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1. SHORT BRIEFING ON CORPORATE TAXATION IN BELGIUM

ЕВРОПЕЙСКИ ПАРЛАМЕНТ PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
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Directorate General for Internal Policies
Policy Department A: Economic and Scientific Policy

Short Briefing on Corporate Taxation in Belgium

The taxation of corporate profits in Belgium

Belgium has a progressive corporate income tax capped at 33.99% (including a 3% crisis surcharge) levied on worldwide income (corrected when needed through a system of foreign tax credits)[1]. When compared to other European members, its statutory rate is on the high side, along with France (34.4%), Italy (30%), Spain (31%) and Germany (30%). But the rates only tell part of the story since the size of the tax base matters as well. Although the tax base definition is quite standard and encompassing, Belgium also offers a wide range of tax incentives, allowances, credits and exemptions which helps explain why revenue from this tax adds up to less than 3% of GDP.

It is notable that Belgium has a higher tax statutory rate, but a lower revenue than the EU average. This is often blamed on the importance of the multiplicity of tax breaks. The highest profile break was introduced in 2006, the so-called *"Notional Interest Deduction"* also known as "*risk capital deduction*". The idea underlying the notional interest deductions was to correct the fiscal disadvantage of using equities rather than debt to finance a company. These deductions (under specific criteria that we will not discuss here) are computed as a predefined percentage of the company's adjusted equity base and are deducted from the tax liability. The accumulation of such tax breaks is widely seen as a key explanation for the fact that despite its high statutory tax rate, Belgium remains quite effective at attracting foreign investment. Despite the apparent modest impact on the attractiveness of the country for foreign investors, there are other concerns associated with the current complexity of the tax system.

Diversity of average tax rates. In the current debates on the scope for changes in the taxation of business in Belgium, one of the issues raised is the diversity of observed average tax rates paid by different types of firms. These differences reveal discrimination of the tax system across sectors and across firm sizes. According to a 2009 study conducted by PTB[2] (the workers' party) widely discussed in the media, the top 50 largest firms in Belgium only paid an average rate of 0.57% and the top 1000 paid an average rate of 5.73%. According to that study the real average tax rate on corporate profits is 9.8%. The study was contested by the Belgian business association (VBO-FEB)[3] who released another study arguing that the median tax rate on corporations was 26.2% based on the analysis of 130,000 firms in 2010. According to it, small firms paid 25.9%, medium firms 27.4%, large firms 28.6% and very large firms 27.2%. This indicates that any debate on reforms on the taxation of businesses in Belgium should not just be about rate levels but also about the fairness of treatment.

How much does Belgium need a reform? To see how relevant the debate on the need to reform the system is, consider another back of the envelope computation. If the PTB study is

[1] The progressivity is as follows: for income from 0 to 25.000€, the tax rate is 24.98%; from 25.000 up to 90.000€, 31.93%; from 90.000 up to 322.500€, 32.54% and for income above 322.500€ the normal rate of 33.99% applies. Reduced rates only apply for companies that meet specific criteria.

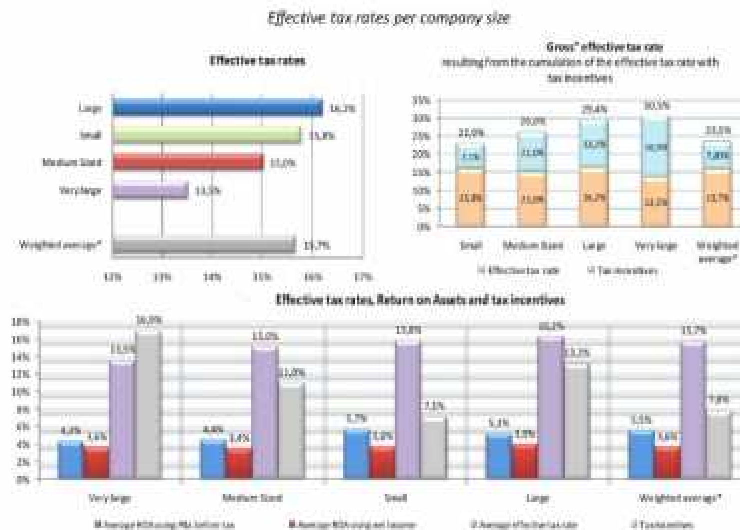
[2] http://ptb.be/

[3] http://vbo-feb.be/

right, the effective tax base is 70% lower than what it should be if pure accounting profits had been taken into account. If the FEB study is right, the tax base is only 26% lower. The range is quite large, but even the minimum seems like a very significant discounting of the tax base. This all explains why effective tax rates in Belgium are significantly lower than their statutory rates would suggest. Moreover, these rough figures also suggest that the scope to cut the statutory tax rates combined with a widening of the base should be considered as a viable option for improvements in revenue, efficiency and equity as well as a simplification and hence a reduction in compliance and monitoring costs associated with the tax.

Strong reform consensus is present. It may be useful to point out at this stage, that this is not really an ideological debate anchored in a confrontation between the left and the right in Belgium. The calls for tax reform on revenue and equity grounds made by the left leaning community have recently found a wide support.[4] Unsurprisingly, the main point from the critics of the current tax is that it could be simpler, with a broader base and a lower rate. In a nutshell, from a more analytical and technical perspective, it could be designed to increase the average effective rate while cutting the marginal rates.

Albeit that objectives widely differ. But as anywhere in the world, the politics of tax reform and tax shifts are at least as complex as the design of a corporate income tax and politicians seem to prefer changes at the margin rather than structural changes. Belgium is not different. The latest EU tax reform monitoring report (2014)[5] shows that Belgium continues try to find ways of broadening the tax base (a lower cap for notional interests deductions, new rules for company cars taxation, stricter thin capitalization rules and lower scope for carry forward of some tax deductions) and is envisioning a major tax shift. The goal is clearly to try to be at least revenue neutral and ideally enhancing but these reforms do not really significantly improve the simplicity of the system and do not do much to reduce compliance and monitoring costs.



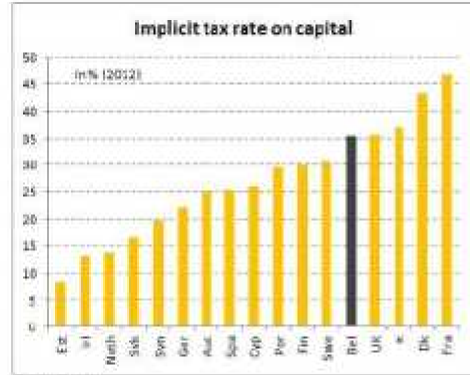
[4] For instance, by an independent (but usually conservative) Think Tank, Itinera in various op-eds (see their web site), by a Belgian academic working for the Economy Ministry (Valenduc (2011)) and by one of the big four accounting firms (Pwc (2011)).
[5] http://ec.europa.eu/economy_finance/publications/european_economy/2014/ee6_en.htm

ANNEX

A1. Tax shift

(Source: Bart Van Craeynest, Petercam)

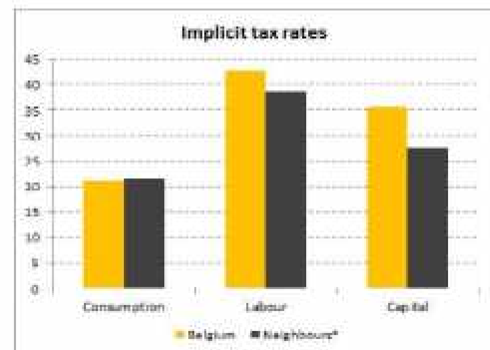
The clear need for a tax shift has come to the fore on the political agenda in the past few months. Finally, as this is a measure that could boost the Belgian economy that has been advocated already for quite a long time. Unfortunately, the focus of the current debate seems to be narrowing down to a shift in the burden from labour to capital. And this is just not the type of tax shift Belgium needs right now.



The tax burden in Belgium is high and will also remain high as we have opted for a large public sector and an extensive social security system. But this does not mean that no improvements can be made to the tax system. Taxes are always negative for the activity that is taxed. Belgium has mainly opted to tax labour very heavily. Given that labour is ultimately the key to our prosperity this is, to put it mildly, an ill-advised choice. The tax burden on labour should be reduced significantly. This can best be done by cutting back on spending, but savings are difficult to achieve politically, and will become all the more difficult in the coming years against the backdrop of an ageing population. Nevertheless, we can greatly improve our tax system, even without spending cuts, by making a smart tax shift.

In recent months, the tax shift has become synonymous with a shift of the tax burden from labour to capital. In the current debate it has, however, quickly been forgotten that the tax burden on capital in Belgium is already high. In 2012, the Belgian government saw a total of 10% of GDP of its revenue coming from taxes on capital, of which 4.1% of GDP came from taxes on wealth. In both cases, Belgium is among the top 5 in Europe and well above the European average (8.2% and 2.8% of GDP respectively). The total tax receipts say little, however, about the actual tax burden on capital. Therefore, the implicit tax rate (i.e. the ratio between tax revenue and the corresponding tax base) on capital is more relevant. But that too is very high in Belgium. According to Eurostat, the implicit tax rate on capital in Belgium is 35.5% whereas in neighbouring countries it is 27.6% on average. Some forms of income from capital (including dividends and capital gains on shares) are taxed very little, if at all, in Belgium, but the total tax burden on capital is currently among the highest in Europe. In light of this, it would be a very good idea to spread the tax burden on capital more evenly. If all forms of income from capital are taxed the same, decisions on the use of capital would no longer be influenced by tax considerations. That means a shift within taxes on capital, including higher tax on dividends, capital gains and rental income, but at the same time lower corporate tax, registration tax and inheritance tax. Raising the total tax burden on capital is not a good idea, however.

