LOYENS LOEFF

TAX

The Belgian Corporate Income Tax reform 2018-2020

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Belgium enacted a major corporate income tax reform at the end of 2017. However, the corporate income tax reform Act was rushed through Parliament and was therefore in need of some improvement. Various measures have therefore in the meantime been modified. Some of the tax reform measures have also been further developed through Royal Decrees.

The implementation date of the numerous measures varies. Most of the measures took effect as of 2018 and 2019. Other measures will only take effect as of 2020. A general overview is depicted in the annex.

The details of the entire corporate income tax reform, including the amendments made over the past years, are outlined below. Please note that this overview does not contain the corona measures that have been introduced in the meantime. An overview of these corona measures can be found **here**.

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Annex

1. Corporate Income Tax ('CIT') rate

1.1 Nominal CIT rate

The nominal CIT rate will gradually be reduced from 33.99% to 29.58% in 2018 and to 25% in 2020. Small and medium sized enterprises (SME's) benefit from a reduced rate of 20.4% on the first tranche of EUR 100,000 taxable income as of 2018 (further decreased to 20% by 2020). This amendment can be summarized as follows:

Nominal CIT rate	2018 - 2019	2020
Non-SME's	29.58%	25%
SME's taxable income ≤ EUR 100,000	20.40%	20%
SME's taxable income > EUR 100,000	29.58%	25%

The definition of 'SME' for purposes of the reduced rate is adjusted as well. A SME is now defined as a company that fulfils all of the following conditions:

- In accordance with article 15, § 1-6 of the Belgian Companies Code, the company may not exceed more than one of the following criteria (a) annual average number of 50 employees; (b) annual turnover of EUR 9,000,000 (excl. VAT); (c) a total balance sheet of EUR 4,500,000 (if applicable to be determined on a consolidated basis).
- The company pays a minimum annual remuneration of EUR 45,000 (or, if lower, at least the amount of the taxable income of the company)) from the 5th taxable period following the establishment of the company, to at least one company manager that is a natural person.
- The company's shares are held for more than 50% by natural persons.
- The company is not an investment company.
- The company does not hold participations for an acquisition value that exceeds 50% of either the revalued paid-up capital or the paid-up capital, taxed reserves and recorded capital gains (participations of at least 75% being excluded for the calculation).

1.2 Reduced CIT rate

- Companies with certain tax-exempt reserves will be temporarily (during assessment years 2021 and 2022) encouraged to convert these amounts into taxed reserves at a reduced CIT rate of 15% (further reduced to 10% subject to a reinvestment condition). The qualifying tax-exempt reserves include for example the investment reserve of 1982, the investment reserve that existed at the end of the last taxable period prior to 1 January 2017 to the extent the investment period has expired and the reinvestment condition was fulfilled and the exempt reserve in relation to the 20% cost deduction permitted above the 100% deduction that existed at the end of the last taxable period prior to 1 January 2017. The measure applies as a minimum taxable basis.
- The special exit tax rate for Belgian REITs and SREIFs is reduced to 12.75% for transactions that occur as of 1 January 2018 and will be increased again to 15% for transactions that occur as of 1 January 2020.

2. Corporate Income Tax base

2.1 Provision for risks and charges

A provision for risks and charges that is recorded as of assessment year 2019 (relating to taxable periods starting the earliest on 1 January 2018) will only be treated as a tax free provision if the risks and charges result from a contractual, legal or regulatory obligation (other than accounting regulations). Provisions that are recorded on a voluntary basis, for example for maintenance costs, are disallowed for tax purposes. The new rule also applies to increases of existing provisions.

In order to avoid that tax-free provisions are recorded in order to benefit from the new lower tax rates upon reversal at a later stage, an anti-abuse provision is introduced. Reversals of provisions that are recorded between 1 January 2017 and 30 December 2020 will be taxed at the CIT rate that was applicable when the provision was recorded. In this respect, the oldest amounts of the provision are deemed reversed first.

2.2. Depreciations

For corporate income tax purposes, the double declining depreciation method is abolished.

Furthermore, the obligation to depreciate assets on a *pro rata temporis* basis during the year of acquisition is extended to SME's.

Finally, SME's are given the possibility to either deduct the ancillary costs related to the acquisition of tangible or intangible fixed assets at once or opt for depreciation but if they opt for the latter, they will be obliged to depreciate these costs in line with the asset to which the ancillary costs relate (as it is already the case for non-SME's).

These changes apply to the assets acquired or put in place as from 1 January 2020.

2.3. Matching principle

The matching principle is introduced in tax law. Expenses relating to a subsequent tax year will consequently only be deductible in that following tax year. This implies for example that prepaid rent can no longer be deducted in the year of payment to the extent the rent relates to the subsequent years. The rule applies to assessment year 2019 relating to the taxable period starting the earliest on 1 January 2018.

2.4. Tax deductibility of expenses

Various changes are introduced regarding the tax deductibility of expenses. Unless indicated otherwise, the new rules apply as of 2020 (to tax assessment year 2021 relating to the taxable period starting the earliest on 1 January 2020). The rules can be summarized as follows:

