claims a tax deduction for interest payments on this loan. In addition, it is now foreseen that the contribution of capital by or the fiscal value of a receivable towards a non-resident taxpayer or foreign PE that is established in a country with which Belgium does not exchange information is deducted from the calculation basis unless the taxpayer demonstrates that the transaction can be supported by financial or economic motives.

When the company claiming the NID has real estate or permanent establishments located abroad, the calculated NID to be deducted in Belgium must be reduced with the lower amount of: (1) the NID portion relating to the net accounting value of the assets connected to the real estate or the PE; or (2) (only for real estate or permanent establishments within the EEA)[2] the positive result of the relevant real estate or PE determined in accordance with the Belgian Income Tax Code.

As of assessment year 2013 (financial year 2012), it is no longer possible to carry forward the unused part of the notional interest deduction of the relevant taxable period.

Previously, a seven-year carry-forward was allowed. Under a transitional regime, any unused and carried-forward notional interest deduction (NID stock) available as of 31 December 2011 (or a taxable period ending in assessment year 2012) may still be carried forward for a period of up to seven years. The amount of the deduction for each taxable period is, however, limited. Up to a taxable income (to be determined after certain deductions) of €1 million, the amounts carried forward may be set off without restriction. If, however, the taxable income exceeds €1 million, only 60 per cent of the excess may be set off. The amount of NID stock not deducted because of the latter restriction may be carried forward indefinitely.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

Under Belgian domestic tax law, the following withholding tax rates apply:
a dividends: 30 per cent;

2 This modification was introduced because of the ECJ *Argenta Spaarbank* case.

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b liquidation bonuses (the difference between the liquidation distributions and the fiscal paid-up capital): 30 per cent;
c interest: 30 per cent; and
d royalties: 30 per cent.

The withholding tax rate of 30 per cent applies as of 1 January 2017.

Under certain conditions, reduced rates apply to dividend distributions in respect of new shares issued from 1 July 2013 onwards by SMEs in return for a cash contribution. For such dividends, the following withholding tax rates apply:
a 30 per cent for distributions in the first two years after the shares are issued;
b 20 per cent for distributions in the third year; and
c 15 per cent for distributions in the fourth (and subsequent) years.

As of assessment year 2015 (financial year 2014 for most companies), SMEs are granted the possibility to reserve their current year profit in a separate reserve account and pay a 10 per cent tax on that occasion. Afterwards, upon liquidation, the separate reserve is treated as fiscal paid-up capital (not triggering a withholding upon liquidation) and, after a five-year waiting period, the company is able to distribute dividends out of that reserve at 5 per cent withholding tax rate (outside of a liquidation scenario). During the five-year period, a withholding tax rate of 17 per cent applies for profits reserved until assessment year 2017 and 20 per cent for profits reserved as of assessment year 2018.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

Dividends

On implementing the EU Parent–Subsidiary Directive of 23 July 1990, Belgium also provided for an exemption from withholding tax on dividends paid by a qualifying Belgian subsidiary to its qualifying EU parent company or to its Belgian parent company. This exemption applies only if the parent company holds at least 10 per cent of the share capital in the Belgian subsidiary uninterruptedly for at least one year. This exemption also applies, under certain conditions, if, at the time the dividend is paid out or attributed, the minimum 12-month holding period has not yet expired. However, in this case, the distributing company needs to provisionally withhold the dividend withholding tax (without a bank guarantee being required). As soon as the minimum holding period has expired, it can also distribute that part of the dividend withheld.

As of 1 January 2007, Belgium has extended this exemption regime from the European Union to all countries with which Belgium has concluded a tax treaty. Belgium provides, therefore, under the same conditions, an exemption of withholding tax on dividends paid to parent companies resident in a tax treaty country. For this extended exemption regime to apply, the relevant tax treaty must provide an exchange of information clause and the parent company must be subject to corporate tax without benefiting from a special tax regime.

At the end of 2016, a specific anti-avoidance rule was added to the requirements for the application of the above-mentioned withholding tax exemption. The anti-avoidance rule states that the withholding tax exemption:

> *cannot be applied with respect to dividends that are associated with a legal act or a series of legal acts of which the tax administration has demonstrated, taking into account all relevant facts and*

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circumstances and except proof of the contrary by the taxpayer, that the legal act or series of legal acts is not genuine and has been put in place with as main goal or one of its main goals to obtain the participation exemption for dividends received, the withholding tax exemption on these dividends or one of the benefits of the EU Parent-Subsidiary Directive in another member state of the European Union. For the purposes of the above paragraph a legal act or a series of legal acts shall be regarded as not genuine to the extent that it is not put into place for valid commercial reasons which reflect economic reality.

