Belgium

Branch Reporter
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Summary and conclusions

The Belgian tax code contains few legal provisions regarding transfer pricing (TP). The key provision is article 185(2) of the domestic tax code which lays down the arm's length principle under domestic law. The tax authorities take the view that the OECD comments, and specifically those relating to Actions 8–10 of the base erosion and profit shifting (BEPS) report, do not need to be transposed into a new law and are immediately applicable. However, the BEPS report has led to the publication of new laws, including one on the new three-tier TP documentation requirements developed in the BEPS report on Action 13.

Although case law on TP cases involving multinationals (MNEs) is almost non-existent, the European Court of Justice has ruled on the compatibility of two Belgian legal provisions with EU law. The absence of TP litigation can be explained by the extended use of unilateral advance tax rulings which provide upfront certainty to MNEs over the TP methods and the margins used by their Belgian entities.

The introduction of the economic ownership of intangibles to the detriment of the legal ownership as well as the obligation to allocate income from the exploitation of intangibles to group companies which have performed functions, used assets and assumed risks in the development, enhancement, maintenance, protection and exploitation (DEMPE) of those intangibles could influence the approach of the tax authorities in the future. It remains to be seen how the courts will perceive this new paradigm in a civil law-based country which puts an emphasis on the terms of contracts. However, the Ruling Commission is much more open to taking the economic ownership of assets into account in its TP rulings. Therefore, the OECD emphasis on the DEMPE functions should not disturb the Commission. Moreover, the returns on financing transactions are already scrutinized and should be commensurate with the functions performed and the risks incurred by the lender.

As far as comparability and synergies are concerned, Belgium is at the forefront not only with its "excess profit" rulings but also with detailed rulings on the deductibility of guarantee fees and the allocation of central purchasing volume discounts. In those areas, Belgium has anticipated the BEPS conclusions.

Regarding hard-to-value intangibles, the Ruling Commission is already using the profit split method prudently and not as the preferred method when examining

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the profit attributable to the exploitation of intangibles. Even with very specific ruling applications, the Ruling Commission checks the methodology by doing its own comparable searches.

The OECD considers that rendering intra-group services is a high-risk transaction because it contends that it can be used to erode profits. The BEPS report updates its existing guidelines on this topic without bringing in any major modifications. Tax inspectors already examine whether the payor benefited from actual services and paid an arm's length consideration based on an acceptable TP method. The Belgian Ruling Commission has issued numerous rulings on intra-group services and its positions are well known since those rulings are published. Most of the time, the applied TP method is a transactional net margin method (TNMM) with a cost-plus as profit level indicator. The mark-up normally ranges between 3 per cent and 8 per cent according to the type of services.

Most of the section of the BEPS report relating to low value-adding services is devoted to a new "elective simplified approach" which allows groups to apply a safe harbour cost plus 5 per cent approach with very few administrative hurdles. The definition of low value-adding services is perfectly in line with that used by the Ruling Commission and the tax authorities. Belgium used to apply a similar safe harbour rule until the European Commission considered it a harmful tax measure that should be abolished. It remains to be seen how Belgium will implement this new approach in the future.

In the framework of services, the Ruling Commission has accepted for years that "disbursements" are cross-charged at cost without requiring a mark-up to be added. Disbursements are costs incurred by an entity of the group for goods or services which are allocated and cross-charged to other group members without adding any mark-up. Indeed, the group members could have acquired those goods or services directly from the third party supplier at the same market conditions. The OECD now takes the same view on those disbursements and this will reinforce the position of the Ruling Commission.

Regarding the use of the profit split method, the Ruling Commission has been prudent and its rulings are likely to be in line with the final OECD recommendations which should be issued in a final report soon.

The major change relating to the TP aspects of the BEPS report concerns the introduction of compulsory three-tier TP documentation. Until 2015, there was no obligation to draw up or file any TP documentation, although the tax authorities encouraged taxpayers to prepare documentation in order to facilitate TP audits. Belgium recently voted a law requiring qualifying taxpayers to prepare country-by-country reporting (CbCR) as well as a master file and a local file along the lines of the BEPS report on Action 13. However, Belgium went beyond the OECD recommendations by requiring qualifying taxpayers to file an extensive local file as soon as a Belgian entity carried out cross-border intra-group transactions for more than €1 million.

This initiative shows once more that Belgium wishes to appear as the best in class while at the same time being a small economy that needs to attract foreign investors. Other countries which participated in the work on the BEPS report may take a "pick and mix" approach to the recommendations of the BEPS report and appear more attractive than Belgium from a tax perspective.

1. Current TP regulation and practice in Belgium

For decades, Belgium has adhered to the OECD TP guidelines without having any legal provision in this respect.

The tax authorities became really active about TP as a result of aggressive TP audits performed in surrounding countries leading to requests for correlative adjustments in Belgium. The authorities issued their first regulations in 1999 requesting their tax inspectors to focus on TP and to apply the OECD principles in this respect. In addition, in 2002, a new tax ruling practice was introduced by law allowing the issuance of binding rulings, including on TP matters.

After introducing the arm's length principle in Belgian domestic law in 2004, a special TP investigation team was formally and officially set up within the tax administration in 2006 with the purpose of auditing large MNEs and monitoring whether they applied the OECD principles adequately.

1.1. Statutory rules

In 2004, article 185 of the Income Tax Code (ITC) was expanded to include the arm's length principle in Belgian tax law for the first time. Article 185(2) of the ITC allows for a unilateral adjustment to the Belgian tax basis if the arm's length principle is not respected, similar to the primary adjustment of article 9 of the OECD model tax convention. Conversely, when an adjustment has been performed by foreign tax authorities, a Belgian taxpayer can request a downward (corresponding) adjustment from the Belgian tax authorities in order to avoid double taxation of the same profit. Article 185(2) only applies between related parties to their cross-border transactions.

According to the tax authorities, domestic transactions are governed by article 26 of the ITC. Article 26 of the ITC provides authority for the taxable profits of enterprises in Belgium to be increased when the authorities can demonstrate that any profit transfers were "abnormal or gratuitous benefits" granted to individuals or companies established in Belgium or abroad. This does not apply if the benefits transferred are subject to tax in the hands of the recipient. Since the ITC does not provide a definition of "abnormal or gratuitous benefits", case law[1] took over and ruled that "abnormal" referred to "that which is not 'in the natural order of things' or not consistent with common practice". This does not match the arm's length principle, despite a denial from the authorities.

In addition, the tax authorities can make use of other more general provisions in the ITC to challenge transfer prices. For example, when an unjustified expense has been incurred, the general rules on the deductibility of business expenses are invoked to disallow it. Furthermore, the ITC contains so-called "anti-abuse provisions" that tackle artificial inbound or outbound profit shifting.

[1] Cassation, 10 April 2000, Pasicrisie, 2000, I, p. 240.