- Deductibility of administrative fines and penalties will be disallowed even if these fines are not of a criminal nature or relate to a deductible tax.
- The tax deductibility of car expenses will be amended as follows:
  - The (formula that determines the) percentage of tax deductibility will be:
    - For vehicles with CO_2-emissions equal to or greater than 200 g/km: 40%.
    - For other vehicles: 120% - [0.5% x coefficient x CO_2 g/km] with a maximum of 100% and a minimum of 50%.
      - ✓ The coefficient will equal 1 for diesel vehicles and 0.95 for other vehicles. The coefficient will be reduced to 90% if the vehicle is equipped with a natural gas engine and has a taxable power of less than 12 fiscal horsepower.
      - ✓ For plug-in hybrid vehicles that have a battery with an electric energy capacity of less than 0,5 Kwh per 100 kg of the vehicles weight or if the vehicle emits more than 50 grams of CO_2 per kilometer (so called 'false hybrids'), the CO_2 emission will be ascertained based on the non-hybrid equivalent with the same fuel. If there is no equivalent, the CO_2 value will be multiplied by 2.5. An exception applies to 'false hybrids' purchased prior to 1 January 2018.
      - ✓ With respect to the CO_2 emission, the law does not clarify whether this emission should be determined based on the WTLP value or rather the NEDC value. According to the FAQ of 25 March 2020, the taxpayer can choose if both values are known. If a vehicle only has a WLTP value, the WLTP CO_2 value applies. If a vehicle only has a NEDC value, the NEDC 1.0 CO_2 value applies.
    - The tax deductibility of fuel expenses will no longer be determined at a rate of 75% but will be aligned with the regime applicable to the other car expenses.
- The 120% deductibility of costs with respect to the organization of common transportation for employees, security costs and company bicycles is reduced to 100%.
- The tax on secret commission will no longer be tax deductible.
- The discount for debt relating to non-depreciable fixed assets recorded as a cost will not be tax deductible to the extent the purchase price is lower than the actual value plus the discount.
- Interest is only tax deductible to the extent that the interest rate does not exceed the market rate. For non-mortgage backed loans without maturity date the term 'market rate' is now defined as the MFI interest rate announced by the National Bank of Belgium for loans up to EUR 1,000,000 with a variable rate and initial rate fixation up to one year issued to non-financial companies concluded in the month of November of the calendar year before the calendar year to which the interest relates, increased by 2.5%. Please note that this interpretation will equally apply to the 1:1 thin capitalization rule. In addition, it is clarified that the 1:1 thin capitalization rule also applies to interests on outstanding receivables (recorded as a current account). The new rules apply to interest that accrue after 31 December 2019.

2.5. Foreign permanent establishment ('PE')

Changes to the PE-concept

The PE-concept under national law has been extended so

as to include PE's created via the commissionaire (or similar) arrangements. This adjustment is in line with the OECD report on the prevention of the artificial avoidance of permanent establishment status (action 7). Please note that in the framework of the Multilateral Instrument (MLI), Belgium initially did not opt for the possibility to address the artificial avoidance of the PE status through commissionaire arrangements. In the meantime, it has withdrawn its reservation in the final version of the ratification document. Belgium deposited the MLI ratification instrument with the OECD on 26 June 2019. The MLI entered into force for Belgium on 1 October 2019. Assuming that the MLI has already entered into force in the other contracting state, the MLI provisions will have effect with respect to withholding taxes on taxable events occurring on or after 1 January 2020 and for all other taxes, including corporate income tax, on taxable periods that begin on or after 1 April 2020.

Changes to the tax treatment of foreign PE's losses

Tax losses incurred by a PE of a Belgian company or with respect to assets of such a company located abroad and of which the income is exempt in Belgium by virtue of a double tax treaty, can no longer be deducted from the Belgian taxable basis as of tax assessment year 2021 (relating to the taxable period starting the earliest on 1 January 2020). The tax treatment of these losses in the foreign state is irrelevant. An exception is made for so-called definitive losses within the EEA. Definitive losses are losses that exist in a certain Member State upon the final termination of the activity or possession of the asset if these losses have not been deducted in that state and cannot be deducted by another tax subject in that state. If an activity is restarted within three years after the termination, there is a recapture of the losses deducted from the Belgian taxable basis.

If a double tax treaty does not provide for an exemption of foreign PE profits but does foresee a reduction of the Belgian taxes, the foreign PE losses can be deducted to the same extent. This is the case for the tax treaties that Belgium concluded with the Isle of Man, Uganda and the Seychelles. Only the latter treaty has currently entered into force.

2.6. Investment deduction

A temporary increase of the base rate of the investment deduction for SMEs applies. The investment deduction is a tax deduction that comes on top of the deduction of the depreciation of eligible assets. In order to encourage investments by SME's, the base rate would be increased to 20% calculated on the acquisition or investment value of fixed assets acquired or created between 1 January 2018 and 31 December 2019 by SME's.

2.7. Notional Interest Deduction ('NID')

As of assessment year 2019 (relating to taxable periods starting the earliest on 1 January 2018), the currently existing NID system, which is calculated on the basis of the adjusted accounting equity (so-called 'risk capital' or 'RC') at the end of the preceding taxable period, is reformed to a system in which NID is only granted with respect to an average five-year increase of the risk capital. The equity base to calculate the NID is equal to 1/5th of the positive difference between (a) the risk capital at the beginning of the taxable period and (b) the risk capital at the beginning of the fifth preceding taxable period. This implies that no NID can be applied if the difference is negative. Adjustments during the taxable period are not taken into account anymore.

Please note that several new anti-abuse provisions are introduced. First, a capital contribution by an affiliated company will be excluded from the risk capital if the contribution was financed with a loan and the affiliated company claims a tax deduction for interest payments on this loan. In addition, it is foreseen that the contribution of capital by or the fiscal value of a receivable towards a non-resident taxpayer or foreign PE that is established in a country with which Belgium does not exchange information is deducted from the risk capital unless the taxpayer demonstrates that the transaction can be supported by financial or economic motives.

The NID rate remains unchanged. The rates applicable for assessment year 2020 are 0.726% for non-SME's and 1.226% for SME's.

Example existing company (taxable period corresponds to financial calendar year):

FY	Risk Capital (RC)
2014	2,500
2015	2,000
2016	2,200
2017	3,000
2018	3,500
20189	3,700
Determination of NID for FY 2019	
RC at the beginning of 2019	3,700
RC at the beginning of the 5th preceding taxable period	2,500
Positive difference	1,200
NID base (1,200 x 1/5)	240
NID (240 x 0.726%)	**1,74**

Example: newly incorporated company (taxable period corresponds to financial calendar year)

FY	Risk Capital (RC)
2014	0
2015	0
2016	0
2017	0
2018	0
2019	3,700
Determination of NID for FY 2019	
RC at the beginning of 2019	3,700
RC at the beginning of the 5th preceding taxable period	0
Positive difference	3,700
NID base (3,700 x 1/5)	740
NID (740 x 0.726%)	**5,37**

2.8. Limitation to the deduction of (mainly) carried forward items resulting in a minimum taxable basis

The reform limits the deduction of certain tax attributes to 70% of the remaining taxable result exceeding EUR 1,000,000. In other words, a minimum taxable basis equal to 30% of the remaining taxable result that exceeds this amount is introduced.

