



MERGERS AND ACQUISITIONS

Belgium

Taxation of Cross-Border
Mergers and Acquisitions

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TAX

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Introduction

Following the implementation of various European Directives on corporate reorganizations, Belgium has developed a legal and tax framework for both cross-border and domestic mergers and acquisitions and the last obstacle to tax-neutral cross-border reorganizations was recently removed.

In a qualifying reorganization transaction (merger, [partial] demerger, contribution of a universality of goods or a line of business), assets, liabilities, and all related rights and obligations are in principle transferred automatically by operation of law from the transferring company to the receiving company by the mere execution of the transaction in accordance with company law provisions. If the transaction qualifies for the tax neutral regime, the transferor will not suffer any capital gains tax, while the receiving company gets no step-up in tax basis. The applicable framework thus centers on the concept of continuity, from both a legal and tax perspective. The principle of continuity also applies to the accounting treatment of the reorganization transactions.

When looking at acquisitions, an important issue is the absence of a fiscal unity in the Belgian income tax regime. A similar effect can, however, often be obtained by a post-acquisition integration plan, which could include a merger of the target entity with the buying entity.

After a brief update of recent changes in Belgian tax legislation concerning cross-border reorganizations, this chapter will address the following fundamental decisions from a Belgian tax perspective that a purchaser will have to make:

- Acquisition through assets or shares
- Choice of the acquisition vehicle
- Funding of the acquisition vehicle

This chapter will focus on the Belgian tax rules applicable to acquisitions and will not elaborate on the Belgian tax treatment of mergers and similar transactions. The discussion will focus mainly on Belgian tax law. Company and accounting law are,

however, also highly relevant when dealing with both national and cross-border acquisitions. These areas are outside the scope of this book, but some of the key points or changes are also summarized later in the chapter.

Recent Developments

With the Law of 11 December 2008, Belgium has taken the last steps to introducing the so-called European Fiscal Merger Directive into Belgian domestic tax law.

The new bill has enlarged the existing tax neutral framework for domestic reorganizations (mergers, [partial] divisions, or de-mergers and contributions of a line of business or of a universality of goods) to cross-border reorganizations within the scope of the Merger Directive.

The following cross-border outbound reorganizations are granted tax-neutral status by the new law:

- the transfer of assets (that is, all or one or more branches of activity) by a Belgium resident company to an intra-European company;
- a merger, division, or partial division of a Belgium resident company where an intra-European company is a receiving company;
- the transfer of a Belgian establishment of an intra-European company to another intra-European company in the framework of an international reorganization (either a transfer of assets or a merger, division, or assimilated transaction) that benefits abroad from tax exemption in accordance with the Directive; and
- the transfer of the statutory seat or the seat of effective management of a European company or a European cooperative society to another EU Member State (emigration).

For the purpose of the new Belgian legislation on corporate reorganizations, an intra-European company is defined as a company from a Member State other than Belgium that can claim the benefits of the Merger Directive: the company has to take one of the forms listed in the annex to the Merger Directive, has to be considered to be resident in that Member State without

being considered under the terms of a tax treaty concluded with a third state to be resident outside the European Union, and has to be subject to a tax similar to the Belgian corporation tax listed in article 3, c) of the Directive, without the possibility of an option and without being exempt.

The tax-neutral regime for outbound cross-border reorganizations is only applicable to assets and reserves that are used and maintained in a Belgian establishment, owned by the receiving company, and that contribute to the taxable results of this establishment. The hidden capital gains will, however, become taxable when the components concerned would at a later stage be withdrawn from the Belgian establishment.

The Law of 11 December 2008 has also clarified the Belgian tax consequences of inbound reorganizations where the receiving company is a Belgian resident. The new rules in particular deal with the following transactions:

- the transfer of a Belgian establishment of an intra-European company to a Belgium resident company in the framework of an international reorganization (either a transfer of assets or a merger, division, or assimilated transaction) that benefits abroad from tax exemption in accordance with the Directive;
- the contribution of a Belgian establishment to a Belgium resident company either by a non-resident company other than an intra-European company or by an intra-European company but without the benefit of tax exemption under the Directive;
- the contribution of a foreign establishment of a non-resident company (either intra-European or not) to a Belgium resident company in the framework of a foreign, either taxable or tax-neutral, transfer of assets (that is, all or one or more branches of activity);
- the transfer of a foreign establishment to a Belgium resident company in the framework of a merger, division, or assimilated transaction; and
- the transfer of the statutory seat or the seat of effective management of a non-resident company to Belgium (immigration).

It should be mentioned that the Law of 11 December 2008 is not confined to the mere introduction of the cross-border aspects of the Directive into Belgian domestic law. It also introduced a number of changes to

existing restructuring tax rules. The most relevant are the following:

- Anti-abuse provisions have been aligned with the Merger Directive. Tax neutrality for reorganization transactions – both purely national and cross-border – has been made conditional on the reorganization not having as its principal objective, or as one of its principal objectives, tax evasion, or tax avoidance.
- Upward parent-subsidiary mergers are made entirely tax neutral. First, any merger gains realized by the absorbing parent company henceforth qualify for a 100-percent dividend received deduction (DRD), as opposed to the previous 95 percent. Second, when absorbing a subsidiary with tax exempt reserves, the parent company will have the option to take over these tax-exempt reserves to prevent them from becoming taxable.
- It is now explicitly provided that unused notional interest deductions will transfer to the absorbing entity in the event of a tax-neutral merger or (partial) division.
- The new bill explicitly adds to the list of taxable items for a Belgian establishment (corporate non-resident income tax) any decrease or reduction of tax-exempt reserves existing within the branch as well as any gain realized on repatriation of branch assets by the foreign head office.

