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Branch Reporter
Thierry Blockerye*

1. Introduction

1.1. Economic and business context

Belgium is one of the smallest countries in the Euro zone, with 10.4 million inhabitants and a GDP of 268 billion euro. Euronext Brussels, which has been the name of the Brussels Stock Exchange since the merger of the Paris, Amsterdam and Brussels exchanges, hosts only 146 Belgian and 105 foreign stocks, for a combined market capitalisation of 163.1 billion euro.

Despite the size of the Belgian market, the local mergers and acquisitions (M&A) market is fairly active, and has remained relatively busy even during the slower economic periods of 2002 and 2003. Data compilers reported 58 transactions, with an aggregate deal value of 10.1 billion euro for 2002 and 91 transactions to a value of 7.4 billion euro for 2003. So far, the year 2004 has also been equally active, with 74 transactions for a total value of 3.3 billion euro.[1]

1.2. Activity drivers

The bulk of the transaction activity in 2003 and 2004 revolved around three types of deals:

- Sector consolidation: many sectors have seen further consolidation activity, through both domestic and cross-border acquisitions. This was the case for instance in the banking sector (in particular, in private banking), with ING's acquisition of AGF Bank and of Mercator; KBL's acquisition of Puilaetco; or Banque Degroof's acquisition of De Buck Private Bankers. Recent cross-border inbound acquisitions by foreign groups of Belgian targets in their respective sectors include SAPA AB's tender offer for Remi Claeys Aluminum, Betrusted's tender offer for Ubizen or ST Microelectronics' acquisition of Proton World, the Belgian smart card developer.
- Private equity investments: private equity investors have historically been less active in Belgium than in certain other continental European countries for a variety of reasons ranging from a tax system less accommodating to

* Tax Partner, Clifford Chance, Brussels; Professor, École Supérieure des Sciences Fiscales; the author wishes to thank his colleague Laurent Legein, who prepared the introduction to this report

1 Source: www.mergermarket.com. Note that the deal value figures only include those transactions for which a transaction value has been publicly disclosed, and hence understates the real aggregate value of the transactions announced in the relevant period.

leveraged buy-out (LBO) structures to an alleged lack of risk-taking entrepreneurial spirit on the part of management teams. That trend has been recently clearly reversed, as most of the large international private equity houses – such as CVC, 3i, Apax, Candover, Bridgepoint Capital, Permira or Doughty Hanson – have been actively involved in recent M&A deals. Examples include:

- Doughty Hanson's 600 million euro acquisition of Balta Industries, a large carpet manufacturer;
- Elektra Partner's 250 million euro acquisition of Aliplast, a maker of aluminum frames; and
- Candover's 1 billion euro acquisition of Ontex NV, a Euronext-listed manufacturer of disposable hygienic products.

- Strategic realignments: many Belgian industrial companies have divested assets or divisions that were deemed no longer to be part of their "core" activities. UCB sold its methylamines and derivates business to Alpinvest and NIB Capital and its films division to Candover; Agfa Gevaert sold its non-destructive testing business to GE Aircraft Engines and its photographic division to a management team; Suez, the Franco-Belgian diversified utilities group, sold its stakes in two Belgian cable companies, Codenet and Worldcom Belgium, respectively to Altice One and MCI, Inc.; Barco demerged its Barconet division and subsequently sold it to Scientific-Atlanta, Inc.

1.3. Legal and structural innovations

The legal environment for M&A transactions has been relatively stable over the last few years.

Notable additions in the deal structuring toolbox include the so-called "partial demerger" (*scission partielle/partiele splitising*), a transaction whereby a company can contribute assets (e.g. a business division) to another company in exchange for newly issued shares of the recipient issued to the shareholders of the demerged company (rather than to the demerged company itself, as is the case in an ordinary spin-off). The possibility existed as a matter of corporate law but was never used because of the lack of a suitable tax and accounting treatment, which is now available (see 4.2.2.2 below). CMB, the Euronext-listed maritime group, used this technique – and was the first listed company to do so – to demerge its "Exmar" division and list it separately on the stock exchange.

Other innovative transactions have included so-called "public-to-private" LBOs such as Candover's acquisition of Ontex, a listed company. This complex debt push-down structure needed in order to optimise, from a tax and financial standpoint, the acquisition financing led Candover to add a 5 per cent "sweetener" to its offer price in the event that acceptances received in the tender offer reached the 95 per cent squeeze-out threshold.

2. Summary of key tax principles in Belgium

The manner by which inbound acquisitions are structured in Belgium is of course directly influenced by the key tax principles which would be applicable at the different steps of an acquisition: implementation of acquisition structures, tax-efficient financing of acquisitions, post-acquisition optimisations, tax-efficient repatriation of profits and tax-optimal exit strategies.

In this respect, the acquisition scenarios usually put in place by the buyers are deeply influenced by:

- the taxation treatment at the level of the sellers which clearly indicates that a seller has a tax advantage to proceed with a share deal rather than an asset deal, despite the fact that asset deal scenarios are more favourable for the buyers;[2]
- the absence of any tax consolidation regime in Belgium;
- the multiplication of anti-abuse provisions that have contributed to render share deal scenarios less attractive and tax optimisations more difficult.

In addition to the above, it should be noted that three recent tax modifications-may have a significant impact on some transactions in the future:

- the new advance ruling procedure;
- the reintroduction of a withholding tax in the framework of liquidations and the redemption of own shares;
- the creation of the "Private Privak/Pricaf", a new category of collective investments.

2.1. Capital gains taxation at the level of the sellers

Sellers (legal persons or companies) generally prefer to structure the sale of their company by way of a share deal rather than by an asset deal.

Capital gains realised by Belgian resident companies on a Belgian participation will indeed benefit from a full corporate income tax exemption whereas capital realised from an asset deal will be subject to the standard corporate income tax rate of 33.99 per cent (33 per cent + 3 per cent crisis tax).

This is generally also the case when the sellers are individuals, although capital gains could be taxable under certain circumstances (please refer to section 3.1.2).

At the level of the buyers, share deals are generally less favourable from a tax point of view as in this case they will not benefit from a step-up in the tax base of the corporate assets, reflected by the higher purchase price offered in comparison with the book/tax value reported by the target company.

Share deals will trigger a number of limitations/drawbacks, which will affect post-optimisation scenarios, e.g.:

- the reduction of leveraging possibilities at the level of the target since the debt financing to be placed in the company will not be higher than the amount of the balance sheet of the target (the existing debt can be refinanced and the equity can be reimbursed by new debt financing; however, no additional leverage may be organised unless the target company purchases other assets);
- the takeover of tax latencies present in the target, such as tax-free reserves, untaxed revaluation surpluses, tax claims and litigation;

[2] See P. Drykoningen, *M&A in Belgium*, Kluwer Law International, 2001, edited by Wim Dejonghe and Wouter Van de Voorde, pp. 157 *et seq*.

- the uncertainty of benefiting from certain tax attributes (transferability of tax losses carried forward) in the target company. Tax losses carried forward may only be maintained if the acquisition had been made for sound and economic reasons (i.e. legitimate needs of a financial or economic character);
- the difficulty of integrating the acquired company with existing assets the buyer may have in Belgium or in Europe. As explained below, there is no tax consolidation regime in Belgium so that it is quite difficult to compensate the taxable income from the acquired company with the interest relating to the financing of the shareholding. Mergers between holding companies (acquisition vehicles) and target companies are legally possible; however, the application of the tax-free regime is also conditional to the respect of the "sound business test" (see below section 2.3.1);
- the impossibility of depreciating goodwill (i.e. the difference between the purchase price of the shares and the book value of the assets and the liabilities of the target company) at the level of the acquiring vehicle.

Although far less interesting than realising asset deals, buyers are often obliged to structure their acquisition through a purchase of shares in order to safeguard the tax treatment of the sellers, and hence to be competitive in their bid.