The minimum taxable basis is calculated as follows: first, the result of the taxable period is determined under the normal rules. Then, in the following order, dividends received deduction of the year, patent income deduction, innovation income deduction, investment deduction and (as of 2019) the group contribution pursuant to the tax consolidation regime (see 2.9) are deducted (i.e. 'fully deductible tax attributes'). If after the above mentioned deductions, the remaining taxable basis exceeds EUR 1,000,000, the following deductions can only be applied to 70% of the taxable basis exceeding EUR 1,000,000, again in the following order: the current year notional interest deduction, carry-forward dividends received deduction, carry-forward innovation income deduction, carry-forward tax losses, and finally, carry-forward notional interest deduction. The excess can be carried forward to the following years. An exception to the minimal taxable basis exists for carry-forward tax losses incurred by start-up companies that qualify as SME during the first four taxable periods.

Example:

Items carried forward (Mio EUR)	Company A
Tax losses carried forward	6,000
NID carried forward	1,000
Calculation minimum taxable basis (Mio EUR)	
Remaining taxable result after deduction of the 'fully deductible tax attributes'	5,500
Maximum allowed utilization (1,000 + (5,500-1,000) x 70%)	4,150
Minimum taxable basis (30% x (5,500-1,000))	1,350
Items carried forward to the following years (Mio EUR)	
Tax loss carried forward	1,850
NID carried forward	1,000

2.9. A tax consolidation system

A group contribution regime is introduced as of assessment year 2020 (relating to the taxable period starting the earliest on 1 January 2019). Under the group contribution regime, a profit-making group company transfers, for tax purposes only, a part of its taxable profit (the so-called "group contribution") to the loss-making group company. The profit-making group company will deduct the group contribution from its taxable profit, while the loss-making group company will offset its current year losses against the group contribution received. The profitable company is obliged to compensate the loss-making company. The amount of this compensation must be equal to the corporate income tax that would have been due by the profitable company in absence of the group contribution regime.

The group contribution regime can be applied by Belgian companies and Belgian permanent establishments ('PE') of companies that are resident in the European Economic Area ('EEA'). Certain taxpayers that benefit from a special tax regime are excluded.

The group contribution regime requires a strong affiliation for an uninterrupted period of at least five years between the company granting the group contribution (i.e. the taxpayer that deducts the group contribution from its taxable basis) and

the loss-making company receiving it (i.e. the recipient of the group contribution). More specifically, there should be a direct participation of 90%. A Belgian or foreign company established in the EEA, recipient of the group contribution, is affiliated with the taxpayer making the group contribution if:

- The Belgian or the foreign company has a direct participation of at least 90% in the capital of the taxpayer; or
- The taxpayer holds directly at least 90% of the capital of the Belgian or foreign company; or
- At least 90% of the capital of the Belgian or foreign company is held directly by another Belgian or foreign company to the extent that this other company has a direct participation of at least 90% in the capital of the Belgian taxpayer.

Tax consolidation is achieved via a group contribution agreement that should be filed together with the income tax return. Parties to the agreement are the Belgian taxpayer and either a Belgian qualifying taxpayer or the Belgian permanent establishment of a qualifying foreign taxpayer. All the following conditions should be respected:

- The agreement relates to one and the same assessment year.
- The agreement mentions the group contribution. The amount of the group contribution is unlimited (and can thus exceed the loss incurred by the recipient of the group contribution) but the recipient cannot deduct the so-called tax deduction such as for example the dividend received deduction, carried forward tax losses and the notional interest deduction nor can foreign withholding taxes be credited against this amount. The (loss-making) qualifying Belgian taxpayer or the Belgian permanent establishment of a qualifying foreign taxpayer should include the amount of the group contribution in the income tax return as a profit of the taxable period concerned.
- The Belgian taxpayer (that transfers its taxable profits) pays a contribution to the loss making qualifying taxpayer in the amount of the tax saving resulting from the group contribution. This payment is not tax deductible in the hands of the payer and not taxable in the hands of the payee (i.e. the payment is fiscally neutral).

Example:

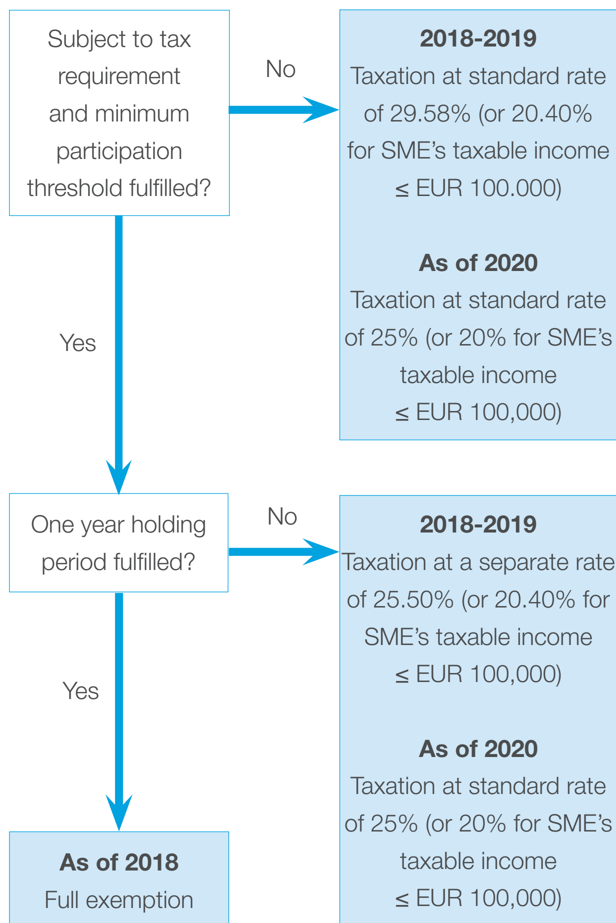
No tax consolidation	**Company A**	**Company B**
Taxable result	-2,000	5,000
Tax (25%)	0	1,250
Tax loss carried forward	2,000	0
Tax consolidation		
Taxable result	-2,000	5,000
Group contribution (determined in group contribution agreement)	2,000	-2,000
Taxable result (via correction in the corporate income tax return)	0	3,000
Tax (25%)	0	750
Effective group contribution payment from B to A (fiscally neutral)	500	-500

