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Outbound Acquisitions: Tax Planning for European Expansion In a Changing Landscape (2022)

Belgium

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12. BELGIUM[327]

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 other E.U. jurisdictions, Belgium offers a wide-range of tax-planning opportunities for Belgian holding companies and Belgian branches of foreign companies.[328]

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

- The participation exemption, also referred to as the dividend received deduction ("D.R.D."),[329] which fully exempts from C.I.T. dividends received from qualifying subsidiaries and capital gains realized on the shares of qualifying subsidiaries

- The innovation income deduction ("I.I.D."), which allows a deduction of 85% of qualifying innovation income

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327 This chapter of the article was written by Werner Heyvaert of AKD Benelux Lawyers in Brussels. The author acknowledges the contribution of his colleague Vicky Sheikh Mohammad.

328 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.

329 D.R.D. stands for *revenus définitvement taxés* or R.D.T. in French and *definitief belaste inkomsten* or D.B.I. in Dutch.

determined in accordance with the O.E.C.D.'s nexus rules[330]

- 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. Where relevant, recent amendments to 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.[331]

A. Corporate Income Tax

i. General Regime

Companies are subject to Belgian C.I.T. if all of the following three conditions are met:[332]

- They have a separate legal personality under Belgian or foreign corporate law or, if the governing foreign

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330 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.

331 In the event of alleged fraud, the statute of limitation is extended to seven 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.

332 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.

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.

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

- They have their effective place of management or control in Belgium.[333]

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.[334]

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%.[335]

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333 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.

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

335 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:[336]

- It qualifies as a small- or medium-sized enterprise ("S.M.E.") within the meaning of the Belgian Companies as Associations Code ("B.C.A.C."). The B.C.A.C. 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:[337]

  (i) An annual average of 50 employees

  (ii) Annual sales of €9 million, excluding V.A.T.

  (iii) A balance sheet total of €4.5 million

- At least 50% of the company's shares are held by individuals.[338]

- 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.[339]

- It is not an investment company.[340]

- 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

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336 Article 215, second limb I.T.C.

337 Article 1:24 B.C.A.C.

338 Article 215, third limb, 2° I.T.C.

339 Article 215, third limb, 4° I.T.C.

340 Article 215, third limb, 6° I.T.C.

recorded capital gains of the company. Participations of at least 75% are excluded from this calculation.[341]

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.[342] As a result, 30% of the taxable profits that exceed €1 million in the carryforward year will remain taxable. The unused tax attributes can be carried forward to following taxable years until finally used. Belgian holding companies will, 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.

b. Participation Exemption

By way of exception, 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[343] of the

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341 Article 215, third limb, 1° I.T.C.

342 *See* Article 207, fifth limb I.T.C.

343 Under the B.C.A.C., 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

subsidiary making the payment *or* the acquisition value of its holdings in the subsidiary is at least €2.5 million.[344]

- **Minimum Holding Period:** The recipient holds (or has committed to hold) the minimum participation referred to in the previous bullet in full ownership[345] for an uninterrupted period of at least one year prior to (and/or following) the dividend distribution.[346]

- **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.[347]

A foreign tax is not considered similar if the nominal or effective rate of tax is below 15%. The taxpayer may rebut this presumption.[348]

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%.[349] 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 tax regime similar to Belgian C.I.T.[350] This list includes the

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creditors (formerly labeled "legal reserve"). For the S.A./N.V., the terminology "capital" remains applicable.

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

345 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.

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

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

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

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

350 Article 203, ¶1, first limb, 1°, *in fine*; *See* "Annex I – E.U. list of non-cooperative jurisdiction for tax purposes" to the E.U.'s Council

following jurisdictions: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and 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.[351] Currently, this list includes the following jurisdictions:

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

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 Serbian-source dividends qualify for the D.R.D. despite appearing on the list.[352]

- **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

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conclusions on the revised EU list of noncooperative jurisdictions for tax purposes, *O.J.,* 2022/C 103/01, March 3, 2022.

351 Article 73^{4quater} R.D./I.T.C.

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

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.[353] 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.

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.[354]

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).[355] 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.[356]

A treasury company is a company that is principally engaged in portfolio investment other than cash pooling.[357]

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

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

355 Article 2, ¶1, 5°, d) I.T.C.

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

357 Article 2, ¶1, 5°, e) I.T.C.

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.[358]

Nonetheless, the D.R.D. is available under certain conditions for E.U.-based finance companies and for investment companies.[359]

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.").[360] The same rule applies to a nonresident company if all of the following conditions are met:

- 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.[361]

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358 Article 2, ¶1, 5°, f) I.T.C.

