



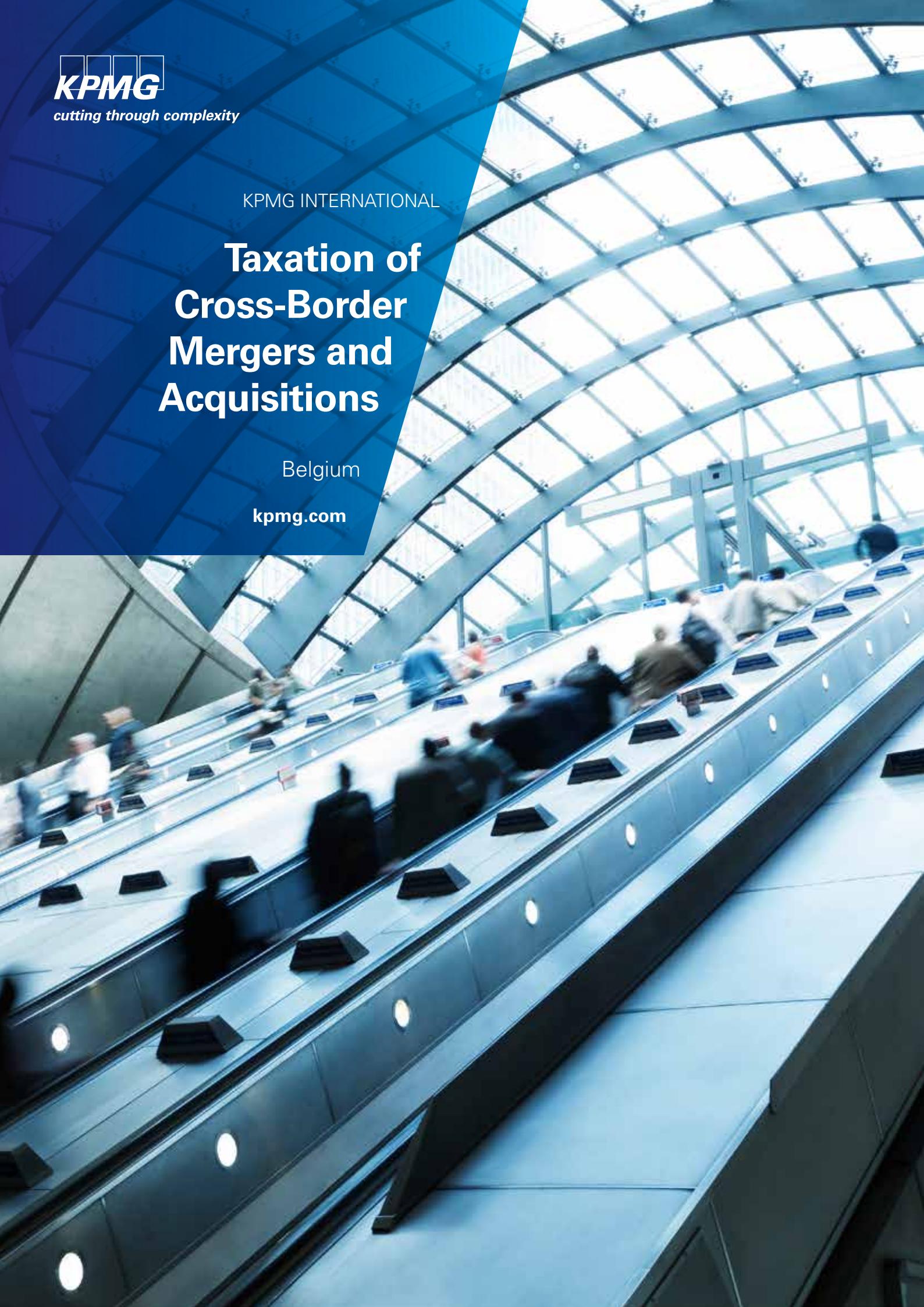
cutting through complexity

KPMG INTERNATIONAL

Taxation of Cross-Border Mergers and Acquisitions

Belgium

kpmg.com



Belgium

Introduction

Following the implementation of various European directives on corporate reorganizations, Belgium has developed a legal and tax framework for both cross-border and domestic mergers and acquisitions (M&A).

In a qualifying reorganization transaction (merger, demerger and partial demerger, contribution of a universality of goods or a line of business), assets, liabilities and all related rights and obligations are in principle transferred automatically by virtue of law from the transferring company to the receiving company by the mere execution of the transaction in accordance with company law provisions. If the transaction qualifies for the tax-neutral regime, the transferor does not suffer any capital gains tax, while the receiving company gets no step-up in tax basis. Since the law of 11 December 2008, both purely Belgian as well as cross-border reorganizations are eligible for tax-neutrality. No entitlement for tax-neutral treatment is available where the main or one of the main objectives of the transaction is tax evasion or tax avoidance. The concept of continuity, which applies from both legal and tax perspectives, also applies to the accounting treatment of the reorganization transactions.

When looking at acquisitions, an important issue is the absence of a fiscal unity in the Belgian income tax regime. A similar effect can often be obtained through a post-acquisition integration plan, which could include a merger of the target entity with the buying entity.

After a brief update on recent changes that are relevant in a mergers and acquisitions (M&A) context, this chapter addresses the following fundamental decisions of a purchaser from a Belgian tax perspective:

- acquisition through assets or shares
- choice of the acquisition vehicle
- funding of the acquisition vehicle.

This chapter focuses on the Belgian tax rules applicable to acquisitions and does not further elaborate on the Belgian tax treatment of mergers and similar transactions. The discussion focuses mainly on Belgian tax law. Company and accounting law are also highly relevant when dealing with both national and cross-border acquisitions. These areas are outside the scope of this chapter, but some of the key points or changes are summarized later in this chapter.

Recent developments

Recently, Belgian budget negotiations have resulted into new tax measures, some of which are important in the context of M&A in the Belgian market.

