LOYENS & LOEFF

NOVEMBER 2020

Tax trends and tips
to look out for in 2021

Introduction

As this tumultuous year is nearing its end, it is time for our annual year-end tax bulletin. But like so many things that have happened in 2020, this version is different than what you are used to.

We carried out client reviews this year, and they taught us that overall, you highly value your relationship with us. Another thing we have learned: there is room for us to grow. Even though you appreciate our strong tax knowhow and quality of expertise, you wouldn't mind if we were more practical from time to time. Practical solutions are crucial for you.

With this in mind, this bulletin not only focuses on the tax trends we see in the market for 2021, but also includes our tips and takeaways.

Trends we see in Belgium, the Netherlands, Luxembourg and Switzerland concern transfer pricing and tax controversies. We have selected a few topics that give us the opportunity to dig deeper into what is happening in these areas.

In addition, we have included the most relevant current tax developments in Belgium, the Netherlands, Luxembourg and Switzerland. You will appreciate that the nature of these developments differs per country, so our aim has been not to discuss the same topics for each country.

Over the last few years, the regulatory tax environment has moved towards greater transparency, leading to more tax work for MNEs to ensure that they are compliant and in control. How MNEs' tax departments deal with this depends on their maturity. Digital innovation in this area as well as other areas of our tax work is extremely welcome, but at the same time a challenge for all of us. Although we do not focus on these trends in this year-end bulletin, they are top of mind at Loyens & Loeff.

Given the general nature of this year-end tax bulletin, the information contained cannot be regarded as legal advice. But as you know, we are happy to share our ideas with you and discuss tailor-made solutions individually. You are most welcome to contact your Loyens & Loeff adviser if you would like to receive more information on any of the topics included in this bulletin.

Kind regards,


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Loyens & Loeff

November 2020

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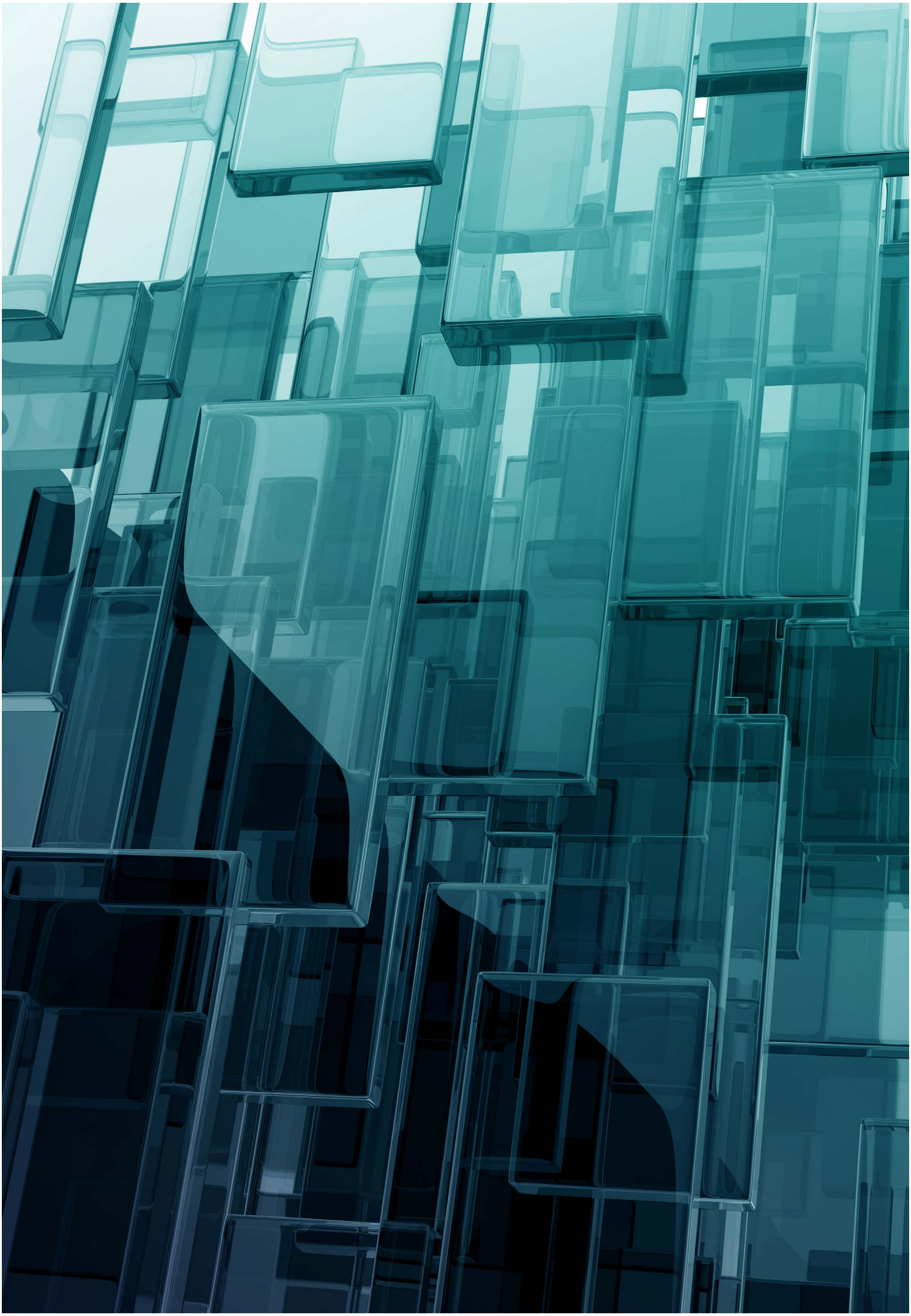