2.2. Absence of tax consolidation rules

Although present for years in the neighbouring countries, no tax consolidation regime currently exists in Belgium.[3] The absence of a tax consolidation regime is particularly penalising in the framework of share deal acquisitions since it is impossible for the target company to compensate its future taxable income against the interest cost resulting from the financing of the shareholding at the level of the acquiring vehicle. This absence of consolidation will therefore oblige the companies either to consider integration scenarios (merger of the target company in the holding vehicle which may trigger taxation of the goodwill should the merger not be deemed to respect the sound and business motives test) or debt push-down scenarios (reduction of the target's equity financed by debt so that part of the new debt may replace the loans entered into at the acquiring vehicle's level in relation with the purchase of the shareholding in the target).

2.3. Multiplication of anti-avoidance rules

The number of anti-avoidance provisions in the Belgian income tax code has multiplied during recent years and especially since 1993.

Among the various anti-abuse provisions that may apply to an acquisition process, we can cite the following.

2.3.1. The sound and business reasons test

The condition of legitimate needs of an economic or financial nature initially provided in article 344, §2 of the ITC can now be found in a number of articles as a

[3] The reasons why such a regime has not (yet) been adopted are described by P. Minne, Belgian Report on *Group Taxation, Cahiers de droit fiscal international*, IFA, 2004, p. 181.

condition for applying specific anti-avoidance measures. As a result of these new provisions, the tax authorities may deny the application of a favourable regime if the taxpayer is only pursuing tax motives.

This business needs test is, for operations carried out since 1 October 1993, a condition to be met in order to achieve a tax-free reorganisation (merger, demerger, partial split, contribution of a division or of a whole company). The difficulty lies in the fact that the law does not give any definition of this criterion and that the tax authorities may therefore be tempted to apply a discretionary interpretation.[4] In the context of inbound acquisitions, the introduction of this condition has had a dramatic effect on leveraged buy-out transactions in which the target company was acquired by a highly indebted Belgian holding company, followed by the absorption of the target. These mergers were very common before 1993, but a post-merger acquisition is today often considered as too aggressive since it is quite obvious that such an integration is directly inspired by tax considerations (i.e. to have the possibility of offsetting the interest paid at the level of the Belgian acquiring vehicle with the taxable profit realised at the level of the target), and hence it may not be guaranteed that the goodwill present in the target may benefit from the exemption.

This condition has also been introduced at the level of article 207, paragraph 3 of the ITC, which provides that whenever, during a taxable period, control of a company is acquired or changed so that it does not correspond to legitimate needs that are of a financial and economic nature, the losses carried forward together with the carry-forward of the balance of the investment deduction not utilised will not be deductible from the profits for that period or for any future taxable period.

2.3.2. Article 344, §1 of ITC: general anti-abuse provisions

General anti-abuse provisions have been introduced in the ITC (article 344, §1) and the Registration Tax Code (article 18, §2). Contrary to specific anti-abuse provisions, this type of provision does not aim at scrutinising transactions that explicitly qualify under a provision of the ITC for favourable tax treatment, but aims at reviewing any transaction that has an applicable tax regime, taken as a whole, which is considered as (too) favourable. The general anti-abuse provision therefore enables the tax authorities to combat certain manoeuvres, which, by means of legal constructions, are intended to reduce the tax charge. This measure is general as it covers all types of transactions. The tax authorities therefore have a weapon which should enable them to fight any type of structure or transaction that appears to be carried out for tax purposes. Pursuant to article 344 of the ITC, it is not the transaction itself that is concerned and that the tax authorities may reject, but it is the legal characterisation that is given to the deed or to the deeds that give effect to the transaction that may be rejected if the characterisation aims at avoiding tax.

One of the main conditions for applying this general anti-abuse avoidance measure is that the characterisation given by the parties does not satisfy legiti-

[4] L. Ph. Hick and P. Dorthu, "Besoins légitimes de caractère financier ou économique: une notion discretionnaire", RGF, 5, 2004, pp. 6–13.

mate needs of an economic or financial nature. We can find the same condition of "business needs test" in these specific anti-avoidance measures. Nevertheless, and contrary to what is applicable to specific anti-avoidance measures, the burden of proof in the framework of article 344 is reversed as it lies with the tax authorities.[5]

2.3.3. Anti-avoidance provisions applicable on post-acquisition structuring

Post-acquisition optimisation structuring must cope with the following provisions:

- article 54 of the ITC: whenever costs are directly or indirectly paid or attributed to a non-resident or to a foreign establishment of the taxpayer if it enjoys a tax regime which is significantly more advantageous than the Belgian tax regime, these costs (interest on borrowings, royalties and payment for services rendered) cannot be deducted unless the Belgian taxpayer proves that they respond to real and authentic transactions and do not exceed normal limits;
- article 26 of the ITC: when an enterprise established in Belgium grants abnormal or gratuitous benefits, they are added to its own profits unless the benefits intervene in determining the taxable income of a Belgian resident recipient;
- article 79/207 of the ITC: this provision rules out the deductibility of various tax deductions (tax losses carried forward, investment deductions, deductions for dividends received) for amounts equivalent to the result that derives from abnormal or gratuitous benefits that the taxpayer obtained from a company with which it has interdependent links. The scope of the application of this provision has been considerably enlarged as a result of the latest tax reforms:[6] at first limited to tax losses carried forward, the provision is now applicable also to the current year's losses. Furthermore, the prohibition on offsetting is now also applicable when an abnormal advantage had been granted during a previous tax year. It is important to note that certain court decisions apply a very broad interpretation of the "abnormal character" under the meaning of article 207 of the ITC. According to these decisions, the compensation of tax losses may be prohibited even when the remuneration received by the company is at arm's length if the transfer of profits in itself appears abnormal in view of the circumstances (e.g. the transfer of a profitable activity to a loss-making company);
- article 206, paragraph 2 of the ITC: this provision reduces the amount of tax losses carried forward that a company has realised prior to a tax-free reorganisation (merger, demerger, contribution of division) which could be used post-reorganisation by the company resulting/benefiting from the reorganisation (tax losses suffered prior to the operation are only deductible in proportion to the portion that its net tax assets represent in the total net tax assets prior to the transaction).

[5] J. Lievens, L. de Broe and P. Maselis, *Fusies and splitsingen*, Mys & Breesch, Brussels, 1993, p. 80.

[6] Th. Blockerye, *Acquisitions et Fusions*, Brussels, Bruylant, 2004, p. 35.

2.3.4. Anti-abuse provisions applicable to funding structures

The following provisions may be applicable in relation to refinancing:

- article 55 of the ITC stipulates that interest is only deductible in so far as it does not exceed an amount corresponding to the market rate;
- article 18 of the ITC equates interest to a non-deductible dividend if the rate exceeds the at "arm's length" principle or if the interest relates to loans granted, under certain conditions, either by a private individual who is a shareholder of a company, or by a private individual or a non-resident company that carries out an appointment or mandate as director, manager or liquidator of the Belgian borrowing taxpayer;
- article 198, 11° of the ITC introduced a 7:1 debt[7] to equity ratio[8] which covers interest paid or borne by resident companies as well as by Belgian establishments of foreign companies that are subject to non-resident tax.[9] The provision is only applicable when the interest is paid or attributed to an actual recipient who is either not subject to income tax, or, for income, is subject to a tax regime that is significantly more advantageous than the ordinary legal provisions applicable in Belgium.

2.3.5. Advance rulings

Since 1993, a ruling procedure has been introduced in the field of income tax and registration duties in order to provide the taxpayer with certainty regarding the tax regime of a specific transaction. Until 31 December 2002, this ruling procedure was only limited[10] to very specific transactions and exemptions, notably the provisions conditioning the application of a favourable tax regime in so far as the transaction could be deemed to be achieved for legitimate needs of a financial and economic nature (i.e. tax-free contribution of divisions, mergers, (partial) splits and change of control).

