12. BELGIUM[363]

Over the last decades, Belgium has become a competitive player in the international tax arena. Despite a relatively high corporate income tax ("C.I.T.") rate of 25% in comparison with some other E.U. jurisdictions, Belgium offers a wide-range of tax-planning opportunities for Belgian holding and operating companies and Belgian branches of foreign companies.[364]

These opportunities include, but are not limited to, the following:

- The participation exemption, also referred to as the dividend received deduction ("D.R.D."),[365] which fully exempts from C.I.T. dividends received from qualifying subsidiaries and

[363] This chapter of the article was written by Werner Heyvaert of AKD Benelux Law Firm in Brussels. The author acknowledges the contribution of his colleague Yannick Vandenplas.

[364] The Belgian branch of a foreign company can be a valuable alternative to a Belgian company because, *inter alia*, there is no dividend withholding tax ("W.H.T.") or "branch profits tax" due on the repatriation of branch income to the head office. In most instances, however, foreign investors operate in Belgium through a subsidiary that adopts a corporate form rather than a branch. Although several corporate forms exist under Belgian corporate law, the most commonly used are the Public Limited Liability Company (S.A./N.V.) and the Limited Liability Company (S.R.L./B.V.). From a Belgian tax perspective, both the S.A./N.V. and the S.R.L./B.V. are subject to identical C.I.T. rules. The use of non-corporate entities, such as partnerships, is relatively limited.

[365] D.R.D. translates to *revenus définitvement taxés* or R.D.T. in French and *definitief belaste inkomsten* or D.B.I. in Dutch.

capital gains realized on the shares of qualifying subsidiaries

- The innovation income deduction, which allows a deduction of 85% of qualifying innovation income determined in accordance with the O.E.C.D.'s nexus rules[366]

- The increased investment deduction, which allows the deduction of a percentage of the acquisition or investment value of qualifying assets that have been acquired or developed during the taxable period and are related to R&D. This deduction comes in addition to the annual depreciation of qualifying assets.

- Tax losses may be carried forward indefinitely

- The ruling practice, which allows taxpayers to obtain a binding opinion from the Belgian Tax Ruling Committee on tax issues and the Belgian Accounting Standards Committee on accounting issues

- The absence of capital tax and of a net wealth tax

- The deductibility of finance costs

- The extensive Belgian tax treaty network

- The application of the E.U. Parent-Subsidiary Directive ("P.S.D.") to all tax treaty countries

This chapter examines the relevant tax aspects for multinationals doing business or planning to do business with or through Belgian holding companies.[367] Where relevant, recent amendments to

---

366 The I.I.D. can be combined with another Belgian tax incentive that is the 80% wage W.H.T. exemption for qualifying scientific workers.

367 For the economic substance requirements in Belgium and the E.U., see W. Heyvaert et *al.*, "Economic Substance:

Belgian tax law are also discussed. With a statute of limitation of at least three years, historic rules remain relevant in case of a tax audit covering previous years.[368]

A. Corporate Income Tax

i. General Regime

Companies are subject to Belgian C.I.T. if all of the following three conditions are met:[369]

- 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.

Views From the U.S., Europe, and the B.V.I., Cayman and Nevis," *Insights*, Vol. 10, No. 3 (2023), pp. 5-27, spec. pp. 15-23 (available at http://publications.ruchelaw.com/news/2023-05/EconomicSubstance.pdf).

368 When a taxpayer fails to submit their tax return or does not do so within the designated timeframe, the statute of limitation is extended to four years. In an international context, such as when taxpayers claim a foreign tax credit or seek exemptions, waivers, or reductions of W.H.T. through tax treaties or E.U. Directives, the statute of limitation is extended to six years. For cases involving alleged fraud or "complex" tax returns, such as those involving Belgian controlled foreign companies or hybrid mismatches rules, the statute of limitation is further extended to ten years. In some circumstances, the statute of limitation is even longer; this is the case, for example, when the Belgian tax authorities receive information from foreign tax authorities.

369 Article 179 of the Belgian Income Tax Code ("I.T.C."), read in parallel with Article 2, ¶1, 5°, a) and b) I.T.C.

- They carry on a business or are engaged in profit-making activities.

- They have their effective place of management or control in Belgium.[370]

Companies are subject to Belgian C.I.T. on their worldwide profit, including distributed dividends. The taxable income is determined on the basis of the commercial accounts and the accounting rules, unless the tax laws provide otherwise.[371]

Companies must use their standalone Belgian G.A.A.P. accounts to prepare their C.I.T. return; accounts prepared using I.A.S. or I.F.R.S. cannot be utilized for Belgian C.I.T. purposes.

ii. Corporate Income Tax Rate

Following a major overhaul of Belgium's C.I.T. in 2017, the standard C.I.T. rate is 25%.[372]

---

370 Although Belgian corporate law recently switched to the "statutory seat" doctrine, Belgian tax law still applies the "real seat" doctrine. When a company has its statutory seat in Belgium, it is presumed to have its real seat in Belgium, too. The company may rebut this presumption if it can establish that its tax residency is in another country in accordance with the tax legislation of that country. The concept of "effective place of management of control" or "real seat" refers to a factual situation. In practice, the real seat will be the place 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.

371 Article 24, third limb I.T.C.

372 Article 215 I.T.C.

Companies may benefit from a reduced rate of 20% for the first €100,000 of taxable income if all of the following conditions are met:[373]

- It qualifies as a small or medium-sized enterprise ("S.M.E.") within the meaning of the Belgian Code on Companies and Associations ("B.C.C.A."). The B.C.C.A. defines S.M.E.'s as companies which, on the balance sheet of the last two financial years, do not exceed more than one of the following criteria:[374]

  (i) An annual average of 50 employees

  (ii) Annual sales of €11.25 million, excluding V.A.T.

  (iii) A balance sheet total of €6 million

- At least 50% of the company's shares are held by individuals.[375]

- It pays, from the fifth taxable period following its establishment, an annual compensation of €45,000 or more to at least one manager of the company that is a natural person. The annual compensation can be lower if it is at least equal to the company's taxable income.[376]

- It is not an investment company.[377]

- It does not hold participations in one or more other companies that have a combined acquisition value that exceeds 50% of either the revalued paid-up capital of the company or the paid-up capital, taxed reserves, and

---

[373] Article 215, second limb I.T.C.

[374] Article 1:24 B.C.C.A.

[375] Article 215, third limb, 2° I.T.C.

[376] Article 215, third limb, 4° I.T.C.

[377] Article 215, third limb, 6° I.T.C.

recorded capital gains of the company. Participations of at least 75% are excluded from this calculation.[378]

Most Belgian holding companies will not be eligible for the reduced rate because, *inter alia,* less than 50% of their shares will be held by individuals.

iii. Minimum Taxable Base

Companies with a taxable profit that exceeds €1 million cannot fully benefit from certain tax attributes such as a tax loss carryforward or a D.R.D. carryforward. In the profitable year, the benefit is capped at 70% of the taxable profits in excess of €1 million.[379] As a result, 30% of the taxable profits that exceed €1 million in the carryforward year will be subject to the standard Belgian C.I.T. rate of 25%. The unused tax attributes can be carried forward to following taxable years until finally used. Belgian holding companies, therefore, need to re-assess their use of tax attributes and their recognition of related deferred tax assets.

iv. Taxation of Dividends Received

a. In General

Dividends received by a Belgian company are in principle subject to the standard 25% C.I.T. rate or the reduced rate of 20% for the first €100,000 of taxable income, if applicable.

The D.R.D. regime is the Belgian implementation of the E.U. Parent-Subsidiary Directive ("P.S.D."). Under the P.S.D., profit distributions from subsidiaries to parents established in the E.U. are, in principle, tax exempt. Member States have two options to achieve this: they can either refrain from taxing dividends received by the parent or its P.E. under the exemption method, or they can tax the dividends and allow the parent or its P.E. to deduct the tax paid by the subsidiary and any sub-subsidiaries through the credit method.

---

[378] Article 215, third limb, 1° I.T.C.

[379] See Article 207, fifth limb I.T.C.

When implementing the P.S.D., Belgium chose the exemption method, but with a unique two-step system. First, the dividend received is added to the tax base of the parent. Then, after dividing the aggregate profit into three baskets – Belgian-source profit, profit exempt by virtue of a tax treaty, and profit not exempt by virtue of any tax treaty – the dividend is deducted from the Belgian tax base. However, this two-step approach can result in a less favorable tax treatment than a pure and simple exemption of the dividend in certain circumstances, which is incompatible with E.U. law. Notable cases highlighting this incompatibility include E.C.J. rulings such as *Cobelfret* (February 12, 2009, C-138/07), *KBC Bank* (June 4, 2009, C-439/07), and *Brussels Securities* (December 19, 2019, C-389/18). Currently, the Belgian D.R.D. regime is still not fully compatible with the P.S.D, particularly in cases of intragroup transfers. The most recent example of a potential incompatibility is the notorious John Cockerill case, which was referred to the E.U. Court of Justice on February 20, 2024, for a preliminary ruling.[380] In this case, the issue being examined is the impact of an intragroup profit transfer (the Belgian equivalent of a partial tax consolidation) on the ability of the recipient company's right to apply the D.R.D.

b. Participation Exemption

Dividends received by a Belgian company may be fully exempt under the D.R.D. regime if all of the following conditions are met:

- **Minimum Participation Value**: The recipient company owns at least 10% of the nominal share capital[381] of the

---

[380] Case No. C-135/24. See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62024CN0135.

[381] Under the B.C.C.A., the concept of "capital" has ceased to exist for the S.R.L./B.V. and is replaced by the concept of "equity." Equity consists of (i) the contributions of shareholders (formerly labeled "share capital"), (ii) reserves (retained earnings), and (iii) income (profit) carried forward that serves as protection for creditors (formerly labeled "legal reserve"). For the S.A./N.V., the terminology "capital" remains applicable.

subsidiary making the payment *or* the acquisition value of its holdings in the subsidiary is at least €2.5 million.[382]

- **Minimum Holding Period:** The recipient holds (or has committed to hold) the minimum participation referred to in the previous bullet in full ownership[383] for an uninterrupted period of at least one year prior to (and/or following) the dividend distribution.[384]

- **Subject to Comparable Tax Test:** The subsidiary making the dividend payment is subject to Belgian C.I.T. or a foreign tax similar to Belgian C.I.T.[385]

  A foreign tax is not considered similar if the nominal or effective rate of tax is below 15%. The taxpayer may rebut this presumption.[386]

  Tax regimes of all E.U. jurisdictions are deemed to be similar to Belgian C.I.T. even if the nominal or effective tax rate is below 15%.[387] Examples of countries benefiting from this rule are Ireland and Cyprus.

  In contrast, countries appearing on the E.U. list of noncooperative jurisdictions will be deemed to not have a

---

382 Article 202, ¶2, first limb, 1° I.T.C.

383 A *usufruct* right over the shares does not suffice. A *usufruct* right arises when full legal ownership to an asset is divided between bare legal ownership (a capital or remainder interest) and ownership of a current right to income or use. The latter is the *usufruct* right. The right exists for a limited period of time and is separate from the capital interest.

384 Article 202, ¶2, first limb, 2° I.T.C.

385 Article 203, ¶1, first limb, 1° I.T.C.

386 Article 203, ¶1, second limb I.T.C.

387 Article 203, ¶1, third limb I.T.C.

tax regime similar to Belgian C.I.T.[388] This list includes the following 12 jurisdictions: American Samoa, Anguilla, Antigua & Barbuda, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad & Tobago, the U.S. Virgin Islands, and Vanuatu.

Likewise, the Royal Decree implementing the I.T.C. ("R.D./I.T.C.") contains a list of 31 jurisdictions that are presumed to not have a tax regime similar to Belgian C.I.T.[389] Currently, this list includes the following jurisdictions:

Abu Dhabi
Ajman
Andorra
Bosnia & Herzegovina
Dubai
East Timor
Gibraltar
Guernsey
Isle of Man
Jersey
Kosovo
Kuwait
Kyrgyzstan
Liechtenstein
Macau
Macedonia
Maldives
Marshall Islands
Micronesia
Moldova
Monaco
Montenegro
Oman
Paraguay
Qatar
Ras al Khaimah
Serbia
Sharjah
Turkmenistan
Umm al Qaiwain
Uzbekistan

Countries appearing on this R.D./I.T.C. list may still pass the subject-to-tax test if the taxpayer is able to rebut the presumption. For example, due to the recent increase of the C.I.T. rate to 15% in Serbia, taxpayers may argue that

388 Article 203, ¶1, first limb, 1°, *in fine*; See "Annex I – E.U. list of noncooperative jurisdiction for tax purposes" to the E.U.'s Council conclusions on the revised E.U. list of noncooperative jurisdictions for tax purposes, approved by the Ecofin Council at its meeting on February 20, 2024.

