



Taxation of cross-border mergers and acquisitions

Belgium

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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 an update on recent changes relevant to mergers and acquisitions (M&A), this report

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 report 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 report, but some of the key points or changes are summarized later in this report.

Recent developments

In the past few years, 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:

- *Thin capitalization*: 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.
- *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).

— *Increased withholding tax (WHT) rate:* As of 1 January 2016, the standard domestic WHT rate on interest and dividends (including liquidation dividends) is 27 percent (previously 25 percent). Within corporate structures, this change 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.

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.

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. Such loss 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 1 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 stating that the selling entity has no outstanding tax liabilities from the Belgian corporate income tax, value added tax (VAT) and social security tax authorities. 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 straight-line and 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, becomes as a result of the transfer, 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 1 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, warranties and 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 1-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 report.

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 Union (EU) Parent-Subsidiary and Interest and Royalty Directives, 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 fairness tax). 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 or 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, and no specific tax rules apply to them. 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 tax-deductible. 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:* One 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 report). Also, the 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, for example, by transferring activities or starting 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. Certain other limitations on the tax-deductibility of interest payments in specific situations are discussed later in this report.

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 that 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 a separate 1:1 debt-to-equity rule, interest on loans from shareholders (individuals) and directors (individuals or foreign [non-EU; cf. European Court of Justice (ECJ) case law] corporations) is re-characterized 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, financial institutions or their branches, 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, as of 1 January 2016, interest paid by a Belgian company is subject to a 27 percent WHT (previously 25 percent).

Important 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 an 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 1 year, or both companies have a common shareholder established in the EU that 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 1 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 beyond those mentioned in the directive to all companies resident in Belgium.

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 27 percent (previously 25 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 report, 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 (unlike 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 this deduction for risk capital.

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 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 (among other things) is 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 NID rate is 2.630 percent for assessment year 2015 (in principle, the calendar year 2014) and 1.63 percent for assessment year

2016 (calendar year 2015). For assessment year 2017 (calendar year 2016), the NID rate is 1.131 percent.

Previously, if a company's taxable base was not sufficient to use the entire NID, the balance could be carried forward for up to 7 years. The ability 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 the 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 27 percent WHT (previously 25 percent, subject to certain conditions). As of 7 July 2013, small companies may benefit from a 15 percent WHT on dividends.

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 that has 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 1 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).

Fairness tax on dividend distributions

On 18 July 2013, a fairness tax was introduced for dividends distributed by a Belgian company (not applicable to qualifying small and medium-sized enterprises).

The fairness tax applies in addition to and separately from the corporate income tax. Like corporate income tax, the fairness tax is not deductible. No deductions or compensation of the loss of the taxable period can be made to the taxable base for fairness tax purposes.

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 financial year 2013).

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

On 28 January 2015, the Belgian Constitutional Court decided to ask three prejudicial questions to the ECJ to verify whether the fairness tax is in line with the EU Freedom of Establishment Directive and Parent-Subsidiary Directive. The European Commission recently filed its written comments with the European Court of Justice substantiating that the fairness tax, in its current form, is not in line with the directives. Currently, it is unclear what the ECJ will ultimately decide.

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 must be performed in accordance with the merger provisions of Belgian and foreign company law.
- 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 EU Merger Directive.

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. In principle, this additional purchase price 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 for 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 provides certain other exceptions to the prohibition of financial assistance without the strict conditions noted above (e.g. for employee takeovers).

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 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 abnormal profit-shifting to either a foreign group entity or Belgian loss-making company. For foreign group entities, the profit shifted abroad is added back to the taxable income of the transferring company; for Belgian loss-making companies, the Belgian beneficiary is not permitted to offset its brought forward and current-year losses against the abnormal income received.

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 the 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 and 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 (e.g. 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 cannot offset prior- or current-year tax losses or other tax attributes from the (implied) profit corresponding to the received advantage. The Belgian tax authorities' position

is that this results in the advantage being immediately taxed in the hands of the company receiving the advantage (cash-out), irrespective of prior- or current-year tax losses or other available tax attributes. 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 and the advantage is 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 its place of effective management is 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.
- The purchaser assumes no inherent tax liabilities on tax-exempt or hidden reserves.
- 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 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.
- No system of tax consolidation is available for profits or losses of the acquirer's group companies and the target's losses or profits. However, specific debt pushdown mechanisms may be available.

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