Dividends distributed to non-resident investors (i.e., foreign individuals or entities not using these funds for a professional activity in Belgium) by Belgian public investment companies are exempt from withholding tax to the extent that these dividends do not originate from Belgian-sourced dividends. The Royal Decree of 30 April 2013 extended this exemption regime to dividends distributed by Belgian institutional investment companies. This modification fills a gap in the Belgian legislation, revitalising the attractiveness of this form of investment company to non-resident investors.

On the liquidation of a Belgian company, the difference between the liquidation distributions and the paid-up capital is subject to a liquidation withholding tax of 30 per cent. Payments to qualifying EU parent companies or to qualifying companies resident in a tax treaty country will generally be exempt (see above).

Further to the *Tate and Lyle* case of the European Court of Justice, a further exemption of dividend withholding tax was introduced. The exemption applies to dividends paid by a Belgian company after 1 January 2018 to a company established in the EEA or in a country with which Belgium has concluded a double tax treaty that foresees the possibility to exchange information provided that the following conditions are met:

- *a* the exemption is only applicable to the extent that the Belgian withholding tax cannot be credited or is not refundable in the beneficiary's jurisdiction;
- *b* the beneficiary must be a non-resident corporate shareholder that has a holding in the capital of the distributing company of less than 10 per cent but with an acquisition value of at least €2.5 million;
- *c* the holding is or will be maintained for an uninterrupted period of at least one year in full ownership;
- *d* the shareholder must have a legal form as mentioned in the EU Parent–Subsidiary Directive or a similar form;
- *e* the shareholder is subject to a corporate income tax or a similar tax and does not benefit from a regime that deviates from the common tax regime; and
- *f* the distributing company has a certificate confirming that the various conditions are met.

Interest

The interest withholding tax can, in most cases, be easily avoided. If the company has, for example, borrowed from an EU-affiliated company, a Belgian bank, a credit institution located in the EEA or in a tax treaty country, or has issued registered bonds to non-resident taxpayers, no Belgian withholding tax will be due on the basis of domestic exemptions. To qualify for exemption, in some cases, certificates issued by the receiving company must be filed alongside the withholding tax return. This certificate must be issued before the interest payment or attribution.

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Belgian source interest payments made as from 1 December 2015 to certain non-resident EEA investment companies that are similar to certain Belgian regulated investment companies are also exempt from withholding tax.

Royalties

Royalty payments to an EU-associated company are generally exempt from withholding tax under the EU Interest Royalty Directive. In addition, most tax treaties concluded by Belgium fully exempt royalties from the royalty withholding tax. To qualify for exemption, a certificate must be filed alongside the withholding tax return. This certificate must be issued before the royalty payment or attribution.

iii Double tax treaties

As the Belgian economy is an open and internationally oriented economy, it has always been one of the objectives of the Belgian government to remove any obstacles that could hinder the international flow of goods and capital. As such, the Belgian government's policy has been to encourage international investments by minimising withholding taxes on dividend, interest and royalty income.

With this in mind, Belgium has concluded a significant number of treaties for the avoidance of double taxation with respect to taxes on income. As of 1 October 2020, Belgium has concluded 104 tax treaties, of which 95 are currently in force. Currently, the Belgian tax treaty network includes tax treaties with the following countries: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, the Ivory Coast, Japan, Kazakhstan, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Mexico, Mongolia, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, Russia, Rwanda, San Marino, Senegal, the Seychelles, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Uruguay, Uzbekistan, Venezuela and Vietnam.

In addition, the treaty with the Soviet Union continues to apply to the following former Member States of the Soviet Union: Kyrgyzstan, Moldova, Tajikistan and Turkmenistan.

Finally, the treaty with Yugoslavia continues to apply to Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.

Several other tax treaties have been signed but have not yet entered into force, such as those with Botswana, the Isle of Man, Macao, Moldova, Oman, Qatar and Uganda.

Since August 2007, Belgium has had a tax treaty model (the Belgian Model) that officially sets out the policy principles followed by Belgian negotiators. Under this Belgian Model Convention, in its latest (June 2010) version, the beneficial policy towards withholding taxes can be summarised as follows:

Income	Recipient	Rate (%)
Dividends	Individuals and non-qualifying companies	15
Dividends	Qualifying companies (interest of at least 10 per cent) and pension funds	Zero
Interest	N/A	10

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Income	Recipient	Rate (%)
Royalties	N/A	Zero
Limitation on benefits	N/A	None