Asset Purchase or Share Purchase

From a buyer's point of view, an asset deal may be favorable, because it may allow the buyer to recover a significant part of the cost of the acquisition through depreciation of certain assets acquired at a relatively high corporate tax rate (currently 33.99 percent in Belgium). Under Belgian tax law, depreciable assets can include goodwill as well as other intangible elements.

On the other hand, inherent goodwill acquired when shares are purchased is not tax-deductible for the buyer, nor are future reductions in the value of shares or capital losses incurred on disposal of the shares. The only exception is a capital loss a corporate shareholder incurs following the liquidation of a company in which it owns shares, but this is only deductible to the extent that the liquidation distributions made by the subsidiary are lower than the subsidiary's fiscal paid-in capital.

From a Belgian seller's perspective, a sale of shares will generally be the preferred option, because any capital gains realized on shares are generally tax-free for both Belgian individuals and Belgian companies. When the

seller is a Belgian company, there are certain exclusions from the general exemption for capital gains on shares (such as for shareholdings in tax-privileged companies). For individuals, Belgian tax law provides that a capital gains tax (at a rate of approximately 18 percent) may be due in certain cases (substantial participation), if the buyer of the shares is a foreign legal entity. In line with European Court of Justice judgments (the De Baeck case, ECJ C-268/03 d.d. 8 June 2004), Belgian tax law has recently been modified so that no substantial participation tax is due when the buyer is a company resident in another Member State of the European Economic Area.

In Belgium most acquisitions take the form of a share deal, which allows the seller to avoid an upfront tax cost on capital gains and the buyer to recover the tax cost, through tax depreciations, over several years.

Purchase of Assets

A purchase of assets will usually result in an increase in the base cost of those assets for both capital gains tax and depreciation purposes, but this increase is in principle taxable in the hands of the seller.

It should be noted that in the case of an asset deal, shortly before the signing of the asset transfer agreement, the seller should in principle request a certificate from the Belgian corporate income tax, value-added tax (VAT), and social security tax authorities that the selling entity has no outstanding tax liabilities. For his/her part the buyer must notify the Belgian authorities of the asset transfer agreement. These formalities are necessary for the asset deal to be recognized by the Belgian tax authorities and to avoid the joint liability of the buyer for unpaid taxes of the seller. If the asset purchase agreement is properly structured and the required notifications have been lodged, no historical tax liabilities of the seller should transfer to the buyer in an asset deal. Joint-liability rules may, however, apply in the case of a transfer of assets under legal continuity (an optional legal feature that is significant if a number of important contracts need to be transferred in the asset deal).

Purchase Price

The assets should be acquired and recorded at fair market value. The excess paid on top of the book value in the hands of the seller must be allocated to specific assets, or, if that is not possible, be recorded as goodwill in the books of the buyer, and will result in a step-up in tax basis for depreciation purposes.

A corporate seller will be taxable at the normal corporate tax rate of 33.99 percent on any capital gain realized on the sale of assets, with a possibility for deferred taxation if certain conditions are met (not possible for own built-up goodwill). An individual seller will be subject to tax at progressive tax rates on the professional assets sold. As a rule, the seller can use tax losses or other tax attributes available to shelter the capital gain arising following the sale of assets.

Goodwill

For tax purposes, goodwill must be depreciated over a minimum of five years. However, in most cases the Belgian tax authorities argue that the depreciation period should be 10 to 12 years, and it is up to the taxpayer to demonstrate that the economic lifetime of the goodwill concerned is actually shorter.

Depreciation

Under Belgian tax law, depreciations of business assets are calculated on the basis of the acquisition cost over the useful life of the assets.

Both the straight-line and the declining-balance depreciation methods are accepted. However, intangible fixed assets, cars, and tangible assets that are depreciated by the owner, but for which the right to use has been transferred, must be depreciated on a straight-line basis. When using the declining balance method, the taxpayer is allowed to switch back to straight-line when the depreciation computed by applying the declining-balance method is lower than the amount indicated by the straight-line method.

Except for intangible fixed assets, which must generally be depreciated over a minimum of five years using the straight-line method, tax law does not provide for any specific periods and rates, although for certain assets indicative rates are set by administrative instructions (such as 5 percent for industrial buildings).

Tax Attributes

Neither the tax loss carry-forward that was available to the company from which assets are acquired, nor the current year's losses of that company will be transferred to the acquiring company. The same restrictions apply to a carry-forward of notional interest deduction and a carry-forward of investment deduction.

As a rule, the seller can use those tax attributes to shelter the capital gain arising on the sale of assets.

Value-Added Tax (VAT)

The sale of the assets of a business, with the exception of land and buildings, by a VAT payer is, in principle, subject to VAT. If a building is new within the meaning of the VAT-code, the taxpayer has the option to elect to bring the sale of this building within the charge to VAT. Certain sales of new buildings are always subject to VAT.

Please note that the seller may need to revise (partially repay) the VAT that he/she originally deducted on certain assets.

The transfer of a separate activity capable of separate operation – a transfer of a going concern – is not subject to VAT if the recipient is or, as a result of the transfer, becomes, a VAT taxpayer.

Transfer Taxes

If Belgian real estate is involved in a purchase of assets, a real estate transfer tax will be due (12.5 percent or 10 percent depending on the location of the real estate) on the market value of the real estate. For the transfer of real estate lease agreements, a 0.2 percent transfer tax is due. If the acquired assets do not include real estate, no transfer tax or stamp duty will be levied.

Purchase of Shares

In case of an acquisition of shares, no (separate) expression of goodwill is possible and depreciations or capital allowances are not allowed for tax purposes. In accounting, a write-down in value is allowed, in case the actual value of the participation is lower, due to a long-term deterioration of the financial or economic situation of the underlying company. However, these write-downs are not tax deductible.

On the seller's side, the capital gains realized on the shares are generally tax exempt, both for corporate and individual investors.