Comparisons with the rest of Europe show that Belgium is a front runner with respect to taxing labour and also among the leaders in terms of tax burden on capital. Belgium is around average in terms of the tax burden on consumption and amongst the lowest in Europe in terms of taxation on pollution. These last two are then obvious candidates for offsetting a reduction in taxation on labour. Simulations by the Federal Planning Bureau and the European Commission confirm that a lowering of the tax burden on labour, offset in terms of the budget by a rise in taxes on consumption and environmental issues, would result in extra jobs and economic growth.



Such a tax shift should be part of a widespread reform of the tax system. The current Belgian tax system is after all the result of a decades-long process in

which new exceptions and specific rules were constantly added. The overall system has therefore become very poorly organised and inefficient, and this should be addressed through an extensive tax reform. The key priorities must be a significant lowering of the tax burden on labour and a fundamental simplification of the tax system. The latter includes re-examining virtually all the existing tax deductions. Taxation can be used to change people's behaviour, but the Belgian Government has overshot the mark somewhat in this regard. A lot of specific rules, such as the housing bonus, the exemptions on savings accounts, company cars, luncheon vouchers, lower VAT rates, etc., were created out of good intentions, but do not actually fulfil their original objectives. They need to be re-examined more closely, and could provide room for further reductions in the tax burden on labour. We need to come up with a tax system that generates the necessary revenue for the government, while damaging the economy as little as possible. In other words, a tax system that serves the economy.

A2. A snapshot of recent Tax Reforms in Belgium

(Source: Deloitte - http://www2.deloitte.com/be/en/pages/tax/articles/Belgium-Tax-Reforms-Deloitte-Belgium-Tax.html)

Key Business Tax Measures

Budget control 2015 tax measures

- Increased fight against tax fraud
- Special tax regime for diamond sector
- Extension of liquidation reserve regime
- New incentives for start-ups
- Investment deduction for digital investments
- Implementation of CJEU's Tate & Lyle decision

Budget 2015 tax measures

- Liquidation reserve
- Secret commissions' tax
- Notional Interest Deduction for banks and insurance companies
- Intercommunales

Individual tax measures

Budget control 2015 tax measures

- "Look-through tax"
- Tax shelter
- Crowdfunding

Budget 2015 tax measures

- Lump-sum business expenses
- Non-indexation of exemptions and reductions
- "Look-through tax"
- Anticipated pension savings levy

Indirect tax measures

Budget 2015 tax measures

- VAT
- Excise duties
- Stock exchange tax
- Environmental tax abolished

A3. Background information on Corporate Taxation in Belgium

Level and structure of tax revenues

Belgium has one of the highest tax rates in the EU, with a tax-to-GDP ratio around 45 %, significantly above the EU average (around 40%). The structure of the Belgian tax system, in terms of broad tax categories of taxes, is characterised by a relatively high share of direct taxes in GDP), reflecting a broad reliance on personal and corporate income taxes, and social contributions. By contrast, with about 13 %, the share of indirect taxes in GDP is broadly in line with the EU average.

Corporate taxation

Companies in Belgium and the subsidiaries of foreign companies are subject to a fixed tax rate of 33.99% (3 % crisis surcharge included) with profit from foreign branches being exempted. There is no tax consolidation of companies. Under certain conditions, a special scheme applies to SMEs having an assessed income lower than EUR 322 500 (a tax rate of 24.98 % is applied on the part from EUR 0 to EUR 25 000, 31.93 % on the part of EUR 25 000 to EUR 90 000 and 35.54 % on the remaining part up to EUR 322 500).

An allowance for corporate equity (ACE), referred to as 'notional interest on corporate capital', was introduced in 2006 to stimulate the self-financing capability of companies. The tax-free presumptive rate of return on equity applied under the ACE system is based on the rate of 10-year government bonds (OLO 10) with a cap of 3 % as of 2012 (3.5 % for SMEs). As opposed to the Italian ACE, which is incremental, the Belgian system provides an allowance for existing stock. The so-called fairness tax has been introduced in 2013 as a minimal tax rate (5 %) on large companies distributing dividends and enjoying either carry-forward of losses or ACE.

Company tax

A resident company is liable to corporation tax on its worldwide profits. A company is resident in Belgium if its registered office or centre of management is situated in Belgium. The place of incorporation is irrelevant. The basic rate of corporation tax is 33%, increased by a 3% surcharge (33.99%). Reduced progressive rates apply only if:

• the company does not distribute dividends during the year that exceed 13% of the paid-up capital at the start of the year

• the profits of the company do not exceed EUR 322,500

• the company pays an annual taxable income of at least EUR 36,000 to at least one director

• the company does not belong to a group of companies with an approved Belgian co-ordination centre

• the company is not a holding company

• the company is not 50% or more owned by one or more companies

The tax rate is the same whether profits are distributed or retained. A non-resident company is liable to the non-residents' tax or to the various withholding taxes levied on Belgian-sourced income or to both, instead of corporation tax. If a non-resident company has a permanent establishment in Belgium, it is liable to non-residents' tax on profits attributable to the permanent establishment, plus any other business income arising in Belgium and income from Belgian real estate. Its Belgian-sourced dividends, interest and royalties, if any, will normally be subject to a final withholding tax. The rate of non-residents' tax is 33% plus the 3% surcharge. Reduced rates apply under certain conditions.

Capital gains tax

Capital gains are normally treated as ordinary business income and are taxable at the normal corporation tax rates. However, there are exceptions such as gains on shares qualifying for the participation exemption.

Branch profits tax

There is no separate branch profits tax in Belgium. Trading profits and capital gains of the Belgian branch of a foreign company are calculated and taxed on the same basis as those of a Belgian resident company.

Determination of taxable income

The profit disclosed by a financial statement is adjusted for disallowable expenditure, exempt profits, special deductions and losses carried forward to arrive at taxable profit. The most important adjustments are described below.

Investment allowance

Companies may claim an investment deduction amounting to a certain basic percentage of the acquisition or investment value of certain fixed assets. The following rates apply:

• with respect to energy-saving investments, investments in environmental research and development and patents: 15.5%

• with respect to investments in safety measures by SMEs: 22.5%

• with respect to investments contributing towards the re-utilisation of the packaging of beverages and industrial products: 3%.

Depreciation

The straight-line depreciation method and the declining-balance method are equally widely used. The declining-balance rate may not exceed twice the straight-line rate. Also, for tax purposes, the declining-balance rate may not exceed 40% of the investment value.

Stock inventory

The acceptable methods of determining acquisition cost are actual cost, FIFO (First in, First out), LIFO (Last in, First out) and weighted average.

Capital gains and losses

Capital gains are (generally) treated as ordinary business income taxable at normal corporation tax rates.

Capital losses are tax-deductible if they relate to fixed assets used for business purposes. Unrealised capital losses on shares (booked devaluations) are not tax-deductible.

Realised capital losses on shares are generally not deductible. Capital losses realised on the liquidation of a company are deductible up to the value of the capital actually paid-up.

Dividends

Dividends received by a company with a participation of at least 10% or an investment of at least EUR 2.5 million in the distributing company are 95% deductible from the fiscal profits of the recipient if the shares have been held for an uninterrupted period of at least one year. The remaining 5% is taxable at normal corporation tax rates as part of the overall taxable profits of the company.

The 95% deduction is not available where the profits of the payer are subject to a tax regime which is substantially more advantageous than the Belgian tax regime. This will be deemed to be the case if the effective tax rate suffered by the company making the distribution is less than 15%. However, this criterion does not apply to companies established in the EU.

Interest deductions

Interest on capital borrowed for business purposes is normally deductible. However, tax deduction will be disallowed to the extent that the interest rate exceeds the market rate. This restriction does not apply to interest paid to a Belgian bank or to another financial institution nor to interest on publicly issued bonds.

Notional interest deduction (NID)

The notional interest deduction regime provides a tax deduction calculated as a percentage of the 'qualifying' equity of a Belgian company or branch. This 'qualifying' equity is multiplied by the monthly average interest rate for long-term Belgian government bonds over the calendar year prior to the year for which the deduction is claimed. The deduction is granted annually and can be used to set off operational or financial income of any kind.

Patent income deduction (PID)

The patent income deduction regime provides a tax exemption of 80% for earned patent income. Consequently, only 20% of the patent income is taxable at the normal corporate tax rate of 33.99%.

Losses

Losses can be carried forward indefinitely. However, this rule will no longer apply if there is a change in the control of a company which cannot be justified by financial or economic reasons other than the recapture of losses.