1.2. Administrative regulations

On 28 June 1999, administrative regulations were issued relating to TP.[2] The regulations are broadly based on the OECD TP guidelines. They urge tax inspectors to carry out in-depth TP audits where the taxpayer fails to show "documentary evidence" that efforts have been made to fix arm's length inter-company prices. Consequently, taxpayers may benefit from preparing a defence file upfront, substantiating their TP methodology. In addition, the regulations underscore the importance of conducting a proper functional analysis and refer to a list of generic functional analysis questions.[3]

In 2000, the tax authorities issued regulations on the application of the European Arbitration Convention and, in 2006, they issued regulations on TP audits and documentation. The regulations on the documentation aspects were merely the transposition of the approved EU code of conduct on TP documentation as recommended by the EU Joint Transfer Pricing Forum.

In September 2016, the authorities issued draft regulations regarding profit attribution to permanent establishments (PEs). Those regulations provide details on the allocation of the profit between the head office and the branches of the same legal entity, much along the lines of the 2008 and 2010 OECD reports on that matter. They explain the scope of the old version of article 7 of the OECD model convention (as used in most Belgian treaties) compared to that of the new article 7. The regulations emphasize the importance of internal transactions and provide numerous examples.

Most TP agreements between taxpayers and the authorities are concluded through the Ruling Commission which is composed of inspectors specializing in TP and who may issue binding rulings. Bilateral or multilateral advance rulings (APAs) are concluded on the basis of the mutual agreement procedure (MAP) under the relevant tax treaties.

1.3. Case law

To the best of the reporter's knowledge, no court has ever ruled on the application of the arm's length principle according to article 185(2) of the ITC. However, the Constitutional Court has ruled repeatedly[4] that the articles of the ITC (such as article 26 in combination with article 49) leading to double taxation did not breach the equality and non-discrimination principles laid down in the Constitution.

The decisions of the European Court of Justice also have a great impact on TP. In this respect, landmark cases are the *SGI* case[5] in which the European Court ruled that the more stringent rules applicable to foreign companies in article 26 of

[2] Regulations AAF/98-0003 dated 28 June 1999, available on the website Fisconetplus of the tax authorities.

[3] P. Boone *et al.*, *International Transfer Pricing*, Section Belgium, New York, Pricewaterhouse-Coopers Publishing, 2015/2016, p. 246.

[4] Constitutional Court, decisions nos. 149/2013 of 7 November 2013 and 160/2010 of 22 December 2010, available on the website of the court.

[5] European Court of Justice, decision C-311/08 of 21 January 2010, OJ, C63/8 of 13 March 2010.

the ITC did not infringe EU law while, in the *Siat* case,[6] the Court ruled that article 54 of the ITC (an anti-abuse provision regarding some payments made to low-tax jurisdictions) did violate EU law because its wording was too vague to grant legal certainty to the taxpayers.

Recently, the European Commission started an infringement procedure against various rulings, including Belgian rulings, on the ground of potential prohibited state aid.

2. The impact of the BEPS project on TP

2.1. Introduction

Representatives of the Belgian tax authorities were among the most active in discussing and preparing the several BEPS reports within the OECD. According to the well-established viewpoint of the authorities,[7] the OECD TP guidelines are immediately enforceable in Belgium since they only comment on and illustrate the arm's length principle embedded in article 9 of the OECD model. Accordingly, the recommendations of Actions 8–10 of the 2015 BEPS report are deemed to apply in Belgium as soon as they are officially approved by the OECD Council,[8] which occurred on 23 May 2016. Some officials even contend that those recommendations apply with retroactive effect; this will not enhance legal security for taxpayers.

Other recommendations of the BEPS report require legislative changes, either through the ratification of the multilateral agreement provided in Action 15 of the BEPS report or through domestic legislation. The law of 1 July 2016 introduced the requirement to prepare and file TP documentation in the form of CbCR as well as a master file and a local file. Before that law, there was no legal obligation to prepare and/or file contemporaneous TP documentation.

The increased "substance-over-form" approach of the BEPS report has not surprised the business community. The commensuration of income with value creation has already been implemented for years by the Ruling Commission in its binding rulings. However, the community foresees the negative impact of the different anti-abuse provisions introduced (and the combination of them) including their introduction of very vague and subjective criteria, and regrets the absence of a mandatory and binding arbitration provision in the multilateral instrument discussed in Action 15 of the BEPS report, as well as the significant administrative burden and costs entailed by CbCR. It expects an increase in the number of disputes relating to double taxation.

6 European Court of Justice, decision C-318/10 of 5 July 2012, OJ, C287/2 of 22 September 2012.

7 S. 26/48 of the tax authorities' commentaries to the ITC and regulations dated 28 June 1999 (AAF/98-0003) onTP to which a summary of the OECD TP guidelines is annexed.

8 On 23 May 2016, the OECD Council approved the amendments to the TP guidelines, as set out in the BEPS report on Actions 8–10, Aligning transfer pricing outcomes with value creation and the BEPS report on Action 13, Transfer pricing documentation and country-by-country reporting.

2.2. Challenges of transactions with intangibles

2.2.1. Definition of intangibles

The ITC does not contain a definition of intangibles. Usually, one looks at the accounting law to find a substitute. Accounting law is supposed to define what should be recorded as intangible fixed assets but it limits the definition to an exhaustive list of items to be considered as intangibles for accounting purposes. Those items are the following:

- R&D expenses;
- concessions, patents, licences, knowhow, trademarks and similar rights;
- goodwill; and
- down payments for intangible fixed assets.

Similarly, article 12 of the OECD model defines the term "royalties" as "consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematographic films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience".

The new definition of intangibles introduced by the OECD in its BEPS report conflicts with that of Belgian accounting law as goodwill is not always considered as an intangible by the OECD[9] but should be taken into account when transferring other assets of the enterprise to establish the arm's length price. Such a conflict is not a problem for the OECD as those legal definitions of intangibles are irrelevant for TP purposes.[10]

2.2.2. Transactions with intangibles

Belgian legislation is based on civil law principles. This means that, for legal purposes, only the legal owner can exercise all rights related to an asset, whether tangible or intangible, unless some of those rights are transferred contractually to another party. Legally speaking, economic ownership is not recognized under civil law. Some rights related to an asset such as the "usufruct" (a sort of "life interest") do not correspond to economic ownership.

For TP purposes, the Ruling Commission has already recognized the concept of economic ownership when examining intra-group transactions and the TP methods proposed and when valuing the prices of transactions envisaged by the taxpayer.[11] To the best of the reporter's knowledge, no Belgian court has ever ruled on the recognition of the economic ownership of an asset, whether or not for TP purposes.

