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Transfer Pricing 2023

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Belgium: Law & Practice

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BELGIUM

Law and Practice

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LOYENS & LOEFF
Law & Tax

1. Rules Governing Transfer Pricing

1.1 Statutes and Regulations

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

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

In February 2020, the Belgian Tax Administration (BTA) issued a circular letter on transfer pricing (Circ 2020/C/35) (the "TP Circular"). In the TP Circular, the BTA confirms adhering to the general principles included in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (the "OECD Guidelines"). The TP Circular provides an overview of the different chapters of the OECD Guidelines (including guidance on financial transactions), provides guidance on the allocation of profits to permanent establishments (PEs) (based on the Authorised OECD Approach as laid down in the 2010 report on the attribution of profits to PEs) and includes the BTA's interpretation and preference on specific topics.

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

- Article 49 ITC (deductibility of expenses);
- Article 54 ITC (deductibility of interest, royalties and service fees);
- Article 55 ITC (deductibility of market-based interest);
- Article 185/2 ITC on CFCs;
- Article 198, Section 1, 10° (deductibility of payments to tax havens in the context of "actual and sincere transactions"); and
- Article 344, Section 2 ITC (non-opposability of transfer of assets to an affiliated company established in a tax haven).

1.2 Current Regime and Recent Changes

Years before the Belgian codification of the internationally accepted arm's length principle in Article 185 Section 2, ITC (in 2004), the BTA traditionally applied Articles 26, 79 and 206/3 ITC as a legal basis for performing transfer pricing corrections based on the principle of "abnormal or benevolent advantages". Although said notion was based on the arm's length principle,

Belgian case law traditionally applied a more subjective approach to the notion of "abnormal or benevolent advantages", accepting that providing assistance to group entities in financial difficulties may under certain conditions not trigger the granting of an abnormal advantage. By taking the group relationship into account, Belgian case law went further than the "separate entity approach" followed by the OECD in the application of the internationally accepted arm's length standard.

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

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

2. Definition of Control/Related Parties

2.1 Application of Transfer Pricing Rules

Article 26 ITC provides that when a Belgian company grants an abnormal or benevolent advantage to a non-Belgian company or establishment with which the Belgian taxpayer has a "direct or indirect relationship of interdependence", the advantage should be included in the Belgian taxpayer's taxable basis. The notion of "direct or indirect relationship of interdependence" has a broader scope than "control" under Belgian company law. Whether or not two entities are in a relationship of interdependence is a question of fact. This may notably be the case when the boards of directors of two entities consist in majority of the same persons, when one entity depends on the other for the supply of raw materials or when one entity is the other entity's sole customer.

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

- a) the companies over which said company exercises a power of control;
- b) the companies who exercise a power of control over said company;
- c) the companies with which said company forms a consortium; and
- d) the other companies which, to the knowledge of their governing bodies, are under the control of the companies referred to in a), b) and c).

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

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

3. Methods and Method Selection and Application

3.1 Transfer Pricing Methods

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

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

3.2 Unspecified Methods

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

3.3 Hierarchy of Methods

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

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

3.4 Ranges and Statistical Measures

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

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

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

3.5 Comparability Adjustments

Belgian law does not require applying comparability adjustments.

The position of the BTA, as reflected in the TP Circular, is aligned with the OECD Guidelines. Comparability adjustments should only be made if they improve comparability. The BTA emphasises the importance of duly documenting the purpose and reliability of an adjustment. The BTA further recognises that adjustments can be justified to account for differences in working capital between the tested party and the comparables.

4. Intangibles

4.1 Notable Rules

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

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

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

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

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

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

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

4.2 Hard-to-Value Intangibles

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

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

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

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

4.3 Cost Sharing/Cost Contribution Arrangements

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

5. Affirmative Adjustments

5.1 Rules on Affirmative Transfer Pricing Adjustments

There is no specific procedure allowing a taxpayer to perform upwards or downwards affirmative transfer pricing adjustments after filing its tax return.

Since 2018, no deduction of current year losses and deferred tax assets (eg, carry-forward tax losses) can be made on the taxable basis as adjusted as a result of a tax audit, except in relation to dividends received during the same taxable period. This applies where the BTA imposes a tax increase of (at least) 10%. Hence, a taxpayer may have an interest in spontaneously correcting its tax return and applying an upwards adjustment to its taxable basis if a transaction was not arm's length. By doing so, the taxpayer may avoid the possibility that a future adjustment upon an audit might constitute its minimum taxable basis.

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

A unilateral downwards adjustment is in principle not possible. The taxpayer will however be able to request a correlative downwards adjustment as a relief to double taxation following an upwards adjustment made in another country in the framework of a mutual agreement procedure under a tax treaty, the Arbitration Convention or the Dispute Resolution Directive.

