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Eligibility for Treaty Benefits Under The Belgium-U.S. Income Tax Treaty

by Jason Connery and Jennifer Blasdel-Marinescu

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SPECIAL REPORTS

Eligibility for Treaty Benefits Under the Belgium-U.S. Income Tax Treaty

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To be entitled to benefits under income tax treaties, companies must satisfy eligibility requirements. This article includes flowcharts to help practitioners navigate the eligibility requirements of the Belgium-U.S. income tax treaty and protocol applicable to Belgian companies, in particular the eligibility requirements for a 0 percent withholding tax rate on dividends.[1]

Income tax treaties may exempt business income from source-country income taxes and eliminate or reduce domestic withholding taxes on payments between residents of countries that are parties to an income tax treaty. To be entitled to benefits under U.S. income tax treaties, a company must not only be a resident of the tax treaty partner's country, but also must satisfy at least one of the tests in the treaty's limitation on benefits provision, if applicable.

The flowcharts in this article focus on the eligibility of Belgian companies claiming treaty benefits, under the treaty's LOB article (article 21), on income that would otherwise be subject to U.S. taxation. This article does not address eligibility for treaty benefits of entities that are partnerships or are otherwise transparent for U.S. or Belgian tax purposes. It also does not discuss the triangular rules in paragraph 6 of the LOB provision in the treaty. This article is based on the treaty, the protocol to the treaty, a competent authority agreement between the competent authorities of the United States and Belgium, dated October 15, 2009 (competent authority agreement), and the U.S. Treasury Department's technical explanation.

This article is the 13th in a series[2] that provides flowcharts to assist practitioners in determining a company's eligibility for tax treaty benefits under the LOB

[1]Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, signed Nov. 27, 2006, and accompanying protocol signed Nov. 27, 2006.

[2]*See* Jason Connery and Jennifer Blasdel-Marinescu, ''Eligibility for Treaty Benefits Under the Ireland-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, June 17, 2013, p. 1223; Connery, Douglas Poms, and Blasdel-Marinescu, ''Eligibility for Treaty Benefits Under the Sweden-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, July 23, 2012, p. 359; Connery, Poms, and Blasdel-Marinescu, ''Eligibility for Treaty Benefits Under the Australia-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Dec. 12, 2011, p. 843; Connery, Poms, and Jennifer Blasdel, ''Eligibility for Treaty Benefits Under the Switzerland-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, May 9,

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provisions of specific U.S. income tax treaties and, when applicable, in determining eligibility for a 0 percent withholding tax rate on cross-border intercompany dividend payments to the company.

This article contains nine flowcharts that analyze the LOB provision of the treaty as applied to Belgian resident companies. Although the flowcharts provide a comprehensive review of applicable provisions under the treaty, taxpayers and their tax advisers should carefully evaluate each case and determine whether the requirements of the treaty are met based on all facts and circumstances. ◆

2011, p. 505; Connery, Poms, and Blasdel, ''Eligibility for Treaty Benefits Under the Japan-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Sept. 6, 2010, p. 789; Connery, Poms, and Blasdel, ''Eligibility for Treaty Benefits Under the 2009 Protocol to the France-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Apr. 12, 2010, p. 149; John Venuti, Connery, Poms, and Blasdel, ''Eligibility for Treaty Benefits Under the Netherlands-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Nov. 23, 2009, p. 601; Venuti, Connery, Poms, and Alexey Manasuev, ''Eligibility for Treaty Benefits Under the Canada-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, June 15, 2009, p. 967; Ron Dabrowski, Venuti, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under U.K.-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Mar. 23, 2009, p. 1095; Venuti, Connery, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under the Luxembourg-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, July 21, 2008, p. 285; Venuti, Dabrowski, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under the France-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Feb. 11, 2008, p. 523; and Venuti and Manasuev, ''Eligibility for Zero Withholding on Dividends in the New Germany-U.S. Protocol,'' *Tax Notes Int'l*, Jan. 14, 2008, p. 181.

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(Flowcharts start on the following page.)

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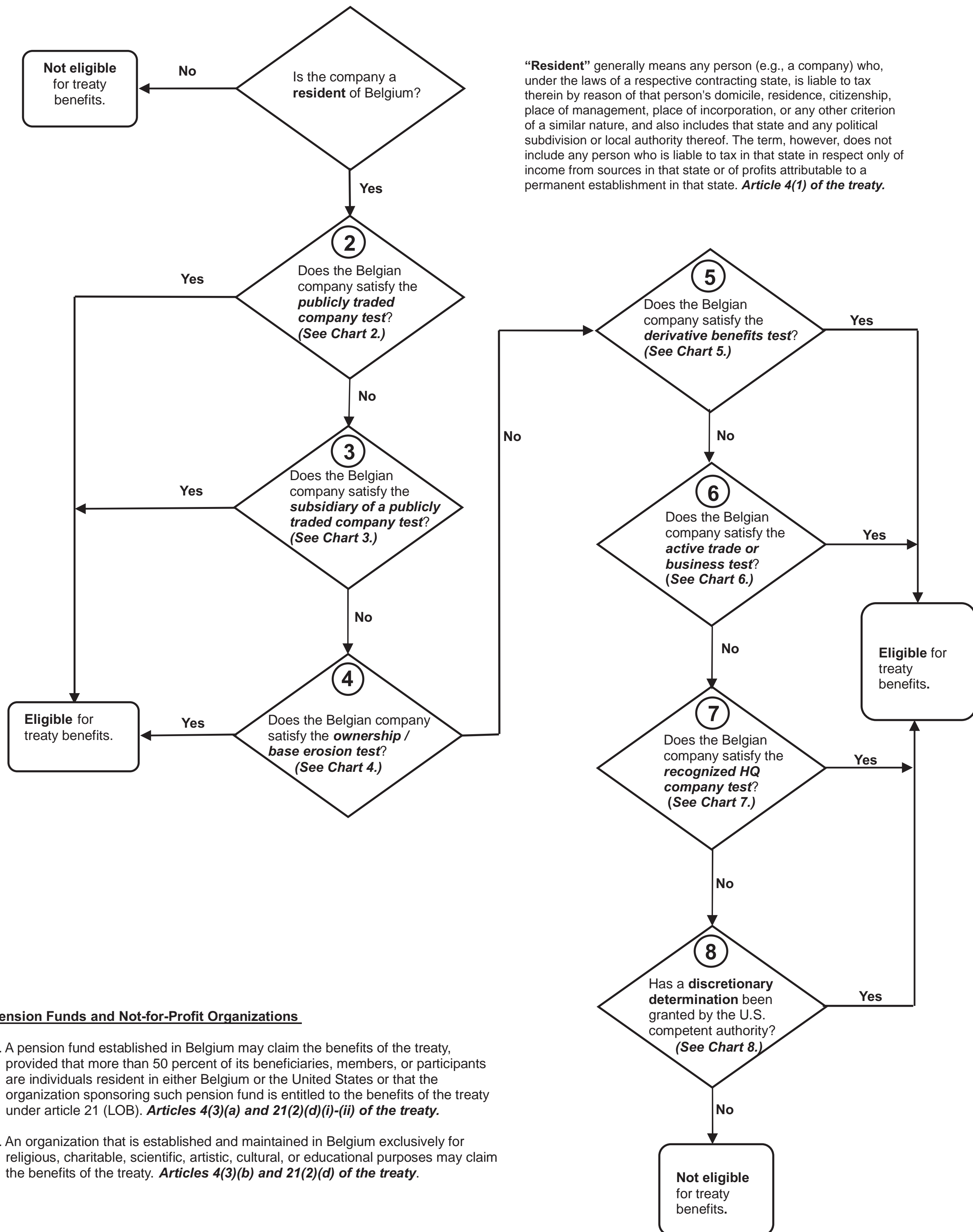