359 *See* Article 203, ¶2 I.T.C.

360 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.

361 Article 203, ¶1, first limb, 3° I.T.C.

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.[362] 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.[363]

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.[364] 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.[365] These companies must also be subject to

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362 Article 203, ¶1, first limb, 4° I.T.C.

363 Article 203, ¶2, seventh limb I.T.C.

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

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

a tax regime comparable to the Belgian tax regime, without benefiting from a regime that deviates from the normal tax regime.[366]

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.[367] The Ruling 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.[368]

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366 Article 203, ¶3 I.T.C.

367 Ruling No. 2018.0085 of February 12, 2019, available on www.monkey.be.

368 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.

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.[369]

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 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. 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.

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

This position was challenged in an appeal to the European Court of Justice ("E.C.J.") in *Cobelfret v. Belgium* (Case C-138/07).[370] On February 12, 2009, the E.C.J. concluded that Belgium failed to refrain from taxing qualifying dividends, as is required under Article 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.[371] 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.[372]

In addition, Belgium disallows the D.R.D. to the extent that a Belgian company's taxable income (*i.e.*, profit) reflects certain nondeductible

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

371 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 www.curia.europa.eu.

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

expenses.[373] However, the disallowance does not apply to dividends stemming from qualifying subsidiaries established in a Member State of the E.E.A.[374]

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,[375] 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

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

374 Article 205, ¶2, second limb I.T.C.

375 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.[376]

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).[377]

- The unused portion of the D.R.D. cannot be carried forward.[378]

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.

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%

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

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

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

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).[379] 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.).[380]

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 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

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379 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.

380 Article 43 I.T.C.

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. 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 not less than €2.5 million – also apply to capital gains.[381]

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 have accrued 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[382] in a preliminary ruling from the E.C.J. that was settled definitively by

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381 *See* Article 192, ¶1 I.T.C, which refers back to Articles 202-203.

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

the Court of Cassation.[383] 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.

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

6) Options

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.

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

b. Taxation of Unrealized Capital Gains on Shares

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 it is booked in a non-distributable reserve account.[384] 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.

c. Taxation of Realized and Unrealized Capital Losses on Shares

Capital losses on shares, whether realized or unrealized, are not tax deductible.[385] 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 nondeductibility 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.[386] However, certain bilateral tax treaties provide a Foreign Tax Credit ("F.T.C.") trumping the Belgian national law

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

385 Article 198, ¶1, 7° I.T.C.

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

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.[387]

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.[388] 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.[389] 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 has 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.

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

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

389 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.

b. Less-Than-10% Investments

Following the ruling from the E.C.J. in the *Denkavit* case,[390] Belgium abandoned the condition that the parent must have held a 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.[391] 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,

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

391 *See* Article 106, ¶5 R.D./I.T.C.

a Belgium-resident corporate shareholder would be entitled to the 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.[392] 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 participation below 10% in the Belgian company but with an investment price or value of at least €2.5 million.

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392 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.

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.A.C.).

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

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[393] 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.

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.[394]

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.

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[395]

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394 For further details, *see* 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.

395 Article 49 I.T.C.

- 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.[396] 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 "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.[397]

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

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396 Article 55 and 56 I.T.C.

397 Article 207, seventh limb, I.T.C.

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.[398]

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.[399] As a result, it is generally understood that 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:[400]

- 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

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398 Article 54 I.T.C.

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

400 Article 198, ¶1, 10º I.T.C.

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.[401] 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.[402] The is cap €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 the of excess interest expense over interest income.[403] The second group of corrections removes income to which the dividends received deduction applies and income to which the innovation income deduction applies.[404] This reflects the view that exempt income is removed when computing fiscal E.B.I.T.D.A.

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401 Article 198/1 I.T.C.

402 See Article 73[4/12] 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 interest payments, guarantee provisions, discount on interest-free or abnormally low-interest loans.

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

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

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

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. 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.

- 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.[405]

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405 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.

e. Group Application

Belgian entities that are part of a group must share the interest deduction cap among themselves.[406] 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 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.[407] 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.[408] That is not clearly the case when the underlying debt is incurred to

- acquire a qualifying participation in another company,[409] 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

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406 Article 198/1, ¶3, fourth limb, first dash I.T.C.