6. Cross-Border Information Sharing

6.1 Sharing Taxpayer Information

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

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

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

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

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

7. Advance Pricing Agreements (APAs)

7.1 Programmes Allowing for Rulings Regarding Transfer Pricing

With the Law of 24 December 2002, the Belgian legislature introduced a system of advance decisions that provide legal certainty for taxpayers.

Within the existing system of advance decisions, a taxpayer can request a unilateral advance pricing agreement (APA) that specifically addresses transfer pricing (eg, the methodology used, comparables, critical assumptions regarding future events, etc). No separate procedure exists for APAs; they follow the same procedure as regular advance tax rulings.

An APA can be requested unilaterally, bilaterally or multilaterally. Typically, the request must be accompanied by a transfer pricing study that includes a comparability analysis including a functional analysis, a description of the transfer pricing method(s) used and a transfer pricing benchmark.

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

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

To obtain legal certainty in all jurisdictions affected by a particular transaction, a bilateral or multilateral APA can be requested. The number of bilateral or multilateral APA applications remains small compared to unilateral APAs. It is not possible to provide an exact timetable for the bilateral APA process as this will depend on several factors including the complexity of the case, the timely availability of information, etc. An additional factor is that a bilateral APA is a negotiation between states and timing will thus also depend on the agenda of the competent authorities and the jurisdictions concerned.

Based on statistical data, the average time for obtaining a bilateral or multilateral in Belgium is approximately 42 months. While unilateral APAs are more commonly used, practice shows that the BTA also promotes bilateral or multilateral agreements and takes a co-operative stance with a view to achieving such agreements.

7.2 Administration of Programmes

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

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

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

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

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

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

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

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

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

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

A taxpayer who has obtained a unilateral APA is not prevented from also submitting the aspects

that were subject to the APA to the MAP. Indeed, the fact that the tax results from a unilateral APA does not, as such, allow the refusal of access to a MAP where the taxpayer considers that the taxation resulting from the APA does not comply with the applicable tax treaty.

7.4 Limits on Taxpayers/Transactions Eligible for an APA

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

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

7.5 APA Application Deadlines

A unilateral APA is only valid if it is issued before the intended transactions or situations have produced effect from a tax perspective. The Ruling Commission takes the position that a situation/transaction has produced effect from a tax perspective from the moment the tax return related to the taxable period during which the situation/transaction occurred is filed. Hence, the APA request should be submitted well in advance considering this timing deadline.

In practice, the Ruling Commission requires that a subsequent request for a renewal of the APA is filed at the latest three to six months before the expiry of the existing APA.

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

7.6 APA User Fees

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

7.7 Duration of APA Cover

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

7.8 Retroactive Effect for APAs

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

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

For example, a person may submit a request for a multilateral APA on 25 July 2023 in which they ask for certainty for a period of five accounting years, namely from 1 January 2023 to 31 December 2027 (inclusive). Even though transactions have taken place between 1 January 2023 and the date of request (25 July 2023), the APA can be initiated from 1 January 2023. However, if the request is submitted on 22 March 2024,

the accounting year 2023 cannot be the subject any further of the prior agreement, because the request must be submitted no later than the last day of that accounting year (in this case 31 December 2023). However, if relevant facts and circumstances are identical during previous tax years, the person may ask for a roll-back, allowing for applying the outcome of the bilateral APA for the previous years. The Belgian competent authority authorises a roll-back, but only if the applicable time limits (such as assessment periods) still permit it.

8. Penalties and Documentation

8.1 Transfer Pricing Penalties and Defences

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

Please see **8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines** regarding the obligation to file certain transfer pricing documentation. An administrative fine may be imposed on companies in cases of non-compliance. This administrative fine ranges between EUR1,250 and EUR25,000 and may be imposed from the second infringement. If the BTA can prove bad faith on the part of the taxpayer, a fine of EUR12,500 can be imposed from the first infringement. Other than the obligations described in **8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines**, no formal obligations are imposed by Belgian law to support the arm's length character of intercompany transactions. The burden of proof for performing a transfer pricing correction lies with the BTA. Nevertheless, in practice it is highly recommended to have supporting transfer pricing documentation for material intra-group transactions in place to mitigate the risk of discussions in this respect.

In the case of an incomplete or incorrect tax return (including a transfer pricing correction upon an audit), the tax due on the income portion corresponding to the upwards adjustment shall be augmented by a tax increase between 10% (first infringement, unless waived in specific circumstances if good faith can be proven) and 200%. To prove the good faith of the taxpayer, availing of transfer pricing documentation can be very useful. Furthermore, an administrative fine of between EUR50 and EUR1,250 may be imposed. The additional tax vested will not trigger late payment interest. If a tax increase of at least 10% is applied, the amount of the correction will be the minimum taxable basis (ie, which cannot be compensated by current year expenses or tax attributes).

