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A: Sharing and shifting of corporate losses – The new profit shifting?

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Branch reporters
Christophe Goossens[1]
Antoine Cleret de Langavant[2]

Summary and conclusions

Carried-forward losses have generally been deductible in the Belgian corporate tax system without time limitation. However, another limit is applicable under the so-called “basket rule”: profits in excess of EUR 1,000,000 may only be absorbed by losses up to 70% of the exceeding profit. The 70% threshold is expected to be reduced to 40% as of 1 January 2023. As a consequence, 60% of the profits in excess of EUR 1,000,000 will form a minimal tax basis, from which no reportable deficit can be deducted.

There is no general carry-back system under Belgian tax law, but there are very specific carry-back measures adopted to meet an urgent need for liquidity in a specific situation: reserve for future losses in response to the Covid-19 pandemic, and the carry-back system for medium-sized agricultural enterprises in case of exceptional weather circumstances recognised as a calamity.

Tax losses have played a key role in the development of specific and general anti-abuse measures in Belgian tax law. Most—if not, all—aggressive tax planning schemes involving losses were tackled by these measures:

- tax losses may not be used against profits deriving from abnormal or benevolent advantages granted by a related enterprise;
- in case of a change in the control of a company, tax losses only remain available if the change passes an economic test; and
- in case of merger or demerger, tax losses of all companies participating in the transaction (absorbed and absorbing) only remain available in proportion of the value of their assets in the total value of the assets of the absorbed and the absorbing companies, which prevents the use of tax losses realised by shell companies.

The treatment of tax losses in an international context has significantly evolved over the years and has been greatly influenced by BEPS and the OECD. While losses realised in foreign permanent establishments used to be fully deductible from Belgian profits if they had not been used against foreign profits, the basic rule now is that such losses may only be deducted in Belgium if they are definitive in the country of the permanent establishment. That rule is, however, only applicable where profits from the foreign permanent establishment are exempted in Belgium in accordance with a double-tax treaty. Otherwise, foreign losses remain fully deductible.

[1] Advises clients on Belgian and Luxembourg tax law issues in the fields of M&A, real estate taxation and international taxation.

[2] Advises clients on Belgian and Luxembourg tax law issues in the fields of M&A, real estate taxation and international taxation.

Part One: General aspects of corporate tax losses

1.1. General overview

Losses refer to two different concepts under Belgian tax law. It can either refer to a loss of value of an asset, or to the final negative result of a taxpayer during a specific taxable period. It is in this second sense that the Court of cassation defines the term loss: "the negative balance of one or more activities carried out on a specific taxable period".[3] This definition concerns entities subject to corporate tax, as well as individuals, but this report only concerns entities that are subject to corporate tax, *i.e.*, mainly companies.

Under Belgian tax law, the taxable result of a company, in principle, corresponds to its accounting result unless a tax law rule deviates from that principle.[4] The profit (or loss) of a company is therefore primarily revealed by the annual accounts. Tax rules include a specific provision allowing for the tax deduction of previous losses from the taxable profits of the current year.[5]

The loss carry-forward system has existed since the first income tax law in 1919[6] to take into account the uncertainties of an entrepreneurial activity.[7] The Belgian system has evolved considerably over the decades. The loss carry-forward system, initially limited to two years, temporarily took a hybrid form between carry-forward and carry-back system in 1925.[8] That system was quickly abandoned in 1931,[9] with a return to a carry-forward system limited to two years. The carry-forward system was then extended to five years in 1954.[10] This limitation— already criticised at the time[11]—was eventually removed in 1989.[12] A limitation of deductibility of losses was introduced in 1991[13] in order to preserve revenues for the state,[14] but was abolished in 1995.[15] The philosophy of the system was, however, reintroduced in 2017[16] and remains similar today: unlimited carry-forward subject to certain conditions that include a spreading over time system.

From an international perspective, Belgian companies are subject to income tax on their worldwide income.[17] Losses realised in other countries are, in principle, deductible

[3] Cass., 23 February 1990, F1785N, free translation of "(…) *le solde négatif d'une ou de plusieurs activités, effectuées au cours d'une période imposable déterminée*".

[4] D. Garabedian, note sous Cass., 20 February 1997, R.C.J.B., 2000, pp. 525 and seq.; Cass., 20 February 1997, F950097F.

[5] Art. 78 of the Belgian Income Tax Code dated 1992 ("BITC") for individuals and art. 206 of the BITC for companies.

[6] Art. 32, law of 29 October 1919 établissant des impôts cédulaires sur les revenus et un impôt complémentaire sur le revenu global.

[7] M. Feye, Traité de droit fiscal des sociétés et des associations, Bruylant, Brussels, 1935, p. 452.

[8] Art. 4, law of 31 December 1925 modifiant la législation en matière d'impôts directs et de taxes y assimilées.

[9] Art. 1, law of 20 July 1931 modifiant la législation relative aux impôts directs.

[10] Art. 1, law of 18 February 1954 modifiant l'article 32 des lois coordonnées relatives aux impôts sur les revenus.

[11] J. Kirkpatrick, L'imposition des revenus des sociétés belges par actions et de leurs actionnaires, obligataires et organes, Larcier, Brussels, 1968, pp. 147-148.

[12] Art. 263, law of 22 December 1989 portant des dispositions fiscales diverses.

[13] Art. 34, law of 20 July 1991 portant des dispositions budgétaires.

[14] Doc. parl., Ch., 5 June 1991, sess. 1990-1991, doc. 1641/1, p. 18.

[15] Art. 4, law of 4 April 1995 portant des dispositions fiscales et financières. The spreading methodology although considered arbitrary by some scholars (J. Kirkpatrick, Le régime fiscal des sociétés en Belgique, Bruylant, Brussels, 1992, p. 95), was validated by the Belgian Supreme Court in 2003, CA, 52/2003, 30 April 2003.

[16] Art. 53, law of 25 December 2017 portant réforme de l'impôt des sociétés.

[17] Art. 5 and 183, BITC.

from that worldwide income. However, Belgium implemented a complex body of rules to reach a balance between the tax interest of the Belgian state and the international tax claims of other states.

1.2. Types of tax policies for domestic losses

(a) Pre-operating losses

The Belgian tax system does not distinguish pre-operating losses from ordinary tax losses. As soon as a company makes tax deductible expenses, it will record a loss if no taxable profit is realised. Those losses are deductible from future profits like any ordinary loss. Preparatory expenses will be deductible if they are made in order to generate future profits.

(b) Loss carry-back

A carry-back system existed in Belgium between 1925 and 1931; it was abandoned because it made it difficult to predict the revenue of the state.[18]

Two specific carry-back systems have been included in Belgian tax law in order to respond to certain urgent and unpredictable situations that were recognised as causing serious liquidity issues for the taxpayers: losses related to the Covid-19 pandemic and agricultural damage resulting from an exceptional weather situation recognised as such.