389 Article 73[4quater] R.D./I.T.C.

Serbian-source dividends qualify for the D.R.D. despite appearing on the list.[390]

- **Specific Anti-Abuse Rule:** The D.R.D. is not available for dividends stemming from a company that distributes income related to a legal act or a series of legal acts that the Belgian tax authorities have determined are not genuine, and have as their main goal or one of their main goals the attainment of the deduction or one of the benefits of the P.S.D. in another E.U. Member State.[391] The determination is to be based on all relevant facts, circumstances, and proof to the contrary. Actions will be considered "not genuine" if they are not taken for valid commercial reasons that reflect economic reality. This rule is separate from Belgium's general anti-abuse provision.

The minimum participation value and minimum holding period requirements do not need to be fulfilled with respect to shares held in or by investment companies and regulated real estate companies.[392] Dividends and capital gains derived from these shares are fully exempt, irrespective of the size or duration of the investment, provided the subject to tax test is met.

c. Exceptions to the Participation Exemption

1) Finance, Treasury and Investment Companies

The D.R.D. is not available for dividends distributed by a finance company, a treasury company or an investment company where the company enjoys a tax regime that deviates from the normal tax regime in its country of residence.[393]

---

390 See Ruling No. 2016.740 of November 29, 2016, available on www.monkey.be.

391 Article 203, ¶1, first limb, 7° I.T.C.

392 Article 202, ¶2, third limb I.T.C.

393 Article 203, ¶1, first limb, 2° I.T.C.

A company is a finance company if its sole or principal activity consists of providing financial services to unrelated parties (*i.e.*, parties that do not form part of a group to which the finance company belongs).[394] Financial services include the provisions of financing and financial management. Belgian companies are part of the same group if one company exercises control over the others, if two companies are controlled by a common parent company, or if they constitute a consortium.[395]

A treasury company is a company that is principally engaged in portfolio investment other than cash pooling.[396]

An investment company is a company whose purpose is the collective investment of capital funds. Examples are companies that qualify as S.I.C.A.V.'s or S.I.C.A.F.'s.[397]

Nonetheless, the D.R.D. is available under certain conditions for E.U.-based finance companies and for investment companies.[398]

2) Regulated Real Estate Companies

The D.R.D. is not available for dividends derived from a Belgian regulated real estate company, which is the functional equivalent of a real estate investment trust ("R.E.I.T.").[399] The same rule applies to a nonresident company if all of the following conditions are met:

---

394 Article 2, ¶1, 5°, d) I.T.C.

395 See Article 2, ¶1, 5°/1, which refers to Article 1:20 B.C.C.A.

396 Article 2, ¶1, 5°, e) I.T.C.

397 Article 2, ¶1, 5°, f) I.T.C.

398 See Article 203, ¶2 I.T.C.

399 Article 203, ¶1, first limb, 2°*bis* I.T.C.; For further details on the tax regime of Belgian Regulated Real Estate Companies, see P. Desenfans et L. Pinte, "Aspects fiscaux des SIR et FIIS," *Jurim pratique*, 2017/3, pp. 189-221.

- The main purpose of the company is to acquire or construct real estate property and make it available on the market, or to hold participations in entities with a similar purpose.

- The company is required to distribute part of its income to its shareholders.

- The company benefits from a regime that deviates from the normal tax regime in its country of residence.

3) Offshore Activities

The D.R.D. is not available for dividends distributed by a company when the non-dividend income of that company originates in a third country and such income is subject to a separate tax regime that provides more favorable results than the regular tax regime.[400]

4) Certain Foreign Branch Income

The D.R.D. is not available when the dividends are distributed by a company that realizes profits through a foreign branch that is subject to a tax regime substantially more advantageous than in Belgium.[401] This disallowance rule is, in turn, subject to an exception. The D.R.D. will be allowed for dividends distributed by (i) Belgian companies with foreign branches or (ii) companies established in certain treaty jurisdictions and that operate through a branch in a third country.

Dividends stemming from non-Belgian branch profits qualify for the D.R.D. to the extent that either the branch profits are subject to a 15% foreign income tax, or the branch is located in another E.U. jurisdiction.[402]

---

[400] Article 203, ¶1, first limb, 3° I.T.C.

[401] Article 203, ¶1, first limb, 4° I.T.C.

[402] Article 203, ¶2, seventh limb I.T.C.

5) **Intermediate Companies**

Subject to a 10% *de minimis* rule, the D.R.D. is not available for dividends distributed by an intermediate company, other than an investment company, that redistributes dividend income derived from tainted participations.[403] As a result, if more than 10% of a dividend received from an intermediate company is funded by the receipt of dividends from its subsidiaries located in third countries, the D.R.D. may be disallowed if the D.R.D. would not have been permitted had the lower-tier companies paid dividends directly to the Belgian company. In other words, a group cannot cleanse tainted dividends by washing them through an intermediary located in an "acceptable" jurisdiction.

As a safe harbor, participations in companies (i) residing in a country with which Belgium has concluded an income tax treaty or (ii) that are listed on a recognized E.U. stock exchange are in principle eligible for the D.R.D.[404] These companies must also be subject to a tax regime comparable to the Belgian tax regime, without benefiting from a regime that deviates from the normal tax regime.[405]

With respect to investments in a second-tier subsidiary through a hybrid entity such as a U.S. limited liability company ("L.L.C."), the Belgian Ruling Committee issued several favorable rulings. In most instances, the Ruling Committee confirmed that, for Belgian tax purposes, one can look through a foreign hybrid entity to allow the D.R.D. as if the underlying participation in a lower-tier company were held directly by the Belgian holding company. Thus, for example, in a ruling dated February 12, 2019, the Ruling Committee found that a Belgian company was entitled to the D.R.D. with respect to dividends received from a U.S. L.L.C.[406] The Ruling

---

403 Article 203, ¶1, first limb, 5° I.T.C.

404 Article 203, ¶2, eighth limb, 1° I.T.C.

405 Article 203, ¶3 I.T.C.

406 Ruling No. 2018.0085 of February 12, 2019, available on http://www.monkey.be.

Committee looked to paragraph 1(b) of Article 22 (Relief From Double Taxation) of the Belgium-U.S. Income Tax Treaty and ruled that the Belgian company was entitled to the D.R.D. to the extent that such dividends stemmed from dividends received by the L.L.C. from a U.S. operating corporation that was subject to full corporate income tax in the U.S.

In the same ruling, the Ruling Committee confirmed that the proceeds of a redemption of capital that is received by an L.L.C. and in turn distributed to a Belgian company was plainly exempt from Belgian C.I.T. by virtue of Article 18, second limb, I.T.C. when the underlying U.S. company owned by the L.L.C. is subject to full tax in the U.S. Article 18 I.T.C. defines the term "dividend." Excluded from the scope of that definition is any return of share capital, provided the corporation that makes a distribution in return of share capital complied with the relevant company law rules. No requirement exists to test the quantitative or qualitative conditions of the D.R.D. under Belgian domestic law or an income tax treaty.[407]

6) **Dividend Payments that are Deductible for the Payor**

The D.R.D. is not applicable to dividend income received from a company that has deducted or can deduct such income from its profits.[408]

7) **Ruling Practice**

Upon a taxpayer's request, the Belgian Ruling Committee may issue an advance tax ruling on various items such as the availability of the D.R.D., the capital gains exemption, the application of anti-abuse

---

407 Note that under U.S. tax law, not all distributions that return share capital are treated as a redemption giving rise to capital gain treatment under U.S. tax law. Under Section 302 of the Internal Revenue Code, a distribution in return of capital – typically referred to as a redemption under U.S. tax jargon – is treated in some circumstances as a redemption and in others as a dividend.

408 Article 203, ¶1, first limb, 5° I.T.C.

provisions and the qualification of a company as resident or nonresident taxpayer. Although a ruling is not mandatory, it is frequently used by multinational groups to obtain legal certainty.

In theory, the Ruling Committee issues the ruling within three months following the receipt of a complete ruling application. In practice, however, the actual term is assessed on a case-by-case basis within 15 days following the filing of the ruling application.

Subject to conditions, a ruling is valid for a maximum of five years. If justified, a ruling can be granted for a longer period. Rulings can also be renewed.

Effective May 2019, the Belgian Accounting Standards Committee issues rulings on the application of accounting law rules. In the absence of a tax rule that differs from an accounting rule, Belgian tax law follows Belgian accounting practice. It is understood that Belgian corporate income tax is based on the taxpayer's Belgian G.A.A.P. accounts, even if the taxpayer is part of a group filing consolidated accounts under I.F.R.S. (or any other set of consolidation rules). The availability of accounting law rulings may prove useful in practice.

d. Taxation of Dividends Received in a Year Having Operating Losses

Prior to assessment year 2009, if a Belgian company's activities other than serving as a holding company for its subsidiaries resulted in a loss in the current year, the loss was used to offset dividend income. As a result, the benefit of the loss carryover was reduced or even completely eliminated. Moreover, the unused portion of the D.R.D. was permanently lost.

This position was challenged in an appeal to the European Court of Justice ("E.C.J.") in *Cobelfret v. Belgium* (Case C-138/07).[409] On February 12, 2009, the E.C.J. concluded that Belgium failed to refrain from taxing qualifying dividends, as is required under Article

[409] E.C.J., *Belgische Staat v. Cobelfret N.V.*, Case C-138/07, February 12, 2009, available at http://www.curia.europa.eu.

4(1) of the E.U. P.S.D. Two other cases were decided by "reasoned order" of the E.C.J. on June 4, 2009.[410] These cases dealt with E.U.-source dividends, Belgian domestic dividends, and dividends from countries outside of Europe. The E.C.J. asked the national courts to decide whether discrimination existed in the treatment of nonresident taxpayers when compared with resident taxpayers. This triggered an amendment to the statute by the Law of December 21, 2009, effective January 1, 2010. The net effect is that the unused portions of the D.R.D. can be carried forward for use in future tax years only if, at the time the dividend is declared, the dividend distributing company is established in any of the following jurisdictions:

- A Member State of the European Economic Area ("E.E.A."), including Belgium

- A country with which Belgium has concluded a tax treaty that contains an equal treatment clause (functional equivalent of Article 22(1)(c) of the Belgium-U.S. Income Tax Treaty currently in effect)

- Another country, provided that Article 63 of the Treaty on the Functioning of the European Union ("T.F.E.U.") (free movement of capital) applies – to the capital represented by the shares that produce the dividends

Non-E.E.A. source dividends remain unaffected by the E.C.J. *Cobelfret* case. Consequently, the unused portion of the D.R.D. cannot be carried forward.[411]

In addition, Belgium disallows the D.R.D. to the extent that a Belgian company's taxable income (*i.e.*, profit) reflects certain nondeductible expenses.[412] However, the disallowance does not

---

410 E.C.J., *Belgische Staat v. KBC Bank N.V. and Beleggen, Risicokapitaal*, Joined Cases C-439/07 & C-499/07, June 4, 2009, available at http://www.curia.europa.eu.

411 Article 205, ¶3, *a contrario* I.T.C.

412 Article 205, ¶2, first limb I.T.C.

apply to dividends stemming from qualifying subsidiaries established in a Member State of the E.E.A.[413]

Where the facts of a particular case involving dividends from a company meet none of the foregoing criteria, the law remains unfavorable for taxpayers. According to a ruling of February 1, 2011, from the Court of First Instance in Brussels,[414] the rule that excess dividends cannot be carried over if they stem from subsidiaries in non-E.E.A. countries with which Belgium does not have an income tax treaty in force containing an equal treatment provision does not run afoul of the Belgian constitutional non-discrimination rule.

In the facts addressed by the Brussels Court, the tax administration allowed a taxpayer to carry over excess dividends from a Japanese subsidiary of a Belgian holding company because an equal treatment provision is provided in Article 23(2)(a) of the Belgium-Japan Income Tax Treaty. However, the tax administration refused to allow the carryover of Taiwanese and South Korean dividends, because the treaties with those jurisdictions did not contain an equal treatment clause. Before the Brussels Court, the taxpayer claimed that the foregoing distinction ran afoul of the Belgian nondiscrimination rule of Article 10 in conjunction with Article 172 of the Belgian Constitution. However, the Tribunal sided with the tax administration, concluding that the distinction between an E.E.A.-source dividend and a "third country dividend" is based upon an objective criterion, and for that reason, is permissible.

In a similar case decided on October 10, 2012, the Belgian Constitutional Court confirmed that the carryforward or denial of the participation exemption for excess dividends from companies organized in third countries not having bilateral tax treaties with

---

[413] Article 205, ¶2, second limb I.T.C.

[414] Court of First Instance in Brussels, February 1, 2011, R.G. 2009/1652/A, available on www.monkey.be.

equal treatment clauses does not constitute a violation of the constitutional nondiscrimination principle.[415]

In sum, the unused portion of D.R.D. for E.E.A. source dividends can be carried forward following the E.C.J.'s *Cobelfret* case discussed above. Conversely, the D.R.D. for non-E.E.A. source dividends remains subject to a double restriction:

- The D.R.D. cannot apply to certain nondeductible expenses (*e.g.,* the nondeductible portion of restaurant expenses).[416]
- The unused portion of the D.R.D. cannot be carried forward.[417]

Say a Belgian company ("BelCo") has (i) a non-E.E.A. source dividend of €50, (ii) a current year loss of €20, and (iii) nondeductible restaurant expenses of €10.