Transfer Pricing

Financial transactions

In February 2020, the OECD issued the report ('Report') with its final guidance on one of the most controversial topics in transfer pricing: the pricing of intra-group financial transactions. The Report will be included in the OECD Transfer Pricing Guidelines for Multinationals Enterprises and Tax Administrations ('OECD TP Guidelines'), which will likely become available in early 2021.

The Report provides guidance in respect of the following main topics: (i) accurate delineation of financial transactions; (ii) treasury functions including intra-group loans, cash pools and hedging; (iii) financial guarantees; (iv) captive insurance; and (v) risk-free and risk-adjusted rates of return.

Takeaways and tips

- In general terms, the OECD appears to be going down the route that intra-group financial transactions should mainly serve to allocate external funding costs within the group and to minimise the potential for 'profit shifting' through financial transactions. This can *inter alia* be derived from the Report's emphasis on the concept of 'implicit support', on which basis theoretically an allocation of external funding costs would be approximated. Also, the Report stresses the importance of the borrower's economic perspective when taking on debt finance, stating that such a borrower would seek to manage its weighted average cost of capital through optimal debt funding.
- Applying principles of economic theory, commercial rationality and corporate finance can be useful to approach complex transfer pricing issues related to financial transactions. In our experience, tax authorities worldwide generally tend to take a closer look at the economic logic behind intra-group financial and other transactions. Instead of applying more traditional transfer pricing methods, financial modelling approaches can be useful in establishing the economic rationality and pricing of financial transactions. In this light, taxpayers should consider substantiating their transfer prices through a quantitative approach.
- Based on the Report, additional scrutiny from tax authorities worldwide is to be expected in respect of the transfer pricing aspects of financial transactions. However, it remains to be seen how tax authorities in OECD countries will implement and interpret this guidance in practice and how this develops over time. As the guidance may in some countries have 'retroactive' effect, it is advisable to proactively assess and continuously monitor whether transfer pricing risks exist in intra-group financial transactions, to evaluate whether such risks may need mitigation and at what price. Trade-off modelling may be useful for this.

Centralised activities

Over recent years we have found that tax authorities have a strong interest in MNEs that centralise certain activities – e.g. purchase of raw materials. Tax authorities are particularly interested in companies that perform centralised activities and are remunerated based on a percentage of total sales or procured materials rather than a cost-plus. Tax authorities are often of the view that benefits derived from such centralised activities should be allocated to those companies that put a company in the position to provide the centralised activities. To support their view, tax authorities rely heavily on transfer pricing documentation prepared by the local taxpayer – such as the master file and the local file – and relevant intercompany agreements in place. Tax authorities may use inconsistencies or certain definitions used in transfer pricing documentation to challenge cross-border intragroup transactions between local taxpayers and a foreign company that provides centralised activities.