(A) Belgian response to the Covid-19 pandemic

The Belgian state adopted a specific temporary measure in response to the Covid-19 pandemic by allowing companies to apply a reserve for future losses in situations where a company realises a taxable profit in the 2019 financial year (which preceded the outbreak of the pandemic) and a tax loss in the 2020 financial year. The law of 23 June 2020 allows companies to create a temporarily exempt reserve that is deducted from future taxable profit. No demonstrated link with the pandemic is required.[19]

(B) Situational support for the agricultural sector

In 2019, the Belgian state adopted a permanent legal framework[20] that allows medium-sized agricultural enterprises to carry-back their losses from the three previous taxable periods when exceptional weather circumstances recognised as a calamity for the region occur.[21]

[18] Doc. parl., Ch., sess. 1930-1931, n° 45, p. 2.

[19] For additional information related to the Covid-19 tax measures implemented in Belgium, see C. Meskens and B. De Cock, Vademecum vennootschapsbelasting 2022, Brussels, Intersentia, 2022, pp. 1697 and seq.

[20] Law of 11 February 2019 portant des dispositions fiscales, de lutte contre la fraude, financières et diverses, as amended.

[21] Art. 78, § 2, BITC, included by a law of 11 February 2019; for additional information related to the agricultural tax measures please see C. Meskens and B. De Cock, Vademecum vennootschapsbelasting 2022, op. cit., pp. 1242 and seq.

(c) Loss carry-forward

(A) General considerations

The central provision for tax loss carry-forward is article 206 of the BITC. According to this article, carried-forward losses may be deducted *without time limit*. The definition of carried-forward losses is broad and encompasses all past negative tax results, established in accordance with the legislation applicable at that time, which have not been deducted previously. However, carried-forward losses can only be utilised with certain limitations and under certain conditions.

(B) Exception to the principle of unlimited loss carry-forward

According to the Court of cassation case-law, carried-forward losses can only be used by the company that incurred them:[22] losses may not be transferred to another entity, not even following a merger or a liquidation, except under specific conditions (see 1.2(e)).

(C) Rules that limit the utilisation of carried-forward losses

A law was adopted in 2017 limiting the deductibility of carried-forward losses (the so-called "*règle de la corbeille*"/"*korfbeperking*", hereafter the "*basket rule*") in order to preserve the revenue for the state originating from corporate tax.[23]

After determining the income of a company, the BITC provides for a series of items to be subtracted.[24] These items are divided into two categories and must be subtracted in the defined order:

– the first category notably includes non-taxable items or income exempted under the Belgian parent-subsidiary regime;[25] and
– the second category notably includes carried-forward losses.[26]

The basket rule applies to the second category of deductions and provides that this category may not exceed EUR 1,000,000 increased by 70% of the positive balance remaining after deduction of all first category items.[27] Therefore, the basket rule effectuates that 30% of the profit after application of the first category of deduction on top of the EUR 1,000,000 amount constitutes a minimum taxable base in corporate taxation.[28]

The consequence of this rule is a broadening of the tax base of Belgian companies by imposing a spreading over time of the deduction of carried-forward losses.

[22] Cass., 8 June 1936, *Charbonnage du Hasard*, Pas., 1936, I, p. 282 ; Com. IR, 199/76, www.fisconetplus.be.
[23] Doc. parl., Ch., 20 December 2017, sess. 2017-2018, doc. 54 2864/001, p. 6.
[24] Art. 206/1 to 207, BITC.
[25] Art. 207, (2), BITC.
[26] Art. 207, (3), BITC.
[27] Art. 207, (5), BITC.
[28] B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., pp. 1231-1232 and seq.

According to recent news releases,[29] materialised in the bill programme law 2022,[30] the government intends to temporarily increase the percentage of minimal profits from 30% to 60%.

(D) Exceptional measures in response to the Covid-19 pandemic

In connection with the carry-back measure adopted in response to the Covid-19 crisis (see 1.2(b)(A)), the Belgian legislator adopted a second measure aimed at strengthening the solvency of companies after the crisis.[31]

In essence, article 194*quater*/1 BITC allows companies[32] that ended the 2020 tax year with a deficit to create an exempt reserve ("*réserve de reconstitution*"/" *wederopbouwreserve*") for deferring the payment of tax charges generated in the future.[33] The amounts allocated to the reserve become taxable profits at the latest at the liquidation of the company[34] and, in all cases when the company carries out a series of operations defined by the law, which include the repurchase of its own shares, the distribution of dividends or the reduction of capital.[35]

(d) Losses after the end of a business

In Belgium, there is no system for preserving carried-forward losses or recovering them if there is a termination of an entrepreneurial activity. Therefore, in case of liquidation or bankruptcy of a Belgian company, the carried-forward losses are deemed lost.

However, in the course of its liquidation, a company remains subject to normal corporate tax rules.[36] This means that tax losses suffered before or in the course of the liquidation can still be used to potentially offset the taxable profits generated by the liquidation.

(e) Transfer of losses in reorganisation schemes

(A) General considerations

According to the Court of cassation case-law, a carried-forward loss can only be used by the company that incurred it:[37] losses may not be transferred to another entity, not even following a merger or a liquidation. In principle, the losses remain available as long as the legal personality of the company is maintained.

There is no condition related to the nature of the activity carried-out by the

29 'Secondes résidences, surprofits, cigarette électronique : voici les mesures économiques prises par le Fédéral', La Libre, 12 octobre 2022.
30 Doc. parl., Ch., 24 November 2022, sess. 2022-2023, doc. 55 3015/001, art. 116, p. 180.
31 Law of 19 November 2020 portant l'introduction d'une réserve de reconstitution pour les sociétés.
32 A certain number of companies is excluded from the regime, see art. 194*quater*/1, § 2, BITC.
33 Doc. parl., Ch., sess. 2019-2020, 55-1412/003, p. 3; Circ., 2022/C/6, 18 January 2022, § 1.
34 Circ., 2022/C/6, 18 January 2022, §§ 20-23.
35 Art. 194*quater*/1, § 5, BITC; Circ., 2022/C/6, 18 January 2022, §§ 10-14.
36 Art. 208, BITC.
37 Cass., 8 June 1936, *Charbonnage du Hasard*, Pas., 1936, I, p. 282 ; see also Com. IR, 199/76.

company. Nevertheless, a judgment from the court of appeal of Antwerp has decided otherwise. According to the court the losses should derive from the same activity as the income from which they are deducted, and subsequently denied the deduction of carried-forward losses in case of a change of activity.[38] In our view, this case law cannot be followed and a change in the corporate purpose of a company should not constitute an exclusion of accumulated carried-forward losses.[39]

At a time when no general or specific anti-abuse provisions were applicable, companies with accumulated tax losses but without any actual activity were purchased in order to absorb other profit-making companies. The legality of that tax-inspired scheme was confirmed by the Court of cassation.[40]

A specific anti-abuse provision has been included in the BITC to tackle those schemes: losses may not be deducted in case of a change in the control of a company unless the change of control is justified by legitimate financial or economic needs.[41] The burden of proof that a change in control does not meet legitimate financial or economic needs lies with the tax authorities.[42]

According to the Court of cassation, to appreciate the legitimate financial or economic needs, all the relevant circumstances of all parties involved in the acquisition or change of control, including the shareholders, must be taken into account. An acquisition or change of control is considered as not fulfilling this condition when the operation results in an improper use of the company with the main purpose of avoiding tax.[43] Legitimate financial or economic needs are notably present where a company in difficulty maintains the employment thanks to the change of control, or in the framework of the restructuration of a group aiming at rationalising or simplifying the group structure, etc.[44]

It is to be noted that it is possible to request a ruling from the Belgian ruling authority ("*Service des Decisions Anticipées*"/ "*Dienst Voorafgaande Beslissingen*") for these legitimate financial and economic reasons.