The Belgian Minister of Finance signed the Multilateral Instrument on 7 June 2017 on behalf of the federal government and the governments of the regions and communities (six in total). On 6 May 2019, the legislative documents implementing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) (MLI) was finally approved by all six legislative authorities in Belgium. On 26 June 2019, Belgium deposited its MLI ratification instrument with the OECD. Upon condition of the fulfilment of the condition of reciprocity of ratification of the covered tax agreements, for Belgium the MLI entered into effect at the earliest on or after 1 January 2020 for withholding taxes and, for other taxes, as of taxable periods beginning on or after 1 April 2020. Belgium submitted a list of 99 tax treaties (and corresponding amending instruments) that it designated as 'Covered Tax Agreements' (i.e., tax treaties to be modified through the MLI). The tax treaties concluded with Germany, Japan (including the new treaty that entered into force on 19 January 2019), Taiwan, Norway (including the new treaty that entered into force on 26 April 2018) and Switzerland were not notified. Given the reciprocity needed to change an existing treaty, it is expected that 65 of the Belgian tax treaties will be altered by the MLI.

Belgium has chosen to apply the principal purposes test (PPT). The PPT provides that the benefit of a tax treaty may be denied if one of the principal purposes of an arrangement or transaction is to obtain tax treaty benefits unless granting these benefits is in line with the object and purpose of the applicable tax treaty. It will therefore be imperative in the future to demonstrate business purposes of an arrangement or transaction, and to ensure that there is adequate substance to achieve these purposes. Because Belgium considers an effective mechanism of dispute resolution to be of primary importance to mitigate any double taxation, it has been willing to implement the mandatory binding arbitration clause.

Although Belgium did initially not opt for the possibility to address the artificial avoidance of the PE status through commissionaire arrangements, it has withdrawn its reservation in the final version. This is in line with Belgian law. The PE concept under national law has recently been extended so as to include PEs created via commissionaire (or similar) arrangements. This new rule applies as of assessment year 2021 (relating to the taxable period starting on 1 January 2020 at the earliest).

iv Taxation on receipt

Foreign-source income (dividends, interest or royalties) is included in the taxable basis for its net amount (after foreign tax).

Dividends qualifying for the participation exemption regime are exempt for 100 per cent from corporate income tax (see above). No tax credit for foreign withholding tax is available.

With respect to foreign-source royalties, there exists a beneficial foreign tax credit (unless the special IP regime (see above) is applied). It is determined as a lump-sum amount equal to 15/85 of the net foreign-sourced income (foreign taxes), irrespective of the amount of foreign withholding taxes actually paid.

With respect to foreign-source interest, a system of actual foreign tax credit exists. However, owing to the calculation method and anti-channelling provisions, it is in most cases quite limited.

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VII TAXATION OF FUNDING STRUCTURES

In Belgium, both equity funding and debt funding are beneficial from a tax perspective. Equity funding will maximise the notional interest deduction, while debt funding will allow the deduction of actual interest expenses. The funding of companies therefore often depends on their activities: holding companies will be debt-funded, intra-group finance companies will be equity-funded, operational companies will often combine both funding methods, etc.

i Deduction of finance costs

Like other business expenses, finance costs are, in principle, deductible if borne to obtain or preserve taxable income. When acquiring a shareholding, a company may incur a certain amount of costs: for instance, interest expenses and other financial charges on loans taken up for the acquisition of a participation, and currency losses on such loans. An important feature of the Belgian corporate tax regime is that such costs are also, contrary to the situation in many other European jurisdictions, generally fully deductible for tax purposes as any other business expenses. This tax deductibility applies regardless of whether the acquisition relates to domestic or foreign shares, or whether the participation qualifies for the participation exemption regime. The deduction can be claimed against all sources of income of the corporate taxpayer.

However, this principle is not absolute. This is demonstrated by the Antwerp Court of Appeals, which ruled on 8 May 2018 that interest expenses with respect to funds borrowed from the grandparent company to cash-wise fund both a capital reduction and dividend distribution would not be deductible.

Under the general rules, however, interest expenses are not tax deductible (in whole or in part) in some particular cases; for example, if the interest rate is not at arm's length (only deduction of the excessive part is denied).

ii Thin capitalisation and general interest limitation rule

Further to the implementation of the European Anti-Tax Avoidance Directive 2016/1164/EU of 12 July 2016, Belgian domestic tax law includes a general interest limitation rule as of 1 January 2019. This interest limitation rule foresees that exceeding borrowing costs will be deductible in the tax period in which they are incurred only up to the higher of 30 per cent of the taxpayer's earnings before interest, taxes, depreciation and amortisation (EBITDA) or €3 million (the 'threshold amount').

