PRICEWATERHOUSECOOPERS

Newsalert

Transactions Group - BELGIUM

January 2009

Cross-border reorganisations: implementation of EU Merger Directive into Belgian tax law

On 12 January 2009, the act implementing the EU Merger Directive into Belgian tax law was published in the Belgian official gazette. Most of the new act's provisions are applicable immediately as of its date of publication. The act introduces a tax-neutral regime for cross-border reorganisations and also brings the existing tax provisions applicable to purely Belgian reorganisations in line with the EU Merger Directive.

The purpose of this newsletter is to comment on the changes made by the new act and give you an insight into the opportunities now available to your organisation in respect of cross-border mergers.

I. General framework

The EU Merger Directive of 23 July 1990 (as amended by the EU Directive of 17 February 2005) provides for a tax-neutral regime for cross-border reorganisations such as mergers, demergers, partial demergers, share-for-share transactions, contributions of assets and transfers of registered office.

The tax-neutral regime provided for by the EU Merger Directive is not only applicable at the level of the companies involved in the reorganisation (roll-over of capital gains, creation of equity, transfer of tax losses) but also in the hands of their shareholders (tax-neutral exchanges of shares).

Till now, the EU Merger Directive has not been implemented in Belgian tax law, meaning that cross-border reorganisations have not been covered by appropriate tax legislation. This situation will be resolved with the expected publication of the new act on 31 December 2008.

The act introduces various changes into the Belgian Income Tax Code ("BITC") to align Belgian tax law with the provisions of the EU Merger Directive. The new legislation provides for a tax-neutral regime for cross-border reorganisations involving Belgian entities and/or Belgian permanent establishments. Moreover, various existing tax provisions applicable to purely Belgian reorganisations have also been aligned with the EU Merger Directive. Finally, other improvements have been implemented to the general, already existing tax provisions relating to reorganisations.

Effective: *12 January 2009.*

PwC Transaction and Corporate Services

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This Newsalert does not provide a comprehensive or complete statement of the taxation law of the countries concerned. It is intended only to highlight general issues that may be of interest to our clients.

For issues relating to this news alert please contact the specialists listed at the end of this article.

II. General changes

1/ Intra-European company

The notion of an intra-European company has been introduced into the BITC for the specific purpose of applying the new tax provisions implementing the EU Merger Directive.

An intra-European company is defined as (1) an EU tax resident company (other than a Belgian tax resident company), (2) that has a legal form mentioned in the annex to the EU Merger Directive and (3) is subject to a normal taxation regime (without being exempt).

2/ Conformity with company law provisions

For most reorganisations (mergers, demergers and contributions), application of the tax-neutral regime is subject to the operation being performed in accordance with Belgian company law provisions or analogous provisions of another Member State concerned by the operation.

Note that cross-border mergers have recently been introduced into the Belgian Companies Code (section 772/1 and following). Mergers with a cash payment exceeding 10% are not considered as a merger from a Belgian company law and tax perspective, except if the company law provisions of the other Member State authorise a cash payment in excess of 10%.

3/ New anti-abuse provision (section 183bis BITC)

The previous anti-abuse provision contained in the BITC (sections 46 and 211) has been aligned to the exact wording of the EU Merger Directive.

Under the old Belgian tax legislation, application of the tax-neutral regime was subject to the operation meeting "*legitimate financial or economic needs*". According to the strict interpretation given to this condition by the Belgian tax authorities, the burden of proving that the operation was business-driven lay in the hands of the taxpayer (taxation being the general rule with tax neutrality being the exception).

For mergers, demergers and contributions, the reference to the notion of *"legitimate financial or economic needs"* has been repealed and replaced by a new anti-abuse provision set out in a separate section of the BITC (183bis). According to this new section, an operation can be carried out tax-neutrally provided it does not have "*tax fraud or tax evasion as its principal objective or one of its principal objectives".*

This new rule means that tax-neutrality has now become the general rule whereas taxation is the exception and the operation will only be taxable if the Belgian tax authorities can prove that its principal objective or one of its principal objectives is tax fraud or tax evasion. The burden of proof lies with the Belgian tax authorities. If the operation is not performed for business reasons, there is a rebuttable presumption of tax fraud or tax evasion. This presumption can be reversed by the taxpayer. The new rule is also in line with the position taken by the Belgian Court of Cassation on 13 December 2007.

4/ Equity of a Belgian fixed place of business ("PE")

The equity of a Belgian PE of a non-resident company is defined as the sum of (1) the tax-free reserves, (2) the taxed reserves and (3) the allocation to capital from the foreign head office.