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Takeaways and tips

- Intercompany agreements are key in both a functional and comparability analysis, and therefore taxpayers should have proper intercompany agreements in place that accurately delineate the actual transaction.
- We find that many MNEs are struggling to prepare efficiently thorough transfer pricing documentation. We recommend that MNEs prepare transfer pricing documentation that minimises potential questions raised by tax authorities. It is of enormous importance to have proper transfer pricing documentation in place that supports the transfer pricing policy of the MNE. One item in particular that requires attention is the supply chain of an MNE, since tax authorities derive the importance of a company for the overall profitability of the MNE from such a supply chain.

Country-by-country reporting

Since the implementation of BEPS Action 13 into domestic law of various countries around the globe, certain MNEs have been required to comply with country-by-country ('CbC') reporting and master file and local file obligations.

Takeaways and tips

- Tax authorities are extremely interested in analysing the data of a CbC report by calculating certain ratios in order to identify 'red flags'. Tax authorities use such ratios to decide whether to request an explanation or start an audit procedure. To be one step ahead of tax authorities, taxpayers could analyse their CbC reports to identify red flags. These red flags could subsequently be used to anticipate questions, or proactively provide explanations (e.g. in the master file and/or the local file).

State aid

The EU General Court's judgment in the Apple case has provided useful lessons for applying transfer pricing rules and assessing the exposure to challenges under State aid rules.

Takeaways and tips

- On points of law, once again the European Commission ('EC') prevailed. In particular, the General Court reconfirmed that transfer pricing rulings can be challenged under State aid rules and their selectivity may be assessed against the broad reference framework (being the generally applicable tax rules) to assess the existence of a selective advantage. Also, rules of domestic law may be interpreted in the light of international guidelines (even if these are post-dated and non-binding), provided they are compatible with domestic law. The EC is looking at 2014-2018 tax rulings from all member states and may therefore continue to open new cases on similar matters.
- The EC will need to improve its factual analysis to meet its burden of proof. Mere presumptions do not suffice: the EC must carry out a thorough functional analysis, taking also the broader group's background into account and identifying the actual functions and risks of the parties to the transaction, and must show why taxpayer's methodological transfer pricing choices lead to a selective tax advantage. Taxpayers should thus focus their defence on facts rather than legal issues.
- On the complex topic of intangibles' pricing, the General Court considered that IP cannot be allocated to operating companies when strategic decisions are made at a higher level. Bearing costs and performing support functions related to IP does not justify the allocation of IP either.

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Looking forward

The Apple case seems at first glance to concern transfer pricing, but the underlying issue was double non-taxation. This may also explain the EC's failure, as State aid rules prove to be inappropriate to deal with such a situation (see also the McDonald's case).

The EC has appealed the Apple judgment. However, its chances of success may be low, as it lost on factual considerations and not on points of law. It also remains to be seen whether the EC will learn from this judgment and the Starbucks judgment when analysing further cases (in particular the extended investigation concerning Ikea in the Netherlands and the 39 individual cases opened on the Belgian 'excess profit' rulings).

Regardless of its defeats in court, the EC has also announced its intention to start screening State aid by third countries in the context of EU market access and public tenders. The EC is also said to be assessing the nexus requirements for IP box regimes.

Transfer pricing litigation in the Netherlands

Over the past years, there has been an increase in transfer pricing litigation in the Netherlands and over the course of 2020 Dutch courts have ruled in a number of transfer pricing cases. There are two cases in particular that we would like to highlight.

Conversion of entrepreneur into toll manufacturer

In this case[1], the Court of Appeal had to rule on a transfer pricing dispute related to the cross-border conversion of a taxpayer – previously operating as entrepreneur – into a toll manufacturer. The taxpayer received an indemnification fee for the business restructuring, and post-reorganisation applied a cost-plus based remuneration. However, according to the tax authorities, although certain activities had indeed transferred to a related entity, the taxpayer still performed the core functions post-reorganisation.

