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# Transfer Pricing 2024

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**Belgium: Law & Practice and Trends & Developments**
Aldo Engels, Emile Bauwens, Emma Parduyns
and Vincenzo Vilardi
Loyens & Loeff

# BELGIUM

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## Law and Practice

**Contributed by:**
Aldo Engels, Emile Bauwens, Emma Parduyns and Vincenzo Vilardi
**Loyens & Loeff**

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## Authors

**Aldo Engels** is a member of Loyens & Loeff's international tax services practice group and of the transfer pricing team in Belgium. He is a counsel in the firm's Brussels office, and advises on matters related to corporate tax law and international tax law, with a focus on transfer pricing. His transfer pricing practice includes strategic advice, documentation, negotiations with tax authorities and dispute resolution. He advises on the setting up and conversion of business models, restructurings, procurement models, PE issues, and transactions involving intangibles. He has a great passion for intra-group financing, including analysing/modelling appropriate financing structures, loan pricing, cash pool models and real estate financing.

**Emile Bauwens** is a member of Loyens & Loeff's international tax services practice group and of the transfer pricing team in the firm's Brussels office. He advises on matters related to corporate tax law, international tax law and transfer pricing. His counsel work includes strategic advice, negotiations with tax authorities and dispute resolution. He advises on the setting up and conversion of business models, restructurings, intra-group financing and M&A transactions.

**Emma Parduyns** is a member of the international tax services practice group and of the transfer pricing team in Loyens & Loeff's Brussels office. She advises on matters related to national and international corporate tax law, and developed a keen interest in transfer pricing by advising clients on financial and operational transactions. Her counsel work includes strategic advice, negotiations with tax authorities, compliance with documentation obligations and dispute resolution.

**Vincenzo Vilardi** is a member of Loyens & Loeff's international tax services practice group and of the transfer pricing team. He is an associate in the firm's Brussels office, and advises on matters related to corporate and international tax law, as well as transfer pricing and all relevant tax matters related to investment funds. He has a broad interest in operational transfer pricing and the transfer pricing aspects of financial transactions. His counsel work in transfer pricing includes strategic advice, documentation, negotiations with tax authorities and dispute resolution.

## Loyens & Loeff

Tervurenlaan 2
1040 Etterbeek
Belgium

Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
Email: info.brussels@loyensloeff.com
Web: www.loyensloeff.com

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# 1. Rules Governing Transfer Pricing

## 1.1 Statutes and Regulations

The Belgian legal provisions of particular relevance to transfer pricing are Articles 26, 79, 185 and 206/3 of the Belgian Income Tax Code 1992 (ITC).

- Article 26 ITC provides that the abnormal or benevolent advantages granted by a Belgian taxpayer to a non-Belgian company or establishment should be included in the taxpayer's taxable basis when granted to (among others) a non-resident related enterprise.
- Articles 79 and 206/3 ITC provide for an anti-abuse rule disallowing certain deductions that would have applied to that part of the result that arises from abnormal or benevolent advantages received by a Belgian taxpayer from a related enterprise.
- Article 185, Section 2(a) ITC governs the recognition of profits on cross-border commercial and financial transactions for Belgian taxpayers that are part of multinational groups. Any profits not recognised by an arm's length cross-border transaction are added to the taxpayer's taxable profit. Article 185 ITC is considered the codification of the OECD's arm's length principle in Belgian tax law.
- Article 185, Section 2(b) ITC allows a corresponding downwards profit adjustment for corporate income tax purposes where profits are included in the taxable basis of a related foreign company located in a treaty jurisdiction.
- Articles 321/1 to 321/7 ITC provide the obligation for taxpayers to file transfer pricing documentation if certain thresholds are exceeded (country-by-country reporting, master file and local file).

In February 2020, the Belgian Tax Administration (BTA) issued a circular letter on transfer pricing (Circ 2020/C/35) (the "TP Circular"). In the TP Circular, the BTA confirms adhering to the general principles included in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (the "OECD Guidelines"). The TP Circular:

- provides an overview of the different chapters of the OECD Guidelines (including guidance on financial transactions);
- provides guidance on the allocation of profits to permanent establishments (PEs) (based on the Authorised OECD Approach as laid down in the 2010 report on the attribution of profits to PEs); and
- includes the BTA's interpretation and preference on specific topics.

Finally, the following are also relevant in the context of transfer pricing:

- Article 49 ITC (deductibility of expenses);
- Article 54 ITC (deductibility of interest, royalties and service fees);
- Article 55 ITC (deductibility of market-based interest);
- Article 198, Section 1, 10° (deductibility of payments to tax havens in the context of "actual and sincere transactions"); and
- Article 344, Section 2 ITC (non-opposability of transfer of assets to an affiliated company established in a tax haven).

Since the previous CFC-rule proved to be of little relevance in practice, Belgium recently shifted its CFC-legislation from Model B (transactional approach) to Model A (entity approach). The ATAD obliged member states to implement a CFC rule and left member states the option to either:

- include non-distributed specific types of passive income in the taxable basis of the controlling taxpayer (Model A); or
- include non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage (Model B).

Model B implied that CFC income could only be taxed in Belgium if it is attributable to the "significant people" functions carried out by the Belgian controlling taxpayer (assessment based on the arm's length principle). By switching to Model A, the Belgian legislature disconnects the CFC-assessment from the arm's length principle.

### 1.2 Current Regime and Recent Changes

Years before the Belgian codification of the internationally accepted arm's length principle in Article 185 Section 2, ITC (in 2004), the BTA traditionally applied Articles 26, 79 and 206/3 ITC as a legal basis for performing transfer pricing corrections based on the principle of "abnormal or benevolent advantages". Although said notion was based on the arm's length principle, Belgian case law traditionally applied a more subjective approach to the notion of "abnormal or benevolent advantages", accepting that providing assistance to group entities in financial difficulties may under certain conditions not trigger the granting of an abnormal advantage. By taking the group relationship into account, Belgian case law went further than the "separate entity approach" followed by the OECD in the application of the internationally accepted arm's length standard.

Article 185 Section 2 ITC was introduced in 2004 to facilitate the interpretation of the notion of "abnormal or benevolent advantage" and thus to increase legal certainty for taxpayers. At the time, this provision was only applicable via tax rulings or mutual agreement procedures.

Following BEPS Action 13, Belgium introduced transfer pricing documentation obligations from 1 January 2016. Depending on certain thresholds, Belgian taxpayers are obliged to submit a country-by-country report (or notification), a master file and a local file with the BTA.

In addition to "non-public" CbCR obligations, the Law of 8 January 2024 amended the Belgian Code of Companies and Associations with respect to the disclosure of income tax information by certain companies (implementing EUR Directive 2021/2101 and commonly referred to as "public CbCR"). This legislation requires companies that are part of MNE groups with a total consolidated turnover of more than EUR750 million in each of the last two consecutive financial years to publicly disclose information regarding the income taxes paid and other tax-related matters, such as a breakdown of profits, revenues and employees per country. The public CbCR applies to financial years starting on or after 22 June 2024. For most Belgian entities, this implies that the new requirements will apply for the financial year starting 1 January 2025.

## 2. Definition of Control/Related Parties

### 2.1 Application of Transfer Pricing Rules

Article 26 ITC provides that when a Belgian company grants an abnormal or benevolent advantage to a non-Belgian company or establishment with which the Belgian taxpayer has a "direct or indirect relationship of interdependence", the advantage should be included in the Belgian taxpayer's taxable basis. The notion of "direct or indirect relationship of interdependence" has a broader scope than "control" under Belgian company law. Whether or not two entities are in a relationship of interdependence is a question of fact. This may notably be the case when:

- the boards of directors of two entities consist in majority of the same persons;
- one entity depends on the other for the supply of raw materials; or
- one entity is the other entity's sole customer.