Losses cannot be carried back.

Foreign source income

There are no provisions similar to the UK's controlled foreign company rules. Foreign-sourced income and capital gains are normally subject to Belgian corporate income tax, unless exempt by treaty provisions.

Dirk Verbeken (PolDepA, Tel.: 48358), Dario Paternoster (PolDepA, Tel.: 32479)

2. COUNTRY SPECIFIC BRIEFING - BELGIUM

TAXE Committee on Tax Rulings and other measures similar in nature or effect

DELEGATION 12 MAY 2015 BRUSSELS

Country specific briefing – BELGIUM

+ See powerpoint presentation on "ADR in Belgian tax law (capita selecta)" (prof. dr. Elly Van de Velde)

+ See "Belgian Transfer Pricing Framework", in R. Willems, *Guide to Tax Rulings in Belgium*, Amsterdam, IBFD, 2012, 63-77.

1. Belgium is a Federal State : the impact on tax rulings

The Service on Advance Decisions in Tax Matters (Tax Rulings Service) is a part of the Federal Tax Authority. Regions are not competent to deliver advance tax rulings (ATR) nor advance pricing agreements (APA).

The competence of the Belgian Tax Rulings Service depends on the federal or regional competence to levy federal or regional taxes. When a federal or regional tax will be levied by the Federal Tax Authority, the Tax Rulings Service will be competent to deliver an advance decision. When a regional – e.g. a Flemish – tax will be levied by the Flemish Tax Authority, the Tax Rulings Service is no longer competent to deliver an advance decision on the application of that Flemish tax act.

- Belgian corporate income tax (CIT) exclusively remains within the scope of the competences of the federal level of government. The same goes for VAT. During the recent institutional negotiations, it was suggested to decentralize a part of the CIT, with the purpose of giving the Regions the power to introduce CIT-credits in the area of their substantial competences. The proposal was not adopted. The Tax Rulings Service is competent for CIT and VAT.

- Following the last (6th) institutional reform, the Regions are entitled to modulate about one fourth of the federal personal income tax (PIT) amount. They can also introduce new tax reductions or tax credits or amend existing tax reductions or tax credits. The Federal Tax Authority still levies PIT, hence the Tax Rulings Service is competent for PIT.

- A part of the tax law making power has been "regionalized". For instance, the Regions are competent for real estate tax (précompte immobilier), inheritance tax (droits de succession), transfer tax (droits d'enregistrement), etc. When the regional tax authority levies these taxes (e.g. in Flanders), the Tax Rulings Service is no longer competent to deliver an advance decision on these tax matters.

2. CIT

See: Marc Bourgeois, Bart Peeters, Xavier Pace, *Belgian report on corporate income tax*, EATLP Congress 2013 (February 2014), www.eatlp.org:

➢ Subject

Each entity with legal personality and a business motive will be subject to CIT.

A taxable 'corporation' is defined as a legal entity with legal personality exploiting a business activity or conducting lucrative operations. Legal entities that do not fulfill these requirements will be taxed under a separate income tax regime for non-lucrative entities.

Only resident companies are subject to CIT (non-resident companies are subject, however, to the non-resident CIT on a limited basis).
The BITC defines tax residence of a corporation as the place where it has its "statutory seat, principal establishment, seat of management or seat of administration" (section 2 (1) (5°) (b) of BITC). These expressions are generally viewed as redundant and referring to the "real seat", i.e. the place where the corporation has its central administration. Since Belgian corporate law and private international law use the same criterion, it is fair to say that a corporation that has its tax residence in Belgium is also governed by Belgian corporate law or, conversely, that all corporations that are governed by Belgian corporate law have their tax residence in Belgium – irrespective thus of their place of incorporation.

➢ General CIT

The treatment is generally the same regardless of the size of the corporation. Many small companies were set up under the form of a legal entity, whereby the profits are taxed under the (more advantageous than PIT) CIT. Nonetheless, starting up a business through a separate legal person is not only for the purposes of tax planning. It also limits one's personal responsibilities and makes it easier to combine the capital of several partners.

CIT is levied at a flat rate of thirty-three percent. However, if the taxable profits are less than 322,500 EUR, a lower progressive tax rate starting at 24.25%.

CIT revenues amount to one fourth of PIT revenues for Belgium.

The calculation of the taxable base for the general CIT has been heavily adapted. National measures to stimulate Belgian investments, such as the notional interest deduction (NID) and a deduction for patent income (DPI), an enlargement of exempted foreign income because of concluded double tax conventions, and intra-European developments, merely because of convictions of the Belgian system by the Court of Justice, complicated the actual regime. Particularly in recent years, the Belgian legislator, in its search for new taxable income, very often added additional conditions for tax exemptions or reduced favorable regimes.

In addition, special incentives apply to particular industries or businesses (e.g. tonnage tax for shipping operators, holding companies, etc.) which reduce substantially their tax base.

Belgium has no tax consolidation regime except for VAT purposes ("VAT unity").

➢ **Additional taxes**

Besides the general CIT, some additional taxes were historically added for several different reasons.

As such a general crisis tax of 3% is levied on, amongst others, the corporate income tax, increasing the 33% tax rate up to 33.99%.

In the struggle against tax fraud, besides other punitive measures, an additional tax (secret commissions tax) of 300% (also increased by a 3% crisis tax to 309 %) was levied on wages and/or salaries that companies would pay without mentioning them in the particular declarations. As the purpose of these declarations is to reveal the income at the level of the beneficiary, this additional tax will not be levied when it is proven that the beneficiary's income is still being taxed. From the end of December 2014 onwards, the additional tax rate is 100% (increased until 103%).

Recently the tax legislator added more separate taxes each in a very particular context. A so-called 'fairness tax' of 5% (increased to 5.15 % by the crisis tax) is levied on dividends distributed by a company on the portion of the distributed dividends that exceeds the companies own taxable income.

Capital gains on shares are taxed separately at 25% (increased to 25.75 %) when the shares are not kept for at least one year, and at 0.4 % (increased to 0.412 %) when shares are kept for more than a year but realized by a large company.

If a company changes its dividend policy (because of a temporary regime for its shareholders) and reduces its standard dividend distribution (to make use of a favorable tax regime of ten percent instead of twenty-five percent) the usual % of distributed dividends that is no longer being distributed is subject to an additional corporation tax of 15%.

➢ **Special tax regimes**

The liability of specific entities to CIT is quite theoretical because of the application of a special tax regime.

Investment companies and Belgian Pension Funds are subject to CIT but only on a very limited tax base (consisting of the sum of any abnormal and gratuitous benefits received and disallowed expenses other than impairment and capital losses on share). From a Belgian perspective, they benefit from the application of double tax treaties because of their (formal) subjection to CIT.

3. General anti-tax abuse measure

See: R. Willems, *Guide to Tax Rulings in Belgium*, Amsterdam, IBFD, 2012, 9-11:

The 29 March 2012 Programme Act restated the general ant-tax abuse measure of section 344 (1) if the BITC: in the first instance, the tax administration had to demonstrate that there is "tax abuse" in the framework of a legal act of acts that the taxpayer has carried out.

Tax abuse can take two forms: avoiding a taxable position and claiming a tax advantage.

3

If the administration demonstrates that there has been tax abuse, the onus is on the taxpayer to prove that the choice for his legal act(s) is justified by other motives than the avoidance of income taxes. An advance ruling can be applied for to obtain upfront legal certainty that this is the case.

If the taxpayer cannot produce that proof, the tax administration can restore the taxable base and tax computation so that the transaction is subject to a taxation which is consistent with the objectives of the income tax provision as if the abuse did not take place.

The Programme Act of 29 March 2012 replaced also the 7:1 debt-equity ratio for interest payments or attributions to (real) beneficiaries taxed at low rates on that interest by a new rule introducing a (general) 5:1 debt-equity ratio.

An anti-abuse rule has been introduced: if loans are guaranteed by a third party or funded by a third party that partly or wholly bears the loan risk, the third party is deemed to be the beneficial owner of the interest if the guarantee or funding has tax avoidance as its main purpose.

4. What excess profit rulings are about

See: K. Dirix, "Harmful Tax Competition: Six Belgian Tax Incentives under the Microscope", *EC Tax Review* 2013/5, 244 and 248:

For companies belonging to an international group, a downward adjustment of the corporate income tax base is made, according to section 185 (2, b) BITC, to reflect the company's excess profit, being that part of the profit exceeding the profit that could have been realized by the Belgian company under arm's length conditions and which is a result of group synergies.

The basic assumption underlying this system is that members of multinational groups can freely dispose of group-owned intangibles such as know-how, research, etc. As a result, they do not have to procure these functions themselves. This allows them to avoid extra costs and generate more profit, which in turn leads to a higher tax base. Hence, the cost structure and profit potential of a group member essentially differ from those of a stand-alone entity.

The arm's length standard requires that profit is allocated between group members as if they were unrelated parties. Hence, the Belgian company should only be taxed on profits which it would have realized as a stand-alone entity. Benefits arising from the simple fact that the company belongs to a multinational group should therefore be exempt from taxes through a downward profit adjustment.

