Belgium

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Summary

The most important merit of the base erosion and profit shifting (BEPS) project is the change in the mindset of Belgian tax policymakers. Belgium has traditionally had a corporate tax regime that applies a high rate (33.99 per cent) on a tax base that can be significantly reduced by deductions such as the notional interest deduction (NID) and the patent box deduction and the exemption for excess profit. When the BEPS work was ongoing, Belgium was not in favour of transposing BEPS recommendations that did not impose minimum standards. However, in the light of the recent EU developments such as the adoption of the Anti-Tax Avoidance Directive (ATAD), the state aid investigations on the Belgian excess profit regime and the changing tax competition climate within the EU, Belgium has redirected its approach by announcing in 2016 a corporate income tax (CIT) reform that aims at significantly reducing the tax rate and broadening the tax base. This reform is in its final stage of preparation and if approved will become effective as of 2017. As a member of the EU, Belgium is required to implement the measures included in the ATAD, even if such measures are not minimum standards from an OECD perspective. In order to achieve a budget neutral CIT reform, Belgium may well transpose some measures of the ATAD (such as the interest deduction limitation and controlled foreign company (CFC) rules) ahead of the deadline imposed by the EU.

Well before the BEPS project, Belgian CIT already provided for a series of measures preventing profit shifting to foreign related parties and offshore jurisdictions (such as the application of the arm's length principle in the area of transfer pricing (TP), the non-deductibility of payments to residents of tax havens, disclosure obligations for payments to tax havens, thin capitalization rules and rules denying the participation exemption to dividends distributed by subsidiaries in low-tax jurisdictions). In response to BEPS Action 5, Belgium has repealed its

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patent box regime in 2016 and legislation will be passed as part of the announced CIT reform to enact the modified nexus approach into domestic law (deduction for innovative income). In view of the announcement of the Minister of Finance that the OECD TP guidelines, as amended as a result of the BEPS actions, will be immediately applied to ongoing tax audits and upon the issuance of rulings, the tax authorities are expected to apply the guidelines in a dynamic manner and even to transactions carried out before 2016.

As far as its tax treaty policy is concerned, Belgium will accede to the multilateral instrument. The reporters expect that Belgium will prevent treaty abuse through a principal purpose test (PPT) and that it may implement the measures concerning permanent establishments (PEs) proposed in Action 7 that concern commissionaires and the specific activity exemptions. Belgium is committed to resolving tax treaty disputes (including cases not involving double taxation) through mandatory binding arbitration. Belgium has always taken a prominent role in the area of transparency and exchange of information. It was an early adopter of the 1998 OECD model convention on mutual administrative assistance in tax matters and has cooperated actively in the development of the common reporting standard. In 2015 Belgium unilaterally initiated the spontaneous exchange of rulings and advance pricing agreements (APAs) with EU Member States. In 2016 Belgium enacted the necessary legislation to enable country-by-country reporting (CbCR) under a three-tier standard, thereby reaching beyond the BEPS standard. Compulsory reporting is imposed starting on or after 1 January 2016 on groups with consolidated revenues of €750 million or more. Much lower thresholds apply to the compulsory filing of the master and local files which will become effective from fiscal years 2017 and 2018.

1. Overview

1.1. Priorities

Belgium has traditionally taken up a prominent role in the field of transparency and exchange of information. It was an early member of the 1988 OECD convention on mutual administrative assistance in tax matters[1] and has cooperated in drafting the common reporting standards. Since the launch of the OECD BEPS project, Belgium has even acted proactively by announcing the spontaneous (and unilateral) exchange of advance cross-border tax rulings as well as APAs with other EU Member States in 2015. It thereby anticipated the outcome of the negotiations on BEPS Action 5 and the EU DAC3 proposal.[2]

Belgium also considers an effective mechanism of dispute resolution of primary importance in order to mitigate any double taxation that may result from the work on BEPS. Therefore, Belgium insisted on adding a commitment to mandatory

1 Signed in 1992 and ratified 1 December 2000.
2 Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

binding arbitration to the minimum standard on Action 14. Although this initiative did not achieve unanimity, 20 countries, which together were involved in more than 90 per cent of outstanding mutual agreement procedure (MAP) cases at the end of 2013, committed to adopt mandatory binding arbitration in October 2015.[3]

By far the most important merit of the OECD BEPS project is the change in mindset to which it has led at a tax policy level. Prior to the outcome of the final reports, excluding the minimum standards, Belgium was not in favour of the BEPS recommendations, which would effectively result in tax harmonization, mainly for reasons of loss of tax sovereignty.[4] At the occasion of the launch of the European Commission's Anti-Tax Avoidance Package (ATAP),[5] the Minister of Finance stated that "Belgium, being a member of the European Union, has very little space to pursue its own economic policy" and that "[g]iving up our niche policy would be inappropriate".[6] However, in the light of recent EU developments such as the adoption of the ATAD[7] and the state aid investigation on the Belgian excess profit ruling (EPR),[8] as well as the changing tax competition climate within the EU,[9] Belgium has redirected its approach by announcing a CIT reform.[10]

1.2. Participation

Belgium is represented in the BEPS working parties and focus groups by 10 experts of the Federal Public Service Finance (FPS Finance). Most of these experts belong to the staff department expertise and strategic support that is responsible for negotiating international instruments and drafting legislation.

An (informal) "BEPS coordination group" was established to ensure that information on BEPS developments and output, both at OECD and EU level, was shared within the FPS Finance. The BEPS coordination group is composed of the Belgian experts in the relevant OECD and EU Council meetings, representatives of the Ruling Commission, of the cabinet of the Minister of Finance, and of the General Administration of Taxes, one staff member of the Anti-Fraud Coordination Service and Belgium's permanent representatives at the OECD and the EU.

In general, decisions on BEPS issues that are considered as strategic from a Belgian perspective (such as the design of the interest limitations and the modified nexus approach or the revision of the PE definition and the TP rules) are made by the Minister of Finance or members of his cabinet. A swift decision process is facilitated by the participation of members of the cabinet of the Minister

3 The countries involved are Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States; see final report on BEPS Action 14, 41.

4 Summary report of the meeting between the TAXE Commission and the Belgian Minister of Finance on 17 June 2015.

5 Released on 28 January 2015 by the European Commission.

6 Chamber of Representatives, Plenary session of 11 December 2014, CRIV 54 PLEN 019.

7 See below section 2.1.1.

8 See below section 1.4.4.

9 For instance the announcement of the drastic reduction of the CIT rate within the UK as well as the recently lodged Luxembourg draft law reforming the CIT.

10 See below section 2.1.4.

of Finance and the permanent representatives. The operational services of the FPS Finance are represented in the BEPS coordination group by experts of the General Administration of Taxes. Their involvement at an early stage of the process, i.e. during the negotiations, fosters the implementation of the BEPS recommendations.

1.3. Public consultation

There is no formal procedure for public consultation during the tax legislative process or during strategic negotiations at a domestic level. However, business organizations and scholars are encouraged to align points of view on international negotiations and draft legislation. The adopted BEPS measures have been individually discussed via informal contacts between the Federation of Enterprises in Belgium (VBO/FEB), a non-profit umbrella organization representing Belgian companies and monitoring all issues of direct relevance to businesses, and the Belgian political and administrative authorities. These consultations are not publicly available.