A new ruling procedure was introduced by the tax reform of 24 December 2002.[11] The new regime, applicable as from 1 January 2003, enables the taxpayer to have advance rulings for all the taxes for which the federal state is competent. The extension of the scope of advance rulings constitutes a step in the right direction and mitigates the difficulty of having anti-abuse provisions, which apply obscure criteria. Nevertheless, and contrary to other neighbouring jurisdictions, it can be regretted that only the central tax authorities are competent to give an

7 In these situations, the interest will be recharacterised as dividends when (and to the extent to which it exceeds) the total amount of the advances generating the interest exceeds the amount of paid-in capital existing on the last day of the taxable period and of the taxed reserves existing on the first day of the taxable period.

8 The interest is regarded as a disallowed expense, if and to the extent of this excess, the total amount of the loans contracted by the borrowing company exceeds seven times the sum of the taxed reserves at the beginning of the taxable period and of the paid-in capital at the end of that taxable period.

9 C. Docclo, "La sous-capitalisation des sociétés", RGF, 5–6, 1999, p. 215; see also B. Peeters, "Onderkapitalisatie en dubbelbelastingverdragen", TFR, 157, 1998, p. 101.

10 C. Vanderveken, "Advance rulings practice effective", *European Taxation*, 1993, pp. 210 *et seq*.

11 P. Hauftenne and Th. Afschrift, "La réforme de l'impôt des sociétés par la loi du 24 décembre 2002", JT, 2003, no. 50 *et seq*.

advance ruling, therefore the consequence of this is that it prolongs receiving an answer and no deadline can be imposed on the tax authorities in the new procedure. This will in most cases render the use of advance rulings inefficient in acquisition transactions where timing plays a very important role. The advance rulings applications may be more appropriate in the implementation of post-acquisition optimisations where the parties can afford more time before receiving the tax authorities' answer.

2.3.6. (Re-)introduction of a withholding tax on liquidation bonuses (liquidation) and acquisition bonuses (redemption of own shares)

The corporate tax reform of 24 December 2002 has reintroduced a 10 per cent withholding tax on the liquidation and the redemption of own shares.

The taxable basis (the liquidation bonus is assimilated to a dividend) is equal to:

- the difference between the liquidation proceeds and the paid-in capital represented by the shares of the company to be liquidated;
- the difference between the acquisition price paid by the company redeeming its own shares and the paid-in capital represented by the redeemed shares.

The withholding tax may nevertheless be avoided by applying domestic exemptions or applicable tax treaty provisions (OECD tax treaties or by application of the Parent–Subsidiary Directive). Belgian domestic law also provides for a limited range of exemptions from withholding tax.[12]

No particular exemption exists for shares held by private individuals and this constitutes an additional incentive for individual shareholders to attempt to sell their shares to a corporate buyer rather than to liquidate their company and recover their investment in the framework of such a liquidation.

2.3.7. The creation of the "Private Privak/Pricaf"[13]

On 22 April 2002, the Belgian Parliament voted and accepted a Bill regarding the creation of a new category of collective investment vehicles called "Private Privak" or "Pricaf Privée" (hereafter referred to as PP). This new vehicle can be defined as a closed-end, non-listed private equity investment vehicle.

With the introduction of the PPs, the Belgian government is aiming at offering an investment vehicle to Belgian and non-Belgian investors who want to invest

12 In the framework of liquidations no withholding tax applies in the particular case when the operation concerns an absorption of a subsidiary by a parent company; art. 264, al. 1, 2° of the ITC (the rules of the taxable liquidation may apply in such cases since the equity of the absorbed company is not entirely transferred to the equity of the absorbing company). In the framework of redemption, no withholding tax applies when the redemption concerns shares which were acquired by the company in the framework of a universal transfer of business (art. 264, al. 1, 2° of the ITC); no withholding tax is due if the redeemed shares are admitted on a Belgian or foreign stock exchange, as far as the transaction is made on the Euronext market or an identical market (art. 264, al. 1, 2° bis of the ITC).

13 For a clear description of the Pricaf, see H. Lamon and M. Chalot, "La pricaf privée: la solution pour le capital à risque?", RGF, 11, 2003, pp. 12 *et seq*.

in non-listed shares of Belgian and non-Belgian target companies. With this goal in mind, a number of basic requirements for the new vehicle have been identified:

- the instrument should be flexible and straightforward: the government wanted to avoid PPs becoming complicated and heavily regulated vehicles;
- tax neutrality for both Belgian and non-Belgian investors: neutrality should in this context be interpreted as “offering the same tax treatment as investors making a direct investment in the underlying shares”;
- the instrument should offer limited liability protection to the investors;
- the Belgian government felt that it was important to provide a guaranteed exit for the investors after a certain period of time.

The goal of the legislator was to provide this new vehicle with a tax transparency regime that is neither less nor more attractive than the regime that would be available if the investor had made a direct investment in the target company. This goal is only partly met and the interposition of the PP will have certain tax effects that may, depending on the circumstances, lead to a better or worse tax treatment compared to direct investments.

The tax regime that is put in place comes down to a (virtually) full exemption of the income generated by the PP in its role as intermediary between the investor and the investment. Among the tax advantages from which the PP may benefit, we can cite:

- a (very) small taxable base similar to the regime applied to Belgian collective investment vehicles;
- treaty protection and the benefit of the Parent–Subsidiary Directive provisions;
- exemption from the 10 per cent withholding tax on liquidation/redemption bonuses;
- exemption from withholding tax in the event of the distribution of capital gains realised on shares;
- capital duty exemption;
- VAT exemption on the services rendered by the management company to the PP or on the activities of the PP.

Notwithstanding the above, the PP has to date only a limited success due to the immense regulatory constraints that have been introduced, i.e. with respect to the total number of investors and the maximum participation of each investor,[14] as well as the type of investments that a PP may acquire (the PP may not acquire financial investments in quoted companies), and finally by the fact that a Pricaf cannot control the target companies in which it acquires a participation.

[14] Lamon and Chalot, *op. cit*., pp. 12 *et seq*.; K. Eyckmans, “De private privak kritisch bekeken”, *Fiscaal Actualiteit*, 2003, no. 23, p. 5. At least 80 per cent of the voting stock must be subscribed to by investors holding a minimum of 4 per cent and a maximum of 16 per cent of the voting stock. The remaining 20 per cent can be held by a limited number of private investors. The investors should be unrelated and must certify that they are in no way related to another investor. A private investor must invest an amount of at least 250,000 euro in the Pricaf.

3. Acquisition of a Belgian target by a foreign acquirer

3.1. Acquisition of shares of a Belgian company

3.1.1. Preliminary remark

The vendor of a Belgian corporation may be a resident or non-resident corporation or individual. This report, however, will only address the tax consequences of a sale of shares of a Belgian corporation when the vendor is a Belgian resident.[15]

3.1.2. Vendor is a Belgian individual

When the vendor is a Belgian individual, almost without exception,[16] the shares are considered to belong to the individual shareholder's private assets so that any capital gains do not fall within the scope of taxation. Correlatively, capital losses are not tax deductible. There are, however, two exceptions to this rule.