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

408 Article 49 I.T.C.

409 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.

at the time of a redemption is treated as a capital gain.[410] 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 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.

As of May 30, 2022, the Court of Cassation has not yet ruled on the matter. The ultimate outcome will be of particular interest because the fact pattern illustrates a typical Belgian technique used to realize a "debt push-down," *i.e.*, a replacement of equity in BelCo by debt owed to Parent. From a cash-flow perspective, neither Parent nor BelCo lost much cash, but BelCo owed interest on the full loan amount of €450 million. Although the Court of Appeals decision

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

remained silent on the matter, it is likely that the interest paid to Parent was not effectively taxable because Parent either had carried-forward tax losses or incurred tax-deductible interest expenses of its own.

vi. Special Fact Patterns related to Interest Expenses

a. Notional Interest Deduction

Effective January 1, 2006, Belgian companies were entitled to a notional interest deduction ("N.I.D."). The N.I.D. is a tax deduction for hypothetical interest owed on the company's equity as it appears in its commercial balance sheet. The notional interest rate is restated every year. For assessment year 2022 (financial book years ending on or after December 31, 2021), the N.I.D. rate is equal to 0% (0.34% for S.M.E.'s).

As an austerity measure, unused portions of the N.I.D. can no longer be carried over to subsequent tax years.[411] To curb perceived abuses, the amount of equity that serves as the basis for computation of the N.I.D. is adjusted by deducting, among other things, the commercial book value of participations that qualify for the participation exemption.[412]

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411 Law of December 13, 2012, on Tax and Financial Provisions (*Belgian State Gazette*, December 20, 2012). Transitional provisions are available regarding the right to utilize any existing "inventory" of carried over N.I.D. going forward.

412 The initial rule that excluded the net assets of a Belgian company held through a branch located in a treaty country and real estate located in a treaty country from the basis for computation of the N.I.D. was repealed following the *Argenta Spaarbank* case of the E.C.J. (Case No. C-350/11 of July 4, 2013). The Belgian statute was amended on December 21, 2013, and the Belgian tax authorities commented on the new rules in a circular letter dated May 16, 2014. Note that the Belgian tax authorities and the Belgian courts have a different opinion regarding the application of the new rules. The tax authorities have applied the amended N.I.D. calculation method for all past years. The courts do not agree with this approach and state that the new rules should be applied from tax assessment year 2014 onwards.

Following the Belgian C.I.T. Reform Law of December 25, 2017, the N.I.D. regime was substantially amended.[413] Effective as of tax assessment year 2019, the N.I.D. is applicable only to the increase in qualifying equity rather than the full amount of the qualifying equity of the previous tax year. Additionally, only one-fifth of any such increase will be taken into account for the year in which the qualifying equity is booked, and the balance will be taken into account in equal installments over each of the four subsequent years. Given the low N.I.D. rate – which is adjusted annually based on the interest rate on Belgium's ten-year government bonds during the preceding year – the practical use of the N.I.D. has become negligible.

b. 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. The new regime is effective as of July 1, 2016.

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).[414]

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

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413 Article 49 of the Law of December 25, 2017, on C.I.T. Reform (*Belgian State Gazette*, December 29, 2017).

414 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.).

the 85% deduction.[415] 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 t W.H.T. of 30%.[416] 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%[417] 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 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.

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

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

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

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.[418] 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,[419] 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.*[420] 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 creditable, as was the situation in E.C.J.'s ruling in *B.L.P. Group.*[421] 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

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

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

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

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

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 above-mentioned circumstances.[422]

F. Private P.R.I.C.A.F.

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

A Private P.R.I.C.A.F. can take the form of a company limited by shares ("N.V.") or a limited partnership with a share capital ("C.V.A."). It is a closed-end fund, established by private investors, *i.e.*, persons investing at least €25,000 each.[423] The Private P.R.I.C.A.F. must have at least six private investors."

A Private P.R.I.C.A.F. 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.'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

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422 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.

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

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. from acquiring a controlling stake in a portfolio company.

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

A Private P.R.I.C.A.F. 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.'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. a tax reduction of 25% of capital losses realized on the shares of a Private P.R.I.CA.F. 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. 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. 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. 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.

- 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.

G. State Aid Investigation[424] - 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.[425] 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, 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

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

425 Former Article 185, ¶2, b) I.T.C.

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. sets aside the judgment of the E.G.C. and refer the case back to the E.G.C. for a second review.[426]

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 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 judgement and referred the case back to the E.G.C., which will have to decide on open questions such as the existence of a selective advantage and the identification of the beneficiaries of the alleged aid.