The allocation to capital is to be understood as all forms of financing (non-interest-bearing current account) provided by the head office. This allocation to capital will also be taken into account for calculation of the notional interest deduction (NID) in the hands of the Belgian PE.

However, any amounts borrowed by the foreign head office but for which interest is deducted from the tax base at the level of the Belgian PE are not taken into account for calculating the NID of the Belgian PE. This position is partially in line with the official practice note of 9 October 2008 (AOIF/AFER 36/2008). According to this practice note, (1) the NID-eligible equity of a Belgian PE does not include interest-bearing current accounts towards the head office (in line with the new act) and (2) the "non-specific" debts are allocated to the Belgian PE based on the balance sheet of the Belgian PE in proportion to the balance sheet of the head office. The last point of the circular is severely debated (and even criticised by the Ruling Commission) and should not be applicable in practice.

5/ Recapture of foreign tax losses

The new legislation lays down two recapture rules with respect to utilisation of the tax losses incurred in a foreign PE located in a tax-treaty country in order to avoid a double deduction.

- ***First rule (to tackle carry-back in the foreign PE):*** foreign PE tax losses can only be deducted from the Belgian tax base provided the taxpayer proves that these foreign tax losses have not been deducted from the tax base of the foreign PE (negative burden of proof lies with the taxpayer).

- ***Second rule (to preserve carry-forward in the foreign PE):*** foreign PE tax losses that have been deducted from the Belgian tax base are added back to the Belgian tax base (recapture) if these foreign tax losses are deducted from the foreign tax base or if the foreign PE is transferred at the time of a reorganisation (burden of proof always lies with the taxpayer).

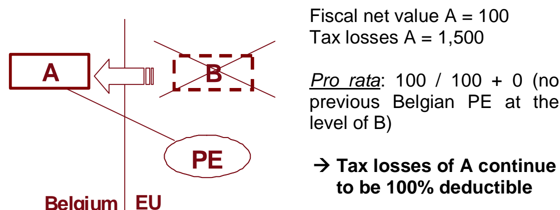
6/ Transfer and limitation of Belgian tax losses

The existing *pro rata* rules for the transfer/limitation of tax losses upon a tax-neutral Belgian reorganisation have been extended to tax-neutral cross-border reorganisations (mergers, demergers and contributions).

In the case of cross-border reorganisations, these *pro rata* rules are only applicable to Belgian tax losses and only in proportion to Belgian net fiscal values.

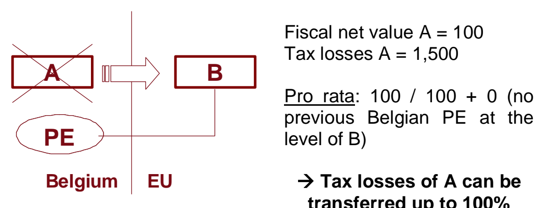
- ***Limitation of Belgian tax losses:*** tax losses existing before the reorganisation at the level of the Belgian absorbing or beneficiary company (or PE) continue to be deductible according to a "*pro rata*" calculated on the basis of the net fiscal value of the Belgian elements involved in the reorganisation.

  Example: *intra-EU company (B) is absorbed by Belgian company (A).*



- ***Transfer of Belgian tax losses:*** tax losses existing before the reorganisation at the level of the Belgian absorbed or demerged company (or PE) are transferred to the absorbing company according to a "*pro rata*" calculated on the basis of the net fiscal value of the Belgian elements involved in the reorganisation. This proportional transfer of tax losses is not applicable to contributions of assets covered by section 46 BITC.

  Example: *Belgian company (A) is absorbed by intra-EU company (B).*



Note that the above rules are also applicable to *"filialisation"* of a Belgian PE (contribution of a PE to a Belgian resident company or another intra-European company) or transfer of a Belgian PE in the framework of a tax-free transaction between intra-European companies (see point V – Contribution of assets – sections 231(2) and (3) BITC).

7/ Transfer and limitation of the notional interest deduction and R&D credit

The new legislation provides for a full roll-over of the notional interest deduction (NID) and R&D credit in the hands of the Belgian absorbing or beneficiary company (or PE) in the case of a cross-border merger, demerger or contribution.

8/ Procedures

In a merger or similar operation, the transferred and recipient companies will be regarded as the same taxable person.