Tax Indemnities and Warranties

In a share acquisition, the purchaser is in principle taking over the target company, together with all related liabilities, including contingent liabilities. The purchaser will, therefore, generally require more extensive indemnities and warranties from the seller in a share deal than in case of an asset acquisition. If significant sums are at issue, it is customary for the purchaser to initiate a due diligence exercise, which would normally incorporate a review of the target's tax affairs. To the extent possible, the findings of such due diligence investigation should be appropriately reflected in tax

representations and warranties and tax indemnities in the share purchase agreement. Typically, in a Belgian context, indemnifications will be structured as a reduction of the share purchase price so that they are not taxable in the hands of the recipient.

Tax Attributes

In principle, prior years' tax losses are available for set-off without time limitation and without a maximum set off per taxable period. However, following the introduction of certain measures intended to counter reorganizations/acquisitions that merely seek to use a company's tax losses, a change in control may limit the brought-forward tax losses of the companies involved.

As a rule, previous tax losses of a Belgian company may not be deducted from future profits in the case of a change in control of that company, unless the change of control is for sound business, financial, or economic reasons. This rule applies equally to a direct as well as an indirect change of control further up the shareholder's chain.

The same change in control restrictions apply to a carry-forward of notional interest deduction and a carry-forward of investment deduction.

The burden of proof lies with the taxpayer and in this respect, it should be noted that the Belgian tax authorities take the position that the financial or economic reasons for the transaction need to be assessed in the hands of the company subject to the change of control. Financial and economic reasons are *inter alia* deemed to exist if, following the change of control, the company continues to operate in the same business with all or a part of its employees.

Crystallization of Tax Charges

Belgian corporate income tax law does not provide for a system of fiscal consolidation. Therefore, no tax charges related to previous intra-group transfers should crystallize in the target at the time of the acquisition of the shares of the target company.

Transfer Taxes

No stamp duty is due on the transfer of shares. A share deal should also not give rise to real estate transfer tax.

Choice of Acquisition Vehicle

There are several possible acquisition vehicles available to a foreign purchaser and tax factors will generally influence the choice. There is no capital duty on the introduction of new capital into a Belgian company or branch. In a Belgian context, the absence of a system of

tax consolidation is important when determining the transaction structure.

Local Holding Company

One of the advantages of using a Belgian company as acquisition vehicle is that Belgian tax law includes no general thin-capitalization or earnings stripping rules. Some limitations on the deductibility of interest expenses may however apply in some situations (see following discussion), but, in general, an acquisition can be structured such that a substantial amount of interest expenses paid by a Belgian acquisition vehicle should be tax deductible.

At the moment of the sale of the shares in the target company by the Belgian company, capital gains realized are in principle tax exempt if the shares qualify for the dividend received deduction (i.e. Belgian participation exemption regime), providing that the target is subject to a normal tax regime. There is currently no minimum holding period or minimum participation requirement for capital gains on shares.

The acquisition with a Belgian company is particularly attractive if the buyer already has taxable presence in Belgium, because in this case the existing tax capacity could be used to shelter the acquisition costs and interest expenses. Possibilities for debt push-down in the absence of a system of fiscal unity or group relief will be discussed later.

As from 1 January, 2006 the stamp duty on the contribution of capital into a Belgian holding company is reduced to a flat fee of EUR 25 instead of the former stamp duty of 0.5 percent. The sale of shares is not subject to stamp duty.

Foreign Parent Company

A foreign parent company could be used if the interest expenses from the acquisition financing can be offset against taxable profits available within the foreign company.

In addition to its compliance with the European Parent-Subsidiary Directive and the European Interest- and Royalty Directive, Belgium also has an extensive tax treaty network that significantly reduces or eliminates general withholding taxes on interest payments or dividends to a foreign parent.

It should be noted that for Belgian individuals, Belgian tax law provides that a capital gains tax (at a rate of approximately 18 percent) may be due on the sale of (or part of) a substantial participation in a Belgian company to a non-Belgian legal entity located outside the

European Economic Area. A substantial participation is generally defined as the ownership (alone or with relatives) of more than 25 percent of a Belgian company in the current or preceding five years. Only participations in Belgian-based companies could trigger this taxation.

The transfer of shares to a foreign acquirer is not subject to any stamp duty.

Non-Resident Intermediate Holding Company

If the country of a foreign buyer taxes capital gains and dividends received from a Belgian target, an intermediate holding company resident in another territory could be used to defer this tax and perhaps take advantage of a more favorable tax treaty with Belgium. In general, Belgian tax treaties do not include severe beneficial ownership restrictions. A sufficient level of substance is, however, required to claim treaty benefits.

Local Branch

As an alternative to the direct acquisition of the target's assets, a foreign purchaser may structure the acquisition through a Belgian branch. For income tax purposes, a branch is not subject to additional tax duties and will be taxed at the standard corporate tax rate of 33.99 percent. No withholding taxes apply on profit repatriations from the branch to the foreign head office. If the Belgian operation is expected to make losses initially, a branch may be advantageous since, subject to the tax treatment applicable in the head office's country, there could be a timing benefit arising out of the ability to consolidate losses with the profits of the head office.

The sale of a branch or the withdrawal of assets from a branch will trigger a tax liability on any capital gains, apart from capital gains on shares, which are usually exempt.

Joint Ventures

Under Belgian tax law, joint ventures are generally structured as corporate vehicles. No specific tax rules apply to such corporate joint ventures. Under Belgian company law possibilities to structure joint ventures as unincorporated partnerships are limited.

Choice of Acquisition Funding

A purchaser using a Belgian acquisition vehicle for an acquisition for cash will need to decide whether to finance the transaction with debt or equity, or even a hybrid instrument that combines the characteristics of debt and equity.