In contrast with what is written in most of Belgium's trade press, the Belgian E.P.R. saga is far from over. The E.G.C.'s first decision might turn out to be a curse in disguise for Belgium because it established that Belgian tax authorities enjoy a genuine margin of discretion when granting the tax rulings. This conclusion, which led to the reversal of the Commission's aid scheme theory, might now back the Commission's claim that all or some of the rulings were selective and, thus, amount to unlawful State Aid.[427]

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:

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426 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).

427 For further details, *see* W. Heyvaert and V. Sheikh Mohammad, "Belgium Following the Recent Excess Profit Rulings Decision," *European Taxation*, 2020, Vol. 60, Issue 5, pp. 190-198.

- 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.

The Minister of Finance has announced that the government is supportive of the project and that it intends to take legislative action which is in line with B.E.P.S. Project recommendations. Nonetheless, the Belgian government prefers to engage in coordinated action regarding measures to combat B.E.P.S. and will await guidance from the Commission before taking legislative action regarding certain Action Items.

As of May 30, 2022, the Belgian Minister of Finance is holding a public consultation on the transposition of O.E.C.D.'s Pillar Two, regarding a 15% minimum tax, which was being converted into an E.U. Directive. On June 18, 2022, Hungary refused to vote in favor of Pillar Two and the matter continues to face uncertainty.

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.[428] 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.

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

a. Definitions

Definitions of hybrid mismatch, hybrid entity, and hybrid transfer were introduced into Belgian tax law:[429]

- 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-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

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

429 *See* Article 2, ¶1 I.T.C.

taxed in the jurisdiction where the permanent establishment is located.

2) Reverse Hybrid Entity Mismatch Rule

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

3) Financial Instrument Mismatch

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

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

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.

2) Deduction Without Inclusion Rules

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.

- 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

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

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 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.[430] These new rules became effective as of January 1, 2019.

A C.F.C. is defined as a low-taxed foreign company or permanent establishment in which a Belgian corporate taxpayer holds, directly or indirectly, more than 50% of the capital or voting rights, or is entitled to receive more than 50% of the profits of that entity. A C.F.C. is deemed to be low taxed 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.[431]

The income included under the C.F.C. rules is based on transfer pricing rules. If a C.F.C. does not perform significant people functions ("S.P.F."), does not own business assets, or does not assume risks, the arrangement is considered to be non-genuine. In comparison, income that is generated through assets or risks connected to the performance of S.P.F.'s by a Belgian taxpayer is included in the Belgian taxpayer's tax base.

If a C.F.C. distributes income that has already been subject to tax at the level of the Belgian corporate shareholder, the amount distributed is matched by a full deduction, thereby avoiding double taxation of the same income in Belgium.

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

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430 Article 185/2, ¶1 I.T.C.

431 *Id.,* ¶2.

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.[432]

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 under the loan, or a party to the loan. Additionally, financial institutions are carved out of the interest limitation rule altogether.[433]

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

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432 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.

433 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.

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 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.

I. Income Tax Treaties

As of January 1, 2022, Belgium has in effect 99 income tax treaties with the jurisdictions listed below.[434]

Albania	France	Malta	Slovakia
Algeria	Gabon	Mauritius	Slovenia
Argentina	Georgia	Mexico	South Africa
Armenia	Germany	Moldova	South Korea
Australia	Ghana	Mongolia	Spain

[434] Belgium has negotiated or is negotiating new treaties with several other countries.

Austria	Greece	Montenegro	Sri Lanka
Azerbaijan	Hong Kong	Morocco	Sweden
Bahrain	Hungary	Netherlands	Switzerland
Bangladesh	Iceland	New Zealand	Taiwan
Belarus	India	Nigeria	Tajikistan
Bosnia & Herzegovina	Indonesia	Norway	Thailand
Brazil	Ireland	Oman	Tunisia
Bulgaria	Israel	Pakistan	Turkey
Canada	Italy	Philippines	Turkmenistan
Chile	Ivory Coast	Poland	Uganda
China	Japan	Portugal	Ukraine
Congo (Dem. Rep.)	Kazakhstan	Qatar	U.A.E.
Croatia	Kosovo	Romania	U.K.
Cyprus	Kuwait	Russia	U.S.A.
Czech Republic	Kyrgyzstan	Rwanda	Uruguay
Denmark	Latvia	San Marino	Uzbekistan
Ecuador	Lithuania	Senegal	Venezuela
Egypt	Luxembourg	Serbia	Vietnam
Estonia	Macedonia	Seychelles	
Finland	Malaysia	Singapore	

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 99 of its Income Tax Treaties as Covered Tax Agreements, i.e. tax treaties to be modified through the M.L.I.[435]

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.