Before applying the D.R.D., the taxable base of BelCo is €40 (50-20+10). If the dividend of €50 meets the conditions for the D.R.D., the D.R.D. will apply only to €30 (40 of net income - 10 of nondeductible expenses), leaving a taxable base of €10 (40-30).

The unused portion of the D.R.D. (50-20 = 30) will be forfeited, as the dividend is from a non-E.E.A. source and thus cannot be carried forward, unless the dividend stems from a participation based in a country having a bilateral treaty in force with Belgium and which contains an equal treatment clause.

---

415 Belgian Constitutional Court, October 10, 2012, R.G. 118/2012, available at http://www.const-court.be.

416 See Article 205, ¶2, first limb I.T.C. for the complete list.

417 Article 205, ¶3, *a contrario* I.T.C.

v. Taxation of Capital Gains on Shares

a. Taxation of Realized Capital Gains on Shares

Capital gains on shares realized by a Belgian company are in principle taxed as ordinary profits and subject to the standard 25% C.I.T. rate or the reduced rate of 20% for the first €100.000 of taxable income, if applicable.

By way of exception, a full exemption is applicable provided that the participation, holding period and subject-to-tax requirements applicable for the D.R.D. are met (see conditions above).[418] The exemption applies only to the net gain realized, *i.e.*, the amount after the deduction of the alienation costs (*e.g.*, notary fees, bank fees, commissions, publicity costs, consultancy costs, etc.).[419]

The fact that, as of assessment year 2019 (accounting years ending on or after December 31, 2018), the capital gain exemption is fully synchronized with the D.R.D. has important consequences in the following cases:

1) The "One Taints All" Principle

Prior to assessment year 2019, capital gains on the disposal of a share package containing a tainted share (*i.e.*, a share that did not qualify for the D.R.D.) were not exempt. After the reform, it is clear that a proportional exemption is possible, similar to the rules for the D.R.D.

2) Disposal of Part of a Qualifying Participation

Assume that a taxpayer has a qualifying participation of more than 10% or €2.5 million and that only a part of that participation is sold

---

418 Article 192, ¶1 I.T.C.; The minimum participation requirement does not apply to insurance and reinsurance companies that hold participations to hedge their liabilities.

419 Article 43 I.T.C.

or otherwise disposed of. Any gain on this sale qualifies for the capital gain exemption.

However, it is not entirely clear whether the exemption will be available when the remainder of the participation is sold at a later time. If the remaining shareholding has an historic book value of at least €2,500,000 or constitutes a participation of at least 10%, the exemption should be available. On the other hand, if the remaining shareholding has dropped below both the 10% and the €2,500,000 thresholds, any gain on the sale of the remaining shareholding will likely fail the minimum participation test and, therefore, not be exempt.

3) Exchange of Shares

Subject to certain conditions, when a Belgian company transfers shares in a Belgian or European target company to a European acquiring company in exchange for issuance of new shares of the acquiring company, any gain resulting from the share-for-share exchange is temporarily exempt under the E.U. Merger Directive by virtue of a roll-over rule. As a result, it is possible in principle to exchange tainted shares for untainted shares. After the exchange, a company could request the exemption for capital gains on shares as described above. To stop this practice, the Belgian legislature has implemented a specific anti-abuse provision limiting the exemption to the capital gains that accrue after the exchange of shares. This provision applies only to shares that do not meet the valuation standard for exemption. Why the holding and/or participation requirements are not also subject to this provision is unclear and may lead to its improper use.

4) Minimum Requirements

The minimum participation requirements that exist for dividends – ownership of 10% of the capital, or an acquisition value of the

shareholding of not less than €2.5 million – also apply to capital gains.[420]

In the past, uncertainty existed regarding the D.R.D. where the shares were acquired by a Belgian holding company at a price or value that was far below their actual value at the time of acquisition. The position of the Belgian tax authorities was that the difference between the artificially low acquisition price and the high actual value as of the date of acquisition should be booked as an undervaluation of assets and taxed as regular income of the holding company. The income would be deemed to accrue in the year of acquisition. It would be taxed retroactively at the full C.I.T. rate of 25%.

This position was successfully challenged in the *Gimle* case[421] in a preliminary ruling from the E.C.J. that was settled definitively by the Court of Cassation.[422] Going forward, the full gain based on the low purchase price is exempt.

5) Operation of the Capital Gains Exemption

The capital gains exemption is granted by a direct elimination of the net gain from taxable income. Consequently, loss utilization is not adversely affected.

Losses derived from other activities of the Belgian holding company, including interest and other costs or expenses related to the acquisition of the participation, are not allocated to the exempt gain.

---

[420] See Article 192, ¶1 I.T.C, which refers back to Articles 202-203.

[421] E.C.J., *Belgium v. Gimle S.A.*, Case-322/12 of October 3, 2012, ECLI:EU:C:2013:632, spec. ¶39.

[422] Court of Cassation, May 16, 2014, R.G. F.10.0092.F., available at www.monkey.be.

This treatment should be compared to the treatment of costs and expenses relating to the sale of shares. This is discussed below.

6) <u>Options</u>

If a Belgian company purchases stock below fair market value pursuant to the exercise of a call option or a warrant, any subsequent gains realized upon the disposition of the shares of stock qualify in principle as fully exempt capital gains, provided all conditions provided in Belgian law are met. The exemption does not apply to gains derived from the sale of the option or the warrant as such. If the call option itself were sold at a gain reflecting the appreciation of the value of the underlying share, the gain would be subject to the regular C.I.T. rate.

Note, however, that the law of December 1, 2016 introduced specific anti-abuse provisions applicable to the D.R.D., the capital gains exemption, and the W.H.T. exemption for parent companies. These rules are in addition to Belgium's general anti-abuse provision. Transposing the revisions to the P.S.D. issued by the European Commission ("Commission"), taxpayers must have appropriate business motives for the implementation of a holding structure, as previously discussed.

b. <u>Taxation of Unrealized Capital Gains on Shares</u>

Unrealized capital gains are not taxable if the capital gains are not reflected in the company's financial accounts. There are no mark-to-market rules under Belgian G.A.A.P. Even if reported, the unrealized gain is not taxable if and as long as it is booked in a non-distributable reserve account.[423] Upon later realization of the gain, the non-distributable reserve account disappears without triggering C.I.T., assuming all conditions for the capital gains exemption are met at that time.

---

[423] Article 24, first limb, 2° I.T.C. read in parallel with Article 44, ¶1, 1° and 190, second and fourth limbs.

c. Taxation of Realized and Unrealized Capital Losses on Shares

Capital losses on shares, whether realized or unrealized, are not tax deductible.[424] However, the loss incurred in connection with the liquidation of a subsidiary company remains deductible up to the amount of lost paid-up share capital.

The nondeductible nature of a capital loss is limited to shares. Capital losses realized on other securities (*e.g.,* bonds) or derivatives (*e.g.,* options) are fully tax deductible.

B. Withholding Tax on Dividend Distributions

i. To Belgium

Dividends distributed by a non-Belgian company to a Belgian company may be subject to dividend W.H.T. at the rate in effect in the country of residence of the company paying the dividend. In most situations, this rate is reduced or eliminated by a tax treaty or the P.S.D.

With the exception of investment companies, Belgium's national law does not grant a tax credit for foreign W.H.T. imposed on dividends.[425] However, certain bilateral tax treaties provide a Foreign Tax Credit ("F.T.C.") trumping the Belgian national law provisions. For instance, the Belgian Court of Cassation ruled on October 15, 2020, that the Belgian tax authorities cannot invoke national provisions to deny Belgian taxpayers the benefit of the 1964 Belgium-France tax treaty.[426]

---

424 Article 198, ¶1, 7° I.T.C.

425 Article 285, second limb I.T.C.

426 Court of Cassation, October 15, 2020, R.G. F.19.0015.F, *F.J.F.*, 2020/10, pp. 365-366; Note that Belgium has recently signed a new tax treaty with France on November 9, 2021. In this respect, see P.-J. Wouters, "The Belgium-France Income and Capital Tax Treaty (2021): What's

ii. From Belgium

a. General Rule

As a general rule, dividends distributed by Belgian companies to resident and nonresident shareholders are subject to 30% Belgian dividend W.H.T.[427] Under specific circumstances, reduced rates or exemptions are available.

A full exemption of Belgian dividend W.H.T. applies on the payment of dividends to a parent company established within the E.E.A. (including Belgium) or in a country with which Belgium has concluded a tax treaty containing an exchange of information provision.[428] In both instances, the shareholder must hold (i) a participation of at least 10% of the Belgian-resident company or an acquisition price or value of at least €2.5 million and (ii) the participation must have been held for an uninterrupted period of at least one year, which may occur partly before and partly after the dividend distribution. Once a qualifying parent company holds a qualifying participation, all additional acquired shares also qualify, even if the one-year holding period is not met with respect to the additional shares.

b. Less-Than-10% Investments

Following the ruling from the E.C.J. in the *Denkavit* case,[429] Belgium abandoned the condition that the parent must have held a

---

New?" *Bulletin for International Taxation*, 2022, Vol. 76, No 3, pp. 159-167.

427 Article 261, 1° I.T.C. and Article 269, ¶1, 1° I.T.C.

428 Article 106, ¶¶5-6*bis* R.D./I.T.C.; Belgian tax authorities take the view that the agreement between Belgium and Taiwan does not qualify as a tax treaty. Therefore, the full dividend W.H.T. exemption for dividends distributed by a Belgian company will not be available to the extent such dividends are distributed to a Taiwanese parent company.

429 E.C.J., *Denkavit Internationaal B.V. and Denkavit France S.A.R.L. v. France*, December 14, 2006, Case C-170/05,

participation of at least 10% for an uninterrupted period of at least one year preceding the distribution of the dividend. Therefore, the parent may hold the 10% participation for one entire year, which may occur partly before and partly after the dividend distribution. If the one-year hurdle is not fully met at the time the dividend is paid, the Belgian distributing company is allowed to pay out the net dividend only (*i.e.,* the gross dividend minus an amount equal to the dividend W.H.T. that would apply if the one-year holding period is not respected, thereby taking into account any treaty-based reductions that would be available if the one-year holding period is not met), without an actual payment to the Belgian tax authorities for the notional tax retained. If the shares are sold prior to meeting the holding period requirement, the amount of W.H.T. becomes due, increased by interest for late payment of tax. Otherwise, the undistributed portion of the dividend can be distributed freely once the one-year holding requirement is met.

The exemption from dividend W.H.T. is subject to the conditions mentioned in the P.S.D. with respect to the legal form, E.U. tax residence, and the parent company's compliance with a subject-to-tax requirement.[430] As a result of the amendment of the P.S.D., several types of entities that were not eligible for the W.H.T. exemption now qualify, most notably the "European company" or "*societas Europaea*" ("S.E."). The legal form requirement does not apply if dividends are paid to Belgian entities subject to Belgian C.I.T.

Corporate investors established in other E.E.A. Member States would be subject to double taxation if they held a participation in a Belgian company that was less than 10% but had an acquisition price or value of at least €2.5 million. Under these circumstances, a Belgium-resident corporate shareholder would be entitled to the

---

available at http://www.curia.europa.eu. Note that this is the second case involving the Denkavit company; the first one (C-283/94, October 17, 1996) also concerned the treatment of dividends, the application of the P.S.D. and the calculation of the two-year minimum holding period required to benefit from the participation exemption.

430 See Article 106, ¶5 R.D./I.T.C.

D.R.D., which amounts to 100% as of January 1, 2018, and be allowed a full credit and refund for Belgian dividend tax withheld at source. In comparison, prior to January 1, 2018, the €2.5 million threshold did not apply for the exemption from dividend W.H.T., meaning that a non-Belgian E.E.A. shareholder with an interest below 10% but an acquisition price or value of at least €2.5 million was subject to Belgian W.H.T. on any dividends received from its Belgian participation.[431] If the shareholder was not entitled to claim a foreign tax credit in its country of residence, the Belgian dividend was subject to double international taxation.

To remedy this unequal treatment, the Law of December 25, 2017, introduced a new dividend W.H.T. exemption. New Article 264/1 I.T.C. alleviates the participation requirement effective as of January 1, 2018. If the participation does not satisfy the 10% test, dividends can still be exempt from W.H.T. if the E.E.A.-based corporate shareholder owns a participation in the Belgian distributing company with a tax book value of at least €2.5 million for an uninterrupted period of at least one year (prior to and/or immediately after the distribution of the dividend). To curb any potential abuses, the new exemption does not apply if, *inter alia*, the beneficiary of the dividend is entitled to credit Belgian dividend W.H.T. against its mainstream tax liability and receive a full refund of any excess W.H.T. in the E.E.A. Member State where it is based. In addition, the beneficiary must certify that it meets the other P.S.D. criteria, *e.g.*, that it has a legal form listed in the Annex to the P.S.D. and that it is subject to the normal C.I.T. regime in the other Member State.