Debt

The financing of an acquisition with debt has the traditional advantage that the interest cost and other expenses (such as bank fees or other transaction costs) are deductible for tax purposes. However, as indicated, Belgian income tax law does not provide for a system of fiscal unity or tax grouping. This complicates the set-off of interest expenses on acquisition finance at the level of a Belgian acquisition vehicle against operating income of the target company, and alternative debt push-down mechanisms may, therefore, be required, such as the following:

- The easiest way to obtain a (partial) debt push-down is to replace the distributable reserves and share capital of the target company with debt (equity stripping). It should be noted that in general, an equity reduction has a negative effect on the notional interest deduction, which is calculated on the company's adjusted equity (see later in chapter).
- To use the interest charges on the acquisition finance, taxable income could be created at the level of the acquisition vehicle, such as by a transfer of activities or the start-up of new activities, which may include management services, etc.
- Finally, a debt push down through merger could be organized, although the Belgian tax authorities may deny the tax-neutral status of a merger of a pure holding company (acquisition vehicle) and its operational subsidiary, triggering a tax cost on all hidden capital gains (including goodwill) at the level of the operating company. A legal merger is, however, feasible in the case of an acquisition by a Belgian operating entity.

Deductibility of Interest

Belgian tax law does not include any general thin-capitalization or earnings stripping rules, but there are certain limitations on the tax deductibility of interest payments in specific situations as set out later in the chapter.

Thin-Capitalization Rules

7:1 debt/equity rule: interest is not deductible:

- if the beneficial owner is not subject to income tax or benefits from a considerably more favorable tax regime with respect to interest income as compared with the applicable tax regime in Belgium; and

- if the total amount of the related loans is more than seven times the aggregate of the company's taxed reserves (at the beginning of the accounting year) and paid-up capital (at the end of the accounting year).

1:1 debt/equity rule: interest on loans from shareholders (individuals) and directors (individuals or foreign [non-European Union; cf. case-law of ECJ] corporations) is re-qualified as a (non-deductible) dividend:

- if the interest rate exceeds the market rate; or
- the total amount of loans is higher than the company's paid-in capital at the end of the accounting year, increased by its taxed reserves at the beginning of the accounting year.

Other Limitations

As a rule, interest payments are not tax deductible when they exceed the market interest rate for the type of loan concerned, taking into account the particular circumstances of the loan. This limitation does not apply to interest paid to Belgian banks or financial institutions and Belgian branches of foreign banks or financial institutions, or to interest paid on publicly issued bonds.

Interest paid directly or indirectly to a tax-privileged non-resident taxpayer (whether or not affiliated) or to a tax-privileged foreign branch is tax deductible only if the paying company is able to demonstrate that the payments are for bona fide purposes and insofar as the interest paid does not exceed an arm's length interest rate.

Withholding Tax on Debt and Methods to Reduce or Eliminate

Under Belgian domestic law, interest paid by a Belgian company is, in principle, subject to a 15-percent withholding tax.

Exemptions from interest withholding tax include inter alia:

- interest on loans granted by a Belgian resident company;
- interest on bonds registered with the issuing company and subscribed by a non-tax privileged non-resident investor; and
- interest paid by Belgian enterprises (including Belgian companies and Belgian permanent establishments of foreign companies) to banks established in a member state of the European

Economic Area or in any other country that has signed a double tax treaty with Belgium.

There is also a specific withholding tax exemption for interest paid by Belgian (mixed) holding companies and Belgian financial enterprises on loans from non-resident lenders.

For the purposes of this exemption a (mixed) holding company is defined as a Belgian company or a Belgian branch of a foreign company that:

- owns shares that qualify as financial fixed assets that have an acquisition value of at least 50 percent, on average, of the total assets on its balance sheet at the end of the taxable period prior to the attribution or payment of the interest; and
- the shares of which are listed on a recognized stock exchange, or at least 50 percent are held, directly or indirectly, by a listed company that is subject to corporate income tax, or to a similar foreign income tax regime, and that does not benefit from a special tax regime or from a tax regime that is considerably more favorable than that in Belgium.

A financial enterprise is defined as a Belgian company or a Belgian branch of a foreign company that:

- belongs to a group of related or associated companies as defined by company law;
- carries out its activities exclusively for the benefit of group companies;
- engages exclusively or predominantly in services of a financial nature;
- seeks external funding exclusively with resident or non-resident companies, with the sole purpose of financing its own activities or those of group companies; and
- owns no shares with an acquisition value that exceeds 10 percent of the financial enterprise's net fiscal value.

Furthermore, Belgium has opted for a flexible implementation of the European Interest and Royalty Directive. From a Belgian perspective, the debtor and the beneficiary of the interest (or royalties) are associated companies if, at the moment of attribution or payment, one of the companies has had a direct or indirect holding of at least 25 percent in the capital of the other company for an uninterrupted period of at least one year, or both companies have a common

shareholder established in the European Union, which has had a direct or indirect holding of at least 25 percent in the capital of both companies for an uninterrupted period of at least one year. Interest or royalties paid between associated companies as defined earlier will, in principle, benefit from a withholding tax exemption. The Belgian government has extended the scope of the exemption to all companies resident in Belgium, not only to those mentioned in the directive.

Checklist for Debt Funding

- The use of bank debts may avoid transfer pricing problems, and should facilitate the interest deduction. As long as interest payments are arm's length, interest on intra-group loans should, however, as a rule be tax deductible (subject to certain specific restrictions). As noted Belgian tax law has no general thin-capitalization or earnings stripping rules.
- Interest payments are, in principle, subject to a withholding tax of 15 percent, but various exemptions or reductions are available.
- In the absence of a system of fiscal unity, the actual tax savings for interest payments on acquisition finance depend on the amount of taxable income available at the level of a Belgian acquiring company. As noted earlier in the chapter, various debt push-down mechanisms are available.

Equity

If an acquisition is funded with equity, dividend payments to the parent company are not deductible for Belgian tax purposes (as are interest payments).

In some situations the funding with equity might, however, be more appropriate than the funding with debt.