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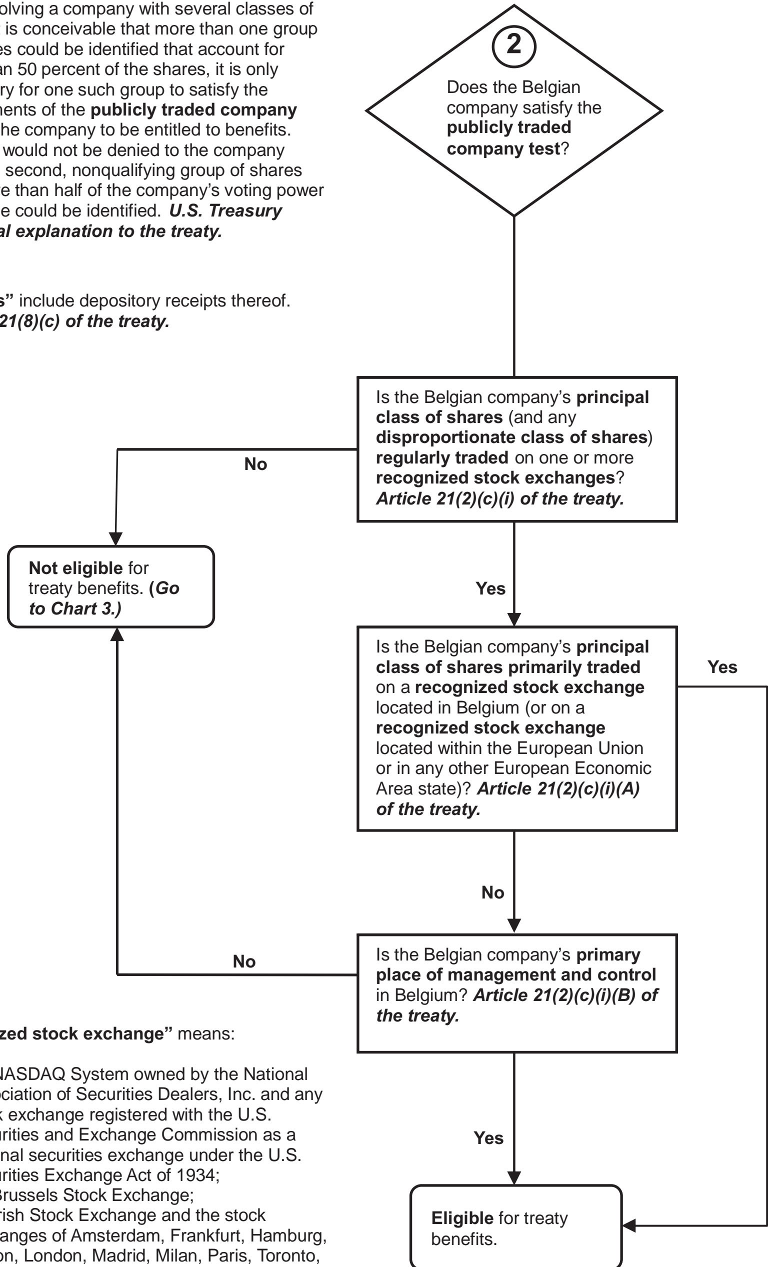
Chart 2. Publicly Traded Company Test Under Article 21(2)(c)(I) (LOB) of the Belgium-U.S. Tax Treaty

"Principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, **principal class of shares** means those classes that in the aggregate represent a majority of the aggregate voting power and value of the company. ***Article 21(8)(a) of the treaty.*** Although in a particular case involving a company with several classes of shares it is conceivable that more than one group of classes could be identified that account for more than 50 percent of the shares, it is only necessary for one such group to satisfy the requirements of the **publicly traded company test** for the company to be entitled to benefits. Benefits would not be denied to the company even if a second, nonqualifying group of shares with more than half of the company's voting power and value could be identified. ***U.S. Treasury technical explanation to the treaty.***

"Disproportionate class of shares" means any class of **shares** of a company resident in a contracting state that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments, or otherwise, in the earnings generated in the other state by particular assets or activities of the company when compared to its participation in overall assets or activities of such company. ***Article 21(8)(b) of the treaty.*** Thus, for example, a company resident in Belgium has a **disproportionate class of shares** if it has outstanding a class of "tracking stock" that pays dividends based upon a formula that approximates the company's return on its assets employed in the United States. ***U.S. Treasury technical explanation to the treaty.***