3. Changes to the Belgian holding regime

3.1. Changes to the tax treatment of capital gains on shares

- The conditions to benefit from the exemption for capital gains on shares are aligned with the conditions for applying the participation exemption (i.e. the dividends received deduction). This implies that the minimum participation threshold requirement of either 10% or EUR 2,500,000 acquisition value is extended to capital gains on shares. To the extent that the participation exemption can only partially be granted, the exemption of the capital gains on these shares will be granted to the same extent.
- The minimum capital gains tax on shares of 0.412% that was applicable to non-SMEs qualifying for the participation exemption is abolished.
- The current separate tax rate of 25% (to be increased with surcharges) on capital gains that are realised on shares within the one year holding period will be abolished as of 2020 since the standard corporate income tax rate will also equal 25%. For SME's which are eligible for the reduced CIT rate, the rate will however equal 20.4% on the first EUR 100,000 taxable income as of 2018 (20% as of 2020).

The CIT rate for capital gains can now be summarized as follows:



3.2. Changes to the tax treatment of dividends received/distributed

- As of 2018, the participation exemption regime for dividends received by a Belgian company is increased from 95% to 100%.
- As will be described below (see 5.2), an exemption of withholding tax is introduced – provided certain conditions are met - if a Belgian company distributes a dividend to a shareholder having a holding in the capital of the Belgian company of less than 10% but with an acquisition value of at least EUR 2,500,000.
- On 17 May 2017, the CJEU has ruled that the Belgian fairness tax (which can become due as a result of a dividend distribution under certain circumstances) is not in accordance with EU law in the specific case where a resident company redistributes dividends in a taxable period following the taxable period in which it received these dividends. On 1 March 2018, the Constitutional Court annulled the fairness tax entirely because it violates the principle of legality and the principle of equality. In general an annulment has retroactive effect. With the exception of the situation where the application of the fairness tax gives rise to a violation of EU law, the Constitutional Court decided to maintain the effects of the annulled act for assessment years 2014-2018 in order to take into account the budgetary and administrative difficulties resulting from the annulment. The abolishment of the fairness tax as was initially foreseen by the draft Repair Bill but was eliminated due its annulment in the meantime

4. Increase for insufficient prepayments

During the taxable period, companies have the possibility to make prepayments on the corporate income tax due. If no or insufficient prepayments are made, the corporate income tax due (as well as the separate assessment in case of insufficient managers' remuneration) will be increased with a non-tax deductible surcharge. For assessment year 2018 the minimum surcharge was set at 2.25% (i.e. 2.25 x 1%). As a result of the tax reform, the surcharge will as a minimum amount to 6,75% (i.e. 2,25% x 3%) as of assessment year 2019. This is because the basic interest rate is increased from 1% to 3%. The increase does not apply for SME's in the first three years following its incorporation. For assessment year 2020, the surcharge equals 6,75% as well.

Example
For the taxable period 2019 (i.e. 1 January 2019 – 31 December 2019) a company is liable to corporate income tax in the amount of EUR 100,000. The company did not make any prepayments during this period. The corporate income tax due will be increased with the following amount:
100.000 X 6,75% = 6.750 EUR.

This surcharge can be avoided (or reduced) by making timely prepayments at specific dates.

5. Withholding tax

5.1. Capital reimbursements

Prior to 2018, no withholding tax was due on capital reimbursements. Capital reimbursements decided upon as of 1 January 2018 will be deemed to relate proportionally to taxed reserves and certain tax-free reserves. Withholding tax will then become due on part of the amount of the capital reimbursement that is deemed to relate to these reserves as it qualifies as a dividend distribution (unless a withholding tax exemption applies). Furthermore, this amount also qualifies as a deemed dividend in the hands of a Belgian shareholder. The rule therefore also applies to foreign companies having

a Belgian shareholder. The measure is amongst others not applicable to tax-free reserves that are not incorporated in the share capital, the legal reserve up to the minimum required amount, the liquidation reserve and the negative taxed reserve recorded as a result of a corporate restructuring.

The amount of the capital reimbursement that is considered to relate proportionally to taxed and certain tax free reserves should be established as follows:

Step 1: determine the *pro rata* allocation by virtue of a percentage that is obtained via the following formula:

$$\frac{\text{Share Capital + share premiums assimilated to share capital + amounts subscribed via profit participating certificates}}{\text{The amount of the numerator + taxed reserves (whether incorporated in the share capital or not) + tax free reserves incorporated in the share capital}}$$

Step 2: determine the amount of the capital reimbursement that relates to capital based on the percentage determined in step 1 ➔ neither withholding tax nor corporate income tax is due on this amount.