Moreover, as of 2018, no deduction of current year losses and carry-forward tax attributes (eg, carry-forward tax losses) can be made on the amount of the upwards adjustment as a result of a tax audit (except in relation to dividends received during the same taxable period). The new rule does not apply where the BTA waives the application of the tax increase in the case of good faith.

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

8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines

From financial year 2016, Belgium legislation requires a taxpayer to file a country-by-country

report, a master file and a local file if certain thresholds are met, as follows.

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

The formats for these files are aligned with the OECD forms, except for the "Belgian local file" form which considerably deviates from the "OECD local file". The "Belgian local file" consists of:

- general business and financial information concerning the local entity; and
- financial information on intercompany transactions and transfer pricing methods.

There is, however, no strict legal obligation to also prepare and file the OECD local file report. The local file report, as suggested by the OECD, is optional and can be attached to the Belgian local file form together with other supporting documentation such as benchmark studies. However, in practice availing of an OECD local file is recommended and generally expected by the BTA.

9. Alignment With OECD Transfer Pricing Guidelines

9.1 Alignment and Differences

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

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

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

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

9.2 Arm's Length Principle

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

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

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

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

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

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

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

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

9.4 Impact of BEPS 2.0

Belgium supports the OECD's BEPS 2.0 initiatives involving Pillar One and Pillar Two, and voted in favour of adopting Council Directive EU 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (implementing Pillar Two).

To anticipate the entry into effect of Pillar Two in the EU from 1 January 2024, Belgium adopted a measure applicable to financial years from 1 January 2023 to limit the deduction of carry-forward tax attributes to EUR1 million plus 40% of the exceeding taxable basis (the deduction limitation percentage applicable until 2022 was EUR1 million plus 70% of the exceeding

part). This rule thus imposes a "minimum taxable basis" equal to 60% of the taxable profits exceeding EUR1 million and is inspired by Pillar Two (ie, 60% of the Belgian statutory CIT rate of 25% = 15%, which is also the minimum rate under Pillar Two), although this measure applies to all corporate taxpayers and not only to companies falling within the scope of Pillar Two rules (ie, companies part of a group having a consolidated revenue of at least EUR750 million). This measure is temporary until Pillar Two enters into force.

Additionally, it is expected that Belgium will adapt its available tax credits to ensure these are "qualified refundable tax credits" under Pillar Two (eg, the tax credit for R&D investments requires limiting the period until refund from five to four years), and to a qualifying domestic minimum tax of 15% (in particular, impacting on corporate taxpayers applying the "innovation deduction regime" providing for an 85% exemption of qualifying net innovation income).

9.5 Entities Bearing the Risk of Another Entity's Operations

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

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

10.1 Impact of UN Practical Manual on Transfer Pricing

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

11. Safe Harbours or Other Unique Rules

11.1 Transfer Pricing Safe Harbours

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

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

11.2 Rules on Savings Arising From Operating in the Jurisdiction

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

11.3 Unique Transfer Pricing Rules or Practices

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

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

- If during a twelve-month period a participant in a cash pool has held a given (minimum) amount as a deposit or as borrowing, such an amount can no longer be priced as a cash pool transaction, but should be priced as a loan. The reclassification of a structural cash pool deposit or borrowing in a term loan is a frequently observed topic during audits.
- According to the BTA, it is a rebuttable presumption that the cash pool leader is a mere service provider and that its remuneration could generally be determined using a cost-based approach.
- In the framework of a business restructuring of a "limited risk" entity remunerated with a transactional net margin method, the BTA considers that restructuring costs should be re-charged to the foreign group entity that made the decision to restructure and/or that benefits from the restructuring.
- According to the BTA, if the actual result of a company falls outside the range of arm's length outcomes, an adjustment should be made to the median of said range unless specific arguments are available to justify another point within the range.
- Synergies obtained through centralised procurement should be reallocated to the group and a centralised procurement company should be remunerated with a cost plus method (unless it can be demonstrated that another method is more appropriate given the added value generated by said entity).

12. Co-ordination With Customs Valuation

12.1 Co-ordination Requirements Between Transfer Pricing and Customs Valuation

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

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

The Belgian VAT authorities have not taken a position in light of this recent case law. It is nevertheless advisable for companies to obtain confirmation from the Belgian VAT authorities on the application of transfer prices on customs values in the event of retroactive transfer pricing adjustments. In this way, the possibility of overpaid customs duties not being recoverable can be avoided.

13. Controversy Process

13.1 Options and Requirements in Transfer Pricing Controversies

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

Administrative Proceedings

Taxpayers have a period of 12 months after receiving the tax assessment to initiate administrative appeal proceedings. The appeal can be lodged by filing a tax complaint, which will be examined by the regional director, who issues a decision of notice. This decision is binding on the BTA, and does not allow an appeal by the BTA. In general, a decision may be expected within six months after filing the tax complaint.