As regards stakeholder consultation at the level of the OECD, input from the VBO/FEB was integrated into and channelled via the Business and Industry Advisory Committee to the OECD (BIAC). However, the general sentiment within the VBO/FEB is that (formal) interaction with business organizations has remained rather limited.

At the EU level, the reactions and positions of the VBO/FEB to the BEPS Action Plan were bundled at the BusinessEurope platform. The positions and recommendations in relation to BEPS of respectively the BIAC and BusinessEurope have been communicated to the Ministry of Finance, the tax authorities and permanent representatives.

1.4. Domestic context: current situation

1.4.1. Excess profit exemption scheme

Belgian resident companies that are part of a multinational (MNE) group and Belgian PEs of non-resident companies that are part of an MNE group could, until 2015, apply for an EPR, allowing them to deduct "excess profit" from their Belgian taxable base. Excess profit can be defined as the residual profit surpassing the hypothetical average profit that a stand-alone company (i.e. not belonging to an MNE group) carrying out comparable activities could be expected to make in comparable circumstances. Belgium considers this excess profit not attributable to the Belgian group entity and therefore excludes it from its Belgian tax base in accordance with article 185(2)(b) of the Belgian Income Tax Code (ITC), parliamentary documents,[11] replies to parliamentary questions by the Minister of Finance[12] and a

[11] In summary, the relevant paragraphs of the Memorandum to the Law of 21 June 2004 clarify that the provision intends to avoid or undo (potential) issues of economic double taxation. Therefore, downward adjustments of an undertaking's taxable base would align with the arm's length principle.

[12] The Minister of Finance held that profit recorded by a Belgian entity which is part of an MNE group that exceeds an arm's length profit should remain untaxed in Belgium, and he has repeatedly

Table 1. Number of applications for EPR rulings

	Requests [a]	Inadmissible/rejected/pending	Positive decision
2005	3	0	3
2006	4	0	4
2007	4	0	4
2008	8	0	8
2009	3	0	3
2010	7	0	7
2011	9	0	9
2012	14	0	14
2013	10	1	9
2014	10	4	6
2015	1	1	0
Total	73	6	67

[a] The requests shown in the table concern formal ruling requests. Note that approximately 30 pre-filing requests did not lead to a formal request to obtain a ruling.

circular letter in this respect.[13] Article 185(2) ITC incorporates the internationally accepted "arm's length principle" of article 9 OECD model convention (OECD MC) for TP purposes into Belgian tax law, including a provision on correlative adjustment comparable to article 9(2) OECD MC, which is the basis of the EPR regime.

A claim for the application of the EPR exemption is subject to obtaining a preliminary ruling issued by an independent agency within the Belgian tax administration (i.e. the Belgian Ruling Commission). A ruling is valid for five years and can be renewed.

Table 1 displays the number of applications for EPR rulings.[14]

Of these rulings, nine were renewed at the time of expiration (i.e. five years after a positive decision was granted) upon request of the taxpayer, and four rulings have expired and were not renewed.

Following an investigation into the compatibility of the Belgian EPR regime with the European state aid rules which was initiated by the European Commission in December 2013 and its negative decision[15] of 11 January 2016 in this respect, the Belgian Ruling Commission has suspended its ruling practice in relation to the EPR regime. The Belgian government has appealed against this decision of the

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stated that this concerns a mere application of the arm's length principle; see *inter alia* Minutes of the Finance and Budget Commission of 13 April 2005, CRABV 51 COM 559, 29–30; Minutes of the Finance and Budget Commission of 11 April 2007, CRABV 51 COM 1271, 11–12.

13 The administrative circular of 4 July 2006 (Circular no. RH.421/569.019 (AOIF 25/2006) of 4 July 2006) provides for the tax technical processing if an EPR exemption is granted: the taxpayer must record an appropriate downward adjustment of profit according to art. 185(2)(b) ITC by way of a so-called "increase of the initial situation of the reserves" in its income tax return.

14 Question no. 819 of 18 February 2016, written parliamentary Q&A of 4 April 2016, QRVA 54 068, 69–72.

15 Decision of 11 January 2016 on the excess profit exemption state aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium, C(2015) 9837 final.

European Commission. The case is currently pending before the General Court of the European Union (Case T-131/16 *Belgium* v. *Commission*). No hearing has been scheduled yet.[16]

1.4.2. Intellectual property regime (IP box)

Until 30 June 2016, Belgian tax law[17] provided for an 80 per cent deduction of gross patent income (patent income deduction (PID)) applicable to resident companies and Belgian PEs of non-resident companies, resulting in an effective tax rate of 6.8 per cent.[18]

The deduction applied to patents and supplementary protection certificates that were either self-developed, or which had been acquired in full ownership, held in usufruct or licensed on the condition that the IP holder applied further improvements. Furthermore, the IP development or improvement must have occurred in an R&D centre qualifying as a "branch of activity", located in or outside Belgium.[19] Excess PID cannot be carried forward to subsequent taxable periods.

For tax year 2012, the PID accounted for 15.1 per cent of the Belgian global tax expenditures, resulting in a revenue shortfall of approximately €114 million.[20] Table 2 provides an overview of the number of small and medium-sized enterprises (SMEs) and companies that do not qualify as SMEs under Belgian company law (other companies) that made use of the PID during tax years 2011, 2012 and 2013.[21]

As displayed by Table 2, the majority of companies benefiting from the PID regime are undertakings that do not qualify as SMEs under Belgian company law. This is unequivocally confirmed by the fact that 99 per cent of PID deductions were claimed by non-SMEs (see Table 3).

The law of 3 August on various urgent tax measures abolished the PID regime in anticipation of an alignment of the Belgian system with the modified nexus approach under Action 5.[22]

16 On 19 July 2016, the General Court dismissed the Belgian government's application for the grant of interim measures to suspend the Commission orders (a) for the immediate and effective recovery of aid granted and (b) to submit a list of beneficiaries of the aid and the total amount (principal and interest) to be recovered from each beneficiary and (c) to keep the Commission informed of the progress of national measures taken to implement the contested decision until full recovery of the aid granted (order of the President of the General Court of 19 July 2016 in Case T-131/16 R *Belgium* v. *Commission*).

17 Arts. 205[1]–205[4] ITC.

18 I.e. application of the statutory corporate income tax rate of 33.99 per cent to 20 per cent of the gross patent income.

19 The requirement to have an R&D centre does not apply to SMEs. Furthermore, the Belgian tax administration allows for (partial) "substance outsource" to other "related" parties under certain conditions (of which the most important relate to the initiation, supervision and financing by an intervening R&D centre) and provided that the subcontractor does not benefit from a regime equivalent to the Belgian PID in its state of residence with regard to the subcontracted R&D activities.

20 Inventory of tax expenditures of the House of Representatives (2013a), in Report of the High Council of Finance, "A tax shifting to the benefit of job creation and broader tax bases – Scenarios for a global and significant tax reform", August 2014, 148.