This provision also introduces an exemption for Belgian companies distributing a dividend to a non-E.E.A. based shareholder who (i) is based in in a country with which Belgium has concluded a tax treaty containing an exchange of information provision and (ii) owns a

---

[431] Since January 1, 2018, Article 264/1, ¶1, second limb I.T.C. allows non-Belgian E.E.A. shareholders with an interest below 10% but with an acquisition price or value of at least €2.5 million to benefit from a full dividend W.H.T. exemption.

participation below 10% in the Belgian company but with an investment price or value of at least €2.5 million.

c. Liquidation/Redemption Distributions to Persons Not Entitled to the Participation Exemption

The W.H.T. rate is set at 30% if dividends result from a redemption of shares or a share buy-back.

Distributions pursuant to liquidations and redemptions are subject to 30% Belgian dividend W.H.T., but may be eligible for rate reductions or exemptions from W.H.T. under a tax treaty concluded by Belgium, the P.S.D., or the unilateral extension of the P.S.D. W.H.T. exemption discussed above.

Through December 2017, any repayment of share capital or share premium to the shareholders was exempt from dividend W.H.T., provided that the repaid capital consisted of paid-up fiscal capital, did not consist of reserves, and the reduction of capital was executed in accordance with the old Belgian Company Law Code (now replaced by the B.C.C.A.).

In order to combat certain abusive "step-up" structures, the Law of December 25, 2017, introduced a relatively complex set of rules governing the reduction and reimbursement to shareholders of fiscal share capital.[432] From January 1, 2018, any reduction of share capital, including qualifying share premium, will be deemed to be paid proportionally from (i) fiscal share capital and share premium and (ii) profits carried forward or retained earnings. Only insofar as the capital reimbursement is deemed to be paid from fiscal share capital and share premium will no dividend W.H.T. apply. The portion of such reimbursement that is deemed to stem from profits carried forward and retained earnings will be treated as a regular

---

[432] Fiscal share capital is any portion of a company's equity that stems from actual contributions in cash or in kind made to the company by its current or past shareholders. It excludes any earnings and profits of the company that were converted to share capital for legal and accounting purposes but did not stem from contributions made by shareholders.

dividend subject to the rules for regular dividend distributions, as discussed above.

iii. Abuse of European Union's Directives

In February 2019, the E.C.J. ruled in the so-called *Danish cases* (Joined Cases C-116/16 and C-117/16) that the explicit transposition of the anti-abuse provisions of the E.U. Directives into national legislation or income tax treaties is not necessary to deny the benefits of these Directives in abusive situations.[433] For the E.C.J., there is, *inter alia*, an indication of abuse when:

- the recipient lacks substance, has no other economic activity in the country or has been interposed in a structure that otherwise would not be covered by the E.U. Directives; or

- the funds are passed on shortly after they are received, which indicates that the entity might be a mere flow-through or conduit to the ultimate recipient.

In December 2020, the Belgian Court of Appeals of Ghent endorsed the E.C.J.'s Danish cases doctrine and earmarked as abusive a W.H.T. exemption applied by a Belgian company distributing dividends to a Luxembourg S.P.V., because of the lack of substance in Luxembourg in combination with the artificial character of a number of steps in the transaction that was at stake.

---

[433] For further details about the Danish cases, see W. Heyvaert et *al.*, "Economic Substance: Views From the U.S., Europe, and the B.V.I., Cayman and Nevis"," *Insights* Vol. 10, No. 3 (2023), pp. 5-27, spec. pp. 16-19 (available at http://publications.ruchelaw.com/news/2023-05/EconomicSubstance.pdf); see also S. Baerentzen, "Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?" *World Tax Journal*, 2020, Vol. 12, No 1, pp. 3-52.

C. Tax Treatment of Borrowing and Interest Payment

In principle, interest expense incurred by a company is tax deductible. However, limitations apply to the deduction.

i. General Expense Deduction Rule

Like other costs and expenses, interest expenses are deductible by a company to the extent they[434]

- relate to the company's business activities,
- are incurred or borne during the taxable period,
- were incurred with a view to producing or maintaining taxable income, or
- are subject to proper documentation being provided.

ii. General Interest Limitation Rule (Arm's Length Principle)

Companies can deduct interest expenses to the extent they correspond to a market interest rate, taking into account the specific characteristics of the financing.[435] These include the currency exchange risk, the debtor's credit rating or creditworthiness, the duration of the loan, the timing of interest payments, the reimbursement of principal, and any collateral held as security by the lender.

If the interest charged between two related parties exceeds the interest charged in a comparable transaction between two unrelated parties, any excessive interest payment is not tax deductible by the borrower. If excessive interest paid or accrued by the borrower is not reported in the company's annual C.I.T. return, but rather added to its tax base as a result of a tax examination by Belgian tax authorities, the excessive interest deduction will be earmarked as an

---

434 Article 49 I.T.C.

435 Article 55 and 56 I.T.C.

"abnormal or gratuitous advantage" and taxed currently without being eligible for a set-off by reason of a loss that is available for carryover from an earlier year or other deductions.[436]

iii. Interest Payments to Tax Exempt/Low Taxed Non-E.U. Residents

If a Belgian company pays interest to a nonresident who is either not subject to tax or who benefits from a tax regime notably more advantageous than the Belgian tax regime, such interest would not be tax deductible unless and to the extent the Belgian company can demonstrate that the interest payment (i) does not exceed the normal limits, *i.e.,* the interest rate is at arm's length and (ii) relates to real and sincere operations, *i.e.,* the loan is neither fictitious nor simulated and is entered into for genuine business, commercial or financial purposes.[437]

It is not required that the borrower has a need to borrow; the borrower is free to choose how it finances its business with shareholder equity, related party debt, or third-party debt. However, the borrower has the burden of demonstrating that the two conditions set forth above are met.

In principle, this rule is applicable to interest paid by Belgian companies to any nonresident who is exempt from tax or subject to a beneficial tax regime on the interest earned. However, in the *S.I.A.T.* case (C-318/10), the E.C.J. ruled that this rule infringes the European freedom to provide services, to the extent the application of the rule treats (i) interest paid to Belgian residents more favorably – not subject to the reversal of burden of proof-rule – than (ii) interest paid to other E.U. residents – subject to the reversal of burden of proof-rule.[438] As a result, it is generally understood that

---

436 Article 206/3, ¶1 I.T.C.

437 Article 54 I.T.C.

438 E.C.J., *S.I.A.T. v. Belgium*, July 5, 2012, Case C-318/10, available at http://www.curia.europa.eu.

the two-prong rule described above, including the burden of proof element, applies only to interest paid or owed to non-E.U. residents.

Another rule provides that interest paid by Belgian companies to a beneficiary established in a jurisdiction listed as a tax haven for Belgian tax purposes would be tax deductible only to the following extent:[439]

- The Belgian company establishes that the interest relates to "genuine and sincere operations" (as defined herein above) with persons other than artificial constructs.
- The Belgian company reports the payment in an annex to its C.I.T. return.

This rule does not apply in either of two instances. The first is that the payment does not exceed €100,000 for a taxable period. The second is that the interest is paid to a non-E.U. person resident in a state with which Belgium has signed an income tax treaty containing a nondiscrimination clause or an automatic exchange of information clause.

iv. E.B.I.T.D.A Limitation Rule

a. In General

Belgium implemented Article 4 of the E.U. Anti-Tax Avoidance Directive ("A.T.A.D.") into its national law. Therefore, companies are allowed to deduct excess borrowing cost only to the extent it does not exceed a cap.[440] Excess borrowing cost refers to an entity's net funding cost, consisting of the difference between interest paid or accrued under its accounting method over interest received or accrued and recognized under its accounting method.[441] The excess

---

439 Article 198, ¶1, 10º I.T.C.

440 Article 198/1 I.T.C.

441 See Article $73^{4/8}$ R.D./I.T.C. that provides a description of income and expenses that are "economically equivalent to interest," *e.g.,* payments under profit participation loans, capitalized interest, foreign exchange gains/losses related to

borrowing cost is capped at €3 million or 30% of the E.B.I.T.D.A. computed for income tax purposes, whichever is greater. The cap is referred to frequently as "fiscal E.B.I.T.D.A."

b. Fiscal E.B.I.T.D.A.

The computation of fiscal E.B.I.T.D.A. begins with taxable profit. After that, several tax-technical corrections are made, which can be divided into two groups. The first group of corrections adds back to the taxable profit amortization deductions, depreciation deductions, and the amount of excess interest expense over interest income.[442] The second group of corrections removes, *inter alia*, income to which the D.R.D., the I.I.D., or an F.T.C. applies, the intragroup profit transfer, or the profit relating to a qualifying long-term public infrastructure project.[443] This reflects the view that exempt income is removed when computing fiscal E.B.I.T.D.A.

c. Exclusions

The fiscal E.B.I.T.D.A. limitation rule for interest expense deductions does not apply to any of the following:

- Income from financial operations of banks, insurance companies, pension funds, leasing companies, and factoring companies
- Income of standalone entities, essentially taxpayers without a foreign P.E. and without affiliates having a direct or indirect shareholding link of at least 25%
- Public-private partnership projects, essentially long-term public infrastructure projects

---

interest payments, guarantee provisions, discount on interest-free or abnormally low-interest loans.

442 Article 198/1, ¶3, second limb I.T.C.

443 Article 198/1, ¶3, third limb I.T.C.

The following three types of loans are also out of scope:

- Loans concluded before June 17, 2016, unless fundamental changes have been made to the terms and conditions after that date[444]

- Loans in relation to public-private cooperation projects

- Loans between Belgian entities that are part of the same group, as discussed in more detail, below

d. Carryforward

Taxpayers can carry forward the excess borrowing costs that cannot be deducted during a financial year to a subsequent financial year or transfer them to another Belgian group entity.[445]

e. Group Application

Belgian entities that are part of a group must share the interest deduction cap among themselves.[446] The allocation may be computed on a per capita basis among all members or in proportion to the level of the respective excess borrowing costs of each member. In the latter instance, a complex four-step approach must be applied when calculating fiscal E.B.I.T.D.A. of the group and its members.

If the overall E.B.I.T.D.A. of a Belgian group is less than €10 million, group entities may collectively waive their right to

---

[444] These grandfathered loans remain subject to the old Belgian 5:1 thin capitalization rule, under which interest payments or attributions in excess of a 5:1 debt-equity ratio are not tax deductible.

[445] Article 194*sexies* I.T.C.; For further details, *see* M. Possoz and B. Buytaert, "*De nieuwe EBITDA-interestaftrekbeperking*," *Tijdschrift voor Fiscaal Recht*, 2019/8, No 560, pp. 378-399.

[446] Article 198/1, ¶3, third limb, first dash I.T.C.

determine their individual E.B.I.T.D.A. in a specific tax form (275 CRC) that that is part of the C.I.T. return.[447] In such a case, the interest capacity depends only on the €3 million threshold.

v. Interest on Debt Pushdowns Payable at Redemption

Interest must be related to the conduct of a business in order to be deductible.[448] That is not clearly the case when the underlying debt is incurred to

- acquire a qualifying participation in another company,[449] or
- pay back equity or distribute dividends to the company's shareholders, as illustrated in the following case.

On May 8, 2018, the Court of Appeals in Antwerp handed down a remarkable ruling regarding the deduction of interest expense that at the time of a redemption is treated as a capital gain.[450] The facts of the case are as follows:

- On July 1, 2012, a Belgian company ("BelCo") borrowed €450 million from its Belgian parent company ("Parent"), incurring interest expense computed at an arm's length rate.
- €350 million of the amount borrowed was used by BelCo to reimburse share capital to its shareholders, including

---

447 Article $73^{4/11}$, ¶3 and $73^{4/12}$, ¶2 R.D. I.T.C.

448 Article 49 I.T.C.

449 Even though a participation in another company may result in a tax-exempt dividend income or capital gains only, it is generally accepted that interest incurred in connection with the financing or the acquisition of the participation is tax deductible.

450 Court of Appeals in Antwerp, May 8, 2018, R.G. 2016/AR/2108, available at http://www.monkey.be.

Parent, and €100 million was used to pay an interim dividend to its shareholders, also including Parent.

- The capital reduction and the interim dividend payment had been authorized by the shareholders prior to the loan agreement between BelCo and Parent.

- For tax assessment year 2013, BelCo claimed a deduction of €9,689,900 of interest expense owed to Parent.

The Belgian tax authorities challenged the deduction claiming it did not meet one of the essential requirements of Article 49 I.T.C. (see prior discussion of the general expense deduction rule), as it was not a cost or expense incurred to produce or maintain taxable income. The Court of Appeals in Antwerp sided with the Belgian tax authorities, taking the view that the reduction and payback of share capital and distribution of dividends to shareholders is not automatically a cost or expense that was incurred to produce or maintain taxable income for BelCo. After having examined the facts at hand, the Court of Appeals ruled that the interest expense was not deductible. BelCo filed an appeal against this ruling with the Court of Cassation, the highest Belgian court in tax matters.