Step 3: determine the amount of the capital reimbursement that relates to the reserves in the following order:

1. On the taxed reserves incorporated in share capital ➔ withholding tax becomes due (unless an exemption applies)
2. On the taxed reserves not incorporated in share capital ➔ withholding tax becomes due (unless an exemption applies)
3. Finally, on the tax-free reserves incorporated in share capital ➔ corporate income tax and withholding tax becomes due (unless an exemption applies)

<u>Example:</u> A company decides to reduce its capital for an amount of EUR 1,000:

Equity	
Share capital (not including any reserves)	5,000
Tax-free reserves incorporated in share capital	1,000
Legal reserve	100
Taxed reserve	3,000
Tax-free reserve not incorporated in share capital	2,500

Capital reimbursement	
Step 1: Percentage: $\frac{5{,}000}{9{,}000\ (5{,}000+1{,}000+3{,}000)}$	55.55%
Step 2: Capital reduction that relates to share capital: 1,000 x 55.55%	555.55
Step 3: Capital reduction that can be fully imputed on taxed reserves: 1,000 - 555.55	444.45

5.2. Dividend distributions

- In order to avoid that reserves are subject to a double taxation (i.e. at the occasion of a capital reimbursement and at the occasion of a later distribution of reserves), an exemption of withholding tax is introduced for dividends that are distributed out of reserves that have previously been subject to withholding tax upon a capital reimbursement (see 5.1). However, distributions are allocated first to those reserves which have not yet been subject to withholding tax.
- Further to the '*Tate and Lyle*'-case of the European Court of Justice and the changes to the participation exemption regime (see 3.2), a new exemption of withholding tax is introduced. The exemption applies to dividends paid by a Belgian company after 1 January 2018 to a company established in the EEA or in a country with which Belgium has concluded a double tax treaty that foresees the possibility to exchange information provided the following conditions are met:
  - The exemption is only applicable to the extent that the Belgian withholding tax cannot be credited or is not refundable in the beneficiary's jurisdiction.
  - The beneficiary must be a non-resident corporate shareholder having a holding in the capital of the distributing company of less than 10% but with an acquisition value of at least EUR 2,500,000.
  - The holding is or will be maintained for an uninterrupted period of at least one year in full ownership.
  - The shareholder must have a legal form as mentioned in the EU Parent-Subsidiary Directive or a similar form.
  - The shareholder is subject to a corporate income tax or a similar tax and does not benefit from a regime that deviates from the common tax regime.
  - The distributing company has a certificate confirming that the various conditions are met.

6. Separate assessments

6.1. Tax on secret commission fee

Business income that is not reported in the accounts is subject to a so-called tax on secret commissions amounting to 100% of the undisclosed income. This rate is reduced to 50% if the undisclosed income was spontaneously reintegrated in the accounting profit of the company in a subsequent financial year. The reduced secret commission tax rate of 50% on such reintegrated income is removed as of 1 January 2020 as well as the provision that no administrative penalty can be imposed in such case.

6.2. Separate assessment in case of insufficient managers' remuneration

Initially, the Corporate Income Tax reform included a separate tax of 5% as from assessment year 2019 for companies that did not pay a minimum annual remuneration to at least one company manager-natural person of the lower of EUR 45.000 or the amount of the taxable income of the company. This separate tax has in the meantime retroactively been abolished again.

7. Procedural changes to ensure compliance

7.1. Minimum taxable basis in case of no or late corporate income tax return filing

If the corporate income tax return is not or not timely filed, the tax authorities can tax a Belgian taxpayer based on a minimum taxable basis. This minimum taxable basis equals EUR 34,000 as from assessment year 2019 (relating to the taxable period starting the earliest on 1 January 2018) and will increase to EUR 40,000 as of assessment year 2021 (relating to the taxable period starting the earliest on 1 January 2020). This amount will be indexed annually as from 2021. In the event of repeated infringements, the minimum taxable basis will be increased with a percentage ranging from 25% to 200%. The taxpayer maintains the possibility to provide evidence to the contrary. If no (sufficient) evidence is provided, this measure results in the following corporate income tax to be paid:

Year	Minimum basis	Standard CIT rate	CIT (EUR)
2018	34,000	29.58%	10,057.20
2019	40,000	25%	10,000

7.2. Effective payment on tax audit adjustments

In order to stimulate taxpayers to fulfil their duties in the field of corporate income tax compliance, no deduction of current year losses and deferred tax assets (e.g. carried forward tax losses) is allowed against a taxable basis determined as a result of a tax audit. An exception is made for the participation exemption for dividends received during the same taxable period. The new rule does not apply for infractions committed negligently and for which no tax increases are applied. In an M&A environment, an increased need for a thorough due diligence may therefore arise. The rule applies as of tax assessment year 2019 (relating to the taxable period starting the earliest on 1 January 2018).

7.3. Late payment and moratorium interest

As of 1 January 2018, new rules apply with respect to late payment and moratorium interest in order to better reflect the economic reality. The new rules can be summarized as follows:

- Late payment interest (i.e. interest to the benefit of the tax administration) is decreased from the current 7% to a percentage that is based on the OLO amount on 10 years from the months of July, August and September. This percentage cannot be lower than 4% and not be higher than 10%.

  Late payment interest will also become due in case the taxpayer converts the tax free reserve for spread taxation, the tax free reserve for capital gains on commercial vehicles or the tax-free reserve for capital gains on inland waterway vessels used for commercial shipping into a taxed reserve prior to the expiration of the reinvestment term. Also, if the reinvestment conditions for the exemption of capital gains realized on sea-going vessels is not met, late payment interest becomes due. This rule applies as of tax assessment year 2019 relating to the taxable period starting the earliest on 1 January 2018.

- Moratorium interest (i.e. interest to the benefit of the taxpayer) is decreased from the current 7% to a percentage that is 2% lower than the late payment interest. It cannot be lower than 2% and cannot be higher than 8%. This interest would start to accrue as of the first day of the month following the month during which a notice of default (e.g. a tax complaint or a request for ex officio relief) is sent to the tax authorities. If the payment is made only after the notice of default is send to the tax authorities, the moratorium interest is calculated from the first day of the month following the month during which the effective payment is made. The month of repayment is not included. No moratorium interest becomes due if the tax authorities do not have the necessary details for making the repayment.

Please note that the Constitutional Court in the meantime ruled that these new rules do not violate the constitutional principle of equality and non-discrimination.