First, when the sale of the shareholding can be characterised as speculative income, i.e. exceeding the limits of the "normal management of a private estate", the resulting capital gains will be taxed at the rate of 33 per cent plus local taxes (article 90, 1° of the ITC). The courts have defined "normal management" as a conservative, risk-averse and non-sophisticated approach to the ownership of a private estate.[17] The tax authorities tend to consider that "internal capital gains", i.e. resulting from the contribution of the shares to a private holding company, still held by the original individual shareholders, are speculative and therefore taxable at the 33 per cent separate rate. This point of view is at times shared by the Belgian courts.[18]

The second exception concerns the sale of a Belgian resident company when a substantial shareholding (seller owning with his or her relatives more than 25 per cent in the Belgian target company at any time during the five years prior to the sale) is sold to a foreign entity (article 90, 9° of the ITC). Capital gains falling within the scope of this provision are subject to a 16.5 per cent tax, plus local taxes. Furthermore, article 94 of the ITC provides for an anti-abuse clause: even if a purchaser at the time of the initial sale was not a foreign entity and the tax would not seem to apply, the tax will become due if the purchaser transfers the shares to a foreign entity within 12 months following the initial sale.

15 This restriction is justified by the fact that under the Belgian double taxation treaties the right to tax capital gains realised on a disposal of shares is generally allocated to the country of residence of the vendor (unless the shares have been invested by a Belgian resident in a non-Belgian PE (art. 13(2) and (3) tax treaties)).

16 In rather exceptional cases the shareholding may be deemed to be allocated to the exercise of a business activity (case of a stockbroker or of a professional trader who will be deemed to hold his shares as business assets).

17 Brussels, 5 February 1999, *Courrier Fiscal*, 1999, p. 263; Cass. 6 May 1988, JT, 1989, p. 62.

18 Trib. Brussels, 1 February 2002, *Courrier Fiscal*, 2002, p. 209; Trib. Namur, 27 March 2002, *Fiscologue*, no. 843, 26 April 2002, p. 8; A. Haelterman, "Plus-values privées sur actions parfois imposables", *Fiscologue*, 10 December 1999, no. 733, p. 1.

The existence of this exception to the general principle of capital gains exemption for individuals has an important influence on the M&A market since sellers who are individuals will often oblige the foreign purchaser to incorporate a new Belgian vehicle to make the acquisition and accept some typical clauses in the share purchase agreement that prevents the latter from transferring the shares acquired by the initial purchaser during a minimum period of at least 12 months after the initial sale. However, it is expected that this provision will be amended at least when the buyer is a resident of the EU, since the European Court of Justice[19] recently considered that article 90, 1° was deliberately in breach of the EU Treaty (freedom of establishment as provided by articles 43 and 48 of the EU Treaty).

3.1.3. Vendor is a Belgian company

Under article 192 of the ITC, capital gains on shares are unconditionally exempt (there is no threshold and no minimum holding period required to qualify for the exemption) provided that the income relating to these shares can be deducted under the participation exemption and in so far as they exceed the amount of the written-back reduction in value previously allowed on the shares. Correlatively, reductions in value and capital losses on shares are not deductible except for capital losses recorded in connection with the liquidation of the company to the extent of the loss of the paid-up capital represented by such shares.

3.1.4. Tax effect at the level of the Belgian acquiring vehicle

Notwithstanding the possibility of incorporating the new Private Pricaf/Privak (see section 2.3.7), the purchase of the shares in a Belgian target company is generally done by a local company (SA or SPRL). The form of the company can be affected by foreign legal rules, e.g. SPRLs (*sociétés privées à responsabilité limitée*) apply for the US "check the box" regulations and not SAs. The shares in the Belgian acquiring vehicle are often held through a Luxembourg Soparfi, because of the interesting participation exemption regime existing in this country, the interesting treaty network as well as the absence of any withholding tax on liquidation bonuses under Luxembourg law.

The acquisition price of the shares must be booked in the assets account of the acquiring company under the heading "financial fixed assets". According to the Accounting Standards Commission,[20] any premium borne to acquire the target company cannot be depreciated in the accounts, except under exceptional circumstances (i.e. in the event of a manifest error in valuating the company whose shares are acquired).

Hence, the part of the price that exceeds the true value of the company cannot be borne, either immediately by debiting the profit and loss account, or by booking a reduction in value, or even by any depreciation of goodwill.

On a tax level, the reductions in value or capital loss on shares are only deductible in the context of the exception set out in article 198, 7° of the ITC

[19] Judgment of 8 June 2004, Case C-268/03.

[20] Opinion ASC of 1 February 1989, *Bull. CNC*, 1989.

(division of corporate assets, i.e. in the context of a liquidation or a taxed merger).[21]

Interest charges on borrowings used to acquire the shares are fully tax deductible in the limits of articles 18, 55 (arm's length principle), 54 (borrowings granted by a company located in a tax haven jurisdiction) and 198, 11° of the ITC (7:1 debt to equity ratio applicable under certain conditions). In the absence of tax consolidation, there is no tax match between the operating business profits of a target and the interest charges borne at the level of the acquiring vehicle.

Future capital gains on the acquired shares will benefit from the participation exemption. Dividends received can theoretically benefit from a 95 per cent participation exemption; in practice, nevertheless, this exemption only applies if the pre-dividend result is positive[22] (which will not be the case if the acquiring vehicle is highly geared with debt and has no other income). In order to combine the tax advantages which result from the participation exemption on the dividends received and the interest expenses relating to an acquisition of a shareholding, companies often try to (re)organise the acquisition at the level of an existing operating company which carries regular business operations. This is more tax efficient because interest expenses on the shareholding can then be offset against the profits from the business operations.

3.1.5. Tax effect at the level of the target company

A share purchase will have a quite reduced impact at the level of the target company. The acquirer will not obtain a "stepped-up" basis for the target's assets unless it performs a so-called "taxable merger" (in fact, a liquidation of the target), which implies the taxation of the goodwill of the target with the standard corporate income tax that will often render this solution impossible.

The only direct impact on the target company is the risk of losing the benefit of deducting the amount of the tax losses carried forward existing prior to the change of control (article 207, al. 3 of the ITC). In case of a change of control, prior tax losses will only remain deductible if the operation meets legitimate needs of a financial and economic nature. The Advance Ruling Commission[23] generally recognises the presence of these legitimate needs when the acquirer maintains the activity (or wants to expand the existing activities) and the personnel employed in the target.[24]

21 However, a capital loss is only deductible to the extent that the distributed net assets are less than the paid-up capital of the liquidated company.

22 In this respect, the Belgian participation regime has been considered as conflicting with the EU Parent–Subsidiary Directive (Trib. Brussels, 25 April 2003, RABG, 2003, p. 1046 and note M. Felis).

23 See decision reported in *Bull. Contr*., 1999, no. 789, p. 102.

24 The Report to the King (preceding the RD of 20 December 1996) having introduced the new anti-avoidance provision furthermore contains a statement according to which it is presumed that the condition of legitimate needs is automatically fulfilled in the event of a change of control of a company in a difficult financial position and when the employees and activities of a company are maintained by the new shareholder.

3.2. Acquisition of assets from a Belgian company

3.2.1. Preliminary remark

Hereunder we have only addressed the sale of a business by a Belgian resident company or by a Belgian permanent establishment (PE) of a non-resident company. We shall not describe the sale of a company by a private person.

3.2.2. Sale of assets by a Belgian resident company

3.2.2.1. Common treatment of capital gains

Capital gains realised by a Belgian company on the sale of assets are in principle[25] taxable at the ordinary rate, i.e. 33.99 per cent (33 per cent + 3 per cent crisis tax). Any capital gains may be set off by the presence of tax-recoverable losses or deductions for investment if at least the transfer price has not been overvalued (which is unlikely when the transfer involves independent parties).

In this last situation, the tax authorities may indeed invoke article 207, paragraph 2 of the ITC, which rules out the deductibility of various tax deductions for amounts deriving from abnormal or gratuitous advantages that the taxpayer has derived from a related company (resident or not).

Set-off with investment deductions is, however, limited per taxable period up to a maximum of 620,000 euro (indexed at 743,440 euro for the tax year 2004), or when the total amount of exemption carried forward at the end of the preceding taxable period exceeds 2,480,000 euro (indexed at 2,973,770 euro for the tax year 2004), 25 per cent of this total amount. Tax losses will be deductible without any time limitation.