These tax changes are as follows:

- *Capital gains on shares:* The favorable tax treatment for capital gains on shares was not entirely abandoned, but the applicable regime has been amended. The favorable tax regime is now subject to a minimum holding period of one year, during which the company should have full ownership of the shares. If the capital gains are realized before the one-year holding period has passed, a specific tax rate of 25.75 percent is applicable. After the holding period expires and starting with the assessment year 2014, companies that are not small companies (according to Belgian company law, considered on a consolidated basis) no longer benefit from a full exemption for qualifying capital gains on shares. They are subject to a separate taxation of 0.412 percent (cash tax charge) on capital gains realized on shares held for an uninterrupted period of at least one year, provided the potential dividends qualify for the dividends received deduction.
- *New fairness tax on dividend distributions:* On 18 July 2013, a fairness tax of 5.15 percent was introduced for dividends distributed by a Belgian company. The fairness tax applies in addition to and separately from the corporate income tax and, like corporate income tax, is not deductible. No deductions or compensation of the loss of the taxable period can be made on the taxable base of the separate taxation. As a matter of principle, the fairness tax also applies on the profit escalation by a foreign head office from a Belgium branch.
- *Thin capitalization:* The former 7:1 debt-to-equity ratio for interest payments to tax havens has been broadened. Interest paid to companies incorporated in tax havens or to another group company is deductible only to the extent that the debt-to-equity ratio does not exceed 5:1. Interest payments made to financial and credit institutions generally are outside the scope of this rule.
- *Uniform withholding tax (WHT) rate:* The WHT rate on interest and dividends has been harmonized at 25 percent (previously 15 percent or 21 percent, subject to certain conditions) as of 1 January 2013. Further, as of 1 October 2014, the WHT rate for liquidation dividends increases to 25 percent (from 10 percent).

Within corporate structures, these changes generally will have limited impact, given that often a WHT exemption is available. However, the increase in WHT on dividends may affect management participation schemes and carried interest schemes.

- **General anti-abuse measure:** A new anti-abuse provision was implemented in Belgian tax law in 2012, which has broader scope than the previous anti-abuse provision. The tax authorities used to be bound by the nature and legal characteristics of the transaction. In principle, they may now ignore an act or a series of acts in the case of an abuse of tax law. The abuse of tax law may be presumed by the tax authorities by all means of proof. However, the taxpayer can rebut the presumption of abuse by providing non-tax motives for the transaction(s).

Asset purchase or share purchase

From a buyer's point of view, an asset deal may be favorable, because it may allow the buyer to recover a significant part of the cost of the acquisition through depreciation of certain assets acquired at a relatively high corporate tax rate (currently 33.99 percent in Belgium). Under Belgian tax law, depreciable assets can include goodwill as well as other intangible elements.

On the other hand, inherent goodwill acquired when shares are purchased is not tax-deductible for the buyer, nor are future reductions in the value of shares or capital losses incurred on disposal of the shares. The only exception is a capital loss a corporate shareholder incurs following the liquidation of a company in which it owns shares, but this is only deductible to the extent that the liquidation distributions made by the subsidiary are lower than the subsidiary's fiscal paid-in capital.

From a Belgian seller's perspective, a sale of shares generally is the preferred option because capital gains realized on shares are generally tax-free or low-taxed for Belgian individuals and companies. Where the seller is a Belgian company, there are certain exclusions from the favorable tax treatment for capital gains on shares (e.g. for shareholdings in tax-privileged companies). Also, as noted, a minimum holding period of one year has been introduced.

For individuals, Belgian tax law provides that a capital gains tax (at a rate of approximately 18 percent) may be due in certain cases (substantial participation), where the buyer of the shares is a company resident in another Member State of the European Economic Area (EEA). Further, the disposal

of shares by Belgian individuals is taxable as miscellaneous income at a tax rate of approximately 35 percent where the transaction can be considered realized outside the management of the private estate. This may be particularly relevant in management buy-out structures.

In Belgium, most acquisitions take the form of a share deal, which allows the seller to avoid an upfront tax cost on capital gains and the buyer to recover the tax cost, through tax-depreciation, over several years.

Purchase of assets

A purchase of assets usually results in an increase in the base cost of those assets for both capital gains tax and depreciation purposes. In principle, this increase is taxable to the seller.

In an asset deal, shortly before the closing of the asset transfer agreement, the seller should request a certificate from the Belgian corporate income tax, value added tax (VAT) and social security tax authorities that the selling entity has no outstanding tax liabilities. The buyer must notify the Belgian authorities of the asset transfer agreement. These formalities are necessary for the asset deal to be recognized by the Belgian tax authorities and to avoid the joint liability of the buyer for unpaid taxes of the seller. If the asset purchase agreement is properly structured and the required notifications have been lodged, no historical tax liabilities of the seller should transfer to the buyer in an asset deal. However, joint liability rules may apply where assets are transferred under legal continuity (an optional legal feature that is significant where a number of important contracts need to be transferred in the asset deal).

Purchase price

The assets should be acquired and recorded at fair market value. The excess paid over the book value in the hands of the seller must be allocated to specific assets. If that is not possible, the assets must be recorded as goodwill in the books of the buyer. Depending on the purchase price paid, the asset purchase thus results in a step-up in tax basis for depreciation purposes.

A corporate seller is taxable at the normal corporate tax rate of 33.99 percent on any capital gain realized on the sale of assets, and tax deferral is possible where certain conditions are met (but not for own built-up goodwill). An individual seller is subject to tax at progressive tax rates on the professional assets sold. The seller generally can use tax losses or other available tax attributes to shelter the capital gain.

Goodwill

For tax purposes, goodwill must be depreciated over a minimum of 5 years. However, in most cases, the Belgian tax authorities argue that the depreciation period should be 10 to 12 years, and it is up to the taxpayer to demonstrate that the economic lifetime of the goodwill concerned is shorter.

Depreciation

Under Belgian tax law, depreciation of business assets is calculated on the basis of the acquisition cost over the useful life of the assets.

Both the straight-line and the declining-balance depreciation methods are accepted. However, intangible fixed assets, cars and tangible assets that are depreciated by the owner but for which the right to use has been transferred, must be depreciated on a straight-line basis. When using the declining-balance method, the taxpayer is allowed to switch back to straight-line when the depreciation computed by applying the declining-balance method is lower than the amount indicated by the straight-line method.

Apart from intangible fixed assets, which must generally be depreciated over a minimum of 5 years using the straight-line method, the tax law does not provide for any specific periods and rates. For certain assets, indicative rates are set by administrative instructions (e.g. 5 percent for industrial buildings).

Tax attributes

Tax loss carry forwards that were available to the company from which assets are acquired and current-year losses of that company are not transferred to the acquiring company. The same restrictions apply to any carry forward of notional interest deduction and investment deduction.

Generally, the seller can use those tax attributes to shelter the capital gain arising on the sale of assets.