In order to obtain this downward adjustment, a request for a unilateral excess profit ruling should be filed with the Belgian Service of Advance Decisions in Tax Matters. An extensive transfer pricing study should be annexed to support the request.

The most remarkable feature is that a corresponding upward profit adjustment (for the foreign group members) is not required. The former Minister of Finance sated it is not up to the Belgian tax authorities to determine which foreign enterprise should be taxed on the excess profit of the Belgian entity. He also claimed that, for the same reason, the Belgian tax authorities cannot exchange the relevant information with foreign administrations.

3. RULINGS ACT OF 24 DECEMBER 2002

Appendix 1

Rulings Act of 24 December 2002[188]

TITLE III – Advance decisions on tax matters.

Section 20. The Federal Tax Authority decides by way of an advance decision on any application for the implementation of taxes under its jurisdiction or for which it provides the collection and recovery service. An advance decision is a legal act by which the Federal Tax Authority determines in accordance with the provisions in force how the law will apply to a particular situation or transaction that has not yet produced any effects from a tax point of view.

The decision cannot grant tax exemptions or reductions.

Section 21. Applications must be sent to the Federal Tax Authority in writing. They must be supported by reasons.

They must contain:

- the identity of the applicant and, where appropriate, relevant parties and third parties;
- a description of the applicant's business;
- a full description of the particular situation or transaction;
- references to the statutory or regulatory provisions on which the decision will focus.

The request shall, where applicable, include full copies of applications on the same subject-matter, together with the relevant decisions, that have been lodged with tax authorities of EC Member States or third countries with which Belgium has a double taxation treaty and relative decisions.

Until such time as a decision has been issued, any new information on the situation or the envisaged transaction must be added to the application. The decision is notified to the applicant within three months of the date of lodging pursuant to the foregoing paragraphs. The Federal Tax Authority and the applicant may jointly agree to alter this period.

The Federal Tax Authority shall notify the applicant of the deadline set in accordance with the preceding paragraph no later than fifteen working days from the time the application is complete.

Section 22. An advance decision cannot be granted where:

1. the application relates to similar situations or transactions that have already produced effects for the applicant from a tax point of view or to an appeal or legal proceedings between the Belgian state and the applicant;
2. grant of an advance decision would be inappropriate or ineffective due to the nature of the statutory or regulatory provisions cited in the application;
3. the request relates to any application of a law regulating tax collection and prosecution matters.

The Crown shall, by order of the Cabinet, determine which matters and arrangements fall under subsection 1(2).

With respect to income taxes, an advance ruling may not be granted where:

1. at the time the application is lodged, essential elements of the transaction or the situation described relate to a country of refuge that does not cooperate with the OECD;
2. the transaction or the situation described is devoid of economic substance in Belgium.

Section 23. Except in cases justified by the subject-matter of the application, the decision is granted for a term not exceeding five years. The Rulings Office grants advance decisions in its function as an administrative authority (Act of 21 June 2004). Advance decisions are binding on the Federal Tax Authority, except:

1. where the conditions to which the decision is subject are not met;
2. where it appears that the situation and the transactions described by the applicant were incomplete or inaccurate, or essential elements of the transactions have not been implemented as stated by the applicant;
3. in cases of amendments to the provisions of treaties, Community law or internal law that are applicable to the situation or transaction and form a basis for the advance decision;
4. where it appears that the advance decision does not comply with provisions of treaties, Community law or internal law.

In addition, advance decisions cease to be binding on the Federal Tax Authority where the main effects of the situation in which the transactions are

effected are altered by one or more related or subsequent factors for which applicant is directly or indirectly responsible.

In such event, withdrawal of the advance decision is effective as of the date of the circumstance for which the applicant is responsible.

Any request made to the tax authorities of a Member State of the European Union or of a third State under section 21, third paragraph, during the validity of an advance decision, and any decision pursuant thereto, shall be notified immediately to the Federal Tax Authority for the purposes of this section.

Section 24. Advance decisions are published anonymously, in accordance with the provisions on professional confidentiality.

Section 25. The Minister of Finance shall annually submit to parliament a report on the application of section 20. The identities of applicants and Federal Tax Authority staff shall not be mentioned in the report. The report is made public by parliament.

Section 26. (Act of 21 June 2004) The Crown, by order of the Cabinet:

- creates the office referred to in section 23, second paragraph, and lays down its operating procedures;
- following consultation with the Committee of Directors, appoints a board of leading members of the office and sets down its operating procedures;
- lays down the procedure for implementing the provisions of this title.

4. TRANSFER PRICING FRAMEWORK

Chapter 9

Transfer Pricing Framework

9.1. Belgium's long experience with unilateral APAs for specific "safe harbour" regimes[34,35]

Over and above its prime location and favourable expatriate tax regime, Belgium has a long tradition of schemes that have helped it attract regional headquarters and support centres (finance and treasury, shared services, European distribution centres, central reinvoicing centres, etc.). Although some are now defunct, the experience gained by the relevant officials lives on in their work for the RO: the rulings practice in these areas is therefore very mature. A run-down:

(i) *1982-2010 – Coordination centres*: The tax base of MNCs' finance and support centres was limited to a markup on operating costs less payroll and finance costs. Because of EU criticism, the system was phased out in 2010. In principle, it was replaced by the notional interest deduction, though the NID is open to all companies and not limited to finance and treasury centres.

(ii) *1984-2003 – Foreign sales corporations*: To promote exports, US companies could set up an FSC in Belgium, to which a share of export profits could be allocated; they qualified for a cost plus 8% ruling.

(iii) *1989-2005 – Distribution centres*: Intra-group distribution centres could apply for European distribution (warehousing) centre status, with a fixed tax base of operating costs + 5%. Initially restricted to storage, value added logistics services have also been allowed since 1994.

34. An APA (advance pricing arrangement) is an arrangement that, in advance of controlled transactions, sets an appropriate set of criteria (e.g. method, comparables and appropriate adjustments, critical assumptions as to future events) for fixing the transfer pricing for those transactions over a certain period of time. An APA may be unilateral, involving one tax administration and a taxpayer, or multilateral, involving the agreement of two or more tax administrations.

35. Safe harbour: Where tax authorities give general guidelines on the interpretation of tax laws, these may state that transactions falling within a certain range will be accepted by the tax authorities without further question.

(iv) *1996-2005 – Recognized service centres*: A safe harbour system for shared service centres. Their minimum tax base was 100% of operating costs plus a markup depending on the services rendered: (i) 5% (in practice 8%) for preparatory and auxiliary services; (ii) 10% for information provision and (iii) 15% for passive sales support. There was no markup on payroll expenses. For active intervention in sales support, a resale minus applied (limited to 5% of turnover).

(v) *1998: "Informal capital" rulings*: MNCs could provide certain intangible assets to Belgian skills centres without impacting their tax base, while the Belgian entity could still amortize them for tax purposes.

(vi) *2006*: Further to EU challenges that the service centre and distribution centre regimes were safe harbour regimes, they were abolished and replaced by the general rulings system.

9.2. Belgium follows the OECD's TP Guidelines

Belgium is a Member country of the OECD[36] and adheres to its TP regulations. The Belgian administrative guidelines[37] explicitly refer to the OECD TP Guidelines. They enshrine the arm's length principle, defined as a comparison of the features of transactions between related and unrelated undertakings.

Related undertakings fundamentally have to stick to the arm's length principle for intra-group dealings (as contained in article 9(1) of the OECD Model Tax Convention).[38]

36. The Organisation for Economic Co-operation and Development (OECD) is a multilateral organization with 30 Member countries, mostly western European plus other industrialized nations including the United States and Japan. Founded in 1961, it provides a forum for national representatives to discuss and coordinate economic and social policies. It has an especially significant role in international tax matters. Its website is at www.oecd.org, where a glossary of transfer pricing terms is available.
37. Circ. AFZ/98-0003, 28 June 1999, *Bull. Bel.*, 796, 2483.
38. "Where conditions are made or imposed between related two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

Belgium's Act of 21 June 2004[39] introduced the arm's length principle to cross-border intra-group relations (section 185(2) ITC).[40]

9.2.1. Scope of the arm's length rule

Section 185(2) of the ITC applies to all cross-border commercial and financial relations among members of a multinational group; they are not limited to the European Union or countries with which Belgium has a double tax treaty but include non-treaty countries. Domestic relations are excluded. A company is defined in section 11 of the Companies Code as being related to another company if it is controlled by or under common control along with or if it controls the other company; control is (direct or indirect) ownership of a majority of voting rights or entitlement (directly or indirectly) to appoint a majority of the other company's directors.

Excluded are dealings between a company and a physical person, or between two physical persons (acting in the course of business).

Section 185(2)(b) of the ITC avoids double taxation by allowing an adjustment based on an advance decision where the profits of a Belgian company would have accrued to another company had the conditions agreed by them been comparable to those applying between unrelated companies (i.e. had it not been party to related-party dealings). Under the arm's length principle, any profit differential ("excess profit") not resulting from functions performed, risks assumed and assets used compared to a stand-alone enterprise should not be allocated to the Belgian company.