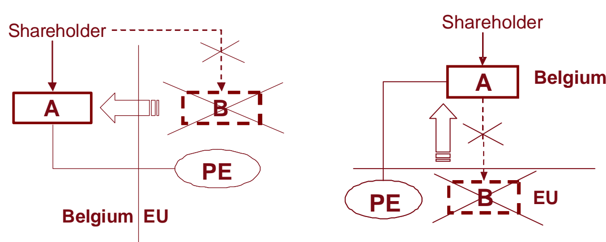
This means that the tax assessment relating to the taxable income of the transferred company up to the date of the reorganisation (merger or similar operation) will be levied in the hands of the recipient company, even if the transferred company no longer has legal personality. This modification has been introduced to protect the interests of the Belgian State in situations similar to that following the Brussels Court of Appeal judgment of 11 January 2008, in which a tax assessment was rejected.

III. Cross-border mergers

Cross-border mergers (and demergers) can benefit from a tax-neutral regime under the following conditions:

- the beneficiary company is a Belgian tax-resident company or an intra-European company;
- the operation is performed in accordance with Belgian company law or analogous provisions applicable in the other Member State;
- the new anti-abuse provision (section 183bis BITC) is complied with.

1/ Inbound mergers (sections 184bis and 184ter BITC)



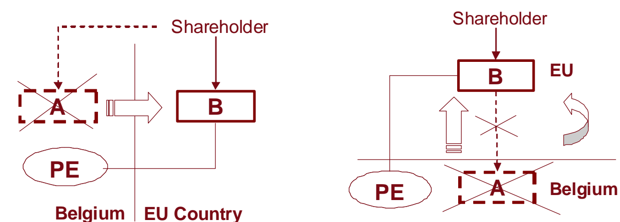
Roll-over of capital gains: subsequent capital gains/losses realised after the merger on the foreign assets of the absorbed company will be calculated on the basis of the accounting value used in the merger. The capital loss, reduction in value or depreciation on those foreign assets at the time of the operation will only be taken into account if they lead to a fiscal net value lower than their book value at the time of the merger. The aim is to avoid any step-up with most important tax deductions on the foreign assets.

Creation of equity: the fiscal paid-up capital created in the hands of the Belgian absorbing company corresponds to the equity elements abroad that are considered as paid-up capital under the Belgian tax rules. Other equity elements abroad represent taxed reserves in the hands of the Belgian absorbing company (except for tax-free reserves relating to a previous Belgian PE).

Merger "badwill": the merger gain ("*merger badwill*") realised upon a parent-subsidiary merger is treated in the hands of the Belgian parent company as a distributed dividend. Under the old tax legislation, this dividend could only benefit from the 95% dividends-received deduction ("DRD") under certain conditions, meaning that the remaining 5% of the dividend was taxable. However, this 5% tax charge was not in line with the provisions of the EU Merger Directive.

Henceforth, the merger gain can benefit from a 100% DRD in the hands of the parent company. No minimum shareholding conditions are applicable to benefit from this 100% DRD. If there is insufficient tax base, we are of the opinion that the 100% DRD may still create an "excess DRD". This position is in line with recent developments in terms of the "excess DRD" issue pending before the tax courts (see the following references for preliminary rulings to the European Court of Justice: no. 2006/AR/675 of 27/2/2007, no. 2003/AR/2195 of 13/09/2007 and no. 05/1212/A of 5/11/2007).

2/ Outbound mergers (section 211 BITC)



Maintenance of a Belgian PE: the tax-neutrality of an outbound merger is subject to the additional condition that the Belgian elements transferred are permanently maintained in a Belgian PE following the merger and contribute to constitution of the tax base in Belgium. The rationale behind this condition is to avoid erosion of the tax base in Belgium.

Note that there will not automatically, and need not necessarily, be a Belgian PE further to the merger. It is therefore possible to opt for partial taxation to the extent that transferred Belgian elements are not maintained in a Belgian PE (see exit taxation below).

Roll-over of capital gains: no taxation will arise in the hands of the Belgian absorbed company in the case of a tax-free merger. There is a roll-over of the fiscal value of the Belgian transferred assets provided they are maintained in a Belgian PE further to the merger. Otherwise, the Belgian absorbed assets will be taxable on their market value.

Equity of the Belgian PE: in the case of a tax-free outbound merger, the taxed reserves and tax-free reserves of the Belgian absorbed company can be transferred to and qualify as such in the hands of the Belgian PE of the absorbing company (see also the comments below in the case of a parent-subsidiary merger). However, in the case of a taxed merger, the capital allocation at the level of the Belgian PE will entirely correspond to the market value of the Belgian absorbed assets.

Exit taxation: the new legislation provides for exit taxation whereby any items removed by the foreign head office from the net assets of the Belgian PE (i.e. where the Belgian assets are not maintained in a Belgian PE) will give rise to a taxable capital gain or tax-deductible loss. Furthermore, any reduction in the tax-free reserves of the Belgian PE will lead to taxation in Belgium. In that case, the 10% Belgian withholding tax may apply to the liquidation dividend unless, say, the parent-subsidiary exemption can be claimed.