Takeaways and tips

- The transfer pricing aspects of conversions (the arm's length nature of the transfer value and/or indemnification fees, and the post-reorganisation remuneration) involving Dutch taxpayers are frequently scrutinised, often resulting in lengthy discussions. Therefore, prior to a reorganisation, it is key to review and document its transfer pricing aspects. This substantiation can be enhanced through economic scenario modelling of the pre- and post-reorganisation situations to review the economic rationale of the restructuring and the arm's length pre- and post-reorganisation allocation of risks and returns.
- After the parties had settled the dispute, the State Secretary of Finance issued a statement on this settlement, in which one of the views he expressed was that taxpayers will be held to their previous 'behaviour' or transfer pricing positions taken, e.g. statements in transfer pricing documentation and the presentation in annual accounts and tax returns. It is questionable whether a court will follow this view, but generally a taxpayer's position can be improved if a coherent transfer pricing system is applied. Therefore, it is recommended that taxpayers carefully consider the transfer pricing model to be applied to new ventures and to review whether their existing transfer pricing model is still in line with the actual and commercial situation.
- A quantitative approach will also help in making informed decisions as to whether, for example, obtaining an advance pricing agreement or taking a filing position without prior consultation would be most beneficial. If a discussion reaches the settlement stage, quantitative scenario analysis will also provide insight in the relationship between risk and return of accepting/rejecting a settlement, and thus helps a taxpayer improve its decision making.

1 ECLI:NL:GHSHE:2020:968.

Arm's length interest rate on and volume of an acquisition loan

In this case[2], the Court of Appeal ruled on, inter alia, the deductibility of interest on a shareholder loan used for the acquisition of a Dutch target by a private equity fund. The loan carried an interest rate which was substantiated through transfer pricing documentation and a benchmarking study. In this case, the tax authorities were successful in challenging the arm's length character of the loan with an economic analysis of the taxpayer's expected future cash flows, while ignoring the available transfer pricing study. More specifically, the Court followed the tax authorities in their argument that the shareholder loan was a 'non-business-like loan'[3], which meant that interest deductibility was limited to the risk-free rate.

Takeaways and tips

- Notwithstanding the outcome of this case that is now pending before the Dutch Supreme Court, we expect that the tax authorities will seek to leverage on this judgment by more actively scrutinising existing structures on the transfer pricing/non-business-like aspects, with a specific focus on the economic aspects of the relevant investment structure, and less so on the traditional loan pricing benchmark. The – until recently – widely held view that a transfer pricing report providing a benchmarked interest rate would sufficiently protect a taxpayer's position appears to have been set aside in this case.
- Investors who have financed acquisitions with a shareholder loan are recommended to review their financing structure. We have developed an approach to evaluate whether a shareholder loan can be challenged based on this decision. This analysis can:
    - complement and strengthen the existing transfer pricing documentation in relation to a shareholder loan, without the need for further changes to the current situation;
    - give insight into any specific risks involved and their quantum; and/or
    - provide a basis for discussions on any changes to be made to enhance/optimise an existing situation.
- For acquisition structures and reorganisations, an economic modelling approach to establish an arm's length debt volume of and interest rate on an intra-group loan is recommended over a traditional benchmarking study. Such an approach provides for a more robust substantiation, as it is tailored to a specific investment whereas benchmarking databases typically lack sufficiently comparable data.

2 ECLI:NL:GHAMS:2020:1407.

3 In short, an intra-group loan is considered 'non-business-like' if the agreed interest on the loan does not adequately reflect the credit risk assumed by the lender, and an adjustment to the agreed interest rate to adequately reflect credit risk can only be made to a level at which the loan becomes de facto profit sharing. Under this concept, the lender is considered to have assumed credit risk in its capacity of shareholder. As this credit risk should not be considered when determining the interest rate on an intercompany loan, this typically results in a lower interest rate to be deducted.

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Substance

During recent years, much more emphasis has been placed on combatting tax avoidance worldwide. In the course of this development, countries, including the Netherlands, have introduced various anti-abuse measures such as:

- the principal purpose test included in the Multilateral Instrument;
- the general anti-abuse rule included in the EU Parent-Subsidiary Directive; and
- the increased Dutch substance requirements for 'Service Companies', being companies that receive and on-pay interest, royalties or lease amounts from and to foreign group companies, and the announcement to broaden the scope of these requirements to holding companies.

