Belgium

Branch Reporters
Marc Bourgeois*
Edoardo Traversa**

Summary and conclusions

Like the majority of other countries, Belgium has inserted into its tax legislation several provisions targeting avoidance mechanisms involving international transactions. Some of these provisions are specifically designed to address international tax evasion, while others are more general, and cover abusive schemes both in domestic and international situations. In the first category of measures, it is worth mentioning, among others, article 344, §2 of the Belgian Income Tax Code (BITC), which allows the tax administration to disregard transactions having respect to transfers of assets made by individuals or companies to non-residents established in low-tax jurisdictions; article 54 BITC disallows deduction of certain payments (interest, royalties, service fees) made directly or indirectly to well-defined non-resident beneficiaries or foreign establishments (established in tax havens or benefiting from a preferential tax regime). Concerning the second category of measures, good examples are article 26 BITC, which allows tax authorities to add back to the taxable profits the "abnormal or gratuitous" advantages granted by the taxpayer, and article 79 BITC, which refuses the deduction of business losses on profits arising from those advantages.

These measures often provide for a rebuttable presumption of evasion, and thus the taxpayer has the possibility to give evidence that the contested transactions have been entered into for sound economic reasons. As a rule the mere existence of tax motives is not in itself a sufficient element to trigger the application of anti-abuse measures in Belgium. Courts interpret tax law provisions rather restrictively and, before applying anti-abuse measures, tend to determine whether all the legal conditions are fulfilled, rather than basing their judgment on the intention of the taxpayers.

In the Belgian tax system, there is no general principle prohibiting the abuse of law. The existence of such a principle has been expressly denied by the Supreme Court, which has instead developed the theory of the "free choice of the least taxed way" (consequence of the so-called principle of legality). According to this theory,

* Professor Dr., University of Liège

** Professor Dr., Catholic University of Louvain/*Avocat* (Liedekerke)

The reporters are very grateful to their colleague Professor Dr Luc De Broe (Catholic University of Louvain): the published version of his doctoral thesis (L. De Broe, *International Tax Planning and Prevention of Abuse*, IBFD, 2008) was of great help for the preparation of the present report. The reporters would also like to thank Adeline Römer (assistant at the University of Liège) and Edouard-Jean Navez (researcher at the Catholic University of Louvain) for their invaluable help.

acts that do not constitute a violation of (express) legal provisions are not prohibited, "even if these acts are entered into with the sole purpose of reducing the tax burden". The absence of such a general anti-abuse principle has induced the legislator to enact a general anti-abuse provision, article 344, §1 BITC. However, this article is not often applied in the case law, in particular in international situations (although several avoidance schemes could theoretically fall into its scope).

Concerning the relation of domestic anti-abuse measures with tax treaties, the position of the Belgian tax authorities is relatively straightforward, since they consider that tax treaties do not prevent their application. Nevertheless, the courts and the tax administration give in general a highly persuasive value to the OECD commentary, which is much more balanced on this issue. Moreover, there are – relatively few – cases, in particular on exit taxes, where the courts have considered that domestic anti-avoidance provisions violate tax treaties and have then refused their application. Therefore, considering the absence of a general anti-abuse doctrine in Belgian tax law, and the rather strict interpretation given by the courts to tax provisions, it seems to be more adequate to adopt a case-by-case approach, i.e. an analysis of the compatibility of each anti-abuse provision with relevant tax treaty articles and the OECD commentary, than to express (too) general opinions on the compatibility of anti-abuse measures with tax treaties.

From the analysis of the existing tax treaty network, it is not possible to ascertain a consistent attitude of the Belgian double tax convention (DTC) practice as regards tax avoidance. Treaties containing general clauses allowing the application of domestic anti-abuse measures are exceptions. Treaties including a general anti-abuse provision are also rather few; such a provision is nevertheless to be found in the 2007 Belgian draft model convention. Belgium seems to rely more on specific anti-avoidance provisions in line with the OECD model. Those specific measures especially concern passive income, i.e. the beneficial ownership test, but can have a broader scope like, in some tax treaties, subject-to-tax requirements and, less frequently, limitation on benefit (LOB) clauses. As regards controlled foreign company (CFC) rules, not only are they not to be found in domestic legislation, but moreover Belgium has always questioned their compatibility with the OECD model (by making observations to the OECD commentary).

In conclusion, it appears from the analysis that Belgium does not seem to consider tax treaty abuse as a major concern in its international tax policy. Belgian authorities seem indeed to put more emphasis on the development of their tax treaty network, i.e. even by concluding conventions with low-tax jurisdictions, in order to attract foreign investments and to encourage businesses to structure their international activities so as to use Belgium as a base or a conduit country. In the future, however, Belgium might change its policy, considering the growing consensus in the fight against international tax evasion and avoidance and the emergence in European tax law of a general anti-abuse principle condemning artificial arrangements solely or essentially aimed at avoiding national tax normally due.

1. Domestic anti-avoidance provisions with an international scope

1.1. General overview

In Belgian tax law, persons and goods are generally exempt from taxation. Tax is an exception which can be established by the legislature alone (Constitution, article 170).[1] As a consequence, tax provisions must be strictly construed. Interpretation by analogy is prohibited.[2] According to the Supreme Court, the principle of the legality of tax implies, among other things, the so-called "free choice of the least taxed way":[3]

> "there is no prohibited simulation, and, therefore, tax evasion, where, in order to benefit from a more favourable tax treatment, and using the freedom of contract, without however violating any legal provision, the parties enter into acts of which they accept all consequences, even if the form they give thereto is not the most usual"[4]

or "even if these acts are entered into with the sole purpose of reducing the tax burden".[5]

It is now admitted that legal form prevails over the "economic substance" of a transaction.[6] However, "legal reality prevails over the mere legal form of transactions":[7] the private law theory on sham is applicable to tax law. In the event of sham, i.e. a fraudulent technique consisting in disguising a transaction as another operation in order to reduce the tax burden, tax authorities and tax courts may look at the real act, i.e. the one disguised. Tax authorities must demonstrate that the parties do not accept all the consequences of their acts or that they violate a public order legal obligation.[8]

The theory on sham cannot be applied too extensively. For example, the tax authorities are not entitled to deny the existence of a company legally created only for tax purposes. It is nevertheless acceptable to show that the alleged foreign company is established in Belgium, i.e. it has its effective place of management in Belgium (article 2, §1(5)(b) BITC). The tax authorities could also, based on the theory of sham, pierce the corporate veil and attribute the legal acts which the company allegedly undertook to the shareholders and tax the latter accordingly where the shareholders seriously deny or abuse the separate legal existence of a company.[9]

1 D. Garabedian, *Cahiers de droit fiscal international*, vol. 87a, 2002, p. 153.
2 T. Afschrift, *L'évitement licite de l'impôt et la réalité économique*, Larcier, 2003, §§ 63–64.
3 Garabedian, *op. cit.*, p. 157.
4 Supreme Court, 6 June 1961, *Brepols*, *Pas.*, 1961, I, 1082.
5 Supreme Court, 22 March 1990, *Au vieux Saint-Martin, Pas.*, 1990, I, 853.
6 Garabedian, *op. cit.*, pp. 153 *et seq.*
7 *Ibid.*, p. 154; C. Docclo, *Cahiers de droit fiscal international*, vol. 86b, 2001, pp. 399 *et seq.*
8 On this second feature ("violation of a public order legal obligation"), Supreme Court, 5 March 1999, *Pas.,* 1999, I, no. 133; J. Kirkpatrick, "L'opposabilité au fisc des conventions non simulées", *JT*, 2000, p. 193.
9 L. De Broe, *International Tax Planning and Prevention of Abuse*, IBFD, 2008, pp. 71–72.

1.2. General anti-avoidance provision with international focus or effect: article 344, §1 BITC

In the Belgian income tax code, a general anti-avoidance provision, inspired by British law,[10] states that

> "the legal characterization given by the parties to an act or to separate acts which together realize the same operation may not be opposed to the tax authorities when those authorities determine, by presumptions or other proof …, that this characterization aims at avoiding taxes, unless the taxpayer proves that this characterization is justified by legitimate needs of a financial or economic nature…"[11]

This article may apply to cross-border transactions.