As regards Article 185 Section 2 ITC, a circular letter dated 4 July 2006 refers to the wording used in Article 1:20 Code of Companies and Associations (CCA), according to which "companies associated with a company" means:

- a) the companies over which said company exercises a power of control;
- b) the companies which exercise a power of control over said company;
- c) the companies with which said company forms a consortium; and
- d) the other companies which, to the knowledge of their governing bodies, are under the control of the companies referred to in a), b) and c).

Under Section 1:14(1) of the CCA, "control" is the ability to decide the appointment of the majority of the directors or the course of corporate policy, whether de facto or de jure.

For transfer pricing documentation requirements, the term "group" is defined as a collection of companies that are related by ownership or control in such a way that they are either required by prevailing accounting rules to prepare consolidated financial statements for financial reporting purposes, or would be required to do so if equity interests in any of the companies were traded on a regulated market.

## 3. Methods and Method Selection and Application

### 3.1 Transfer Pricing Methods

Belgian law does not list specific transfer pricing methods that taxpayers can use.

The rules set forth in the OECD Guidelines apply to the use of transfer pricing methods within Belgium. Indeed, with reference to the OECD Guidelines, the TP Circular states that the taxpayer is free to choose a transfer pricing method, provided that the method chosen results in an arm's length outcome for the specific transaction.

### 3.2 Unspecified Methods

Belgian law does not specify which methods a taxpayer should use. Hence, a taxpayer is free to choose its preferred method to set prices, provided that those prices are consistent with the arm's length principle. In practice, taxpayers generally use one of the five methods listed in the OECD Guidelines, although other methods may also be accepted depending on the case (eg, valuation techniques for transactions involving intangibles).

### 3.3 Hierarchy of Methods

Neither the law nor the TP Circular provide for a hierarchy of methods.

According to the TP Circular, where multiple methods can be applied in an equally reliable manner, a traditional method is preferable to a transactional profit method. Moreover, if the comparable uncontrolled price (CUP) method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is preferred. This position is aligned with the OECD Guidelines.

### 3.4 Ranges and Statistical Measures

Belgium does not require the use of ranges or statistical measures.

In the TP Circular, the BTA recognises that transfer pricing is not an exact science, and a transfer pricing analysis will often result in a range of values in which the applicable price is situated. If the retained comparables are highly comparable and of equally high quality, each point within the full range is considered acceptable for the BTA. However, statistical methods can be used to increase the reliability of the results.

The BTA indicates that they favour the interquartile range (IQR) approach and will accept the result if the tested party falls within the IQR. The BTA further provides that an adjustment is needed if the result of the tested party falls outside the (IQR/full) range. Such adjustment will be made to a point within the range which is aligned with the facts and circumstances of the tested transaction. If it is not possible to designate a specific point within the range, the BTA's preference is to use the median.

### 3.5 Comparability Adjustments

Belgian law does not require applying comparability adjustments.

The position of the BTA, as reflected in the TP Circular, is aligned with the OECD Guidelines. Comparability adjustments should only be made if they improve comparability. The BTA emphasises the importance of duly documenting the purpose and reliability of an adjustment. The BTA further recognises that adjustments can be justified to account for differences in working capital between the tested party and the comparables.

## 4. Intangibles

### 4.1 Notable Rules

Belgian law does not impose notable rules specifically relating to the transfer pricing of intangibles.

The BTA generally applies the guidance included in Chapter VI of the OECD Guidelines to evaluate the arm's length character of a transaction involving intangibles. The TP Circular explicitly emphasises the importance of identifying those entities performing the so-called DEMPE functions (ie, development, enhancement, maintenance, protection and exploitation). According to the BTA, entities controlling important risks with respect to the DEMPE functions should be entitled to (part of) the overall return derived from the intangible.

According to the BTA, the most appropriate transfer pricing method for pricing transactions involving intangibles would generally be either:

- the profit split method;
- the CUP method; or
- the cost-plus method (this latter only to remunerate routine contributions – eg, development of internal accounting software).

The BTA further accepts the use of valuation techniques, such as:

- the discounted cash flows method;
- the relief from royalty method;
- the residual value method; or
- the premium profit method.

The BTA emphasises the importance of clearly documenting the reasons justifying the choice of a given method in the taxpayer's transfer pricing documentation.

### 4.2 Hard-to-Value Intangibles

Belgian law does not contain special rules regarding hard-to-value intangibles.

Where the BTA would want to make a transfer pricing correction, they would be bound by the ordinary statute of limitations (ranging between three and six years prior to the assessment year, depending on the case).

In its TP Circular, the BTA provides that in the case of hard-to-value intangibles, ex post results can be used as presumptive evidence to evaluate whether future developments or events having impacted on the ex post results could have been anticipated by the taxpayer, as well as to evaluate the reliability of the used assumptions when pricing the transaction.

Although the BTA considers that it can perform a price adjustment or impose a different payment structure if demonstrated that the assumptions were not correct or the future developments would have been taken into account when pricing the transaction, the BTA also recognises that no adjustment can be imposed by the mere fact that ex post results deviate from ex ante price arrangements.

### 4.3 Cost Sharing/Cost Contribution Arrangements

Belgium recognises cost sharing/cost contribution arrangements. No special rules are imposed. The BTA follows the OECD Guidelines in this respect.

## 5. Affirmative Adjustments

### 5.1 Rules on Affirmative Transfer Pricing Adjustments

There is no specific procedure allowing a taxpayer to perform upwards or downwards affirmative transfer pricing adjustments after filing its tax return.

Since 2018, no deduction of current year losses and deferred tax assets (eg, carry-forward tax losses) can be made on the taxable basis as adjusted as a result of a tax audit, except in relation to dividends received during the same taxable period. This applies where the BTA imposes a tax increase of (at least) 10%. Hence, a taxpayer may have an interest in spontaneously correcting its tax return and applying an upwards adjustment to its taxable basis if a transaction was not arm's length. By doing so, the taxpayer may avoid the possibility that a future adjustment upon an audit might constitute its minimum taxable basis.

A spontaneous upwards adjustment could be made in two ways depending on whether or not the tax assessment has been vested yet. As long as the tax assessment is not vested, a taxpayer could make an informal request with the competent tax service to correct its tax return. Following vesting of the tax assessment, the taxpayer can introduce a tax appeal against its own tax return within a one-year period.

A unilateral downwards adjustment is in principle not possible. The taxpayer will however be able to request a correlative downwards adjustment as a relief to double taxation following an upwards adjustment made in another country in the framework of a mutual agreement procedure under a tax treaty, the Arbitration Convention or the Dispute Resolution Directive.

## 6. Cross-Border Information Sharing

### 6.1 Sharing Taxpayer Information

Belgium has an extensive network of treaties and agreements under which various types of tax-related information are shared either automatically or on request.

As an EU member, Belgium has implemented EU Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (as repeatedly amended) providing for various exchange-of-information mechanisms, such as:

- the exchange of information on request;
- the exchange of cross-border tax rulings;
- the exchange of country-by-country reports; and
- the exchange of mandatory disclosure reports.

The BTA actively makes use of these instruments in the framework of transfer pricing audits (eg, selecting taxpayers subject to audit based on cross-border information received, making requests for exchange of information with foreign tax authorities in the framework of an audit).

Belgium has further adhered to the various OECD initiatives on the exchange of information in the framework of the BEPS project, such as the cross-border exchange of tax rulings and country-by-country reports.

## 7. Advance Pricing Agreements (APAs)

### 7.1 Programmes Allowing for Rulings Regarding Transfer Pricing

With the Law of 24 December 2002, the Belgian legislature introduced a system of advance decisions that provide legal certainty for taxpayers.