Since Actions 8–10 of the BEPS report would be considered by the tax authorities as the practical application of the arm's length principle mentioned in article 185(2) of the ITC, the emphasis placed by the OECD on value creation by each enterprise of the group and on the actual behaviour of the parties rather than on the

9 Aligning transfer pricing outcomes with value creation, Actions 8–10, Paris, OECD Publishing, 2015 final reports, 5 October 2015, 6.2–6.29.
10 See *ibid.*, 6.13 and 6.29.
11 See Ruling 2015.002 dated 24 March 2015, available on the website www.ruling.be.

legal ownership of intangibles[12] will probably be adopted by the tax authorities for TP purposes.

2.2.3. "Substance-over-form" approach towards intangibles

For 10 years, the tax authorities, either during TP tax audits or through advance tax rulings, have emphasized the importance of the "substance-over-form" principle.

During tax audits, the Belgian taxpayer often claims a limited risk profile in order to limit the level of its taxable remuneration in Belgium. This requires a thorough functional analysis which is audited by tax inspectors. In cases where the Belgian entity is the entrepreneur, the authorities check whether the return left with the other related parties is commensurate with the actual functions and risks assumed by those entities. Not only contracts but also the actual behaviour of the parties are examined. Discrepancies could lead to adjustments.

Tax rulings do require an upfront functional analysis and a benchmark study to justify the TP method(s) and the margins attributed to each entity involved in the ruling request. Although the legal ownership of tangible and intangible assets is important, the Ruling Commission examines the allocation of the functions, the risks and the use of the (in)tangible assets.[13] Since rulings are advance rulings, i.e. before the actual transactions take place, the Commission cannot check whether or not the allocation of functions, risks and intangibles described in the ruling request matches the actual behaviour of the parties. However, under Belgian tax law, if the actual behaviour of the parties and the way they carry out the transactions do not correspond to what was described in the ruling request, the ruling is not binding upon the tax authorities and it loses any usefulness.

Since the OECD principles embedded in Action 8 of the BEPS report are moving from a focus on the legal owner to a focus on each group member which performs functions, uses assets or assumes risks that are expected to contribute to the value of the intangibles, it is expected that the tax authorities will also modify their attitude in the same way as from 2016. The authorities are likely to examine closely the assignment of the DEMPE[14] functions among the group entities. This change could have a significant impact on Belgian companies owning intangibles as well as on Belgian sales entities of foreign groups which could possibly develop commercial intangibles and be forced to recognize additional profit relating to the development of these intangibles. In this respect, the tax authorities have carefully studied the US landmark *GlaxoSmithKline* case where the key issue concerned the allocation of the US profit between the legal owner (the UK parent company) and the economic owner of some alleged commercial intangibles (the US sales subsidiary).[15] The tax authorities are not yet auditing commercial entities based in Belgium to examine whether or not they have become the economic owners of commercial intangibles.

12 See report on Actions 8–10, *op. cit.*, 6.32.

13 See Ruling 2013.290 dated 29 April 2014 and Ruling 2012.090 dated 19 February 2013.

14 Development, enhancement, maintenance, protection and exploitation of an intangible.

15 *GlaxoSmithKline Holdings (Americas) Inc. & Subsidiaries* v. *Commissioner of Internal Revenue*, TC no. 5750-04, filed on 2 April 2004. The text of the lawsuit can be found in *Tax Management Transfer Pricing Report*, 14 April 2004, no. 23, pp. 1119 *et seq.*

Since Belgian tax law is based on legal ownership under civil law, it is highly probable that the move from an emphasis on the legal ownership to that on the economic ownership will be limited to the TP field. It is very unlikely that Belgian tax law will be modified in this respect.

2.2.4. Comparability and group synergies

Synergies were explicitly recognized by the tax authorities before the BEPS report, particularly by the Ruling Commission. From a TP perspective, synergies mean advantages stemming from the fact that a company belongs to a group and can benefit from advantages that an independent company would not obtain.

The OECD does not give any precise definition of synergies and nor does it explain how to measure and price them. Synergies are discussed in the framework of the profit split method, including in its public discussion draft on "the revised guidance on profit splits" of 4 July 2016, but it is difficult to see the usefulness of this term in determining whether the profit split is the best TP method.

Synergies have also been recognized in Belgium through the so-called "excess profit rulings".[16] These rulings are delivered by virtue of article 185(2) of the ITC, which deals with cross-border transactions of companies or branches belonging to an MNE. This article provides a downward adjustment: when a company is taxable on profits on which another company could be taxed or has already been taxed, the taxable income of the first company is adjusted in an appropriate manner, as if the agreed conditions between the two companies were those which would have been agreed between two independent companies.

Because a Belgian company benefits from synergies and other intangibles (a client list, a distribution network, etc.) for which it does not pay any consideration, it will generate additional profits stemming from those "received" intangibles. Because an independent company would not benefit from those intangibles and in order to respect the arm's length principle, the Belgian entity requests, in an advance ruling, the tax exemption of the portion of the profit stemming from the exploitation of those "received" intangibles.

The granting of those rulings was explicitly based on paragraph 1.10 of the OECD TP guidelines which reads as follows:

> "The arm's length principle is viewed by some as inherently flawed because the separate entity approach may not always account for the economies of scale and interrelation of diverse activities created by integrated businesses. There are, however, no widely accepted objective criteria for allocating the economies of scale or benefits of integration between associated enterprises."

The "excess profit" rulings are presently being challenged by the European Commission which takes the position that they constitute prohibited state aid, based on its own definition of the arm's length principle which does not match that of the OECD. Belgium has filed an appeal against the Commission's decision.

16 See Rulings 900.479 dated 29 June 2010 and 2010.106 dated 20 April 2010, available on www.ruling.be.

The second area where synergies are explicitly recognized in Belgium is the area of financial transactions, specifically in respect of an implicit and/or explicit guarantee given by the parent company to one of its affiliates. The question is to determine whether a subsidiary always benefits from the creditworthiness of the ultimate parent of the group when negotiating a loan from a related party or a third party and whether it is allowed to pay a guarantee fee to the parent company if the latter takes on an explicit engagement to guarantee the reimbursement of the loan if the affiliate fails to do so. The implicit guarantee toward the lender who lends the money to an affiliate stems from the fact that the borrowing subsidiary belongs to an MNE and, indirectly and to a certain extent, benefits from the creditworthiness of the parent company. This implicit guarantee is therefore a synergy stemming from the fact that the affiliate belongs to the group without any actual transaction being undertaken by the group. The explicit guarantee is a formal engagement from the parent company to reimburse the loan taken by a subsidiary if the latter does not reimburse its loan.