A common factor of these and many other anti-abuse measures is that the level of substance of a taxpayer is used as a means to assess whether a structure or transaction is abusive and, if so, whether tax benefits should be denied or other measures should be taken.

Substance is not easily defined as its meaning depends on the purpose for which it is used. For instance, a specific set of minimum substance requirements is used by the Dutch tax authorities to determine whether a foreign shareholder can benefit from the Dutch dividend withholding tax exemption, unless the Dutch tax authorities successfully show the shareholding is abusive. Such requirements include local resident directors, an office space and sufficient relevant salary expenses at the level of the shareholder.

On the other hand, if payments are made from source countries to the Netherlands, such source countries may have their own interpretation of the minimum level of substance the recipient should have in order to benefit from certain tax benefits. In general terms, substance can be regarded as the actual presence of a company in a jurisdiction, evidenced by its business enterprise including, but not limited to, its assets, liabilities and employees.

In light of these and other developments, MNEs are looking for tools to assess their current substance and set up their business in a way that is efficient from a business perspective and future-proof from a tax perspective. For example, MNEs increasingly tend to set up their tax and other functions, internal procedures, compliance and risk management in-house. This can be a challenging transition.

Loyens & Loeff can assess an MNEs level of substance and the risks from a Belgian, Dutch, Luxembourg and Swiss tax perspective. Furthermore, we can make clear and practical suggestions to improve the efficiency of the structure and make it future-proof. We can also act as a sparring partner of the local companies that have set up their tax and other functions in-house.

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Tax controversy, times are changing

A more rigid attitude on the part of the tax authorities leads to more conflicts.

The Netherlands

The Dutch tax authorities have in recent years become more determined in their approach to tax disputes. This has resulted in a rise in the number of tax audits, adjustments, disputes and cases being brought to court. We see an increasing emphasis on transfer pricing. The tax authorities do not shy away from imposing substantial corrections and even penalties, which has led to an increase in the number of disputes in this area. Another issue that is causing a great deal of discussion with the tax authorities is the right to a refund or set-off of dividend tax. We see the tax authorities raising substance and beneficial ownership issues (application of the Danish cases) and increasing use is being made of the possibilities offered by anti-dividend stripping legislation.

There are many legislative developments, both on an international and a national level, that have also led to an increase of disputes with the tax authorities. For example, the OECD/G20 BEPS project and the EU Anti-Tax Avoidance Directive (‘ATAD’) have led to the introduction of a multitude of new legislation and amendments to existing legislation. As a result of these developments, tax laws and bilateral tax treaties contain far-reaching anti-abuse provisions and reporting obligations. In addition, for the tax authorities the exchange of information between countries has become much easier. The Panama Papers have also led to new legal measures. The interpretation of all these new rules has led to more disputes with the tax authorities. In a cross-border context, mutual agreement procedures and arbitrage can be an attractive dispute resolution mechanism.

Due to the more assertive attitude of the tax authorities, client privilege is becoming increasingly important. Attorneys at law and civil-law notaries, for example, have client privilege. The government is currently considering an adjustment to client privilege, which in the future would result in a limitation of the cases in which client privilege applies.

Luxembourg

In Luxembourg, the number of disputes with the tax authorities is also increasing. Tax audits are more frequent, with an emphasis on valuation and transfer pricing (notably since a reorganisation within the tax authorities’ audit department) as well as on VAT, and are increasingly followed by adjustments leading to disputes. While some disputes continue to be settled at the level of the controversy division of the tax authorities, a significant number of cases are brought to court.

This trend towards more disputes is notably driven by the series of State aid cases initiated by the EC against Luxembourg, which has resulted in extensive debates on financing activities, the qualification and tax treatment of certain financing instruments and the recognition of foreign branches. The implementation of ATAD is likely to strengthen this trend. The Luxembourg tax authorities are also increasingly relying on the abuse-of-law doctrine to challenge existing structures. The recent broadening of the scope of the long-standing domestic general anti-abuse rule may further increase this tendency, as could the insertion of anti-abuse clauses in tax treaties. It remains to be seen whether the tax authorities will recognise that the consequences of a finding of abuse should differ depending on the legal ground they rely on when invoking abuse.