When the anti-abuse provision is applicable, previous losses are definitely excluded from future deduction on any subsequent taxable period.[45]

38 Anvers, 18 December 1995, Courr. fisc., 1996, p. 186.

39 J. Kirkpatrick, L'imposition des revenus des sociétés belges par actions et de leurs actionnaires, obligataires et organes, op. cit., p. 148 ; Cass., 20 November 1963, Pas., I, p. 367 ; E. van der Bruggen, "L'Administration s'accrochera-t-elle à un arrêt controversé ?', Fisco., n° 553, 1996 ; P. Hinnekens, 'Changement de contrôle et pertes reportées : interprétation souple ', Fisco., n° 1145, 30 January 2009 ; H. Lamon, Acquisitions, financement et cessions d'entreprises, Larcier, Brussels, 2015, pp. 352-353; Gent, 9 September 2008, T.F.R., 2009/4, n° 356, pp. 168-170.

40 Cass., 22 March 1990, *Au Vieux Saint-Martin*.

41 Art. 207, (8), BITC.

42 Cass., 13 December 2007, F060065N ; A. Haelterman, "Fusions : c'est au fisc à démontrer l'absence de besoins légitimes', Fisco., n° 1101, 1 February 2008 ; L. Deklerck, Manuel pratique d'impôt des sociétés, Larcier, Brussels, 2020, p. 472.

43 Cass., 21 December 2017, F160019N.

44 B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., pp. 1240 and seq., on the application of the notion by the ruling services see *e.g.* SDA, 2014.582, 2010.265.

45 Art. 207, (8), BITC. The definitive elimination of tax losses to be carried forward is confirmed by a decision of the Court of cassation of 19 September 2013 (F120111N).

Concerning mergers and demergers, two anti-abuse provisions may have an impact on tax losses:

– firstly, the merger or demerger cannot be tax neutral if it has tax fraud or tax evasion as its main objective or as one of its main objectives.[46] In such a case, the (de-)merger is treated as a liquidation of the absorbed company, which will then lose all its tax losses; and
– secondly, tax losses of *each company* participating in the merger or demerger will be limited in proportion of the net tax value of its assets compared to the total of the net tax value of its assets and that of the other company (see hereafter, (B) and (C)).

(B). Losses carried-forward in case of neutral merger[47]

Carried-forward losses available to *each of the entities* involved in the merger are limited in proportion of the net tax value of its assets compared to the total of the net tax value of its assets and that of the other company.

The objective of this system is to neutralise the practice referred above of having a company with an important amount of carried-forward losses absorb a company that is making profits.[48] Since the losses of each of the involved entities are limited in accordance with the same formula, it becomes irrelevant which one of them is absorbing the other. However, according to the Court of cassation,[49] the losses covered by the formula do not include the losses incurred in the ongoing year. It is therefore possible that this choice still has limited consequences.[50]

In the case of an intra-European cross-border merger, the same rules apply, but the *pro rata* excludes foreign elements. As a consequence, the limitation of the tax losses of the Belgian beneficiary company will only be applicable if the intra-European transferring company has a pre-existing Belgian permanent establishment.[51] If this is not the case, the losses of the Belgian beneficiary company will remain fully deductible after the transaction.[52]

The neutrality regime is waived either when the transaction is not carried out in accordance with the provisions of the Companies and Associations Code or when the transaction does not comply with article 183*bis* BITC mentioned above,[53] or if the participants in the transaction are not resident or European companies.[54] In this scenario, the tax losses of the absorbing company are fully preserved,[55] and the

46 Art. 183*bis*, BITC; on this notion see S. Van Crombrugge, "Motifs économiques valables pour une fusion fiscalement neutre", Fisco., n°1743, 22 April 2022, p. 8.

47 Art. 211, BITC.

48 On this matter see the decision of the Court of cassation "*Au Vieux Saint-Martin*", Cass., 22 March 1990, Pas. I, p. 849, where a loss-making company had absorbed a profit-making company.

49 Cass. 25 January 2019, F170063N.

50 H. Lamon, Acquisitions, financement, et cessions d'entreprises, op. cit., p. 359.

51 Art. 240*bis*, § 1, BITC

52 H. Lamon, Acquisitions, financement, et cessions d'entreprises, op. cit., p. 729 ; B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., pp. 1561-1562.

53 Doc. parl., Sénat, 1992-1993, n° 765-1, 2 June 1993, pp. 4-5.

54 Art. 211, § 1, (4), 1° and 3°, BITC.

55 Art. 206, § 2, BITC.

losses of the absorbed company are lost because it is considered as liquidated for tax purposes.[56]

It is remarkable to note that if a merger itself is not neutral, because it has tax fraud or tax evasion as one of its main objectives, there is no application of the fractional regime above, which means that, while the merger becomes taxable, the tax losses of the absorbing company are fully preserved.[57]

(C) Losses carried-forward in case of neutral demerger

The rules applying to demergers are similar to those applicable to mergers. Prior to 1993, tax losses were lost in the event of a demerger, as the operation was treated as a liquidation of the demerged company.[58]

Where the demerger occurs by creating several new companies, the amount of the tax losses of the demerged company to be carried-forward by each of them is determined in proportion to the net tax value of the contributed elements in the total of such value for the demerged company.

In such a situation, all losses of the demerged company are preserved and split amongst the new companies created by the demerger.