21 Parliamentary question no. 407 of 17 June 2015, written parliamentary Q&A of 22 July 2015, QRVA 54 057, 318–320.

22 See below section 2.1.3.

Table 2. Total number of companies benefiting from the Belgian PID regime						
Tax year	**2011**		**2012[a]**		**2013[a]**	
SMEs (article 15 Belgian Companies Code)	5	26.79%	61	26.07%	61	22.34%
Other companies	148	73.21%	173	73.93%	212	77.66%
Total	202	100%	234	100%	273	100%

[a] Provisional figures

Table 3. Total amount of PID (€)						
Tax year	**2011**		**2012[a]**		**2013[a]**	
SMEs (article 15 Belgian Companies Code)	2,058,777	0.27%	3,821,201	0.65%	5,374,886	0.47%
Other companies	763,658,339	99.73%	581,150,884	99.35%	1,142,750,102	99.53%
Total	765,717,116	100%	584,972,085	100%	1,148,124,988	100%

[a] Provisional figures

1.4.3. NID

Belgian tax law allows resident companies and non-resident companies with taxable presence in Belgium (through a PE or (rights) on immovable property located in Belgium) to deduct a notional interest expense (i.e. a fictitious cost of their equity) from their taxable base.[23] The NID is based on the company's adjusted[24] net accounting equity per financial year-end. The percentage of the deduction is linked to the interest rate on 10-year linear bonds paid by the Belgian treasury and is increased by 0.5 per cent for companies qualifying as SMEs.[25] As of tax year 2014, unused NID can no longer be carried forward.[26]

23 Art. 205*bis*–205*octies* ITC.

24 The following elements are excluded from the NID calculation base: the net tax value of own shares and of fixed financial assets, the net accounting value of material fixed assets, the net accounting value of assets held as a passive investment, the value of real estate used by directors and the recorded but unrealized capital gain, R&D tax credit carried forward which is accounted as equity capital, and capital investment subsidies. Furthermore, if the company has a foreign PE of which the profits are exempt under the applicable DTC, the NID base is reduced by the positive difference between the net book value of the PE's assets (except for the shares or corporate units) and its total liability items.

25 While the NID rate was 4.473 per cent (4.973 per cent for SMEs) in tax year 2009, it has decreased to 1.131 per cent (1.631 per cent for SMEs) in tax year 2017.

26 Prior to tax year 2014, NID carryforward was limited to seven years. A transitional regime was put in place as of tax year 2013.

Table 4. Total amount of NID (thousand €)					
Tax year	**2008**	**2009**	**2010**	**2011**	**2012[a]**
SME (article 15 Belgian Companies Code)	2,944,359	4,053,038	4,104,325	4,661,595	5,193,628
Other companies	9,783,711	13,326,512	12,810,616	14,772,407	16,742,437
Total	12,728,070	17,379,550	16,914,941	19,434,002	21,936,065

[a] Provisional figures

Table 4 provides an overview of the number of SMEs and other companies that made use of the NID regime during tax years 2008 until 2012.[27]

The NID aims at creating a level playing field of the tax treatment of debt and equity, and – more importantly – promotes the attractiveness of Belgium in a competitive international tax environment when the Belgian regime for coordination centres was dismantled after it was found to be incompatible with the European state aid rules.[28] As such, the NID regime provides a reduced effective tax rate for capital-intensive companies, MNE headquarters and treasury centres,[29] in particular because the Belgian Ruling Commission has repeatedly held that treasury companies with limited substance and/or activity may deduct notional interest from their tax base.[30] In the same vein, the Belgian Minister of Finance has declared that when a parent company enters into a loan agreement on which it pays (tax deductible) interest to capitalize its subsidiary, the latter company may apply NID to reduce its taxable base, even where the equity contribution lacks business reasons.[31] Furthermore, recent jurisprudence[32] adheres to a strict interpretation of anti-abuse measures invoked by the tax authorities to deny the application of NID (in the absence of specific anti-abuse provisions of the NID regime) and, like the Ruling Commission, do not consider the NID conditional upon sufficient substance in Belgium.[33]

27 Question no. 237 of 7 March 2013, written parliamentary Q&A of 25 April 2014, QRVA 53 158, 197–199.

28 ECJ, 22 June 2006, C-182/03 and 217/03, *Belgium and Forum 187* v. *Commission.*

29 See E. Zangari, "Addressing the Debt Bias: A Comparison between the Belgian and the Italian ACE Systems", European Commission Working Paper No. 44, 2014; M. Gerard, "Belgium moves to dual allowance for corporate equity", *European Taxation*, April 2006; C. Valenduc, "Les intérêts notionnels: une réforme fondamentale et controversée", *Courrier hebdomadaire du CRISP*, 2009, no. 2018.

30 *Inter alia* decisions nos. 600,167 dated 3 October 2006; 700,251 dated 10 July 2007; 700,395 dated 23 October 2007.

31 Parliamentary question no. 29 of 14 January 2009, parliamentary Q&A of 20 January 2009, QRVA 52 046, 25–26, the Minister of Finance declared that "taking into account the taxpayer's right to choose the least taxed option [to structure its business], [such constructions] cannot, in principle, be challenged by the tax authorities".

32 Court of appeal Antwerp 12 January 2016; Court of appeal Liège 26 June 2015; *contra*: Court of first instance Antwerp 25 June 2014; Court of first instance Leuven 13 June 2014 and 25 June 2014.

33 See W. Huygen and P. Vandenbussche, "No substance requirements for Belgian notional interest deduction", *Derivatives & Financial Instruments*, 2016, Vol. 18, No. 3.

The NID is regarded and promoted as an innovative and powerful measure in international tax law to attract investment. As such and in combination with *inter alia* the extensive Belgian treaty network, access to EU directives and ruling practice, the NID regime has been promoted by the Belgian FPS Finance.[34] Moreover, research in relation to the NID demonstrates that, as regards non-tax related economic benefits, the incentive has triggered 20,577 new jobs since its entry into force in 2006.[35] Also, according to Stanford University, the NID has contributed to an increase in the capital structures of Belgian companies by 17 per cent.[36]

1.4.4. Impact of the EC state aid investigations

Since June 2013, the European Commission has been investigating the tax ruling practices of Member States. In this regard, the Commission has specified that it does not consider tax rulings as such a problem under EU state aid regulations "if they simply confirm that tax arrangements between companies within the same group comply with the relevant tax legislation". However, according to the Commission, "tax rulings that confer a selective tax advantage to specific companies can seriously distort competition within the EU's Single Market and violate EU state aid rules".[37]

As described above,[38] Belgium was affected by a recent state aid decision of the European Commission declaring the EPR scheme unlawful under the EU state aid rules as it would confer selective tax advantages to Belgian entities belonging to MNE groups, whereas Belgian stand-alone companies are taxed on their net accounting profit. Second, the recognition of alleged excess profit which was exempted under the scheme was found not to be in line with the arm's length principle of the OECD TP guidelines.[39] In investigating whether ruling practices infringe state aid rules, the European Commission seems to consider situations of double non-taxation problematic from a state aid perspective.[40] The position of the Commission does not seem to be justified as double non-taxation is the result of the interaction of the tax laws of two states, while state aid is concerned with the laws of just one Member State.