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In the aftermath of the so-called Danish cases decided by the Court of Justice of the European Union ('CJEU'), substance and beneficial ownership have lately attracted considerable attention and are at the heart of mutual agreement procedures between Luxembourg and other Member States. Such mutual agreement procedures are an attractive dispute resolution mechanism in a cross-border context and the recent implementation of an EU directive on tax dispute resolution mechanisms could further boost their use.

Belgium

A similar trend is observed in Belgium. Although the Belgian tax authorities have always taken a sharp stance, we see an increase in issues relating to substance, beneficial ownership (application of the Danish cases – see pages 25) and tax audits with detailed questions that were not previously asked.

Switzerland

Due to its practice on advance tax rulings, tax positions are typically discussed upfront with the tax authorities. This also reduces the amount of tax litigation to a certain degree.

However, in line with the trends observed in other jurisdictions, the Swiss tax authorities are becoming stricter in issuing tax rulings. This notably applies to the Swiss federal tax administration which is tightening its practice for outbound dividends with respect to local substance and beneficial ownership, as well as in general with respect to obtaining a beneficial dividend withholding tax position. Furthermore, the arm's length nature of transactions is much more prone to scrutiny as transfer pricing reports are challenged more frequently.

Separately, acquisitions of Swiss targets by investors which typically have difficulty obtaining relief under a double tax treaty (for example, private equity firms) are now also challenged if they seek to minimise outbound dividend withholding tax through a more sophisticated investment structure.

In general, Swiss tax authorities show an increasing reliance on abuse-of-law doctrine by constantly expanding their prior practice and leveraging on the fact that investors are typically not interested in litigating a case before having acquired the target entity. We expect, however, that this expansion of tax practice will trigger an increase in litigation in the future as well as a further increase in mutual agreement procedures. In particular, because the Swiss federal tax administration is expected to be challenged for going beyond what they would be allowed under existing double tax treaties.

Foreign MNEs often choosing the Netherlands as stock listing jurisdiction

Public limited liability companies under Dutch law ('N.V.s') play an important role as share issuers, with listings not only at Euronext Amsterdam, but often also with primary (or secondary) listings elsewhere (e.g. NYSE, NASDAQ or the London Stock Exchange). Based on the 'incorporation theory' applicable under Dutch law, it is possible to make use of an N.V. as share issuer irrespective of the location of the head office, tax residency or listing venue. We are seeing an increase in the number of MNEs that opt for an N.V. for their stock listing.

Dutch tax and corporate law offers a lot of flexibility

There are several commercial, tax and corporate governance reasons to opt for an N.V. as issuer. Such reasons include a neutral jurisdiction in case of a merger between two foreign enterprises and a certain nexus with the Netherlands or, more in general, with the EU. Also, the use of an N.V. as share issuer has numerous precedents, making it a reliable European vehicle for a listing.

In terms of corporate governance, Dutch law offers a lot of flexibility. For example, Dutch law allows for structures deviating from the one-share-one-vote principle in order to strengthen the position of a controlling shareholder and/or to reward long-term shareholdership. Such possible structures include loyalty voting structures and high / low voting structures. Over the past few years the Netherlands has seen a growing use of loyalty voting structures. In a loyalty voting structure, shareholders are invited to register their shares in a 'loyalty registry' held by the company. Provided that the shares remain registered to the same shareholder for a set period of time (typically three to five years), that shareholder may be granted certain additional 'loyalty' benefits; usually additional voting or dividend rights. Examples of companies with such structures include Fiat Chrysler Automobiles N.V. and Ferrari N.V.

A loyalty voting structure may be similar to, but should be distinguished from, a high / low voting structure. In a classical high / low voting structure a company would have two classes of shares with different voting rights but similar economic rights. A selling shareholder could only offer low voting shares to the public and retain high voting shares itself, thereby limiting the voting power of its co-shareholders. Examples of companies with such a structure include Altice N.V. and Trivago N.V.

Furthermore, under Dutch law it is possible to implement certain anti-takeover measures to protect a company against hostile takeover attempts and – although there are certain safeguards as to the position of minority shareholders – there is no mandatory representation of minority shareholders in the management or supervisory board.