Article 344, §1 BITC does not sanction tax fraud but tax avoidance.[12] It targets situations where taxpayers enter into (a) genuine and sincere legal transaction(s) but choose a specific legal characterization with the sole purpose of avoiding taxation. The tax authorities may disregard the characterization chosen by the parties, but not the transaction(s) as such: the legal effects should indeed be the same before and after the recharacterization process.[13] The burden of proof that the conditions set out in article 344, §1, are satisfied rests on the tax authorities. The taxpayer can avoid recharacterization by proving "legitimate needs of a financial or economic nature".[14]

Because of its restrictive conditions, article 344, §1 has rarely been successfully applied.[15] Courts tend to disallow recharacterization on the grounds that it does not entail the same legal consequences as the characterization chosen by the taxpayer, e.g. a redemption of shares cannot be recharacterized as a distribution of dividends;[16] a reduction of capital cannot be assimilated to a distribution of dividends;[17] the legal effects of a lease and those of a usufruct are different.[18]

10 The intention was to integrate into Belgian law the "step by step" doctrine, developed by the House of Lords (Parl. Doc., Chamber, 1992–93, 1072/8, 101), and the different cases (e.g. *Ramsay* v. *IRC*, *Burmah*) submitted to the House of Lords, at the origin of the doctrine, discussed in De Broe, *op. cit.*, pp. 172–174).

11 Art. 344, §1 BITC.

12 It seems that the Belgian Minister of Finance intended to insert into Belgian income tax law the principle of abuse of rights. Nevertheless, this notion is not explicitly included in art. 344, §1 BITC.

13 Parl. Doc., Senate, 1992–93, 762-1, 3. In the case law, the question whether the legal effects of the two characterizations should be "identical" or "similar" is under discussion (J. Kirkpatrick and D. Garabedian, "Les impôts sur les revenus et les sociétés. Examen de jurisprudence (1991 à 2007)", *RCJB*, 2008, pp. 303–319).

14 On the meaning of "legitimate needs of a financial or economic nature", see Garabedian, *op. cit.*, p. 159.

15 On an application of art. 344 BITC, concerning rental schemes, Supreme Court, 21 April 2005, *Pas.*, 2005, 914; Supreme Court, 11 December 2008, *FJF*, 2009, 814. Other illustrations may be found in Kirkpatrick and Garabedian, *op. cit.*, pp. 297 *et seq.*

16 Supreme Court, 4 November 2005, www.cass.be.

17 On the dissolution of a company, Court of Appeal Antwerp, 17 April 2007, *FJF*, 2007, 732.

18 Supreme Court, 22 November 2007, *FJF*, 2008, 541.

1.3. Specific anti-avoidance provisions with international focus or effect

1.3.1. Rules relating to transfer pricing adjustments

1.3.1.1. Adjustment for abnormal or gratuitous advantages

Under article 26 BITC, the Belgian tax authorities are allowed to include in the profits the "abnormal or gratuitous advantages"[19] granted by the taxpayer. This covers situations where a Belgian taxpayer (a) supplies services or goods below normal market conditions (e.g. a loan without interest), or (b) pays a price for services or goods exceeding the normal market price (e.g. excessive royalties). In order to avoid the adjustment, the taxpayer must prove that the advantage was taken into consideration when determining the taxable income of the beneficiary, even if it is not effectively taxed[20] (which avoids double economic taxation). Therefore, article 26 BITC does not apply if the beneficiary is a Belgian company subject to corporate tax or a Belgian branch of a non-resident company.[21] For such companies, the tax authorities often refer to another provision of the BITC to refuse the deduction: article 49 BITC, which establishes the conditions for deduction of business expenses in general.[22]

Nevertheless, the counter-proof cannot be invoked when the advantage is granted to non-residents connected with the taxpayer or benefiting from a preferential tax regime in their country of residence (article 26, §2 BITC).

1.3.1.2. Specific transfer pricing rule

Article 185, §2 BITC (introduced in 2004) allows the tax authorities to adjust the profits of a Belgian company in the event of profit transfers to or from a foreign company in the same multinational group without complying with the "arm's length" principle. Its wording is rather similar to that of article 9 OECD MC.[23] A similar provision (article 235(2) BITC) applies to transactions involving permanent

19 On this concept, e.g. Supreme Court, 10 April 2000, *Pas.*, I, 2000, 240; Supreme Court, 31 October 1979, *Pas.*, 1980, I, 280.

20 For example, where the advantage leads to a reduction of the amount of the loss carry-over of the beneficiary of the advantage, e.g. Court of Appeal Antwerp, 15 June 1999, *FJF*, 99/250; Court of Appeal Mons, 1 December 2000, *FJF*, 2001/14; Court of Appeal Ghent, 14 April 2004, *FJF*, 2004/283; Court of Appeal Brussels, 19 May 2005, *Fisc.*, 2005, no. 985, 9.

21 Com. BITC, 26/30. The contrary would lead to a violation of the freedom of establishment under the EC Treaty and to an indirect discrimination of permanent establishments under art. 24 OECD model convention (De Broe, *op. cit.*, pp. 84–85).

22 The question of whether art. 26 prevails over art. 49 has been largely debated in the doctrine and in the case law (Supreme Court, 30 October 2008, *FJF*, 2009, 384). Art. 26 was modified in 2007 by the addition of the words "without prejudice to the application of Art. 49 BITC". On the constitutionality of this amendment, see Belgian Constitutional Court, no. 151/2008, 6 November 2008, OG (= Official Gazette, called *Moniteur belge/Belgische Staatblad*), 4 December 2008, 63821.

23 Art. 185, §2, is, however, more restrictive than art. 9 OECD MC. The former refers to associated "companies", thus excluding non-incorporated enterprises, while the latter refers to "associated enterprises".

establishments.[24] Article 185, §2 can – at least[25] – be applied when a ruling has been asked for – i.e. once a ruling has been submitted to the Belgian Ruling Committee – and in cases of mutual agreement procedures under tax treaties or under the EC Arbitration Convention.

1.3.1.3. Article 79 BITC/article 207 BITC

Article 79 BITC provides that no deduction of business losses is allowed on the part of the benefit or profit arising from abnormal or gratuitous advantages (cf. article 26 BITC) granted to the taxpayer, directly or indirectly, by an enterprise with which he/she is directly or indirectly interdependently linked. Article 207 BITC provides that no deduction or compensation with the loss of the tax period can be operated on that part in the results arising from such abnormal or gratuitous advantages.[26] These provisions also deal with transfer of profits and the indirect consequences on the taxable base of the receiving company.[27]

The interaction between article 185, §2, and article 207 can cause problems as article 207 allows certain deductions on the profit transferred from abroad to be rejected while article 185, §2, requires correlative (downwards) adjustments if the profit transferred has also been taxed abroad in the name of the transferor company.[28]

1.3.2. Disallowance of expenses

1.3.2.1. Article 49 BITC

Article 49 BITC establishes the conditions for deduction of business expenses in general. The Belgian Supreme Court does not admit that the companies' expenses not connected with the corporate purpose are deductible business expenses.[29] In the reporters' view, this disputed construction is an attempt to insert into the Belgian tax law a kind of judicial abuse of rights principle that has no legal basis in the existing tax legislation.[30]

[24] Art. 235(2) BITC is useful because art. 26 BITC is not applied to transactions between a head office and its own PE (see O. Neirynck, "Les prix de transfert en Belgique. Evolutions récentes", in *Liber Amicorum Jacques Malherbe*, Bruylant, 2006, p. 794).

[25] De Broe (*op. cit.*, pp. 97–98) considers that, unless there is such a "ruling" request, art. 26 BITC is the only provision that can be relied upon by the tax authorities to proceed with profit adjustments. Other authors do not agree with this opinion (T. Vanwelkenhuyzen, *Les prix de transfert*, Larcier, 2009, p. 77). See also E. van de Velde, *Afspraken met de fiscus. De grenzen, juridische kwalificatie en rechtsgevolgen*, PhD Thesis University of Antwerp, April 2009, to be published, p. 91.