Value added tax

The sale of assets of a business, except land and buildings, by a VAT payer is, in principle, subject to VAT. If a building is new within the meaning of the VAT code, the taxpayer has the option to elect to bring the sale of the building within the charge to VAT. Certain sales of new buildings are always subject to VAT.

Sellers may need to revise (partially repay) the VAT that they originally deducted on certain assets.

The transfer of a separate activity capable of separate operation – a transfer of a going concern – is not subject to VAT if the recipient is or, as a result of the transfer, becomes, a VAT taxpayer.

Transfer taxes

Where Belgian real estate is involved in a purchase of assets, a real estate transfer tax is due (12.5 percent or 10 percent depending on the location of the real estate) on the market value of the real estate. For the transfer of real estate lease agreements, a 0.2 percent transfer tax is due. The rate is 2 percent for the transfer of leasehold rights. If the acquired assets do not include real estate, no transfer tax or stamp duty is levied.

Purchase of shares

On an acquisition of shares, no (separate) expression of goodwill is possible, and depreciation and capital allowances are not allowed for tax purposes. In accounting, a write-down in value is allowed where the actual value of the participation is lower due to a long-term deterioration of the financial or economic situation of the underlying company. However, these write-downs are not tax-deductible.

On the seller's side, the capital gains realized on the shares are generally tax-exempt for an individual and subject to a limited tax charge (0.412 percent) for a corporate seller (0 percent for small companies). As noted earlier, the favorable tax treatment for corporate taxpayers is subject to a minimal holding period of one year.

Tax indemnities and warranties

In a share acquisition, the purchaser takes over the target company, together with all related liabilities, including contingent liabilities. The purchaser therefore generally needs more extensive indemnities and warranties from the seller in a share deal than in an asset acquisition. If significant sums are at issue, the purchaser usually initiates a due diligence exercise, which normally incorporates a review of the target's tax affairs. To the extent possible, the findings of such due diligence investigation should be appropriately reflected in tax representations and warranties and tax indemnities in the share-purchase agreement. Typically, in a Belgian context, indemnifications are structured as a reduction of the share-purchase price so that they are not taxable to the recipient.

Tax attributes

In principle, prior years' tax losses are available for set-off without time limitation and without a maximum set-off per taxable period. However, following the introduction of certain measures intended to counter reorganizations or acquisitions that merely seek to use a company's tax losses, a change in control may limit the carried forward tax losses of the companies involved.

Generally, previous tax losses of a Belgian company may not be deducted from future profits in the case of a change in control of that company, unless the change of control is for sound business, financial or economic reasons. This rule applies equally to a direct change of control and an indirect change of control further up the shareholder's chain.

The same rule applies to any carry forward of notional interest deduction and investment deduction.

The burden of proof lies with the taxpayer. The Belgian tax authorities generally take the position that the financial or economic reasons for the transaction need to be assessed in the context of the company subject to the change of control. Among other things, financial and economic reasons are deemed to exist where, following the change of control, the company continues to operate in the same business with all or some of its employees.

Crystallization of tax charges

Belgian corporate income tax law does not provide for a system of fiscal consolidation. Therefore, no tax charges related to previous intragroup transfers should crystallize in the target at the time of the acquisition of the shares of the target company.

Transfer taxes

No stamp duty is due on the transfer of shares. A share deal should not give rise to real estate transfer tax.

Choice of acquisition vehicle

Several possible acquisition vehicles are available to a foreign purchaser, and tax factors generally influence the choice. There is no proportionate capital duty on the introduction of new capital into a Belgian company or branch. In a Belgian context, the absence of a system of tax consolidation is important to consider when determining the transaction structure.

Local holding company

An important advantage of using a Belgian company as an acquisition vehicle is that Belgian tax law has favorable thin capitalization rules. With the introduction of a 5:1 debt-to-equity ratio for intragroup financing (discussed earlier), the deductibility of interest expenses is restricted but still leaves a broad margin for debt financing.

At the moment of the sale of the shares in the target company by the Belgian company, capital gains realized are subject to a minimal tax charge only (0.412 percent; 0 percent for small companies) where the shares qualify for the dividend received deduction (i.e. Belgian participation exemption regime, generally requiring that the target is subject to a normal tax regime). As indicated, a one-year minimum holding period has been introduced for capital gains on shares. There is no minimum participation requirement to benefit from the tax regime for capital gains on shares.

The acquisition by a Belgian company is particularly attractive where the buyer already has a taxable presence in Belgium. In this case, the existing tax capacity could be used to shelter the acquisition costs and interest expenses. Possibilities for debt pushdown in the absence of a system of fiscal unity or group relief are discussed later in this chapter.

A capital increase into a Belgian holding company is subject to a flat registration tax of 50 Euros (EUR). The sale of shares is not subject to stamp duty.

Foreign parent company

A foreign parent company could be used where the interest expenses from the acquisition financing can be offset against taxable profits of the foreign company.

In addition to the exemptions on the basis of the European Parent-Subsidiary Directive and the European Interest and Royalty Directive, Belgium also has an extensive tax treaty network that significantly reduces or eliminates WHT on interest payments and dividends to a foreign parent.

For Belgian individuals, Belgian tax law provides that a capital gains tax (at a rate of approximately 18 percent) may be due on the sale of (or part of) a substantial participation in a Belgian company to a non-Belgian legal entity located outside the EEA. A substantial participation generally is defined as the ownership (alone or with relatives) of more than 25 percent of a Belgian company in the current or preceding 5 years. Only participations in Belgian-based companies trigger this taxation.

The transfer of shares to a foreign acquirer is not subject to stamp duty.

Non-resident intermediate holding company

If the country of a foreign buyer taxes capital gains and dividends received from a Belgian target, an intermediate holding company resident in another territory could be used to defer this tax and perhaps take advantage of a more favorable tax treaty with Belgium. In general, Belgian tax treaties do not include severe beneficial ownership restrictions. However, a sufficient level of substance is required to claim treaty benefits.

Local branch

As an alternative to the direct acquisition of the target's assets, a foreign purchaser may structure the acquisition through a Belgian branch. For income tax purposes, a branch is not subject to additional tax duties and is taxed at the standard corporate tax rate of 33.99 percent. No WHT applies on profit repatriations from the branch to the foreign head office (see the discussion about the fairness tax later in this chapter). Where the Belgian operation is expected to make losses initially, a branch may be advantageous since, subject to the tax treatment applicable in the head office's country, a timing benefit could arise from the ability to consolidate losses with the profits of the head office.