N.V.s resident outside the Netherlands – tax neutral treatment

For Dutch corporate income tax ('CIT') and dividend withholding tax ('DWT') purposes, an entity incorporated under Dutch law (like an N.V.) is deemed to be a Dutch resident and is taxed on that basis, unless the Netherlands' taxing right is restricted under a tax treaty. If an N.V. is also considered a tax resident of another country due to having its place of effective management ('PoEM') in that country, the dual-residence provision in Dutch tax treaties generally allocates the tax treaty residence of the N.V. to that other country.[4] As a result, based on case law, the Netherlands is then prohibited to levy (i) CIT on profits of the N.V. that are not allocable to a Dutch permanent establishment, and (ii) DWT on profits distributed by the N.V. to non-Dutch shareholders. This allows for a tax-neutral treatment in the Netherlands for groups with no or limited nexus and investors in the Netherlands.

N.V.s resident in the Netherlands – ordinary tax treatment

Ordinary Dutch tax treatment can be established by maintaining the PoEM of the N.V. in the Netherlands. The PoEM is generally situated in the Netherlands if the board of directors of the N.V. takes its strategic management decisions in the Netherlands and such decisions are not de facto taken by the directors, or others, outside the Netherlands. As a Dutch tax resident, barring exceptions for certain qualifying investment entities, the N.V. is subject to CIT at the ordinary rates (headline rate of 25%). Benefits derived from shareholdings in foreign subsidiaries may be exempt pursuant to the Dutch participation exemption regime. Profit distributions are subject to 15% DWT, unless relief is available under domestic law, EU law or a tax treaty, depending on the circumstances of the relevant shareholder.

Some specific considerations for listed N.V.s resident in the Netherlands

In a listed context, individual investors can generally claim a credit for the DWT due against their local income tax liability. To the extent that a full credit can be claimed, the DWT does not represent an actual cost. Qualifying pension funds and other tax-exempt investors and organisations can potentially claim relief from DWT under an applicable tax treaty or Dutch domestic law. The issuance of shares – including 'loyalty shares' that may grant additional economic or voting rights – is subject to DWT if issued at the expense of the N.V.'s profit reserves, but only up to the nominal value of the shares issued. If the shares are issued at the expense of the share premium which is recognised paid-up capital of the N.V., no DWT is due.

If shares in a foreign company are contributed to the N.V. in exchange for shares, the recognised paid-up capital of the N.V. for DWT purposes (consisting of nominal paid-up capital and share premium) will increase with the fair market value of the shares so contributed, provided that the shares are not contributed with the main purpose of avoiding or deferring Dutch taxation. Subject to fulfilling certain corporate law formalities, the N.V. should then be able to make distributions to its investors free of DWT in the form of repayments of recognised paid-up capital, up to the fair market value of the shareholding contributed to the N.V., as well as any additional capital raised through the issuance of shares to new investors.

4 In tax treaties that contain the revised dual-residence provision developed in BEPS Action 6 (incorporated in selected tax treaties via the Multilateral Instrument), tax treaty residence is determined in a mutual agreement procedure between the competent authorities of both countries, having regard to the entity's PoEM, but also to the place where it is incorporated and any other relevant factors. In the absence of certain situations of tax abuse, the PoEM should generally continue to be the decisive factor under this revised dual-residence provision.

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There are precedents of Dutch-resident listed companies who maintain a share structure with two classes of shares (for example, classes A and B) in order to make use of the recognised paid-up capital as efficiently as possible. The classes of shares can carry similar economic and voting rights, but distributions on the class A shares would be made out of the N.V.'s profit reserves (as a general rule, subject to DWT), whereas distributions on the class B shares would be made out of recognised paid-up capital (free of DWT). The class A shares would typically be issued/traded at a small discount, compared to the class B shares. Investors who are eligible to relief from DWT, or who can fully credit the DWT, would then typically elect to buy the class A shares, whereas other investors would typically elect to buy class B shares. A notable example of a Dutch-resident company that trades separate classes of shares carrying identical economic rights but with a different DWT treatment is Royal Dutch Shell Plc.