Transfer of tax-free reserves: in the case of a parent-subsidiary merger, there is no or only a partial remuneration in new shares by the parent company since it already holds shares in the absorbed company. In such a case, the equity of the Belgian absorbed company is entirely or partially reduced and not transferred to the absorbing company.

Under the old tax legislation, a partial tax charge could still arise in connection with a tax-free merger (even if all the conditions for the tax-neutral regime were met) to the extent that the reduction in equity in the hands of the Belgian absorbed company was set against certain tax-free reserves. Such taxation was not in line with the provisions of the EU Merger Directive.

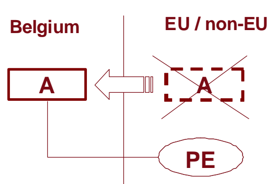
In order to avoid taxation of this kind, the new legislation now provides for the Belgian PE of the absorbing company to be able to "recreate" all the tax-free reserves (not linked to a foreign PE) of the Belgian absorbed company. Note that the possibility (optional rules) of "recreating" the tax-free reserves is applicable to all tax-free reserves of a Belgian absorbed company (no limitation to certain tax-free reserves as provided under the old tax legislation). This possibility also exists for internal Belgian mergers.

IV. Transfers of registered office

The EU Merger Directive provides for a tax-neutral regime for transfers of the registered office of a European Company (SE) or a European Cooperative Society (SCE) between Member States.

The tax regime laid down in the new Belgian legislation for transfers of registered offices is quite similar (with some exceptions) to that applicable to inbound and outbound mergers.

1/ Inbound migrations (sections 184bis and 184ter BITC)



Outside the framework of the EU Merger Directive, the new Belgian legislation contains specific provisions where any legal foreign company transfers its registered office to Belgium. These provisions are applicable to all legal forms of non-resident companies (EU or non-EU) transferring their registered office to Belgium.

Roll-over of capital gains: subsequent capital gains/losses realised on foreign assets after the transfer will be calculated on the basis of the accounting value used in the transfer. The capital losses, reductions in value or depreciation on these foreign assets at the time of the operation will only be taken into account if they lead to a fiscal net value lower than their book value at the time of the operation. The aim is to avoid any step-up with most important tax deductions on the foreign assets.

Note that the above rule does however not apply in the case of a migrating company that is not subject to income tax abroad or that is located in a tax haven country, except if this is an EU company subject to the common tax regime applicable in the other EU Member State.

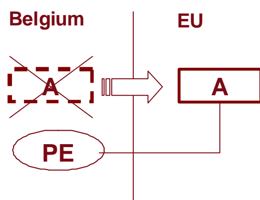
In addition, if the foreign migrating company previously had a Belgian PE, the new legislation provides for a roll-over of the fiscal values of that Belgian PE upon the transfer of registered office.

Creation of equity: the (fiscal) paid-up capital of the (new) Belgian company after the transfer corresponds to the equity elements abroad that qualify as paid-up capital under the Belgian tax rules. Other equity elements abroad represent taxed reserves in the hands of the Belgian company (except for tax-free reserves relating to a previous Belgian PE).

However, if the migrating company is not subject to income tax abroad or is located in a tax haven country, the other equity elements will be considered as tax-free reserves in Belgium, except if this is an EU migrating company subject to the common tax regime applicable in the other EU Member State (this does not cover Luxembourg 29 holding companies, which are not subject to a common tax regime in Luxembourg). Note that this rule is more restrictive than the position taken in a number of previous parliamentary questions where the Ministry of Finance stated that the migration of a company subject to a low taxation regime also results in taxed reserves, i.e. the "subject to tax" criteria prevails over the tax rate applicable to the reserves (see Parliamentary question no. 947, Dupré, 8 March 1994, Parliamentary question no. 996, De Clippele, 29 March 1994, and Antwerp Court of Appeal, 1 April 2008).

Transfer of losses: the tax losses attributable to the previous Belgian PE of the migrating company can be fully transferred to the new Belgian company without limitation.

2/ Outbound migrations (section 214bis BITC)



In line with the EU Merger Directive, the new Belgian legislation provides for a tax-neutral regime for outbound migrations by an EC or an SEC from Belgium to another Member State. Note that, contrary to the tax-neutral regime for inbound migrations, which applies to any legal form of non-resident company, the tax-neutral regime for outbound migrations is only applicable to SEs or SECs. This means that the outbound migration of a Belgian company will be taxable.