Capital losses are tax deductible and any excess on the taxable profit of the year will constitute a tax loss to be carried forward without any time limitations.

3.2.2.2. Deferred taxation regime

Article 47 of the ITC provides for a spread taxation regime (which is optional) for capital gains realised on tangible or intangible fixed assets that have been used by the company's business for more than five years. This special regime is only reserved for capital gains realised in connection with a sale, contribution, exchange or a forced realisation in so far as the taxpayer satisfies the reinvestment conditions laid down in article 47 of the ITC.

The principle of this (optional) regime is to defer the taxation of capital gains realised in the course of a business activity and to spread the tax charge over a number of years in proportion to the depreciation pertaining to the assets acquired by way of the reinvestment of the proceeds of the assets on which the capital gains have been realised. The reinvestment period is three years, starting from the first day of the taxable period in which the gain was realised, unless the

[25] Belgian tax law still contains the so-called "exemption of the monetary portion" of the capital gains. We refer to the 1992 report of Mr. L. de Broe on the same subject.

reinvestment is made in buildings, aircraft or vessels, in which case the reinvestment period is extended to five years.

3.2.3. Sale of assets by a Belgian PE of a foreign company

The principles of taxation applicable to Belgian PEs are similar to those applied to resident companies. The applicable rate for taxpayers subject to non-resident corporate income tax is similar to the rate applying to resident companies, i.e. 33.99 per cent; even if there is no tax treaty, virtually all tax provisions (determination of income, deductibility of costs and expenses, exemption and allowances, etc.) affect Belgian and foreign companies equally.

Two particularities should be noted:

(a) If the PE is selling all of its assets and liabilities to a third party, it will be *de facto* impossible for the branch to apply for the deferred taxation regime of article 47 of the ITC, since with the disappearance of the PE, the seller will not be able to meet one of the conditions set out in article 47: the obligation to report the capital gain on the separate account of the liabilities side of the balance sheet.

(b) If the PE is selling Belgian real estate, tax must be paid by way of withholding tax, to be withheld by the notary enacting the transfer of ownership. The PE still has the obligation to declare the capital gain in the next non-resident corporate income tax return but may credit the withholding tax retained on the final tax bill.

A problem may arise in cases where the transfer of assets from the PE may benefit from a capital gains tax exemption (article 231 §2 or §3 – see section 4.2.3 below). In such cases, a withholding tax is not justified but tax law does not provide for any exception.[26]

3.2.4. Tax effect at the level of the acquirer

The assets that have been purchased will either be located at the level of an existing or a new Belgian subsidiary, or will (most likely) constitute a PE in Belgium under the relevant tax treaty provisions or provisions of domestic law (article 227, 2° of the ITC).

Assets should be valued at the stepped-up acquisition cost and this constitutes the most attractive feature of an asset purchase for a buying company. These assets (with the exception of land, shares and securities) qualify for depreciation on either a straight-line or a declining-balance basis[27] according to their economic lifetime. The tax reform of 22 December 2002 changed the rule according to which a buyer was allowed to take into account a full year’s depreciation in the year of acquisition but could not depreciate in the year of disposal; depreciations are now allowed in a given book/tax year *pro rata temporis*.[28]

26 In such cases, practical solutions may often be found with the competent tax inspector who would normally accept a bank guarantee equal to the capital gains tax to be paid should the exemption regime not apply.

27 However, certain assets, such as assets leased to a third party under operating leases, do not qualify for the double declining-balance depreciation.

28 Hauftenne and Afschrift, *op. cit.*, no. 39.

If part of the price may not be allocated to specific assets, this excess will constitute a payment for goodwill (clientele), subject to an accounting straight-line depreciation of five years. From a tax point of view, however, as indicated in an answer to a parliamentary question, goodwill will be amortised over a time period that shall not be less than 10 to 12 years.[29]

Future gains or losses will be computed from the acquisition costs, i.e. the new stepped-up basis.

3.2.5. Joint liability for tax liabilities in the case of sale or transfer of businesses

The Royal Decree of 12 December 1996 introduced a new measure aiming at preventing transferors who have not satisfied their tax debts from declaring insolvency following the transfer of their business.

Article 442 bis of the ITC contains a two-pronged provision. On the one hand, it provides that the transfer will not be enforceable *vis-à-vis* the tax authorities prior to the end of a one-month period after the notification of the transaction to the competent tax collector. On the other hand, it introduces rules which provide for joint liability, until the expiration of the one-month period, of the transferee and transferor for the tax debts of the latter existing at the time of the transfer deed. Any amount recoverable from the transferee is, however, limited to the amount of the transfer price[30] already paid by the transferee to the transferor at the commencement of the one-month period.

The rules of non-enforceability and joint liability, as described above, do not apply if a certificate is enclosed with the transfer deed, issued by the responsible collector of direct taxes, attesting that no tax debt is due by the transferor as of that date. The certificate must be dated no later than 30 days prior to the notification of the transaction.

It should also be noted that article 442 bis does not apply to transfers organised by way of mergers, splits or the contribution of divisions as wholes conducted in accordance with the Belgian Company Code's provisions.

3.3. Funding

Interest relating to the financing of shares or assets is generally tax deductible within the limits of the arm's length principle. Certain provisions and anti-avoidance provisions limit the level of deductions that are allowed. Reference is made to article 54 of the ITC (section 2.3.3), 55, 18 and 198, 11° of the ITC (section 2.3.4).

Belgian source interest is subject to a withholding tax rate of 15 per cent. A number of exceptions are nevertheless foreseen in domestic law, in relation to the quality of the debt instrument (e.g. registered bonds issued for the ben-

[29] Ann Soetaert, "Afschrijving van goodwill: een overzicht van 10 jaar rechtspraak", TFR, 2000, p. 439; QP no. 199 of 9 September 1992, De Clippelle, *Bull. Contr*., 725, 1993, p. 582.

[30] Or in the event of a contribution to a company to the amount corresponding to the par value of the shares attributed in consideration for the transfer, as well as to the amount of the debts taken over by the transferee.

efit of a non-resident entity) or by reference to the quality of the lender or the borrower.[31]

Tax treaties entered into by Belgium and some treaty countries (e.g. Luxembourg, Germany and the Netherlands) do provide, under certain conditions (i.e. the fact that there is no shareholding relationship of more than 25 per cent between the borrower and the lender), for a total exemption from withholding tax. A similar exemption applies for banks resident in certain treaty countries.[32]

Belgium recently introduced the interest withholding tax exemption[33] provided by the EC Directive on Royalties and Interest.[34] Conditions are set out in article 107 §6 of the RD/ITC which states that the Belgian borrower and EU resident lender must be associated (25 per cent shareholding) and that this link must exist for an uninterrupted period of at least one year. In addition, the beneficiary of the interest should be the full owner, or the owner of the usufruct over the interest-bearing securities, for the entire duration to which the interest relates.

4. Acquisition of part of a Belgian target business by a foreign acquirer

4.1. Sale of a Belgian or foreign subsidiary by a Belgian company

As stated above, the sale by a Belgian resident company of a subsidiary is generally exempt from corporate income tax as a result of the Belgian participation exemption (article 192 of the ITC). The exemption will, however, not be applicable if the dividend income relating to these shares cannot benefit from the 95 per cent received dividend deduction. The conditions in order to benefit from this regime are further described in section 5.1.2 below.

4.2. Transfer of partial business from a Belgian company

4.2.1. Contributions of division to a Belgian or EU resident company

4.2.1.1. Tax regime

Capital gains realised on the occasion of a contribution of a Belgian company to another company of one or more lines of the business may be exempted provided the conditions set out in article 46, paragraph 1, 2° of the ITC are respected, i.e.:

- the contribution is one of a line of business (or a universal transfer), i.e. a totality of assets and liabilities able to operate on its own;

[31] Such as the new withholding tax exemption recently introduced by companies qualifying as financial corporations (RD of 16 May 2003, Official Gazette 5 June 2003).