34 See *Notional Interest Deduction: an innovative Belgian tax incentive*, 2013, Strategic Coordination and Communication Department, Federal Public Service Finance.

35 Excluding jobs created by immigrated MNEs since 2006, see J. Konings, C. Lecocq, B. Merlevede and R. Vandendriessche, "De impact van de notionele interestaftrek op de kapitaalstructuur en tewerkstelling van multinationale ondernemingen in België", VIVES Research Center for Regional Economics (KU Leuven), Briefing 2016/08.

36 F. Panier, F. Pérez-Gonzalez and P. Villanueva, *Capital Structure and Taxes: What Happens When You (Also) Subsidize Equity?*

37 Commission Press Release IP/15/6221 of 3 December 2015.

38 See above section 1.4.1.

39 See Commission decision of 11 January 2016 on the excess profit exemption state aid scheme SA.37667, C(2015) 9837 final, at para. 134.

40 A. Taferner and J.W. Kuipers, "Tax Rulings: In Line with OECD Transfer Pricing Guidelines, but Contrary to EU State Aid Rules?", *European Taxation*, April 2016, 142, footnote 24, where the authors refer to Commissioner Vestager's statement announcing the opening of the state aid investigation into the *McDonalds* rulings granted by Luxembourg: "A tax ruling that agrees to [MNCs] paying no tax on their European royalties either in Luxembourg or in the US has to be looked at very carefully under EU State aid rules. The purpose of Double Taxation treaties between countries is to avoid double taxation – not to justify double non-taxation."

The issue of double non-taxation as a result of national tax rulings was also considered by the European Parliament which, however, did not endorse state aid investigations as a proper means to combat double non-taxation unless double non-taxation is deliberately caused by (a) rulings that clearly deviate from a (reasonable interpretation of) domestic law, or (b) special legislation that is selective in itself.[41]

2. Responses to BEPS measures

2.1. Responses to mainly domestic action items (Actions 2–5)

The final report on Action 2 includes *inter alia* specific recommendations, i.e. domestic law amendments aimed at avoiding hybrid mismatches, and the so-called linking rules. The latter set of rules consists of (a) a primary response denying a deduction at source if the income is not taxed in the beneficiary's country, and (b) in the absence of or in case of the non-applicability of the proposed primary hybrid mismatch rule, a secondary or defensive rule, denying exemption if the payment is deducted by the payer. These linking rules operate *de facto* as a set of subject-to-tax rules: where double non-taxation otherwise would occur, the domestic law of one country links to the other country's law to eliminate it.

Under Action 3 of the BEPS project, the OECD outlines the so-called "building blocks" of CFC rules, "designed to ensure that jurisdictions that choose to implement them will have rules that effectively prevent taxpayers from shifting income into foreign subsidiaries".[42]

The BEPS report in relation to the limitation on interest deductions (Action 4) suggests a common approach based on best practices to limit the tax deductibility of interest up to "10–30 per cent" of earnings before interest, taxes, depreciation and amortization (EBITDA). The interest limitation applies to loans granted by related parties (e.g. shareholder loans) as well as third parties (e.g. banks), regardless of the lender's tax position (i.e. low-taxed or fully subject to tax) and residence. The final report on Action 4 further recommends that countries adopt a "group ratio" rule in addition to the fixed ratio rule and provide additional flexibility for highly leveraged groups or industry sectors.

The final report on Action 5 sets out a definition of the "substantial activity" criterion to be applied when determining whether tax regimes are harmful. To this end, the report elaborates on substantial activity requirements in relation to IP regimes, which are comprised in the so-called modified nexus approach.

2.1.1. Impact of the EU ATAD

Notwithstanding the overall constructive attitude with regard to participation in working party 11 and the focus groups, Belgium was reluctant to agree upon minimum standards affecting domestic tax law.

41 R. Luja, *Report on EU State aid law and national tax rulings*, TAXE Special Committee of the European Parliament, October 2015; see also Taferner and Kuipers, *op. cit.*, 142.

42 See final report on Action 3.

The final BEPS reports on Actions 2, 3 and 4 do not contain minimum standards but identify respectively model provisions (to tackle hybrid mismatch arrangements), best practices (effective CFC rules) and convergent approaches (limiting interest deductions). Taking into account the increased levelling between large and small economies by the BEPS actions, the Minister of Finance in December 2015 considered the European Union the most appropriate forum to implement the "common approach" BEPS action items.[43]

On 12 July 2016 the EU ATAD was formally adopted. It is part of the European Commission's ATAP and aims at ensuring the coherent, effective and swiftly coordinated implementation of certain OECD BEPS actions. The Commission considered it "essential for the good functioning of the internal market that, as a minimum, Member States implement their commitments under BEPS and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion".[44] It therefore proposed a set of rules providing for a minimum level of protection for the internal market in the areas of interest limitation (Action 4), CFCs (Action 3) and hybrid mismatches (Action 2). The ATAD even went beyond the BEPS project by setting the obligation for Member States to enact provisions on exit taxation and a general anti-abuse rule (GAAR).

Particularly regarding the ATAD provision limiting interest deductions,[45] the Belgian government insisted on a transitional period, arguing that its tax law already provides for targeted (thin capitalization) regulations aimed at limiting excessive interest deductions.[46] Since the ECOFIN Council did not accept a transitional period of infinite duration, the EU Ministers of Finance agreed to include a clause postponing the entry into force of the interest limitation rule until 1 January 2024[47] in respect of "Member States which have national targeted rules for preventing base erosion and profit shifting risks at the date of the entry into force of this Directive, which are equally effective to the interest limitation rule set out in this Directive".[48]

The European Commission's ATAD thus converted OECD Actions 2, 3 and 4 into minimum standards at EU level. Notwithstanding the grandfathering rule in relation to the limitation of interest deduction provision, Member States have until 31 December 2018 to implement the main provisions of the ATAD in their domestic legislation, which would then apply as from 1 January 2019.

2.1.2. Existing Belgian legislation countering BEPS

In order to adequately evaluate the implementation progress by the Belgian legislator of the BEPS action items which mainly require purely domestic initiatives, it

43 Minister of Finance's General Policy Paper, part tax fraud of 4 December 2015, DOC54 1428/022.

44 Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, 2016/0011 (CNS), consideration (2).

45 Art. 4 ATAD.

46 R. Finley, "EU Council Approves Compromise Anti-Tax-Avoidance Directive", *Tax Notes International*, 22 June 2016.

47 Unless prior to that date an agreement between the OECD members on a minimum standard with regard to BEPS Action 4 would be published on the official website during a period of a full fiscal year.

48 Art. 11, *in fine* ATAD.

is important to give an overview of the legal framework of Belgium's current anti-BEPS rules.