Within the existing system of advance decisions, a taxpayer can request a unilateral advance pricing agreement (APA) that specifically addresses transfer pricing (eg, the methodology used, comparables, critical assumptions regarding future events, etc). No separate procedure exists for APAs; they follow the same procedure as regular advance tax rulings.

An APA can be requested unilaterally, bilaterally or multilaterally. Typically, the request must be accompanied by a transfer pricing study that includes:

- a comparability analysis (including a functional analysis);
- a description of the transfer pricing method(s) used; and
- a transfer pricing benchmark.

The Belgian APA process is a performant system and an effective way for the taxpayer to avoid disputes with the BTA. Where a taxpayer has obtained an APA confirming the arm's length nature of its transfer pricing policy, the BTA is in principle bound by such agreement. Upon audit, the BTA may nevertheless verify whether the facts and circumstances underlying the APA have not changed and whether the transfer pricing policy confirmed in the APA has been correctly applied in practice.

The processing time for a unilateral APA application varies depending on the complexity of the file, the completeness of the information provided and the timing of submission. Nevertheless, if well prepared, it should be possible to obtain an APA within three to six months.

To obtain legal certainty in all jurisdictions affected by a particular transaction, a bilateral or multilateral APA can be requested. The number of bilateral or multilateral APA applications remains small compared to unilateral APAs. It is not possible to provide an exact timetable for the bilateral APA process as this will depend on several factors including the complexity of the case, the timely availability of information, etc. An additional factor is that a bilateral APA is a negotiation between states and timing will thus also depend on the agenda of the competent authorities and the jurisdictions concerned.

Based on statistical data, the average time to negotiate a bilateral or multilateral APA in Belgium is approximately 39 months with EU countries and 30 months with non-EU countries. While unilateral APAs are more commonly used, practice shows that the BTA also promotes bilateral or multilateral agreements and takes a co-operative stance with a view to achieving such agreements.

## 7.2 Administration of Programmes

Unilateral APA requests are handled by the Service for Advance Decisions (also known as the “Ruling Commission”), a well-functioning government body within the Federal Public Service (FPS) Finance acting autonomously from the BTA. Generally, the Ruling Commission has a co-operative attitude towards the taxpayer. The Ruling Commission is managed by a board of six leading college members, including a chairperson. Decisions are taken by a majority vote. In the case of a tie, the chairperson has a casting vote. Although decisions are taken autonomously by the Ruling Commission, other tax authorities may be consulted for advice during the ruling proceedings.

In order to examine the request as soon as possible, the Ruling Commission generally stipulates adding the following documentation to the APA request:

- identity of the parties and description of the group and its activities;
- duration of the APA;
- description of the intercompany transactions;
- details regarding the transfer pricing method;
- comparability study (if available), including a functional analysis;
- unilateral rulings concluded by the group (if any);
- the proxy of the person who filed the request;
- financial data of the concerned company; and
- references to the applicable legal provisions at hand.

Until a ruling is granted, any new information relating to the situation or transaction concerned must be added to the application.

Two phases of the unilateral APA application process can generally be distinguished: the pre-filing phase and the formal ruling application.

- In the first (and optional) phase, the formal ruling application is prepared by submitting a pre-filing application to the Ruling Commission (possible even on an anonymous basis). In this pre-filing application, the intended transaction as well as the background of the transaction are already accurately described and documented in detail. Moreover, during the pre-filing phase, consultations with the

designated team within the Ruling Commission already take place. The purpose of this phase is to come to a formal ruling request to be presented to the college.
- In the second phase, the formal ruling application is submitted to the college within the Ruling Commission, which decides on granting the ruling.

Applications are examined thoroughly, with the underlying facts as well as the assumptions being discussed through a constructive dialogue with the applicant. The applicant is expected to be fully co-operative throughout the process. The Ruling Commission can ask the opinion of the Central Income Tax Administration, but the final decision-making power remains with the Ruling Commission.

Although the BTA published some general guidance, no specific procedure for bilateral APAs has been established in Belgium. Bilateral APAs are concluded by the Belgian competent authorities (ie, the FPS Finance, General Administration of Taxes, Central Services, Service International Relations, Division Commentary). After the written request is filed by the taxpayer, essentially a discussion/negotiation between states takes place where an agreement may or may not be reached. During the negotiation process, the competent authorities may request additional information from the taxpayer. When the competent authorities reach an agreement, the decision will be signed by each competent authority involved.

## 7.3 Co-ordination Between the APA Process and Mutual Agreement Procedures

The request for a MAP must explicitly state whether the subject of the request has already been dealt with previously, in the context of a unilateral, bilateral or multilateral APA or other agreement concluded during a tax audit. If so, a copy of this APA or agreement must be handed over to the Belgian competent authority.

A taxpayer who has obtained a unilateral APA is not prevented from also submitting the aspects that were subject to the APA to the MAP. Indeed, the fact that the tax results from a unilateral APA does not, as such, allow the refusal of access to a MAP where the taxpayer considers that the taxation resulting from the APA does not comply with the applicable tax treaty.

## 7.4 Limits on Taxpayers/Transactions Eligible for an APA

All taxpayers subject to Belgian transfer pricing rules are in principle eligible for an APA. APAs may cover any (interpretative) issues and multiple issues at once (eg, transfer pricing and permanent establishments). However, an APA cannot be granted if:

- it would be inappropriate or ineffective because of the statutory or regulatory provisions referred to in the request;
- the request concerns application of any tax law concerning collection or prosecutions;
- at the time the application is filed, essential elements of the situation/transaction described are connected with a tax haven that does not co-operate with the OECD; or
- the operation or transaction described does not have economic substance in Belgium.

## 7.5 APA Application Deadlines

A unilateral APA is only valid if it is issued before the intended transactions or situations have produced effect from a tax perspective. The Ruling Commission takes the position that a situation/transaction has produced effect from a tax perspective from the moment the tax return related to the taxable period during which the situation/transaction occurred is filed. On its website, the Ruling Commission specifies that the request for a unilateral APA should be submitted at the latest by 30 November of the calendar year to which the transaction relates (or eight months before the final deadline for filing the tax return for companies who do not keep their accounts by calendar year). In practice, the Ruling Commission requires that a subsequent request for a renewal of the APA be filed at the latest three to six months before the expiry of the existing APA.

For bilateral and multilateral APAs, a roll-back is possible (see **7.8 Retroactive Effect for APAs**).

### 7.6 APA User Fees

APAs can be obtained free of cost from the Ruling Commission, the Belgian competent authority.

### 7.7 Duration of APA Cover

In general, unilateral tax rulings are valid for a maximum period of five years unless the subject of the topic allows for a different period. Following a recent policy change, transfer pricing APAs confirming the pricing of a transaction are only valid for three years (in line with the considered validity period of the underlying benchmark study).

### 7.8 Retroactive Effect for APAs

A formal roll-back is not possible in the context of unilateral APAs in Belgium.

For practical reasons, the Belgian competent authority authorises initiating a bilateral APA on the first day of the financial year, even if transactions have already taken place between the first day of the financial year and the date of filing the application, provided that the application is filed no later than on the last day of the financial year. For example, a person may submit a request for a multilateral APA on 25 July 2023 in which they ask for certainty for a period of five accounting years, namely from 1 January 2023 to 31 December 2027 (inclusive). Even though transactions have taken place between 1 January 2023 and the date of request (25 July 2023), the APA can be initiated from 1 January 2023. However, if the request is submitted on 22 March 2024, the accounting year 2023 cannot be the subject any further of the prior agreement, because the request must be submitted no later than the last day of that accounting year (in this case 31 December 2023). However, if relevant facts and circumstances are identical during previous tax years, the person may ask for a roll-back, allowing for applying the outcome of the bilateral APA for the previous years. The Belgian competent authority authorises a roll-back, but only if the applicable time limits (such as assessment periods) still permit it.