Notional Interest Deduction (NID)

When considering funding a Belgian entity with equity or debt, the benefits and opportunities related to the so-called notional interest deduction should be taken into account. As from assessment year 2007 – that is, as from the calendar year 2006 for companies with an accounting year that follows the calendar year – resident and non-resident corporate taxpayers are entitled to a deduction for risk capital (notional interest deduction). This measure is intended to encourage the strengthening of companies' equity capital by reducing the tax advantage of funding with loan capital, as opposed to equity capital.

Following the introduction of the notional interest deduction, all companies subject to resident or non-resident corporate tax will be allowed to deduct a deemed interest from their taxable profits calculated on their adjusted equity capital. Within the context of mergers and acquisitions, when calculating the equity qualifying for the notional interest deduction, the company's equity is (amongst other things) reduced by the net fiscal value of the company's own shares and of shares and participations in other companies that are part of the company's financial fixed assets.

The rate of the notional interest deduction is determined each year and is linked to 10-year government bonds. For assessment years 2007, 2008, 2009, and 2010 (corresponding to the financial years 2006 – 2009 for companies with a financial year equal to the calendar year), the rates were set at 3.442 percent, 3.781 percent, 4.307 percent, and 4.473 percent respectively. It was announced that the rate of the notional interest deduction for the assessment years 2011 and 2012 (financial years 2010 and 2011 for companies with a financial year equal to the calendar year) would be capped at 3.80 percent. If a company's taxable base is not sufficient to use the entire notional interest deduction, the balance can be carried forward up to a maximum of seven years.

With the introduction of the NID, new techniques become available, particularly in an international context, to achieve a double deduction of interest expenses on acquisition finance, by using a separate Belgian finance vehicle. An acquisition vehicle will generally not benefit from an NID, given that the fiscal value of share participations held as fixed assets has to be deducted from the equity for calculating the NID.

Withholding Tax on Equity and Methods to Reduce or Eliminate

Under Belgian domestic law, dividends paid by a Belgian company are, in principle, subject to a 15 percent withholding tax if they are paid either on shares that are publicly issued, or on shares that were issued following a cash contribution, and that are registered with the issuer or placed on open deposit in Belgium. In other cases, the domestic withholding tax rate is 25 percent.

A withholding tax of 10 percent applies to benefits that are considered as dividends in the event of a liquidation or a buy-back of shares.

An exemption from dividend withholding tax is available for dividends paid by a Belgian subsidiary to its parent company, provided the parent company is a Belgian

company or a qualifying resident company of another EU Member State, which has held or will hold at least 10 percent (minimum shareholding as of January 2009) of the shares in the Belgian subsidiary for an uninterrupted period of at least one year.

Finally, a general exemption from withholding tax was introduced for dividend payments to companies located in a tax treaty country made under conditions similar to those set out in the EU Parent/Subsidiary Directive.

Equity Reorganizations

According to Belgian tax law, the following conditions need to be fulfilled for a domestic reorganization (mergers, [partial] divisions or de-mergers, and contributions of a line of business or of a universality of goods) to take place under a tax-neutral regime:

- The absorbing company must be a resident of Belgium.
- The reorganization has to be performed in accordance with the Belgian company law provisions applicable to a merger without liquidation (as described earlier in summary).
- The reorganization does not have as its principal objective, or as one of its principal objectives, tax evasion, or tax avoidance.

As indicated earlier, a new Law of 11 December 2008 has enlarged the existing tax-neutral framework for domestic reorganizations to cross-border reorganizations within the scope of the Merger Directive.

Hybrids

Hybrid instruments are treated as debt or equity for tax purposes, depending on their legal classification, rather than on their economic substance (form over substance). If properly structured in the loan agreement, profit-participating loans or similar instruments can, in principle, be classified as debt for Belgian tax purposes (tax treatment follows the Belgian civil law requirement that there must be an obligation in the instrument to repay the principal, for it to qualify as a loan). Qualification as debt would allow an interest deduction at the Belgian level. Such hybrid instruments may be subject to re-classification under general anti-abuse provisions, but if properly structured this risk may be limited.

Discounted Securities

Under Belgian tax law, there are no specific tax rules for securities acquired at a discount. Specific tax rules may,

however, apply to non-interest bearing receivables, or receivables with an interest rate below the market rate.

Deferred Settlement

If properly structured, future additional payments for the acquisition of a target company on the basis of the future profits of the latter (earn-out clauses), can usually qualify as part of the purchase price of the shares. In such cases, this additional purchase price will, in principle, not be taxable in the hands of the seller of the shares, and will increase the share purchase price (not tax-deductible) in the hands of the acquirer.

Other Considerations

Company Law and Accounting

Previously Belgian companies were not, in principle, entitled to give advances, grant loans, or provide securities to third parties to enable the latter to acquire their shares (prohibition of financial assistance). Recently, this restriction was removed and replaced by an entitlement, in principle, for companies to provide financial assistance with a view to the acquisition of their shares by a third party if certain stringent conditions are fulfilled:

- the operation must take place under the responsibility of management and under fair and equitable market conditions;
- the operation requires the prior consent of the general meeting;
- management draws up a report indicating the reasons for the envisaged transaction, the interest for the company, the conditions under which the transaction will take place, the risks inherent in the transaction with respect to the liquidity and solvency of the company, and the consideration at which the third party shall acquire the shares;
- the sums used under the operation must be available for distribution (net asset test); the company must book, on the passive side of the balance sheet, a non-distributable reserve equal to the amounts used for the financial assistance; and
- if a third party acquires shares which have been subject to financial assistance, or subscribes to a capital increase, such acquisition or subscription must take place at a fair price.

There are no specific issues relating to acquisitions from a Belgian accounting perspective.

Group Relief/Consolidation

Belgian corporate income tax law does not provide for any consolidation for tax purposes of the profits or losses of separate legal entities. The concept of VAT-unity was recently introduced in Belgian law, but it should be noted that specific rules apply if a Belgian target company is extracted from an existing fiscal unity as a result of an acquisition.