Maintenance of a Belgian PE: the transfer of seat is tax-neutral on condition that a Belgian PE is permanently maintained in Belgium after the transfer. It is therefore possible to opt for partial taxation, since the Belgian elements transferred that are not maintained in a Belgian PE will automatically become taxable (see exit taxation below).

Roll-over of capital gains: no taxation will arise in the hands of the Belgian outbound migrating company in the case of a tax-free transfer of registered office.

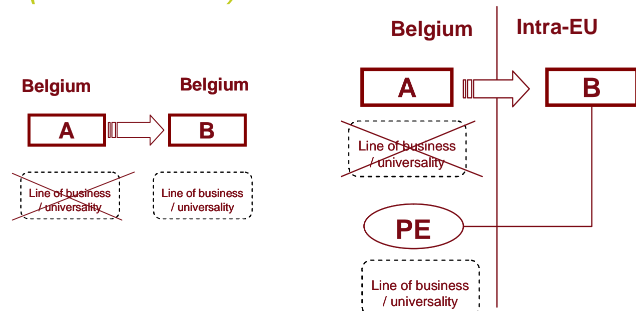
Equity of the Belgian PE: in the case of a tax-free outbound migration, the taxed and tax-free reserves of the Belgian migrating company can be transferred as such to the Belgian PE of the absorbing company, as if no transfer had taken place.

Exit taxation: the new legislation provides for exit taxation, whereby any items removed by the foreign head office from the net assets of the Belgian PE (i.e. where the Belgian assets are not maintained in a Belgian PE) will give rise to a taxable capital gain or a tax-deductible loss. Furthermore, any reduction of the tax-free reserves of the Belgian PE will lead to taxation in Belgium. In such a case, 10% Belgian withholding tax may be due unless, say, the parent-subsidiary exemption can be claimed.

Transfers of losses: tax losses incurred before the transfer by the Belgian migrating company are 100% tax-deductible in the hands of the Belgian PE after the transfer.

V. Contribution of assets

1/ Scenario 1: contribution by a Belgian resident company of a line of business or of its entire company assets by way of a universal transfer (section 46 BITC)



Contributions by a Belgian resident company of a line of business or of its entire assets by way of a universal transfer can benefit from a tax-neutral regime under the following conditions:

- the beneficiary company must be a Belgian tax-resident company or an intra-European company;
- the operation must be performed in accordance with Belgian company law or analogous provisions applicable in the other Member State;
- the new anti-abuse provision (section 183bis BITC) must be complied with.

Maintenance of a Belgian PE: in the case of a contribution by a Belgian company of a line of business or of its entire assets by way of a universal transfer to an intra-European company, tax-neutrality is only available for the contributed elements that are maintained in a Belgian PE and contribute to the constitution of a tax base in Belgium. As a result, it is possible to opt for a full or partial taxable contribution, resulting in the items not maintained in the Belgian PE being taxed at their market value.

Roll-over of capital gains: in the case of a tax-free contribution, the Belgian contributed assets will keep the same fiscal value after the operation.

However, in the case of a taxable transaction (because the new anti-abuse provision – section 183bis BITC – is not fulfilled), a fiscal step-up will be available for the contributed items. This is a new disposition as, currently, there is no possibility to obtain a fiscal step-up since the transfer takes place at book value.

Creation of equity: in the case of a tax-free contribution to a Belgian company, the (fiscal) paid-up capital in the hands of the Belgian beneficiary company will correspond to the net fiscal value of the contributed assets.

However, if no tax-exemption is applicable (because the new anti-abuse provision – section 183bis BITC – is not fulfilled), the line of business/universal transfer of assets will be contributed at its market value and the paid-up capital created in the hands of the Belgian beneficiary company will correspond to the market value of the contributed items. Given the neutrality for accounting purposes in that scenario, the fiscal step-up would not qualify for the notional interest deduction (NID).

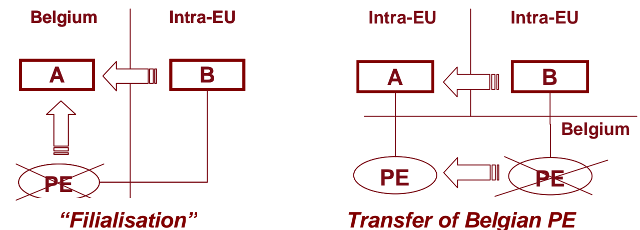
Equity of the Belgian PE: in the case of a tax-free contribution to an intra-European company, the capital allocation created in the hands of the Belgian PE further to the contribution will correspond to the net fiscal value of the contributed items.