39. Act of 21 June 2004, BOJ, 9 July 2004; it came into force on 19 July 2004.
40. "Notwithstanding the second part [of the section], in relation to two companies, members of a multinational group of associated companies, and their cross-border relations:
(a) where between the two companies in their commercial or financial relations, conditions are made or imposed which differ from those which would be made between independent companies, any profits which would have accrued to one of the companies in the absence of such conditions, but by reason of those conditions have not so accrued, may be included in the profits of that company;
(b) where in the profit of a company profit is included that is also included in the profit of another company, and the profit so included consists of profit which would have accrued to that other company if between the two companies conditions had been agreed upon that independent companies had agreed upon, then the profit of the first mentioned company will be adjusted appropriately.
The first part [of this section] is applied on the basis of an advance ruling, without limiting the scope of the Treaty to eliminate double taxation of companies arising from intra-group transactions (90/436) of 23 July 1990 and the international treaties to avoid double taxation."

The cost structure of a stand-alone company might differ fundamentally and its profit can be lower as a result. As part of an international group, a Belgian company may directly or indirectly benefit from certain attributes not available in a stand-alone situation. Excess profit can arise by the use of group synergies or corporate organizational (or "going concern") attributes like legally unprotected assets (know-how), barriers to entry, specific means of business organization, efficient experienced staff, a budget process or a stock control system and arise from transferring new activities to Belgium or free access to group intangibles (goodwill, know-how, access to new markets, client and supplier networks, reputation, etc.). Belgian companies are therefore only taxed on profits commensurate with their own functions, assets and risk profile, assessed on a stand-alone basis.

For the purposes of claiming a downward adjustment further to section 185(2) of the ITC, a ruling from the RO is preferable to adjustment procedures under the EU Arbitration Convention or the tax treaties, given its advance character. Cases are decided on the basis of the arm's length principle.

The provision also applies to Belgian establishments of multinational groups, following amendment of section 235, second paragraph of the ITC.

9.3. Abnormal or gratuitous benefits

Overlapping to a degree with the arm's length principle is the Belgian domestic law concept of abnormal or gratuitous benefits, which, though predating the introduction of the arm's length principle into Belgium, ought properly to be interpreted in a manner consistent with that principle. These benefits are open to challenge by the Belgian tax office when they are granted or received by Belgian taxpayers.

A benefit is abnormal if it is contrary to the customary way of things, established rules or usage, or if it is contrary to what is usual in similar cases. Gratuitous benefits are those granted other than in performance of an obligation or granted for no consideration.

The concepts are applied consistently by the RO, as has been expressed in its Decision 900.221 of 8 September 2009:

> 13. Legal scholars have sought to clarify the term "abnormal or gratuitous benefits" consistently, inter alia on the basis of the case law.

> 14. Thus, under the Supreme Court judgment of 29 April 2005 (Court of Cassation, 29 April 2005, www.cass.be), where a court is called upon to rule on the abnormal or gratuitous character of a benefit, it may consider whether the benefit is received/granted in abnormal circumstances in the context of transactions that cannot be justified by economic reasons but only by fiscal reasons. According to past cases decided by the Court (*Craft* (26 April 1966, Pas., I, 1081) and *Au Vieux Saint-Martin* (23 February 1995, FJF, 95/63)), abnormality should be interpreted broadly by evaluating not only the consideration for the transaction, but also the transaction itself.
>
> 15. The concept of "abnormal or gratuitous benefit" is the transposition into Belgian law of the arm's length principle, as set down in international tax treaties. A transaction does not meet the arm's length standard if it would not have been contracted between independent parties in comparable circumstances.
>
> 16. In general, the concept of an abnormal or gratuitous benefit requires that a company actually received a benefit that is abnormal or gratuitous. Benefit means any advantage that enriches the recipient without there being equivalent compensation.[41] Such a benefit may be considered abnormal if it is contrary to the usual manner of carrying on business, or contrary to the rules, custom or established practice in identical or comparable situations. A benefit is gratuitous if the entity receiving the enrichment does not require to compensate the entity granting the benefit.[42]
>
> 17. The criteria for determining whether benefits granted are normal, abnormal or gratuitous comprise the economic conditions at the relevant time, the respective positions of the parties and the facts in question.[43]
>
> 18. In certain, specific circumstances, it is acceptable from a commercial point of view for related companies to help group companies in difficulty, particularly to maintain their commercial and financial reputation."[44]

41. Reference to Antwerp Court of Appeal, 13 May 1991, *AME NV*, Jurisprudence fiscale, 91/149, 26/16 of the Commentaries on the ITC.
42. Reference to Supreme Court case of 31 Oct. 1979, *Regents Park Land Co. (Belgium) NV*, Bulletin 590, p. 2356.
43. Reference especially to the cases from Mons Court of Appeal of 3 Nov. 1989 and Antwerp Court of Appeal of 10 May 1994.
44. Reference especially to the cases decided by Antwerp Court of Appeal on 10 May 1994, Mons Court of Appeal on 18 May 2001, Leuven Court of First Instance on 6 Feb. 2004 and Brussels Court of First Instance on 20 Apr. 2005.

9.3.1. Abnormal or gratuitous benefits granted

Abnormal or gratuitous benefits granted to a foreign related entity may be added to the tax base of the Belgian company granting them (section 26 ITC):

> Where an undertaking established in Belgium grants abnormal or gratuitous benefits, then, subject to the provisions of section 54, the benefits are included in its own profits unless those benefits qualify for determining the taxable income of the recipient.
>
> Notwithstanding the limitation set out in the first paragraph, abnormal or gratuitous benefits are included in own profits where the benefits are conferred upon:
>
> 1° a taxpayer falling under section 227[45] with which the undertaking established in Belgium has any direct or indirect link of interdependence;
>
> 2° a taxpayer falling under section 227 or a foreign establishment that, by virtue of the laws of the country where it is established, is not subject to income taxation or is subject to a significantly more favourable tax regime than that to which the undertaking established in Belgium is subject;
>
> 3° a taxpayer falling under section 227 having common interests with a taxpayer or establishment falling under (1°) or (2°).

Section 26 is regarded as the embodiment of the arm's length standard of article 9(1) of the OECD Model. The common aim of both rules is to prevent artificial profit shifts within multinational enterprises.

However, the scope of section 26 is broader. It applies to any artificial Belgian or cross-border transfer of profits, irrespective of whether it takes the form of an artificial increase in charges or renunciation of potential profit by a Belgian company in favour of another taxpayer, whether related or unrelated, whether a physical or a legal person. The tax authorities need only evidence that the transfer entails an abnormal or gratuitous benefit. However, there is no tax charge if the Belgian taxpayer can evidence that the benefit is included in the beneficiary's tax base.

The second paragraph of section 26 sets out three specific cross-border situations in which no such evidence will be accepted: (i) the first is primarily intended to prevent a shift of Belgian profits to foreign related undertakings; (ii) the second is mainly aimed at preventing Belgian profits being shifted to foreign individuals or legal persons or foreign PEs (whether related or otherwise) established in tax havens or foreign countries with privileged tax regimes; and (iii) the third is primarily directed against benefits in favour

45. I.e. a non-resident corporate entity or individual.

of a "clean" foreign beneficiary (an individual or a legal person) acting as an intermediary for a foreign taxpayer and whose relationship of interdependence with the Belgian company is hard to establish, or to a PE set up by a "clean" foreign taxpayer in a tax haven or a foreign country with a privileged tax regime.

9.3.2. Abnormal or gratuitous benefits received

Under section 207 of the ITC,[46] abnormal or gratuitous benefits received by a Belgian company may not be offset against its current year or carry-over tax losses or other tax reliefs. The explanatory statement to the Tax Reform Bill also abolished the then administrative tolerance on benefits received from foreign taxpayers as from assessment year 2004.

It has been said in an answer to a parliamentary question[47] that abnormal or gratuitous benefits received will always be liable to tax, even if the company is loss-making: prior or current year tax losses are not offset against such benefits, though they can be carried over to future years.

The restrictions on abnormal or gratuitous benefits received also apply as between Belgian companies.

9.4. Belgian TP audit practice

As in most countries, the Belgian tax authorities have in recent times sharpened their interest in TP matters, resulting in their setting up a specialist TP audit department on 1 July 2006[48] and issuing a new update[49] to their TP practice note. The new practice note takes account of the European Code of Conduct on TP documentation.[50] It requires tax inspectors to take a pragmatic, flexible attitude in TP audits. It also contains an indicative list of "red flags" that might trigger an audit, such as the use of tax havens and back-to-back or circular arrangements. It refers to commonly encountered cases, including structural loss situations, reorganizations, exits of functions and management fee payments.

46. As amended by the Corporate Tax Reform Act of 24 Dec. 2004.
47. Parliamentary question 340 by L. Van Campenhout, 2 Apr. 2004.
48. AOIF Circular 26/2006, 4 July 2006, Cp.221.4/A/601.321.
49. AOIF Circular 40/2006, 14 Nov. 2006, Ci. RH. 421/580.456.
50. Approved by the EU Council on 7 June 2006.