Exceeding borrowing costs are defined as the positive difference between (1) the amount of the deductible interest costs (and other economically equivalent costs) of a taxpayer that are not allocable to a PE if its profits are exempt in accordance with a double tax treaty, and (2) taxable interest revenues (and other economically equivalent revenues) that the taxpayer receives and that are not exempt pursuant to a double tax treaty. For taxpayers that form part of a group:

a interest expenses (or income) paid (or received) by the taxpayer to (or from) a Belgian company or Belgian PE that form part of the group, and are not excluded, will be disregarded for purposes of calculating the exceeding borrowing costs; and

b the threshold amount is to be considered on a consolidated basis, which implies that:
- the EBITDA of the taxpayer should be increased (or decreased) with the amounts paid (or received) by the taxpayer to (or from) a Belgian company or Belgian PE that form part of the group and are not excluded from this rule;

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- group entities with a negative EBITDA have to allocate this negative EBITDA to all other Belgian group members with a positive EBITDA in proportion to this positive EBITDA; and
- the threshold of €3 million will be allocated proportionally among the members of the group.

The Royal Decree of 20 December 2019 foresees three specific methods for allocating this amount.

Interest that cannot be deducted pursuant to this new interest limitation rule can be carried forward indefinitely. The use thereof in a subsequent year is, however, limited to the threshold amount of that year. In case a taxpayer forms part of a group of companies, any non-utilised threshold amount, and even amounts exceeding this threshold amount can, however, be transferred to another Belgian group company or Belgian PE.

In addition to the general interest limitation rule, specific tax thin capitalisation rules apply in the case of financing by Belgian or foreign individual shareholders or directors, or non-EU corporate directors (debt-to-equity ratio of 1:1), and by low-taxed entities (debt-to-equity ratio of 5:1).

iii Restrictions on payments

Distributions by a BV/SRL are subject to a double test: a net asset test and a liquidity test. No distribution may occur when the net assets of the company are or would become negative ('net asset test'). Furthermore, the decision of the shareholders' meeting to distribute profits only has effect after the board of directors has established that the company, based on reasonably expected developments, is able to continue to fulfil its payment obligations after distribution ('liquidity test') over a running period of at least 12 months. Distributions by a NV/SA are not subject to this liquidity test.

iv Return of capital

Prior to 2018, no withholding tax was due on capital reimbursements if the decision was made in accordance with the provisions of the Companies Code and to the extent that it concerned the return of effectively paid-in paid-up capital (i.e., capital constituted through actual contributions by the shareholders). Reimbursements of fiscal capital decided upon as of 1 January 2018 are, however, deemed to relate proportionally to taxed reserves and certain tax-free reserves (if any). Withholding tax is therefore now due on the part of the amount of the capital reimbursement that is deemed to relate to these reserves as it qualifies as a dividend distribution (unless a withholding tax exemption applies). Furthermore, this amount also qualifies as a deemed dividend in the hands of a Belgian shareholder. The rule, therefore, also applies to foreign companies that have a Belgian shareholder. The measure is, inter alia, not applicable to tax-free reserves that are not incorporated in the share capital, the legal reserve up to the minimum required amount, the liquidation reserve and the negative taxed reserve recorded as a result of a corporate restructuring.

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VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

The critical issue upon the acquisition of a Belgian company consists of the fact that the group contribution system in place as of 2019 (see above) requires an affiliation during at least five taxable periods. It is, therefore, more difficult than in most other jurisdictions to achieve a debt push-down. Alternative solutions to nevertheless achieve a debt push-down include post-acquisition mergers, or refinancing of equity or existing debts. However, recent case law denies the deductibility of interest expenses incurred in the framework of a refinancing of equity. Before implementing such an alternative debt push-down, a careful assessment of the file and the risks involved is therefore strongly recommended.

Buyers usually use either a Belgian acquisition vehicle or a Luxembourg one. One of the factors (besides other financial considerations) that will determine this choice is the question of whether the buyers can benefit from an exemption from Belgian withholding tax on future dividend distributions if a Belgian acquisition vehicle is used. As of late 2016, this question will require a thorough analysis of the consequences of the specific anti-avoidance rule of the EU Parent–Subsidiary Directive (discussed above). The necessary attention must also be given to the fact that the acquisition vehicle must qualify as the beneficial owner of the dividends (or other payments made to it).

For Belgian sellers, any capital gain realised will in most cases remain (quasi-) tax-free. Corporate sellers will benefit from the participation exemption and, for individual sellers, an exemption will apply if it can be established that the capital gain is realised in the normal management of their private wealth. Individual sellers may require from non-EEA buyers that the acquisition vehicle is located in the European Union and that this vehicle holds the participation in the Belgian company for at least one year. This is to avoid a substantial interest taxation in their hands.

ii Reorganisation

Further to the implementation of the EU Merger Directive, Belgian tax law now provides that a merger can take place tax neutrally if the following conditions are met:

a the acquiring company is a Belgian or an intra-European company; and

b the reorganisation does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance. The merger is deemed, unless proved otherwise, to have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance if the merger does not take place based on valid commercial reasons, such as a restructuring or rationalisation of the activities of the concerned companies.