Several ruling requests were filed with the Ruling Commission about the arm's length price of a guarantee fee when the parent company was granting an explicit guarantee.[17] The Ruling Commission heavily relied upon the Canadian landmark *GE* case to take a position. In that case,[18] the US-based parent General Electric Capital Corporation (GECUS) (with an AAA credit rating) guaranteed debt securities issued by a Canadian subsidiary GECC (with a BB credit rating on a stand-alone basis) in consideration for a guarantee fee equal to 1 per cent per annum of the principal amount of debt securities outstanding during a year. The deduction of this guarantee fee was disallowed by the tax authorities because this explicit guarantee had no economic benefit for the Canadian subsidiary as it already enjoyed an implicit guarantee. According to the Canadian tax authorities, the parent company would never allow a group affiliate to default on its debt because this would damage the parent's own AAA credit rating and increase its borrowing significantly. Due to this implicit guarantee, GECC would have had the same credit rating as its ultimate parent and could have borrowed at the same interest rate without the explicit guarantee.

The court held that the factor of "implicit guarantee" was relevant in an arm's length analysis under the TP rules. It applied a "yield approach" comparing the interest rate GECC would have paid with and without GECUS's guarantee. The Tax Court found that GECC's credit rating (with implicit support but without the guarantee) was at most BBB-/BB+ (and not AAA) and that the 1 per cent guarantee fee satisfied the arm's length test.[19]

In its BEPS report on Actions 8–10, the OECD is adopting the same reasoning as the Canadian tax court concerning group synergies. No payment is required when a subsidiary obtains incidental benefits attributable solely to its being part of

[17] See Rulings 2016.034 dated 23 February 2016 and 2016.093 dated 19 April 2016.

[18] *The Queen* v. *General Electric Capital Canada Inc.*, Federal Court of Appeal, 15 December 2010, 2010 FCA 344, confirming the judgment in first instance (*General Electric Capital Canada Inc.* v. *The Queen*, 4 December 2009, 2009 TCC 863 (Can LII). See D. Ledure, "General Electric Capital Canada Inc./The Queen – Impliciete guaranties en het arm's length principle", TFR, 2012, no. 424, pp. 566 *et seq.*

[19] F. Barette *et al.*, "Crown Loses GE Capital Canada Transfer Pricing Appeal", *Fasken Martineau Taxation Bulletin*, 21 December 2010, p. 1.

a larger MNE group. However, when a material advantage is obtained as a result of deliberate concerted group actions, a consideration should be paid.[20] It is regrettable that the examples of group synergies given by the OECD are limited to a central purchasing function generating volume discounts and to a guarantee fee. There are other types of group synergies which can create benefits to group companies, as the Belgian "excess profit rulings" illustrated. For those synergies, it would have been interesting to know the OECD viewpoint as far as the potential consideration was concerned.

2.2.5. Hard-to-value intangibles

Pursuant to the BEPS report on Actions 8–10, Belgium did not take any specific measures regarding hard-to-value intangibles. It remains to be seen whether the tax authorities will apply the recommendations mentioned in the report regarding hard-to-value intangibles, particularly the use of *ex post* results to possibly challenge the valuation *ex ante* of an intangible under certain circumstances and when some thresholds are exceeded. Outside the TP context, it is generally accepted that the tax authorities may not interfere in the management of the taxpayer's business and challenge the assumptions taken at the time a taxable transaction is decided. Moreover, case law largely demands that the authorities look at the time the transaction took place and not when the results of the transaction were known some years later (usually when a tax audit is taking place). It remains to be seen whether, for the sole purpose of valuing a hard-to-value intangible, the tax authorities and/or the courts will change their attitude.

When examining the few tax rulings dealing with hard-to-value intangibles, the question of whether or not a related party took into account the valuation uncertainty in pricing the transaction is dealt with (a) when parties use a valuation method like the discounted cash flow approach[21] or (b) by limiting the binding character of the ruling to a period of maximum five years. In the first case, the discounted cash flow can be based on projected results but with an adjustment after a few years to take into account the actual profits whether or not with a retroactive effect.

In some rulings, the valuation of the intangible is based on the acquisition price paid to a third party in the recent past (comparable uncontrolled price (CUP)) with an adjustment of the value based on a valuation carried out by an external expert.[22] Taxpayers often use external databases like RoyaltyStat to value intangibles when comparables are available.[23] In other rulings, the residual profit method is used when no comparables are available.[24]

20 Aligning Transfer Pricing Outcomes with Value Creation, Actions 8–10, Paris, OECD Publishing, 2015 Final Reports, 5 October 2015, 1.157 and 1.158. This confirms the OECD position mentioned under 7.13 of the OECD TP guidelines.

21 See Ruling 2015.002 dated 24 March 2015.

22 See Ruling 2016.038 dated 15 March 2016, Ruling 2016.123 dated 19 April 2016 and Ruling 2016.095 dated 17 May 2016.

23 See Rulings 2015.689 dated 26 January 2016 and 2015.599 dated 19 January 2016.

24 See Rulings 2016.104 dated 22 March 2016, 2015.670 dated 26 January 2016 and 2015.331 dated 15 September 2015.

The OECD recognizes the usefulness of economic valuation techniques for transactions involving the transfer of intangibles or rights in intangibles. Although not excluding other methods, the application of income-based valuation techniques, especially valuation techniques premised on the calculation of the discounted value of projected future cash flows derived from the exploitation of the intangible being valued, is considered as useful.

The OECD concedes that using a valuation based on the actual future income does not exactly match the attitude of third parties. “Although in some cases an uncontrolled party may mitigate its individual risks through agreed variations in prices, this generally does not result in the other party sharing in the outcomes of its business activities or sharing in its risks.”[25] However, when related parties value an intangible on the basis of future actual outcomes, they share the risks associated with the business of the party realizing the future outcomes.

Based on the OECD TP guidelines[26] and a specific EU experts report on the valuation of intellectual property,[27] the EU Joint Transfer Pricing Forum issued a discussion paper on the use of economic valuation techniques in TP.[28] This discussion paper sets up the theoretical framework of valuation techniques. Further developments on the practical implementation of those techniques are expected in the coming months and will certainly inspire the tax authorities and Belgian taxpayers.

2.2.6. Cost contribution agreements (CCAs)

CCAs are seldom initiated in Belgium. This does not mean that Belgian companies do not participate in them but that those CCAs are agreements entered into outside Belgium and are governed by foreign tax law. Mostly, the main contributors are non-Belgian affiliates. There are a few rulings on this matter.[29]

To the best of the reporter’s knowledge, there is no published Belgian court decision concerning CCAs.

Tax audits of CCAs with Belgian members are guided by the recommendations of Chapter VIII of the OECD TP guidelines. The amendments brought by Action 8 of the BEPS report will probably not increase the use of CCAs in Belgium. The main concern regarding the report relates to the requirement that contributions of the members of the CCA be commensurate with their proportionate share in the expected benefits. This premise will furthermore increase disputes about valuation with the tax authorities. There are circumstances when a valuation at cost is more appropriate, as for the use of research centres in the case of agreements concluded with third parties.