Advance TP documentation is not a strict formal requirement, but a prudent manager will develop a proactive attitude to it, including collecting written documentation to underscore the arm's length character of the TP applied. Of course, the *most* prudent attitude is to gain legal certainty with a positive ruling. Tax inspectors are open to documentation in a foreign language, especially pan-European or worldwide TP studies, TP group policies or agreements with foreign entities. In line with the Code of Conduct, the practice note introduces into a Belgian context the concepts of "masterfile" and country-specific documentation. It also confirms the acceptability of the current practice of pan-European benchmarking studies.

9.5. The five TP methods described in the OECD Guidelines

9.5.1. Traditional transactional methods

(i) *Comparable uncontrolled price* (CUP) *method*: Compares the price for property or services transferred in a controlled transaction to that charged for those transferred in a comparable uncontrolled transaction in comparable circumstances.

(ii) *Resale price method*: Used in fixing TP between affiliated companies, under which an arm's length price is ascertained by deducting a normal profit margin from the resale price at which a buyer of inventory assets resells them to an unrelated party.

(iii) *Cost-plus method*: Uses the cost incurred by the supplier of property (or services) in a controlled transaction. An appropriate cost plus markup is added to this cost to make an appropriate profit in light of the functions performed (taking into account assets used and risks assumed) and market conditions, and establish an arm's length price for the original controlled transaction.

9.5.2. Transactional profit methods

These are TP methods that examine the profits from particular controlled transactions in favour of one or more of the participating associated undertakings.

(i) *Profit split method*: Allocates the combined operating result from a transaction among the various parties by determining the value of each party's contribution to the result. Appropriate where the transactions are so closely linked that they cannot be evaluated separately.

(ii) *Transactional net margin method* (TNMM): Examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction (or transactions aggregated under the principles in Ch. I of the OECD TP Guidelines).

Where the CUP and cost-plus methods cannot be applied, the TNMM is a reasonable alternative to determine an arm's length compensation (Decision 900.009 of 25 August 2009).

9.6. Revised Chapters I-III of the OECD TP Guidelines

On 22 July 2010, the OECD revised Chapters I-III of its TP Guidelines for Multinational Enterprises and Tax Authorities,[51] placing considerably more emphasis on the processes adopted by taxpayers, their reliability in applying the arm's length principle and the quality of the analysis supporting them. The OECD has reaffirmed that the arm's length principle is the fairest and most reliable basis for determining where profits fall to be taxed.

The OECD previously suggested that the CUP was the preferred method, followed by the other "traditional transactional" methods (resale price and cost-plus) followed, "exceptionally", where the first three methods cannot be applied reliably, by the "last resort" profit-based methods (TNMM and profit split). This distinction has now been removed. The basis for choosing one method over the others is now expressed as "finding the most appropriate method for a particular case", though it is not necessary to examine each in detail in every case. A certain hierarchy is maintained in that the CUP method is to be favoured. So, if there is an even choice between the CUP method and the TNMM, for example, CUP should still prevail.

The use of publicly available databases in applying profit-based methods requires high standards of comparability. The OECD endorses the use of an interquartile range, albeit in terms that do not preclude the use of other statistical approaches that may be appropriate in the circumstances.

51. Source: PwC Pricing Knowledge Network Publication of 22 July 2010.

In addition to the five comparability factors that have been part and parcel of the Guidelines since 1995, a nine-step process has been added as an example of how the revised Guidelines can be applied in practice. They now pay close attention to the selection of profit-level indicators and provide detailed guidance on the commonest, including return on sales, return on cost and return on capital (or assets), with dedicated sections on Berry ratios, use of which is now endorsed in certain limited circumstances, though discouraged in others.

The Guidelines now contain more details on when profit split is likely to be most appropriate and, importantly, what its limitations and disadvantages are in practice and how it should be applied. One key element is the importance of intangibles and, in the language that has finally emerged in the past few months, *valuable, unique intangibles* – as distinct from intangibles that may be more routine in nature or of little value. Where two or more parties have valuable, unique intangibles, the profit split method is probably most appropriate. The Guidelines also explicitly express a preference for objective, rather than subjective, profit-split factors.

The attractiveness of the profit split method to tax authorities is that it is two-sided: it requires detailed information on all relevant businesses, wherever they are located, and a calculation of combined profits. Balance is provided by making it clear that, where one-sided methods are more appropriate, only limited information on function and risk is required from parties other than those the method is being applied to, and that detailed financial information on them is not needed.

9.7. Belgium's TP ruling practice

Belgium's rulings are not of the nature of a "safe harbour": each decision is individual, dealing with the law's application to a specific situation or transaction, taking account of the applicant's individual circumstances. Nevertheless, the fact that Belgium has had a rulings process for relatively long time and the transparency with which decisions are published allow certain trends in TP rulings practice to be discerned.

9.7.1. How applications are formulated

Applications normally request confirmation that the envisaged compensation for intra-group dealings is at arm's length in line with section 185 of the ITC and will not qualify as an abnormal or gratuitous benefit granted (section

26) or received (sections 79 and 207). Some also seek confirmation that the beneficiaries of the services will not be deemed to have a PE in Belgium.

9.7.2. Validity of rulings

In line with the statute, most are issued for five years, but are renewable. However, they are only valid as long as the facts remain unchanged. If there is doubt as to whether a change is relevant, it is advisable to contact the RO and request an addendum or, if need be, file a new application.

9.7.3. Markup percentages

The envisaged compensation does not need to be equal to the median from the benchmarking studies that have been carried out, provided any difference can be satisfactorily explained (e.g. lower risk).

9.7.4. Interquartile range

The outcome has to fall within the interquartile range arrived at by the taxpayer's study. If the cost-plus method is applied for intra-group services, the markup is applied to operating costs. If only one markup is to be applied to different categories of services, a weighted average markup is calculated based on a key (e.g. full-time equivalents per specific line of business).

9.7.5. Disbursements

Disbursements must be recharged, but without a markup. These are "run-through" expenses charged by a third party or related company to the service provider – which does not add any value – and that already include a profit margin and could conceivably have been charged directly to the ultimate beneficiary.

9.7.6. Net finance costs

Net finance costs may be recharged without a markup, but only have to be if they are material (though the RO has a strong general preference for recharges).

9.7.7. Exceptional costs

Exceptional costs (e.g. redundancy costs) have to be recharged – without a markup – if the result of a decision at group level.

9.7.8. Standard cost-plus formula

The standard cost-plus formula is "operating costs (excluding disbursements) plus a markup percentage plus disbursements and net finance costs and exceptional costs where they are the result of a decision taken at group level."

9.7.9. Cap and floor

Decisions on sales support services increasingly include a cap and floor mechanism, only requiring adjustment between the compensation based on budgeted figures and the actual figures below a floor and above a ceiling with a range of plus and minus 10% (*See* Decision 700.223 of 18 December 2007).

9.7.10. Financial crisis

The financial crisis since the fourth quarter of 2008 and uncertainty about how the economic situation will develop in the near future have given rise to certain problems. Since benchmarking studies are perforce based on past figures, the impact of the crisis has not yet filtered through, which means that ranges and medians are liable to be over-optimistic. This is an additional argument for applying a markup below the median.

9.7.11. Exit goodwill

As opposed to buy-in payments (Decision 800.231 of 13 January 2009), exit goodwill becomes an issue in times of crisis when functions and assets are moved outside Belgium as part of a restructuring. The issue may be whether the Belgian company is entitled to an exit payment, e.g. for goodwill (Decision 400.382 of 17 February 2005) or in relation to a conversion (Decision 600.085 of 13 April 2006), though not where assets or functions were initially acquired at no cost (Decisions 600.268 of 5 December 2006 and 600.332 of 19 June 2007).

9.7.12. Cost-plus method for intra-group services

In most cases of intra-group services, the cost-plus method is applied. To calculate the arm's length cost plus markup, a search will be done in a Belgian (the Belfirst) database in some cases or, more frequently, a pan-European benchmarking study (Amadeus) will be done, resulting in statistical interquartile ranges and medians. The interquartile range (IQR) is the range of values between the first and third quartiles (a quartile being any of the three values that divide the sorted data set into four equal parts, so that each part represents one quarter of the observed samples). The median is the value that divides the total frequency into two halves (e.g. in a set of values comprising 1, 4, 7, 8, 10, 11, 23, 45 and 52, the median is 10).

9.8. What goes into a TP ruling application?

Applications for TP decisions must include the following detailed documentation:

(1) a detailed description of the features of the related-party transactions:
   - (a) the services rendered and the recipients of the services, who will be charged for them;
   - (b) the group structure (legal entities, business structure) and general activities (including the shareholding structure and the applicant's holdings);
   - (c) intra-group transactions and the contractual relationships between group members (including copies of the relevant agreements);
   - (d) the functions carried out and risks incurred by the relevant parties (based on functional and risk analyses);

(2) any IP (indicating its ownership);

(3) in so far as possible, a comparison of the relevant transactions with transactions between independent companies;
   - (a) the selected TP method and the strategy for selecting independent comparables given the functions performed (which can be categorized) and the risks incurred plus the relevant markets and data;
   - (b) the selected comparables (if per category of functions), e.g. in external databases (which are to be named);
   - (c) the arm's length compensation for the functions to be performed;
   - (d) if the cost plus method is gone for, the application must state the cost base to which the markup will be applied;

(e) any other factors having an impact on comparability (economic circumstances, business strategies, etc.).