If the receiving company is a pre-existing company, the merger rules must also be applied in a second step (see (B)). The consequence of this second step is that a part of the losses carried-forward in a demerger where the beneficiaries are pre-existing companies is lost.[59]

For the purpose of the calculation, the total net tax value of assets cannot be less than zero.[60]

(D) Losses carried-forward in case of partial neutral demerger

As a merger, a partial demerger benefits from the tax neutrality regime, except if it appears that the main purpose of the transaction is tax evasion or avoidance.[61]

The *pro rata* rule is applicable as for a classic merger.[62]

56 T. Blockerye, Acquisitions et réorganisations de sociétés, Anthémis, Limal, 2016, p. 250.

57 Art. 206, § 2, BITC *a contrario*, on this subject see J. Kirkpatrick, 'L'absorption-liquidation et le régime de l'imposition', in Les fusions et scissions internes de societes en droit commercial et en droit fiscal, éd. du Jeune Barreau de Bruxelles, Brussels, 1993, pp. 216-217; J.-L. Godefroit, IFA, 1998, p. 342; G. Kleynen, "Les incohérences fiscales du nouveau régime des fusions-scissions en ce compris les scissions dites "partielles" (première partie)", J.D.F., 2002/9-10, p. 302; B. Caluwé, N. De Beule, en C. Rapoye, Splitsingen en partiële splitsingen, Brussels, Intersentia, 2013, p. 303; B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., p. 1568.

58 Lamon, Acquisitions, financement, et cessions d'entreprises, op. cit., p. 363.

59 For a numerical example of wastage please see Lamon, Acquisitions, financement, et cessions d'entreprises, op. cit., p. 364.

60 Art. 184*ter*, § 3, BITC.

61 B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., p. 1581.

62 Art. 206, § 2, BITC.

(f) Group loss compensation (tax consolidation vs. group loss transfer)

(A) General considerations

As such, Belgium does not have a tax consolidation system. For a long time, Belgian practice has resorted to different restructuring methods in order to try to use tax losses at the benefit of other group companies (see 1.2(e)). The absence of a consolidation regime was certainly a factor decreasing the attractiveness of Belgium for entrepreneurial investment. For these reasons,[63] the legislator recently adopted a system to achieve a comparable result under the form of group profits transfer.[64]

The system allows a company to transfer taxable *profits* of the present financial year to another company within the same group. The company transferring the profits, in exchange for that limitation of its corporate tax exposition, must pay a compensation to the acquiring company, equivalent to the tax that would have been due in the absence of the transfer.

(B) Effect of the intra-group transfer scheme

The intra-group transfer scheme consists of a transfer of a taxable profit (without an actual capital transfer) of a financial year from one group company to another.[65] The profit of the beneficiary company is increased by the amount of the profit transfer, while the transferring company benefits from an equivalent deduction.[66] The deduction does not fall under the basket rule mentioned above (see 1.2(c)(C)).[67]

The beneficiary company can only absorb the intra-group transfer *with the loss of the same financial period*, and therefore not with other tax deductions (such as carried-forward losses).[68] This means that the transferred amount exceeding the current year's losses of the beneficiary company is fully taxable, which substantially limits the benefit of the intra-group transfer.[69]

(C) Conditions for the intra-group transfer scheme[70]

The conditions for the intra-group transfer scheme are the following:

– Both companies must be Belgian residents for tax purposes or eligible foreign companies, *i.e.*, residents of an EEA country with a permanent establishment in Belgium. The regime is also open to resident sister companies if the common foreign parent company is established in a country that has concluded a DTT

[63] Doc. parl., Ch., 2017-2018, doc. 54-2864/001, p. 10.
[64] Art. 205/5, BITC.
[65] Art. 205/5, § 2, (2), BITC.
[66] Art. 207, (2), BITC.
[67] Art. 207, (5), BITC.
[68] Art. 206/3, § 1, BITC as introduced by the law of 21 January 2022 portant des dispositions fiscales diverses.
[69] S. Gommers, 'Comment traiter concrètement le nouveau 'transfert intragroupe'", Fisco., n°1615, 2019, p.2.
[70] For a description from an accounting perspective see CNC, 2019/06, 5 June 2019, Transfert intra-groupe and CNC 2021/17, 8 December 2021, Traitement comptable de la compensation pour le transfert intra-groupe dans le chef de la société transférante en cas d'absence ou d'insuffisance d'Impôts belges sur le résultat au compte 4500.

with Belgium that includes a non-discrimination clause in accordance with article 24 of the OECD model;[71]
- in accordance with the Mark & Spencer case law,[72] it is also possible to conclude a profit transfer agreement with an eligible foreign company; provided that it has definitively ceased its activities and these have not been restarted within three years (see 1.3(a) Profit allocation of PE's (articles 5 and 7 of the Models));[73]
- both companies must be affiliated in such a way that the transferring company has been at least 90% *directly* owned by the receiving company or *vice versa* for an uninterrupted period of five years. Both companies may also be owned *directly* by a common parent, be it in Belgium or abroad. Indirect shareholdings are excluded, therefore, when a group intends to benefit from the regime, it should set up a sole central holding company;[74]
- the transferring company must pay an indemnity to the beneficiary company equal to the corporate tax that would have been due by the transferring company if it had not benefited from the intra-group transfer deduction; and
- concerned companies must enter into an intra-group transfer agreement (to be renewed annually) concluded before the first of the two companies concerned files its annual tax return.[75]

Exclusions are applicable in certain situations, notably in the case of companies that are subject to a tax regime derogating from ordinary tax law.[76]

(g) The role of anti-abuse provisions (GAARs and/or SAARs) in the context of losses

(A Specific anti-abuse provisions

The Belgian legislator has provided for several anti-abuse provisions to counter specific situations. With regard to the carry-over of tax losses, the following anti-abuse measures can be mentioned:
- *reorganisation schemes:* several specific anti-abuse provisions are applicable to reorganisation schemes (see 1.2(e));
- *prohibition to use losses against abnormal or benevolent benefits*.[77] Carried-forward losses cannot be deducted from the part of the profits derived from abnormal

[71] L. Cassart and P.-J. Wouters, La consolidation fiscale, Larcier, Brussels, 2021, p. 59.

[72] CJEU, C-446/03, 13 December 2005, Mark & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes).

[73] Doc. parl., Ch., sess. 2017-2018, n° 54-2864/003, p. 45 ; P., Delacroix, Actualités en matière de consolidation fiscale, TRV-RPS, 2021, p. 259.

[74] S. Gommers, "Comment traiter concrètement le nouveau 'transfert intragroupe'", op. cit., p. 2.

[75] L. Cassart and P.-J. Wouters, La consolidation fiscale, op. cit., p. 102.

[76] Art. 205/5, BITC.