[25] Revised guidance on profit splits, BEPS report on Actions 8–10, public discussion draft, 4 July 2016, Paris, OECD Publishing, p. 8.

[26] See OECD TP guidelines, 9.94.

[27] Final Report from the Expert Group on Intellectual Property Valuation, 29 November 2013, Luxembourg, Publications Office of the European Union, 2014.

[28] Discussion Paper on Scoping the Work on the Use of Economic Valuation Techniques in Transfer Pricing, DOC: JTPF/013/2015/EN, 22 October 2015, available on the EUJTPF website.

[29] See e.g. Ruling 2013.326 dated 3 September 2013.

For CCAs on services not creating intangibles, the EU Joint Transfer Pricing Forum issued some recommendations on CCAs in June 2012 addressing some critical practical issues faced by multinationals using CCAs.[30] The view of the Forum was clearly focused on sharing the costs and is based on the reasoning that, for these kinds of services, their value is not much greater than their cost.

2.3. Risk and capital

Since the tax authorities apply the OECD TP guidelines as they are modified over time, it is to be expected that they will apply the new OECD approach, which aligns the returns with the value creation and which comprises measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. As requested by the OECD, it is to be expected that the authorities will put less emphasis on the contractual arrangements where the actual behaviour of the related parties deviates from those contractual arrangements, and if the legal owner of the assets does not carry out important functions, assume the most significant risks and enhance the value of its assets.

Whereas Belgium has a civil law-based tradition to focus on legal agreements and on respect for the legal obligations of the parties,[31] the BEPS report will undoubtedly lead to a more economic approach to TP in Belgium and to a more economic analysis of intra-group transactions.

Regarding the returns on capital, the tax authorities have long experience starting with the audits of Belgian coordination centres (intra-group treasury companies benefiting from a specific tax regime which has now been abolished) and with the intra-group finance companies which succeeded them. Thorough tax audits focus on the arm’s length consideration but also on whether the returns of those finance companies are commensurate with the functions and the risks of the transaction being examined.[32]

2.4. High-risk transactions

2.4.1. CUP and quoted prices for cross-border commodity transactions

Commodity transactions are based on prices quoted on commodity exchanges. To the best of the reporter’s knowledge, there has not been any published court decision or any tax ruling on the TP aspects of commodity transactions. Belgium not being a country rich in commodities, agreements usually involve Belgian entities as buyers of commodities.

It is expected that any deviation from the quoted price or any item added to the quote under any qualification whatsoever would be carefully examined by the authorities.

30 Report on cost contribution arrangements on services not creating intangible property (IP), DOC: JTPF/008/FINAL/2012/EN, 7 June 2012.

31 Based on the landmark *Brepols* case, Cassation, 6 June 1961, Pasicrisie, 1961, I, p. 1082.

32 See Ruling 2016.123 dated 19 April 2016.

2.4.2. Intra-group services

Intra-group services should be examined on the one hand when the Belgian entity provides the services and on the other hand when it is the beneficiary of the services.

Profits generated by rendering services are not defined as such in the ITC but they undoubtedly fall under the definition of taxable profits by virtue of article 24 of the ITC. With regard to services at international level, profits from services are only taxable in the residence state of a company unless the services are rendered in another contracting state through the presence of a PE. However, in some treaties, Belgium has deviated from this rule and provided that the furnishing of services is deemed to constitute a PE (the so-called "services PE") in certain circumstances.[33]

Belgium has a long tradition in concluding agreements with taxpayers regarding intra-group services. The first formalization of those agreements is embedded in the regulations of 1996 regarding service centres.[34] In many cases, the cost plus method was encouraged, with a mark-up ranging from 5 per cent to 15 per cent. Unlike the USA,[35] Belgium has rarely agreed on an invoicing of the costs without a mark-up for low value-adding services.

When those regulations were considered as a harmful tax measure by the European Commission, they were abolished and replaced by formal advance tax rulings based on the OECD principles pursuant to the Law of 24 December 2002. Except for very high value services, the most commonly used TP method was and still is the cost plus method. Except for stewardship expenses, most direct and indirect costs are included in the cost basis. In many rulings, the Ruling Commission requires in addition that net financial costs and net exceptional costs be recharged at cost, which is not indicated in the OECD TP guidelines.[36] The Commission justifies this requirement by the wish to avoid those costs totally offsetting the taxable mark-up.

Another issue which is important in Belgium in the framework of low value-adding services is the cross-charging of "disbursements". Disbursements are costs incurred by an entity of the group for goods or services which are allocated and cross-charged to other group members without adding any mark-up. Indeed, the group members could have acquired those goods or services directly from a third party supplier. The goods or services would be charged by the third party supplier to one company of the group at market price and the billed entity would simply allocate the goods or services between the group members and cross-charge the costs billed by the supplier. Therefore, no value-adding service would be performed by the group entity cross-charging the costs. For "disbursements" the Ruling Commission accepts the cross-charging of those costs without a mark-up.[37]

33 See for more detail C. Devillet and X. Van Vlem, *Enterprise Services*, subject 1 of the IFA Congress 2012, Boston (USA), Belgium report, pp. 145–147.

34 Regulations Ci.RH.421/483.766, 26 July 1996 on the tax regime of service centres, *Bulletin des Contributions*, 1996, no. 763.

35 Services cost method, Treasury Regulations, s. 1.482-9b.

36 See e.g. Ruling 2015.167 dated 13 May 2015.

37 See Rulings 2015.167 dated 13 May 2015 and 2012.086 dated 3 April 2012.

The OECD has always had some issues with the cross-charging of costs without a mark-up and has taken the view that every service should be remunerated as independent enterprises would want to make a profit when rendering services. It is obvious that independent enterprises are not cross-charging expenses at cost to other companies as they are never part of an MNE. The position of the OECD was slightly more flexible in sections 7.34 to 7.37 of the guidelines. Those comments remained unchanged in the final report on Action 8 of the BEPS report and should be considered as reinforcing the Belgian Ruling Commission's position.

As far as the level of the mark-up is concerned, the applicant for the ruling has to demonstrate the arm's length nature of the range on the basis of comparables. Rather than applying a range, the Ruling Commission normally agrees on a fixed percentage. Sometimes low value-adding services can be marked up with 3 per cent.[38] Sometimes, when several services are rendered by the applicant, the Commission recommends a single average rate for all services.

When the Belgian entity is the beneficiary of the intra-group services, the services are usually rendered to all group companies and the costs are allocated between the beneficiaries, including the Belgian entity. The type of costs being charged, the amounts as well as the allocation keys are carefully examined by the tax authorities. There is no compulsory allocation method; it is up to the taxpayer to justify it on a case-by-case basis.