In the case of a taxable contribution to an intra-European company, the fiscal capital allocation created in the hands of the Belgian PE further to the contribution should also correspond to the net fiscal value of the contributed items (this is applicable either in case of a tax-free or a taxable transaction). Nothing is provided for in the new act as to the possibility to benefit from a fiscal step-up in case of a taxable transaction, contrary to the contribution of a line of business/universality to a Belgian company (see above).

Transfer of losses: in the case of a tax-free contribution:

- the tax losses of a Belgian recipient company are limited to a *pro rata* calculated on the basis of the net fiscal value of the Belgian elements involved in the operation;
- the tax losses of the Belgian contributing company are not transferred.

2/ Scenario 2: contribution by an intra-European company of a Belgian PE (or Belgian items) to a Belgian/intra-European company (section 231(2) BITC)



Contributions of a Belgian PE (or Belgian items) by an EU can benefit from a tax-neutral regime under the following conditions:

- the beneficiary company must be a Belgian resident company ("*filialisation")* or another intra-European company;
- the contributed assets must relate to a line of business/universal transfer of assets;
- the contribution must be tax-exempt in the hands of the EU contributing company;
- the operation must be performed in accordance with Belgian company law or analogous provisions applicable in the other Member State;
- the new anti-abuse provision (section 183bis BITC) must be complied with.

Maintenance of a Belgian PE: in the case of a contribution by an intra-European company of a Belgian PE (or items) to an intra-European company, tax-neutrality is only available for the contributed elements that are maintained in a Belgian PE and contribute to constitution of a tax base in Belgium. As a result, it is possible to opt for such contributions of a Belgian PE to an intra-European company to qualify as a fully or partially taxable contribution, which entails a tax charge on the market value of the elements concerned.

Roll-over of capital gains: in the case of a tax-free contribution, the Belgian contributed assets will keep the same fiscal value after the operation.

Contrary to a contribution made to a Belgian beneficiary company under section 46 BITC, no fiscal step-up will be available for the contributed items in case of a taxable transaction.

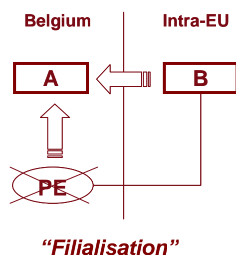
Creation of equity: in the case of a tax-free contribution of a Belgian PE to a Belgian company, the (fiscal) paid-up capital created in the hands of the Belgian beneficiary company corresponds to the net fiscal value of the contributed assets, minus the taxed and tax-free reserves of the Belgian PE.

Contrary to a contribution made to a Belgian beneficiary company under section 46 BITC, in case of a taxable transaction, the (fiscal) paid-up capital of the Belgian recipient company will also correspond to the net fiscal value of the contributed items minus the taxed and tax-free reserves of the Belgian PE (this is applicable either in case of a tax-free or a taxable transaction).

Equity of the Belgian PE: in the case of a tax-free contribution to an intra-European company of Belgian items (not constituting a Belgian PE), the capital allocation created in the hands of the new Belgian PE further to the contribution will correspond to the net fiscal value of the contributed items.

Where an existing Belgian PE is transferred at the time of the contribution, the taxed reserves, tax-free reserves and capital allocation of the transferred Belgian PE will be transferred as such (but there are limitations where there is no full consideration in the form of new shares).

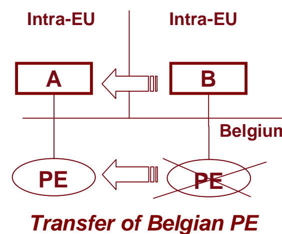
Transfer of losses: in the case of a tax-free contribution by an intra-European company of a Belgian PE (or Belgian items) to a Belgian company ("*filialisation*"):



"Filialisation"

- the tax losses of the Belgian recipient company A are limited to a *pro rata* calculated on the basis of the net fiscal value of the Belgian elements involved in the operation;
- the tax losses of the Belgian PE of B are transferred to the Belgian recipient company with a limitation according to a *pro rata* calculated on the basis of the net fiscal value of the Belgian elements involved in the operation.

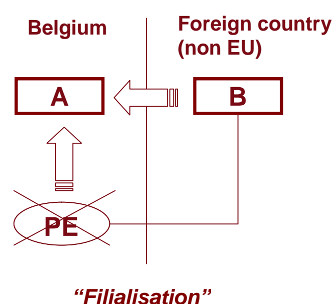
In the case of a contribution by an intra-European company of a Belgian PE to an intra-European company with a pre-existing Belgian PE (transfer of Belgian PE):



Transfer of Belgian PE

- the tax losses of the recipient Belgian PE (pre-existing Belgian PE of A) are limited to a *pro rata* calculated on the basis of the net fiscal value of the Belgian elements involved in the operation;
- in this scenario, the transfer of the tax losses of the contributed Belgian PE of B is not provided for. In the light of the new tax legislation, these tax losses should be transferred. Note that if the recipient company does not have a pre-existing Belgian PE, the tax losses of the contributed Belgian PE should be entirely maintained.