An acquired business and an existing local business can, thus, be consolidated through a merger. Practice demonstrates, however, that the tax administration tends to scrutinise mergers through which a debt push-down is realised.

Cross-border mergers are possible as well within the European Union from both a corporate and tax perspective. This cross-border merger is subject to a fourth condition to achieve tax neutrality. The transaction will, indeed, only be tax-neutral from a Belgian perspective to the extent that the assets acquired as a consequence of this transaction are maintained in a Belgian establishment by the EU absorbing or receiving company. The same applies for the tax-free reserves of the absorbed Belgian company.

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iii Exit

Through a cross-border conversion, a Belgian company can move its registered office out of Belgium without being liquidated from a corporate perspective. The latter will only be true if, under the laws of the jurisdiction of immigration, the continuation of the legal personality of the company is also accepted.

From a tax perspective though, the emigration of a company will always be considered as a deemed liquidation of the company. Consequently, all latent capital gains, tax-free reserves and goodwill become taxable at 25 per cent. Arguably, no liquidation withholding tax is due. For an emigration to other EU Member States, this exit taxation does not, however, apply, if and to the extent that a PE is maintained in Belgium.

As of 1 January 2019, the transfer of assets from Belgian headquarters to foreign PEs (internal dealings) implying a loss of taxable substance in Belgium is also subject to exit tax. The rules regarding inbound transfers have been adjusted as well. Previously, these rules generally provided that assets entering the Belgian territory had to be registered at their pre-transaction foreign book value (i.e., no step-up in the tax base was provided). Because this was contrary to European Anti-Tax Avoidance Directive 2016/1164/EU of 12 July 2016, the new rules now accept the market value as the starting value of the assets for tax purposes (unless the company immigrates from a tax haven). To the extent that these assets were subject to an exit tax in the country of emigration and Belgium has concluded a treaty with this country that provides for the possibility to exchange information, the value established by this foreign country is refutably presumed to correspond to the market value (unless it is a tax haven). If these conditions are not fulfilled, the market value is presumed to correspond to the book value according to Belgian rules, unless proof to the contrary is provided.

The taxpayer can choose between the immediate payment of exit tax or the deferred payment in five equal instalments, in case of reorganisations or a transfer of the seat, the main establishment or the centre of management to another EU or EEA Member State with which Belgium has an agreement on mutual recovery assistance. With respect to the EEA, the rules will in first instance only apply to Iceland and Norway. The payment deferral is forfeited upon the occurrence of 10 different events, of which the most important are: the alienation of all or a part of the assets involved; the further transfer of seat outside the European Union or EEA; the non-respect of the payment date of one of the instalments; and the opening of an insolvency procedure against the (ex-) taxpayer. Moreover, the tax administration can require a security in case of deferred payment, based on an assessment of the risk of non-recovery.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

Under the domestic anti-avoidance rule (GAAR), a legal act or series of legal acts constituting a single operation cannot be opposed to the Belgian tax administration if the tax authorities prove on the basis of objective circumstances that tax abuse exists.

The statutory provision indicates that tax abuse is deemed to exist if: (1) the taxpayer places itself outside the scope of a tax provision in a manner that is incompatible with the objectives of this provision; or (2) the taxpayer claims an advantage under a tax provision contrary to the objectives of that tax provision, and the transaction is in essence aimed at obtaining that tax advantage.

The tax administration will have to prove that tax abuse exists, which they may do by all legal means of evidence (including presumptions). The taxpayer then has to show the

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existence of motives other than tax motives. The explanatory notes to the bill that introduced this GAAR specify that the tax authorities will apply the GAAR in the following situations: (1) the legal act has only a tax motive; (2) the non-tax motives are very general and not specifically connected with the legal act concerned; and (3) the non-tax motives are specific, but the importance of these motives is so small that a reasonable person would not have carried out the transaction because of this non-tax motive; in this case, it can be assumed that this non-tax motive is not the genuine motive.

If the taxpayer does not establish sufficient legitimate non-tax motives for his or her act, the tax authorities may reclassify the act to bring it in line with the objectives of the relevant tax provision. The tax authorities may then determine the taxable base and the amount of tax due as though there was no abuse.