[77] The system of prohibiting the deduction of abnormal or benevolent benefits has been significantly modified by the recent laws of 27 June 2021 portant des dispositions fiscales diverses et modifiant la loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces and 21 January 2022 portant des dispositions fiscales diverses. On these laws see S. Van Crombrugge, 'Détermination du bénéfice et ordre des déductions : un peu de bricolage', Fisco., n°1733, 11 February 2022 ; and J. Van Dyck "A propos des droits d'auteur, chambres d'étudiants, prestations médicales, etc.', Fisco., n° 1709, 6 August 2021.

or benevolent benefits that the company has obtained directly or indirectly from a company with which it is directly or indirectly in a relationship of mutual dependence.[78] This measure is intended to prevent a profitable company from artificially transferring its profits to a loss-making company. The application of this specific anti-abuse measure presupposes that two conditions are met:

- firstly, the advantages obtained by the loss-making company must be abnormal and benevolent. An advantage is benevolent when it is granted without constituting the performance of an obligation or is granted without any consideration.[79] It is abnormal when, in view of the economic circumstances of the time, the advantage is contrary to the usual order of things, to the rules or to established commercial practice;[80]
- secondly, these advantages must have been obtained from a company with which the beneficiary is in a relationship of mutual dependence. Causality between the relationship of mutual dependence and the abnormal or benevolent benefit must not be demonstrated;[81]

– *controlled foreign company ("CFC") rule* (see 3.4);
– *anti-mismatch system* (see 3.3); and
– *recapture rule for the deduction of "definitive losses" incurred in an EEA member state in case of restarting the business in the relevant state*. If a definitive loss has been used and the business is restarted within three years, an amount equivalent to the amount deducted is added to the tax base[82] (see 1.3(a)).

(B) General anti-abuse provision

According to article 344, § 1st, BITC, if the tax authorities can demonstrate that a legal act or a series of legal acts carrying out the same operation constitutes a tax abuse, that act or series of acts may not be opposed to the tax authorities.

There is a tax abuse if, by way of an act or a series of acts, the taxpayer carries out a transaction whereby it places itself outside the scope of application of a provision of the BITC or the decrees issued pursuant to it, in violation of the objectives of that provision, or whereby it claims a tax benefit provided for by a provision of the BITC or by decrees issued pursuant to it, the granting of which would be contrary to the objectives of that provision, and provided that the essential purpose of the transaction is to obtain that benefit.[83]

The taxpayer can rebut the claim of a tax abuse by demonstrating that the choice

[78] Art. 79, 206/3, § 1, and 207/2, BITC.
[79] Cass., 31 October 1979, Pas., 1980, I, pp. 280 – 282.
[80] Cass., 10 April 2000, Pas., 2000, I, p. 240.
[81] B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., p. 1233.
[82] Art. 185, § 3, (6), BITC.
[83] See on the Belgian GAAR, *e.a.* : D. Garabedian, 'La nouvelle règle fiscale anti-abus et les "ensembles d'actes juridiques réalisant une même opération", in Alabaster, IFA 1938-2013, Anthémis, Brussels, 2013, pp. 193 and seq.; T. Afschrift, L'abus fiscal, Larcier, Brussels, 2013 ; J. Van Dyck, 'Nouvel article 344, § 1 : une disposition anti-abus plus 'adulte", Fisco., 1284, 24 February 2012, p. 3 ; C. Docclo, 'Petit manuel d'utilisation de l'article 344, § 1er CIR 1992', T.F.R., 2012/15, n° 427, p. 768; S. Van Crombrugge, 'Fraus legis of wetsontduiking in het Belgisch fiscaal recht anno 2012', T.R.V., 2012/6, pp. 544 and seq. ; B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., p. 1616.

of this legal act or series of legal acts is justified by motives other than tax avoidance and is therefore not artificial.[84]

In case of tax abuse, the taxable basis and the tax calculation will be restored and the transaction will be taxed in accordance with the object of the provision, as if the abuse had not occurred.

Article 344, § 1st was introduced in 1993 and subsequently rewritten in 2012 to broaden the possibility for the administration to target tax abuses. The introduction of this anti-abuse provision was partly motivated by the aggressive use of tax losses. In a decision of the Belgian Court of cassation "*Au Vieux Saint-Martin*", an inactive company that had accumulated a large amount of carried-forward tax losses absorbed a profitable company. In the absence of any applicable anti-abuse provision, the Court of cassation did not reject the tax consequences of that absorption—the parties had accepted all legal consequences of their actions. According to the decision, there was neither a simulation prohibited with regard to the tax authorities nor tax fraud when, in order to benefit from a more favourable tax regime, the parties, making use of their contractual freedom, without, however, violating any legal obligation, draw up acts of which they accept all the consequences, even if these acts are carried out for the sole purpose of reducing the tax burden.[85]

Generally speaking, according to the principle *lex specialis derogat legi generali* the general anti-abuse provision is arguably not applicable where specific anti-abuse provisions have been enacted.[86] As a consequence, the general anti-abuse provision should not be applicable if a transaction passes the test of other specific anti-abuse provisions. Concerning tax losses, the general anti-abuse provision should not be applicable to a change in control or a merger or demerger, if such transactions have passed the specific anti-abuse tests discussed above (see 1.2(g)(A)).

1.3. Key principles of tax treaty law relevant in case of losses

(a) Profit allocation of PE's (Articles 5 and 7 of the Models)

As mentioned above, Belgium adopts a worldwide taxation regime (see 1.1). Belgium's taxation authority is, however, limited by the DTTs which attribute certain income to foreign states (*e.g.*, income attached to a foreign permanent establishment or income attributed to real estate located in a country with which Belgium concluded a DTT).

In order to allocate the assets and liabilities of a Belgian company between its main place of business and any permanent establishments, Belgian tax authorities apply the "*principe de l'entreprise indépendante*" that corresponds to the Authorized OECD Approach.[87]

84 Doc. parl., Ch., 2011-2012, n°53-2081/001, p. 114.

85 Cass., 22 March 1990, Pas. I, p. 849.

86 Doc. parl., Ch., 2011-2012, n°53-2081/001, pp. 112-113: free translation '*The application of article 344, § 1, BITC by the administration constitutes an ultimate recourse and must be applied only when the ordinary method of interpretation, the technical provisions of the BITC, the special provisions on the fight against evasion and the theory of simulation are of no help*'.

87 Circ., 2020/C/35 of 25 February 2020 concernant les directives en matière de prix de transfert à l'intention des entreprises multinationales et des administrations fiscales, Chapter XI (*Etablissements stables et prix de transfert*).

The profits and liabilities that a permanent establishment could have obtained if it had been a separate enterprise carrying out the same or similar activities under the same or similar conditions are attributed to it.[88]

After this allocation, the system of deductibility of foreign losses applies.[89] Since 2017,[90] this system has deeply changed through several legislative interventions.[91] From fiscal year 2022 on, the deduction is supposed to apply based on specific categories and therefore three different situations should be distinguished depending on the geographical origin of the income:[92]

– *A DTT has been signed with the state where the losses originate which provides for an exemption of profits*. In this case, the deductibility of losses is in principle excluded, except in the case of "definitive losses".