3/ Scenario 3: contribution of a Belgian PE to a Belgian company (section 231(3))



"Filialisation"

This scenario expressly covers the contribution of a Belgian PE by a (non-EU) foreign company to a Belgian company (*"filialisation").*

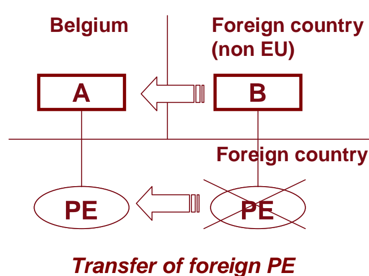
Similar tax rules apply as for scenario 2. However, the conditions required for tax-neutrality under scenario 2 are not applicable. The only requirement is that the contribution is fully remunerated by new shares issued by the Belgian beneficiary company.

Creation of equity: the paid-up capital created in the hands of the Belgian beneficiary company will correspond to the net fiscal value of the Belgian contributed PE, minus the taxed and tax-free reserves.

Transfer of losses: in the case of a tax-free contribution:

- the tax losses of the Belgian recipient company are limited to a *pro rata* calculated on the basis of the net fiscal value of the Belgian elements involved in the operation;
- the tax losses of the Belgian PE are transferred to the Belgian recipient company with a limitation according to a *pro rata* calculated on the basis of the net fiscal value of the Belgian elements involved in the operation.

4/ Scenario 4: contribution of a foreign PE to a Belgian company (section 184bis(3) BITC)



Transfer of foreign PE

This scenario covers the contribution of a foreign PE by a (non-EU) foreign company to a Belgian company.

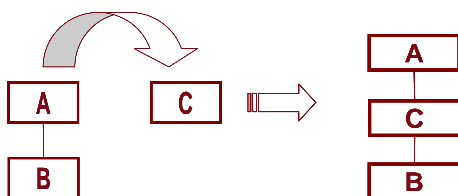
Creation of equity: for such operations, the new Belgian legislation stipulates that the paid-up capital created in the hands of the Belgian beneficiary company must correspond to the net book value of the foreign assets.

Transfer of losses: there is no limitation on the tax losses carried forward in the hands of the recipient Belgian company.

VI. Exchange of shares

The new act also elaborates on exchanges of shares (so-called share-for-share transactions), i.e. contributions of shares to a company in exchange for shares in the recipient company. We would point out that, in general, Belgian tax law was mostly in line with the EU Merger Directive. As a result, the changes made to the current legislation aim at tackling only exceptional cases. We elaborate below on three different situations.

1/ Share-for-share exchange by a corporate shareholder

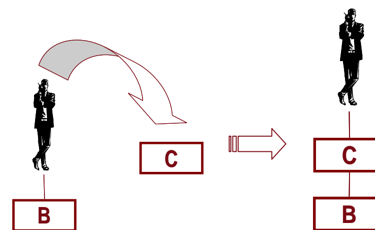


Possibility of a temporary tax exemption for the contributing company (A): in principle, share-for-share transactions can be performed free of corporate income tax to the extent that the contributed shares are shares eligible for the Belgian participation exemption regime under section 192BITC (the holding requirements do not need to be fulfilled).

However, if this exemption is not available, the company can apply the temporary exemption (section 45(1)(2°) BITC) that is available for companies (in case section 192 BITC does not apply) as well as for individuals acting in the course of business (see below, point 2).

Equity of the recipient company (C): in case of application of section 192 BITC, the (fiscal) paid-up capital in the hands of the (Belgian) recipient company C will be determined on the basis of the market value of the contributed shares whereas in case of application of section 45(1)(2°) BITC, the (fiscal) paid-up capital of the (Belgian) recipient company will be determined on the basis of the acquisition value of the contributed shares in the hands of the contributing company (similar as below point 2).

2/ Share-for-share exchange by an individual acting in the course of business (section 45(1)(2°) BITC)



A share-for-share transaction by an individual acting in the course of business is taxable in his hands under current tax law. Further to the amendments, a temporary tax exemption will be available to the contributing individual, which is in line with the Merger Directive.