In general, profit shifting to group entities or tax havens is targeted by articles 26 and 185(2) of the ITC. Furthermore, the ITC includes two thin capitalization rules that limit excessive interest deduction. First, article 18(4) ITC provides for a 1:1 debt/equity[49] ratio for loans granted essentially by unincorporated shareholders and directors to a Belgian company. Any interest on such "tainted" debt in excess of the 1:1 ratio is recharacterized into a non-deductible dividend. Second, article 198(11) ITC lays down a 5:1 debt/equity ratio that applies to (a) interest paid on loans on which the real beneficiary is not subject to income taxes, or, with regard to interest income, is subject to a substantially more advantageous tax regime[50] than the Belgian tax regime; and to (b) interest paid on intra-group loans, regardless of whether the recipient is based in Belgium or elsewhere.

Belgium monitors transactions with no or low-tax jurisdictions[51] by a reporting obligation. According to article 307(1), taxpayers must report all payments made to tax havens exceeding €100,000 per financial year.[52] Furthermore, article 54 ITC provides that interest, royalties or professional fees paid to beneficiaries in "substantially more advantageous tax regimes" are not tax deductible. However, the taxpayer is allowed to provide evidence that the payments relate to actual transactions made in good faith, and that they are at arm's length.

To prevent economic double taxation of dividends distributed by a subsidiary to its Belgian parent company, Belgian tax law provides for a 95 per cent deduction of dividends received if the conditions that apply for the participation exemption are met (dividend received deduction (DRD)).[53] For the DRD to apply two sets of conditions have to be met: (a) the so-called quantitative conditions, relating to size and holding period of the participation,[54] and (b) the qualitative conditions, which essentially concern the tax regime in the residence state of the distributing company. As regards the qualitative conditions, article 203(1) and (5) ITC provides that the DRD is not available for dividends received from qualifying shareholdings if the paying company has been subject to tax at a (statutory or effective) rate of less than 15 per cent (so-called "substantially more advantageous tax regime"). However, dividends received from companies located in the EU Member

49 For the purposes of the debt/equity ratio, "equity" is defined as the sum of the taxed reserves at the start of the relevant financial year and the paid-in share capital at the end of the financial year.

50 The wording of art. 198(11) ITC ("substantially more advantageous tax regime") is identical to the text of art. 54 ITC which has been held problematic from an EU perspective; see Case C-318/10 of 5 July 2012, *Société d'investissement pour l'agriculture tropicale SA (SIAT)* at paras. 26–28.

51 Targeted jurisdictions are included in two lists, a so-called "OECD" list summing up countries that, according to the OECD Global Forum on Tax Transparency and Exchange of Information, do not effectively or substantially apply the OECD standard of exchange of information, and a "Belgian" list containing jurisdictions with no taxation on domestic or foreign sourced income, a statutory tax rate of less than 10 per cent or an effective tax rate applicable to foreign income of less than 15 per cent, provided that this jurisdiction is not an EEA member state.

52 The obligation was extended by the Programme Law of 1 July 2016 to include payments to PEs or bank accounts located in targeted jurisdictions, to broaden the criteria of tax havens on the Belgian blacklist and to ease the required listing period on the OECD list.

53 Arts. 204–205(2) ITC.

54 I.e. a minimum participation requirement of at least 10 per cent or €2.5 million in the capital of its subsidiary, which has been or will be held in full ownership for an uninterrupted period of 12 months.

States are excluded from this rule. For the purposes of this provision, Belgian tax law[55] provides for a "blacklist" of countries with a substantially more advantageous tax regime.[56] However, the presumption that the dividends have been subject to such a substantially more advantageous tax regime is rebuttable both by the taxpayer and the tax authorities.

The Belgian GAAR, included in article 344(1) ITC, provides that the tax authorities may disregard or recharacterize a transaction (defined as a legal action or a chain of legal actions) if they can prove that there is tax abuse. "Tax abuse" is defined as either a transaction in which the taxpayer places itself outside the scope of a provision of the ITC or a transaction that gives rise to a tax advantage provided by a provision of the ITC, whereby obtaining the tax advantage would infringe the purpose of the relevant provision of the ITC, provided that obtaining the tax advantage is the essential goal of the transaction. The taxpayer can ward off the application of the GAAR if it can demonstrate that the choice of the legal form of his actions is not motivated by tax reasons.

Finally, under article 344(2) ITC the Belgian tax authorities may disregard certain transactions to persons in jurisdictions whose tax regime is significantly more advantageous to taxpayers than Belgium's tax system, unless the taxpayer establishes that the transaction in question has a genuine financial or economic purpose. These transactions include the sale, transfer or contribution of shares, bonds, debts, intellectual property or cash to persons in jurisdictions whose tax regime is significantly more advantageous to taxpayers than Belgium's tax system. This provision is seldom applied by the tax authorities but has a significant *in terrorem* effect on taxpayers.

2.1.3. Post-BEPS processes and early assessment of progress to date

Belgium is committed to international coordination on hybrid mismatches[57] (Action 2).[58] The Belgian tax administration examined the changes that should be made in its domestic tax law[59] in order to deal appropriately with hybrid mismatches in accordance with the report on Action 2.[60]

Belgium is also required to implement the anti-hybrid provision[61] which is inserted in the European Parent–Subsidiary Directive (PSD) to prevent the double non-taxation of dividends distributed within corporate groups deriving from hybrid

55 Art. $73^{4\,quater}$ RD/ITC.

56 The countries included in the list are Abu Dhabi, Ajman, Alderney, Andorra, Bosnia and Herzegovina, the British Virgin Islands, Dubai, East Timor, Gibraltar, Guernsey, Herm (part of the Channel Islands), the Isle of Man, Jersey, Kosovo, Liechtenstein, Macau, Macedonia, the Maldives, the Marshall Islands, Mayotte, Micronesia, Moldavia, Monaco, Montenegro, Oman, Paraguay, Qatar, Ras al-Khaimah, Serbia, Sharjah, Somalia, Turkmenistan, Umm al Qaiwain and Uzbekistan.

57 A Belgian example of such mismatches are the so-called PPL schemes (profit participating loans).

58 The linking rules only apply to payments (or transactions legally considered as payments) and consequently do not cover the Belgian NID.

59 Belgium already proposes to its treaty partners to include in the tax treaty the provision on transparent entities as recommended by the report on Action 2.

60 Responses to the TAXE Committee (European Parliament), letter of 2 June 2015.

61 Council Directive 2014/86 of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

loan arrangements.[62] To this end, a bill was adopted on 1 December 2016 providing for an exclusion of the use of the DRD if and to the extent that the dividend paying entity (also including the PE of the distributing entity) can deduct the dividend distributions from its taxable basis.[63]

In addition, article 9 of the ATAD contains an anti-hybrid rule, which Belgium is required to implement by 31 December 2018 at the latest. On 25 October 2016, the European Commission launched a proposal[64] to extend article 9 ATAD to third countries, thereby expanding the envisaged hybrid structures,[65] as a response to the ECOFIN Council statement of 20 June 2016 in which it urged the European Commission to design anti-hybrid rules in relation to third countries by the end of October.

Since work on hybrid mismatches is still ongoing at OECD and EU level, Belgium is not likely to take any further steps on implementing the rules prior to 2018.