Before performing a benchmarking study based on an external database, the applicant can submit the potential selection criteria to be used for the comparables search with a view to determining an arms' length compensation (geographic area, factors to be taken into account, envisaged floors and ranges, means of finance, etc.). The selection criteria can be agreed at a pre-filing meeting. If only one global percentage is to be proposed for different categories of functions, then a weighted average must be used. The benchmarking study has to include data for the last four book years that are available, at least three of which must have been profitable. Companies with structural losses must be ruled out.

9.9. Notice on simplified TP studies

In a notice of 22 June 2009,[52] the RO describes when a simplified TP study can be accepted. In principle, any request for a TP decision must include a detailed functional analysis and a risk analysis to support the proposed compensation method and markup percentage. However, to make it easier to file TP applications, the RO take a practical approach in certain cases by allowing a simplified benchmark study. The main simplification is that, besides the functional analysis, when searching for and selecting comparables, the applicant only has to use the internal search robot available within the relevant databases without time-consuming manual and Internet-based fine-tuning. In these cases, the RO will do its own benchmarking study. The study also has to state the reasons for the proposed method and markup.

9.10. Bilateral and multilateral APAs

Bilateral APAs involve two tax authorities; multilateral APAs involve three or more. According to the OECD,[53] bilateral APAs are becoming more popular because they proactively prevent disputes and, over the long term, are a cost-effective tool for both taxpayers and governments. Where a programme is available, a taxpayer may request a bilateral APA with respect to specific cross-border transactions, which is dealt with via the mutual agreement procedure article in the relevant tax treaty. Once final, bilateral APAs provide

52. Published at www.ruling.be.
53. Online at: www.oecd.org.

an increased level of tax certainty in both tax jurisdictions, thus considerably reducing the likelihood of double taxation. A pragmatic means of securing a bilateral APA can also be to make parallel ruling applications in the two countries involved, but in such a case there remains a risk that the two tax authorities could come to different conclusions.

In Belgium, both bilateral and multilateral APAs are possible, in application of article 25(1) of most of its double taxation treaties. It generally takes about a year to get an APA in straightforward cases. Extensions take 1 to 2 years, depending on the extent of any changes; large cases can take 2 to 3 years. To date, there has been limited experience with APAs, most of them being bilateral. The RO can provide assistance in examining TP files. The first multilateral decision was issued in March 2004, involving Belgium, the Netherlands and France.[54] The case concerned a listed company's profit split mechanism with entities in those three countries.

Applications for bilateral and multilateral APAs must be lodged at the following address:[55]

(in Dutch)	(in French)
Centrale diensten AOIF – dir. III1	Services centraux AFER – dir. III1
North Galaxy	North Galaxy
Koning Albert II-laan, bus 32	Avenue du Roi Albert II, boîte 32
1030 Brussel	1030 Bruxelles

54. Fisc. Act. 2004, 17/2-4.
55. For the attention of Mrs Sandra Knaepen, First Finance Attaché (tel.: +32-(0)2-576-2411; email: sandra.knaepen@minfin.fed.be).

Appendix 2

Simplified Transfer Pricing Study: Notice of 22 June 2009

A. When is a simplified transfer pricing study acceptable?

The Rulings Office may accept a simplified transfer pricing study from companies whose operations are limited to one or more the following activities:

1. preparatory activities;
2. auxiliary activities;
3. providing information to clients and customers;
4. activities contributing passively to sales;
5. purchasing raw materials and excipients, finished products and trade goods in their own name or in the name and for the account of group companies for which they are intended;
6. storage, administration and packaging of products under point 1(5) where the activities are limited to simple procedures to maintain the goods in good condition during their storage and/or to prepare them for distribution or resale;
7. booking orders made by non-members of the group and preparing and mailing order confirmations, without accepting the orders in any way;
8. sale and/or transport and delivery of the products under 1(5) to or on behalf of group companies;
9. preparing and mailing sales invoices (invoices on behalf of non-members of the group must be issued in the name and for the account of the group members that have purchased the products from these suppliers – payment of the invoices may not be made to the supplier itself);
10. financial, banking, VAT, customs, excise and administrative formalities in respect of these activities.

B. What should the simplified study contain?

1. the characteristics of the services;
2. a risk analysis;
3. a functional analysis;
4. details over at least four accounting years;
5. comparables may not be negative in all four book years;
6. comparables with an overall negative percentage over all four book years must be excluded;
7. in searching for comparables, only the database search engine may be used;

8. if, for instance, only one markup is required for different functions, it must be based on a weighted average (e.g. the relevant workforce);
9. the selected TP method and any proposed markup must be supported by reasons.

C. How will the Rulings Office operate?

1. The Rulings Office will carry out a benchmarking study internally.

2. If the applicant's proposal falls within the range fixed by the Rulings Office, then the Rulings Office can accept the simplified study; if not, an additional analysis has to be done of the study used.

D. For what services will the Rulings Office certainly not accept a simplified study?

1. requests in respect of section 185, second paragraph (b), Income Tax Code (excess profits);
2. finance spreads;
3. sales transactions (e.g. commissionaires, limited-risk distributors);
4. production functions (e.g. contract manufacturers).

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5. ALTERNATIVE DISPUTE RESOLUTION IN BELGIAN TAX LAW

Alternative Dispute Resolution in Belgian Tax Law
(Capita selecta)

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Overview

I. Towards a renewed relationship?
II. The 'ombudsman' and tax mediation
III. ATRs/unilateral APAs
IV. Informal tax agreements
V. Comparison
VI. Questions

I. Towards a renewed relationship?

- Fundamental debate on complex, extensive, variable, uncertain and vague income tax law
- Change of mentality within the tax administration (Tax-on-web, call center, ...) = 'COPERFIN'
- From a 'conflict model' to a 'dialogue model' concerning a more mutual and cooperative approach with mutual trust and transparency (so-called 'enhanced' relationship)?

➢ Two keywords: *tax compliance* and *legal certainty*
➢ Legally organized ADR and informal 'arrangements'

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II. The 'ombudsman' and tax mediation

'Ombudsman'

- March 13, 1995 (federal) and July 7, 1998 (Flemish)
- For any party with a legal interest
- Independent government service (depends on the legislative power) – to be consulted after complaints department of the tax administration
- Mediation after an improper performance of the tax administration
- As soon as a disagreement occurs but before entering the administrative or judicial phase
- No fee
- Informal procedure

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II. The 'ombudsman' and tax mediation

Tax Mediation Service

- Federal Statute of April 25, 2007
- Service effective from June 1, 2010 onwards – leading committee renewed in April 2015
- For any party (taxpayer or tax authority) with a legal interest
- Autonomous service within the Federal Tax Authority (independent? impartial?)
- Only for taxes levied by the Federal Tax Authority (no Flemish gift/transfer and inheritance taxes any longer, but still these taxes of the other two Regions)
- After entering the administrative phase but before any administrative or judicial judgment – no suspension!
- No fee, informal procedure

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III. ATRs/unilateral APAs

Service for Advance Decisions in Tax Matters (Tax Rulings Service)

- Federal Act of December 24, 2002, effective from January 1, 2005 onwards (after regimes in 1993 and 1999) – leading committee renewed in 2010 en 2015
- **Definition of 'advance decision'**
  1. Binding legal decision
  2. Delivered by the Federal Service for Advance Decisions in Tax Matters
  3. In accordance with provisions in force (national, European, international)
  4. With respect to the application of tax law
  5. On specific (not hypothetic) situations
  6. Before any tax consequences ('advance')
  7. No exemption nor reduction
- **Procedure, publication and transparency**

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III. ATRs/unilateral APAs

Definition

"An **advance decision** is

a legal act by which

the Federal Tax Authority determines

in accordance with the provisions in force

how tax law will apply

to a particular situation or transaction

that has not yet produced any effects from a tax point of view"

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III. ATRs/unilateral APAs

1. Binding legal decision

- Binding for the entire Federal Service of Finance (from federal tax administration to local tax inspectors), unless:
  - the conditions to which it is subject are not met
  - the applicant described the situation or transaction incompletely or inaccurately, or essential elements have not been implemented as stated
  - changes in provisions of treaties, EU law, internal law that form a basis for the advance decision
  - the advance decision does not comply with treaty or EU or domestic law provisions
- Unilateral binding: the applicant (taxpayer) is not required to execute the presented operations (but then the ruling becomes invalid)
- Normally valid for 5 years unless a longer period is justified

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III. ATRs/unilateral APAs

2. Federal Service for Advance Decisions in Tax Matters (Tax Rulings Service)

- Regional service?