8. Implementation of the Anti Tax Avoidance Directives (ATAD I and II)

As a member of the EU, Belgium is obliged to implement the measures included in the Anti-Tax Avoidance Directives ("ATAD I and II"). As part of the CIT reform, measures neutralising hybrid mismatches (within the EU and towards third countries), CFC legislation, exit taxation and the interest limitation rule have been implemented. For more detailed information on the implementation of ATAD I, in the Netherlands, Belgium and Luxembourg , reference can be made to our **brochure**.

8.1. Hybrid mismatches

A 'hybrid mismatch' means a situation between associated enterprises that form part of the same enterprise or that act in the framework of a structured arrangement where the following outcome is achieved: (a) a deduction of the same payment, expenses or losses occurs in two jurisdictions or (b) a deduction of a payment occurs in the jurisdiction in which the payment has its source without a corresponding inclusion for tax purposes of the same payment in the other jurisdiction ('deduction without inclusion'). No hybrid mismatch is present if this non-inclusion results from a special tax regime that applies to the payee. Differences in tax outcomes that are solely attributable to differences in the value ascribed to a payment, including through the application of transfer pricing, also fall outside the scope of a hybrid mismatch.

These results are often attributable to differences in the legal characterization of a financial instrument or entity. According to the Act, Belgium is required to solve such hybrid mismatches through the denial of deduction of payments or the inclusion of income that would otherwise not be taxed. In addition, various other types of mismatches are targeted. For instance, where a Belgian taxpayer has a permanent establishment ('PE') in another EU Member State and the two jurisdictions treat the PE differently, resulting in double non-taxation of the PE income, Belgium is required to tax the PE income that would otherwise not be taxed pursuant to a double tax treaty. Another example includes the situation whereby a company is resident in Belgium and in another jurisdiction and this company deducts the same expense in both residence states. Belgium will then be required to disallow the deduction unless the company is resident of Belgium according to a double tax treaty concluded with another Member State.

8.2. Controlled Foreign Company ('CFC')-legislation

A CFC-rule intends to tackle profit shifting (out of the residence state or even out of third states) and long-term deferral of taxation that a taxpayer achieves via structures with low taxed companies without substantive activities. If the conditions of the CFC-rule are fulfilled, the non-distributed profits realized by such foreign companies will immediately become subject to tax in the hands of the Belgian parent company. The rule applies as of tax assessment year 2020 relating to the taxable period starting the earliest on 1 January 2019.

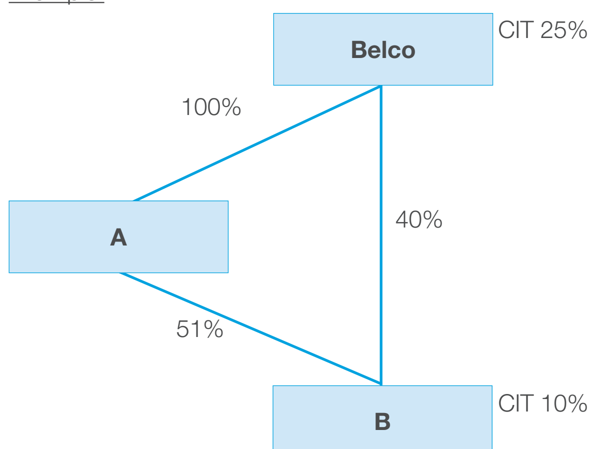
Definition of a CFC

A foreign company qualifies as a CFC if the following conditions are met:

- The Belgian taxpayer owns directly or indirectly the majority of voting rights, or holds directly or indirectly at least 50% of the capital, or is entitled to receive at least 50% of the profits of the foreign company (control test);
- The foreign company is in its country of residence either not subject to an income tax or is subject to an income tax that is less than half of the income tax if the company would be established in Belgium. In calculating this income tax, the profits that this foreign company would have realized through a PE is disregarded if a double tax treaty applies between the country of the foreign company and the country in which the PE is located that exempts this profit (taxation test).

Foreign PE's of a Belgian taxpayer are also included in the scope of application if the profits of the PE are exempt or reduced in Belgium by virtue of a double tax treaty and the taxation test is met.

Example:



Belco holds in total more than 50% of the capital of company B (i.e. 40% directly + 51% indirectly). According to the Belgian rules, the taxable income of company B would amount to EUR 100,000.

Case scenario 1:
According to local rules, the taxable income of company B amounts to EUR 90,000. The corporate income tax that company B pays in its country of residence amounts to EUR 9,000 (10% x EUR 90,000). Since this amount is lower than half of the income tax that would be due if the company would be established in Belgium (i.e. EUR 12,500 (12.5% X EUR 100,000)), the company qualifies as a CFC.

Case scenario 2:
According to local rules, the taxable income of company B amounts to EUR 150,000. The corporate income tax that company B pays in its country of residence amounts to EUR 15,000 (10% x EUR 150,000). Since this amount exceeds half of the income tax that would be due if the company would be established in Belgium (i.e. EUR 12,500 (12.5% X EUR 100,000)), the company does not qualify as a CFC.

Income to be included under the CFC rules
The ATAD I left Member States the option to either include non-distributed specific types of income as defined in the ATAD (i.e., interest, dividends, income from the disposal of shares, royalties, income from financial leasing, income from banking, insurance and other financial activities, income from invoicing associated enterprises as regards goods and services where there is no or little economic value added) or to include non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. Belgium has opted for the latter approach. An arrangement shall be regarded as non-genuine to the extent that the CFC would not own assets or would not have undertaken risks if it were not controlled by the Belgian taxpayer where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income. The attribution of income is then limited to the income attributable to the significant people functions carried out by the Belgian controlling taxpayer. The rule thus only prevents taxpayers from shifting profits out of Belgium. The same approach applies irrespective of whether the CFC resides in a Member State or in a third country.

The question arises as to the interaction with existing transfer pricing rules. The legislator clarified that article 185§2a ITC 92, which incorporates the internationally accepted arm's length principle in Belgian tax law, takes precedence over the CFC-rule.