As mentioned above,[66] BEPS Action 4 on interest limitations was considered critical from a Belgian perspective, particularly as it was converted into a minimum standard of protection by the ATAD. In the light of the grandfathering period granted in article 11, *in fine* of the ATAD, it is expected that the government will examine whether the interest limitation rules which are currently available under Belgian tax law[67] will be regarded as "national targeted rules … which are equally effective to the interest limitation rule set out in [the ATAD]".

In respect of CFC legislation, Belgium traditionally considers such rules as contrary to article 5, article 10 and especially article 7 of the OECD MC.[68] However, the application of article 344(2) ITC can, to a certain extent, produce consequences that are similar to CFC rules.[69]

In the context of the discussions on BEPS Action 3, Belgium took the position that CFC legislation is only acceptable in the absence of a genuine economic activity in the CFC country. As Belgium perceives the prevention of double taxation as fundamental to international tax policy, the Belgian delegation proposed that the report on BEPS Action 3 explicitly referred to the obligation for a contracting state to eliminate double taxation under tax treaties and to the need for additional guidance in the OECD MC and/or commentary in that respect. This concern is reflected in chapter 7 of the final report on Action 3, which sets out recommendations for the

62 Hybrid loan arrangements are financial instruments that have characteristics of both debt and equity.

63 Law of 1 December 2016 on tax measures (1), published in the Belgian Official Gazette on 8 December 2016.

64 Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, COM(2016) 687 final.

65 In addition to hybrid entity mismatches and hybrid financial instrument mismatches included in the ATAD, the newly proposed directive introduced provisions targeting hybrid transfers, hybrid PE mismatches, imported mismatches and dual resident mismatches.

66 See above section 2.1.1.

67 See above section 2.1.2.

68 Commentary on the OECD model tax convention para. 27.4 to art. 1. The attribution of income to a shareholder through the application of CFC rules implies that the tax base in the shareholder state is increased by means of income from a foreign entity not liable to pay tax in the shareholder state according to the tax treaty. The shareholder state thus disregards the legal personality of the foreign entity and taxes the income, contrary to the tax treaty.

69 See above section 2.1.2.

prevention of double taxation under CFC legislation. The same consideration is formulated in the ATAD, which provides that shareholders be granted relief through a deduction for the tax paid in another Member State or third country if the application of CFC legislation gives rise to double taxation.[70] As regards the implementation of the CFC rules of the ATAD, it can be expected that Belgium will opt for the transactional approach according to which only non-distributed income arising from non-genuine arrangements should be included in the tax base of the shareholder.[71]

In the light of the broad acceptance of CFC legislation both under the BEPS project and following the introduction of such rules in the ATAD, the Belgian tax administration is currently reconsidering its reservation to the OECD MC.[72]

On 3 August 2016, a law[73] was adopted repealing the current PID regime[74] and providing for a grandfathering period[75] as of 1 July 2016 to comply with the OECD Action 5 minimum standard. A pre-draft law, providing for an innovation income deduction regime (IID) in line with BEPS Action 5 to replace the current PID articles, is expected to be enacted on the occasion of the announced CIT reform.[76] The draft law will align the current PID regime with the modified nexus approach as it is based on the calculation of qualifying expenditures as proposed by the OECD to establish the link between expenditures, IP assets and IP income.[77] To this end, the "modified nexus" fraction below represents the ratio between the taxpayer's own (or non-related party's) R&D activities and the related party's outsourced R&D activities:

$$\frac{\text{Qualifying expenditure (+ uplift)}}{\text{Overall expenditure}} \times \text{Net innovation income}$$

Qualifying expenditures are expenditures incurred by the taxpayer itself and compensation paid to non-related companies for outsourced R&D activities.[78] Taxpayers may apply a 30 per cent uplift to the qualifying expenditure to the extent that the taxpayer has overall expenditure. Qualifying expenditure must have a direct "nexus" with the IP asset.[79] The overall expenditures include all general costs in relation to either the IP right, the type of product or service or the group of

70 ATAD, art. 8, §7 and Recital no. 5 (it is not, however, part of the minimum standard).

71 ATAD, art. 7, §2, b).

72 Briefly two options are considered: a total withdrawal of the CFC reservation or merely accepting its application provided it is in line with the ECJ's *Cadbury Schweppes* ruling.

73 Law of 3 August 2016 on various urgent tax measures, published in the Belgian Official Gazette on 11 August 2016.

74 See above section 1.4.2.

75 Until 30 June 2021.

76 See below section 2.1.4.

77 Pre-draft law on the introduction of a deduction for innovation income and explanatory memorandum thereto, which have not been published.

78 The outsourcing of R&D activities to a non-related party via a related party will only lead to qualifying expenditures if no mark-up is charged on the compensation agreed between the related parties.

79 Interest expenses, costs related to immovable assets or any costs that could not be directly linked to a specific IP asset are excluded from the qualifying expenditures.

products or services generating the innovation income, as well as acquisition costs of qualifying intangible property.

The IID is more stringent than the former PID regime in allowing a deduction of net income (vs. gross income under the former regime). On the other hand, the IP assets qualifying for the new IID are extended to breeders' rights, orphan drug designations, data or market exclusivity granted by a public body and copyrighted software. Qualifying innovation income will also include indemnities resulting from an infringement of IP rights and amounts obtained upon alienation[80] of qualifying IP rights. Taxpayers must determine the qualifying income for each IP asset separately (i.e. tracing and tracking of the income). However, if the taxpayer can demonstrate that such tracking is impossible from a practical point of view, it may establish the income at product or service level.

An 85 per cent deduction will apply to the amount determined by applying the above fraction to the net innovation income and can be carried forward in case of insufficient profits. Furthermore (and unlike the PID regime), the IID draft law provides for its provisional applicability already during the patent application procedure, which can be claimed by reporting a tax-free reserve in the tax return. In such cases, the benefit only becomes permanent upon the actual granting of the patent.

When determining the IID for the first applicable tax year, taxpayers are required to first deduct from the innovation income all overall expenditures incurred during previous tax years ending on 1 July 2016 at the earliest. An (irrevocable) option is left, however, to spread this "recapture" mechanism over a period of a maximum of seven years.

2.1.4. The announced Belgian CIT reform

The expected impact of BEPS, ATAP and state aid developments[81] on the Belgian business climate have triggered a debate regarding the Belgian CIT system as a whole. The April 2016 budget control agreement requested the Finance Minister to provide a CIT reform proposal by the end of September 2016. The key features of the proposal, which is currently in its final stage of preparation, are budget neutrality,[82] simplification and a gradually[83] reduced statutory CIT of 20 per cent in 2019. To this end, the Minister's proposal aims at broadening the taxable base and abolishing most of the "niche" regimes, such as the NID regime.[84] It is to be noted that the envisaged budget neutrality will evidently be influenced by the timing of domestic measures implementing the ATAD.