An indirect technique to obtain tax consolidation involves the use of tax-transparent partnerships. Here, care must be taken to ensure the tax authorities have no reason to impute an abnormal profit-shifting, either toward a foreign group entity or toward a Belgian loss-making company. In the first case, the profit shifted abroad is added back to the taxable income of the transferring company; in the second case the Belgian beneficiary will not be permitted to offset its brought forward and current year losses against the abnormal income received.

An abnormal profit-shifting can be deemed to exist not only in the absence of adequate compensation for the transferor, but also if a transaction is carried out in economically abnormal conditions. If a profit-generating activity were to be transferred to a loss-making related company (such as through a tax-neutral contribution of a separate activity) in order to obtain a tax consolidation, the tax authorities might deny the latter company the right to offset its brought-forward losses against the profits resulting from the activity transferred.

In some cases, if a Belgian target company has accumulated losses, an indirect corporate tax consolidation can be achieved through the waiver or forgiveness of a debt claim on the loss-making company. A common technique in Belgium is a conditional waiver of a debt claim, where the loan is reinstated if the debtor's financial position improves. Close attention should be paid to such waivers, because the Belgian tax authorities scrutinize the business motivation for them closely.

Transfer Pricing

If after the acquisition, an inter-company relationship develops between the buyer company/group and the target, due care needs to be taken to ensure all such transactions are at arm's length. Failure to comply with the arm's length principle may give rise to transfer pricing problems. In a Belgian context, both abnormal or benevolent advantages received or granted could give rise to adverse tax consequences.

An advantage is generally considered by the tax authorities as abnormal or benevolent if the receiving party enriches itself without adequate or real compensation. In Belgian case law the notion of abnormal or benevolent advantage has been defined as follows:

- Abnormal is anything that is contrary to the normal practice in a similar situation.
- Benevolent implies the idea of a gift without (sufficient) compensation.

If a Belgian enterprise grants an abnormal or benevolent advantage, the amount of any such advantage is to be added back to the taxable base of the enterprise concerned unless the advantage is taken into account when determining the taxable base of the recipient of the advantage (article 26 BITC). If the recipient is a Belgian company, it is, in principle, accepted by the tax authorities that this anti-abuse provision does not apply. This should also be the case if the recipient is in a tax loss position.

According to article 207 BITC, tax losses and certain other tax attributes (investment deduction, notional interest deduction) cannot be set off against income from so-called abnormal or benevolent advantages received from enterprises that are directly or indirectly related to the company receiving the benefit. The Belgian company receiving the abnormal or benevolent advantage is not allowed to offset previous years' nor current year's tax losses or other tax attributes from the (implied) profit corresponding to the received advantage. The Belgian tax authorities take the position that this results in the advantage being immediately taxed in the hands of the company receiving the advantage (cash-out), irrespective of current year's or prior years' tax losses or other tax attributes available. The minimum taxable basis of a Belgian company thus includes the total amount of abnormal or benevolent advantages received. The tax loss carry-forward would, in the case of such adjustment, be increased with the advantage effectively subject to tax. The overall effect would thus be a timing difference (deferral of use of tax losses).

Dual Residency

In Belgium, no specific rules apply to dual resident companies. In general, a company is considered a Belgian company for tax purposes if it has its seat of effective management in Belgium.

Foreign Investments of a Local Target Company

Profits realized through a foreign branch are, in principle, tax exempt at the level of the Belgian target company under the applicable double tax treaty (if any). If no tax treaty is available, the branch profits (net of any foreign income taxes) are taxable at the ordinary Belgian corporate income tax rates.

Foreign branch losses are, in principle, tax deductible from the profits of the Belgian target company. However, the Belgian company will be subject to recapture rules, if the branch losses are deducted from the branch profits abroad.

Finally, Belgian tax law does not include Controlled Foreign Company (CFC) or similar rules.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- The purchase price (including goodwill) may be depreciated for tax purposes.
- In general, no previous (tax) liabilities of the seller are inherited.
- No inherent tax liabilities on tax-exempt reserves or on hidden reserves are taken over by the purchaser.
- It is possible to acquire only part of a business.
- Automatic consolidation of profits/losses of the acquiring entity (including transaction costs and interest charges) with profits/losses of the business acquired.

Disadvantages of Asset Purchases

- Possible need to renegotiate certain business-related agreements (such as supply agreements, renewal of licenses). The option to subject the asset deal to the system of legal continuity would, in principle, result in a transfer of all applicable agreements by force of law (exclusions, however, apply).
- If only assets are acquired, a higher capital outlay is usually involved (unless the liabilities of the business are also assumed).
- It is usually unattractive to the vendor (due to tax charges on capital gains resulting from an asset deal), thereby increasing the price.

- Real estate transferred is subject to a 10 percent or 12.5 percent registration duty (unless the transfer is within the VAT regime) and must comply with environmental legislation.
- Accounting profits may be affected by the creation and authorization of acquisition goodwill.
- The potential benefit of any pre-acquisition tax losses or other tax attributes remains with the vendor.

Advantages of Share Purchase

- As only net assets are purchased the capital outlay is lower.
- It is more attractive to the vendor, because capital gains on shares are, in principle, tax-exempt.
- Brought-forward tax losses of the target company generally remain unaffected if there are business reasons for the change in control.
- Purchaser may gain the potential benefit of existing business agreements (change in control clauses may, however, apply).

- There are no registration duties on the transfer of shares (unless anti-avoidance provisions apply), or the transfer of real estate.
- There are no environmental formalities for a transfer of real estate.