  Definitive losses means losses originating from an EEA member state that exist at the time the company definitively ceases its activities in the EEA member state, only if, in respect of those losses, no deduction of any kind is allowed in the member state in which the foreign establishment[93] was located.[94] This means that all non-definitive losses in the defined sense are excluded from the Belgian tax base.[95]

  The definitive loss must first be offset against foreign profits exempted by the DTT, then against foreign profits not exempted by DTT, and finally against the Belgian profits.[96] The surplus can be carried-forward indefinitely[97] but can only be deducted to the extent that the definitive loss exceeds the profits exempted by the DTT.[98] According to the parliamentary work,[99] these definitive carried-forward losses should then follow the same order of allocation under article 207 BITC (*i.e.*, be applied in priority against foreign profits exempted by the DTT, then against foreign profits not exempted by DTT, and finally against the Belgian profits).[100] Scholars[101] are concerned about this system and doubt it is compatible with European case law, specifically with the Lidl Belgium

88 J. Kirkpatrick, D. Garabedian, le régime fiscal des sociétés en Belgique, Bruylant, 2003, Brussels, p. 461.

89 Art. 206/1 to 207/2, BITC.

90 Prior to these reforms the system introduced by the law of 11 December 2008 linked the deduction of foreign losses to the condition that the company proves that these losses were not or had not been deducted abroad.

91 Law of 25 December 2017 portant réforme de l'impôt des sociétés, law of 27 June 2021 portant des dispositions fiscales diverses, and law of 21 January 2022 portant des dispositions fiscales diverses.

92 S. Gommers and W. Willems, "Pertes de source étrangère : nouvelles règles de déductibilité', Fisco., n°1646, 28 February 2020 ; S. Van Crombrugge, 'Détermination du bénéfice et ordre des déductions : un peu de bricolage', Fisco., n°1733, 11 February 2022; B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., pp. 1122 and seq.

93 Art. 185, § 3 also refers to corporate losses inherent in assets located abroad in addition to permanent establishments.

94 Art. 185, § 3, (1), BITC; Doc. parl., Ch., sess. 2017-2018, n°54-2864/001, p. 45; Circ., 2021/C/97, 3 November 2021, §§ 14-20; on the concept of definitive loss see CJEU, C-446/03, 13 December 2005, Mark & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes), § 55.

95 Circ., 2021/C/97, 3 November 2021, § 8.

96 Art. 206/4, (2), (a), BITC; Doc. parl., Ch., 2021-2022, n°55-2351/001, p. 14.

97 Art. 206, § 1, (1) and (2), BITC.

98 Art. 206, § 1, (4), BITC.

99 Doc. parl., Ch., sess. 2021-2022, n°55-2351/001, p. 98.

100 Art. 207, (7), BITC refers to the art. 206/4, BITC.

101 S. Gommers and W. Willems, "Pertes de source étrangère : nouvelles règles de déductibilité', Fisco., n° 1646, 28 February 2020 ; S. Van Crombrugge, 'Détermination du bénéfice et ordre des déductions : un peu de bricolage', Fisco., n°1733, 11 February 2022.

case.[102] Indeed, in some circumstances, this provision may have the consequence that not all definitive losses are deductible.

An anti-abuse provision in the form of a recapture rule has been included in the event that the activity is restarted within three years.[103] In this case, an amount equivalent to the deducted definitive loss is added to the taxable base.[104] In addition, the excess that has not been deducted is lost.[105]

– *No DTT has been signed with the state where the losses originate*.[106] In this case, foreign profits are fully taxable in Belgium, and losses are equally fully deductible.[107]
– *A DTT has been signed with the state where the losses originate, which provides for a partial exemption of profits*. In this case, the deductibility is only available in an equivalent proportion except in the case of "definitive losses" (see above).[108]

That system links the deductibility of losses incurred abroad with the method through which double taxation is relieved. The intention is to avoid any double deduction of losses.

Belgian tax law contains anti-abuse provisions to prevent a Belgian taxpayer from reducing its tax base by transferring profits to a permanent establishment located in a jurisdiction with a more favourable tax regime (see 3.4).[109]

(b) Profit/loss recognition in relation to foreign subsidiaries (Articles 7 and 13 of the Models)

In order to allocate the gains and losses associated with intra-group transactions in a group context, Belgium applies the "separate entity approach" ("*approche de l'entité distincte*"/"*afzonderlijke entiteiten benadering*") principle recommended by the OECD.[110] Under this approach, the group companies should be considered as independent entities. The Belgian tax administration applies the methodology recommended by BEPS Actions 8-10 and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TPG").

The goal is to prevent a profitable company from artificially transferring its profits to a loss-making company. In such a case, the grantor (or recipient) company is deemed to have granted (or received) an abnormal or benevolent benefit. Carried-forward losses cannot be used to the extent the profits derived from abnormal or benevolent advantages which the company has obtained directly or indirectly from a company with which it is directly or indirectly related.[111]

102 CJEU, C- 414/06, 15 May 2008, Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn.
103 See Circ., 2021/C/97, 3 November 2021, §§ 21-24.
104 Art. 185, § 3, (6), BITC.
105 Art. 206, § 1, (5), BITC.
106 Or, alternatively, a DTT which does not provide for an exemption of profits.
107 Art. 206/4, (2), (b), BITC.
108 Art. 185, § 3, (2), BITC.
109 Art. 185/2, BITC.
110 Circ. 2020/C/35 of 25 February 2020 concernant les directives en matière de prix de transfert à l'intention des entreprises multinationales et des administrations fiscales.
111 Art. 206/3, § 1, BITC and Art. 79, BITC, for additional information see De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., pp. 1233 and seq.

Part Two: Utilisation of losses for tax planning

2.1. General overview

Most, if not all, aggressive tax-planning schemes are prevented by the general and specific anti-abuse measures, which were specifically adopted to tackle those schemes in most cases (see 1.2(g)(B)).

2.2. Schemes shifting profits to a loss-making party

Shifting profits from a profit-making entity A to a loss-making entity B could theoretically be possible through the sale, by A to B, of assets that do not generate taxable income, such as a shareholding in another entity benefiting from the participation exemption regime. Such a sale would be funded by a loan granted by B to A, which would generate deductible interest for A. B would use its losses to offset the taxable profit generated by the interest.

Such a scheme would, however, be strictly limited by (i) transfer pricing rules (ii), the prohibition to use losses against abnormal or benevolent benefits, and (iii) the GAAR.[112] According to the Court of cassation, an abnormal benefit may exist in any abnormal situation, even if market prices have been applied by the parties.[113]

2.3. Schemes circumventing time restrictions on the carry-over of losses

There are no time restrictions on the carry-over of losses.

2.4. Schemes circumventing change of ownership/activity restrictions on the carry-over of losses

We refer to section 1.2(e): such schemes are prevented by article 207, (8), BITC. If a change of ownership is not justified by non-tax motives, tax losses are lost.

2.5. Incorrect application of transfer pricing rules

A specific anti-abuse provision is aimed at preventing the incorrect application of transfer pricing rules in the context of tax losses (see 1.2(g)(A)). Tax losses may not be used against profits resulting from abnormal or benevolent benefits, which is a very broad concept that encompasses any profit derived from non at arm's-length transactions.

[112] Art. 207, BITC.

[113] Cass., 29 April 2005, F030037N.

2.6. Schemes planning around rules on the recognition or treatment of losses

These schemes are prevented by the Belgian general corporate tax system or by general and specific anti-abuse measures.