80 Provided that the assets qualify as fixed assets and were either developed during the preceding tax year at the latest or acquired in the last 24 months.
81 Together with other tax and non-tax factors such as Belgium's unattractive statutory CIT rate and high social security costs.
82 I.e. the tax rate reduction should mainly be funded by abolishing most of the "niche" regimes and by other compensatory measures.
83 With intermediary rates of 27 per cent in 2017 and 24 per cent in 2018.
84 See above section 1.4.3.

2.2. Responses to mainly treaty-based action items (Actions 6 and 7)

Under Action 6 of the BEPS Action Plan, the OECD Member States agreed to include in the preamble of their tax treaties an express statement that tax treaties are not intended to be used to generate double non-taxation. In addition, states should, as a minimum standard, implement either (a) a combined approach consisting of a (simplified) limitation on benefits (LOB) rule and a PPT, (b) a PPT alone, or (c) a (comprehensive) LOB rule supplemented by specific anti-conduit rules. States are also encouraged to include in article 1 of their treaties a "saving clause" to preserve their right to deny treaty benefits to their residents who otherwise would claim that a domestic anti-avoidance rule is overridden by a treaty provision.[85] Finally, Action 6 provides for tax policy considerations that states should consider before deciding to enter into a tax treaty with another state.[86]

The proposed amendments to the PE definition in article 5 of the OECD MC, set out in the BEPS Action 7 report, can be classified into two main categories. On the one hand, the OECD Member States agreed on measures aimed at preventing the use of commissionaire arrangements and similar strategies to avoid a PE (i.e. rather technical changes). On the other hand, Action 7 targets the use of exemptions for specific preparatory or auxiliary activities, including the artificial fragmentation of "cohesive" business activities into preparatory or auxiliary activities so that each separate part thereof may benefit from the specific activity exemptions of article 5 (4). Also, the Action 7 report proposes the use of the PPT rule recommended under Action 6 to address schemes involving the splitting-up of construction contracts between closely related enterprises or, alternatively, inserting a dedicated paragraph in the commentary to the OECD MC requiring the automatic aggregation of time spent by closely related enterprises in the context of construction sites or installation projects.

2.2.1. Existing Belgian treaty practices countering BEPS

The elimination of double taxation article (article 22) of the Belgian model tax treaty provides for an exemption of foreign income provided that it has already been subject to tax in the other contracting state (source state). Article 22 of the Belgian model deviates from the OECD MC as it requires the income to be "taxed" in the source state, whereas article 23(A) of the OECD MC provides that income shall be exempt if it "may be taxed" there. Thus, article 22 of the Belgian model imposes a subject-to-tax requirement on foreign source income, thereby preventing double non-taxation which could arise if specific items of income are tax-free in the source state or the income is not actually taxed in the source state due to domestic tax relief measures.

Although the subject-to-tax clause included in article 22 of the Belgian model as such is an effective remedy against double non-taxation, its application is thwarted

[85] See L. De Broe, "Tax Treaty and the EU Law aspects of the LOB and PPT provision", in R. Danon (ed.), *Base Erosion and Profit Shifting (BEPS): Impact for European and International Tax Policy*, 2016, pp. 203–204.

[86] Final report on Action 6.

due to (a) inconsistent treaty practice (because many Belgian double tax treaties include the "may be taxed" terminology of the OECD MC) and (b) interpretation difficulties in jurisprudence and the administrative guidelines of the Belgian model clause.

The Belgian tax authorities have issued several circular letters containing conflicting interpretation guidance, resulting in ambiguity as regards the question of whether foreign source income must be "taxable" or "taxed" in order to be exempt in Belgium.[87] Belgian courts are equally divided as regards the application of article 22 of the Belgian model, leading to considerable legal uncertainty for taxpayers and revenue losses as a result of double non-taxation.[88]

2.2.2. Post-BEPS processes and early assessments of progress to date

As regards Action 6, the reporters understand that Belgium intends to include only the PPT in its tax treaties and is not currently planning on implementing the LOB rule, unless it is forced to do so by the other contracting state. This position would be in line with the BIAC "BEPS project recommendations", stating that the minimum treaty standards imposed by Action 6 would create a significant compliance burden for taxpayers, especially where both the LOB and PPT rules were adopted.[89] However, recent treaty negotiations in relation to the new Belgium–Japan double tax treaty[90] demonstrate the insertion of the LOB as well as the PPT. In the absence of any official communication or guidance by the Ministry of Finance, it is to be seen whether Belgium will adhere to this approach on a consistent basis. It is furthermore understood that Belgium will introduce a saving clause in its treaty practice. This has, however, not been included in the new Belgium–Japan double tax treaty.

It appears that Belgium welcomes and supports the suggested measures of BEPS Action 7. This is shown in its recently approved treaty with Japan, which includes the recommended provisions to target commissionaire arrangements and the specific activity exemptions.[91]

Furthermore, article 22 (limitation on benefits) of the new US model income tax treaty targets interest payments to related parties that benefit from notional deductions. Likewise, proposal 1 by the delegate for the United States of May 2015 concerning possible changes to the OECD MC proposals defines as a "special tax regime" any legislation, regulation or administrative practice providing for

87 See L. De Broe and N. Bammens, "Interpretation of subject-to-tax-clauses in Belgium's Tax Treaties: Analysis of the 'Exemption vaut Impôt' Doctrine", *Bulletin of International Taxation*, 2009, 68.

88 In particular, the *exemption vaut impôt* doctrine of the Belgian Supreme Court (first introduced in the *Sidro* case of 12 September 1970 and essentially entailing that a tax exemption implies that the income item is subject to tax as a starting point) is often cited (incorrectly); see for instance the decision of the Court of First Instance of Mons of 19 February 2008; decision of the Court of First Instance of Leuven of 8 June 2012; decision of the Court of First Instance of Mons of 11 September 2013 which was annulled by the Court of Appeal of Mons in its decision of 3 June 2015.

89 BIAC, BEPS Position paper – July 2016, 4–5.

90 Convention of 12 October 2016 between Japan and the Kingdom of Belgium for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance.

91 Art. 5(5) to (8) of the Belgium–Japan DTC signed 12 October 2016.

"notional interest deductions that are allowed without regard to liabilities for such interest".[92]

As a result of these developments, the Belgian High Council of Finance has suggested abolishing the NID regime in the framework of the CIT reform[93] which is currently on the political agenda. The tax policy considerations described in the final report on BEPS Action 6 may therefore be implemented indirectly.

Belgium considers mandatory binding arbitration the best way to ensure that treaty disputes are effectively resolved through MAP.[94] The Belgian model has provided for such arbitration since 2007 and Belgium has been successful in including it in e.g. its treaties with the USA and the UK (in force) and the recent treaties with Switzerland and Japan (not yet in force). The arbitration provision is now included in the multilateral instrument (part IV applicable only to countries that opt in). Belgium considers the "last best offer" approach (so-called "baseball arbitration") to be the appropriate default rule under MAP as it is simpler and quicker and reduces the risk of arbitration being delayed where competent authorities are unable to resolve the case. Belgium prefers to have no limitations on cases eligible for arbitration. However, if a treaty partner disagreed, it might limit arbitration to cases of actual double taxation. To ensure that only one avenue is pursued at a time, Belgium reserves the right not to enter into arbitration where an administrative tribunal or court has already handed down a decision on the dispute at stake. Likewise it will terminate arbitration if, at any time after the request for arbitration, such a decision is handed down.