Disadvantages of Share Purchases

- The purchaser acquires inherent tax liabilities on tax-exempt reserves and hidden reserves.
- Previous (tax) liabilities of the company are inherited.
- The purchase price or any goodwill included in the purchase price cannot be depreciated for tax purposes. This is, however, generally compensated by a lower purchase price.
- There is no system of consolidation for tax purposes available for profits or losses of the companies in the acquirer’s group and the losses or profits of the target company. Specific debt push-down mechanisms may, however, be available.

Withholding Tax Rate Chart

The rate information and footnotes contained in this table are from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Albania	15	5	5	5
Algeria	15	15	15	5/15 ³
Argentina	15	10	12	3/5/10/15 ⁴
Armenia	15	5 ⁵	0/10 ⁶	8
Australia	15	15	10	10
Austria	15	15	15	0/10 ⁷
Azerbaijan	15	5/10 ⁸	10	5/10 ⁹
Bangladesh	15	15	15	10
Belarus	15	5	10	5
Bosnia and Herzegovina ¹⁰	15	10	15	10
Brazil	15	10 ⁵	10/15 ⁶	10/15/20 ¹¹
Bulgaria	10	10	0/10 ^{6,12}	5
Canada	15	5 ⁵	10	0/10 ¹³
China (People’s Rep.)	10	10	10	10
Croatia	15	5 ⁵	0/10 ⁶	0
Cyprus	15	10	0/10 ¹²	0
Czech Republic	15	5	0/10 ^{6,12}	0/5 ¹⁴
Denmark	15	0	10	0
Ecuador	15	15	0/10 ⁶	10
Egypt	20	15	15	15/25 ¹⁵
Estonia	15	5	10	5/10 ¹⁶
Finland	15	5	0/10 ¹⁷	5
France	15	10 ⁵	15	0
Gabon	15	15	15	10
Georgia	15	5	0/10 ⁶	5/10 ¹⁸

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Germany	15	15	0/15 ¹⁹	0
Ghana	15	5 ⁵	10	10
Greece	15	5	5/10 ⁶	5
Hong Kong	15	0/5 ²⁰	0/10 ^{6,12}	5
Hungary	10	10	0/15 ^{12,17}	0
Iceland	15	5 ⁵	0/10 ⁶	0
India	15	15	10/15 ⁶	10 ²¹
Indonesia	15	10	10	10
Ireland	15	15	15	0
Israel	15	15	15	0/10 ³
Italy	15	15	15	5
Ivory Coast	15	18	16	10
Japan	15	5	10	10
Kazakhstan	15	5 ⁵	10	10
Korea (Rep.)	15	15	10	10
Kuwait	10	0 ²²	0	10
Kyrgyzstan ²³	15	15	15	0
Latvia	15	5	10	5/10 ¹⁶
Lithuania	15	5	10	5/10 ¹⁶
Luxembourg ²⁴	15	10 ²⁵	0/15 ¹⁹	0
Macedonia ¹⁰	15	10	15	10
Malaysia	15	15	10/- ²⁶	10/- ²⁷
Malta	15	15	10	0/10 ⁹
Mauritius	10	5 ⁵	0/10 ^{6,12}	0
Mexico	15	5	10/15 ⁶	10
Moldova ²³	15	15	15	0
Mongolia	15	5 ⁵	0/10 ^{6,12}	5
Montenegro ¹⁰	15	10	15	10
Morocco	15	15	15	5/10 ³
Netherlands	15	0/5 ²⁸	0/10 ²⁹	0
New Zealand	15	15	10	10
Nigeria	15	12.5 ⁵	12.5	12.5
Norway	15	5	0/15 ⁶	0
Pakistan	15	15	15	0/15/20 ³⁰
Philippines	15	10 ⁵	10	15
Poland	15	5 ³¹	0/5 ⁶	5
Portugal	15	15	15	10
Romania	15	5	10	5
Russia	10	10	0/10 ⁶	0
San Marino	15	0/5 ³²	0/10 ⁶	5
Senegal	15	15	15	10
Serbia ¹⁰	15	10	15	10
Singapore	15	5 ⁵	5	5 ³³
Slovak Republic	15	5	0/10 ¹⁷	5
Slovenia	15	5	10	5
South Africa	15	5	0/10 ^{6,12}	0
Spain	15	0	0/10 ¹⁷	5
Sri Lanka	15	15	10	10
Sweden	15	5	0/10 ^{6,12}	0
Switzerland	15	10	0/10 ⁶	0
Taiwan	10	10	10	10
Tajikistan ²³	15	0/15 ⁴²	0/10 ⁴³	0
Thailand	20	15	10/25 ⁶	5/15 ³
Tunisia	15	15	15	5/15/20 ³⁴
Turkey	5/20 ³⁵	5 ³⁵	15	10
Turkmenistan ²³	15	15	15	0

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Ukraine	15	5 ³⁶	2/10 ⁶	0/10 ³⁷
United Arab Emirates	5	0/10 ³⁸	0/5 ³⁸	0/5 ³⁸
United Kingdom	10	5	15	0
United States	15	0/5 ³⁹	0	0
Uzbekistan	15	5 ⁵	10	5
Venezuela	15	5	0/10 ⁶	5
Vietnam	15	5/10 ⁴⁰	10	5/10/15 ⁴¹