The sale of a branch or the withdrawal of assets from a branch triggers a tax liability on any capital gains, apart from capital gains on shares, which generally benefit from favorable tax treatment.

Joint ventures

Under Belgian tax law, joint ventures are generally structured as corporate vehicles. No specific tax rules apply to such corporate joint ventures. Under Belgian company law, possibilities to structure joint ventures as unincorporated partnerships are limited.

Choice of acquisition funding

A purchaser using a Belgian acquisition vehicle for an acquisition for cash needs to decide whether to finance the transaction with debt, equity or a hybrid instrument that combines the characteristics of both.

Debt

Financing an acquisition with debt has the traditional advantage that the interest cost and other expenses (e.g. bank fees and other transaction costs) are deductible for tax purposes. However, as indicated, Belgian income tax law does not provide for a system of fiscal unity or tax-grouping. This complicates the offset of interest expenses on acquisition financing at the level of a Belgian acquisition vehicle against operating income of the target company. Alternative debt pushdown mechanisms may be required, such as the following:

- *Equity reduction:* The easiest way to obtain a (partial) debt pushdown is to replace the distributable reserves and share capital of the target company with debt (equity stripping). Generally, an equity reduction has a negative effect on the notional interest deduction, which is calculated on the company's adjusted equity (as discussed later in this chapter). Also, the new 5:1 debt-to-equity ratio needs to be taken into account.
- *New activities:* To use the interest charges on the acquisition financing, taxable income could be created at the level of the acquisition vehicle, such as by a transfer of activities or the start-up of new activities, which may include management services. Potential exit taxes should be taken into account.
- *Merger:* A debt pushdown through merger could be organized, although the Belgian tax authorities may deny the tax-neutral status of a merger of a pure holding company (acquisition vehicle) and its operational subsidiary, triggering a tax cost on all hidden capital gains (including goodwill) at the level of the operating company. A legal merger may be feasible in the case of an acquisition by a Belgian operating entity.

Deductibility of interest

Until recently, Belgian tax law did not include general thin capitalization or earnings stripping rules. However, a 5:1 debt-to-equity ratio now applies. There are also certain other limitations on the tax-deductibility of interest payments in specific situations as set out later in this chapter.

Thin capitalization rules

Under the 5:1 debt-to-equity rule, interest is not deductible where:

- the recipient is resident in a tax haven or is a company belonging to the same group, and
- the total amount of related loans is more than five times the aggregate of the company's taxed reserves (at the beginning of the accounting year) and paid-up capital (at the end of the accounting year).

This 5:1 debt-to-equity ratio replaced a 7:1 – ratio that only applied to beneficial owners in a tax haven. For the application of the new debt-to-equity rule, a group is considered to be:

- an entirety of affiliated companies that fall under the same management or controlling company
- whereby this management directly or indirectly holds 20 percent of a company belonging to the group.

In order to assess whether a company belongs to a group, the participations in this company held by all other group companies are added.

Interest payments on loans granted by finance and credit institutions generally fall outside the scope of this thin capitalization rule.

Under the 1:1 debt-to-equity rule, interest on loans from shareholders (individuals) and directors (individuals or foreign [non-EU; cf. case law of ECJ] corporations) is re-qualified as a (non-deductible) dividend where:

- the interest rate exceeds the market rate
- the total amount of loans is higher than the company's paid-in capital at the end of the accounting year, increased by its taxed reserves at the beginning of the accounting year.

Other limitations

Generally, interest payments are not tax-deductible where they exceed the market interest rate for the type of loan concerned, taking into account the particular circumstances of the loan. This limitation does not apply to interest paid to Belgian banks or financial institutions and Belgian branches of foreign banks or financial institutions, or to interest paid on publicly issued bonds.

Interest paid directly or indirectly to a tax-privileged non-resident taxpayer (whether or not affiliated) or to a tax-privileged foreign branch is tax-deductible only where the paying company can demonstrate that the payments are for bona fide purposes and that the interest paid does not exceed an arm's length interest rate.

A general disclosure obligation applies for payments to tax havens if certain thresholds are exceeded.

Withholding tax on debt and methods to reduce or eliminate it

In principle, under Belgian domestic law, interest paid by a Belgian company is subject to a 25 percent WHT (previously 15 percent or 21 percent).

Among other things, exemptions from interest WHT include:

- interest paid to a Belgian-resident company
- interest on registered bonds subscribed by a non-tax-privileged foreign investor
- interest paid by Belgian enterprises (including Belgian companies and Belgian permanent establishments of foreign companies) to financial institutions established in an EEA Member State or tax treaty state.

A specific WHT exemption applies to interest paid by Belgian taxpayers qualifying as a (listed) holding company or financial enterprise (essentially defined as intragroup bank; see below) on loans from non-resident lenders.

For purposes of this exemption, a holding company is defined as a Belgian company or a Belgian branch of a foreign company:

- that owns shares that qualify as financial fixed assets that have an acquisition value of at least 50 percent, on average, of the total assets on its balance sheet at the end of the taxable period prior to the attribution or payment of the interest
- the shares of which are listed on a recognized stock exchange, or at least 50 percent are held, directly or indirectly, by a listed company that is subject to corporate income tax, or to a similar foreign income tax regime, and that does not benefit from a special tax regime or from a tax regime that is considerably more favorable than that in Belgium.

A financial enterprise is defined as a Belgian company or a Belgian branch of a foreign company that:

- belongs to a group of related or associated companies as defined by company law
- carries out its activities exclusively for the benefit of group companies
- engages exclusively or predominantly in services of a financial nature
- seeks external funding exclusively with resident or non-resident companies with the sole purpose of financing its own activities or those of group companies
- owns no shares with an acquisition value that exceeds 10 percent of the financial enterprise's net fiscal value.

Further, Belgium has opted for a flexible implementation of the European Union (EU) Interest and Royalties Directive. From a Belgian perspective, the debtor and the beneficiary of the interest (or royalties) are associated companies where, at the moment of attribution or payment, one of the companies has had a direct or indirect holding of at least 25 percent in the capital of the other company for an uninterrupted period of at least one year, or both companies have a common shareholder established in the EU, which has had a direct or indirect holding of at least 25 percent in the capital of both companies for an uninterrupted period of at least one year. In principle, interest and royalties paid between associated companies (as defined earlier) are exempt from WHT. The Belgian government has extended the scope of the exemption to all companies resident in Belgium, not only to those mentioned in the Directive.