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435 *See* the official website of the Belgian Ministry of Finance for the full list of countries.

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 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 a new tax treaty with France on November 9, 2021.[436] Other changes include the signature of an additional protocol to the tax treaty with Norway on September 9, 2021 and the notification by Belgium and the Netherlands to the O.E.C.D. Secretariat on November 25, 2021, to bring their treaty under the umbrella of the M.L.I.

J. D.A.C.6 – Mandatory Disclosure of Aggressive Cross Border Tax Structures[437]

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 the 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

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436 In this respect, *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.

437 *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).

arrangement). The 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.

For any failure to report or timely report, a fine is imposed ranging between €5,000 and €50,000. For filing an insufficient or incomplete report, a fine is imposed ranging between €1,250 and €12,500. The amounts double when the infringement is intentional. Likewise, higher penalties apply when an intermediary (or the relevant taxpayer) commits multiple infringements.

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 arises whether the Belgian Constitutional Court will accept this restrictive interpretation of the L.P.P.[438] Several Belgian Bar and attorney associations introduced annulment procedures before the Belgian Constitutional Court to request the annulment of the Law.

As of May 30, 2022, the Belgian Constitutional Court requested a preliminary ruling from the E.C.J.[439] The request for a preliminary ruling concerns 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. Awaiting the ruling from the E.C.J., the proceedings before the Belgian Constitutional Court are suspended.

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438 *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.

439 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.

K. COVID-19 Tax Measures

In the wake of the lockdown and travel restrictions imposed during the C.O.V.I.D.-19 pandemic, Belgium adopted several emergency measures to alleviate the financial strains on Belgian corporate taxpayers. The Commission indicated on March 13, 2020, that such measures fall outside the scope of State Aid. In other words, Member States can take appropriate measures without the involvement of the Commission or the risk of such measures being struck down afterwards on the basis that they constitute non-permissible State Aid.

In Belgium, the measures included the following:

- The deferral of tax payments and filing deadlines for V.A.T., wage W.H.T., resident and nonresident C.I.T., resident and nonresident personal income tax, and legal entities tax
- The deferral of tax audits
- Higher tax credits for C.I.T. prepayments
- Flexibility of the E.B.I.T.D.A. grandfathering rule
- Write-downs on trade receivables
- The loss carryback light[440]
- The tax-free reconstruction reserve[441]

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440 *See* Belgian Circular Letter 2020/C/122 of September 22, 2020 (available at https://eservices.minfin.fgov.be/myminfin-web/pages/fisconet/document/3b030fc8-3281-46e0-80c3-2f08a787d89f); Advice of the Belgian Accounting Standards Committee 2020/11 of September 9, 2020 (available at https://www.cnc-cbn.be/fr/nouvelles/nouveau-projet-davis-mesures-covid-19-carry-back); J. Permeke and M. Krug, "The Loss Carry-Back Regime and the Reconstitution Reserve," *Tijdschrift Beleggingsfiscaliteit*, 2020, No 14, pp. 13-39.

441 *See* W. Heyvaert and V. Sheikh Mohammad, "Belgium's Latest Fiscal Response to the Economic Slump Caused by the COVID-19 Pandemic – A New Reconstitution Reserve for Belgian

- The bilateral agreements about residency for cross-border workers, that treated days worked from home as days worked from the typical place of business[442]

As of May 30, 2022, most of these measures have either been withdrawn or are being phased out.

Corporate Taxpayers," *AKD Newsflash*, December 7, 2020 (available at https://akd.eu/insights/belgium-s-latest-fiscal-response-to-the-economic-slump-caused-by-the-covid-19-pandemic).

442 See W. Heyvaert and V. Sheikh Mohammad, "COVID-19 & Taxation of Cross-Border Employees: Belgium Extends Mutual Agreements with the Netherlands, Luxembourg, France and Germany Through 31 March 2022," *AKD Newsflash*, December 22, 2021 (available at https://www.akd.eu/insights/covid-19-and-taxation-of-cross-border-employees-belgium-extends-mutual-agreements-with-the-netherlands-luxembourg-france-and-germany-through-31-march-2022).