[32] The Belgian government has recently announced that it will extend the exemption to all financial institutions resident in the EU or resident in countries with which Belgium has concluded tax treaties.

[33] RD of 22 December 2003.

[34] 3 June 2003, 2003/49/CE.

- the company receiving the contribution has its corporate registered office or principal place of business in an EU Member State;
- the sole consideration for the contribution is shares in the recipient company (a balance of less than 10 per cent will nevertheless not prevent the exemption from applying);
- the transaction satisfies legitimate needs of a financial or economic nature.

If the recipient of the contribution is a company established in the EU other than Belgium, the assets contributed will be deemed to constitute a Belgian establishment, within the meaning of article 229 paragraph 1 of the ITC, of the company receiving the contribution.

The gain, expressed in the exchange ratio, cannot be expressed under Belgian GAAP and the fiscal value of the shares received in exchange for the contribution is identical to the fiscal value of the assets and liabilities it has contributed to the company receiving the contribution.

Tax losses or investment deductions generated by the contributing company will remain vested in that company as if the transaction had not taken place.

At the level of the contribution, the assets maintain the same tax values as existing at the level of the contributor, prior to the operation. Also, the paid-in capital generated at the level of the beneficiary company can only be held as tax capital to the extent of the value that the contribution had in the hands of the former taxpayer from a tax point of view. Unlike mergers and splits, contributions do not entail any transfer of equity to the recipient company.

When the company receiving the contribution has suffered tax losses prior to the contribution, these losses are only deductible in proportion to the shares that its net tax assets represented in the total net tax assets prior to the transaction.

4.2.1.2. Limitations on the tax-free regime

The chances of success in realising a tax-free operation depend on whether the contribution will be deemed to respect the legitimate needs condition. Business needs will generally be accepted if the seller is prepared to create a durable joint venture with its new partner and hence willing to keep the shares resulting from the contribution.

An immediate sale of the shares for the fair market value will trigger a gain, which, theoretically, will be exempt from capital gains tax (capital gain on shares – article 192 of the ITC). Nevertheless, this second transaction is likely to trigger a negative reaction from the tax authorities in so far as the succession of transactions (contribution/sale) has the effect of transforming a taxable gain on assets into an exempt capital gain on shares.

Indeed, the tax authorities could attack the envisaged transactions on two levels:

- The first operation (demerger or contribution transaction) does not satisfy legitimate needs of a financial or economic nature in so far as the transfer of shares is the product of a manifest wish to avoid the payment of tax on capital gains.
- The succession of transactions can be recharacterised as a sale of assets on the basis of article 344 ITC and/or article 18 of the RDC.

Without entering into the controversy surrounding article 344 ITC, we consider that the rapid succession of contribution/demerger transactions and the sale of securities is likely, in fact, to produce a disapproving reaction from the tax authorities.

Hence, this type of transaction should only be attempted if the transaction can be justified by motives other than tax motives. In any event, we advise that the proposed transaction be submitted to the ruling procedure.

If a comparison is made between Belgian legislation in this regard and that of neighbouring states, it can be regretted that the condition that there must be legitimate needs of a financial or economic nature is not satisfactory as regards the fiscal certainty of the taxpayers. Article 344 paragraph 1 can be applied when the tax authorities can prove that the two transactions in question (e.g. the contribution followed by the sale of the shares) are linked by a unity of intention. Hence, in this context, one might wonder how long the transferee company should keep the shares before selling them so as not to have the slightest risk. The law, as it currently stands, does not provide an answer to this question. This legitimate needs condition is open to various interpretations on the part of various inspectors and therefore does not ensure equality for all taxpayers before the law.

4.2.2. Tax-free split of a company followed by a sale of shares

4.2.2.1. Classical versus partial splits

Classical splits or demergers are operations in which a Belgian company is dissolved, without being liquidated, and transfers its assets and liabilities to two or more companies.

In order to qualify for exemption, the demerger must satisfy the following conditions (article 211 of the ITC):

- the companies benefiting from the contributions must be Belgian residents;
- the transaction must be carried out in accordance with the Belgian Company Code;
- the transaction must satisfy legitimate needs of a financial or economic nature.

Contrary to the contribution of a division, the split triggers not only a distribution of assets and liabilities, but also a distribution of equity.

The tax regime may be compared to that applicable to contributions. However, various differences exist, in particular the fact that tax losses and investment deductions generated by the split company will be allocated between the companies benefiting from the contribution. The allocation key will be the tax value of the transferred assets and liabilities.

As the classic split entails a transfer of a whole, the tax risk associated with these operations can be significant if the transaction is deemed not to meet the legitimate needs test and the tax authorities were then allowed to tax the possible goodwill relating to all existing assets.

The split of a company directly followed by a sale of shares of one company resulting from the split constitutes a succession of operations that could be criticised by the tax authorities. Reference is made to the reclassification risk as described in section 4.2.1.2 above, as regards contributions followed by a sale of shares.

4.2.2.2. Partial splits

Unlike classical splits, partial splits do not trigger the dissolution of the split entity, although they result in the disappearance of part of the net equity of the contributing entity. Unlike the case in contributions of divisions, the split entity does not become a shareholder of the company benefiting from the contribution since the shares resulting from the contribution are remitted to the shareholders of the split company.

The tax regime and the conditions that must be fulfilled in order to benefit from the exemption are the same as for the classical split.

Nevertheless, achieving a partial split may appear less risky since the risk of taxation, if any, will in this scenario be limited to the portion of the embedded gains relating to the transferred division and not the gains relating to the activity maintained in the split company.

In the event of a sale of shares in the company benefiting from the transferred business, the tax authorities could attempt once again to reclassify the share deal exemption into a taxable asset sale by virtue of article 344 paragraph 1 of the ITC. This risk does not, in our opinion, exist when the shareholders of the split company are non-residents, since Belgium will in such cases have no right to tax the capital gains.

4.2.3. Transformation of a Belgian PE into a Belgian resident company, possibly followed by a sale of shares in the resident company

In accordance with article 231 paragraph 3 of the ITC,[35] capital gains realised or expressed in connection with the contribution of a Belgian PE to a Belgian resident company in exchange for an issue of shares in that company are exempt.

The rules provide, to a certain extent, for tax neutrality with respect to the taxable base of the transferred assets and liabilities and the tax composition of the equity created at the level of the Belgian benefiting company. Depreciation, investment deductions, capital losses and capital gains to be taken into consideration in the hands of the resident company on the assets released by the Belgian establishment are determined as if the contribution transaction had not taken place.

Moreover, the same applies as regards exemptions that the Belgian establishment has qualified for prior to the contribution, i.e. capital gains, reductions in value and exempt provisions.

It is interesting to note that the exemption regime may be granted notwithstanding the residence of the contributor (the contributing entity must not be a resident in Belgium or in the EU) and that the compliance with the legitimate needs test is not required for this type of transaction.

As a result of the contribution of the Belgian PE to a Belgian resident company, the foreign head office will have a shareholding in the Belgian resident company.

35 Inserted by the Act of 30 January 1996 amending various provisions relating to non-resident tax.

No further tax consequences would be applicable in Belgium should the foreign shareholder decide to sell the shareholding since the capital gain would in such case only be taxable in the country of residence of the shareholder.

5. Acquisition of a foreign business by a Belgian company

5.1. Acquisition of a shareholding

5.1.1. Interest paid by a Belgian company relating to the financing of the acquisition

Interest paid by a Belgian company in relation to debt financing is tax deductible subject to the same conditions as described above, even if the corresponding income of shareholding may benefit from the dividend participation exemption.