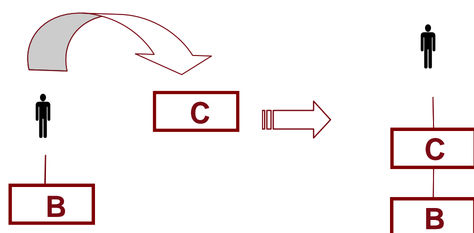
Temporary tax exemption for the contributing individual: the contributing individual can benefit from a temporary tax exemption if the following conditions are met:

- the contributed shares are shares in a Belgian or intra-European company;
- the shares are contributed to a Belgian or intra-European company;
- the shares are contributed in exchange for new shares (max. 10% cash payment);
- the recipient company owns at least 50% of the voting rights in the contributed company (via the transaction or otherwise);
- the new anti-abuse provision (section 183bis) must be complied with.

Upon a later sale of the new shares by an individual acting in the course of business, the capital gain or loss will be calculated as if no share-for-share deal had taken place (i.e. taking into account the fiscal value of the contributed shares).

Equity of the recipient company (C): the (fiscal) paid-up capital in the hands of the (Belgian) recipient company C will be determined on the basis of the acquisition value of the contributed shares in the hands of the contributing individual. The difference between the market value and the acquisition value of the shares is considered to be a taxed reserve, as a result of which a subsequent distribution of this difference will be deemed a dividend (triggering withholding tax).

3/ Share-for-share exchange by an individual not acting in the course of business (so-called internal gains) (section 90(9°), line 1, BITC)



The new Act makes some changes to the rules governing internal gains (i.e. capital gains realised upon a contribution of shares by a private individual to his wholly-owned holding company). Before the new act, capital gains realised on shares by a private individual were not taxable if they were realised in the framework of the normal management of his private estate (this issue has been the subject of numerous rulings). This has not changed. However, if the "normal management" condition is not met, the new act provides for taxation of the capital gain as miscellaneous income, but with the possibility of a temporary exemption in the hands of the contributing individual, which means that taxation will only arise upon future disposal of the shares, if that future disposal is indeed taxable. At that time, the acquisition value of the shares at the time of the share-for-share transaction will be taken into account to determine the amount of the capital gains.

It should be noted that the new act has relocated the internal gains article (previously section 90(1°) and now section 90(9°)). As a result, (taxable) miscellaneous income is no longer limited to the abnormal part of the capital gain (as already confirmed by the Belgian Court of Cassation in the "Balthus" judgment) but extends to the entire amount of the capital gain.

Please note that, additionally, the capital gain will be determined on a gross basis (i.e. prior deduction of costs).

Taxation as miscellaneous income: capital gains on shares that are not considered as arising from the normal management of one's private estate are in principle taxable as miscellaneous income at 33%.

Temporary tax exemption for the contributing individual: the contributing individual can benefit from a temporary tax exemption on the capital gains (in connection with a (merger, (partial) de-merger, conversion or) contribution of shares, if the following conditions are met:

- the contributed shares are shares in a Belgian or intra-EU company;
- the shares are contributed to a Belgian or intra-European company;
- the shares are contributed in exchange for new shares (max. 10% cash payment);
- the recipient company (C) owns at least 50% of the voting rights in the contributed company (B) (via the transaction or otherwise);
- the new anti-abuse provision (section 183bis) must be complied with.

The contributing individual will also have to evidence in his tax returns in subsequent years that the shares are still in his possession and that they have not been subject to any form of redemption.

Equity of the recipient company (C): the (fiscal) paid-up capital in the hands of the (Belgian) recipient company C will be determined on the basis of the real value of the contributed shares in the hands of the contributing individual to the extent that the contribution is remunerated in new shares in the recipient company.

VII. Sizeable capital gains

The new act has brought the Belgian legislation on capital gains realised on shares by a private individual further to transfer of a holding of at least 25% in a Belgian company into line with the ECJ's De Baeck judgment. As a result, such capital gains are not taxable if the shares are transferred to a company located in the European Economic Area (i.e. the EU plus Norway, Iceland and Liechtenstein).

VIII. Conclusions

The new act will lower most of the tax obstacles standing in the way of cross-border reorganisations involving Belgian companies. In the current economic climate, this may constitute a basis for corporate reorganisations that aim to optimise the efficiency with which the EU market is tackled, for instance by taking advantage of cross-border use of tax deductions or simplifying your organisational chart.

Of course, each and every situation is different and tailored advice is of the utmost importance. The PwC M&A Tax Team or your regular PwC Contact person will therefore be pleased to assist you if you require any further information.

For more-detailed information, please feel free to contact the Belgian PwC M&A Tax specialists:

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