On March 19, 2020,[451] the Court of Cassation ruled on the matter by following the Court of Appeals in Antwerp and establishing that the tax deductibility of an interest accrual in these circumstances is not automatically excluded, but that the company must corroborate that the interest expense was incurred or borne to obtain or maintain income. In this case, the taxpayer did not meet its burden of proof because the underlying documentation was apparently very meager and not very accurate. For example, the loan was made "for general corporate purposes."

---

[451] Cass. March 19, 2020, F.19.0025.N/1, available at www.stradalex.com.

vi. Special Fact Patterns related to Interest Expenses

a. Patent Income Deduction and Innovation Income Deduction

Belgium's patent income deduction ("P.I.D.") was abolished as of July 1, 2016, subject to grandfathering according to which the P.I.D. could still be applied until June 30, 2021, for qualifying patents received or applications filed before July 1, 2016.

A new innovation income deduction, or I.I.D., was introduced, based on the modified nexus approach recommended by the O.E.C.D. in B.E.P.S. Action 5. This regime was effective as of July 1, 2016.

The Act of December 19, 2023 "introducing a minimum tax for multinational companies and large domestic groups"[452] ensures that multinational groups or large domestic groups pay an effective 15% tax (see below). This minimum tax negates the tax benefit of the I.I.D. This is why the Act of May 12, 2024, containing various tax provisions, provides measures to safeguard the tax benefit of the I.I.D. Taxpayers can now opt to not deduct (part of) the I.I.D. but to convert it into a transferable, non-refundable tax credit, known as the I.I.D. "innovation income tax credit."[453]

Under the I.I.D. regime, a corporate taxpayer can deduct from the taxable base up to 85% of its net innovation income, resulting in an effective C.I.T. that can be as low as 3.75% (*i.e.,* 25% regular Belgian C.I.T. rate multiplied by the remaining 15% of net innovation income).[454] The company can therefore choose to pay

---

452 Published in the Belgian Official Gazette on December 28, 2023.

453 Articles 205/1, 289decies and 292ter I.T.C.

454 If, in the tax year for which the I.I.D. is claimed, insufficient taxable income is left to absorb the full amount of the I.I.D., any unused portion can be carried forward to subsequent tax years, with no time limit (Article 205/1, ¶1, second limb I.T.C.).

more corporate tax (by converting all or part of its I.I.D. into a tax credit) to avoid a top-up tax of up to 15%. The conversion into a tax credit is done at the corporate tax rate of 25%. The tax credit can be carried forward without any time limitation to financial years in which the effective tax rate would exceed 15%.

One of the benefits of the I.I.D over its predecessor, the P.I.D. regime, is that income from copyrighted software is also eligible for the 85% deduction.[455] Through June 30, 2022, the former P.I.D. regime and the new I.I.D. regime could be applied simultaneously.

vii. Withholding Tax on Outbound Interest Payments

In principle, interest paid by any Belgian company is subject to a W.H.T. of 30%.[456] Often, this domestic rate can be reduced by bilateral tax treaties, the E.U. Interest and Royalty Directive, and several domestic exemptions that have been implemented in Belgium. This will be the case if the Belgian company borrowed from an E.U.-affiliated company, a Belgian bank, a credit institution located in the E.E.A., or a lender resident in a tax treaty country. It applies also if the Belgian company issued registered bonds to nonresident taxpayers. In some cases, certificates must be filed alongside the W.H.T. return.

D. Capital Duty

Pursuant to the Law of June 23, 2005, the rate of capital tax is set at 0%[457] for all contributions to share capital occurring on or after January 1, 2006.

The contribution in kind of Belgian situs real estate may be subject to the real estate transfer tax (10% in Flanders; 12.5% in Brussels

---

455 For further details, see W. Heyvaert, "Belgium's New Innovation Income Deduction Regime," *European Taxation*, 2018, Vol. 58, Issue 5, pp. 206-209.

456 Article 261, 1° I.T.C. and Article 269, ¶1, 1° I.T.C.

457 Technically speaking, the capital tax is not repealed, but its rate is set at 0%.

and Wallonia) to the extent the contribution is not made exclusively or entirely in return for shares of stock. A classic example is the contribution of real estate together with an existing mortgage loan that predates the contribution.

E. V.A.T.

On the basis of E.C.J. case law, a distinction is made between active and passive holding companies for purposes of V.A.T.[458] A passive holding company has no economic activity that gives entitlement to claim a credit for input V.A.T. Its activities consist exclusively of the collection of dividends as well as the realization of capital gains upon disposition of shares or participations. In comparison, an active holding company is involved in its subsidiaries' management in return for remuneration. To the extent that its activities are neither exempt nor outside the scope of V.A.T., an active holding company can credit input V.A.T. against output V.A.T.

Based on a response in 2010 of the Belgian Minister of Finance to a Parliamentary Question,[459] even V.A.T. incurred in connection with a sale of shares may be creditable and refundable, under appropriate circumstances. This insight is derived from the E.C.J.'s ruling *Skatteverket v. A.B. S.K.F.*[460] First, one should determine whether there is in principle a direct relationship between a previous transaction, such as an input transaction on which input V.A.T. is chargeable, and a subsequent transaction, such as an output transaction that is subject to output V.A.T. If a relationship exists, the input V.A.T. can be credited by the holding company in computing its V.A.T. payments to the Belgian government. However, if there is a direct relationship between an input transaction and an output transaction that is either exempt from V.A.T. or outside the scope of V.A.T., the input V.A.T. is not

---

458 See *e.g.* E.C.J., *E.D.M. v Fazenda Pública*, April 29, 2004, Case C-29/08, available at http://www.curia.europa.eu.

459 Parl. Question, No. 299 of January 12, 2010, Brotcorne, *Q&A,* Chamber 2009-2010, No. 52-102, 107.

460 E.C.J., *Skatteverket v. A.B. S.K.F.*, October 29, 2009, Case C-29/08, available at http://www.curia.europa.eu.

creditable, as was the situation in E.C.J.'s ruling in *B.L.P. Group.*[461] Nonetheless, the input V.A.T. may still be creditable when the cost for the input services is part of the general expenses of the taxpayer and is included in the price charged by the taxpayer for goods delivered or services rendered to its affiliate. In essence, the parent can create its own connection by acts it takes and records it keeps.

This principle, too, was formulated in the *Skatteverket v. A.B. S.K.F.* case and the Belgian tax administration accepted that input V.A.T. could be creditable in the event of an issuance of new shares or the purchase of shares. However, V.A.T. credit is not available if the cost of the input transaction on which V.A.T. was charged is included in the sale price of the shares, which is either exempt or out of the scope of V.A.T. On May 3, 2018, the Advocate General of the E.C.J. clarified that V.A.T. incurred in connection with a failed sale of shares is fully deductible in the abovementioned circumstances.[462]

F. Private P.R.I.C.A.F./P.R.I.V.A.K

Private P.R.I.C.A.F./P.R.I.V.A.K.'s are unlisted collective investment undertakings aimed at investing in unlisted companies. As such, a Private P.R.I.C.A.F./P.R.I.V.A.K. is not a holding company.

A Private P.R.I.C.A.F./P.R.I.V.A.K. can take the form of a company limited by shares ("S.A./N.V." or "S.R.L./B.V."). It is a closed-end fund, established by private investors, *i.e.*, persons investing at least €25,000 each.[463] The Private P.R.I.C.A.F./P.R.I.V.A.K. must have at least six private investors."

---

461 E.C.J., *B.L.P. Group P.L.C. v. Commissioners of Customs & Excise*, April 6, 1995, Case C-4/94, available at http://www.curia.europa.eu.

462 Opinion of Advocate General Kokott in E.C.J., *Ryanair L.T.D. v. The Revenue Commissioners*, October 17, 2018, Case C-249/17, available at www.curia.europa.eu.

463 Note that the Royal Decree of May 8, 2018, decreased the minimum investment threshold from €100,000 to €25,000.

A Private P.R.I.C.A.F./P.R.I.V.A.K. exists for a period of 12 years. This period can be extended by the investors twice, each time for a period of three years. The extensions must be approved by 90% of the votes cast, representing at least 50% of the share capital.

Private P.R.I.C.A.F./P.R.I.V.A.K.'s may invest in a broad range of financial instruments issued by *unlisted* companies. This includes (i) shares, bonds, and debt instruments of all kinds; (ii) securities issued by other undertakings for collective investment; and (iii) derivative financial instruments such as subscription rights and options. Other investments are either partially or temporarily authorized or prohibited.

The Law of March 26, 2018, abolished a restriction that prohibited a Private P.R.I.C.A.F./P.R.I.V.A.K. from acquiring a controlling stake in a portfolio company.

Private P.R.I.CA.F./P.R.I.V.A.K.'s must register with the Belgian tax authorities. Furthermore, the Royal Decree of May 8, 2018, provides Private P.R.I.C.A.F./P.R.I.V.A.K.'s with the ability to create compartments or silos.

A Private P.R.I.C.A.F./P.R.I.V.A.K. is subject to C.I.T., but its tax base deviates from the normal C.I.T. regime and is limited to certain elements such as non-arm's length benefits received, nondeductible expenses, and payments in lieu of dividends in stock-lending transactions. Private P.R.I.C.A.F./P.R.I.V.A.K.'s do not pay other income taxes.

The Law of March 26, 2018, granted private investors in a Private P.R.I.C.A.F./P.R.I.V.A.K. a tax reduction of 25% of capital losses realized on the shares of a Private P.R.I.CA.F./P.R.I.V.A.K. established after January 1, 2018. The loss will be equal to the excess of (i) the capital invested by the private investors over (ii) the sum of the distributions made by the Private P.R.I.C.AF./P.R.I.V.A.K. to the private investors as a result of the company's complete liquidation, plus the dividends paid to the private investors. The tax reduction is capped at €25,000 without indexation.

Dividends distributed by a Private P.R.I.C.A.F./P.R.I.V.A.K. are in principle subject to a 30% W.H.T. Several exceptions exist:

- Distributions paid from capital gains realized on shares held by a Private P.R.I.C.A.F./P.R.I.V.A.K. are exempt from W.H.T. As of January 1, 2018, the general participation exemption for capital gains on shares applies only if a corporate taxpayer holds a stake of at least 10% in the capital of the underlying company or the underlying investment has an acquisition value of at least €2.5 million. This requirement, as well as the one-year holding requirement, do not apply to participations held by an investment company, such as a Private P.R.I.C.A.F./P.R.I.V.A.K.

- Share redemptions and liquidation gains are also exempt from W.H.T.

- The Law of March 26, 2018, extended the application of a reduced dividend W.H.T. rate of 15% or 20% (the V.V.P.R.*bis* regime) to indirect investments, such as those held through a Private P.R.I.C.A.F./P.R.I.V.A.K.

G. State Aid Investigation[464] - Belgian Excess Profit Rulings

In principle, taxation of Belgian companies is based on the total amount of book profits recorded on the company's books, including certain "disallowed expenses" as well as any distributed profits in the form of dividends.

However, the Belgian "Excess Profit Rulings" ("E.P.R.") regime allowed for special treatment of selected companies that are part of a multinational group.[465] This was based on the premise that the Belgian subsidiary or branch of the multinational group makes a profit that could not be made by a hypothetical stand-alone company. This excess profit results from being part of a multinational group that brings along benefits such as synergies,

---

464 For further details about State Aid, *see* Chapter V, A.

465 Former Article 185, ¶2, b) I.T.C.

economies of scale, reputation, and client and supplier networks. This excess profit was deductible from the Belgian entity's tax base, subject to the issuance of a favorable advance tax ruling by the Belgian Ruling Committee.

Between 2005 and 2014, Belgium applied the E.P.R. regime to approximately 55 entities. Most of them were allowed to claim a 50% to 90% deduction, without any indication that the deducted amounts were being included in a tax base elsewhere.

Surprisingly, Belgium neither notified the Commission of these rulings nor waited for the Commission's green light under the so-called "standstill obligation" before putting into effect the E.P.R. regime.

Nonetheless, due to the intensive publicity campaign under the catch phrase "Only in Belgium," the regime eventually drew the Commission's attention, triggering a preliminary investigation in December 2013 and a formal in-depth investigation in February 2015.

In January 2016, the Commission reached an adverse decision, concluding that the E.P.R. regime constituted an aid scheme within the meaning of Article 1(d) of Council Regulation (E.U.) 2015/1589. The Commission was of the view that by discounting excess profit from a beneficiary's tax base, Belgian tax authorities selectively misapplied the I.T.C. and endorsed unilateral downward adjustments of the beneficiaries' tax base although the legal conditions were not fulfilled.