5.1.2. Dividend income

Provided certain conditions are met, a Belgian corporate shareholder may benefit from the participation exemption (the so-called dividend received deduction) according to which only 5 per cent of the dividends received will be taxable at the Belgian corporate income tax rate of 33.99 per cent.

This special regime only applies if:

- at the time of attribution or payment of the dividend, the Belgian shareholder holds at least a participation of 10 per cent in the subsidiary or it has an acquisition value of 1.2 million euro;
- if the shareholding may qualify accounting-wise as a financial fixed asset and provided that the shareholding has been held in full ownership for an uninterrupted period of at least one year.

Notwithstanding these general conditions, article 203 of the ITC stipulates that the dividend participation exemption will not apply to the negative cases listed below:

(a) The dividend will be disallowed if distributed by a company which is neither subject to Belgian corporate income tax nor subject to a foreign tax similar to the Belgian resident corporate income tax or which is established in a country where the common tax legislation is substantially more advantageous than in Belgium. Subsidiaries resident in EU countries are deemed to have a common tax legislation that is not more advantageous than in Belgium. Outside the EU scope, subsidiaries should at least be subject to an effective or a national taxation rate of 15 per cent in order not to be blacklisted because of the foregoing “subject to tax” condition.

(b) The dividend will be disallowed if distributed by a financial company, a treasury company or an investment company which, although it is a resident of a country which does not fall within the scope of point (a) above, benefits from a tax regime which is more favourable than the common tax regime.

(c) The dividend will be disallowed if distributed by a company in so far as the income which it receives, other than dividends, has been generated outside its resident country and benefits, in the country of residence, from a tax regime which is different from the common tax regime.

(d) The dividend will be disallowed if distributed by a company in so far as it realises profits through one or more foreign branches which are globally subject to a more tax advantageous regime than would be applicable to the profits in Belgium (the profit of the PE should be globally subject to a taxation rate of at least 15 per cent to pass this test).

(e) The dividend will be disallowed if distributed by a company, other than an investment company, which in turn redistributes dividend income of which at least 90 per cent would not qualify for the dividend participation exemption.

If 90 per cent of all of the inbound dividend income (which will be used by the intermediary company to distribute an outbound dividend) can benefit from the received dividend deduction, a participation exemption for 100 per cent of the outbound dividend can be claimed by the beneficiaries. Conversely, if less than 90 per cent of the inbound dividend is entitled to the received dividend deduction, no participation exemption can be claimed for the outbound dividend.

5.2. Acquisition of a foreign branch

A Belgian resident company will be taxed on its worldwide income at the normal standard rate of 33.99 per cent. However, if that company carries out activities in a treaty country and if these activities can be considered as constitutive of a PE in that country, income resulting from these activities will be taxed in that foreign country, and it will be exempt in Belgium.

Should the activities be performed outside Belgium in a country with which Belgium has not concluded a treaty, the income will be taxable in Belgium at the standard non-resident corporate income tax rate (33.99 per cent). Prior to the tax reform of 2002, the taxation of foreign branch profits was reduced to one quarter of the normal rate. It is generally accepted by doctrine that the expression "taxed" means that the relevant income should at least be subject to tax in the foreign country (even if not effectively taxed).

Special regulations apply if the foreign PE or the Belgian head office are suffering losses so that the offset of tax losses must follow a predefined imputation order. When it is expected that the acquired activity will generate a loss in the first years, it is more interesting to envisage an asset deal rather than a share deal for Belgian tax purposes: tax losses suffered in a PE will indeed be deductible against the Belgian source profit at the level of the Belgian head office so that the foreign loss will effectively be deducted against the Belgian source profit, during the year of realisation of the loss. When the PE will recover a taxable situation in the foreign country, a recapture rule will be applicable in Belgium in order to avoid double-dip situations. Since the tax reform of 2002, the rate of taxation of such recaptured income is equal to the standard non-resident corporate income tax rate.

6. Mergers of equals/dual holding structures/stapled stock structures

There are no specific Belgian tax provisions applying to the “merger of equals”, i.e. a transaction under which two companies are united through the issuance of shares on the basis of approximate equality. Belgium has adopted the provisions contained in the Third EU Directive on Mergers as a result of which the shareholders of both companies will replace their shares in the dissolved entity by the new shares issued by the entity resulting from the merger. Belgium has also adopted the favourable tax provisions provided by the EU Mergers Directive according to which shareholders will benefit from a roll-over relief in respect of the new shares (the gain possibly realised or recognised on the occasion of the merger on the shares is tax exempt and the tax value of the shares received from the absorbing entity is the same as the shares held in the absorbed entity).

The reorganisation[36] performed in 2001 by the Dutch-Belgian Fortis Group constitutes a quite unique and famous example of the combination of the merits of a dual holding company structure (one in Belgium, one in the Netherlands) where the shareholders of each jurisdiction could maintain their status and tax regime and the advantages of stapled stock structure, where one new “unified” share comprises one ordinary share in each of the parent companies, including the rights attached thereto such as voting rights and dividend rights.[37]

In the above case, the reorganisation entailed the realisation of a number of share transfers (where tax neutrality could be reached due to the capital gains exemption regime which is present both in Belgium and in the Netherlands) and a tax-free merger between two entities (the former Fortis Belgium into Fortis SA).

Résumé

La doctrine fiscale belge préconise généralement les acquisitions d’entreprises belges par un acquéreur étranger à travers une structure de transaction sur les actions. Jusqu’en 1993, la fusion de l’entreprise cible et du véhicule d’acquisition belge était souvent réalisée immédiatement après une acquisition afin d’obtenir une imputation des intérêts relatifs au financement sur les bénéfices imposables de la société cible nouvellement acquise (la législation fiscale belge ne prévoit pas de régime de consolidation). Depuis 1993, de telles fusions sont devenues plus difficiles du fait de l’introduction d’une nouvelle condition à remplir pour bénéficier du régime exempt d’impôts: la fusion doit être effectuée pour des motifs judicieux et économiques, c’est-à-dire pas seulement pour des raisons fiscales. En tout cas, une fusion exempte d’impôts n’accroîtra pas l’assiette de l’impôt des actifs des entreprises cibles telle qu’elle existe aujourd’hui. Des fusions “imposables” (en réalité des liquidations suivies du transfert de la totalité des actifs) sont réalisables et permettent une plus-value des actifs d’acquisition; néanmoins, elles sont généralement sans intérêt étant

36 Prospectus and Information memorandum dated 15 November 2001 with respect to the unification of the shares of Fortis.

37 The respective articles of association of the two parent companies have been amended in order to implement the twinning of the shares.

donné qu'elles déclenchent aussitôt un impôt sur les gains en capital. Lorsque la fusion n'est pas possible, un plan postérieur à l'acquisition consistera à procéder à un transfert de la dette existant au niveau du véhicule d'acquisition à l'entreprise cible moyennant une distribution de capital (remplacement des fonds propres par le capital d'emprunt) ou la relocalisation des actifs au niveau de l'entreprise cible. Les règles de la sous-capitalisation (rapport de 7 à 1 entre le capital d'emprunt et les fonds propres) ne s'appliquent que lorsqu'un emprunt est garanti par une société, sous réserve d'un régime fiscal plus favorable que le régime classique belge de l'imposition des intérêts.

Des possibilités de réorganisation exempte d'impôts existent effectivement, mais elles se bornent souvent à des transactions actifs contre actions. Les dispositions de lutte contre les utilisations abusives peuvent permettre le reclassement d'un gain en capital sur les actions exempt d'impôts en un gain en capital sur les actifs imposable, dans les cas où une réorganisation est immédiatement suivie de la vente au comptant des actions reçues en rémunération de la contribution à l'entreprise cible.