Payments made to obtain services are deductible if they respect the arm's length principle according to article 49 of the ITC. There are some anti-abuse provisions which increase the burden of proof for the taxpayer which wants to deduct the expenses for the payment of services. The main articles in this respect are articles 54 and 198(10) of the ITC.

Obviously, the taxpayer must not only prove that services are actually rendered but also that the Belgian entity obtains a benefit from those services. There are still court decisions confirming that some taxpayers are unable to prove that services for which they paid were actually rendered.[39] Those cases do not concern MNEs. Many of the latter conclude tax rulings so that they have the legal certainty that the costs and the mark-up will not be challenged by the Belgian tax authorities during a subsequent tax audit.

The following three recent rulings dealing with a Belgian applicant as the service provider are interesting to mention.

A Belgian company carries out different support services, including the coordination of all internal IT projects and the reporting of all activities of the division to the parent company, public relations, marketing and legal services, and the management of a centralized customer service department. In view of the limited risk profile of the service provider, a TNMM method with a "full cost mark-up" as profit level indicator is used to determine its remuneration. A benchmark study had been carried out by the applicant resulting in a median of 6 per cent mark-up, which was in line with the mark-up arrived at by the Ruling Commission through

38 Rulings 2015.417 dated 15 September 2015 and 2014.645 dated 10 February 2015, available on www.ruling.be and 2016.315 dated 14 June 2016 (unpublished).

39 See Cassation (1st Chamber N.), 15 October 2015, R.G. no. F.140161.N.

its own benchmark study. Moreover, the net financial costs and net non-recurring costs should be cross-charged at cost.[40]

In another recent ruling, for similar support services, the Ruling Commission accepted a cost plus 6 per cent with a prohibition on deducting interest charges from the mark-up. The TNMM method was used with a full cost mark-up as PLI.[41]

Sometimes the cost plus method is accepted but the remuneration of the service provider is determined in a specific manner. In a 2015 ruling, the provider of unspecified services was entitled to 15 per cent of the profit expected from all contracts as determined on day one of the transaction (in order to give it a financial incentive to be efficient), in addition to the reimbursement of its operating costs, net financial costs and net non-recurring costs. In any case, a mark-up of 5 per cent on all operating costs would form the minimum remuneration of the service provider for tax purposes.[42]

A new element introduced in Action 8 of the BEPS report is the acceptance of a safe harbour regime for low value-adding services. The OECD has always been reluctant to accept safe harbour rules. In its guidelines, the organization devotes 5 paragraphs to the benefits of safe harbour rules and 21 paragraphs to their disadvantages.[43] Therefore, the introduction of a safe harbour regime for low value-adding services is a new strategy for the OECD.

The new definition of low value-adding services is not surprising and corresponds to the definition used in Belgium by the Ruling Commission. The services are of a supportive nature, are not part of the core business of the enterprise, do not require the use of valuable intangibles and do not involve the assumption of significant risks. The type of services falling and not falling under this definition are also in line with the position of the Belgian tax authorities.[44]

It remains to be seen how the tax authorities will integrate this new safe harbour regime into their TP approach, which is exclusively based on comparables to prove the arm's length nature of the compensation. This new regime will be welcomed by companies as it will simplify the TP policy and documentation requirements. The recent Belgian law on TP documentation,[45] and particularly the section related to the local file, does not mention whether or not the use of this safe harbour regime should be documented in any way.

2.4.3. Profit splits in the context of value chains

When facing MNEs with a highly integrated value chain, the tax authorities, and especially the Ruling Commission when examining tax ruling requests, look at the TP method(s) used by the taxpayer. Often, the profit split method is used when a

40 Ruling 2015.476 dated 20 October 2015.

41 Ruling 2014.700 dated 20 January 2015. Recent rulings do not publish the applied mark-up: see Ruling 2016.117 dated 17 May 2016.

42 Ruling 2014.747 dated 24 February 2015.

43 OECD TP guidelines, chapter IV, section E, Safe harbours, 2010 version, which has been replaced by a more flexible version dated 16 May 2013.

44 Aligning transfer pricing outcomes with value creation, Actions 8–10, Paris, OECD Publishing, 2015 final reports, 5 October 2015, 7.45–7.49.

45 Programme Law of 1 July 2016, *Moniteur belge*, 4 July 2016, 2nd edn, pp. 40,978–40,983.

valuable intangible is part of the value chain. Sometimes the residual profit method is used when one company is using an intangible or the profit split method is used when two or more companies own high-value intangibles.[46] Exceptionally, the CUP method is used when comparables are available or when a valuable intangible has recently been acquired from a third party, offering a reference price which, after a value adjustment for the period between the acquisition and the transaction being contemplated, can be considered as an arm's length price.

The following rulings are a good illustration of the position of the Ruling Commission.

The first ruling is a case where the CUP method has been used in order to value intangibles. The applicant wanted to obtain a confirmation from the Ruling Commission that the royalty percentage for the royalty embedded in the sales price of the product (incorporating the new technology) was at arm's length. This royalty percentage was necessary to claim a patent box deduction.

For wholesales, internal CUP data are available to determine the percentage of the embedded royalty which amounts to a median of 7.5 per cent in this case. For sales at retail level, external CUPs are sought via external databases used by the applicant of the ruling (LexisNexis and TP Cut) and confirmed by a benchmark study via TP Catalyst performed by the Ruling Commission. The median percentage was 5 per cent in this case.[47]

In the second ruling, the valuation of the intangible was arrived at through the use of the residual profit method after deduction of a profit for routine activities.

The Ruling Commission agreed that the percentage of royalties, embedded in a new technology in the medical device sector, was at arm's length in order to qualify for the patent box deduction. In order to determine the return attributable to the new technology compared to existing technologies, the method of residual profit was used after deduction of the profit attributable to the sale of similar devices not including that new technology by third parties. The remuneration for the new technology was based on approaches using anticipated benefits and based on the market.[48] Under the benefit approach, one calculates the profit generated by the new technology compared to the profits of independent comparables performing the activity of producing and selling similar devices which use a more common technology. Under the market-based approach, one looks for transactions between third parties for similar technologies. The applicant used the RoyaltyStat database to arrive at an interquartile range which was in line with the royalty percentage under the anticipated benefit approach.[49]

In the third ruling, a profit split method was used. In the framework of the patent box deduction, two companies were involved in the exploitation of different patents embedded in a product. To compute the profit from this exploitation attributable to each company, the profit split method was used. The allocation of profit

[46] Rulings 2015.262 dated 8 September 2015 and 2015.098 dated 2 June 2015. See also Ruling 2016.123 dated 19 April 2016.

[47] Ruling 2015.689 dated 26 January 2016.

[48] Based on 6.29 and 6.23 of the 2010 OECD TP guidelines.