"Shares" include depository receipts thereof. ***Article 21(8)(c) of the treaty.***



A class of **shares** is considered to be **regularly traded** on one or more **recognized stock exchanges** in a tax year if the aggregate number of shares of that class traded on such stock exchange or exchanges during the preceding tax year is at least 6 percent of the average number of shares outstanding in that class during that preceding tax year. ***Article 21(8)(e) of the treaty.*** The **regularly traded** requirement can be met by trading on any **recognized stock exchange** or exchanges. Trading on one or more **recognized stock exchanges** may be aggregated for purposes of the **regularly traded** standard. Thus, a Belgian company could satisfy the **regularly traded** requirement through trading, in whole or in part, on a **recognized stock exchange** located in the United States. Authorized but unissued shares are not considered for purposes of the **regularly traded** standard. ***U.S. Treasury technical explanation to the treaty.***

Stock of a Belgian company is **"primarily traded"** if the number of shares in the company's **principal class of shares** that are traded during the tax year on all **recognized stock exchanges** in Belgium (or within the EU or EEA) exceeds the number of shares in the company's **principal class of shares** that are traded during that year on established securities markets in any other single foreign country. ***U.S. Treasury technical explanation to the treaty.***

A Belgian company's **primary place of management and control** will be in Belgium only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial, and operational policy decision making for the company (including its direct and indirect subsidiaries) in Belgium than in any other state, and the staffs conduct more of the day-to-day activities necessary for preparing and making those decisions in Belgium than in any other state. ***Article 21(8)(f) of the treaty***. Thus, the test looks to the overall activities of the relevant persons to see where those activities are conducted. In most cases, it will be a necessary, but not a sufficient, condition that the headquarters of the company (that is, the place where the CEO and other top executives normally are based) be located in Belgium. ***U.S. Treasury technical explanation to the treaty.***

For guidance regarding the persons who are considered "executive officers and senior management employees," see ***U.S. Treasury technical explanation to the treaty.***

"Recognized stock exchange" means:

(i) the NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
(ii) the Brussels Stock Exchange;
(iii) the Irish Stock Exchange and the stock exchanges of Amsterdam, Frankfurt, Hamburg, Lisbon, London, Madrid, Milan, Paris, Toronto, and Zurich; and
(iv) any other stock exchanges agreed upon by the competent authorities. ***Article 21(8)(d) of the treaty.***

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Chart 3. Subsidiary of a Publicly Traded Company Test Under Article 21(2)(c)(ii) (LOB) of the Belgium-U.S. Tax Treaty

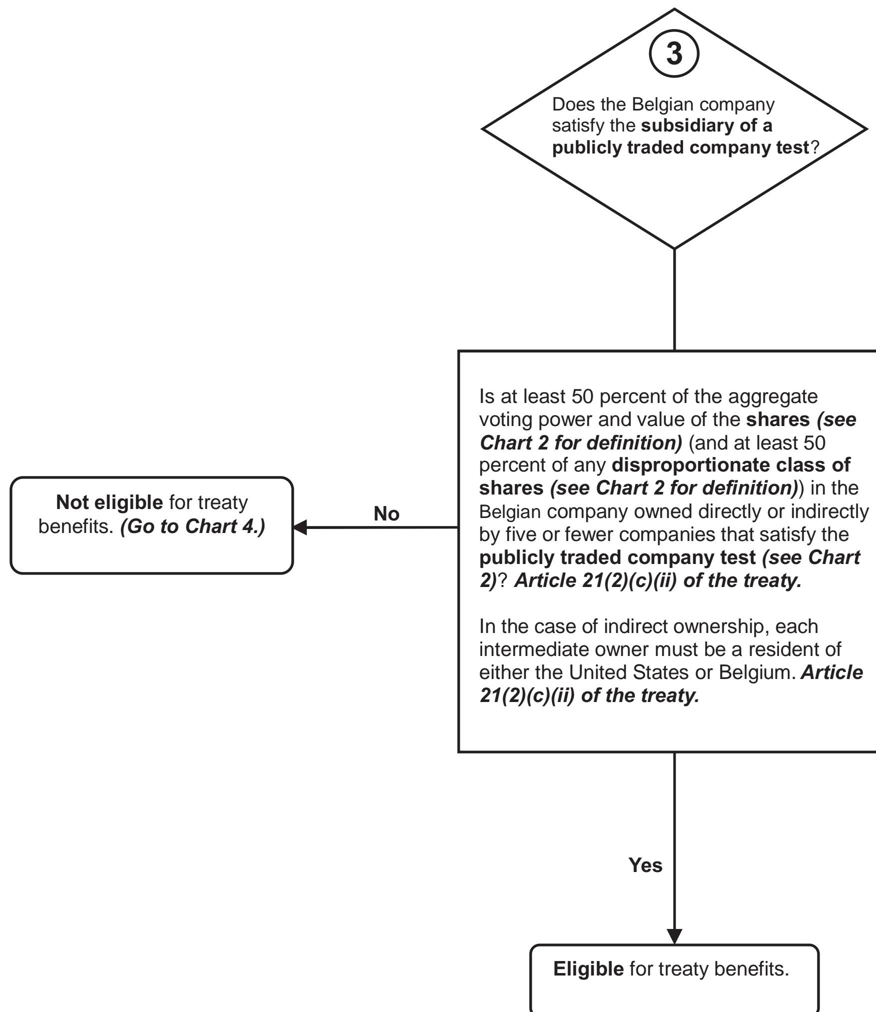

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Chart 4. Ownership/Base Erosion Test Under Article 21(2)(e) (LOB) of the Belgium-U.S. Tax Treaty