[26] Several decisions apply arts. 79 and 207 BITC: e.g. Court of Appeal Mons, 10 October 2007, *FJF*, 2008/164; Court of Appeal Brussels, 20 April 2005, *JDF*, 2005, 264; Court of Appeal Brussels, 19 December 2002, *FJF*, 2003/136. Other case law is discussed in Vanwelkenhuyzen, *op. cit.*, pp. 81–82.

[27] On the interpretation of art. 207 BITC as an application in Belgian law of the principle of economic reality, Court of Appeal Liège, 17 February 1993, *FJF*, 93/141 and Supreme Court, 23 February 1995, *Pas.*, I, 1995, no. 107 (capital inflow to an affiliated company making losses without economic justification).

[28] De Broe, *op. cit.*, pp. 100–101.

[29] Supreme Court, 18 January 2001; Supreme Court, 19 June 2003; Supreme Court, 9 November 2007.

[30] T. Afschrift, "L'appréciation de la réalité juridique des actes par le juge du fond", *JDF*, 2007, 102 *et seq.*; D. Garabedian, "Le principe du choix licite de la voie la moins impose. Un état des lieux", in

1.3.2.2. Article 54 BITC

Article 54 BITC is an anti-abuse measure, the purpose of which is to disallow deduction of certain (in principle deductible) payments (interest,[31] manufactured dividends, royalties[32] and service fees)[33] made directly or indirectly (via conduit companies)[34] to well-defined non-resident beneficiaries or foreign establishments (established in tax havens or benefiting from a preferential tax regime).[35] The provision presumes that such payments relate to artificial or sham transactions and/or do not meet the arm's length test.[36] Taxpayers can rebut these presumptions by establishing that such payments have been made with respect to genuine and sincere operations and that they do not exceed the open market standards.[37] Thus, article 54 BITC sets out proof requirements that are more burdensome than what is required under the general deductibility rule of article 49 BITC.[38]

In comparison with article 26, article 54 BITC is less favourable to the taxpayer. In order to apply article 26, the tax authorities must themselves demonstrate that the arm's length principle was not complied with by the taxpayer. Under article 54, taxpayers are placed at a disadvantage because they must rebut two statutorily defined presumptions and directly prove that transactions are genuine and at arm's length. Therefore, it is not surprising that article 26 BITC expressly provides that article 54 should prevail over article 26.

1.3.3. Thin capitalization rules

1.3.3.1. Non-deductibility of interest paid to lenders enjoying a preferential tax regime

Article 198(11) BITC provides that Belgian companies and Belgian permanent establishments of non-resident companies are not allowed to deduct interest paid to lenders benefiting from a preferential tax regime, when a certain ratio of debt to

cont.
L'évolution des principes généraux du droit fiscal, Larcier, 2009, pp. 100–106; M. Van Keirsbilck, "Artikel 49 WIB 1992. Een nieuwe algemene anti-misbruikbepaling", *TFR*, 2004, 233 *et seq.*

31 On art. 54 and interest, Supreme Court, 10 November 1964, *Pas.*, 1965, I, 251.

32 On art. 54 and royalties, Ruling Ci. Com./028 of 7 February 1994, *Bull. Contr.*, 1997, 39.

33 On art. 54 and service fees, Court of Appeal Ghent, 5 February 1998, *FJF*, 98/167; Court of Appeal Ghent, 30 September 2003, *Fisc. Act.*, 2003, 34/4. As regards reinsurance premiums, see Trib. Antwerp, 14 February 1998, *FJF*, 98/167.

34 On the notion of indirect payments, and the need to carry the risk of the operation, J.P. Lagae and P. Mathieu, "Prix de transfert entre sociétés belges et sociétés étrangères", *Le droit fiscal international belge et l'évitement de l'impôt*, Ed. Jeune Barreau de Bruxelles, 1996, p. 102; T. Afschrift and A. Rayet, "Les impôts sur les revenus et la loi du 28 juillet 1992", *JT*, 1992, 810; De Broe, *op. cit.*, pp. 106–108.

35 De Broe, *op. cit.*, pp. 104–106; Docclo, *op. cit.*, p. 404.

36 De Broe, *op. cit.*, p. 102. Arts. 55 and 56 BITC provide for rules to determine circumstances in which interest is considered to be paid "at arm's length".

37 *Ibid.*, p. 102.

38 Art. 49 BITC requires the taxpayer to prove that the expense was made or borne with a view to obtaining or retaining taxable business income and to justify the authenticity of the expense and the amount thereof by written documents.

equity is exceeded.[39] The main purpose of this provision is more to avoid profit shifting abroad than to combat thin capitalization.[40] In order to avoid conduit structures, article 198(11) also requires the lender to be the real recipient of the interest.[41]

1.3.3.2. Non-deductibility of interest paid to certain shareholders and directors

Article 18(4) BITC has two main goals: avoiding thin capitalization of Belgian companies and impeding a Belgian company from eroding its tax base via the payment of excessive interest.[42] Article 18(4) recharacterizes some kinds of interest into dividends for the purposes of corporate tax and withholding tax when a debt:equity ratio is exceeded (i.e. where the total amount of tainted debts exceeds the sum of the taxed reserves at the beginning of the taxable period plus the paid-up capital at the end of the taxable period) and/or if the interest is not "at arm's length".[43] For the implementation of article 18(4) the tainted debts are the loans[44] granted by an individual shareholder or by a director or manager, whether individual or non-resident legal person.[45]

1.3.4. Non-recognition of certain asset transfers to low-tax jurisdictions

Article 344, §2 BITC allows the tax authorities to disregard a sale, transfer or contribution of income-producing assets (shares, bonds, debt claims or other securities, patents, manufacturing processes, manufacturing or trade brand names, or cash) made by individuals or companies to a non-resident established in a low-tax jurisdiction.[46] This provision applies to Belgian resident taxpayers as well as to

39 The legislator has fixed the debt:equity ratio at 7/1. This ratio has finally been established at a very high level in order to permit coordination centres to finance Belgian group members without, in practice, being affected by art. 198(11) (L. de Broe and M. de la Serna, "Les règles fiscales belges destinées à lutter contre la sous-capitalisation des sociétés à l'épreuve du droit européen", *Liber Amicorum J. Malherbe*, Bruylant, 2006, pp. 310–311).

40 Art. 198(11) BITC differs from traditional thin capitalization rules. In addition, the ratio set out in art. 198(11) exceeds the ratio commonly applied in other jurisdictions and the provision does not recategorize the disallowed interest into a dividend.

41 While art. 198(11) uses the term "real recipient", art. 54 BITC expressly refers to payments made "either directly or indirectly", without using the expression "real recipient". The words "real recipient" are construed in different ways by the doctrine (T. Afschrift and I. Berthelon, "L'impôt sur les revenus et l'arrêté royal du 21 décembre 1996", *JT*, 1997, 365; De Broe, *op. cit.*, pp. 117–119; C. Docclo, "La sous-capitalisation des sociétés. Quelques réflexions sur l'article 198, 11°, du Code des impôts sur les revenus", *RGF*, 1999, 222).

42 As a principle, the withholding tax on interest is fixed at 15 per cent while the withholding tax on dividends is fixed at 25 per cent. The payment of interest could also constitute an alternative to the payment of remuneration.

43 I.e. it does not comply with the conditions set out in art. 55 BITC.

44 The expression "loan" must be defined according to art. 1892 of the Belgian Civil Code (i.e. general civil law concept of "loan"): Supreme Court, 4 September 2009.

45 Loans made by Belgian companies are left outside the scope of this rule, even if the Belgian company performs functions as director of the borrowing company (De Broe, *op. cit.*, p. 122).