Elimination of double taxation
If the CFC distributes profits to the taxpayer and those distributed profits were previously taxed in the hands of the Belgian taxpayer, these profits shall be fully deducted from the tax base when calculating the amount of tax due on the distributed profits. In addition, capital gains realised on the disposal of shares of a CFC will be exempt to the extent that the profits of the CFC have already been taxed in the hands of the Belgian taxpayer as CFC income and these profits have not yet been distributed and still exist on an equity account prior to the alienation of the shares.

Double taxation is however not fully eliminated. The taxes that the CFC pays in its country of residence (for example in scenario 1 referred to above) are not allowed as a deduction from the Belgian tax. Moreover, the current rules do not foresee that the allocation of the profit of the CFC to the Belgian taxpayer is proportionate to the taxpayers' participation in the CFC. On 2 July 2020, the European Commission has send a letter of formal notice as it considers it contrary to the ATAD I that Belgium does not eliminate double taxation.

Reporting obligation
A Belgian taxpayer should report in its tax return that it has a foreign subsidiary or PE that qualifies as a CFC if

the income is subject to tax in the hands of the Belgian taxpayer pursuant to the CFC rule.

8.3. Exit taxation and step-up

Via the Act of 1 December 2016, the existing provisions on exit taxation were brought to a large extent in line with the requirements on exit taxation laid down in the ATAD I. More precisely, Belgium introduced a deferred payment regime of 5 years for companies subject to exit taxes on (EEA) outbound cross-border transfer of assets/business, tax residence and restructuring. However, outbound internal dealings (i.e. outbound transfers from a Belgian head office to a foreign permanent establishment) were up to now not covered. This transaction will now equally trigger a (deferred) exit tax which is calculated on the positive difference between the market value of the transferred assets on the one hand and the acquisition or investment value of the assets decreased with previously allowed impairments and depreciations on the other hand.

The rules regarding inbound transfers have been adjusted as well. Previously, these rules generally provided that assets entering the Belgian territory had to be registered at their pre-transaction foreign book value, i.e. no step-up in the tax base was provided. Since this was contrary to the ATAD I, the new rules now accept the market value as the starting value of the assets for tax purposes.

To the extent that these assets were subject to an exit tax in the country of emigration and Belgium has concluded a treaty with this country that provides for the possibility to exchange information, the value established by this foreign country is refutably presumed to correspond to the market value (unless it is a tax haven). If these conditions are not fulfilled, the market value is presumed to correspond to the book value according to Belgian rules, unless proof to the contrary is provided.

The amended exit tax rules apply to transfers that occur as of 1 January 2019

8.4. Interest limitation rule

Limitation of the interest deductibility

The interest limitation rule foresees that exceeding borrowing costs will be deductible in the tax period in which they are incurred only up to the higher of 30% of the taxpayer's EBITDA or EUR 3.000.000 ('threshold amount'). This rule entered into force on 1 January 2019 and is applicable as of assessment year 2020 (relating to taxable periods starting the earliest on 1 January 2019).

The term borrowing cost in the ATAD I is broad and includes interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance as defined in national law. The definition of interest under national law has therefore been supplemented by a Royal Decree dated 20 December 2019 in order to also cover other costs that are economically equivalent.

Exceeding borrowing costs are defined as the positive difference between (a) the amount of the deductible interest costs (and other economically equivalent costs) of a taxpayer that are not allocable to a permanent establishment if its profits are exempt in accordance with a double tax treaty and (b) taxable interest revenues (and other economically equivalent revenues) that the taxpayer receives and that are not exempt pursuant to a double tax treaty.

EBITDA is determined based on the result of the taxable period (i.e. the tax adjusted accounting result including disallowed expenses) to be

- increased with depreciations, write-offs, exceeding borrowing costs carried forward that are being utilized, and the exceeding borrowing costs that are tax deductible
- decreased with certain tax exempt income (i.e. income that benefit from the participation exemption, the patent income deduction, the innovation income deduction and income that is exempt pursuant to a double tax treaty), with the amount of the group contribution and with profit realized through the execution of a public-private partnership if the operator, interest cost, assets and profits are located in the EU.

For taxpayers that form part of a group, the following applies:

- Interest expenses (or income) paid (or received) by a resident company or a Belgian permanent establishment that form part of a group and are not excluded, will be disregarded for purposes of calculating the exceeding borrowing costs;
- the threshold amount is to be considered on a consolidated basis. This implies that:
    - the EBITDA of the taxpayer should be increased/decreased with the amounts paid/received by the taxpayer to/from a Belgian company or Belgian permanent establishment that form part of the group and are not excluded from this rule;
    - group entities with a negative EBITDA have to allocate this negative EBITDA to all other Belgian group members with a positive EBITDA in proportion to this positive EBITDA;
    - the threshold of EUR 3.000.000 will be allocated proportionally among the members of the group.

The Royal Decree of 20 December 2019 foresees 3 specific methods for allocating this amount.

Interest that cannot be deducted pursuant to this new interest limitation rule can be carried forward indefinitely. The use thereof in a subsequent year is, however, limited to the threshold amount of that year.

Excluded loans and taxpayers

The rule does not apply to:

- loans used to fund a long-term public infrastructure project where the project operator, borrowing costs, assets and income are all in the EU.
- loans that were concluded prior to 17 June 2016 if no essential changes were made. For these loans the current 5:1 thin capitalization rule will remain applicable. This 5:1 thin capitalization rule will nonetheless also remain applicable for loans concluded after 17 June 2016 if the interest is paid to tax havens (for other loans concluded after 17 June 2016 this thin capitalization rule is abolished).
- stand-alone companies (i.e. a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment)
- various financial undertakings (for example, credit institutions, investment companies and (re)insurance undertakings) and companies that are solely or mainly active in the financing of real estate through real estate certificates, financial leasing companies and companies that are mainly active in factoring activities. According to the European Commission, Belgium excludes from the interest limitation rules certain types of entities, which do not qualify as "financial undertakings" under ATAD. The European Commission has therefore send a formal notice to Belgium on 2 July 2020.