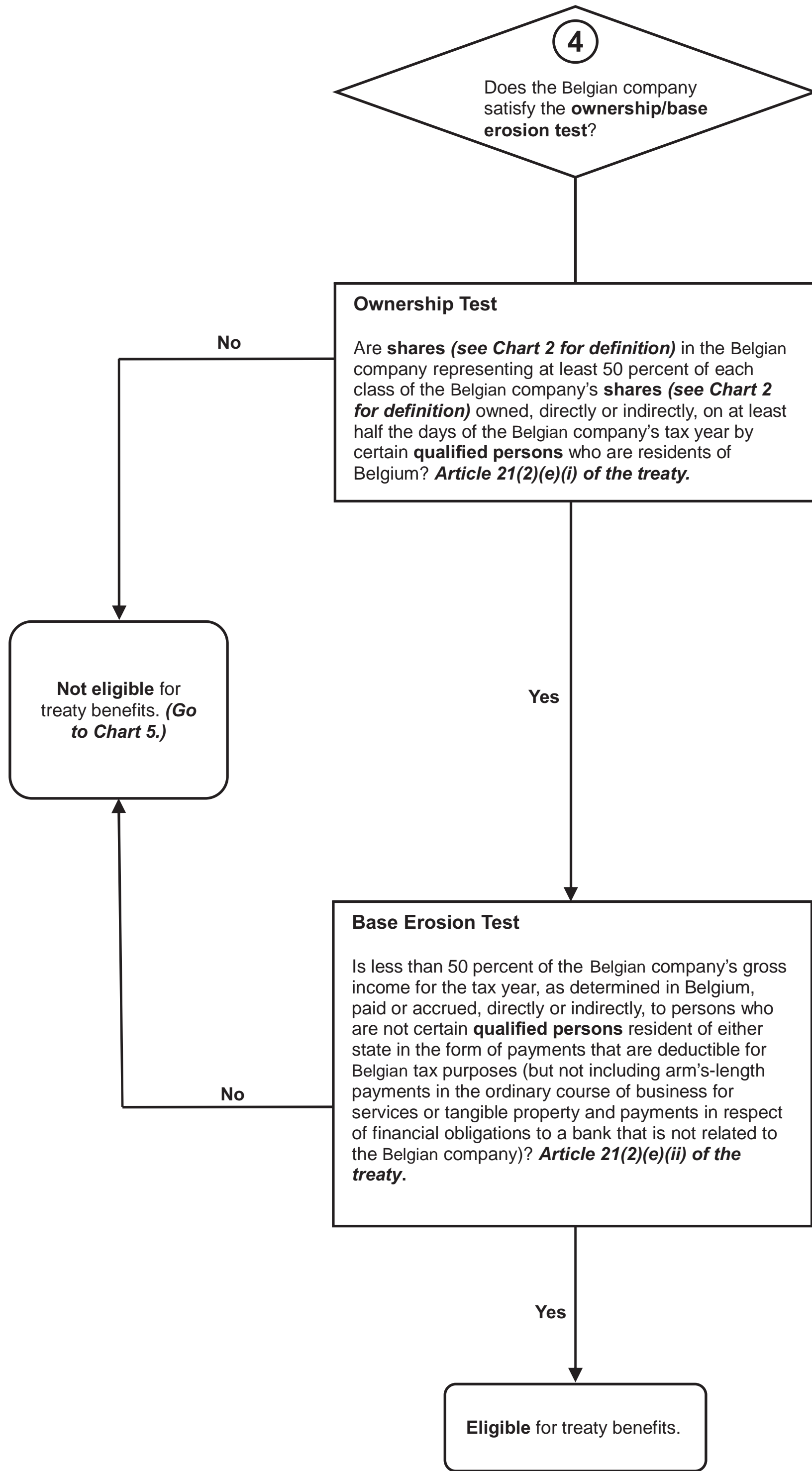

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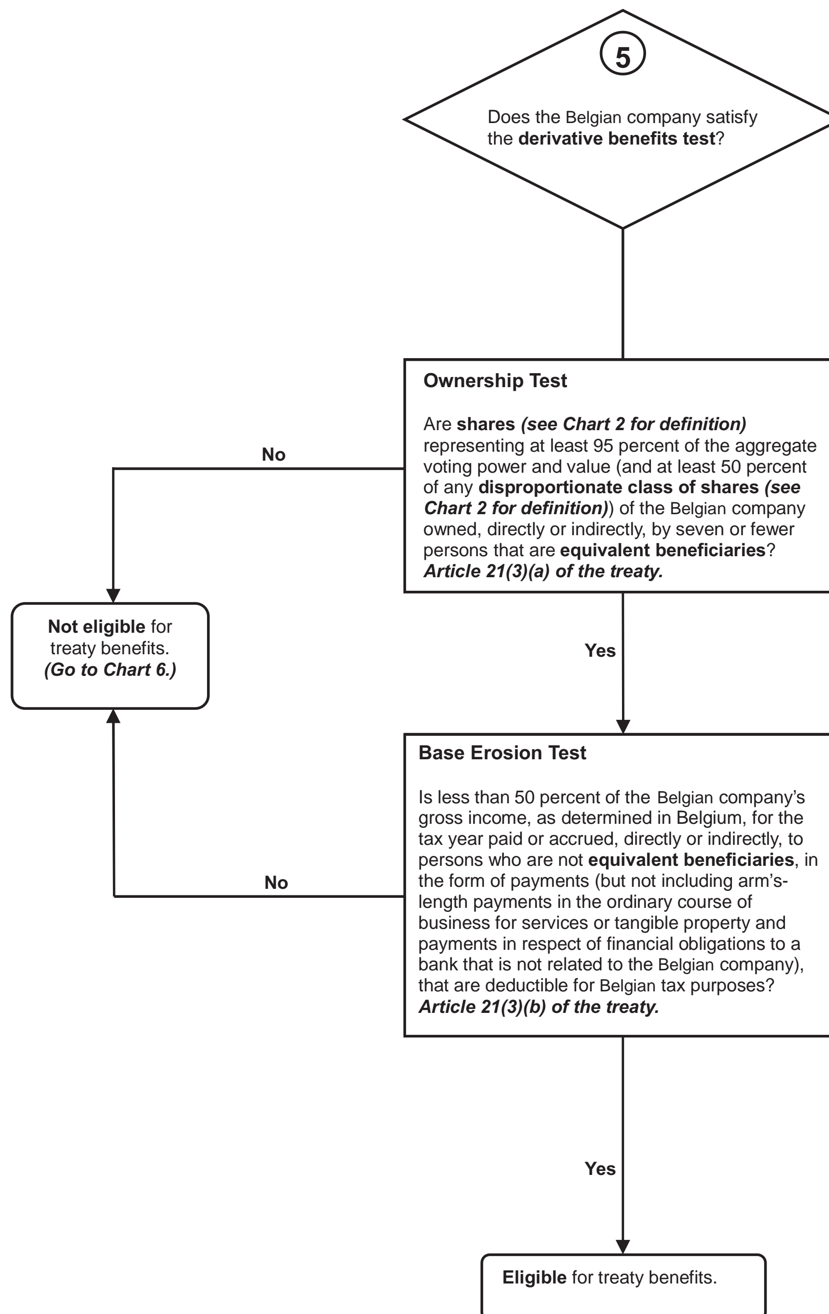
Chart 5. Derivative Benefits Test Under Article 21(3) (LOB) of the Belgium-U.S. Tax Treaty