46 Art. 344, §2, has a similar purpose to CFC rules. It, however, differs from CFC legislation on several points, identified by De Broe, *op. cit.*, pp. 124–128, and P. Vanhaute, *Belgium in International Tax Planning*, 2nd edn, IBFD, 2008, p. 222.

non-resident taxpayers owning income-producing assets in Belgium.[47] The initial burden of proof – i.e. that the conditions set out in this provision are met – rests on the tax authorities. There is no requirement to prove fraud or intention of fraud or to avoid taxation: indeed, the statute itself presumes that the taxpayer has the intention of avoiding tax in transferring assets abroad.[48] Article 344, §2, establishes a fiction: the assets transferred are deemed not to have left the transferor's estate and the income produced by these assets remains taxable in the name of the transferor.[49] In order to escape a fiction of this nature, the taxpayer must prove that the transaction is justified by legitimate needs of a financial or economic nature, i.e. not only for tax reasons, or that he has received for the transaction a real consideration producing income effectively subject in Belgium to a tax burden which is normal in comparison with that which would have been borne if the transaction had not taken place.[50]

If the transfer of assets is made without any consideration or against a consideration that is not "at arm's length", a conflict may arise between article 344, §2, and article 26 BITC. As these provisions do not have the same tax consequences, their simultaneous application appears to be unacceptable.[51]

1.3.5. Anti-avoidance provisions relating to the participation exemption

Articles 202 and 203 BITC implement the EU Parent–Subsidiary Directive, aiming at eliminating double taxation of intra-group dividends between companies situated in different EU Member States. These Belgian participation exemption provisions nevertheless have a wider scope, since they also apply to distribution of dividends between Belgian companies or between Belgian and non-European companies. Several (anti-avoidance) conditions limit the scope of the participation exemption. Besides a participation threshold (10 per cent or EUR 1,200,000 for at least one year), the BITC provides for a "subject to tax" test, taking the form of five cumulative requirements. In particular, the distributing subsidiary must be subject to Belgian corporate tax or to a foreign tax similar to the Belgian one,[52] and be established in a country in which the generally applicable tax regime is not much

47 On this issue, see Vanhaute, *op. cit.*, p. 215.

48 De Broe, *op. cit.*, p. 138.

49 Supreme Court, 18 December 1962, *Pas.*, I, 1963, 489; Court of Appeal Antwerp, 17 June 2003, *TFR*, 2004/8; Vanhaute, *op. cit.*, p. 216.

50 The comparison should be made between the Belgian tax that would have been levied on the income produced by the asset in the absence of the transfer and the Belgian tax that is actually levied on the income effectively received from the consideration obtained for the transfer (P. Minne and S. Douenias, *Planification fiscale internationale des sociétés belges*, Larcier, 2004, p. 342). There is nevertheless significant controversy among authors about the practical consequences of this fiction rule: De Broe, *op. cit.*, pp. 134–137.

51 On the interaction between arts. 26 and 344, §2 BITC, e.g. P. Cauwenbergh, *International Transfer Pricing*, Interscientia, 1998, p. 193, and De Broe, *op. cit.*, pp. 129–131.

52 The requirement will be met even if the profit has not effectively been taxed (F. Vanistendael, "Looking Back: A Decade of the Parent–Subsidiary Directive. The Case of Belgium", *EC Tax Review*, 2001, p. 156; C. Cheruy, *Le régime fiscal des sociétés holding en Belgique*, Larcier, 2008, p. 385).

more advantageous than in Belgium,[53] i.e. if that country's general nominal tax rate or its general effective tax rate is less than 15 per cent. A Royal Decree (RDBITC) establishes a list of 53 non-EU[54] countries presumed to have such favourable tax regimes.[55]

1.3.6. Anti-avoidance provision relating to the interest withholding tax exemption

See article 107, §2(10) of the Royal Decree implementing the BITC.[56]

*1.3.7. The foreign tax credit on passive income (*quotité forfaitaire d'impôt étranger*)*

See articles 285 to 289 BITC, discussed below in section 1.4.1 on tax sparing.

1.3.8. Anti-avoidance provision relating to corporate restructuring operations

In 2008, a new anti-avoidance provision relating to corporate restructuring operations was adopted,[57] inspired by article 11 of the EC Merger Directive. By virtue of article 183*bis* BITC, the tax neutrality regimes cannot be applied if the restructuring operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance. The fact that the operation is not carried out for valid commercial reasons, such as the restructuring or rationalization of the activities of the companies participating in the operation, may constitute a rebuttable ("unless evidence to the contrary is given") presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives. Taxpayers are then entitled to directly prove that the operation does not have tax evasion or tax avoidance as its principal objective or as one of its principal objectives. The way in which the expressions "principal objective of tax avoidance" and "valid commercial reasons" should be construed is subject to discussion.[58]

53 On the taking into account of rulings or administrative practices that have no legal basis in the laws of that state, see De Broe, *op. cit.*, p. 89.

54 Art. 203, §1, al. 2 and 3 BITC.

55 Art. 73/4*quater* RDBITC; also Comm. BITC, 199/34 and 199/35. De Broe defends the idea that this list is exhaustive (*op. cit.*, p. 151). This point of view is not shared by all the authors: B. Peeters, "De Belgische deelnemingsvrijstelling na de belastinghervorming", *TFR*, 2003, 154. The Minister of Finance considers that the taxpayer can, however, take issue with the presumption resulting from the inclusion in the list (Parl. Question no. 47 of 21 October 2003, CRIV 51, COM 026); also Minne and Douenias, *op. cit.*, p. 254; De Broe, "Hong Kong dividend genieten van DBI-regime", *TFR*, 2004, 868; Ph. Lion *et al.*, "Het nieuwe D.B.I.-regime", *AFT*, 2003, pp. 183–187; H. Vanhulle, "De wijzigingen aan het stelsel van de D.B.I.-aftrek", *AFT*, 2003, p. 67.

56 De Broe, *op. cit.*, pp. 157–158.

57 Law of 11 December 2008, *BM*, 12 January 2009.

58 Garabedian, *op. cit.*, pp. 91 *et seq.* Comp. W. Vandenberghe, "De omzetting van de fusierichlijn", *AFT*, 2004/4, pp. 4 *et seq.*; H. Vanhulle and N. Bouveret, "Le nouveau régime des fusions et scissions transfrontalières", *RGF*, 2009/1, pp. 17 *et seq.*

1.3.9. Exit tax on pension capital

According to article 364*bis* BITC, where pensions are paid or allocated in the form of capital, the surrender value or savings to a taxpayer who has previously transferred his residence or his seat of wealth abroad, the payment is deemed to have taken place on the day preceding that transfer. In the legislator's view, this provision was designed to address an abuse of the distributive rule on income from pensions in the Belgian treaties that follow article 18 of the OECD model. This clause attributes the right to levy tax on the state of residence. So, the purpose of article 364*bis* was to avoid double non-taxation of pensions constituted in Belgium, as was the case for persons migrating to France before taking their pension. However, this provision no longer applies in an intra-EEA context (see also under section 1.4.1).

1.3.10. Taxation of artistes and sportsmen

See article 228, §2(8) BITC.

1.4. The relationship between domestic anti-avoidance provisions and tax treaties

As a general remark, Belgium is a monistic country, recognizing the dominance of international (and Community) law. Moreover, the courts and the tax administration give a highly persuasive value to the OECD commentary.[59] Additional (domestic) sources of interpretation are the administrative commentary on tax treaties (not updated since 1996), and the administrative circular of 2004 on the application, functioning and objectives of DTCs.[60] In addition, since Belgium is a Member State of the European Union, DTCs (with other Member States, but also with third countries) must be interpreted and applied in conformity with Community law.

1.4.1. General approach made by national administration and courts on the compatibility of domestic anti-avoidance provisions with tax treaties

The Belgian administrative position is relatively straightforward, as it considers that DTCs do not prevent the application of such rules. This viewpoint is in line with a certain monistic conception: (domestic) anti-avoidance provisions are to be applied in the same way to both domestic and international situations. Moreover, it reflects the OECD commentary (article 1, §9(4)), as modified in 2003.

59 See J. Wouters and M. Vidal, "De OESO-Modelovereenkomst inzake dubbelbelastingverdragen en de Belgische rechter" [The OECD Model Double Taxation Convention and the Belgian Judge], *Liber Amicorum Frans Vanistendael*, Knops Publishing, 2007, pp. 559–566; J. Wouters and M. Vidal, "The OECD Model Convention Commentary and the ECJ: law, guidance, source of inspiration?", in L. Hinnekens and Ph. Hinnekens (eds.), *Liber Amicorum Fiscalium "A vision of taxes within and outside European borders". Festschrift in Honour of Prof. Em. Frans Vanistendael*, Kluwer, 2008, pp. 989–1006, and the protocol of the Belgian draft model convention of 2007.