The Commission also argued that the Belgian practice of issuing E.P.R.'s in favor of certain companies may have discriminated against certain other Belgian companies, which did not or could not receive a ruling. The Commission found that Belgian E.P.R.'s gave a selective advantage to specific multinational companies, allowing them to pay substantially less than the regular amount of Belgian C.I.T. they would owe without an E.P.R. being in place.

The Commission issued a recovery order under which Belgium was required to take all necessary measures to recover the purported aid

from all beneficiaries during the relevant ten-year period. The total amount to be recovered exceeded €900 million.

Following the Commission's negative decision and recovery order, Belgium and Magnetrol International, one of the beneficiaries of purported aid, lodged an action before the General Court of the European Union ("E.G.C.").

In February 2019, the E.G.C. annulled the Commission's decision. The court found that the Commission failed to establish the existence of an aid scheme but did not conclude on whether the E.P.R.'s gave rise to unlawful State Aid.

In April 2019, the Commission lodged an appeal to the E.C.J. to seek clarity on the standards for establishing a State Aid scheme.

In September 2019, the Commission also announced the opening of separate in-depth investigation procedures in which E.P.R.'s are labeled as individual aid.

In December 2020, Advocate General ("A.G.") Kokott issued a favorable opinion regarding the appeal lodged by the Commission against the E.G.C.'s judgment of 14 February 2019. According to the A.G., the Commission rightfully earmarked the Belgian practice of making downward adjustments to profits of Belgian corporate taxpayers forming part of a multinational group as an unlawful State Aid scheme. The opinion recommended that the E.C.J. set aside the judgment of the E.G.C. and refer the case back to the E.G.C. for a second review.[466]

In September 2021, the E.C.J. followed the A.G.'s opinion and overruled the E.G.C.'s Ruling. The E.C.J. ruled that the three

---

[466] For further details, see W. Heyvaert and V. Sheikh Mohammad, "Turning Point in the Belgian Excess Profit Rulings Appeal Procedure - Advocate General Kokott Backs the European Commission's Aid-Scheme Theory," *AKD Newsflash*, December 18, 2020 (available at https://www.akd.eu/insights/turning-point-in-the-belgian-excess-profit-rulings-appeal-procedure).

conditions for an aid scheme to exist were met. However, the E.C.J. only looked into the methodological aspects of the E.G.C.'s judgment and referred the case back to the E.G.C., which was instructed to decide on open questions such as the existence of a selective advantage and the identification of the beneficiaries of the alleged aid.

On September 20, 2023, the E.G.C. ruled that Belgium's E.P.R. regime constitutes unlawful State Aid. In so doing, the E.G.C. confirmed the Commission's 2016 decision and rejected all arguments put forward by the Belgian state. According to the E.G.C., the Commission rightly found that the E.P.R. regime constituted financing through state resources by not taxing the excess profit, which in principle did form part of taxable profits in Belgium, resulting in a loss of tax revenue belonging to the state.[467] The E.G.C. also confirmed that the application of a downward profit adjustment "requires a correlation between the profit adjusted downwards in Belgium and profit included in another group company established in another State."[468] Because the E.P.R.'s are unilaterally issued, they are not part of the reference system (meaning the ordinary or "normal" tax system applicable).[469] The E.G.C. also found that the E.P.R. regime conferred a selective economic advantage on the beneficiary as it led to a relief from tax that would otherwise have been due under the Belgian corporate tax rules that distinguishes between economic operators in a comparable factual and legal situation.[470] In addition, the Court confirmed that the E.P.R. regime was selective because (i) it could only be used by entities that were part of a multinational group of

---

[467] E.G.C., September 20, 2023, Case T-131/16 RENV, available online on CURIA - Documents (europa.eu), paragraphs 26-32 (the "E.G.C. Ruling").

[468] *Id.*, see paragraph 74 of the E.G.C. Ruling.

[469] Article 185, §1, ¶2 I.T.C.; see also paragraphs 114-117 of the E.G.C. Ruling.

[470] See paragraphs 107-113 of the E.G.C. Ruling.

companies,[471] (ii) it could not be used by companies that had decided not to make investments, centralize activities, and create jobs in Belgium,[472] and (iii) it could not be taken advantage of by companies belonging to a "small group."[473]

H. B.E.P.S. and F.A.T.C.A.

i. In General

In reaction to the O.E.C.D. initiative to combat base erosion and profit shifting (the "B.E.P.S. Project"), Belgium has implemented the following actions:

- Action Item 5 regarding the adoption of the I.I.D. using the modified nexus approach in lieu of the P.I.D.
- Action Item 2 regarding hybrid mismatches
- Action Item 3 regarding C.F.C. rules
- Action Item 4 regarding the interest limitation rule
- Action Items 8 through 10 and 13 regarding transfer pricing

Most measures were implemented in Belgium by December 31, 2018.

In 2021, the O.E.C.D. achieved a significant milestone by reaching an agreement on international tax reform to address B.E.P.S. One of the key measures included in this agreement focused on establishing a minimum tax rate of 15% for major multinational corporations,

---

471 Article 198, §1,10°/4 I.T.C.; see also paragraphs 119-124 of the E.G.C. Ruling.

472 See paragraphs 125-132 of the E.G.C. Ruling.

473 See paragraphs 133-140 of the E.G.C. Ruling: indeed, the Commission's "sample" had shown that "none of those rulings concerned entities belonging to small groups of undertakings."

known as the "Pillar Two" initiative. Building upon this global framework, the E.U. took action by publishing European Council Directive (E.U.) 2022/2523 on December 14, 2022. This directive closely aligns with the regulations outlined by the O.E.C.D. E.U. Member States were expected to implement this directive by December 31, 2023 at the latest.

Belgium met this expectation by implementing the Act of December 19, 2023 introducing a minimum tax for multinational companies and large domestic groups (published in the Belgian Official Gazette on December 28, 2023).

ii. B.E.P.S. Action 2: Hybrid Mismatches

The Belgian government has implemented the E.U. anti-hybrid mismatch rule provided for in the A.T.A.D.[474] Dividends derived from a subsidiary are excluded from the D.R.D. to the extent that the subsidiary has deducted, or can deduct, this income from its profit.

a. Definitions

Definitions of hybrid mismatch, hybrid entity, and hybrid transfer were introduced into Belgian tax law:[475]

- A hybrid mismatch is an arrangement resulting in either of two tax benefits. The first is a deduction of expenses for both a Belgian company or permanent establishment and a foreign enterprise or establishment thereof resulting in a double deduction. The second is a deduction for one of the participants to the arrangement without an income inclusion by the other participant resulting in a deduction without inclusion in income.

- A hybrid mismatch requires associated enterprises that are part of the same group or that act under a structured arrangement. No hybrid mismatch exists where the non-

[474] Articles 185, 198, and 203 I.T.C.

[475] See Article 2, ¶1, 16° I.T.C.

inclusion is due to the application of a tax regime that derogates from the standard tax law or differences in the value attributed to a payment, including differences resulting from the application of transfer pricing rules.

- A hybrid entity is any entity or arrangement that is regarded as a taxable entity under the laws of one jurisdiction but is treated as a transparent entity under the tax laws of another jurisdiction.

A "hybrid transfer" is any arrangement to transfer a financial instrument that is treated for tax purposes as having been derived simultaneously by more than one of the parties to the arrangement.

b. Taxable Hybrids

1) Disregarded Permanent Establishment Mismatch Rule[476]

Belgian companies will be taxed on profits attributable to a permanent establishment in another E.U. Member State that was exempt in that Member State under a tax treaty. Note that the profits must be realized due to a hybrid mismatch arrangement and not taxed in the jurisdiction where the permanent establishment is located.

2) Reverse Hybrid Entity Mismatch Rule[477]

Belgium will consider a hybrid entity incorporated or established in Belgium to be taxable if one or more associated nonresident entities are established in one or more jurisdictions that consider the Belgian entity to be taxable.

The hybrid entity's income will be taxed in Belgium to the extent that it is not already taxed under the laws of Belgium or any other

---

[476] Article 185, §1, ¶2 I.T.C.

[477] Article 185, §1, ¶3 I.T.C.

jurisdiction. This rule does not apply to collective investment vehicles.

3) Financial Instrument Mismatch[478]

A taxable hybrid mismatch may occur due to different characterizations of the same financial instrument or item of income resulting in a deduction for the foreign enterprise or its establishment and no inclusion for the Belgian company or establishment of the deemed beneficiary under the laws of the other jurisdiction.

4) Hybrid Entity Mismatch[479]

A hybrid mismatch exists where deductible income is paid by a foreign hybrid entity or its establishment in another country without a taxable inclusion for the Belgian company. This is the case when a foreign hybrid entity is considered transparent for Belgian purposes and as a taxable entity in the foreign jurisdiction.

c. Nondeductible Hybrids

The deduction of expenses in Belgium in the context of hybrid mismatches will be disallowed.

1) Double Deduction Rule[480]

Payments will be disallowed if there is a double deduction, for both a Belgian company or permanent establishment and a foreign enterprise or permanent establishment, from non-dual inclusion income.

---

478 Article 185, §2/1, a) I.T.C.

479 Article 185, §2/1, b) I.T.C.

480 Article 198, §1,10°/1 I.T.C.

2) Deduction Without Inclusion Rules[481]

The deduction of hybrid mismatch payments is prohibited in six instances where a payment is deductible in Belgium without a corresponding foreign inclusion:

- **Financial instrument mismatches**. A payment is made under a financial instrument where (i) the deduction without inclusion would be due to a difference in characterization of the instrument or income and (ii) the payment is not included in the taxable income of the beneficiary within a reasonable period of time.

- **Reverse hybrid entity mismatches**. A payment is made to a reverse hybrid entity, *i.e.*, an entity that is considered a taxpayer under Belgian law and as a transparent entity under the laws of another jurisdiction.

- **Hybrid allocation mismatches**. A payment is made to an entity with one or more establishments, where the non-inclusion abroad is the result of differences in the allocation of payments made to the hybrid entity's head office and its establishment, or between two or more establishments of that same entity.

- **Hybrid permanent establishment mismatches**. A payment is made to an entity that is regarded as a permanent establishment under the laws of its head office but disregarded under the law of the establishment's jurisdiction and the corresponding income is not taxable under the laws of the head office's jurisdiction.

- **Hybrid entity mismatches**. A payment is claimed as a deduction without being included in the beneficiary's taxable income, such as if a Belgian entity is treated as taxable in Belgium but as transparent in the recipient's jurisdiction.

---

[481] Article 198, §1,10°/2 I.T.C.

- **Deemed permanent establishment payment mismatches**. A deemed payment is made between a head office and its permanent establishment, or between two or more permanent establishments, that has already been deducted from non-dual inclusion income.

3) Imported Hybrid Mismatches[482]

Imported hybrid mismatches occur between interested parties in foreign jurisdictions who shift the tax consequences to Belgium. For example, a Belgian entity contracts an ordinary loan with a foreign entity that itself has concluded a hybrid loan with another foreign entity.

4) Tax Residency Mismatch Rule[483]

Payments are not deductible if they are made by a Belgian domestic company that is also a tax resident in one or more other jurisdictions and they are deductible from income in one of the other jurisdictions against income that is not taxable in that other jurisdiction. A deduction is allowed, however, if the other jurisdiction is an E.U. Member State with which Belgium has concluded a tax treaty that determines the company is treated as a Belgian-resident taxpayer.

Most of the above rules are applicable from 2020 (book years ending December 31, 2019).

iii. B.E.P.S. Action 3: C.F.C. Rules

Until January 1, 2019, Belgium did not have C.F.C. legislation in place *per se*, but it had, and still has, extensive anti-abuse rules with an effect similar to C.F.C. rules. For example, Article 344 §2 of the I.T.C. tackles transfers of assets to entities that are resident in tax havens. Article 54 of the I.T.C. denies the deduction of interest payments to low-taxed entities and Article 307 of the I.T.C. imposes

---

482 Article 198, §1,10°/3 I.T.C.

483 Article 198, §1,10°/4 I.T.C.

a reporting obligation on taxpayers making payments to offshore entities.

Belgian law contains a look-through tax, sometimes referred to as "Cayman tax" for income derived by individual taxpayers from the use of foreign vehicles such as trusts or foundations. Since 2014, these juridical arrangements must be reported on the individual's personal income tax return, and in many instances the trust or foundation will be considered tax transparent so that the income will be taxable directly in the hands of the resident individual who is the beneficiary.

In addition, the A.T.A.D. contains a C.F.C. component, which is intended to deter profit shifting to low-tax or no-tax jurisdictions. These C.F.C. rules are mandatory in all E.U. Member States. The Commission aims to discourage income shifting by re-attribution of income from a passive, lightly taxed C.F.C. to its E.U. parent company.

Belgium has opted to implement C.F.C. rules that target income only when derived by a C.F.C. through non-genuine arrangements set up for the essential purpose of obtaining a tax advantage.[484] These rules became effective as of January 1, 2019.