Note: The **derivative benefits test** is potentially applicable to all benefits under the treaty, although the test is applied to individual items of gross income. ***U.S. Treasury technical explanation to the treaty.***

"**Equivalent Beneficiary"** means:

A resident of a member state of the EU or of any other EEA state or of a party to the North American Free Trade Agreement, or of Switzerland, but only if that resident:

(i)(A) would be entitled to ***all*** the benefits of a comprehensive tax treaty between any EU member state or any other EEA state or any party to NAFTA, or Switzerland and the United States under provisions analogous to the rules for certain **qualified persons** ***(see Chart 4, Base Erosion Test, for definition)***, provided that if such convention does not contain a comprehensive LOB provision, the resident would be entitled to the benefits of the treaty by reason of status as a **qualified person** ***(see Chart 4, Base Erosion Test, for definition)*** if such person were a resident of one of the states under article 4 (resident); **and**

(B) with respect to insurance premiums and to income referred to in article 10 (dividends), 11 (interest), or 12 (royalties), would be entitled under such convention to a rate of tax with respect to the item of income for which benefits are being claimed under the treaty that is at least as low as the rate applicable under the treaty; **or**

(ii) is a resident of either the United States or Belgium that is a **qualified person** ***(see Chart 4, Base Erosion Test, for definition)*** entitled to all the benefits of the treaty by reason of such status. ***Article 21(8)(g) of the treaty.***

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Chart 6. Active Trade or Business Test Under Article 21(4) (LOB) of the Belgium-U.S. Tax Treaty

(Applies only if an item of income is derived in connection with or incidental to an active trade or business in Belgium)

The term **"trade or business"** is not defined in the treaty. The United States will refer to the regulations issued under section 367(a) for the definition of the term "trade or business." In general, therefore, a trade or business will be considered to be a specific unified group of activities that constitute or could constitute an independent economic enterprise carried on for profit. Furthermore, a corporation generally will be considered to carry on a trade or business only if the officers and employees of the corporation conduct substantial managerial and operational activities. ***U.S. Treasury technical explanation to the treaty.***

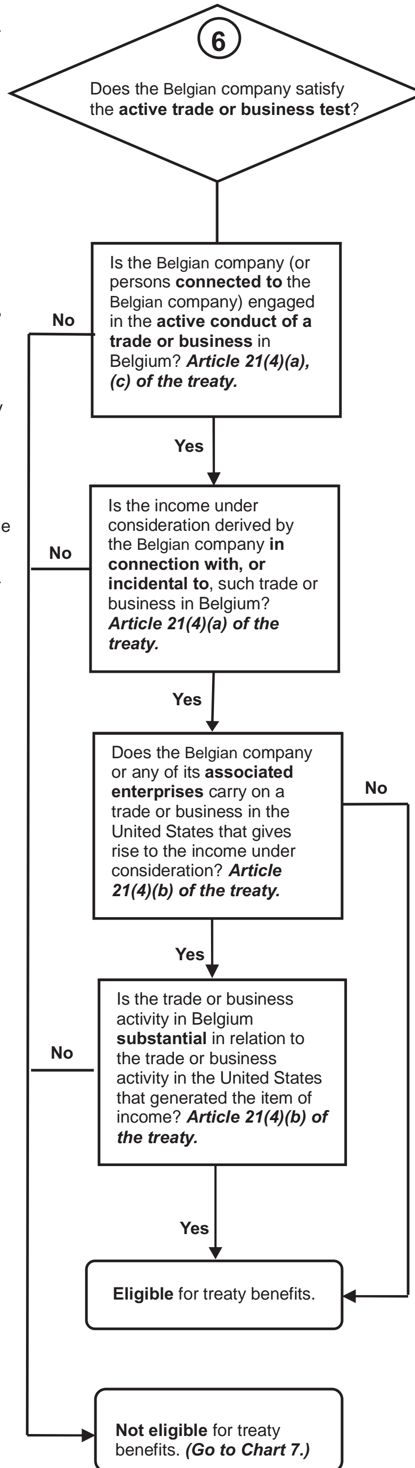
The **active conduct of a trade or business** does not include the business of making or managing investments for one's own account, unless these activities are banking, insurance, or securities activities carried on by a bank, insurance company, or registered securities dealer. ***Article 21(4)(a) of the treaty.*** Because a headquarters operation is in the business of managing investments, a company that functions solely as a headquarters company will not be considered to be engaged in an active trade or business for purposes of the **active trade or business test.** ***U.S. Treasury technical explanation to the treaty.***

An item of income is derived **"in connection with"** a trade or business if the income-producing activity in the source state (in this case, the United States) is a line of business that "forms a part of" or is "complementary" to the trade or business conducted in Belgium by the income recipient. ***U.S. Treasury technical explanation to the treaty.***