2.7. Schemes creating artificial losses

These schemes are prevented by the Belgian general corporate tax system or by general and specific anti-abuse measures.

2.8. Schemes involving the dual/multiple use of the same loss

These schemes are prevented by the Belgian general corporate tax system or by general and specific anti-abuse measures.

Part Three: Impacts of BEPS on the treatment of losses

3.1. General overview

The Belgian tax legislative framework has evolved considerably over the last five years under the combined influence of the OECD and the European Union through specifically the ATAD 1[114] and ATAD 2[115] directives.

In particular, Belgium has introduced the following measures to counteract previous tax abuses:

- Action 2 (*Neutralising the Effects of Hybrid Mismatch Arrangements*) and ATAD 2 led to the adoption of hybrid anti-treatment legislation;[116]
- Action 3 (*Controlled Foreign Company*) and ATAD 1 led to the adoption of CFC legislation;[117]
- Action 4 (*Limitation on Interest Deductions*) and ATAD 1 led to the adoption of the interest limitation rule;[118]
- Action 5 (*Harmful tax practices*) led Belgium to replace its previous system aimed at favouring the development of intellectual creation on the national territory by another system deemed less harmful;[119]
- Actions 8-10 associated with TPG led Belgian tax authorities to modernise the way transfer pricing rules were applied;[120] and

[114] Dir., 2016/1164, 12 July 2016.

[115] Dir., 2017/952, 29 May 2017.

[116] See art. 185 and 198, § 1st, 10°/1 to 10°/4, BITC as introduced by the law of 25 December 2017 as amended.

[117] See art. 185/2, BITC as implemented by the law of 25 December 2017 as amended, and Circ., 2020/C/79.

[118] See art. 198/1, BITC as implemented by the law of 25 December 2017 as amended, and Circ., 2020/C/97, 2021/C/87 and 2021/C/94.

[119] See art. 205/1 to 205/4, BITC as implemented by the law of 9 February 2017 as amended, and Circ., 2020/C/95.

[120] Circ. 2020/C/35 of 25 February 2020 concernant les directives en matière de prix de transfert à l'intention des entreprises multinationales et des administrations fiscales.

– Actions 12 and 13 and the directives 2016/881[121] and 2018/822 ("DAC6")[122] led to the adoption of an extensive mandatory automatic exchange of information system in Belgium.[123]

3.2. Transfer pricing

(a) BEPS Actions 8-10

The Belgian tax administration adopted a new circular in 2020[124] that directly refers to the methodology preconised by the TPG of 2017. To our knowledge, there is currently no case law based directly on this circular.

Previously, Belgian tax authorities referred to the TPGs of 1995 and 2010. Following recent case law, the outcomes of the TPG of 2017 were already applicable, but only in order to clarify the outcomes of the TPGs of 1995 and 2010.[125] Following this reasoning, the conclusions of the TPG of January 2022 should be applicable in Belgium on the items that specify the TPG of 2017 and, therefore, the circular of 2020.

Apart from case law, a large number of rulings have already been issued by the ruling service that directly applies the circular and, by reference, the outcomes of the TPG of 2017.

(b) Transfer Pricing implications of the Covid-19 pandemic in relation to losses

(A) Comparability analysis

come testing approach" in case law in the context of the Covid-19 pandemic nor in the context of previous crisis. In a circular dated 1999[126] (not revoked), the Belgian administration emphasises that elements subsequent to the transfer pricing study should not (unless they are foreseeable) play a role in a subsequent audit of a transfer pricing study.

(B) Allocation of losses and costs associated with Covid-19

The case law feedback on the measures applied during the height of the Covid-19 crisis is not yet fully available. However, the ruling service has confirmed the approach to renegotiate intra-group agreements to allocate losses that occurred

[121] Directive (UE) 2016/881 du Conseil du 25 mai 2016, J.O., L 146 du 3 juin 2016.

[122] Council Dir., 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

[123] Law of 1 July 2016 and law of 20 December 2019.

[124] Circ. 2020/C/35 of 25 February 2020 concernant les directives en matière de prix de transfert à l'intention des entreprises multinationales et des administrations fiscales.

[125] Gand (fisc.) (5e ch.) n° 2016/AR/455, 8 June 2021 (rôle n° : 2016/AR/455).

[126] Circ., 28 June 1999, n° AAF/98-0003, 4.A: "*Si l'analyse est effectuée par le contribuable au moment de la transaction est étayée par des documents subséquemment probants, les éléments postérieurs faisant ressortir une valeur supérieure devront être écartés.*"

due to the Covid-19 crisis between related companies in a recent ruling.[127] Referring to points 42 to 45 of the OECD Covid-19 Pandemic Guidance, the service considers that the allocation does not constitute an abnormal or benevolent advantage.

To this end, the ruling service requires the taxpayer to carefully consider the options available to them from an objective perspective, as well as the long-term effects on the profit potential of the parties involved, and whether the renegotiation should give rise to compensation for the disadvantaged party.

3.3. Anti-mismatch recommendations

Belgium has adopted an anti-mismatch system in line with Action 2 of BEPS and article 7 of the directive ATAD 1.

In a nutshell,[128] the current system reflects the implementation of a hybrid system in two aspects:

- firstly, it allows the Belgian tax authorities to recreate a tax base for the (transparent or opaque) Belgian company in cases where the application of the legislation of a third country would result in a hybrid treatment;[129] and
- secondly, it allows the Belgian tax authorities to refuse the deduction of a payment made by a Belgian taxpayer if the payment is not included in the recipient's taxable base (deduction/non-inclusion)[130] or is also deductible in its jurisdiction (double deduction).[131]

To the best of our knowledge, no judgement has been rendered in Belgium concerning a tax abuse based on anti-hybrid mismatch rules yet.

3.4. CFC recommendations

Belgium has adopted a CFC rule in line with Action 5 of BEPS and article 7 of the directive ATAD 1.

According to this rule,[132] taxable profits of a Belgian taxpayer also include undistributed profits of a related foreign company (or foreign establishment) located in a low or non-taxed jurisdiction if such profits arise from non-genuine arrangements set up primarily to obtain a tax advantage.

The regime is applicable as soon as the Belgian taxpayer, directly or indirectly, holds either the majority of the voting rights or a participation of at least 50% in the foreign company, and this foreign company, under the legislation of its state of residence, is subject

[127] SDA, 2021.0983.

[128] The seven possibilities of hybrid mismatch mentioned in the ATAD have been implemented in the BITC, for an extensive description see Lamon, H. et Van Bavel, A., Impôt des sociétés, droit comptable et IFRS, Larcier, Brussels, 2022, pp. 449 and seq.

[129] Art. 185, § 2/1, BITC.

[130] Art. 198, § 1st, 10°/2, BITC.

[131] Art. 198, § 1st, 10°/1 and 198, § 1st, 10°/4, BITC.