Example:

Exceeding borrowing cost	**Company A**	**Company B**
Interest expense	2,000	4,000
Interest income	0	0
Exceeding borrowing cost	2,000	4,000
Calculation threshold amount (the threshold of 3 m€ is not further considered as it is less beneficial in this example)		
EBITDA Result of the taxable period:	6,000	15,000
+ depreciation/write-offs	2,000	3,000
+ exceeding borrowing cost	2,000	4,000
- Exempt income	-5,000	0
Total EBITDA	5,000	22,000
30% of EBITDA	1,500	6,600
Disallowed exceeding borrowing cost		
Tax deductible exceeding borrowing cost	1,500	4,000
Disallowed exceeding borrowing cost	500	0

Transfer of unused threshold amount

In case a taxpayer forms part of a group of companies, any non-utilized threshold amount, and even amounts exceeding this threshold amount, can be transferred to another Belgian group company or Belgian PE. An agreement should be concluded between both taxpayers that provides for the transferred threshold amount and, optionally, for the payment of a compensation in the amount of the tax saving resulting from the transfer. Taking into account the example above, this would imply that company B could transfer 500 of its remaining threshold amount to company A as a result of which company A can deduct its entire interest expense.

No impact on investment companies

Certain investment companies benefit from a derogatory tax regime as their taxable basis is determined based upon abnormal or benevolent advantaged received and most of the disallowed expenses. In order to avoid that those companies are penalized by this new measure, the disallowed exceeding borrowing cost will not form part of the taxable basis.

9. Various other amendments

Several other amendments have been introduced:

- In line with administrative practice, it is now explicitly foreseen that dividend received deduction carried forward will be transferred at the occasion of a restructuring on a pro rata basis in the same way as is currently the case for tax losses carried forward. This applies to transactions that occur as of 1 January 2018.
- The exemption of capital gains realized by a company for housing credit that is subject to a special tax regime, is abolished.
- The exemption regime for the work-inclusion company is amended and is limited to the amount of the gross wage of the hired employee. In addition, the tax-free premiums of the region can no longer be exempt twice.
- Amendments to the tax shelter regime have been introduced.
- The investment reserve is abolished for new investments. The possibility to constitute such reserve is limited to taxable periods ending at the latest on 30 December 2018.
- Abolition of certain economic exemption regimes, for example in relation to supplementary personal and certain trainees.
- In order to avoid the reversal of certain tax free reserves that are recorded during a taxable period that starts the earliest on 1 January 2017 and ends at the latest on 30 December 2020 (for example tax-free reserves in relation to the spread taxation regime for capital gains realized on certain assets subject to reinvestment conditions) into taxed reserves at the new lower rates, an anti-abuse provision is introduced. Under certain conditions, these reserves will be taxed at the rate that was applicable when the reserve was recorded.
- The wage withholding tax exemption of scientific research personnel is extended to include holders of a bachelor’s degree. The exemption amounts to 40% of this wage withholding tax as from 1 January 2018 and will increase to 80% as from 1 January 2020. The exemption only applies if the company also employs scientific research personnel with master degrees for whom the exemption is applied.

Annex - Entry into force

2018
Decrease of corporate income tax rates
Reduction exit tax rate for real estate companies
Adjusted SME definition
Limitation to tax free provision for risk and charges
Introduction of the matching principle in tax law
Temporary increase of the investment deduction
Amendments to the notional interest deduction regime
Limitation to the deduction of (mainly) carried forward items (minimum taxable basis)
Introduction of a minimum participation threshold requirement for capital gains on shares
The separate tax rate for capital gains realized on shares not maintained for a period of at least one year is not applicable for SME's
Abolition of the minimum capital gains tax on shares
Increase of the Belgian participation exemption regime to 100%
Increase for insufficient tax prepayments
Introduction of a *pro rata* allocation of capital reimbursements to reserves
Introduction of a withholding tax exemption on certain dividends distributed
Increase of minimum taxable basis in case of no or late corporate income tax return filing
Introduction of an effective payment on tax audit adjustments
Decrease of late payment and moratorium interest
Late payment interest becomes due if reinvestment condition is not fulfilled upon conversion of certain tax-free reserves into taxed reserves prior to the expiration date
Pro rata transfer of dividend received deduction carried forward at the occasion of a restructuring
Amendment to exemption regime for the work-inclusion company
Amendments to the tax shelter regime
Abolition of investment reserve
Introduction of an anti-abuse provision to avoid the conversion of some existing tax-free reserves into taxed reserves at the new lower rates
Extension of the withholding tax exemption to certain bachelor's degrees employed in R&D projects or programs

2019
Introduction of a tax consolidation regime
Introduction of hybrid mismatch rules
Introduction of CFC-legislation
Amendments to the exit taxation regime and introduction of step-up
Introduction of a new interest limitation rule
2020
Further decrease of corporate income tax rates
Increase of exit tax rate for real estate companies
Changes to the depreciation system
Disallowance of the tax deductibility of fines and penalties
Adjustment to the tax deductibility of car expenses
Abolition of the 120% deductibility of certain costs
Disallowance of the tax on secret commission
Disallowance of the discount on debts recorded as a cost
Interpretation of the term 'market rate' and clarification of the term 'loan'
Disallowance of the deduction of foreign PE losses
Extension of PE-definition under national law
Abolition of the separate tax rate for capital gains realized on shares not maintained for a period of at least one year for non-SME's
Abolition of reduced secret commission tax rate of 50% on undisclosed income and exemption of administrative fine
Further increase of minimum taxable basis in case of no or late corporate income tax return filing
Abolition of the exemption of capital gains realized by a company for housing credit
Further amendments to the tax shelter regime
Abolition of certain economic exemption regimes
Further increase of the withholding tax exemption to certain bachelor's degrees employed in R&D projects or programs

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