A business activity generally will be considered to form a part of a business activity conducted in the source state if the two activities involve the design, manufacture, or sale of the same products or type of products, or the provision of similar services. The line of business in the state of residence may be upstream, downstream, or parallel to the activity conducted in the source state. Thus, the line of business may provide inputs for a manufacturing process that occurs in the source state, may sell the output of that manufacturing process, or may sell the same sorts of products that are being sold by the trade or business carried on in the source state. ***U.S. Treasury technical explanation to the treaty.***

For two activities to be considered "complementary," the activities need not relate to the same types of products or services. They should, however, be part of the same overall industry and be related in the sense that the success or failure of one activity will tend to result in the success or failure of the other. ***U.S. Treasury technical explanation to the treaty.***

When more than one **trade or business** is conducted in the source state (in this case the United States) and only one of the **trades or businesses** forms a part of or is complementary to a **trade or business** conducted in the state of residence (in this case Belgium), it is necessary to identify the **trade or business** to which an item of income is attributable. Royalties generally will be considered to be derived **in connection with** the **trade or business** to which the underlying intangible property is attributable. Dividends will be deemed to be derived first out of earnings and profits of the treaty-benefited **trade or business**, and then out of other earnings and profits. Interest income may be allocated under any reasonable method consistently applied. A method that conforms to U.S. principles for expense allocation will be considered a reasonable method. ***U.S. Treasury technical explanation to the treaty.***



An item of income derived from the source state is **"incidental to"** the trade or business carried on in the state of residence if production of the item facilitates the conduct of the trade or business in the state of residence. An example of incidental income is the temporary investment of working capital of a person in the state of residence in securities issued by persons in the source state. ***U.S. Treasury technical explanation to the treaty.***

A Belgian company is **associated** with an **enterprise** of the United States if it participates directly or indirectly in the management, control, or capital of the U.S. enterprise or if any of the same persons participate directly or indirectly in the management, control, or capital of the Belgian company and the U.S. enterprise. ***Article 9(1) of the treaty.***

A person is **"connected to"** another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate voting power and at least 50 percent of the aggregate value of the **shares** ***(see Chart 2 for definition)*** in the company or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate voting power and at least 50 percent of the aggregate value of the **shares** ***(see Chart 2 for definition)*** in the company or of the beneficial equity interest in the company) in each person. In any case, a person is considered **connected to** another person if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons. ***Article 21(4)(c) of the treaty.***

Whether the Belgian company's trade or business (or the trade or business of a person **connected to** the Belgian company) is **substantial** in relation to the trade or business activity in the United States that generated the item of income is determined based upon all the facts and circumstances and takes into account: (i) the comparative sizes of the trades or businesses in each state; (ii) the nature of the activities performed in each state; and (iii) the relative contributions made to that trade or business in each state. In any case, in making each determination or comparison, due regard will be given to the relative sizes of the U.S. and Belgian economies. The determination of substantiality is made separately for each item of income derived from the source state. It therefore is possible that a person would be entitled to the benefits of the treaty with respect to one item of income but not with respect to another. If a resident of a state is entitled to treaty benefits with respect to a particular item of income under the **active trade or business test**, the resident is entitled to all benefits of the treaty insofar as they affect the taxation of that item of income in the source state. ***U.S. Treasury technical explanation to the treaty.***

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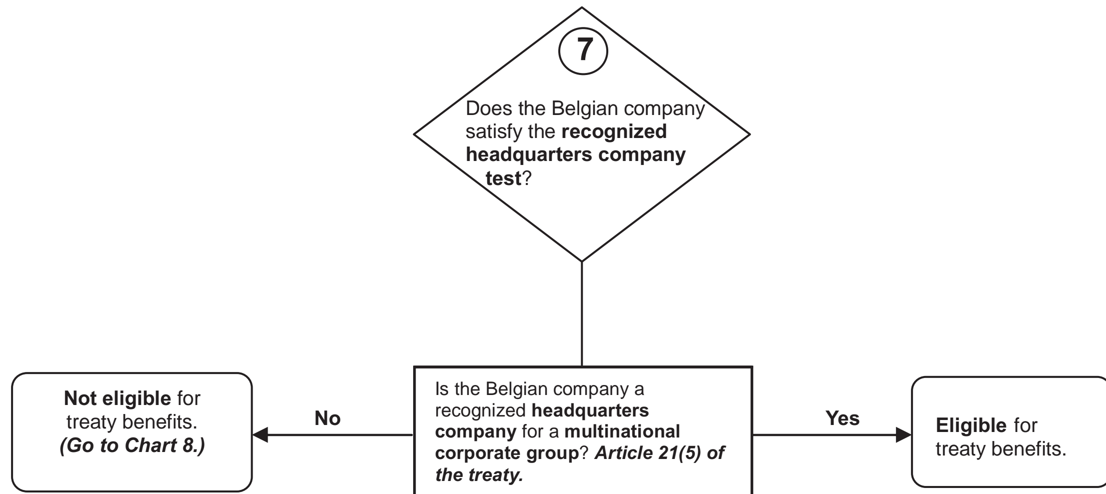
Chart 7. Headquarters Company Test Under Article 21(5) (LOB) of the Belgium-U.S. Tax Treaty



A **multinational corporate group** includes all corporations that the **headquarters company** supervises and excludes affiliated corporations not supervised by the **headquarters company**. The **headquarters company** does not have to own shares in the companies that it supervises. ***U.S. Treasury technical explanation to the treaty.***

A Belgian company will be considered a recognized **headquarters company** only if**:**

1) it provides a substantial portion of the overall supervision and administration of the group (e.g., pricing, marketing, internal auditing, internal communications, and management), which may include, but cannot be principally, group financing;
2) the corporate group consists of companies that are resident in, and engaged in an active business in, at least five countries, and the business activities carried on in each of the five countries (or five groupings of countries) generate at least 10 percent of the gross income of the group;
3) the business activities carried on in any one country other than Belgium generate less than 50 percent of the gross income of the group;
4) no more than 25 percent of its gross income is derived from the United States;
5) it has, and exercises, independent discretionary authority to carry out the functions referred to in subparagraph 1), above;
6) it is subject to the same income taxation rules in Belgium as other Belgian company residents; and
7) the income derived in the United States either is derived **in connection with** ***(see Chart 6 for definition)*****,** or is **incidental to** ***(see Chart 6 for definition)***, the active business referred to in subparagraph 2), above.