Les transactions sur la cession d'actifs sont moins fréquentes du fait de l'impôt payable par le vendeur lors de la cession d'actifs (sauf si l'impôt peut être éludé par l'imputation des déficits reportés sur le fonds de commerce ou les gains de l'entreprise cible non précédemment comptabilisés) et par les associés du vendeur sur la distribution du produit de la liquidation. À cet égard, la réforme fiscale de 2002 a réintroduit une retenue à la source de 10 pour cent sur les excédents de la liquidation, ce qui constitue un impôt libératoire pour les personnes physiques belges associées.

Les investissements extérieurs effectués par des investisseurs belges prennent souvent la forme d'une transaction sur les actions. Cette tendance a la préférence parce que le régime de participation belge accorde, sous certaines conditions, une déduction de 95 pour cent sur les dividendes reçus et une exemption de 100 pour cent sur les futurs gains en capital. Les intérêts liés au financement des acquisitions d'actions nationales ou étrangères sont également déductibles dans une certaine limite.

Zusammenfassung

Erwägungen auf der Grundlage des belgischen Steuerrechts begünstigen im Allgemeinen den Erwerb belgischer Unternehmen durch einen ausländischen Erwerber mittels Beteiligungsgeschäft. Bis 1993 wurde eine Fusion der Zielgesellschaft mit dem belgischen Erwerbsträger häufig unmittelbar im Anschluss an einen Erwerb realisiert, um einen steuerlichen Abzug der Finanzierungszinsen gegenüber den steuerpflichtigen Gewinnen der neu erworbenen Zielgesellschaft durchzuführen (das belgische Steuerrecht kennt keine steuerliche Konsolidierung). Seit 1993 sind derartige Fusionen erschwert, nachdem für die Inanspruchnahme von Steuerbefreiung eine neue Bedingung eingeführt wurde: Die Fusion muss aus triftigen wirtschaftlichen Gründen erfolgen, d.h. sie darf nicht lediglich aus steuerlichen Gründen vorgenommen werden. Jedenfalls führt eine steuerfreie Fusion nicht zu einer Erhöhung der historischen Besteuerungsgrundlage des Vermögens der Zielgesellschaft. "Steuerpflichtige" Fusionen (eigentlich Liquidationen mit anschliessender Übertragung des gesamten Vermögens) sind machbar und ermöglichen eine Werterhöhung des Vermögens der erwerbenden Gesellschaft; generell sind sie jedoch nicht interessant, da sie umgehend eine Kapitalertragssteuerpflicht auslösen. Wenn eine Fusion nicht möglich ist, besteht die Planung für die Nacherwerbsphase in der Durchführung einer Übertragung der beim Erwerbsträger bestehenden Verschuldung auf die Zielgesellschaft, und zwar mittels Eigenkapitalverteilung (Austausch von Eigenkapital gegen Verschuldung) oder mittels Verlagerung von Vermögenswerten auf der Ebene der Zielgesellschaft. Die Unterkapitalisierungsregelungen (Schuld-Eigenkapital-Koeffizient 7:1) sind nur dann anwendbar, wenn seitens einer Gesellschaft ein Darlehen nach einem günstigeren Steuerrecht als dem regulären belgischen Zinsbesteuerungssystem gewährt wird.

Es bestehen zwar durchaus Möglichkeiten zur steuerfreien Unternehmenssanierung; sie sind jedoch häufig auf Transaktionen von Vermögenswerten gegen Beteiligungen beschränkt. Folgt auf eine Sanierung unmittelbar der Barverkauf der für die Einlage in die Zielgesellschaft erhaltenen Beteiligungen, kann auf der Grundlage geltender Bestimmungen gegen steuerlichen Missbrauch eine Neueinstufung steuerfreier Kapitalerträge aus Beteiligungen als steuerpflichtige Kapitalerträge aus Vermögen vorgenommen werden.

Transaktionen in Form von Vermögensveräusserungen sind weniger häufig anzutreffen, und zwar aufgrund der Steuer, die (soweit sie sich nicht durch Verrechnung der steuerlichen Verlustvorträge mit den bisher nicht berücksichtigten *Goodwill*- oder Ertragswerten der Zielgesellschaft vermeiden lässt) vom Verkäufer auf die Veräusserung von Vermögensgegenständen und von den Gesellschaftern des Käufers auf die Verteilung des Liquidationserlöses zu zahlen ist. In diesem Zusammenhang wurde im Zuge der Steuerreform von 2002 eine Quellensteuer von 10 Prozent auf Liquidationsvergütungen wieder eingeführt, die eine Abschlusssteuer in den Händen belgischer Einzelgesellschafter darstellt.

Ins Ausland gehende Investitionen belgischer Anleger erfolgen häufig in Form von Beteiligungsgeschäften. Dieser Trend wird wegen des belgischen Teilhaberschaftssystems bevorzugt, das unter bestimmten Voraussetzungen einen Abzug in Höhe von 95 Prozent auf erhaltene Dividenden und eine Steuerfreistellung in Höhe von 100 Prozent auf zukünftige Kapitalerträge ermöglicht. Zinsen für die Finanzierung innerstaatlicher oder ausländischer Beteiligungserwerbe sind innerhalb bestimmter Grenzen ebenfalls steuerlich abzugsfähig.

Resumen

En general, la doctrina tributaria belga favorece la adquisición de empresas locales por compradores extranjeros mediante una estructura operativa sobre las acciones. Hasta 1993, la fusión de la empresa objetivo y el instrumento de adquisición belga tenía lugar inmediatamente después de la compra para imputar los intereses financieros a los beneficios imponibles de la sociedad objetivo recién adquirida (en la legislación tributaria belga no existe el régimen de consolidación). Desde 1993 estas fusiones presentan más dificultades al haberse introducido una nueva condición para la exención fiscal: la fusión debe producirse por motivos económicos y razonables, es decir, no sólo por razones fiscales. En cualquier caso, una fusión exenta no incrementará la base imponible histórica del activo de las empresas objetivo. Las fusiones “gravables” (en realidad, liquidaciones seguidas de la transmisión de todos los activos) son realizables y permiten la plusvalía de los activos de adquisición, pero carecen de interés por cuanto dan lugar inmediatamente a un impuesto sobre las ganancias de capital. Cuando no es posible la fusión, un plan posterior de adquisición consistirá en transferir la deuda existente a nivel del instrumento de adquisición a la empresa objetivo mediante distribución de capital (sustitución de capital propio por deuda) o relocalización de los activos a nivel de la empresa objetivo. Las normas sobre subcapitalización (ratio 7:1 deuda/capital propio) se aplican únicamente en préstamos concedidos por una sociedad sujetos a un régimen fiscal más favorable que el clásico belga de tributación de los intereses.

Existen posibilidades de reorganización exenta de gravamen, pero se limitan a operaciones de activos por acciones. Las disposiciones de lucha contra el abuso permiten la reclasificación de la ganancia de capital sobre acciones exenta en ganancia de capital sobre activos imponible, cuando tras la reorganización se produce la inmediata venta al contado de las acciones recibidas en remuneración de la aportación a la empresa objetivo.

Son menos frecuentes las operaciones de venta de activos debido al impuesto a pagar por el vendedor y sus socios en la distribución del producto de la liquidación (salvo si cabe la posibilidad de imputar las pérdidas al fondo de comercio o los beneficios de la empresa objetivo no contabilizados anteriormente, en cuyo caso puede no haber tributación). La reforma fiscal de 2002 reintrodujo la retención en la fuente del 10 por ciento sobre los excedentes de la liquidación, que constituye un impuesto final para los socios personas físicas belgas.

Las inversiones exteriores efectuadas por inversores belgas adoptan normalmente la forma de operaciones con acciones, y ello es así porque el régimen de participación belga concede, bajo ciertas condiciones, la deducción del 95 por ciento sobre los dividendos percibidos así como una exención del 100 por ciento sobre las futuras ganancias de capital. También son deducibles, con ciertos límites, los intereses de la financiación de adquisiciones de acciones nacionales o extranjeras.