60 Circular letter of 16 January 2004 no. AAF 5/2004, www.fisconet.be.

There is very little case law on the subject. A significant example is the Supreme Court decision on article 364*bis* BITC (see section 1.3.9). This provision was considered by a majority of authors as violating both tax conventions and Community law. This opposition caused a reduction to the scope of article 364*bis* (through an administrative circular), which continued to be applied only in the case of double non-taxation.[61] The Supreme Court rejected this administrative position, considering that the convention (*in casu*, with France) did not include any subject to tax requirement.[62] Later, the same provision was considered incompatible with Community law (treaty freedoms) by the European Court of Justice.[63]

This case law is certainly relevant but cannot be considered as an example of a general judicial doctrine. On the one hand, the DTC with France is rather old and does not refer to domestic anti-avoidance measures. On the other hand, the interpretation of the Supreme Court is based on the wording of the DTC, and the court made no reference in the judgment about abusive situations (and a possible treaty override in those cases).

It can also be worth mentioning case law on anti-abuse measures enacted in order to combat aggressive tax saving schemes based on rather generous (and unconditional) tax-sparing provisions[64] included in old DTCs concluded with several countries (South Korea, Brazil, Uruguay, Italy, etc.).[65] These measures relating to the Belgian foreign tax credit are a subject to tax clause – articles 285 and 287 BITC[66] – a limitation of the tax credit on a pro rata base linked with the duration of the ownership of the loan – article 288 – and an anti-channelling clause – article 289 BITC.

The Supreme Court ambiguously held that on the grounds of the primacy of international law, the credit provided for by the DTC should be awarded even in the case of tax saving schemes (back-to-back transfers of cross-border loans just for the payment of interest),[67] but that the DTC did not affect the application of domestic provisions on the computation of the taxable base (tax gross-up clause), which indirectly allowed a reduction of the treaty credit by application of anti-abuse provisions contained in the BITC.[68] Once again, no general conclusions can be drawn from this judgment in a very specific situation, especially considering that some of these schemes turned out to be fraudulent.

61 Also commentary, art. 18, §§12–15. This position is consistent with the reservation that Belgium expressed in the OECD for the residual category of income, art. 21, §16.

62 Supreme Court, 5 December 2003, *Fiscologue*, no. 240, p. 8. On a similar provision in the Belgium–Netherlands DTC, Supreme Court, 26 April 2001, *Fiscologue*, no. 801, p. 3.

63 ECJ, 5 July 2007, Case C-522/04, *Commission* v. *Belgium*.

64 As the 1998 OECD report *Tax Sparing: A Reconsideration* shows, many countries had to face this phenomenon.

65 Supreme Court, 9 January 2003, *TFR*, 2003, no. 239, p. 320, comment by D. Wyntin. Comp. with the position of the Belgian tax administration on art. 344, §2 BITC (De Broe, *op. cit.*, p. 639) and the OECD position on “facts giving rise to tax liability” (OECD commentary on art. 1, §9(2)).

66 Art. 287 BITC also provides that the foreign tax credit will be limited proportionately to the financial costs borne by the taxpayer.

67 Also Trib. Mons, 20 June 2003 and Trib. Brussels, 26 June 2003, *Fiscologue*, no. 899, p. 8.

68 Supreme Court, 9 January 2003, *TFR*, 2003, no. 239, p. 320, comment by D. Wyntin. Comp. with the position of the Belgian tax administration on art. 344, §2 BITC (De Broe, *op. cit.*, p. 639) and the OECD position on “facts giving rise to tax liability” (OECD commentary on art. 1, §9(2)).

1.4.2. Compatibility of domestic anti-abuse provisions with tax treaties: analysis

1.4.2.1. Compatibility of the general anti abuse provision with DTCs

The only general anti-avoidance measure existing in Belgian tax law is article 344, §1 BITC. This provision is rarely applied, even in a purely domestic context, and therefore does not provoke any serious issue on its compatibility with DTCs[69] in its current interpretation by national courts.

1.4.2.2. Compatibility of specific anti-avoidance provisions with DTCs

Some domestic provisions specifically deal with adjustment of profits in relation to transactions between related parties (mostly companies), such as article 26, §2(1) (and (3)) or article 185, §2 BITC (see above).

Such rules have to be tested against article 9 OECD MC. Article 185, §2 BITC is very close to article 9 OECD MC. Article 26 BITC has a broader scope than article 9, applying to all related parties and not only to "associated enterprises", and can thus only partially be tested. Nevertheless, various authors consider this provision to be inconsistent with article 9, insofar as it presumes that the non-arm's length conditions of the transactions were caused by the fact that the enterprises are affiliated without the need to directly prove this causal connection.[70]

Other provisions, such as articles 54 BITC, 26 BITC, §2(2) (and (3)), 198(11) BITC, and 344, §2 BITC, refer to entities benefiting from preferential tax regimes (commentary on article 1, §214). Since it can be assumed that such payments could not occur between parties that are not in a special relationship, such provisions seem prima facie consistent with article 11(6) OECD MC, provided that they are not applied in such a manner as to shift the burden of proof away from the tax administration (either on the taxpayer or by presumption).[71] Besides, insofar as article 198(11) also provides for the refusal of interest deduction in the case of thin capitalization (debt:equity ratio exceeding 7:1), it may be considered to conflict with article 11(6) OECD MC if applied to arm's length transactions, and with article 9 if the transactions are not made between "associated enterprises".

Article 344, §2 BITC (see above) shares some common features with CFC provision, but it differs from CFC legislation on several points.[72] There is no CFC legislation in Belgium as such (commentary, §§23 and 26), which is consistent

[69] According to De Broe, the possibility of recharacterization provided by this article could successfully be used in some new (hypothetical) cases by the tax administration (De Broe, *op. cit.*, pp. 476–493; also T. Jansen and P. de Vos, *Handboek Internationaal en Europees Belastingrecht*, Interscientia, 2008, pp. 809–810).

[70] Lagae and Mathieu, *op. cit.*, pp. 95–96; J. Thilmany, *Transferts indirects de bénéfices*, Ced Samson, 1996, p. 166; De Broe, *op. cit.*, p. 516. It seems that the legislator intended to facilitate the task of the tax administration (and thus to depart from art. 9 OECD MC), since the older version of this provision (the former art. 24 BITC) explicitly referred to this causal relationship (Ph. Jans, *Les transferts indirects de bénéfices entre sociétés interdépendantes*, Bruylant, 1976, p. 95).

[71] De Broe, *op. cit.*, p. 543.

[72] *Ibid.*, pp. 124–128 and 637–638.

with the observations expressed by Belgium on article 1 (§27(4)), article 7 (§40(1)) and article 10 (§68(1)), according to which CFC legislation violates articles 7(1) and 10(5) of the OECD model. Since article 344, §2 BITC allows the taxpayer to escape the fiction by proving that the transaction is justified by legitimate needs of a financial or economic nature or by showing that he has received for the transaction a real consideration producing income subject to normal taxation in Belgium, its compatibility with the OECD MC is difficult to assess and would require a case-by-case approach.

In other cases, domestic rules provide for the recharacterization of items of income (commentary (§22(1)), such as article 18(4) BITC. The Belgian tax administration considers that the recharacterization is also valid for the application of the DTCs, and thus that the treaty's article on dividends applies.[73] Moreover, most of the DTCs concluded by Belgium include a reservation on this possibility, as well as the OECD commentary.[74] In this context, this provision is to be considered, in most cases, compatible with article 10 OECD MC, in line with the OECD commentary, insofar as it is limited to cases where the borrowers share the entrepreneurial risk (article 10, §25)[75] and with article 9, when it applies to excessive (non-arm's length) interest between affiliated companies.[76] However, when it is applied to a borrowing company, whose debt/equity ratio exceeds 1:1 (article 18(4) 2nd indent), the application of such a provision may violate article 9 OECD MC.[77] Moreover, if the lender is a non-resident company, it can also constitute a discrimination prohibited by article 24(4) OECD MC (the Belgian article being only applicable to non-residents).[78]

Finally, some provisions include a subject to tax test (see commentary on article 1, §§15 and 16), such as article 198(11) BITC. The subject to tax condition contained in article 26 BITC allows the taxpayer to escape the application of the anti-avoidance measure, if it proves that the beneficiary of the payment has been subject to (Belgian) tax. This proof is of course not available for payments to non-residents in the same way as those to residents. Nevertheless, this condition cannot be considered discriminatory on the grounds of article 24(4), since it is only applicable for non-arm's length transactions (an exception is provided for situations dealt with in articles 9 and 11(6) OECD MC).