Article 21(5)(a)-(g) of the treaty.

If the gross income requirements of subparagraphs 2), 3), or 4) above are not fulfilled, they will be deemed to be fulfilled if the required ratios are met when averaging the gross income of the preceding four years. ***Article 21(5) of the treaty.***

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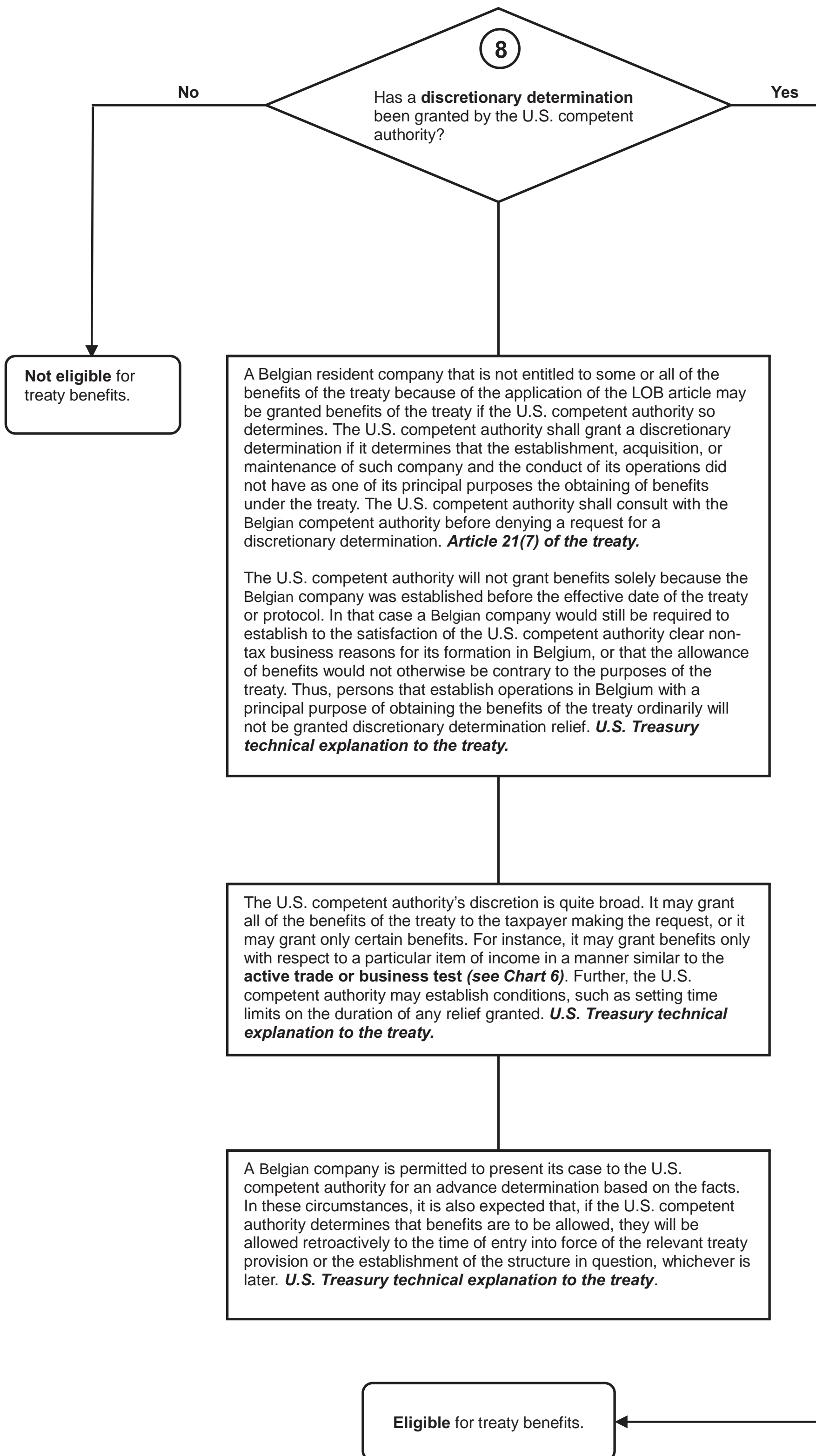
Chart 8. Discretionary Determination by U.S. Competent Authority Under Article 21(7) (LOB) of the Belgium-U.S. Tax Treaty



Requesting competent authority assistance — A taxpayer may request the assistance of the U.S. competent authority under Rev. Proc. 2006-54. The U.S. competent authority may determine in its own discretion that the taxpayer qualifies for certain benefits under the LOB article of the treaty.

There is a US $27,500 user fee for requesting a **discretionary determination** under the LOB article. If a request is submitted for more than one entity, a separate user fee is charged for each entity. **Rev. Proc. 2006-54, section 14.2, as amended by I.R. 2012-38.**

The **U.S. competent authority** is the Secretary of the Treasury or his delegate. ***Article 3(1)(g)(ii) of the treaty.***