Certainty as to whether an envisaged legal act or series of legal acts does not constitute tax abuse can be obtained through a formal ruling request.

ii Controlled foreign corporations

Legislation

Under the Belgian controlled foreign corporation (CFC) rules, a foreign company qualifies as a CFC if the following conditions are met:

a the Belgian taxpayer owns directly or indirectly the majority of voting rights, or holds directly or indirectly at least 50 per cent of the capital, or is entitled to receive at least 50 per cent of the profits of the foreign company (control test); and

b the foreign company (or foreign PE of a Belgian company) is in its country of residence either not subject to an income tax or is subject to an income tax that is less than half of the income tax if the company would be established in Belgium. In calculating this income tax, the profits that this foreign company would have realised through a PE are disregarded if a double tax treaty applies between the country of the foreign company and the country in which the PE is located that exempts this profit (taxation test).

With effect from 31 December 2020, these conditions should be disregarded if the foreign company is established in a jurisdiction that appears on the EU list of non-cooperative jurisdictions at the end of the taxable period.

The EU Anti-Tax Avoidance Directive left Member States the option to either include non-distributed specific types of income as defined in the Directive (i.e., interest, dividends, income from the disposal of shares, royalties, income from financial leasing, income from banking, insurance and other financial activities, income from invoicing associated enterprises as regards goods and services where there is no or little economic value added) or to include non-distributed income arising from non-genuine arrangements that have been put in place for the essential purpose of obtaining a tax advantage. Belgium has opted for the latter approach. An arrangement shall be regarded as non-genuine to the extent that the CFC would not own assets or would not have undertaken risks if it were not controlled by the Belgian taxpayer where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income. The attribution of income is then limited to the income attributable to the significant people functions carried out by the Belgian controlling taxpayer.

If the CFC distributes profits to the taxpayer and those distributed profits were previously taxed in the hands of the Belgian taxpayer, these profits shall be fully deducted from the tax base when calculating the amount of tax due on the distributed profits. Furthermore, capital

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gains realised on the disposal of shares of a CFC will be exempt to the extent that the profits of the CFC have already been taxed in the hands of the Belgian taxpayer as CFC income, and these profits have not yet been distributed and still exist on an equity account prior to the alienation of the shares. Double taxation is, however, not fully eliminated. The taxes that the CFC pays in its country of residence are not allowed as a deduction from the Belgian tax. Moreover, the current rules do not foresee that the allocation of the profit of the CFC to the Belgian taxpayer is proportionate to the taxpayers' participation in the CFC. On 2 July 2020, the European Commission sent a letter of formal notice as it considers it contrary to the EU Anti-Tax Avoidance Directive that Belgium does not fully eliminate double taxation.

Reporting obligation

Direct or indirect payments made by Belgian companies to entities, individuals, permanent establishments and even bank accounts established in a tax haven have to be reported in a separate form attached to the resident and non-resident corporate income tax return. The reporting obligation is only applicable if the total amount of payments exceeds €100,000 per tax year.

Failure to report payments to tax havens that qualify as professional expenses for the Belgian taxpayer will lead to the refusal of the (tax) deductibility of these expenses. In a worst-case scenario, an additional fine and tax increase could be imposed. On the other hand, the fact that the new reporting obligation has been observed does not necessarily imply that the Belgian tax authorities will accept that the payments are tax deductible as professional expenses. The taxpayer must still prove that this payment was motivated by sound business reasons (i.e., the non-artificial character of the parties involved, and of the transaction giving rise to the payments).

The presence of a state on a tax haven list at the moment of the payment is sufficient to require its reporting. Tax havens are determined by three lists:

a the OECD list, which includes states that, according to the Global Forum on Tax Transparency and Exchange of Information of the OECD, do not effectively or substantially apply the OECD exchange of information standard;

b the Belgian domestic list, which contains states without or with low taxation. The criteria used to constitute this list have been expanded with the Program Law of 4 July 2016. A new list still has to be enacted by Royal Decree. The following will be on the list: states outside the EEA, in which companies are not subject to corporate tax on domestic or foreign income, or that have a nominal corporate tax rate of less than 10 per cent or have an effective corporate tax rate on foreign income of less than 15 per cent. The latter (new) criterion may have far-reaching consequences for corporate groups including entities established in states with a territorial taxation system, such as Singapore or Hong Kong; and

c the EU list of non-cooperative jurisdictions.

iii Transfer pricing

Belgian tax law includes rather stringent transfer pricing rules. The main rules can be summarised as follows.

Any abnormal or benevolent advantage granted to another person or entity is added to the taxable basis of a Belgian company, unless it is taken into account to determine the taxable income of the recipient. If the non-arm's-length benefit is granted to another Belgian company, this transfer pricing adjustment does not apply.

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Any abnormal or benevolent advantage received directly or indirectly from an affiliated enterprise constitutes the minimal taxable basis of the Belgian company (no deduction of losses, losses carried forward, notional interest deduction, etc., is allowed).

For financial years starting on or after 1 January 2016, the three-tiered approach to transfer pricing documentation proposed by the OECD, which requires multinational enterprises (MNEs) to submit a country-by-country report, a master file and a local file, applies (Program Law 4 July 2016).