73 Comm. DTC, no. 10/321; Minister of Finance, Parl. Question, 29 December 1995, *Bull. Contr.*, 1996, 313.

74 Belgium expressed a reservation on the OECD commentary on art. 10, para. 3 (§78). Examples are the treaties with the Netherlands or with Mexico.

75 G. Bombeke and A. Huyghe, "Chapter X: Dividendes", in A. Van de Vijver (ed.), *The New US–Belgium Double Tax Treaty*, Larcier/IBFD, 2009, pp. 196–197. See, however, De Broe, *op. cit.*, pp. 528–536 and 542.

76 Art. 18(4), 1st indent BITC refers to art. 55 BITC (arm's length criterion – market interest rate).

77 De Broe, *op. cit.*, p. 519.

78 Bombeke and Huyghe, *op. cit.*, p. 198; De Broe, *op. cit.*, pp. 566–568; Ph. Bielen and H. Verstraete, "Non-discriminatie", in Peeters, *op. cit.*, p. 686; also OECD commentary on art. 24, §56; the judgment of the European Court of Justice declaring this article discriminatory in an EU context (ECJ, 17 January 2008, C-105/07, *Lammers and Van Cleef*).

1.5. Abuse of the tax treaty itself: domestic law principles or interpretation of the treaty?

Professor De Broe considers that no general international law provision, in particular article 26 of the Vienna Convention on the Law of Treaties (principle of good faith) and article 38 of the statute of the ICJ (general principle of international law), provides adequate support to construe tax treaties as containing an implicit anti-abuse rule. Tax treaties are concluded between states, and could thus not contain a principle of abuse that would primarily affect taxpayers, but rather on the disparity between the national tax systems and the corresponding absence of homogeneity in the legal treatment of "abusive practices" in the application of DTCs.[79]

From a Belgian perspective, the absence in domestic law of a general anti-avoidance doctrine or principle makes very unlikely the possibility that a court would recognize such principle or doctrine in international law. Moreover, the administration itself does not seem to consider that a general anti-abuse principle exists.[80] The facts that Belgium has not expressed any relevant observation in this respect on the 2003 changes in the commentary and that a reference to the commentary is generally made in Belgian DTCs (see protocol added to the Belgian draft model convention 2007) cannot on their own be used as a legal basis for such a principle. Moreover, as a counter-argument, several important administrative sources such as the 2004 circular or the 2007 Belgian draft model convention do not include the combat of avoidance as a DTC objective (even secondarily).[81]

2. General and specific anti-avoidance provisions in tax treaties

2.1. General overview

It is not possible to ascertain a consistent attitude in Belgian DTC practice as regards tax avoidance.

2.2. Specific treaty provisions allowing application of domestic anti-avoidance provisions

Belgium has concluded several treaties including specific clauses aiming to safeguard the application of domestic anti-avoidance provisions. The oldest of the treaties still in force is the one concluded with Germany (1967), according to which "in no case shall the provisions of the Convention be construed so as to prevent a Contracting State from applying the provisions of its national law relating

79 De Broe, *op. cit.*, pp. 374–376. See also De Broe, "Kroniek international Belastingrecht 2007-2008", *TRV*, 2009, no. 2, p. 115. However, a teleological interpretation would be of little help for the DTCs that follow the 2007 Belgian draft model convention, which only makes reference to the "fight against fiscal evasion" (*fraude fiscale* in the French version).

80 Minne and Douenias, *op. cit.*, pp. 207–208.

81 Above-mentioned 2004 circular, para. II.

to the prevention of tax evasion and fiscal fraud".[82] The treaties concluded later with Luxembourg (1971)[83] and Austria (1971)[84] contain similarly drafted provisions. The Belgium–Egypt convention of 1991 is also similar, with the additional nuance that it refers to provisions that "are specifically aimed at combating tax fraud or evasion".[85]

More recently, Belgium accepted the inclusion of similar clauses, such as those in the protocol of the DTC with San Marino (2005), which provides that "in no case shall the provisions of the Convention be construed so as to prevent a Contracting State from applying the provisions of its national law relating to the prevention of tax fraud", which is rather limited,[86] in the agreement signed with Hong Kong (2003)[87] and in the treaty concluded with Singapore (2006),[88] both clauses permitting the application of domestic anti-avoidance measures "insofar as they do not give rise to taxation contrary to the Agreement/Convention".

One may wonder what the words "taxation contrary to the Agreement/Convention" mean. In this respect, the agreement with Hong Kong contains various specific provisions aiming to safeguard the right of Belgium to apply anti-avoidance measures, such as article 23, §3 (reproducing article 24, §4 OECD MC) according to which the deduction of "interest, royalties and other disbursements" and of "any debts of an enterprise" from the taxable profits shall be subject to the same conditions as those applying to domestic situations. This paragraph is interpreted by the Belgian authorities as safeguarding, even in cases not expressly contemplated by the convention, i.e. in articles 9, §1 (adjustment of profits of associated enterprises), 11, §7 (excessive interest) and 12, §6 (excessive royalties), the application of domestic anti-abuse measures, such as articles 54, 55 and 198(11) BITC.[89]

Finally, other DTCs confer authority to apply domestic anti-abuse provisions, but only for particular categories of income. The DTC with Switzerland, for example, is limited to dividends, interest and royalties.[90] In two cases, DTCs safeguard the right to apply only one particular measure: thin capitalization rules (Spain)[91] and CFC rules (Canada). The authorization to apply anti-abuse measures can sometimes be found in a joint commentary, as is the case in the new DTC with the Netherlands, for dividend stripping.[92]

82 Belgium–Germany DTC of 11 April 1967, OG, 30 July– 7 August 1969, final protocol, §17 (IBFD translation).
83 Belgium–Luxembourg DTC of 17 September 1970, OG, 27 January 1973.
84 Belgium–Austria DTC of 29 December 1971, OG, 28 June 1973.
85 Belgium–Egypt DTC of 3 January 1991, OG, 24 July 1997.
86 Belgium–San Marino, 21 December 2005, OG, 24 July 2007, protocol, no. 8.
87 Belgium–Hong Kong agreement of 10 December 2003, OG, 10 November–3 December 2004, art. 27.
88 Belgium–Singapore DTC of 6 November 2006, OG, 11 December 2008, art. 28. According to Luc De Broe, this provision is meaningless, since it does not refer to tax avoidance in any of its official languages (De Broe, *op. cit.*, p. 462).
89 Circular letter no. AAF 4/2005 of 31 March 2005, available online at www.fisconetplus.be.
90 Belgium–Switzerland DTC of 28 August 1978, OG, 14 October 1980, art. 22(2).
91 Belgium–Spain DTC of 14 June 1995, OG, 22 September 2003, protocol, no. 5; Belgium–Canada DTC of 23 May 2002, OG, 24 September 2004, art. 27, §3.
92 This joint explanatory memorandum of the Belgium–Netherlands DTC of 5 June 2002 is annexed to the Bill of ratification (*Parl. Doc*, Senate, 2002–2003, no. 2-1293, 2).