On December 22, 2023,[485] the Belgian C.F.C rules were reformed drastically. This reform shifts the Belgian C.F.C. regime from A.T.A.D. Model B (the transactional approach) to A.T.A.D. Model A (the entity approach). This means that the passive income of a C.F.C. that is directly owned by a Belgian controlling company (see the participation requirement below) and that is subject to low taxation abroad (see the taxation requirement below) will be added to the Belgian tax base of the controlling company, unless the C.F.C. can demonstrate sufficient economic substance.

The participation requirement is met if the taxpayer alone, or together with its associated entities, holds a qualifying participation

484 Article 185/2, ¶1 I.T.C.

485 Program Law, published in Belgian Official Gazette on December 29, 2023.

in a foreign company. The participation threshold is more than 50% of the voting rights in the foreign company, or at least a 50% participation in its capital or profit entitlement.

The tax authorities published an explanatory note for corporate income tax returns for tax year 2024 with the following guidance:

- The taxpayer needs to hold (directly) at least one share[486] in the potential C.F.C.

- A purely indirect holding or a holding only through associated entities does not constitute a C.F.C.

- If the taxpayer holds at least one share, the direct participation of the taxpayer must be aggregated with the direct participation held by any associated entity (not on a *pro rata* basis) to assess if any of the participation thresholds are met by the taxpayer.

For example: Belgian Company A has a direct participation of 10% in foreign Company B and 40% in Company C. The latter has a direct participation of 42% in B. Since A and C are associated entities, the full participation for application of the C.F.C. regime is 52%.[487]

This implies that the notion of control under the new Belgian C.F.C. legislation (and A.T.A.D.) differs from its definition under the B.C.C.A. Taxpayers need to ensure that they pay proper attention to these differences when reviewing group entities that potentially qualify as C.F.C.'s, as they may lead to group entities that are not

---

486 Meaning a voting right, participation in capital, or profit entitlement right.

487 This is calculated as follows: 10% + 42% = 52%. In other words, there is no proportional calculation of the associate's participation, as this would result in a full participation for application of the C.F.C. regime calculated as 10% + (42% × 40%) = 26.80%.

controlled by their parent companies under the B.C.C.A. unexpectedly qualifying as C.F.C.'s for tax purposes.

The taxation requirement is met when the C.F.C. is deemed to be low taxed, *i.e.,* if (i) it is not subject to any income tax or (ii) is subject to income tax at a rate that is less than 50% of the rate that would be imposed were it a resident of Belgium.[488] The C.F.C. will be presumed to be low taxed when it is established in a jurisdiction listed as a tax haven by the E.U. or Belgium (see above), although this presumption is rebuttable.

The new C.F.C. legislation introduces three safe harbors at the level of the Belgian controlling company. The C.F.C. income inclusion should not be applied under the following circumstances:

- The Belgian controlling company shows that the C.F.C. carries out a substantial economic activity supported by personnel, equipment, assets, and buildings defined as "the offering of goods or services on a particular market," excluding intercompany services, unless the respective transactions are carried out at arm's length.

- Less than one third of the total income of the C.F.C. originates from so-called "passive income."

- The C.F.C. is a regulated financial institution to which the E.B.I.T.D.A. interest deduction limitation does not apply, and for which one third or less of the total income is derived from transactions with the Belgian controlling company or entities associated with the latter.

To determine the portion of the C.F.C.'s income that must be included in the taxable basis of the Belgian controlling company, the profit of the C.F.C. must be based on Belgian accounting and tax rules as if the C.F.C. were located in Belgium. The income to be included is then limited to (i) the part of income that is not distributed and (ii) the C.F.C.'s passive income. Passive income is broadly defined and includes, not only income from interest,

---

488 *Id.,* ¶2.

royalties, dividends, and from the disposal of shares, but also income from rental and leasing property, certain financial activities, and income from the purchase and sale of goods and services which add little or no economic value to the C.F.C. This income is allocated in proportion to the Belgian company's direct voting rights, direct ownership rights in the share capital, or rights to the profits of the C.F.C. (whichever is higher).

iv. B.E.P.S. Action 4: Excessive Interest Deductions

Similar to most other countries, Belgium already had various rules limiting excessive interest deductions. The most well-known rule is the 5:1 thin capitalization rule, under which interest payments or attributions in excess of a 5:1 debt-equity ratio are not tax deductible. Belgium has implemented the A.T.A.D. by providing an interest limitation rule to discourage companies from creating artificial debt arrangements designed to minimize tax. This rule entered into effect on January 1, 2019, and is effective for tax assessment year 2020 and later. Interest is deductible only up to a certain amount, *viz*., the greater of 30% of an entity's tax-adjusted earnings before interest, taxes, depreciation, and amortization (essentially E.B.I.T.D.A.) or €3 million. This was accomplished by enactment of the Law of December 25, 2017, which transposed A.T.A.D. into national law.[489]

Loans entered into prior to June 17, 2016, are grandfathered. Consequently, interest on such loans will not be subject to the limitation based on 30% of E.B.I.T.D.A., provided that no substantial changes are made to these loans on or after June 17, 2016. According to the Minister of Finance, substantial changes are, *inter alia*, changes in the duration of the loan, the interest rate due

---

[489] Article 40 of the Law of December 25, 2017, on the C.I.T. Reform (*Belgian State Gazette,* December 29, 2017) introducing Article 198/1 I.T.C., to take effect on January 1, 2020.

under the loan, or a party to the loan. Additionally, financial institutions are carved out of the interest limitation rule altogether.[490]

For purposes of the interest limitation rule, certain items are earmarked as equivalent to interest and, thus, captured by the rule. A Royal Decree dated December 27, 2019, provides a description of income and expenses that are economically equivalent to interest. Included are payments under profit participating loans, capitalized interest, foreign exchange gains/losses related to interest payments, guarantee provisions, and original issue discount on interest-free or abnormally low-interest loans. Taxpayers seeking certainty can request a ruling as to specific costs and products.

v. B.E.P.S. Actions 8, 9, 10, and 13: Transfer Pricing

Belgium has transfer pricing rules in place to avoid profit shifting, and in recent years transfer pricing audits have increased significantly. However, until recently, there were no specific statutory transfer pricing documentation requirements under Belgian law. It is of course advisable to have sufficient documentation available, as a lack of documentation may result in a thorough transfer pricing audit.

Belgium has enacted legislation to introduce specific transfer pricing documentation requirements based on B.E.P.S. Action 13. This means that the O.E.C.D.'s recommended three-tiered approach to transfer pricing documentation is mandatory in Belgium. As a result, a Belgian entity forming part of an international group must compile a Master File and a Local File, if certain criteria are met. In addition, if the ultimate parent of a multinational group is a Belgian company, and if it has gross consolidated revenue of at least €750 million, it must file a Country-by-Country Report with the Belgian

---

[490] For further information on the interest limitation rule, see W. Heyvaert and E. Moonen "Belgium – ATAD Implementation in Belgium: An Analysis of the New Interest Limitation Rule," *European Taxation*, 2019, Vol. 59, No. 7 pp. 354-360.

tax authorities within 12 months from the closing of the consolidated financial statements of the group.

vi. F.A.T.C.A.

F.A.T.C.A.'s primary function is to require financial institutions outside the U.S. to report information on U.S. account holders to the I.R.S. The associated penalty for noncompliance is the "big stick" of a 30% U.S. W.H.T. on certain income and principal payments to recalcitrant financial institutions. The W.H.T. applies to payments made by all persons, even those unrelated to the U.S. account in issue.

On April 23, 2014, Belgium concluded a Model 1 Reciprocal Agreement with the U.S., meaning that foreign financial institutions established in Belgium will be required to report information on U.S. account holders directly to the Belgian tax authorities, who in turn will report to the I.R.S.

vii. Pillar Two - Minimum Tax for Multinational Companies and Large Domestic Groups

The Law of December 19, 2023 introducing a minimum tax for multinational companies and large domestic groups states that based on the consolidated figures of the group, taxpayers need to identify the jurisdictions in which the effective tax burden is lower than 15%. The 15% minimum tax rate is then achieved through three different surcharges:

- **Qualified Domestic Top-up Tax ("Q.D.M.T.T."):** This tax applies if all Belgian entities in the aggregate do not pay tax at an effective rate of 15%, for example, due to the application of tax incentives such as the investment deduction or the I.I.D.

- **Income Inclusion Rule ("I.I.R."):** If foreign group entities are taxed in one or more low-tax jurisdiction, the Belgian ultimate parent entity or a Belgian intermediate parent entity will be partly taxed on that income proportional to the parent entity's ownership interest in the qualifying income of the low-taxed group entity. If the low-tax jurisdictions

impose an income top-up tax, Belgium can only apply the I.I.R. if the exchange of information shows that the low-taxed jurisdictions have not (sufficiently) taxed the income.

- **Undertaxed Profit Rule ("U.T.P.R."):** If the tax authority in the country of a targeted parent entity does not fully apply the I.I.R., the revenue services in the other countries where the group operates can disallow tax deductions or impose withholding taxes to arrive at a minimum 15% overall corporate tax rate. Belgium has opted to levy an additional U.T.P.R. tax.

The minimum tax provided for in the Law of December 19, 2023 took effect from 2024 (for fiscal years beginning on December 31, 2023 or later), except for the U.T.P.R. surcharge, for which a grace period applies until 2025.

The computation of the various surcharges goes as follows:

- The minimum tax legislation applies to large multinational groups with consolidated sales exceeding €750 million during two out of the four previous fiscal years and to domestic groups exceeding the €750 million threshold. Group entities can be either corporations or permanent establishments. Certain entities are excluded (*e.g.*, government agencies, international organizations, non-profit organizations, pension funds, investment funds, and real estate investment vehicles).

- The result for each jurisdiction is then determined based on the consolidated financial statements of the group for the local group entities, with certain adjustments (*e.g.,* exemptions for dividends and capital gains, certain disallowed expenses, and transfer pricing adjustments). The result is the qualifying income or loss by jurisdiction.

- Subsequently, the effective tax levied on the local group entities in each jurisdiction is computed. Deferred taxes are also taken into account.

- The difference between the effective tax rate and the minimum tax rate (15%) results in the percentage of the top-up tax, which is then multiplied by the excess profit of the jurisdiction. Excess profit is determined by reducing the qualifying income of the jurisdiction by an exclusion based on substance (the substance based income exclusion, or "S.B.I.E.").[491] If applicable, the domestic top-up tax payable abroad must be considered (see above). If a loss is recorded in a particular jurisdiction, no top-up tax is applied. There is a *de minimis* exclusion if all group entities in a jurisdiction generate revenue of less than €10 million on average and a profit of less than €1 million on average for the reporting year and the two preceding years.

- Finally, it is determined which group entities in Belgium are liable for the Q.D.M.T.T., the I.I.R. surcharge, or the U.T.P.R. surcharge.

To reduce the administrative burden for both multinational groups and tax authorities, "safe harbors" have been developed to easily determine whether there is no risk of low-taxed profit in a particular jurisdiction. Pending the final list of safe harbors, a temporary arrangement has been developed based on the data in the group's country-by-country report.[492]

To determine that a jurisdiction poses no risk of low-taxed profit, three tests have been devised:

- ***De Minimis* Test:** The group has reported total revenues of less than €10 million and a profit (loss) before income tax of less than €1 million in that jurisdiction in its country-by-country report.

---

[491] Specifically excluding a standard return on tangible assets amounting to 10% in 2023 (decreasing to 5% in 2033) and payroll costs amounting to 8% in 2023 (decreasing to 5% in 2033).

[492] Article. 321/1, 15° I.T.C.

- **Effective Tax Rate ("E.T.R.") Test**: The (i) relevant taxes in the financial reporting and (ii) the profit (loss) before income tax from the country-by-country report demonstrate that the effective tax rate exceeds 15% for reporting years starting in 2023 or 2024, 16% for reporting years starting in 2025, and 17% for reporting years starting after 2026.

- **Routine Profit Test**: The group's profit (loss) before income tax in a jurisdiction does not exceed the amount of income excluded based on concepts of economic substance, calculated by using the abovementioned percentages of tangible assets and payroll costs.

The Minister of Finance has confirmed that a carried-forward D.R.D. is included in the "relevant taxes" that count towards achieving the effective tax rate of 15%. Deferred taxes related to a carried-forward D.R.D. are treated the same as losses carried forward for the calculation of the minimum tax. Therefore, the use of a carried-forward D.R.D. does not negatively impact the calculation of the minimum tax, as it does not risk falling below the 15% threshold and thus does not necessitate a top-up tax. The application of the minimum tax at the level of a foreign subsidiary results in a tax burden of 15%, thus satisfying the taxation requirement of the D.R.D.[493] The minister noted that the D.R.D. does not apply if low-taxed income accumulated in years before the introduction of the minimum tax are distributed. This means that dividends from countries with a local top-up tax of at least 15% are generally eligible for the D.R.D., unless another exclusion applies.