## 8. Penalties and Documentation

### 8.1 Transfer Pricing Penalties and Defences

Other than penalties for non-compliance with transfer pricing documentation filing obligations, Belgium does not impose penalties specifically applicable in the transfer pricing context. The general penalties applicable in cases of corporate income tax adjustments also apply in a transfer pricing context.

Please see **8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines** regarding the obligation to file certain transfer pricing documentation. An administrative fine may be imposed on companies in cases of non-compliance. This administrative fine ranges between EUR1,250 and EUR25,000 and may be imposed from the second infringement. If the BTA can prove bad faith on the part of the taxpayer, a fine of EUR12,500 can be imposed from the first infringement.

Other than the obligations described in **8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines**, no formal obligations are imposed by Belgian law to support the arm's length character of intercompany transactions. The burden of proof for performing a transfer pricing correction lies with the BTA. Nevertheless, in practice it is highly recommended to have supporting transfer pricing documentation for material intra-group transactions in place to mitigate the risk of discussions in this respect.

In the case of an incomplete or incorrect tax return (including a transfer pricing correction upon an audit), the tax due on the income portion corresponding to the upwards adjustment shall be augmented by a tax increase between 10% (first infringement, unless waived in specific circumstances if good faith can be proven) and 200%. To prove the good faith of the taxpayer, availing of transfer pricing documentation can be very useful. Furthermore, an administrative fine of between EUR50 and EUR1,250 may be imposed. The additional tax vested will not trigger late payment interest. If a tax increase of at least 10% is applied, no deduction of current year losses and carry-forward tax attributes can be made on the amount of the upwards adjustment as a result of a tax audit (eg, carry-forward tax losses, but excluding dividends received during the same taxable period). Hence, the amount of the correction will be the minimum taxable base. This rule does not apply where the BTA waives the application of the tax increase of at least 10% in the case of good faith.

Please refer to **13.1 Options and Requirements in Transfer Pricing Controversies**.

## 8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines

From financial year 2016, Belgian legislation requires a taxpayer to file a country-by-country report, a master file and a local file if certain thresholds are met, as follows.

- Country-by-country report – multinational enterprise groups which, for the reporting period immediately preceding the last closed reporting period, report a total consolidated revenue of at least EUR750 million in their consolidated financial statements.
- Master file and local file – any Belgian group entity which, for the financial year immediately preceding the last closed financial year, exceeds one of the following criteria, as reflected in its standalone statutory annual accounts:
  (a) a total of EUR50 million in operating and financial income, excluding non-recurring income;
  (b) a balance sheet total of EUR1 billion; or
  (c) an annual average headcount of 100 full-time equivalents.

The formats for these files are aligned with the OECD forms, except for the "Belgian local file" form which considerably deviates from the "OECD local file". The "Belgian local file" consists of:

- general business and financial information concerning the local entity; and
- financial information on intercompany transactions and transfer pricing methods.

There is, however, no strict legal obligation to also prepare and file the OECD local file report.

The local file report, as suggested by the OECD, is optional and can be attached to the Belgian local file form together with other supporting documentation such as benchmark studies. However, in practice availing of an OECD local file is recommended and generally expected by the BTA.

## 9. Alignment With OECD Transfer Pricing Guidelines

### 9.1 Alignment and Differences

Belgian law does not contain any rules deviating from the OECD Guidelines. Although not expressly stated in the law, the OECD Guidelines are generally followed in Belgian tax practice and applied by the BTA and the Ruling Commission. An exception in this respect is the Belgian local file form, which considerably deviates from the OECD local file report under Chapter V of the OECD Guidelines (see **8.2 Taxpayer Obligations Under the OECD Transfer Pricing Guidelines**).

The OECD Guidelines are consistently applied in published circulars. In the TP Circular, the BTA confirms adhering to the general principles included in the OECD Guidelines. The TP Circular provides an overview of the different chapters of the OECD Guidelines (including guidance on financial transactions) and refers extensively to several of the OECD Guidelines' paragraphs. Nevertheless, it is argued in legal doctrine that certain "clarifying positions" of the BTA in the TP Circular deviate from the OECD Guidelines (see **11.3 Unique Transfer Pricing Rules or Practices**).

Belgian case law has ruled on the position of the OECD Guidelines in Belgian practice. In two cases (case No 2016/AR/455 dated 8 June 2021 ("Uniclic"), and case No 2012/AR/2901 dated 16 September 2014 ("Beaulieu")), the Ghent Court of Appeal ruled that the OECD Guidelines are not obligatory or enforceable but are a mere recommendation. It proceeded by stating that the OECD Guidelines do contain internationally accepted principles which can be applied by the BTA as they provide sufficient guarantees in terms of objectivity and reliability.

In addition, in the 2021 case, the Court took a position on the non-retroactive application of the DEMPE concept in transfer pricing, in which it ruled that only the economical context and legal framework of the period to which the facts relate should be considered. The Court stated that a tax assessment can only be vested based on a more recent version of the OECD Guidelines if the new provisions are a mere clarification of the existing guidelines.

### 9.2 Arm's Length Principle

Belgian transfer pricing rules do not depart from the OECD's arm's length principle as laid down in Article 9 of the OECD Model Tax Convention.

In the TP Circular, the BTA endorses the arm's length principle as the internationally accepted standard for dividing profits of a multinational group between its members.

### 9.3 Impact of the Base Erosion and Profit Shifting (BEPS) Project

The OECD's BEPS project has strongly affected Belgium's transfer pricing landscape.

Belgium has adopted numerous measures resulting from or inspired by the BEPS recommendations, including the following in the field of transfer pricing.

- Belgium introduced a regime for the automatic exchange of information on tax rulings (including all arrangements concerning transfer pricing and the allocation of profits to permanent establishments) issued on or after 1 January 2017.

- Belgium introduced transfer pricing documentation and reporting requirements through country-by-country reporting and the two-tiered master file and local file as a result of the implementation of EU Directive 2016/881/EU amending EU Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (BEPS Action 13). These requirements apply for financial years starting from 1 January 2016.

Upon publication of the BEPS final reports, the Belgian Minister of Finance stated that the new OECD guidance on BEPS Actions 8–10 will be applied by the BTA in transfer pricing audits. The BTA has since referred to these documents and reports published in the framework of BEPS as part of their daily practice, and has even done so in a case evaluating a prior transaction. In this respect, the Ghent Court of Appeal (No 2016/AR/455, dated 8 June 2021 ("Uniclic")) ruled that the application of the DEMPE functions guidance for evaluating transactions entered into prior to its publication constitutes a disallowed retroactive application of the OECD Guidelines.

The Belgian TP Circular adheres to the OECD Guidelines of 2017 and includes the OECD guidance on BEPS Actions 8–10.

### 9.4 Impact of BEPS 2.0

On 14 December 2023, the Belgian legislature transposed Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise (MNE) groups and large-scale domestic groups in the Union (known as Pillar II). The law includes a co-ordinated system of rules designed to ensure that large (domestic/MNE) groups with a consolidated revenue exceeding EUR750 million for at least two of the four previous years are subject to a minimum effective tax rate of 15%. The Belgian implementation of Pillar II is applicable to financial years starting on or after 31 December 2023.

In the context of the implementation of Pillar II in Belgium, the Belgian legislature has adapted the timeframe during which the Belgian R&D tax credit can be refunded (reducing it from five to four years). This would lead to the qualification of the R&D tax credit as a "qualified refundable tax credit", which has a more favourable impact on the effective tax rate calculations under Pillar II as compared to a non-qualified refundable tax credit.