These treaties are, however, exceptions among Belgian DTCs; practically none of the DTCs concluded between 1977 and 2003 confers such authority, while more recent conventions – but not all of them[93] – tend to include anti-abuse measures (in different forms). The absence of such clauses can certainly be justified by the traditional administrative position (DTCs do not prevent the application of domestic measures).[94] Another reason could be the rather unclear Belgian policy towards treaty shopping, illustrated by the recent negotiation and conclusion of DTCs with low-tax jurisdictions.[95]

2.3. General anti-avoidance provisions in tax treaties

As a general rule, Belgium does not include in DTCs explicit general anti-abuse provisions.[96] This attitude is to be regarded as coherent with the administrative doctrine on the application of domestic anti-abuse provisions to tax treaties (see section 1.4.1). However, the Belgian draft model convention 2007 contains a general anti-abuse provision (article 27, "Miscellaneous"), for cases where "the main purposes or one of the main purposes of [a] resident or a person connected with such resident was to obtain the benefits of the Convention".[97] It is, however, uncertain whether this provision will remain, or will be adapted to meet the criteria established by the European Court of Justice.[98]

This "main purpose test" clause is based on the OECD commentary on article 1 (§21(4)) with two significant differences. First, this clause is not limited to passive income.[99] Secondly, the commentary allows contracting parties to deny the treaty benefits if "any person concerned with the creation or assignment of such item of income" seeks to take advantage of the convention, and not only in situations where the taxpayer himself or a connected person pursues this objective. However, the recent convention with the Isle of Man (signed in June 2009 and not yet in force) makes use of the (broader) wording of the commentary.

2.4. Specific anti-avoidance provisions in tax treaties

2.4.1. LOB clauses

The objective of LOB clauses is to impede the interposition of an entity in order to receive treaty benefits. It seems that treaty shopping does not represent a major concern for Belgium. In 2009 only 11 (12 including the DTC with Turkey) out of

93 For example, the DTC with Chile of 6 December 2007 does not contain any provision on avoidance.

94 Comm. DTC, 28/17, 9/3 and 5.

95 De Broe, *op. cit.*, p. 468.

96 For example, the DTC concluded with South Africa (1 February 1995, OG, 11 June 1999) or with Albania (14 December 2002, OG, 10 November 2004).

97 On the Belgian draft model convention 2007, J. Gombeer, "Orientations actuelles de la politique de la Belgique en matière de convention préventive de la double imposition", *Bull. Doc. Min. Fin.*, 2008, no. 3, pp. 137–147 and B. Peeters and A. Lecocq, "New Belgian Standard Convention for Tax Treaty Negotiations", *Steuer und Wirtschaft International,* 2008, no. 5, pp. 197–204.

98 For example, ECJ, 12 September 2002, Case C-196/04, *Cadbury Schweppes.*

99 See DTC with the Congo which only provides for a "purpose test" in the case of dividends (Belgium–Congo DTC, 23 May 2007 (not in force), protocol, no. 4).

almost 90 Belgian tax treaties included an LOB clause for Belgium-sourced income.[100]

Some of the LOB clauses are specific, as they apply only to certain categories of income, i.e. passive income. This is the case of the DTCs concluded with Switzerland,[101] Spain, Azerbaijan[102] and Canada. In some DTCs (e.g. Spain), they do not apply if the company carries on substantial trade or business activities in its country of residence. In Belgium, this carve-out provision has the effect of excluding all the companies subject to corporate tax[103] from the scope of this anti-abuse measure. The LOB provision in the Canadian DTC (and only for interest and royalties) includes an ownership and control test (look-through approach – OECD commentary, article 1, §13) and a subject to tax clause (commentary on article 1, §15).[104] The protocol adds, however, a bona fide provision, which is in line with the recommendation of the commentary (article 1, §16)[105] and an anti-fat capitalization measure, targeting non-residents owning or controlling Belgian coordination centres deriving (interest) income from Canada.[106]

Some other LOB provisions have a more general scope, i.e. they are applicable to all categories of income issued from the state of source. This is the case of the treaties concluded with the United States, the Baltic countries, San Marino, Taiwan and Venezuela. The new Belgian–US tax treaty[107] contains a comprehensive LOB clause, much more far-reaching than the preceding convention. This article is similar, but not identical, to other LOB clauses inserted in a recent DTC concluded by the United States.[108] Since they are not used to such complex LOB clauses,[109] the Belgian authorities could rely on article 21(7) of the convention (exception made for taxpayers not pursuing an abusive purpose) to justify a (cautious) case by case approach.[110]

The LOB provisions in other conventions (except the DTC with Venezuela) consist, more simply, in excluding from the benefits of the DTC those not fulfilling the

100 Also Belgium–UK DTC, art. 10(3)(d) (limited to income from the UK).

101 Belgium–Switzerland DTC of 28 August 1978, OG, 14 October 1980, art. 22, which includes a subject to tax test and a channel approach (§2) and, for interest, a thin capitalization rule (§1(a) and an arm's length test (§1(b)). On the Belgo-Swiss treaty and on the Swiss international policy regarding tax avoidance see P. Kelley and J.P. Lagae, "The Belgian Swiss Income Tax Treaty", *Intertax*, 1980, pp. 153 *et seq.*; S. van Weeghel, *The Improper Use of Tax Treaties*, Kluwer, 1998, pp. 248 *et seq.*; De Broe, *op. cit.*, pp. 732–734.

102 DTC with Azerbaijan, arts. 11, §7 and §8, 12, §6 and §7 and 21, §4, which contains a "main purpose test" as proposed by the OECD commentary (art. 1, §21(4)), and for interest and royalties, an arm's length test.

103 De Broe, *op. cit.*, p. 737.

104 Belgium–Canada DTC, art. 27, §6.

105 Comp. BITC, art. 203(2).

106 De Broe, *op. cit.*, p. 738.

107 Belgium–USA DTC of 27 November 2006, OG, 9 January 2008, art. 21.

108 A. Bax and F. Dierck, "Limitation of Benefits", in A. Van de Vijver (ed.), *The New US–Belgium Double Tax Treaty*, Larcier/IBFD, 2009, pp. 421–454, sp. 421. Comp. OECD commentary, art. 1, §20 and US model, art. 22.

109 On the compatibility of LOB clauses with Community law, comp. ECJ, 5 November 2002, cases C-466/98 to C-476/98, *Open Skies*, with ECJ, 12 December 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*.

110 On the Belgium–USA DTC, art. 21, §7, Bax and Dierck, *op. cit.*, p. 451.

"main purpose" test.[111] The abusive intent has to be proven by the tax authorities, by taking into account, among other factors, the circumstances, the "amount and nature of the income", the real intention of the parties and the residence of the persons controlling the taxpayer or beneficially owning the income (see the DTC with the three Baltic states).

Nevertheless, some domestic anti-abuse provisions contain a reversal of the burden of proof in the case of international transactions (see above).

As for article 344, §2 BITC, it may be argued that DTCs do not affect the right of the contracting state to tax the same income held by the beneficiary (although this would clearly result in double economic taxation).

Finally, the DTC concluded with Venezuela (1993) contains an LOB (subject to tax) clause specifically targeting double non-taxation features that may result from the interaction of worldwide and territorial tax systems.[112] This clause has, however, lost any practical relevance since Venezuela moved from a territorial to a worldwide income tax system in 2002. Interestingly, this type of clause is not to be found in more recent DTCs concluded with countries applying a territorial system, such as the DTC with Hong Kong,[113] which could be seen as an incentive to channel international financial flows through Belgium.[114]

The Belgium–Bahrain convention includes an LOB clause and makes express reference to the OECD commentary.[115]

2.4.2. Beneficial ownership

As most of the Belgian DTCs follow the OECD model, the expression "beneficial owner" is included in many treaties concluded by Belgium after 1977, as well as in the Belgian draft model convention of 2007,[116] but without definition.[117] This concept is also to be found in domestic legal provisions, whether autonomous, such as article 198(11) BITC[118] or article 2, §1(1) of the law on tax amnesty of 2003,[119] or

111 Belgium–Estonia DTC of 5 November 1999, OG, 10 June 2003; Belgium–Lithuania DTC, 26 November 1998, OG, 10 July 2003, art. 29; Belgium–Latvia DTC, 21 April 1999, OG, 10 July 2003, art. 29; Belgium–San Marino DTC, art. 23; Belgium–Taiwan DTC, 13 October 2004, OG, 23 December 2005, art. 27.