Qualifying groups (with consolidated gross turnover exceeding €750 million) will have to file a country-by-country report (CbCR) with the Belgian tax authorities within 12 months of their consolidated financial statements' closing date. Belgian taxpayers belonging to a multinational group are in any case required to notify the Belgian tax authorities of the identity and tax residency of the group's entity that will submit the group's CbCR on the last day of the MNE's financial year. On 2 May 2019, a law was approved including an update on the notification obligation of each Belgian group entity of a multinational group with regard to filing a CbCR. The notification by the Belgian group entity with regard to filing the CbCR will now only be required if the information to be provided differs from the information that was provided in respect of the previous reporting period.

A mandatory automatic exchange of CbCRs within the European Union applies. Belgium also implemented the Multilateral Competent Authority Agreement for the Automatic Exchange of CbCRs, which is signed by 91 countries. Finally, Belgium concluded a Competent Authority Arrangement for the automatic exchange of CbCRs with the United States on 1 August 2017. This agreement will enable the exchange of CbCRs between Belgium and the United States.

Belgian taxpayers belonging to a multinational group are required to submit a master file and a local file when exceeding one of the following criteria on an unconsolidated basis during the previous financial year: (1) a total amount of revenue including financial but excluding non-recurrent income of €50 million; (2) a balance sheet total of €1 billion; or (3) an annual average of 100 full-time employees.

The master file should be submitted within 12 months of the end of the MNE's financial year. The local file should be annexed to the Belgian taxpayer's annual tax return.

The master file should include, among other things, an overview of the intra-group financial transactions, the financial and fiscal position of the group on a consolidated basis, and the group's general transfer pricing policy.

The local file should include, among other things, detailed transactional transfer pricing documentation identifying the transactions between the Belgian entity and the foreign entities of the group if such transactions exceed €1 million during the previous financial year. The local file requires MNEs to disclose more figures than initially suggested by the OECD. On the other hand, MNEs are not required to enclose transfer pricing policies, transfer pricing studies and intercompany agreements (those documents can, however, voluntarily be included). MNEs only have to indicate whether such documentation is available. It follows that Belgian taxpayers are not explicitly required to provide for transfer pricing documentation containing a functional analysis, economic analysis and benchmark studies. However, in practice, it is highly recommended to have transfer pricing documentation (in line with OECD guidance) available as indicating that no such documentation is available will increase the odds of triggering an audit. In addition, even though it is not explicitly required, it is recommended to prepare a reconciliation between the local file and the financial statements.

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iv Tax clearances and rulings

There is an important ruling practice in Belgium. Under this ruling policy, a taxpayer may apply for a ruling with respect to any tax issue. The introduction of a ruling request is, however, not possible in the following cases:

a the ruling request concerns transactions that are the subject of litigation;
b the ruling request concerns the application of an act regarding the collection of taxes;
c the transaction envisaged does not have economic substance in Belgium; or
d the essential aspects of the transaction envisaged relate to a tax haven that does not work with the OECD or to a country with no or low taxation that appear on a Belgian list unless a double tax treaty is available that foresees the exchange of information.

A ruling request must be filed before the transaction is implemented. In principle, the tax administration must decide on the ruling request within three months following its filing. In practice, the actual term is determined on a case-by-case basis within 15 days following the filing of the request. A ruling is usually valid for a maximum of five years, although a longer period can be granted if justified by the taxpayer. A ruling can also be renewed.

A ruling is generally not required at all to acquire a local business. Thanks to the flexibility of the ruling system, it is, however, a popular instrument that is often used by multinational groups to obtain legal certainty on issues such as transfer pricing, restructurings involving a Belgian company and hybrid financing.

Since 27 May 2019, the Belgian Accounting Standards Board can issue rulings on the application of the various accounting standards applicable in Belgium. As Belgian tax law follows Belgian accounting law unless tax law expressly deviates from accounting law, the impact of the possibility to obtain accounting law rulings cannot be underestimated.

The EU Directive of 8 December 2015 on the automatic exchange of information has been transposed into national law via the Belgian Act of 31 July 2017. Prior to this Act, Belgium already had a system in place to exchange information (including rulings) spontaneously. However, this system was not applied in practice and was, therefore, not effective. Belgium now exchanges information automatically on advance cross-border tax rulings and advance pricing agreements in conformity with the EU Directive.

v 'Catch-all' provision

Payments made by Belgian taxpayers for services rendered by a related non-resident taxpayer are subject to 12.5 per cent withholding tax in the event that Belgium has the power to tax such income pursuant to a tax treaty or, in the absence of a tax treaty, in the event the non-resident beneficiary does not prove that the income has actually been subject to tax in his or her state of residence. The scope of application of the catch-all provision is limited to income or profits derived from the provision of services to Belgian taxpayers that act in a professional capacity and that have a direct or indirect relationship of interdependence with the service provider (i.e., related parties), whether such services are rendered in Belgium or in a foreign country.