### 9.5 Entities Bearing the Risk of Another Entity's Operations

Belgium follows the OECD Guidelines in relation to risk allocation. Risk will thus be allocated to the entity performing risk control functions and having the financial capacity to bear the risk. The TP Circular provides that such entity is entitled to the residual profits after having remunerated other entities on an arm's length basis. For transactions involving intangibles, the TP Circular provides that if an entity does not control any risk regarding the development of the intangible and does not manage the financial risks, such entity should only be entitled to a risk-free return.

## 10. Relevance of the United Nations Practical Manual on Transfer Pricing

### 10.1 Impact of UN Practical Manual on Transfer Pricing

The UN Practical Manual on Transfer Pricing does not have significant impact on Belgian transfer pricing practice. To the authors' knowledge, there is no legislation, regulations, rulings or case law referring to said guidance. Belgium, being an OECD member country, follows the guidance provided by the OECD Guidelines. Belgium's tax treaties generally include a transfer pricing provision based on Article 9 of the OECD Model Convention and the OECD Guidelines are usually applied in practice to evaluate the arm's length character of transactions.

## 11. Safe Harbours or Other Unique Rules

### 11.1 Transfer Pricing Safe Harbours

Belgian law does not include safe harbours for transfer pricing purposes.

The BTA accepts the OECD's simplified approach for determining the arm's length remuneration of low value-adding intra-group services. Under said approach, the service provider can apply a profit mark-up of 5% on all costs related to the services (other than disbursements) and is subject to less detailed documentation requirements. The TP Circular explicitly clarifies which types of services may be within the scope of the simplified approach, in line with the OECD Guidelines.

### 11.2 Rules on Savings Arising From Operating in the Jurisdiction

Belgium has no specific rules governing savings that arise from operating in its jurisdiction. The TP Circular refers to the OECD Guidelines on how to deal with location savings in a transfer pricing analysis.

### 11.3 Unique Transfer Pricing Rules or Practices

Belgium does not have unique rules applicable in the transfer pricing context.

In its TP Circular, the BTA takes in the following notable positions (among others).

- If during a 12-month period a participant in a cash pool has held a given (minimum) amount as a deposit or as borrowing, such an amount can no longer be priced as a cash pool transaction, but should be priced as a loan. The reclassification of a structural cash pool deposit or borrowing in a term loan is a frequently observed topic during audits.
- According to the BTA, it is a rebuttable presumption that the cash pool leader is a mere service provider and that its remuneration could generally be determined using a cost-based approach.
- In the framework of a business restructuring of a "limited risk" entity remunerated with a transactional net margin method, the BTA considers that restructuring costs should be re-charged to the foreign group entity that made the decision to restructure and/or that benefits from the restructuring.
- According to the BTA, if the actual result of a company falls outside the range of arm's length outcomes, an adjustment should be made to the median of said range unless specific arguments are available to justify another point within the range.
- Synergies obtained through centralised procurement should be reallocated to the group and a centralised procurement company should be remunerated with a cost-plus method (unless it can be demonstrated that another method is more appropriate given the added value generated by said entity).

The Ruling Commission delivered a negative ruling on the transfer pricing consequences of a VAT refund for limited risk distributors of subsidised pharmaceutical products. This ruling reflects the position of the BTA on this specific topic, which has been the subject of controversy during recent years. The case concerned two companies subject to compensatory contributions on turnover regarding subsidised medicines, paid to the Belgian National Institute for Health and Disability Insurance (NIHDI). Both reached an agreement with the Belgian VAT administration accepting that these contributions result in a reduction of the taxable amount for VAT, entitling them to a refund of the VAT included in the contributions effectively paid to the NIHDI. The companies wished to obtain confirmation that these VAT refunds can be included in the calculation of the operating margin remuneration under the TNMM that both companies should realise for their routine distribution activities. The Ruling Commission and BTA take the position that this is not the case as only Belgian distributors are entitled to such refund, which should therefore be included in their taxable basis on top of the ordinary operating margin.

## 12. Co-ordination With Customs Valuation

### 12.1 Co-ordination Requirements Between Transfer Pricing and Customs Valuation

Belgium does not require co-ordination between transfer pricing and customs valuation.

However, transfer pricing adjustments can have a material impact on customs values when the latter are based on the company's transfer prices. The Court of Justice of the European Union recently ruled (C-529/16, dated 20 December 2017 ("Hamamatsu")) that transfer prices cannot be used to determine customs values if they are subject to retroactive transfer pricing adjustments.

The Belgian VAT authorities have not taken a position in light of this recent case law. It is nevertheless advisable for companies to obtain confirmation from the Belgian VAT authorities on the application of transfer prices on customs values in the event of retroactive transfer pricing adjustments. In this way, the possibility of overpaid customs duties not being recoverable can be avoided. In their circular letter 2018/C/9 on customs valuation, the Belgian customs authorities have set out their position regarding the acceptability of an intra-group price as customs value and amendments to the customs value based on a transfer pricing adjustment.

## 13. Controversy Process

### 13.1 Options and Requirements in Transfer Pricing Controversies

Taxpayers can challenge the results of a transfer pricing audit in administrative proceedings. If the proceedings in the administrative phase do not lead to the desired outcome, judicial proceedings can be initiated.

#### Administrative Proceedings

Taxpayers have a period of 12 months after receiving the tax assessment to initiate administrative appeal proceedings. The appeal can be lodged by filing a tax complaint, which will be examined by the General Adviser (*Adviseur-Generaal/Conseiller Général*) who issues a decision of notice. This decision is binding on the BTA, and does not allow an appeal by the BTA. In general, a decision may be expected within six months after filing the tax complaint.

It is important to note that the taxpayer can only initiate judicial proceedings after having received a (negative) decision from the regional tax service. By way of exception, a petition with the court can be lodged if the regional director does not provide its decision within six months after filing the tax complaint.

A taxpayer can file a request for mediation with the tax mediation service during the phase of administrative proceedings, meaning before the regional director has rendered its decision of notice or before initiating judicial proceedings when the administrative phase can be deemed otherwise exhausted. The tax mediation service can only facilitate mediation between the concerned parties and can only result in a non-binding proposal.

### Judicial Proceedings

Where the taxpayer wishes to initiate judicial proceedings after exhausting the administrative appeal, a petition must be filed before the court of first instance. The petition must be filed within three months after the decision of notice by the General Adviser (*Adviseur-Generaal/Conseiller Général*).

The judgment of the court of first instance is open for appeal. Appeals must be brought before a court of appeal within one month after the judgment of the court of first instance is served.

Finally, the taxpayer can bring the judgment of the court of appeal before the supreme court (Court of Cassation). This should be done within three months after the judgment of the court of appeal was served. The Court of Cassation only decides on points of law, and will not reconsider findings of facts.

## 14. Judicial Precedent

### 14.1 Judicial Precedent on Transfer Pricing

Belgian transfer pricing case law is presently still quite limited (around five to ten relatively recent cases with significant practical relevance based on the current framework), but is gaining importance. As the number of transfer pricing audits is substantially increasing, this may lead to more case law in the future.

There is nevertheless extensive established case law on the interpretation of the notion of “abnormal or benevolent advantage”. Applying said notion under Articles 26, 79 and 206/3 ITC, the Belgian courts have traditionally advocated for a subjective and pragmatic approach. Therefore, the courts have accepted more subjective arguments to determine the arm’s length character of transactions, such as the global balance at group level, the specific characteristics of the group relationship and financial difficulties of group companies. In this respect, the Belgian courts have also accepted direct and indirect set-offs based on the economic reality in a group context.

### 14.2 Significant Court Rulings

The following recent cases are of particular relevance for Belgian transfer pricing practice.

#### Ghent Court of Appeal, 8 June 2021, No 2016/AR/455 (“Uniclic”)

This case concerned the arm’s length character of a royalty-free licensing arrangement between a domestic manufacturing company acting as a licensee of patented technology (in the flooring industry) owned by a foreign related company located in Luxembourg. The BTA considered that the Belgian entity performed certain functions and managed certain risks in relation to the foreign company's licensing activity and thus contributed to the foreign company's profits resulting from the exploitation of the patents without receiving any remuneration.