Checklist for debt funding

- The use of bank debts may avoid transfer pricing problems and should facilitate the interest deduction as long as interest payments are at arm's length. Within a 5:1 debt-to-equity ratio, interest on intragroup loans generally is tax-deductible (subject to certain other specific restrictions).
- In principle, interest payments are subject to a WHT of 25 percent (previously 15 percent or 21 percent), but various exemptions or reductions are available.
- In the absence of a system of fiscal unity, the actual tax savings for interest payments on acquisition financing depend on the amount of taxable income available at the level of a Belgian acquiring company. As noted earlier in this chapter, various debt pushdown mechanisms are available.

Equity

If an acquisition is funded with equity, dividend payments to the parent company are not deductible for Belgian tax purposes (as are interest payments).

However, in some situations, funding with equity may be more appropriate than funding with debt.

Notional interest deduction

When considering funding a Belgian entity with equity or debt, the benefits and opportunities related to the so-called notional interest deduction (NID) should be taken into account. As of assessment year 2007 – that is, as of the calendar year 2006 for companies with an accounting year that follows the calendar year – resident and non-resident corporate taxpayers are entitled to a deduction for risk capital (NID).

This measure is intended to encourage the strengthening of companies' equity capital by reducing the tax advantage of funding with loan capital, as opposed to equity capital.

Following the introduction of the NID, all companies subject to resident or non-resident corporate tax may deduct a deemed interest from their taxable profits calculated on their adjusted equity capital. Within the context of M&A, when calculating the equity qualifying for the NID, the company's equity is (among other things) reduced by the net fiscal value of the company's own shares and of shares and participations in other companies that are either part of the company's financial fixed assets or that qualify for the dividends received deduction.

The rate of the NID is determined each year and is linked to 10-year government bonds, subject to certain caps. The notional interest deduction rate is 2.742 percent for assessment year 2014 (in principle, the calendar year 2013) and 2.630 percent for assessment year 2015 (calendar year 2014).

Previously, if a company's taxable base was not sufficient to use the entire notional interest deduction, the balance could be carried forward for up to 7 years. The possibility to carry forward unutilized NID has been abolished. The carry forward of NID existing at the time of the abolition remains available for carry forward under restrictions.

With the NID, techniques may be available, particularly in an international context, to achieve a double deduction of interest expenses on acquisition financing by using a separate Belgian finance vehicle. An acquisition vehicle generally does not benefit from an NID, given that the fiscal value of share participations held as fixed assets is deducted from equity for calculating the NID.

Withholding tax on equity and methods to reduce or eliminate it

Under Belgian domestic law, dividends paid by a Belgian company are currently subject to a 25 percent WHT (previously 15 or 21 percent, subject to certain conditions). As from 7 July 2013, small companies may benefit from a 15 percent WHT on dividends.

Until 1 October 2014, a WHT of 10 percent applies to distributions that are considered as dividends in the event of a liquidation. As of 1 October 2014, the WHT also rises to 25 percent for such dividends. In the past, the 10 percent rate also applied in case of a buy-back of shares.

An exemption from dividend WHT is available for dividends paid by a Belgian subsidiary to its parent company, provided the parent company is a Belgian company or a qualifying resident company of another EU Member State, which has held or will hold at least 10 percent (minimum shareholding as of January 2009) of the shares in the Belgian subsidiary for an uninterrupted period of at least one year.

Finally, a general exemption from WHT was introduced for dividend payments to companies located in a tax treaty country made under conditions similar to those set out in the EU Parent-Subsidiary Directive (provided that the tax treaty (or

any other treaty) provides for the exchange of information in fiscal matters).

New fairness tax on dividend distributions

On 18 July 2013, a fairness tax was introduced for dividends distributed by a Belgian company.

The fairness tax is a separate taxation in addition to and separate from the corporate income tax and, like corporate income tax, it is not deductible. No deductions or compensation of the loss of the taxable period can be made on the taxable base of the separate taxation.

The fairness tax rate is 5.15 percent (5 percent plus a 3 percent crisis surcharge). Where no prepayments were made, an increase is payable due to no or insufficient advance tax payments. The fairness tax is levied for the taxable period for which dividends are distributed, and the tax is determined on the basis of a specific calculation. The fairness tax enters into force as of assessment year 2014 (generally the financial year 2013).

Belgian branches of foreign companies may also be subject to the fairness tax.

Equity reorganizations

According to Belgian tax law, the following conditions must be met for a domestic reorganization (mergers, [partial] divisions or demergers, and contributions of a line of business or of a universality of goods) to take place under a tax-neutral regime:

- The absorbing company must be a resident of Belgium or another EU Member State (EU Merger Directive requirements must be met).
- The reorganization has to be performed in accordance with the Belgian and foreign company law provisions applicable to a merger.
- the reorganization must not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance.

As indicated earlier, the law of 11 December 2008 has broadened the existing tax-neutral framework for domestic reorganizations to cross-border reorganizations within the scope of the Merger Directive.

Hybrids

Hybrid instruments are treated as debt or equity for tax purposes, depending on their legal classification rather than on their economic substance (form-over-substance).

If properly structured in the loan agreement, in principle, profit-participating loans or similar instruments can be classified as debt for Belgian tax purposes. (The tax treatment follows the Belgian civil law requirement that there must be an obligation in the instrument to repay the principal for it to qualify as a loan). Qualification as debt may allow an interest deduction at the Belgian level. Such hybrid instruments may be subject to re-classification under general anti-abuse provisions. Further, the applicable rules on hybrid instruments may change as a result of current international initiatives (e.g. the Organisation for Economic Co-operation and Development's initiative regarding base erosion and profit shifting).

Discounted securities

Under Belgian tax law, there are no specific tax rules for securities acquired at a discount. Specific tax rules may apply to non-interest bearing receivables or receivables with an interest rate below the market rate.

Deferred settlement

If properly structured, future additional payments for the acquisition of a target company on the basis of its future profits (earn-out clauses) can usually qualify as part of the purchase price of the shares. This additional purchase price, in principle, benefits from favorable tax treatment to the seller and increases the share purchase price (non-tax-deductible) to the acquirer.