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vi Ultimate beneficial owner register

The fourth anti-money laundering directive obliges EU Member States to install a register in which the ultimate beneficial owners (UBOs) of legal entities are identified. The Act of 18 September 2017, introducing the UBO register, was published in the Belgian Official Gazette on 6 October 2017 and the implementing Royal Decree of 30 July 2018 was published on 14 August 2018. UBOs of Belgian companies need to be identified in the Belgian UBO register. The natural persons who directly hold more than 25 per cent of the shares, the share capital, or the voting rights of a Belgian company, control a holding company that holds more than 25 per cent of the shares or the share capital of a Belgian company, or control the Belgian company by other means are considered UBOs. As a minimum, the UBO's name, date of birth, nationality and address will need to be reported, as well as the nature and the extent of the beneficial interest held. A similar obligation applies to UBOs of foundations, (international) non-profit organisations, trusts and fiduciaries. The directors of the entity need to comply with the obligation to report the aforesaid information to the Belgian UBO register.

A Royal Decree of 23 September 2020 introduced further disclosure obligations and entered into force on 11 October 2020. One of the new obligations concerns the registration of all supporting documents. Belgian legal entities that already registered their UBOs before 11 October 2020 will have to register the supporting documents on 30 April 2021 at the latest. Belgian legal entities that report (modifications of) information to the Belgian UBO register as of 11 October 2020 will have to register the supporting documents upon registration.

vii Common reporting standard

As of 1 January 2016, the common reporting standard applies to Belgian financial institutions such as banks, investments entities and certain insurance companies. Reporting to the Belgian tax authorities should be done by 30 June of each year, after which the Belgian tax authorities will exchange the information to the relevant jurisdictions.

X YEAR IN REVIEW

Most of the limited changes that were introduced in the course of 2021 are discussed above. To counter the economic effects of the covid-19 pandemic, the legislator has enacted several temporary tax measures such as payment delays, filing extensions and a carry-back of losses incurred in 2020. Some of these measures still apply in 2021–2022.

XI OUTLOOK AND CONCLUSIONS

Following the elections in May 2019, a new federal government was formed in September 2020. Notwithstanding the fact that budgetary deficit is fast increasing, no major developments in tax legislation are expected during the course of 2022. A major reform of the individual income tax is being prepared, but the timing thereof remains unclear.

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Appendix 1

ABOUT THE AUTHORS

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Christian Chéruy is a member of Loyens & Loeff's general tax practice group in Brussels. He is the former head of tax.

Mr Chéruy's practice covers a broad range of international and domestic corporate tax issues. These issues include inward investments, holding and financing structures (including the notional interest deduction), corporate restructurings (including cross-border reorganisations), transfer pricing and thin capitalisation rules, withholding tax requirements, double tax treaty matters, corporate and structured finance projects, mergers and acquisitions, real estate, and private equity partnerships. He advises on the taxation of intellectual property and the availability of tax relief in respect of R&D. He also advises individuals on wealth optimisation techniques.

Mr Chéruy also heads the Belgian tax controversy and litigation team. He provides assistance at every stage of the resolution process from audit examination to tax appeals and, where necessary, tax litigation. He frequently acts on behalf of taxpayers in negotiations with the Belgian revenue services and, particularly, with the special Tax Investigation Brigade. He also has considerable experience in handling alternative dispute resolution processes (i.e., ruling requests and advance pricing agreements).

He is consistently ranked as one of the leading tax lawyers in Belgium by *Chambers Europe* and *The Legal 500*.

Mr Chéruy is a regular speaker at conferences on a wide range of (international) tax issues and the author of a leading treatise analysing the legal, accounting and tax aspects of Belgian holding companies. He is a member of the Brussels Bar.

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Marc Dhaene is a member of Loyens & Loeff's general tax practice group in Belgium. His practice covers a broad range of international and domestic corporate tax issues such as inward investments, holding and financing structures, corporate restructuring (including cross-border reorganisations), transfer pricing, tax treaty issues, withholding tax requirements, corporate and structured finance projects, and mergers and acquisitions.

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Mr Dhaene has written extensively on tax-related subjects, and has given several lectures and seminars on various aspects of corporate tax law such as the Belgian holding regime, transfer pricing, anti-abuse provisions, undervaluation of assets, tax treatment of partnership structures and tax treatment of mergers.

Mr Dhaene has been a member of the Brussels Bar since 1998.

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