The BTA claimed, with reference to a functional analysis, that the Belgian domestic company performed all DEMPE functions (ie, development, enhancement, maintenance, protection, exploitation) in respect of the patents and also managed all important risks. Accordingly, by applying Article 26 ITC, the BTA included a significant part of the foreign company's profits in the domestic company's taxable base. The Court ruled against the BTA, making several interesting statements with respect to:

- the burden of proof (ie, on the BTA);
- the working in time and the value of the OECD Guidelines (ie, mere recommendations which in principle cannot be applied with retroactive effect – see **9.1 Alignment and Differences**); and
- clarifications regarding the allocation of DEMPE functions.

### Antwerp Court of Appeal, 20 June 2017, No 2015/AR/2583 ("Philip Morris International")

This case dealt with the valuation of shares sold by a Belgian company to a Dutch related company. The BTA considered that the valuation of shares based on a discounted cash flow (DCF) method was too low and thus resulted in the Belgian seller granting an abnormal advantage to its Dutch parent company. The BTA used an alternative valuation method based on which the BTA arrived at a higher valuation.

The Court recognised that the BTA did not question the appropriateness of the DCF method as such, but merely that the discount rate used would be too high (and consequently lead to a lower price). The Court ruled that the BTA did not prove that the discount rate used would be incorrect or arbitrary. The Court concluded that when several valuation methods are available, the BTA cannot conclude that an abnormal or benevolent advantage is granted when it appears that the method applied by the taxpayer is appropriate and was correctly applied, even if an alternative valuation leads to a different result. In other words, the mere fact that the BTA arrives at a different price by applying a different method does not prove that an applied price is abnormal.

### Antwerp Court of Appeal, 5 March 2019, No 2017/AR/1640 ("Opel")

This case dealt with the remuneration method of a Belgian entity acting as a manufacturer of cars sold to a German related entity. Here, the BTA argued that the profit split method used to distribute profits between the Belgian entity and the German related company was inappropriate as the Belgian entity had to be classified as a contract manufacturer acting on behalf of the German principal, and should therefore be entitled to a cost-plus remuneration (rather than a share in the overall loss based on the profit split method).

The Court ruled that a mere reference to the OECD guidelines to prove that another transfer pricing method is more appropriate is not sufficient to meet the burden of proof that lies with the BTA with respect to transfer pricing corrections. The Court ruled against the position of the BTA as the BTA could not provide a transfer pricing study showing that, considering the Belgian entity's functional and risk profile, a different transfer pricing method should have been applied. Furthermore, the BTA could not provide a benchmarking study in support of the proposed cost-plus remuneration. A reference to arm's length remunerations accepted in previous APAs was not accepted here.

### Brussels Court of First Instance, 20 June 2023, No 2021/2991/A

In this case, the Court reviewed and assessed a Belgian company's credit rating for determining the arm's length interest rate under an intercompany loan from a related Swiss lender. The loan had a floating interest increased with a credit margin dependent on the Belgian company's credit rating, which was determined by using Standard & Poor's "Corporate Methodology" ("S&P methodology"). The BTA argued that S&P methodology was not correctly applied and considered that the credit rating of the Belgian company was understated, resulting in excessive interest payments.

The Court concluded that the BTA successfully demonstrated that the taxpayer incorrectly applied the credit rating method but failed to prove the arm's length interest underlying the tax correction. Subsequently, the Court conducted its own analysis to come up with a different credit rating, taking into account the impact of implicit group support. The Court then allowed the BTA to determine a new interest rate based on the outcome of the Court's credit rating analysis and to issue a new tax assessment on that basis. The Court hereby brings some nuance to the (high) twofold burden of proof to the BTA – ie, the BTA should demonstrate that:

- the method applied by the taxpayer does not lead to an arm's length outcome (either because the method is inappropriate or was incorrectly applied); and
- another method providing another price is appropriate.

This gives the BTA a second chance to come up with the correct price based on the Court's properly determined credit rating.

## 15. Foreign Payment Restrictions

### 15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions

Belgium does not have legislation on capital controls and does not impose other restrictions on outbound payments relating to uncontrolled transactions (except in exceptional situations, such as with UN sanctions).

Belgium levies withholding tax on payments of movable income (interest, dividends, royalties) subject to various exemptions and treaty reductions.

Belgian tax law further includes various rules denying the tax deductibility of certain outbound payments in specific situations (eg, payments to tax havens).

### 15.2 Restrictions on Outbound Payments Relating to Controlled Transactions

Belgium does not have legislation on capital controls and does not impose other restrictions on outbound payments relating to controlled transactions (except in exceptional situations, such as with UN sanctions).

As previously stated, Belgium levies withholding tax on payments of movable income (interest, dividends, royalties) subject to various exemptions and treaty reductions. Belgium also levies withholding tax on certain types of outbound service fees to related companies.

Belgian tax law also includes various rules denying the tax deductibility of certain outbound payments in specific situations (eg, payments to tax havens).

### 15.3 Effects of Other Countries' Legal Restrictions

Belgium does not have rules regarding the effects of other countries' legal restrictions.

## 16. Transparency and Confidentiality

### 16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes

Unilateral APAs are published on a no-name basis. The Ruling Commission publishes a report annually which includes a summary of the most relevant advance rulings rendered in the course of the year (including negative rulings). Bilateral APAs are currently not published by the Belgian competent authority.

The final decision of a procedure under the Dispute Resolution Directive is published in its entirety to the extent that the affected parties agree with such publication. If the affected parties or the Belgian competent authorities do not agree with such publication, an abstract of the final decision will be published.

A MAP under the Arbitration Convention will only be published if the competent authorities agree to publish the decision and if the affected persons consent thereto.

A MAP under a double tax treaty will not be published as the notes of the competent authorities and the decision are deemed to be confidential.

The outcome of transfer pricing audits is not published.

### 16.2 Use of "Secret Comparables"

Although there is no legislation or guidance prohibiting it, the BTA does not make use of "secret comparables" in transfer pricing assessments.

# Trends and Developments

**Contributed by:**
Aldo Engels, Emile Bauwens, Emma Parduyns and Vincenzo Vilardi
**Loyens & Loeff**

**Loyens & Loeff** is a leading law firm and the logical choice as a legal and tax partner for clients doing business in or from the Netherlands, Belgium, Luxembourg and Switzerland (the firm's home markets). Clients can count on personal advice from any of the firm's 1,000 advisers, based in one of its offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to its full-service practice, sector-specific experience and thorough understanding of the market, the firm's advisers comprehend exactly what clients need. The transfer pricing team consists of experts from various tax areas, offering a fully integrated approach to transfer pricing matters. Expertise ranges from advice on strategy, documentation and interaction with other tax and legal issues to negotiations with (international) tax authorities and dispute resolution. Given the ongoing actions taken by the G20, OECD (BEPS) and the EU, transfer pricing has become more important than ever, and Loyens & Loeff is well equipped to provide seamless service both on tax and on legal aspects.

## Authors

**Aldo Engels** is a member of Loyens & Loeff's international tax services practice group and of the transfer pricing team in Belgium. He is a counsel in the firm's Brussels office, and advises on matters related to corporate tax law and international tax law, with a focus on transfer pricing. His transfer pricing practice includes strategic advice, documentation, negotiations with tax authorities and dispute resolution. He advises on the setting up and conversion of business models, restructurings, procurement models, PE issues, and transactions involving intangibles. He has a great passion for intra-group financing, including analysing/modelling appropriate financing structures, loan pricing, cash pool models and real estate financing.