Notes

- Many treaties provide for an exemption for certain types of interest, such as interest paid to the state, local authorities, the central bank, export credit institutions, or in relation to sales on credit. Such exemptions are not considered in this column.
- Unless otherwise indicated, the rates in this column apply if the recipient company owns at least 25 percent of the Belgian company's capital or voting power, as the case may be.
- The lower rate applies to copyright royalties, excluding films, etc.
- The rate is 3 percent on news items, 5 percent on copyrights (excluding films, etc.), and 10 percent on computer software, patents, trademarks, equipment leasing, and know-how.
- A minimum holding of 10 percent is required.
- The lower rate applies, inter alia, to interest paid to banks. Conditions may apply.
- The 10-percent rate applies if the Austrian company owns more than 50 percent of the capital in the Belgian company.
- The rate is 5 percent if the Azerbaijani company (a) owns at least 30 percent of the capital in the Belgian company and has invested at least USD 500,000 in that company or (b) has invested at least USD 10 million in the Belgian company. The rate is 10 percent if the Azerbaijani company owns at least 10 percent of the capital in the Belgian company and has invested at least USD 75,000 in that company.
- The lower rate applies to copyright royalties, including films, etc.
- The treaty concluded between Belgium and the former Yugoslavia.
- The 10-percent rate applies to copyright royalties, including films, etc.; the 20-percent rate applies to trademarks and commercial names.
- The lower rate applies, inter alia, to interest on bank deposits. Conditions may apply.
- The lower rate applies to copyrights (excluding films, etc.), computer software, patents and know-how.
- The zero rate applies to copyright royalties, including films, etc. (the rate of 10 percent was reduced to 0 percent from 1 January, 2004 following the conclusion of the treaty between the Czech Republic and the Slovak Republic – most-favored nation treatment); the 5-percent rate applies to industrial royalties and know-how (the treaty rate of 10 percent was reduced to 5 percent from 1 January, 2008 following the conclusion of the treaty between the Czech Republic and Austria – most-favored nation treatment); the 5-percent rate under the Belgium-Czech Republic treaty continues to apply to equipment leasing.
- The higher rate applies to trademarks.
- The lower rate applies to equipment leasing.
- The lower rate applies, inter alia, to interest on current accounts and on advance payments between banks.
- The lower rate applies if the beneficial owner is an enterprise of Georgia.
- The zero rate applies if the recipient is an enterprise; this does not apply to (a) interest on bonds and (b) interest paid by a company to a company owning at least 25 percent of the paying company's voting power or shares.
- The zero rate applies if the Hong Kong company has owned directly at least 25 percent of the capital in the Belgian company continuously for at least 12 months. The 5 percent rate applies if the Hong Kong company owns directly at least 10 percent of the capital in the Belgian company.
- The rate under the treaty is 20 percent. However, by virtue of a most-favored nation clause (Protocol Art. 1), the rate is reduced to 10 percent. (Under the treaty between India and Austria, for example, the rate is currently 10 percent.)
- This rate applies to dividends paid to the Kuwaiti government or to a company owned for at least 25 percent by the Kuwaiti government.
- The treaty concluded between Belgium and the former USSR.
- The treaty does not apply to income paid to exempt Luxembourg holding companies.
- A minimum holding of 25 percent or a holding with a purchase price of at least EUR 6,197,338 (BEF 250 million) is required.
- The 10-percent rate applies if the interest is paid by an enterprise engaged in an industrial undertaking. Otherwise, the domestic rate applies.
- The domestic rate applies to artistic copyrights, including films, etc.
- Under this treaty, the exemption applies to dividends qualifying for the EC Parent-Subsidiary Directive. The 5-percent rate applies if the Netherlands company owns directly at least 10 percent of the capital in the Belgian company.
- The zero rate applies, besides interest mentioned in note 1, where the Netherlands beneficial owner is an enterprise and (a) the interest has not arisen from bearer securities representing loans or deposits, or (b) the interest has arisen from bearer securities representing loans or deposits and the enterprise carries on a banking or insurance activity and holds the securities in question for at least three months preceding the date of payment.
- The rate is zero on copyrights (excluding films, etc.) and 15 percent on know-how.
- The rate applies if the Polish company holds directly (i) at least 25 percent of capital in the Belgian company or (ii) at least 10 percent of the capital in the Belgian company and has invested in it at least EUR 500,000.
- The zero rate applies if the San Marino company has owned directly at least 25 percent of the capital in the Belgian company continuously for at least 12 months. The rate is 5 percent if the San Marino company has owned directly at least 10 percent but less than 25 percent of the capital in the Belgian company continuously for at least 12 months.
- In the case of equipment leasing, the 5-percent rate is levied on 60 percent of the gross amount of royalties.
- The rate is 5 percent on copyrights (excluding films, etc.), 15 percent on patents and know-how, and 20 percent on trademarks, films, and equipment leasing.
- Under the final protocol to the treaty, the rate is 5 percent for companies as long as dividends received by a Belgian company from a Turkish company are exempt, which is currently the case (the general participation exemption). Otherwise, the treaty rate will be 15 percent if the Turkish company owns directly at least 10 percent of the capital of the Belgian company and 20 percent in other cases.
- A minimum holding of 20 percent is required.
- The higher rate applies to copyright royalties, including films, etc.
- The zero rate applies to payments to financial institutions and public bodies.
- The 5-percent rate applies if the US company owns directly at least 10 percent of the voting power in the Belgian company. The zero rate applies if the US company owns at least 10 percent of the capital of the Belgian company for a 12-month period ending on the date the dividends are declared.
- The rate is 5 percent if the Vietnamese company owns at least 50 percent of the capital in the Belgian company and 10 percent if it owns at least 25 percent (but less than 50 percent).
- The rate is 5 percent on patents and industrial and scientific know-how and 10 percent on trademarks and commercial know-how.
- Dividends shall not be taxed in the contracting state of which the company paying the dividends is a resident if the beneficial owner of the dividends is a) A company which is a resident of the other contracting state and which holds, for an uninterrupted period of at least 12 months, shares representing directly at least 10 percent of the capital of the company paying the dividends; or b) a pension fund that is a resident of the other contracting state, provided that such dividends are not derived from the carrying on of a business by the pension fund or through an associated enterprise.
- Interest shall be exempted from tax in the contracting state in which it arises if it is a) interest paid in respect of a loan granted or a credit extended by an enterprise to another enterprise; b) interest paid to the other contracting state, to one of its administrative-territorial units or local authorities or a public entity thereof; or c) interest paid to a pension fund, provided that such interest is not derived from the carrying on of a business by the pension fund or through an associated enterprise.

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