Other considerations

Company law and accounting

Previously, Belgian companies were not entitled to give advances, grant loans, or provide securities to third parties to enable the latter to acquire their own shares (prohibition of financial assistance). Recently, this restriction was removed and replaced by an entitlement, as a matter of principle, for companies to provide financial assistance with a view to the acquisition of their shares by a third party. Such financial assistance is subject to certain stringent conditions:

- The operation must take place under the responsibility of management and under fair and equitable market conditions.

- The operation requires the prior consent of the general meeting.
- Management must draw up a report indicating the reasons for the proposed transaction, the interest for the company, the conditions under which the transaction will take place, the risks inherent in the transaction to the company's liquidity and solvency and the consideration at which the third party will acquire the shares.
- The sums used under the operation must be available for distribution (net asset test); the company must book, on the passive side of the balance sheet, a non-distributable reserve equal to the amounts used for the financial assistance.
- Where a third party acquires shares that have been subject to financial assistance or subscribes to a capital increase, such acquisition or subscription must take place at a fair price.
- Belgian company law further provides certain other exceptions to the prohibition of financial assistance, without the strict conditions noted above (e.g. in the case of a takeover by the employees).

There are no specific issues relating to acquisitions from a Belgian accounting perspective.

Group relief/consolidation

Belgian corporate income tax law does not provide for any consolidation for tax purposes of the profits or losses of separate legal entities. The concept of VAT-unity was recently introduced in Belgian law, but specific rules apply where a Belgian target company is extracted from an existing fiscal unity as a result of an acquisition.

An indirect technique to obtain tax consolidation involves the use of tax-transparent partnerships. Here, care must be taken to ensure the tax authorities have no reason to impute an abnormal profit-shifting, either toward a foreign group entity or toward a Belgian loss-making company. In the first case, the profit shifted abroad is added back to the taxable income of the transferring company; in the second case, the Belgian beneficiary is not permitted to offset its brought forward and current-year losses against the abnormal income received.

An abnormal profit-shifting can be deemed to exist not only in the absence of adequate compensation for the transferor but also where a transaction is carried out in economically abnormal conditions. Where a profit-generating activity is transferred to a loss-making related company (e.g. through a tax-neutral contribution of a separate activity) in order to obtain a tax consolidation, the tax authorities might deny the latter company the right to offset its brought forward losses against the profits from the activity transferred.

In some cases, where a Belgian target company has accumulated losses, an indirect corporate tax consolidation can be achieved through the waiver or forgiveness of a debt claim on the loss-making company. A common technique in Belgium is a conditional waiver of a debt claim, where the loan is reinstated if the debtor's financial position improves. Close attention should be paid to such waivers because the Belgian tax authorities scrutinize their business motivation closely.

Transfer pricing

After an acquisition, where an intercompany relationship develops between the buyer company or group and the target, due care needs to be taken to ensure all such transactions are at arm's length. Failure to comply with the arm's-length principle may give rise to transfer pricing problems. In a Belgian context, both abnormal or benevolent advantages received or granted could give rise to adverse tax consequences.

An advantage is generally considered by the tax authorities as abnormal or benevolent where the receiving party enriches itself without adequate or real compensation. Belgian case law has defined the notion of abnormal or benevolent advantage as follows:

- abnormal is anything that is contrary to the normal practice in a similar situation
- benevolent implies the idea of a gift without (sufficient) compensation.

Where a Belgian enterprise grants an abnormal or benevolent advantage, the amount of the advantage is added back to the taxable base of the enterprise concerned unless the advantage is taken into account when determining the taxable base of the recipient of the advantage (article 26, Belgian Income Tax Code - BITC). In principle, where the recipient is a

Belgian company, the tax authorities accept that this anti-abuse provision does not apply. This should also be the case where the recipient is in a tax loss position.

According to article 207 BITC, tax losses and certain other tax attributes (investment deduction, NID) cannot be set off against income from so-called abnormal or benevolent advantages received from enterprises that are directly or indirectly related to the company receiving the benefit. The Belgian company receiving the abnormal or benevolent advantage is not allowed to offset previous years' nor current year's tax losses nor other tax attributes from the (implied) profit corresponding to the received advantage. The Belgian tax authorities take the position that this results in the advantage being immediately taxed in the hands of the company receiving the advantage (cash-out), irrespective of current year's or prior years' tax losses or other tax attributes available. The minimum taxable basis of a Belgian company thus includes the total amount of abnormal or benevolent advantages received. In the case of such adjustment, the tax loss carry forward is increased with the advantage effectively subject to tax. Thus, the overall effect generally would be a timing difference (deferral of use of tax losses).

Dual residency

In Belgium, no specific rules apply to dual resident companies. In general, a company is considered a Belgian company for tax purposes if it has its place of effective management in Belgium.

Foreign investments of a local target company

In principle, profits realized through a foreign branch are tax-exempt at the level of the Belgian target company under an applicable tax treaty. If no tax treaty is available, the branch profits (net of any foreign income taxes) are taxable at the ordinary Belgian corporate income tax rates.

Foreign branch losses generally are tax-deductible from the profits of the Belgian target company. However, the Belgian company is subject to recapture rules where branch losses are deducted from foreign branch profits.

Finally, Belgian tax law does not impose controlled foreign company or similar rules.

Comparison of asset and share purchases

Advantages of asset purchases

- The purchase price (including goodwill) may be depreciated/amortized for tax purposes.
- In general, no previous (tax) liabilities of the seller are inherited.
- No inherent tax liabilities on tax-exempt reserves or on hidden reserves may be taken over by the purchaser.
- Possible to acquire only part of a business or some valuable assets ('cherry-picking').
- Automatic consolidation of profits or losses of the acquiring entity (including transaction costs and interest charges) with profits or losses of the business acquired.

Disadvantages of asset purchases

- Possible need to renegotiate certain business-related agreements (e.g. supply agreements, renewal of licenses). In principle, the option to subject the asset deal to the system of legal continuity results in a transfer of all applicable agreements by force of law (subject to exclusions).
- Where only assets are acquired, a higher capital outlay is usually involved (unless the liabilities of the business are also assumed).
- Usually unattractive to the vendor (due to tax charges on capital gains resulting from an asset deal), thereby increasing the price.
- Real estate transferred is subject to a 10 percent or 12.5 percent registration duty (unless the transfer is within the VAT regime) and must comply with environmental legislation.
- Accounting profits may be affected by the creation and authorization of acquisition goodwill.
- The potential benefit of any pre-acquisition tax losses or other tax attributes remains with the vendor.