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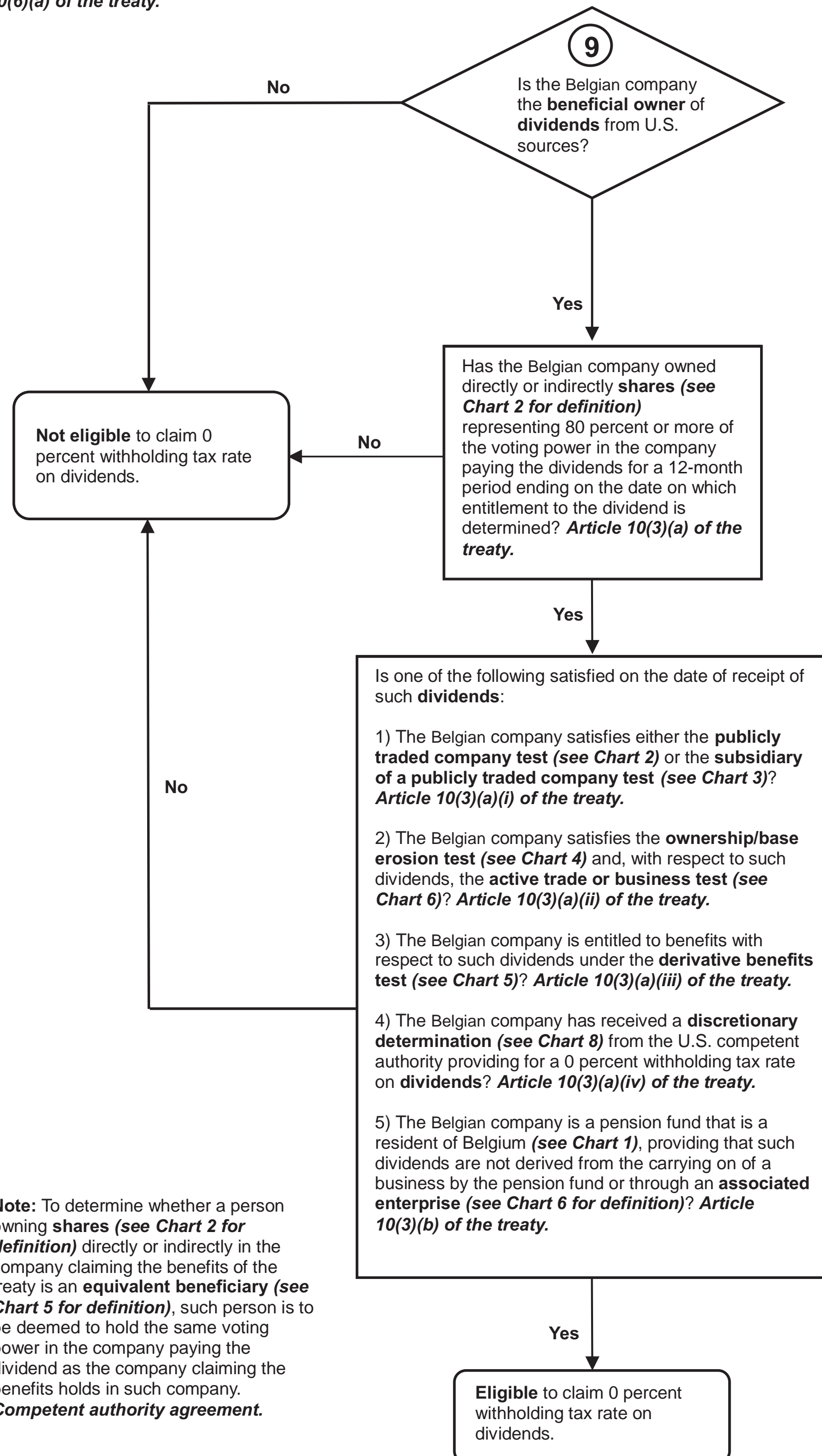
Chart 9. Eligibility for 0 Percent Withholding Tax Rate on Dividends Under Article 10(3) of the Belgium-U.S. Tax Treaty



The term **"beneficial owner"** is not defined in the treaty, and is, therefore, defined as under the internal law of the country imposing the tax (here, the United States) unless the context otherwise requires or the competent authorities agree to a common meaning under the provisions of article 24 (mutual agreement procedure). ***Article 3(2) of the treaty and U.S. Treasury technical explanation to the treaty.*** The **beneficial owner** of the dividend for purposes of article 10 (dividends) is the person to which the dividend income is attributable for tax purposes under the laws of the United States. Thus, if a dividend paid by a U.S. corporation is received by a nominee or agent that is a resident of Belgium on behalf of a person that is not a resident of Belgium, the dividend is not entitled to the benefits of article 10 (dividends). However, a dividend received by a nominee on behalf of a resident of Belgium would be entitled to treaty benefits. ***U.S. Treasury technical explanation to the treaty.***

The term **"dividends"** means income from **shares** ***(see Chart 2 for definition)*** or other rights, not being debt-claims, participating in profits, as well as income that is subjected to the same taxation treatment as income from **shares** ***(see Chart 2 for definition)*** under the laws of the state of which the payer is a resident (in this case, the United States). ***Article 10(7) of the treaty.***

Dividends are defined "broadly and flexibly." The definition is intended to cover all arrangements that yield a return on an equity investment in a corporation as determined under the tax law of the source state (in this case, the United States), as well as arrangements that might be developed in the future. The term **"dividends"** includes income from **shares** ***(see Chart 2 for definition)***, or other corporate rights that are not treated as debt under the law of the source state, that participate in the profits of the company. The term also includes income that is subjected to the same tax treatment as income from **shares** ***(see Chart 2 for definition)*** by the law of the source state. Thus, a constructive dividend that results from a non-arm's-length transaction between a corporation and a related party is a dividend. In the case of the United States the term **dividend** includes amounts treated as a dividend under U.S. law upon the sale or redemption of shares or upon a transfer of shares in a reorganization. *See, e.g.,* Rev. Rul. 92-85, 1992-2 C.B. 69 (sale of foreign subsidiary's stock to U.S. sister company is a deemed dividend to extent of the subsidiary's and sister company's earnings and profits). Further, a distribution from a U.S. publicly traded limited partnership, which is taxed as a corporation under U.S. law, is a dividend for purposes of article 10 (dividends). However, a distribution by a limited liability company is not taxable by the United States under article 10 (dividends), provided that the LLC is not characterized as an association taxable as a corporation under U.S. law. Finally, a payment denominated as interest that is made by a thinly capitalized corporation may be treated as a dividend to the extent the debt is recharacterized as equity under the laws of the source state. ***U.S. Treasury technical explanation to the treaty.***

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