**Emile Bauwens** is a member of Loyens & Loeff's international tax services practice group and of the transfer pricing team in the firm's Brussels office. He advises on matters related to corporate tax law, international tax law and transfer pricing. His counsel work includes strategic advice, negotiations with tax authorities and dispute resolution. He advises on the setting up and conversion of business models, restructurings, intra-group financing and M&A transactions.

**Contributed by:** Aldo Engels, Emile Bauwens, Emma Parduyns and Vincenzo Vilardi, **Loyens & Loeff**

**Emma Parduyns** is a member of the international tax services practice group and of the transfer pricing team in Loyens & Loeff's Brussels office. She advises on matters related to national and international corporate tax law, and developed a keen interest in transfer pricing by advising clients on financial and operational transactions. Her counsel work includes strategic advice, negotiations with tax authorities, compliance with documentation obligations and dispute resolution.

**Vincenzo Vilardi** is a member of Loyens & Loeff's international tax services practice group and of the transfer pricing team. He is an associate in the firm's Brussels office, and advises on matters related to corporate and international tax law, as well as transfer pricing and all relevant tax matters related to investment funds. He has a broad interest in operational transfer pricing and the transfer pricing aspects of financial transactions. His counsel work in transfer pricing includes strategic advice, documentation, negotiations with tax authorities and dispute resolution.

## Loyens & Loeff

Tervurenlaan 2
1040 Etterbeek
Belgium

Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
Email: info.brussels@loyensloeff.com
Web: www.loyensloeff.com

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# BELGIUM TRENDS AND DEVELOPMENTS

**Contributed by:** Aldo Engels, Emile Bauwens, Emma Parduyns and Vincenzo Vilardi, **Loyens & Loeff**

## Introduction

During recent years, transfer pricing (TP) has been one of the main areas of focus of the Belgian tax administration (BTA) and of increased importance in Belgian tax practice. In 2020, the BTA issued a circular letter (the "TP Circular") providing a comprehensive overview of TP principles in the Belgian context. The TP Circular holds significant practical value and provides interesting insights into the BTA's views. In addition to a longstanding ruling practice, recent years have seen the emergence of case law that assesses existing rules in concrete situations. The latter is the consequence of the significant audit activity in Belgium by the dedicated TP cell within the BTA. This article highlights the latest developments in Belgian legislation, case law and practice.

## Legislative Updates

### *Extension of statutory assessment deadlines*

The general statute of limitations for Belgian corporate income tax is three years. This period can be extended in certain specific cases, such as fraud or following the receipt of information from foreign tax authorities. Following a recent legislative amendment, as of the assessment year 2023 (financial year starting on or after 1 January 2022) the assessment deadline for non-filing or late filing is extended to four years.

Additionally, for "semi-complex" filings from the assessment year 2023 onwards, an assessment deadline of six years applies. A corporate income tax return submitted by a taxpayer who is also obliged to submit TP documentation in Belgium (ie, local file, master file or country-by-country report) should be regarded as "semi-complex". Hence, all taxpayers subject to mandatory TP documentation filing now face an extended period of six years open for audit and reassessment."

### *Public country-by-country reporting*

On 8 January 2024, new legislation amending the Belgian Code of Companies and Associations transposed Directive 2021/2101 with respect to public country-by-country reporting ("public CbCR"). This legislation requires companies subject to CbC reporting to publicly disclose the reported information (including income taxes paid, profits and revenues per country).

The public CbCR applies to financial years starting on or after 22 June 2024. For companies whose financial year coincides with the calendar year, this implies that the new requirements will apply for the financial year starting 1 January 2025, and the first public CbCR will need to be submitted by 31 December 2026 at the latest.

### *Controlled foreign companies (CFCs)*

Since the previous CFC rule proved to be of little relevance in practice, Belgium shifted its CFC legislation from Model B (transactional approach) to Model A (entity approach) as from financial year 2023.

The EU Anti-Tax Avoidance Directive (ATAD) obliged member states to implement a CFC rule, and left member states the option to either:

- include non-distributed specific types of passive income in the taxable basis of the controlling taxpayer (Model A); or
- include non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage (Model B).

Belgium initially opted for Model B, which implied that CFC income could only be taxed in Belgium if it is attributable to the "significant people" functions carried out by the Belgian controlling taxpayer (assessment based on the arm's length principle). By shifting to Model A, the Belgian legislature disconnects the CFC assessment from the arm's length principle and chooses a stricter entity-based approach. The BTA can of course still make TP adjustments regarding non-arm's length transactions entered into by a Belgian taxpayer with a CFC based on the standard TP provisions.

### *Federal government agrees on new obligation to submit information on foreign group entities*

In January 2024, the federal government reached an agreement to impose additional information obligations for Belgian companies part of an international group. They would become subject to the obligation to submit to the BTA information originating from foreign group entities with which they entered into transactions. In this way, the BTA could obtain (among others):

- financial statements;
- organisational charts;
- tax returns;
- board reports;
- tax assessments; and
- obtained rulings.

For the BTA, this would be an alternative to requesting an exchange of information with foreign tax authorities.

At the time of this article's publication, the draft bill has not yet been definitively submitted in anticipation of an opinion from the Council of State. It remains to be assessed whether such new information obligations would meet the proportionality test.

### *Pillar II*

On 14 December 2023, the Belgian legislature transposed Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise (MNE) groups and large-scale domestic groups in the Union (known as Pillar II). The law includes a co-ordinated system of rules designed to ensure that large (domestic/MNE) groups with a consolidated revenue exceeding EUR750 million for at least two of the four previous years are subject to a minimum effective tax rate of 15%. The Belgian implementation of Pillar II is applicable to financial years starting on or after 31 December 2023.

### *Multiple TP aspects*

The law includes multiple TP aspects and provides for an adjustment of GloBE income for cross-border transactions between related entities not priced at arm's length. An adjustment is also foreseen under certain conditions with respect to transactions between entities within the same jurisdiction.

## Recent Case Law

### *Credit rating analysis to price intra-group debt*

In a recent ruling, the court of first instance of Brussels reviewed and assessed the credit rating of a Belgian company for determining the arm's length interest rate under an intercompany loan provided by a Swiss related lender. The case sheds light on how the BTA and courts approach the credit rating determination process, making use of credit rating agencies' established methodologies and considering the impact of implicit group support.

The BTA claimed that the Belgian borrower should be considered a "core entity" under the S&P Group Rating Methodology, as a result of which it should have the same credit rating as the group to which it belongs. The BTA concludes that the credit rating of the Belgian borrower was understated, resulting in excessive interest payments to the Swiss lender.

In this judgment, the court confirms that the BTA bears the burden of proof regarding demonstrating the validity of a TP adjustment. Earlier leading case law confirmed that the burden of proof is twofold – ie, the BTA should demonstrate that:

- the method applied by the taxpayer does not lead to an arm's length outcome (either because the method is inappropriate or was incorrectly applied); and
- another method providing another price is appropriate.

In the case at hand, the court concluded that the BTA successfully demonstrated that the taxpayer incorrectly assessed the borrower's creditworthiness, but that the BTA failed to establish an arm's length interest rate itself (ie, the second step in the burden of proof was not met).

The court, however, did not end its assessment there but instead conducted its own analysis to arrive at a different credit rating. Indeed, as based on the court's analysis, not all criteria of the S&P Group Rating Methodology were met (referring, inter alia, to the Belgian borrower's relative profitability and the group annual reports). The court concluded that the Belgian borrower should be classified as a "highly strategic subsidiary", of which the standalone credit rating should be one notch below the credit rating of the Group. The court then allowed the BTA to determine a new interest rate based on the outcome of the court's credit rating analysis, and to issue a new tax assessment on that basis. The court hereby brings some nuance to the (high) twofold burden of proof to the BTA, by giving the BTA a second chance to come up with the correct price based on the credit rating as determined by the court.