Advantages of share purchase

- Only net assets are purchased, so the capital outlay is lower.
- More attractive to the vendor because capital gains on shares may be tax-exempt or subject to a minimal tax charge only.
- Carried forward tax losses of the target company generally remain unaffected if there are business reasons for the change in control.
- Purchaser may gain the potential benefit of existing business agreements (subject to any change in control clauses).
- No registration duties apply on the transfer of shares (unless anti-avoidance provisions apply) or real estate.
- No environmental formalities are required on a transfer of real estate.

Disadvantages of share purchases

- Purchaser acquires inherent tax liabilities on tax-exempt reserves and hidden reserves.
- Previous (tax) liabilities of the company are inherited.
- The purchase price or any goodwill included in the purchase price cannot be depreciated for tax purposes. This is generally compensated by a lower purchase price.
- There is no system of consolidation for tax purposes available for profits or losses of the companies in the acquirer's group and the losses or profits of the target company. However, specific debt pushdown mechanisms may be available.

Belgium – Withholding tax rates

This table sets out reduced WHT rates that may be available for various types of payments to non-residents under Belgium's tax treaties. This table is based on information available up to 1 January 2014.

Source: *International Bureau of Fiscal Documentation, 2014*

	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies ² (%)		
Domestic rates				
<i>Companies:</i>	10/25	0	0/25	0/25
<i>Individuals:</i>	15/25	N/A	0/15/25	25
Treaty rates				
<i>Treaty with:</i>				
Albania	15	5	5	5
Algeria	15	15	15	5/15 ³
Argentina	15	10	12	3/5/10/15 ⁴
Armenia	15	5 ⁵	0/10 ⁶	8
Australia	15	15	10	10
Austria	15	15	15	0/10 ⁷
Azerbaijan	15	5/10 ⁸	10	5/10 ⁹
Bangladesh	15	15	15	10
Belarus	15	5	10	5
Bosnia and Herzegovina ¹⁰	15	10	15	10
Brazil	15	10	10/15	10/15/20 ¹¹
Bulgaria	10	10	0/10 ¹²	5
Canada	15	5	10	0/10 ¹³
Chile	15	0 ¹⁴	5/15 ¹⁵	5/10 ¹⁶
China (People's Rep.)	10	5	10	7
Congo (Dem. Rep.)	10	5	10	10
Croatia	15	5	0/10	0
Cyprus	15	10	0/10	0
Czech Republic	15	5	0/10	0/5 ¹⁷
Denmark	15	0	10	0
Ecuador	15	15	0/10	10
Egypt	20	15	15	15/25 ¹⁸
Estonia	15	5	10	5/10

	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies ² (%)		
Finland	15	5	0/10 ¹⁹	0/5
France	15	10	15	0
Gabon	15	15	15	10
Georgia	15	5	0/10	5/10 ²⁰
Germany	15	15	0/15 ²¹	0
Ghana	15	5	10	10
Greece	15	5	5/10	5
Hong Kong	15	0/5 ²²	0/10	5
Hungary	10	10	0/15	0
Iceland	15	5	0/10	0
India	15	15	10/15	10 ²³
Indonesia	15	10	10	10
Ireland	15	15	15	0
Israel	15	15	15	0/10
Italy	15	15	15	5
Ivory Coast	15	15	16	10
Japan	15	5	10	10
Kazakhstan	15	5	10	10
Korea (Rep.)	15	15	10	10
Kosovo	15	10	15	10
Kuwait	10	0 ²⁴	0	10
Kyrgyzstan ²⁵	15	15	0/15	0
Latvia	15	5	10	5/10
Lithuania	15	5	10	5/10
Luxembourg ²⁶	15	10 ²⁷	0/15	0
Macedonia (FYR)	15	10	15	10
Malaysia	15	15	-/10 ²⁸	-/10 ²⁹
Malta	15	15	10	0/10
Mauritius	10	5	0/10	0
Mexico	15	5	10/15	10
Moldova	15	0/15	15	0
Mongolia	15	5	0/10	5
Montenegro	15	10	15	10

	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies ² (%)		
Morocco	10	6.5	10	10
Netherlands	15	0/5 ³⁰	0/10 ³¹	0
New Zealand	15	15	10	10
Nigeria	15	12.5	12.5	12.5
Norway	15	5	0/15	0
Pakistan	15	15	15	0/15/20 ³²
Philippines	15	10	10	15
Poland	15	5 ³³	0/5	5
Portugal	15	15	15	10
Romania	15	5	10	5
Russia	10	10	0/10	0
Rwanda	15	0 ³⁴	0/10 ³⁵	10
San Marino	15	0/5 ³⁶	0/10	5
Senegal	15	15	15	10
Serbia	15	10	15	10
Singapore	15	5	5	5 ³⁷
Slovak Republic	15	5	0/10	5
Slovenia	15	5	10	5
South Africa	15	5	0/10	0
Spain	15	0	0/10	5
Sri Lanka	15	15	10	10
Sweden	15	5	0/10	0
Switzerland	15	10	0/10	0
Taiwan	10	10	10	10
Tajikistan	15	15	0/15	0
Thailand	20	15	10/25	5/15
Tunisia	15	5	5/10	11
Turkey	5/20 ³⁸	5	15	10
Turkmenistan	15	15	0/15	0
Ukraine	15	5 ³⁹	2/10	0/10 ⁴⁰
United Arab Emirates	10	0/5 ⁴¹	0/5	0/5
United Kingdom	10	0	10	0
United States	15	0/5 ⁴²	0/15 ⁴³	0

	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies ² (%)		
Uzbekistan	15	5	10	5
Venezuela	15	5	0/10	5
Vietnam	15	5/10 ⁴⁴	10	5/10/15 ⁴⁵

Notes:

1. Many treaties provide for an exemption for certain types of interest, e.g. interest paid to the state, local authorities, the central bank, export credit institutions or in relation to sales on credit. Such exemptions are not considered in this column.
2. Unless stated otherwise, the reduced treaty rates given in this column generally apply if the recipient company holds directly or indirectly at least 25 percent of the capital or the voting power, as the case may be, of the company distributing dividends.
3. The lower rate applies to copyright royalties, excluding films, etc.
4. The rate is 3 percent on news items, 5 percent on copyrights (excluding films, etc.) and 10 percent on computer software, patents, trademarks, equipment leasing and know-how.
5. A minimum holding of 10 percent is required.
6. The lower rate applies, *inter alia*, to interest paid to banks. Conditions may apply.
7. The 10 percent rate applies if the Austrian company owns more than 50 percent of the capital in the Belgian company.
8. The rate is 5 percent if the Azerbaijani company (a) owns at least 30 percent of the capital in the Belgian company and has invested at least USD500,000 in that company or (b) has invested at least USD10 million in the Belgian company. The rate is 10 percent if the Azerbaijani company owns at least 10 percent of the capital in the Belgian company and has invested at least USD75,000 in that company.
9. The lower rate applies to copyright royalties, including films, etc.
10. The treaty concluded between Belgium and the former Yugoslavia.
11. The 10 percent rate applies to copyright royalties, including films, etc.; the 20 percent applies to trademarks and commercial names.
12. The lower rate applies, *inter alia*, to interest on bank deposits. Conditions may apply.
13. The lower rate applies to copyrights (excluding films, etc.), computer software, patents and know-how.
14. A minimum holding of 10 percent for an uninterrupted period of 12 months is required.
15. The lower rate applies, *inter alia*, to interest on loans granted by banks and insurance companies, and interest on bonds or securities that are regularly and substantially traded on a regulated securities market.
16. The lower rate applies to equipment leasing.
17. The 0 percent rate applies to copyright royalties, including films, etc. (the rate of 10 percent is reduced to 0 percent from 1 January 2004 following the conclusion of the treaty between the Czech Republic and the Slovak Republic – most-favored nation treatment); the 5 percent rate applies to industrial royalties and know-how (the treaty rate of 10 percent is reduced to 5 percent from 1 January 2008 following the conclusion of the treaty between the Czech Republic and Austria – most-favored nation treatment); the 5 percent rate under the Belgium-Czech Republic treaty continues to apply to equipment leasing.
18. The higher rate applies to trademarks.
19. The lower rate applies, *inter alia*, to interest on current accounts and on advance payments between banks.
20. The lower rate applies if the beneficial owner is an enterprise of Georgia.
21. The zero rate applies if the recipient is an enterprise; this does not apply to (a) interest on bonds and (b) interest paid by a company to a company owning at least 25 percent of the paying company's voting power or shares.
22. The zero rate applies if the Hong Kong company has owned directly at least 25 percent of the capital in the Belgian company continuously for at least 12 months. The 5 percent rate applies if the Hong Kong company owns directly at least 10 percent of the capital in the Belgian company.
23. The rate under the treaty is 20 percent. However, by virtue of a most-favored nation clause (Protocol Art. 1), the rate is reduced to 10 percent. (Under the treaty between India and Austria, for example, the rate is currently 10 percent.)
24. This rate applies to dividends paid to the Kuwaiti government or to a company owned for at least 25 percent by the Kuwaiti government.
25. The treaty concluded between Belgium and the former USSR.
26. The treaty does not apply to income paid to exempt Luxembourg holding companies. From 1 January 2011, this provision is obsolete because the transitional regime for existing holding companies expires on 31 December 2010.
27. A minimum holding of 25 percent or a holding with a purchase price of at least EUR6,197,338 is required.
28. The 10 percent rate applies if the interest is paid by an enterprise engaged in an industrial undertaking. Otherwise, the domestic rate applies.
29. The domestic rate applies to artistic copyrights, including films, etc.
30. Under this treaty, the exemption applies to dividends qualifying for the EC Parent-Subsidiary Directive. The 5 percent rate applies if the Netherlands company owns directly at least 10 percent of the capital in the Belgian company.
31. The zero rate applies, besides interest mentioned in note 1, where the Netherlands beneficial owner is an enterprise and (a) the interest has not arisen from bearer securities representing loans or deposits or (b) the interest has arisen from bearer securities representing loans or deposits and the enterprise carries on a banking or insurance activity and holds the securities in question for at least 3 months preceding the date of payment.
32. The rate is 0 percent on copyrights (excluding films, etc.) and 15 percent on know-how.
33. The rate applies if the Polish company holds directly (i) at least 25 percent of capital in the Belgian company or (ii) at least 10 percent of the capital in the Belgian company and has invested in it at least EUR500,000.
34. The zero rate applies if the Rwanda company has owned directly at least 25 percent of the capital in the Belgian company continuously for at least 12 months.
35. The zero rate applies if (i) the Rwanda company holds directly or indirectly at least 35 percent of the capital in the Belgian company and (ii) the amount of the loan(s) granted by the Rwanda company does not exceed the amount of the equity of the Belgian company.
36. The zero rate applies if the San Marino company has owned directly at least 25 percent of the capital in the Belgian company continuously for at least 12 months. The rate is 5 percent if the San Marino company has owned directly at least 10 percent but less than 25 percent of the capital in the Belgian company continuously for at least 12 months.
37. In the case of equipment leasing, the 5 percent rate is levied on 60 percent of the gross amount of royalties.
38. Under the final protocol to the treaty, the rate is 5 percent for companies as long as dividends received by a Belgian company from a Turkish company are exempt, which is currently the case (the general participation exemption). Otherwise, the treaty rate will be 15 percent if the Turkish company owns directly at least 10 percent of the capital of the Belgian company and 20 percent in other cases.
39. A minimum holding of 20 percent is required.
40. The higher rate applies to copyright royalties, including films, etc.
41. The zero rate applies to payments to financial institutions and public bodies.
42. The 5 percent rate applies if the US company owns directly at least 10 percent of the voting power in the Belgian company. The zero rate applies if the US company owns at least 10 percent of the capital of the Belgian company for a 12-month period ending on the date the dividends are declared.
43. The 15 percent rate applies to interest on profit-sharing bonds.
44. The rate is 5 percent if the Vietnamese company owns at least 50 percent of the capital in the Belgian company and 10 percent if it owns at least 25 percent (but less than 50 percent).
45. The rate is 5 percent on patents and industrial and scientific know-how and 10 percent on trademarks and commercial know-how.

KPMG in Belgium

Wouter Caers

KPMG Tax and Legal Advisors
Bourgetlaan 40
Brussels
1130
Belgium

T: +32 (0) 38211973

E: wcaers@kpmg.com

kpmg.com

kpmg.com/socialmedia



kpmg.com/app



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2014 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved.

The KPMG name, logo and "cutting through complexity" are registered trademarks or trademarks of KPMG International.

Designed by Evalueserve.

Publication name: Belgium – Taxation of Cross-Border Mergers and Acquisitions

Publication number: 131036

Publication date: May 2014