  E.g. NO ATRs from January 1, 2015 onwards for most Flemish inheritance/transfer and gift taxes

  Nowadays in Flanders: "interpretative questions" – answered by a committee of members of the Flemish Tax Authority – will be published (anonymous, individual or collective) on the website
- Leading committee (6), one president incl.
- Autonomous service within the Federal Tax Authority (independent of the central tax administration?): possibility of consultations between the Tax Rulings Service and the operational and central tax services within the Federal Tax Authority ('**Protocol**' of December 8, 2010, via 'central point of contact')

III. ATRs/unilateral APAs

Protocol:

- Tax Rulings Service requests the central tax administration for a general point of view; nowadays, this also happens during the prefiling procedure – anonymously:
  - Application of new legislation / no instruction yet
  - Problem of general policy / instruction incomplete (e.g. complex financial products)
  - Existing commentaries or instructions insufficient, incomplete or susceptible for change, or Tax Ruling Service wants to deviate from the point of view taken by the central administration that is generally applicable

III. ATRs/unilateral APAs

- If there is no agreement after consultation between central tax administration and Tax Rulings Service, the Tax Rulings Service decides (according to the Protocol):
  - unanimously, by preference
  - at the earliest, 10 working days after the central tax administration has been informed by the Tax Rulings Service – when this term cannot be respected, it has to inform the president of the Federal Taks Authority
- Better communication and consultation with central tax administration on: parliamentary questions, principial rulings, draft recommendations for public consultation, including comments received, …
- Six-monthly evaluation protocol: from last consultation (November 5, 2014) appears that the collaboration between the Tax Rulings Service and the central tax administration is generally rated very good

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III. ATRs/unilateral APAs

3. In accordance with the law

- ATRs *contra legem* (international, European, national) are not binding (tax treaties, statutes, secondary legislation as royal decrees)
- Very strong constitutional principle of legality

  Art. 170 Belgian Constitution: *no taxation without representation*

  = prohibited delegation of essential elements of taxation to the tax administration, unless exceptional circumstances and on the condition of confirmation by the parliament
  - allowed delegation of incidental, ancillary tax rules
  - ATRs are OK as long as very strict interpretation of essential elements

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III. ATRs/unilateral APAs

4. Application of tax law

- Decision about how tax law will be applied in the taxpayer's concrete situation
- Income taxes (PIT, CIT, non-resident income tax, legal entities tax), VAT, customs duties, registration duties
- Various tax matters relating to acquisitions of assets or shares, mergers, divisions, changes in control of companies with carry-over tax deductions, PE, TP, dividends received deduction, depreciation, provisions, capital gains taxation, benefits in kind, costs properly due by an employer, notional interest deduction, patent income deduction, VAT, copyrights, personal estate planning (only Brussels and Walloon regions since January 1, 2015), professional costs, tax residency, income from movable property, tax collection and prosecution,etc

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III. ATRs/unilateral APAs

5. Specific situation or transaction

- Individual situation
- No hypothetic question
- No precedent value to third parties: to obtain tax certainty, one should apply for a ruling oneself
- Rulings offer legal certainty with respect to the tax consequences of an operation – can be considered a powerful risk management instrument in tax planning terms

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III. ATRs/unilateral APAs

6. Before any tax consequences ('advance')

- Even after the transaction has occurred and after the income tax year in which the transaction occurred, but before filing the relevant tax return for that income tax year
- No roll-back impact
- No similar situations or transactions that have already produced effects for the applicant from a tax point of view or to an appeal or legal proceedings between the Belgian State and the applicant

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III. ATRs/unilateral APAs

7. No exemption nor reduction

- Art. 172 Belgian Constitution: '*No privileges at all, no exemption nor reduction of taxes can be levied except by statute*' = tax principle of equality
  - Similar cases must be treated equally, different cases unequally
  - Some excluded matters:

    Tax rates and calculation of taxes, amounts and percentages of taxes, tax declaration, examination and control, evidence, tax assessment, terms, professional secrecy, administrative sanctions, tax increase, collection or prosecution of taxes, bi- or multilateral cooperations, etc.
- Constitutional tax principle of legality

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III. ATRs/unilateral APAs

- With respect to income taxes, an advance decision may not be granted where:
  - at the time the application is lodged, essential elements of the transaction or the situation described relate to a country of refuge that does not cooperate with the OECD (list of 2000 – rulings about transactions with Luxembourg are legally possible – not on a black list);
  - the transaction or the situation described is devoid of economic substance in Belgium

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III. ATRs/unilateral APAs

Procedure

- Informal prefiling meeting: Report Court of Audit (2013): negative prefiling decision should be communicated to the central tax administration (from the annual report of 2014 onwards, these decisions will be generally published), should be not anonymously, should not be more than collecting information
- Mutual relationship between parties: all necessary information –spontaneously or on request – to the Tax Rulings Service (information disclosure)
- No fee, but consultancy costs
- [2014: Prefiling = 1186 / Filing = 756]

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Prefiling	250	575	642	698	742	866	866	951	1103
Filing	375	570	553	465	500	576	576	592	647

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III. ATRs/unilateral APAs

- Decision with majority of votes of the leading committee (mostly unanimously)
- Term of 3 months (no strict term) from filing onwards – depends on the complexity of the ruling application (can be shorter after a prefiling)
- Copy of the formal application to the central tax administration and of the advance decision to the the local tax inspectors

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III. ATRs/unilateral APAs

Publication

- Individual, anonymous and summarized publication of ATRs/unilateral APAs on www.fisconetplus.be
- Collective, anonymous and summarized publication in the annual report on www.ruling.be, incl. negative decisions of the prefiling procedure – with filenumber (from the annual report of 2014 onwards)
- (Individual/collective) publication balances on the divide between transparency and professional secrecy
- 93% of all rulings is published: between January 1, 2005 and February 3, 2015 630 of 4.770 rulings were not published – 9,8% of 630 rulings were excess profit rulings (8 EPR were published)

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III. ATRs/unilateral APAs

Transparency

- Tax rulings are added on the taxpayer's file
- Belgium shares its rulings with other Member States upon request

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IV. Informal tax agreements

Informal tax agreements between taxpayers and local or central tax administrations

- Parallel with the possibility of an ATR
- Flourishing and daily practice (with a long tradition) to accomplish legal certainty in Belgium
- BUT they create legal uncertainty itselves: can be cancelled for future tax years, can be cancelled for past tax years if the agreement is *contra legem*, no standard proceedings are available, etc.

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V. Comparison

Informal tax agreements	ATRs en unilateral APAs
No legislation, only some extraordinary specific legislation	Federal Act of December 24, 2002 (effective from 2005 onwards)
With the central, regional or local tax administrations	Autonomous service within the Federal Tax Authority – internal protocol for cooperation
Direct and indirect taxes (PIT, CIT, VAT, ...) Questions of facts, no exemptions nor reductions	Direct and indirect taxes within the competence of the Federal Tax Authority, some excluded matters
Ex anterior and posterior	Ex anterior
Binding between the parties according to the "principles of proper administration" – possibility of proof of a lack of consent	Binding for the entire Federal Service for Finances (incl. local tax inspectors) according to the law
No procedure	Prefiling meeting and formal filing meeting
No publication	Individual anonymous summary as publication and/or in the annual report
No communication	Internal communication

VI. Questions

Whether and to what extent do tax 'arrangements' (informal tax agreements *and* ATRs/APAs) provide legal certainty?

- Does the Belgian Constitution allow agreements with the tax administration? (in principle, "yes")
- Are there any international, European, constitutional or administrative limits to take into account? ("yes")
- Is Belgian tax law entirely of public order? (evolution to "not entirely")
- Is there any unity of tax policy? (evolution to "yes")
- What is the difference between interpreting the law and qualifying facts? (question of "law"/question of "facts")
- What is the legal qualification and its consequences? (unclear)
- Is the taxpayer legally protected? (yes and no)

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VI. Questions

1. Legal limits and possibilities?

- **International level**:
  - OECD report 'Harmful tax competition: an emerging global issue'
  - OECD TP Guidelines for Multinational Enterprises and Tax Administrations (APA)
  - BEPS
- **European level**:
  - EU Code of Conduct for Business Taxation
  - EU APA Guidelines
  - State aid rules

Belgian excess profit rulings: Belgium complies with the OECD TP Guidelines and BEPS (dixit the former president of the Tax Rulings Service)

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VI. Questions

- **National level**
  - Belgian Constitutional tax principles of legality (art. 170 Constitution) and equality (art. 172 Constitution)
  - Other limits:
    * Public order character of tax law? Court of Appeal of Brussels January 8, 2014: tax law is not entirely of public order (contra Supreme Court: no tax agreement on a question of law)
    * General principles of proper administration (principle of legal certainty, legitimate expectations, ...)

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VI. Questions

2. Legal qualification?

- Widely varying qualifications: from unilateral individual administrative act (ATR) to informal agreement
- On the divide between public law and private law
- Alternative approach in favour of the legal protection of the taxpayer

3. Legal consequences?

- Material law
  - Between parties
  - Third parties: no binding precedent
- Procedural law
  - Tax Rulings Service controlled by the Parliament (answering questions on the annual report) and marginal control by the Belgian Court of Audit (report February 2013)
  - Legal recourse (Court of First Instance Mons 2010: acceptance of legal interest)

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