[132] Art. 185/2, BITC.

to a tax of less than half of the tax that would have been due by the company had it been located in Belgium.[133]

The pro rata participation of the Belgian taxpayer in the foreign company is not taken into account, nor is any foreign tax that may have been levied on the undistributed profits.[134]

The undistributed profits that have been taxed under the CFC rule and that are subsequently distributed to the Belgian tax may benefit from an exemption.[135]

3.5. Limitation of interest deductibility

Belgium has adopted a limitation of interest deductibility system in line with Action 4 of BEPS and article 4 of the directive ATAD 1.

According to the Belgian limitation of interest deductibility system,[136] the tax deductibility of "exceeding borrowing cost" of Belgian companies is limited to the higher of (i) 30% of the (tax adjusted) EBITDA,[137] or (ii) a *de minimis* amount of EUR 3 million, where "exceeding borrowing cost" means the positive difference between the interest (and equivalent costs)[138] that are considered as business expenses of the taxable period in which they are incurred, and the interest (and equivalent) income that are included in the profits.

Excess interest expenses that are not tax deductible from the result of the taxable period—during which, they have been incurred due to the 30% EBITDA rule—can be carried-forward without time limitation under the form of a profit exemption. Therefore, exceeding borrowing cost has characteristics in common with a tax loss-carried-forward in the sense that the excess can be carried-forward indefinitely to future years until full deduction.

If the taxpayer is an entity belonging to a Belgian group of companies, a tax consolidation[139] will be "simulated". The taxpayer's EBITDA will therefore need to be adjusted with any intra-group amounts paid by, or to, a domestic company or Belgian establishment.[140]

A company that is part of a group can transfer a deductible interest surplus to another company in the group that has an exceeding borrowing cost. This transfer takes the form of an interest deduction agreement between the taxpayer and another company in the group or a Belgian establishment in the group.[141]

133 Art. 185/2, § 2, BITC, to be noted that those conditions are not required when the foreign company (or the permanent establishment) is located in a jurisdiction included in the EU list of non-cooperative jurisdictions (art. 185/2, § 2, al. 2, BITC).

134 L. Deklerck, Manuel pratique d'impôt des sociétés, op. cit., p. 193.

135 See art. Art. 202, § 1, 4°, BITC on dividends and art. 202, § 1, 5°, BITC on capital gains.

136 Art. 194*sexies*, 194*septies*, 198/1, and 235, 2°, BITC.

137 Belgian tax law provides an autonomous definition of EBITDA for tax purposes in line with the directive ATAD 1, see Doc. parl., Ch., Sess. 2017-2018, 54 2864/001, p. 70.

138 Art. $73^{4/8}$, § 1st, Royal Decree implementing the BITC.

139 This consolidation has an independent interpretation that applies only in the context of exceeding borrowing cost and should not be confused with the consolidation described in the subsection 1.3.6 (*Group loss compensation*).

140 Art. 198/1, § 3, BITC.

141 Art. 198/1, § 3, BITC.

3.6. Patent boxes[142]

Belgium has profoundly modified its system to promote the development of intellectual property on Belgian territory. The previous regime, the "patent income deduction", was deemed harmful by Action 5 of the OECD work.[143] A new regime, Innovation Income Deduction, "IID" ("*Déduction pour revenus d'innovation/Aftrek voor innovatie-inkomsten*"),[144] applies since 1 July 2021.

Belgian taxpayers may deduct the IID related to eligible intellectual property rights (including patents) on its profits according to the following formula:

$$\textit{net innovation income x } 85\% \textit{ x } \frac{\textit{qualifying expense}}{\textit{total expenses}} \textit{ x } 1{,}3$$

Qualifying expenses refer to those incurred for R&D activities carried out by the taxpayer itself and those paid to an unrelated company (which are deemed to be arm's length). Total expenses refer to qualifying expenses increased by the acquisition costs of the intellectual property and external intra-group R&D costs.

Through this formula, the Belgian system provides on the one hand that losses related to R&D are only deductible on R&D income. If these losses exceed the R&D income of the year, losses can be carried-forward indefinitely to subsequent years. On the other hand, when the result of the formula above exceeds the global taxable income of the period, the excess can be carried-forward to the following taxable periods, without time limitation.[145] In this sense, IID forms a special category of carried-forward tax losses. IID is also subject to the basket rule (see 1.2(c)).[146]

3.7. Mandatory disclosure rules and CbCR

Belgium has transposed the DAC6 into the Belgian legal order as it stands. As a result, the hallmark of category B is directly connected to arrangements involving tax losses.[147] Also included under this hallmark are the arrangements in which a participant in the arrangement artificially takes actions to acquire a loss-making company, terminate the core business of that company and use the company's losses to reduce its tax burden, including by transferring those losses to another jurisdiction or by accelerating the use of those losses.[148]

In addition to the transposition of DAC6, Belgium has implemented a country-by-country reporting system of the CbCR type. The system imposes an obligation to file three different files: a main file, a local file, as well as a country-by-country declaration, on Belgian

[142] For an extensive description of the Belgian IID regime see L. Deklerck, L., Manuel pratique d'impôt des sociétés, op. cit., pp. 430 and seq.

[143] T., Vanwelkenhuyzen, Les prix de transfert, Larcier, Brussels, 2015, p. 312.

[144] Art. 205/1 to 205/4, BITC.

[145] Art. 205/1, § 1st, (2), BITC.

[146] Art. 207, (1), BITC.

[147] Art. 326/2, (5), 1°, BITC.

[148] Malherbe, J., "La déclaration obligatoire des dispositifs transfrontières – Directive DAC 6 du 25 mai 2018 et loi du 20 décembre 2019", R.G.C.F., 2020/1-2, p. 32.

entities that are part of a multinational group and have a consolidated turnover of at least EUR 750 million. All three forms are, among other things, intended to enable the Belgian tax authorities to carry out a proper analysis of transfer pricing risks and to conduct a more effective audit.[149]

3.8. BEPS Action 6 and Principal Purpose Test (PPT)

The arrangement of the different anti-abuse rules in Belgian law is complex, in particular due to the different levels of regulations (BEPS recommendations, ATAD 1 anti-abuse clauses contained in specific directives, and national law). As a result of Action 6 of the BEPS, the EU has adopted the ATAD 1 directive aimed at standardising PPT Clauses in the member states.[150]

Belgium has not transposed this provision as it considers that the existing provision meets the European standard (see 1.2(g)(B)).

Furthermore, the Belgian implementation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS ("MLI") includes the PTT clause in the vast majority of DTTs.[151]

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[149] Art. 321/1 to 321/6, BITC, for additional information on the declarative obligations applying in Belgium see. B. De Cock, C. Meskens, Vademecum vennootschapsbelasting, op. cit., p. 59 and the Circular 2020/C/88.

[150] J. Malherbe, "les dérives du droit fiscal", in Liber Amicorum Xavier Dieux, Larcier, Brussels, 2022, pp. 1689-1707.

[151] Art. 7 (1), MLI.

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