Meanwhile, measures have already been introduced to safeguard the I.I.D. from the effects of the minimum tax legislation (see above). Additionally, the O.E.C.D. has introduced further "safe harbors" concerning the Q.D.M.T.T. and the U.T.P.R. Finally, there is a simplified calculation for non-substantial entities that are not included in the consolidated financial statements of the group due to their limited size or materiality, based on the data in the group's

---

[493] Article 203 § 1, 1, 1° and 203 § 1, 2 I.T.C.

country-by-country report.[494]

Multinational groups within the scope of the minimum tax must apply for an enterprise number with the Crossroads Bank for Enterprises. This requirement applies not only to Belgian groups but also to foreign groups. The enterprise number is necessary to use the online MyMinfin applications and to validly make any advanced payments on the minimum tax. If such advance payments are not made during the financial year, the amount of any minimum tax due will be increased.

In principle, groups only need to file an information form in one country. However, because it may take some time for the necessary data to reach the Belgian Revenue Service, a form must be submitted that only includes the I.I.R. and the U.T.P.R. due in Belgium. Based on this form, the Belgian Revenue Service can impose tax.

I. Income Tax Treaties

As of June 12, 2024, Belgium has 96 income tax treaties in effect, with the jurisdictions listed below.[495]

Albania	Finland	Macedonia	Seychelles
Algeria	France	Malaysia	Singapore
Argentina	Gabon	Malta	Slovakia
Armenia	Georgia	Mauritius	Slovenia
Australia	Germany	Mexico	South Africa
Austria	Ghana	Moldova	South Korea
Azerbaijan	Greece	Mongolia	Spain
Bahrain	Hong Kong	Montenegro	Sri Lanka
Bangladesh	Hungary	Morocco	Sweden
Belarus	Iceland	Netherlands	Switzerland
Bosnia & Herzegovina	India	New Zealand	Taiwan
Brazil	Indonesia	Nigeria	Tajikistan

494 See art. 321/1, 15° I.T.C.

495 Belgium has negotiated or is negotiating new treaties with several other countries.

Bulgaria	Ireland	Norway	Thailand
Canada	Israel	Oman	Tunisia
Chile	Italy	Pakistan	Turkey
China	Ivory Coast	Philippines	Turkmenistan
Congo (Dem. Rep.)	Japan	Poland	Ukraine
Croatia	Kazakhstan	Portugal	U.A.E.
Cyprus	Kosovo	Romania	U.K.
Czech Republic	Kuwait	Russia	U.S.A.
Denmark	Kyrgyzstan	Rwanda	Uruguay
Ecuador	Latvia	San Marino	Uzbekistan
Egypt	Lithuania	Senegal	Venezuela
Estonia	Luxembourg	Serbia	Vietnam

In addition, Belgium has in effect a substantial number of Tax Information and Exchange Agreements ("T.I.E.A.'s"). Nearly all of these T.I.E.A.'s are concluded with countries that do not have a comprehensive income tax treaty in force with Belgium, *i.e.*, most often tax havens.

Belgium signed the Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("M.L.I."), thereby incorporating the minimum standards outlined by the B.E.P.S. Project into its existing tax treaties. Belgium designated 96 of its income tax treaties as Covered Tax Agreements, i.e. tax treaties to be modified through the M.L.I.[496]

On October 1, 2019, the M.L.I. entered into force for Belgium. For an income tax treaty to be covered by the M.L.I., both signatories must have (i) joined the M.L.I., (ii) included each other in their list of covered income tax treaties, and (iii) deposited their instruments of ratification.

Belgium submitted reservations against the agency permanent establishment provision. Regarding the elimination of double taxation provided for in the M.L.I., Belgium will incorporate Option B regarding the credit method in its existing double tax treaties so

[496] See the official website of the Belgian Ministry of Finance for the full list of countries: MyMinfin (fgov.be).

long as the other contracting state is also a party to the M.L.I. and has not stated any reservations regarding this provision.

Recent significant changes include the signature of replacement income tax treaties with France on November 9, 2021,[497] and the Netherlands on June 21, 2023.[498] Other changes include the signature of a competent authority agreement with Austria on May 30, 2023, the signature of an agreement relating to the interpretation of article 5 of the income tax treaty with the Netherlands on November 23, 2023, regarding employees working from a home office, and the signature of a mutual agreement regarding Part VI (arbitration) of the M.L.I. with Switzerland on July 3, 2023.

J. D.A.C.6 – Mandatory Disclosure of Aggressive Cross Border Tax Structures[499]

On May 25, 2018, the Council of the European Union adopted Directive (E.U.) 2018/855 (referred to as "D.A.C. 6"). This Directive introduced mandatory disclosure rules for E.U.-linked intermediaries or, under specific circumstances, for taxpayers themselves (*e.g.,* when the intermediary is precluded from reporting by virtue of the client-attorney privilege).

Belgium implemented the Directive into domestic law on December 12, 2019 (*Belgian State Gazette,* December 30, 2019). Under

---

[497] See P.-J. Wouters, "The Belgium-France Income and Capital Tax Treaty (2021): What's New?" *Bulletin for International Taxation*, 2022, Vol. 76, No 3, pp. 159-167.

[498] See W. Heyvaert, "New bilateral tax treaty Belgium and the Netherlands," November 7, 2023. (available at https://www.akd.eu/insights/new-bilateral-tax-treaty-belgium-and-the-netherlands).

[499] See W. Heyvaert and V. Sheikh Mohammad, "European Union's New Reporting Obligations for Tax Intermediaries: Key Features of the Belgian Administrative Guidance – D.A.C.6," *Insights*, Vol. 8, No 2 (2021), pp. 3-10 (available at http://publications.ruchelaw.com/news/2021-03/Belgium.pdf).

Belgian law, cross-border arrangements are reportable if they meet at least one of the hallmarks set out in the Law (which are identical to hallmarks A-E listed in Annex IV of the Directive). Hallmarks are broad categories setting out particular characteristics identified as potentially indicative of aggressive tax planning. Most hallmarks enter into play only if they meet a so-called "main benefit test" (*i.e.,* where a tax benefit is the main or one of the main objectives of the arrangement). Belgian law does not cover purely domestic arrangements.

Until recently, the reporting deadlines were (a) August 31, 2020, for arrangements with a first step implemented between June 25, 2018 and July 1, 2020, and (b) within 30 days for arrangements with a first step implemented effective July 1, 2020 or later. However, due to the COVID-19 crisis, Belgium extended these deadlines.

The Law of December 20, 2019 provided that fines for any failure to report in a timely, sufficient, and complete manner would range from €1,250 to €100,000. On May 10, 2023, the Supreme Administrative Court (*Raad Van State* or *Conseil d'État*) annulled the Royal Decree implementing administrative fines and provided guidance in the application of such fines. This does not mean that administrative fines can no longer be imposed. The minimum and maximum penalty rates are still regulated by the Law of December 20, 2019.

An intermediary who is precluded from reporting pursuant to a legal professional privilege ("L.P.P.") must inform in writing any other intermediary or the relevant taxpayer of the fact that the reporting obligation shifts to them. However, the L.P.P. exemption does not apply for the reporting of marketable arrangements. The question arose whether the Belgian Constitutional Court would accept this restrictive interpretation of the L.P.P.[500] Several Belgian bar and

---

[500] See W. Heyvaert and V. Sheikh Mohammad, "*Secret professionnel de l'avocat et D.A.C. 6 - une conciliation (im)possible ?*" *Journal de droit fiscal*, 2019, No 11, pp. 321-329; L. Vanheeswijck, "*D.A.C. 6: het einde van het beroepsgeheim in fiscale zaken?*" *Tijdschrift voor fiscaal recht*, 2019, n° 560, p. 377.

attorney associations introduced annulment procedures before the Belgian Constitutional Court to request the annulment of the Law.

Noting that the notification obligation was required to satisfy the requirements of the Directive, the Belgian Constitutional Court requested a preliminary ruling from the E.C.J.[501] The request for a preliminary ruling concerned the compatibility of the Directive with Article 7 (right to respect for private life) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the E.U. insofar as it requires legal counsel to notify other intermediaries of a need to report under D.A.C.6.

On December 8, 2022, the E.C.J. confirmed in *Orde van Vlaamse Balies and Others v. Vlaamse Regering* (Case C-694/20) that the obligation for lawyer intermediaries advising on potentially aggressive cross-border tax arrangements to notify other nonclient intermediaries of their reporting obligations *vis-à-vis* the tax authorities infringes on the right of taxpayers to have the privacy of their communications with legal counsel respected. With this landmark judgment, the E.C.J. confirmed that the L.P.P. protects the confidentiality of lawyer-client communications not only in relation to the exercise of the client's rights of defense, but also for legal advice beyond the context of litigation. On July 20, 2023, the Belgian Constitutional Court annulled the Flemish regulations transposing D.A.C.6 in this regard (Case No. 111/2022) and similar cases are now pending before the Belgian Constitutional Court for the other transposing measures.[502]

---

[501] E.C.J., *Orde van Vlaamse Balies and Others v. Vlaamse Regering*, Case C-694/20, December 21, 2021, available at www.curia.europa.eu.

[502] The Belgian Constitutional Court issued an interlocutory judgment on the Federal transposing measures (Case No. 103/2022). There are cases pending regarding the Walloon transposing decree (joint case numbers 7480, 7498 and 7537), the transposing decree of the French-speaking community (case numbers 7535, 7581, and 7585) and the transposing ordinance of the Brussels-Capital Region (case numbers 7481, 7510, 7511, and 7521).

K. A.T.A.D. 3 – Unshell Directive

One of the latest tax developments in the E.U. is the proposal for a Council Directive laying down rules to prevent misuse of shell entities for tax purposes. Introduced by the European Commission in December 2021, the Directive is commonly referred to as A.T.A.D. 3 or the Unshell Directive.

In the Explanatory Memorandum of the draft proposal, the Commission explains the purpose of the Directive:

> While important progress has been made in [the area of ensuring fair and effective taxation] in the last years, especially with the adoption of the Anti-Tax Avoidance Directive (A.T.A.D.) and the expansion of scope of the Directive on Administrative Cooperation (D.A.C.), legal entities with no minimal substance and economic activity continue to pose a risk of being used for improper tax purposes, such as tax evasion and avoidance, as confirmed by recent massive media revelations.

In fact, within the E.U., legal personality is granted by Member States based on purely formal requirements such as minimum capital or minimum number of shareholders, without any review of or checks on the economic activity of the entity.

Therefore, it is relatively easy for non-E.U. investors to interpose an E.U. entity to enjoy advantageous tax treatment under D.T.T.'s, E.U. primary law such as the fundamental freedoms or secondary law such as the P.S.D. and the I.R.D., and national laws of Member States.

To combat the inappropriate use of shell companies, the draft proposal outlines rules to identify shell entities in the E.U., to allow for the exchange of information among Member States about identified shell entities, and to deny E.U. tax benefits to identified shell entities. Purportedly, the goal is not to make shell entities disappear, but to avoid their abusive use for tax purposes.

If adopted and implemented, undertakings deemed as lacking minimal substance would be denied treaty benefits and benefits under E.U. primary and secondary law, particularly under the P.S.D. and I.R.D.

i. First Step: Is the Entity in Scope?

All E.U. entities are in scope except entities with listed securities, such as publicly traded stocks or bonds and regulated entities. In the initial proposal by the Commission, entities with at least five full-time employees are also out of scope. However, this exclusion was removed by the European Parliament.

In contrast with the O.E.C.D.'s Pillar One and Pillar Two initiatives, the A.T.A.D. 3/Unshell Directive is not limited to large M.N.E.'s.

ii. Second Step: Is the Entity at Risk?

The proposed Directive describes elements that identify undertakings that may lack substance and are at risk of potential misuse for tax purposes. It initially specifies the criteria that would lead to the obligation for taxpayers to report their substance on their tax returns. To be "at risk," an entity must meet three criteria:

- More than 65% of its income or assets are categorized as passive
- More than 55% of its activities or assets relate to cross-border transactions
- Administration and management are outsourced to a third-party

If an entity is at risk, it must report the following on its annual tax return:

- Whether premises are available for its exclusive use (shared use by entities of the same group also counts)
- Whether it has at least one active E.U. bank account

- Whether at least one qualified director or the majority of the full-time employees live close to the undertaking and are involved in the decision-making process

The current proposal suggests that Member States impose a penalty of at least 2% of the entity's turnover for incorrect reporting or failure to report. In the event of a false declaration, an additional penalty of at least 4% of the entity's revenue would be imposed.

National tax authorities must assess each year whether an entity or undertaking is a shell based on the information furnished by the company. A presumed shell entity can present proof to show it has genuine economic activity and sufficient nexus with the Member State of which it claims to be a tax resident. Even if an entity is not a shell under the A.T.A.D. 3/Unshell Directive, it may still be considered a shell under national law.

iii. Third Step: What if the Entity is a Shell?

Shell entities are not eligible for tax benefits under the network of D.T.T.'s in force and effect of the Member State in which tax residence is claimed. Also, it is not considered to be resident in that Member State for purposes of claiming benefits of certain European Directives, such as the P.S.D. and the I.R.D.