2.3. Responses to TP measures (Actions 8–10 and 13)

Under Actions 8–10 the OECD agreed on the updated TP guidance covering various TP aspects, such as the amended guidance on applying the arm's length principle, guidance on TP comparability factors, guidance on TP for commodity transactions, a revision of chapter VI of the OECD TP guidelines with regard to intangibles, guidance on valuation methods, etc. The updated TP guidelines (2015), endorsed by the OECD Council on 23 May 2016, will apply in the context of existing treaties via articles 7 and 9 OECD MC.

The final report on Action 13 sets out a three-tiered standardized approach to TP documentation and CbCR.

2.3.1. Existing Belgian TP practices countering BEPS

Please refer to section 2.1.2.

2.3.2. Post-BEPS processes and early assessments of progress to date

With regard to the outcome of BEPS Actions 8–10 Belgium generally welcomes the reaffirmation of the arm's length principle over so-called special measures and

92 Final report on Action 6, 96.
93 See above section 2.1.4.
94 See above section 1.1.

global formulary apportionment methodologies. As neither articles 7 and 9 of the OECD MC nor the Belgian TP provisions (i.e. articles 26 and 185(2))[95] were modified and since Belgian tax treaties following the OECD MC are, as a matter of principle, to be interpreted in a dynamic manner, one may expect Belgium to apply the new TP guidelines to transactions carried out before 2016.[96] The Belgian Minister of Finance declared that the new TP guidelines were immediately applied to tax audits and when issuing rulings.[97] The recently introduced CbCR and other documentation requirements will not apply retroactively.

Lacking statutory documentation requirements, Belgium has traditionally been one of the more pragmatic jurisdictions in the area of TP documentation. A circular letter[98] issued by the Belgian tax authorities recognizes the principle of the "prudent manager", implying the presumption that directors – depending on the nature of the transactions – have written documentation of related-party deals in place, which allows them to substantiate the arm's length character of the TP applied.

After the adoption of the final report on Action 13 Belgium introduced a compulsory standard requiring large companies to file TP documentation under the three-tiered approach (CbCR, master file and local file), thereby going beyond the minimum standard of Action 13 and the provisions of EU Directive 2016/881 of 25 May 2016.[99] The CbCR applies to groups with consolidated revenue of €750 million or more, a threshold which will result in approximately 55 Belgian reports being filed for the financial year starting on or after 1 January 2016.

With regard to the master and local files, Belgian law provides a much lower threshold. The reaching in the preceding fiscal year of either a recurring operating and financial revenue threshold of €50 million, a balance sheet total of €1 billion or employment of 100 FTEs (to be assessed on the basis of the stand-alone financial statements of the Belgian entity) triggers the filing obligation. More than 3,000 Belgian units of an MNE group would be targeted. The master and local file requirements are effective from fiscal year 2017, except for part two of the local file which is expected to only become applicable as from fiscal year 2018. The master file will contain information regarding the description of the group's capital structure, TP policy and significant intangible assets utilized.

The local file will have to be provided in a specific format consisting of two parts. One part of the local file form will contain some general information that will have to be completed and filed by all companies or PEs satisfying one of the three thresholds (listed above). The second part of the form (a more detailed one, providing mainly qualitative and quantitative information on the various sorts of intercompany transactions)[100] will only be completed and filed by companies or PEs that

95 See above section 2.1.2.

96 In this respect, it was held by the Ghent Court of Appeal that the tax authorities could retroactively apply the principles set out in the 1995 TP guidelines as the latter warrant objectivity and soundness to a sufficient degree. The Court referred to para. 9.1 of the OECD commentary, stating that the TP guidelines represent internationally agreed principles: see Case 2012/AR/2901 of the Ghent Court of Appeal dated 6 September 2014.

97 Minister of Finance General Policy Paper, part tax fraud of 4 December 2015, DOC54 1428/022.

98 Circular Letter AOIF 40/2006 dated 14 November 2006.

99 New art. 321/1 to 321/7 ITC.

100 Such as the gross and operating profit at business unit level, not only for the fiscal year in question but also the two preceding years, and details of a most comprehensive set of in- and outbound transactions for each business unit.

have cross-border intra-group transactions exceeding in total a value of €1 million. Where the company or PE includes more than one business unit, the second part of the form will have to be completed and filed per business unit exceeding the €1 million threshold. The filing format practicalities will be set out in a Royal Decree.

3. Taxpayers' rights and risks

In view of BEPS and the approved ATAD, it is expected that highly leveraged companies will be most probably affected by the BEPS project, though there is great uncertainty with regard to the application of the interest limitation provision contained therein.[101]

Second, companies with limited substance are likely to be affected by BEPS.

As the (previous) Belgian IP box regime already contained substance requirements in order for R&D centres to benefit from the patent deduction – also in the case of outsourced R&D activities – the impact on taxpayers currently benefiting from IP incentives will supposedly not be of a substantial nature. On the other hand, the required "tracking and tracing" of qualifying expenditures will be a challenge for some industries, such as the pharmaceutical sector, for which very long lead times apply between the process of R&D and the qualifying IP income generated as a result.

MNEs will face substantially increased compliance burdens as a result of the new TP documentation rules, CbCR obligations and tracking obligations under the IID. In addition, CbCR is expected to trigger significant transparency, technical, operational and systems challenges to businesses. New TP guidelines and (the interaction of) GAARs on both the EU and OECD level can reduce legal certainty, in particular if these measures are applied retrospectively.

4. Conclusion

The most important merit of the BEPS project is the change in the mindset of Belgian tax policymakers. Initially, Belgium was not in favour of transposing BEPS recommendations that did not impose minimum standards. However, in the light of the recent EU developments such as the adoption of the ATAD, the state aid investigations on the Belgian excess profit regime and the changing tax competition climate within the EU, Belgium has redirected its approach by announcing in 2016 a CIT reform that aims at significantly reducing the tax rate and broadening the tax base. In response to BEPS Action 5, Belgium has repealed its patent box regime in 2016 and legislation will be passed as part of the announced CIT reform to enact the modified nexus approach into domestic law. The reporters expect the Belgian tax authorities to apply the OECD TP guidelines, as amended following the

[101] Particularly with regard to the notion "equivalent ratio of the group" in art. 4(5)(a) ATAD and the application of the grandfathering clause of art. 11, *in fine* ATAD.

BEPS actions, in a dynamic manner and even to transactions carried on before 2016. As far as its tax treaty policy is concerned, Belgium will accede to the multilateral instrument. It is expected that Belgium will prevent treaty abuse through a PPT and that it may implement the measures concerning PEs proposed in Action 7 that concern commissionaires and the specific activity exemptions. Belgium is committed to resolving tax treaty disputes (including cases not involving double taxation) through mandatory binding arbitration. In 2016 Belgium enacted the necessary legislation to enable CbCR under a three-tier standard, thereby going beyond the BEPS standard.