[49] Ruling 2015.670 of 26 January 2016, published 12 April 2016. For a similar case and decision involving a double approach method, see ruling 2015.608 dated 22 December 2015 and Ruling 2015.098 of 2 February 2015. For another decision applying the residual profit method in a patent box context, see Ruling 2015.262 of 8 September 2015.

was based on the costs incurred by each company for the sales of products in which the patents were embedded. The percentage attributable to each of the two companies was applied to the actual sales revenue of the products.[50]

On 4 July 2016, the OECD released a discussion draft on "the revised guidance on profit splits". Its key theme is that a profit split method is appropriately applied only where the relevant activities are highly integrated or reflect unique and valuable contributions by both parties to the intercompany transaction, and should not be used solely because a one-sided method may be difficult to apply under the particular circumstances. The discussion draft outlines two variations of the profit split method: a split of anticipated profits and a split of actual profits. The reporter considers that both profit split methods have their merits and that all depends on the facts of each situation to determine which method would have been chosen by independent parties. It remains to be seen whether or not the OECD will take the numerous comments made on the draft into account in its final report.

As Belgium will automatically endorse the final guidelines stemming from the final report and is a country with significant pharmaceutical activities and sophisticated industrial R&D, the final text will be crucial for both enterprises and tax authorities.

2.5. TP documentation

Until 2015, Belgian tax law did not require taxpayers to prepare contemporaneous TP documentation. Consequently, there were no penalties for any absence of readily available TP documentation. However, Belgium did implement the code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD) through regulations dated 14 November 2006.[51] Those regulations describe how a TP tax audit should be conducted and also the type of questions and documents to be requested in the framework of such tax audits. Surprisingly, although regulations are an internal document of the tax administration for the attention of its tax inspectors only and have no binding effect outside the administration, they were also addressed to taxpayers, which were encouraged to prepare robust TP documentation in anticipation of future TP tax audits.

2.5.1. CbCR

Belgium took the opportunity of the implementation of Action 13 of the BEPS report to introduce a legal obligation[52] for taxpayers to prepare contemporaneous three-tier TP documentation as from 2016. The TP documentation comprises CbCR, a master file and a local file. Concerning CbCR, the law uses the model legislation included in the CbCR implementation package which forms annex IV to the revised chapter V of the OECD TP guidelines,[53] adds some definitions for the

50 Ruling 2012.090 of 19 February 2013.

51 Regulations Ci.RH.421/580.456 (AFER 40/2006), 14 November 2006, available on Fisconetplus.be.

52 Programme Law of 1 July 2016, *op. cit.*

53 See Transfer pricing documentation and country-by-country reporting, Action 15 of the BEPS report, final reports, 5 October 2015, Paris, OECD Publishing, pp. 37 *et seq.* and Guidance on the implementation of the country-by-country reporting, BEPS Action 13, 29 June 2016, Paris, OECD Publishing.

sake of clarity and completes the implementation package with additional provisions but without departing from the rationale of the OECD. The law has not yet transposed the European directive of 2011 on the exchange of fiscal information between Member States.

Article 54 of the new law determines the content of CbCR: it should comprise the 11 pieces of information (revenue, profit before tax, taxes, share capital, number of employees, etc.) as well as a list of the Belgian constituent entities with the precise nature of their activities (13 types of activity are mentioned) as provided in the model template for CbCR under annex III to chapter V of the new OECD TP guidelines.

CbCR should be filed electronically by the Belgian ultimate parent entity of a group that has gross consolidated group revenue of at least €750 million as reflected in the consolidated financial statements during the year preceding the reporting year. A reporting template has been drawn up in a Royal Decree. Each Belgian constituent entity should notify the tax authorities whether or not it is either the ultimate parent company or the surrogate parent entity or neither, by the last day of the reporting year (and for the first time in 2016).

The filing of CbCR should occur no later than 12 months after the last day of the reporting period concerned of the MNE. The filing obligation starts as of the accounting year beginning from 1 January 2016.[54]

Article 56 of the law explicitly states that CbCR should be used to evaluate the risks relating to TP and other risks associated to BEPS or for economic or statistical analyses. No TP adjustments may be exclusively based on CbCR, although the report can be used in the framework of additional tax investigations which can lead to TP adjustments.

Belgium will exchange CbCR on the basis of either the bilateral tax treaties or the Convention on Mutual Administrative Assistance in Tax Matters[55] or the future multilateral instrument to modify bilateral tax treaties.[56] Concerning the exchange of CbCR between tax authorities, the law of 2016 does not provide any specific obligations to the tax authorities in order to guarantee the strict confidentiality of the information included in the CbCR. This creates a major concern for MNEs.

2.5.2. Master and local files

The above-mentioned law of 1 July 2016 introduces the requirement for each Belgian constituent entity to draw up and file a master file as well as a local file.

2.5.2.1. The master file

The purpose of the master file is to give the tax authorities an overview of the MNE in order to assess the presence of significant risks regarding the TP policy of each

54 The parliamentary works to the law of 1 July 2016 mention that the first filing relating to the 2016 reporting year should not occur before 1 October 2017 "in order to allow a correct management of the CbC reports" (Doc. Parl., *Chambre des représentants*, no. 54-1875/001, p. 58).

55 Convention dated 25 January 1988 and its additional protocol of 27 May 2010 both ratified by Belgium.

56 Action 15 of the BEPS report.

Belgian constituent entity. The content requirements for the master file are closely aligned with those put forth by the OECD and include:

- the nature of its global business operations;
- a list of the intangible assets and a description of the group's TP policies related to R&D and intangibles;
- intra-group financial transactions;
- the consolidated financial and tax statements of the group;
- the overall TP policies; and
- the global allocation of income and economic activity.

The exact content is provided in a Royal Decree. Some other items are added to the list, such as an organizational structure of the group or existing unilateral APAs and other tax rulings relating to the allocation of income among countries. The above-mentioned content requirements are in line with the EU TP documentation (EU TPD) recommended in the EU code of conduct and which was applied by Belgium until 2015.

2.5.2.2. The local file

As regards the local file, Belgium is going beyond the OECD's requirements by requesting the filing of two forms: one that needs to contain general information on the local entity, and a second form that focuses on detailed information on the TP applied between the local entity and foreign group entities.

The first form should include information on the organizational structure of the Belgian entity (e.g. directors, shareholders, subsidiaries) and on the nature of the activities of the local entity as well as an overview of the transactions with related parties.

The second form should comprise, for each business unit, the following data on intra-group transactions (a materiality level of €25,000 per transaction may be applied):

- the nature of the activities;
- aggregated data on the transactions made by the business unit on the one hand with other entities of the group and on the other hand with third parties over three financial periods;
- sales to and purchases from non-residents for inventory, intangible fixed assets, tangible fixed assets, financial fixed assets and commission for services;
- the TP method used for each flow along the lines of what is mentioned in annex II to chapter V of the BEPS report on Action 13;
- details on cross-border financial transactions: interest from loans, interest from cash poolings, interest from commercial debts, guarantee fees, (re)insurance premiums, derivatives;
- details on any other cross-border transactions;
- profit allocation with PEs; and
- a list of CCAs, rulings and internal reinsurance contracts. A copy of the documents may be attached if the taxpayer so wishes.