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

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

Judicial Proceedings

Where the taxpayer wishes to initiate judicial proceedings after exhausting the administrative appeal, a petition must be filed before the court of first instance. The petition must be filed within three months after the decision of notice by the regional director.

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

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

14. Judicial Precedent

14.1 Judicial Precedent on Transfer Pricing

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

There is nevertheless extensive established case law on the interpretation of the notion of "abnormal or benevolent advantage". Applying said notion under Articles 26, 79 and 206/3 ITC, the Belgian courts have traditionally advocated for a subjective and pragmatic approach. Therefore, the courts have accepted more subjective arguments to determine the arm's length character

of transactions, such as the global balance at group level, the specific characteristics of the group relationship and financial difficulties of group companies. In this respect, the Belgian courts have also accepted direct and indirect set-offs based on the economic reality in a group context.

14.2 Significant Court Rulings

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

- Ghent Court of Appeal, 8 June 2021, No 2016/AR/455 ("Uniclic"). This case concerned the arm's length character of a royalty-free licensing arrangement between a domestic manufacturing company acting as a licensee of patented technology (in the flooring industry) owned by a foreign related company located in Luxembourg. The BTA considered that the Belgian entity performed certain functions and managed certain risks in relation to the foreign company's licensing activity and thus contributed to the foreign company's profits resulting from the exploitation of the patents without receiving any remuneration. The BTA claimed, with reference to a functional analysis, that the Belgian domestic company performed all DEMPE functions (ie, development, enhancement, maintenance, protection, exploitation) in respect of the patents and also managed all important risks. Accordingly, by applying Article 26 ITC, the BTA included a significant part of the foreign company's profits in the domestic company's taxable base. The Court ruled against the BTA, making several interesting statements with respect to the burden of proof (ie, on the BTA), the working in time and the value of the OECD Guidelines (ie, mere recommendations which in principle cannot be applied with retroactive effect; see **9.1 Alignment and Differences**) and clarifications regarding the allocation of DEMPE functions.
- Antwerp Court of Appeal, 20 June 2017, No 2015/AR/2583 ("Philip Morris International"). This case dealt with the valuation of shares sold by a Belgian company to a Dutch related company. The BTA considered that the valuation of shares based on a discounted cash flow (DCF) method was too low and thus resulted in the Belgian seller granting an abnormal advantage to its Dutch parent company. The BTA used an alternative valuation method based on which the BTA arrived at a higher valuation. The Court recognised that the BTA did not question the appropriateness of the DCF method as such, but merely that the discount rate used would be too high (and consequently lead to a lower price). The Court ruled that the BTA did not prove that the discount rate used would be incorrect or arbitrary. The Court concluded that when several valuation methods are available, the BTA cannot conclude that an abnormal or benevolent advantage is granted when it appears that the method applied by the taxpayer is appropriate and was correctly applied even if an alternative valuation leads to a different result. In other words, the mere fact that the BTA arrives at a different price by applying a different method does not prove that an applied price is abnormal.
- Antwerp Court of Appeal, 5 March 2019, No 2017/AR/1640 ("Opel"). This case dealt with the remuneration method of a Belgian entity acting as a manufacturer of cars sold to a German related entity. Here, the BTA argued that the profit split method used to distribute profits between the Belgian entity and the German related company was inappropriate as the Belgian entity had to be classified as a contract manufacturer acting on behalf of the German principal, and should therefore

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

15. Foreign Payment Restrictions

15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions

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

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

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

15.2 Restrictions on Outbound Payments Relating to Controlled Transactions

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

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

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

15.3 Effects of Other Countries' Legal Restrictions

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

16. Transparency and Confidentiality

16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes

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

The outcome of transfer pricing audits is not published.

16.2 Use of "Secret Comparables"

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

17. COVID-19

17.1 Impact of COVID-19 on Transfer Pricing

The main discussion points with the BTA in the context of COVID-19 concerned the repartition and allocation of losses and exceptional costs incurred during the pandemic between associated companies, and in particular whether routine entities remunerated with a transactional net margin method can bear such losses and costs under specific circumstances.

The BTA has not yet taken any official position on this matter, apart from a reference to the "OECD Guidance on the transfer pricing implications of the COVID-19 pandemic" on its website.

17.2 Government Response

The Belgian government took multiple measures to support businesses in overcoming the adverse consequences of the COVID-19 crisis. The measures consisted of deferred payments of corporate income tax, wage withholding taxes, VAT and other taxes. Other support measures consisted of a waiver of late payment interests and late payment fines.

17.3 Progress of Audits

The tax audit process was only temporarily delayed at the start of the COVID-19 pandemic. Subsequently, tax and transfer pricing audits were mostly initiated or continued through online meetings.

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