112 Belgium–Venezuela DTC of 22 April 1993, OG, 14 April 1999, art. 22.

113 The DTC between Belgium and Hong Kong (10 December 2003, OG, 10 November–3 December 2004) in its protocol (para. 7) provides a subject to tax test for Hong Kong sourced items of income other than dividends, interest or royalties, received by Belgian residents.

114 De Broe, *op. cit.*, pp. 353 *et seq.*

115 Belgium–Bahrain DTC, signed on 4 November 2007, protocol.

116 For example, the recent DTC with Ghana of 22 June 2005, art. 10, §4 and art. 11, §5 or the new DTC signed with the Netherlands denying, in the case of dividend stripping, the person recipient of the dividend being considered as the effective beneficiary. Very interestingly, the Belgium–Luxembourg DTC of 17 September 1970 does not include such a provision despite having been amended in 2002.

117 Except for the treaty with Turkey, which cannot be considered very helpful (Belgium–Turkey DTC of 2 June 1987, protocol, art. 5).

118 See also art. 289 BITC.

119 Law of 31 December 2003, OG, 6 January 2004.

which implement the EC Savings and Interest and Royalties Directives, such as article 338bis BITC or article 117, §6*bis* RDBITC.[120]

As is the case in other jurisdictions, this concept also does not receive a clear-cut definition from domestic case law.[121] An additional interpretative difficulty is caused by the fact that the French notion of *bénéficiaire effectif* (effective beneficiary) and the Flemish version of *uitendelijk gerechtigde* (final beneficiary) – both authentic – can be construed in a divergent manner.[122] The Belgian administrative commentary on DTCs, as well as article 117, §6*bis* RDBITC, define this notion as "the owner or usufructholder of the shares, securities, assets and rights",[123] focusing on the legal dimension of the ownership, and as such can be construed as an application of the sham doctrine[124] (see section 1.1) and the rejection of a (broader) economic (or substantive) interpretation,[125] typical of common law countries.[126] However, Belgium seems to be laid out to adopt too broad a definition of beneficial ownership.[127]

2.4.3. Remittance base taxation clauses

Some DTCs contain remittance clauses, like the treaties with Singapore (article 27) and with Cyprus (treaty of 14 May 1996, article 29).

2.4.4. CFC legislation

On the absence of CFC legislation in Belgium, see above section 1.4.2.2.

2.4.5. Subject to tax test

Some of Belgium's DTCs include provisions that can be seen as subject to tax clauses departing from the OECD MC. Several conventions, and the Belgian draft MC, require, generally for the application of articles equivalent to articles 18, 21

120 B. Springael, "Implementation of the Interest and Royalties Directive", *Derivatives and Financial Instruments*, 2004, no. 6, pp. 279–289.

121 L. De Broe and N. Bammers, "De interpretatie van het begrip 'beneficial ownership' onder de OESO-Modelverdrag: ondanks meer international rechtspraak blijft de onduidelijkheid", *TFR*, 2008, pp. 1047–1065.

122 On this issue, see De Broe, *op. cit.*, pp. 715–724.

123 Belgian Com. DTC, nos. 10/204 and 231; 11/204, 226/5 and 231; 12/203 and 231.

124 Brussels Court of Appeal, 6 October 1995, *AFT* 1996, pp. 476–451; Van Gompel, *op. cit.*, p. 213.

125 L. Hinnekens, "Treaty shopping en anti-misbruikregels in België en elders", in M. Storme and S. Van Crombrugge (eds.), *Actuele problemen van fiscaal recht*, Deurne, Kluwer, 1989, pp. 261–264; M. de Munter, "Artikel 11 Interest", in B. Peeters (ed.), *Het nieuwe Belgisch- Nederlands dubbelbelastingverdrag. Een artikelsgewijze bespreking*, Ghent, Larcier, 2001, at p. 258; S. Claes, "De 'beneficial ownership'- clausule: much to do about nothing", *Fisc. Int.* (2001), no. 212, p. 3; also F. Dierckx, "Artikel 10 Dividenden", in Peeters (ed.), *op. cit.*, pp. 206–210; B. Peeters, *Dubbelbelastingverdragen -Commentaar*, Brussels, Ced. Samsom, 1991, para. 10.2.

126 J. Van Gompel, "Interest", in A. Van de Vijver (ed.), *The New US–Belgium Double Tax Treaty*, Larcier/IBFD, 2009, p. 212; A. Haelterman, *Fiscale trasprantie. Theorie en praktik in Belgie*, Kalmthout, Biblo, 1992, pp. 235–236. De Broe, however, seems to favour an autonomous tax interpretation: De Broe, *op. cit.*, p. 718.

127 See the very narrow interpretation of the concept given by the Belgian Minister of Finance (although based on the OECD commentary), in De Broe, *op. cit.*, no. 534.

and/or 23 OECD MC, that income is "taxed" or, more rarely, "subject to tax" (instead of "may be taxed").[128] These provisions have been the subject of various and contradictory decisions in case law. Indeed, the words "taxed" or "subject to tax" can be interpreted as requiring either effective taxation, or, less strictly, being subject to the tax law provisions of another state, even if by application of these provisions the income turns out to be exempt. This latter interpretation is based in Belgium on a 1970 Supreme Court judgment.[129] However, in a recent judgment, the Brussels Court of Appeal made a new distinction and considered that, even if "subject to tax" could refer to income exempted under the laws of the contracting state, the word "taxed" implied effective taxation.[130]

In order to avoid such ambiguity, recent DTCs tend to give a definition of the word "taxed". For example, according to the Belgium–San Marino DTC:

> "income is taxed in San Marino when it is effectively included in the taxable base by reference to which the San Marino tax is computed. Income is therefore not taxed in San Marino when, being subjected to the tax treatment normally applicable to such income under San Marino law, it is either not taxable or exempted from tax in San Marino…"[131]

2.4.6. Rent-a-star companies

In Belgium, a particular problem arises from the fact that most Belgian DTCs do not include a provision similar to article 17, §2 OECD MC, while this provision has been implemented into domestic tax (article 228, §2(8) BITC). The tax administration considers this provision applicable even in the case of older DTCs.[132] However, until now, the courts have generally rejected the attempt by the tax administration to apply this domestic law provision.[133] However, more recent DTCs concluded by Belgium usually include a provision similar to article 17, §2 OECD MC (see for example article 16, §2 of the 2007 Belgian draft model convention).

2.4.7. Tax-sparing provisions in DTCs and abuse

For this topic see above section 1.4.1.

128 For example, the Belgium–Ukraine DTC of 20 May 1996, OG, 19 October 1999 (art. 23); the Belgium–Vietnam DTC of 28 February 1996, OG, 10 September 1999 (art. 21); the old Belgium–Canada DTC of 29 May 1975, OG, 11 September 1976 (art. 18, Pensions).

129 Supreme Court, 12 September 1970, *Pas.*,1970, I, p. 37.

130 Brussels Court of Appeal, 17 January 2008, *Fiscologue Int.*, no. 294, 1-4 (with comment of M. Van Keirsbilck, "Komt de exemption vaut impôt op de helling te staan?"/'Exemption vaut impôt': l'adage remis en cause?).

131 Belgium–San Marino DTC, protocol, no. 7.

132 Circular of 1 February 2002, no. AFER 3/2002, www.fisconet.be; OG, 25 April 1997.

133 Antwerp Court of Appeal, 6 May 2008; Louvain Court of First Instance, 2 November 2007, comment D. Deschrijver, *TFR*, 2008, no. 350, pp. 959 *et seq.*; Ghent Court of Appeal, 21 March 2006, www.fisconet.be; Brussels Court of Appeal, 23 June 2004, www.fiscalnet.be; also De Broe (2009), pp. 115–155, no. 17.

3. Relationship between anti-abuse provisions and EC law

See ECJ, 17 January 2008, C-105/07, *Lammers and Van Cleef*[134] and the conclusions of 10 September 2009 of Adv. Gen. Kokott in the pending case C-311/08, *Société de gestion industrielle* (SGI).

134 De Broe and De la Serna, *op. cit.*, pp. 204 *et seq.*; L. De Broe and N. Bammens, "Belgische thin-cap regel schendt vrij vestigingsrecht", *Fiscoloog internationaal*, 2008, no. 290, p. 1.