This second form should only be prepared and filed if the intra-group cross-border transactions of any Belgian business unit exceeded €1 million during the financial year concerned. Representatives of the Belgian entities concerned have already complained about the significant additional administrative burden entailed by this second form.

2.5.2.3. Filing obligation for the master file and the local file

The obligation to file a master file as well as a local file will be imposed on every Belgian group company that, on the basis of the Belgian financial statements related to the accounting period preceding the last accounting period, exceeds one of the following criteria:

- operational and financial revenue of €50 million (excluding non-recurring revenue);
- a balance sheet total of €1 billion;
- 100 full-time equivalent employees (on an average annual basis).

The timing of the filing is different for the two files. The master file should be filed within one year after the closing date of the consolidated financial statements of the group while the local file must be filed together with the tax return of the Belgian entity relating to the same accounting year. However, the second form of the local file should be filed only for financial years starting on or after 1 January 2017. The filing will take place electronically.

Penalties ranging from €1,250 to €25,000 can be imposed by the tax authorities if the Belgian entities do not fulfil their legal obligations concerning the TP documentation, including CbCR.

2.5.3. Compliance costs

The CbCR is not a document supporting the TP policy or the TP methods or the contracts of an MNE. Therefore, it should not be considered strictly speaking as being part of the TP documentation of a group. CbCR has been recommended by the OECD mainly to “make it easier for tax administrations to identify whether companies have engaged in transfer pricing and other practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments”.[57] In other words, the OECD hopes that tax authorities will be informed of entities having few employees but generating significant revenue subject to low taxation so that they can start TP investigations in a more focused manner. However, for MNEs, there are multiple reasons for a mismatch between revenue and the number of employees. The benefit of tax incentives granted by some countries for specific activities such as R&D is one of them.

Because the tax authorities lack sufficient resources to start cross-border TP investigations, the OECD has compelled MNEs to provide a huge quantity of information to the authorities. However, it has not provided safeguards to avoid an inappropriate use of the data provided. MNEs expect a significant increase in the number of additional tax assessments and related double taxation.

The additional administrative costs relating to the gathering of the requested information could divert MNEs from their core business while they will not gain any benefit from it. The OECD has not recommended replacing current domestic

[57] Transfer pricing documentation and country-by-country reporting, Action 13, 2015 final report, 5 October 2015, Paris, OECD Publishing, p. 9.

requirements for TP documentation by the three-tier approach so that each country is free to add the OECD filing to its existing documentation requirements. Moreover, MNEs had expected that, as compensation for all additional constraints contained in the BEPS report, a mandatory and binding arbitration provision would be added to the multilateral instrument discussed in Action 15 of the BEPS report, allowing the removal of double taxation within a fixed timeframe. The OECD had promised this to MNEs[58] which unanimously repeated their wish to see a mandatory and binding arbitration provision within the MAP procedure[59] in order to reduce the legal uncertainty and the number of cases of double taxation, but the OECD did not obtain the necessary consensus on this matter, so that, in the final BEPS report, the mandatory and binding arbitration provision is only optional, while many anti-BEPS measures such as all anti-abuse provisions or the new TP approach linking profits to value creation will be enforced.

2.6. TP-related measures in other BEPS actions and other measures against BEPS

There are TP-related measures in other BEPS actions as in Action 1, Addressing the tax challenges of the digital economy. The main issue seems to be whether or not the state of residence of clients who purchase tangible or intangible goods or services over the internet from a non-resident seller who has no physical presence whatsoever in that state, is entitled to tax part of the profit generated on those sales. In most countries, those sales are already subject to VAT or a sales tax.

According to the OECD, there is no need to search for specific ways to tax profits generated by the digital economy as these are part of the overall economy and cannot be ring-fenced for tax purposes. The OECD believes that BEPS in the digital economy will be adequately tackled by other BEPS measures, such as the broadening of the definition of PE or the anti-abuse provisions or the DEMPE functions and the control over risks relating to intangibles. This also seems to be also the opinion of senior officials from the tax authorities at present.

Part of Action 7 of the BEPS report relates to the attribution of profits to PEs. On 4 July 2016, a discussion draft was released and comments from interested parties have been published. The draft report does not bring any changes to the authorized OECD approach (AOA) of profit attribution to PEs. It applies the AOA approach, taking into account the prerequisite that each entity should be rewarded according to the actual significant functions performed, the risks borne and the assets held.

In September 2016, the tax authorities released draft regulations on the 2010 version of article 7 of the OECD model and the OECD commentary on the attribution of profits to PEs. Those draft regulations do not take the impact of the BEPS report on the attribution of profits to PEs into account.

[58] See Action Plan on Base Erosion and Profit Shifting, July 2013, Paris, OECD Publishing, p. 23. See also the introduction of MAP arbitration in para. 5 of art. 25 of the 2008 OECD model and Make dispute resolution mechanisms more effective, BEPS Action 14, public discussion draft, Paris, OECD Publishing, 18 December 2014, paras. 41 *et seq.*

[59] Comments received on public discussion draft BEPS Action 14, Make dispute resolution mechanisms more effective, Paris, OECD Publishing, 19 January 2015.

2.7. Can BEPS work in favour of MNEs?

TP-related BEPS actions and their information gathering initiatives will inevitably force MNEs to pay even more attention to the compliance requirements and to prepare more detailed TP documentation. This is particularly true for the delineation of the functions and risks associated with intangible assets since the focus has moved from legal ownership to economic ownership. It is not clear at this stage whether or not Belgian MNEs will receive any benefit from the BEPS report.

3. What is the future of TP?

Since 2015, the OECD has adopted an "inclusive framework approach". All decisions of the OECD being taken by consensus and not by a formal vote, the non-members had to agree on the text of the BEPS report in order to reach a consensus. As a result, many measures are a compromise between the OECD member states and the non-members, including the BRICS countries. Sometimes unclear positions are taken and huge interpretation problems may be expected over some imprecise recommendations or various options made available (for example, regarding anti-abuse provisions). This may lead to more situations of double taxation and to many more tax disputes.

Belgium will implement the actions of the BEPS report over time. However, the tax authorities take the position that Actions 8–10 do not need to be transposed into a new law and are immediately applicable.

Since Belgium has a long history of binding advance tax rulings, many MNEs present in Belgium request tax rulings to obtain legal certainty about their TP policy. One may expect an increase in tax ruling applications as a result of the lack of clarity of some recommendations of the BEPS report.