### *Share capital contribution*

In a ruling of the court of appeal of Brussels, it was confirmed that the taxable base of a Belgian company can be adjusted in respect of a non-arm's length benefit granted in the context of a share capital contribution to which the company was not legally a party. The case concerned a capital increase by a Luxembourg grandparent through the contribution of a receivable to its Belgian indirect subsidiary. The court decided that the Belgian parent company granted a non-arm's length benefit to its Luxembourg parent, as it agreed to a capital increase at a price per share well below the market value thereof. It stated that as a result, the Belgian parent's wealth decreased through the dilution of its participation in its Belgian subsidiary and the Luxembourg grandparent's wealth increased as it acquired a participation at a value exceeding that of the contributed receivable. Based on the foregoing, the court concluded that the transfer of value from the Belgian parent to the Luxembourg grandparent constitutes a non-arm's length benefit to be added to the Belgian parent's taxable basis.

### *Impact of "cash tax for audit adjustments"*

A TP adjustment in Belgium can result in an unexpected effective tax cost or "cash tax", regardless of the taxpayer's tax situation in the year in which the adjustment occurs (eg, loss). Indeed, as from financial year 2018, upward (TP) adjustments accompanied by a tax increase of at least 10% constitute a minimum taxable base against which the taxpayer cannot offset losses or other tax attributes. This 10% tax increase applies automatically in the case of a violation of a provision of the Belgian Income Tax Code. Nevertheless, the BTA may waive a tax increase in the absence of bad faith. The BTA has discretionary authority in this matter. Therefore, the taxpayer has an interest in actively co-operating with the BTA and demonstrating good faith in the context of a TP audit.

Recent case law confirmed that a tax increase of 10% in certain cases may have a penal character. In such cases, the court has the power to reduce the tax increase if it would be disproportionate. In assessing disproportionality, case law also considers the impact of the deduction limitation as a result of the "cash tax for audit adjustments" principle.

### *DEMPE approach*

A recent ruling concerned a Belgian company that paid a 12.5% royalty on turnover for the licensing of a brand to a related Luxembourg company. According to the BTA, the Luxembourg licensor did not perform any DEMPE functions relating to the brand and should therefore only be entitled to a cost-plus return. The court rejected this approach and considered the tax assessment as arbitrary. The court notably considered that a tax assessment cannot be solely based on OECD guidelines as these are not mandatory law. In addition, the tax assessments related to financial years 2015 and 2016 – ie, the years prior to the publication of the 2017 OECD Guidelines incorporating the DEMPE concept (prohibition of retroactive application of new versions of the OECD Guidelines).

Finally, inspired by the EU Amazon case, the court rejected the position that the Luxembourg licensor was merely acting as a passive intellectual property (IP) owner, as, according to the court, by licensing its IP the licensor indeed actively exploits the IP and should receive a market-based consideration in return.

## Noteworthy Rulings

### *Ruling on hard-to-value intangibles*

The Ruling Commission rendered a ruling about the licensing of IP which is still in a developmental phase and qualifying as a hard-to-value intangible (HTVI) according to the OECD Guidelines and the TP Circular.

The ruling applicant performed a provisional IP valuation by using the discounted cash flows approach based on forecasted cash flows derived from the use of the IP by the licensee. A price adjustment mechanism was factored in, providing for a new valuation based on actuals and updated forecasts following the first year of commercialisation of the IP. If the newly calculated value deviates by more than 20% from the originally agreed price, a retroactive price adjustment will take place.

The Ruling Commission confirmed this approach and agreed that the IP would no longer qualify as an HTVI following the first year of exploitation.

### *Ruling on the impact of VAT refunds on limited risk distributors of subsidised pharmaceutical products*

The Ruling Commission issued a negative ruling regarding the treatment of certain VAT refunds in the TNMM calculation method for a limited risk distributor (LRD) of subsidised medicines. This ruling reflects the position of the BTA on this specific topic, which has been the subject of controversy during recent years. The case concerned two companies subject to compensatory contributions on turnover regarding subsidised medicines, paid to the Belgian National Institute for Health and Disability Insurance (NIHDI). Both reached an agreement with the Belgian VAT administration accepting that these contributions result in a reduction of the taxable amount for VAT, entitling them to a refund of the VAT included in the contributions effectively paid to the NIHDI. The companies wished to obtain confirmation that these VAT refunds can be included in the calculation of the operating margin remuneration under the TNMM that both companies should realise for their routine distribution activities.

The Ruling Commission delivered a negative decision and stated that the refund of Belgian VAT on RIZIV contributions should not be included in the calculation of the remuneration for routine distribution activities. Based on this position, the income from the VAT refunds is economically allocated to the LRD. This is in contrast to the costs (eg, contributions to the NIHDI and non-deductible VAT costs) which are economically borne by the foreign principal.

The Ruling Commission argued that in practice the Belgian LRD will pay the Belgian VAT directly via its own VAT return and will be the only party entitled to a VAT refund. The Ruling Commission further stated that the Belgian VAT can only be refunded to the party that originally remitted it to the Belgian State, and that a foreign principal does not dispose of a VAT taxable amount that can be revised.

### *Rulings on zero-profit allocation to Belgian permanent establishments*

Various rulings have been rendered in cases where a foreign company availed of a Belgian permanent establishment owing to the activities performed by a third party or associated Belgian company in Belgium. The activities performed include, among others, certain services related to inventory management or sales support activities performed on behalf of the foreign entity.

In said rulings, the Ruling Commission confirmed that if the Belgian company receives an arm's length remuneration for the activities performed (which is always the case if it is a third party), no taxable profit should be allocated to the Belgian permanent establishment of the foreign entity. Indeed, in such case, the functions allocable to the permanent establishment are already remunerated at the level of the Belgian company.

## Audit Practice

### *TP cell within the BTA*

The BTA has a dedicated TP unit, which initiated a new wave of TP audits in 2024. In recent years, there has been a noticeable increase in both the number of conducted TP audits and the number of specialised TP auditors within the BTA's TP unit. In addition, specially trained officials within the Large Enterprises division and the Special Tax Inspection conduct TP audits. This creates a climate of thorough investigation and enforcement that is also observed in other countries.

Unlike previous circulars, the TP Circular does not provide specific indications regarding the cases in which TP audits are most likely. Companies are typically selected through an internal data mining process based on a risk assessment analysis, the indicators of which remain confidential.

### *Information request and pre-audit meeting*

A TP audit typically begins with a standard broad questionnaire, consisting of around 30 questions and regarding (inter alia) the Belgian company's:

- organisational structure;
- supply chain;
- segmented P&Ls per business units;
- functional and risk profile;
- financial transactions; and
- transactions involving intangibles.

A recently observed trend is that the BTA's TP unit sometimes opts for a more customised questionnaire based on available information, or immediately sends a request for a so-called pre-audit meeting. Such a meeting allows the BTA to gain initial insights into how the Belgian company operates within the group and its applied TP policy. Even upon receipt of a questionnaire, the taxpayer can usually request a pre-audit meeting before responding in writing, which allows for discussing the questions orally and delineating the parameters of the audit.

### *Focus on certain topics during audit*

Certain topics are frequently and thoroughly investigated during audits. For instance, the BTA tends to carefully review (inter alia):

- the reconciliation of the TP policy with the annual accounts;
- the alignment of the applied TP model with the functional profile;
- the origin of losses;
- the allocation of synergies related to procurement activities;
- the DEMPE functions in relation to IP; and
- the arm's length nature of intra-group service fees, including the cost base in a cost-plus remuneration, etc.

Moreover, the BTA particularly focuses on financial transactions, such as:

- the applied interest rate for remunerating intercompany debt;
- the arm's length character of a company's intra-group debt level; and
- the arm's length character of cash pool arrangements.

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