Digital taxation

In the course of 2020, the OECD has continued its work on addressing the tax challenges of the digital economy. On 12 October 2020, the OECD released updated reports on Pillar One and Pillar Two for public consultation together with a report on the economic impact assessment following the adoption of Pillar One and/or Pillar Two. The Pillar One proposal focuses on new nexus and profit allocation rules for certain business models, whereas the Pillar Two proposal pursues more broadly a global minimum effective taxation. The reports identify key issues, both political and technical, where divergences remain to be solved.

Pillar One

In concrete terms, the Pillar One proposal is designed to re-allocate to market jurisdictions the taxing right on a particular share of an MNE's 'residual profit' ('Amount A'). The proposal covers highly digitised businesses providing 'Automated Digital Services', such as online advertising services, social media platforms and online intermediation platforms, and also consumer-facing businesses, i.e., businesses which sell goods and services primarily targeted at consumers. The detailed scope of each of the two groups is one of the key pending political issues. To be effectively covered, an MNE group's global consolidated revenue must meet a threshold amount (initially set at EUR 750 million) as established under international financial accounting standards, while at the same time a significant part of that global revenue needs to be derived from foreign sources (no threshold set yet).

Further, Pillar One is aimed at simplifying the application of transfer pricing rules to determine the profit attributable to standard marketing and distribution functions ('Amount B'). Amount B refers to a fixed return (based on third-party comparables using the Transactional Net Margin Method) for standard (baseline) marketing and distribution activities taking place physically in a market jurisdiction.

Pillar Two

In turn, Pillar Two effectively seeks to enforce a global, yet to be determined minimum level of effective taxation on income derived by MNEs. It would apply to MNEs and their constituent entities where the annual gross revenue of the MNE group, as determined under applicable financial accounting standards, is at least EUR 750 million (or the equivalent in another currency) in the previous fiscal year.

Pillar Two combines domestic and treaty-based rules that allow the other jurisdictions where the MNE operates (notably the jurisdiction of the ultimate parent entity) to charge a top-up amount of tax on resident group entities. In concrete terms, the proposal includes four different rules: the income inclusion rule ('IIR'), a switch-over rule ('SOR', to facilitate the application of the IIR in a treaty context), an undertaxed payment rule ('UTPR', which serves as back-stop to the IIR) and a subject-to-tax rule ('STTR'). The IIR (with the SOR) and UTPR are together referred to as the Global Anti-Base Erosion Rules ('GloBE Rules'). The STTR and SOR would require changes to tax treaties.

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Tip

In the short term, MNEs that may be in scope of the future rules should take the opportunity of the public consultation to share concerns they may have in terms of complexity and administrative burden. The written consultation runs until 14 December 2020 and will be followed by a public consultation meeting in mid-January 2021. The new target deadline for an overall political agreement on Pillar One and Pillar Two is mid-2021. In the coming months, MNEs subject to country-by-country reporting obligations (or which may reach the EUR 750 million turnover threshold in the next 2 years) are advised to assess whether or to what extent they may be affected by Pillars One and/or Two, and in which countries this may occur.

Domestic developments in the Netherlands

Proposed adjustment of the arm's length principle

On Dutch Budget Day 2020, the government announced that it will propose new legislation that should apply from 1 January 2022. The government expects to present these new measures in a separate legislative proposal in the spring of 2021.

One of the proposed measures is that the arm's length principle will no longer be applied if this leads to a reduction of the taxable profit in the Netherlands (through an informal capital contribution or a deemed dividend), to the extent that the other country involved in the transaction does not include a corresponding adjustment in its tax base, or does so for a lower amount. The aim of this measure is to eliminate double non-taxation through transfer pricing mismatches. In the budget day announcement, the government states that this measure contributes to a more balanced taxation of multinationals and brings the Netherlands more in line with international practice.

Takeaways and tips

As the legislative proposal is still to be drafted, the specific contents are unknown. We do expect, however, that the proposed adjustments will have an impact on existing cases. Below is an overview of the expected impact and our recommendations.

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- Advance pricing agreements ('APAs') containing an informal capital or deemed dividend element will most likely expire at the time of the legislative amendment, which is expected to be 1 January 2022, as many of these APAs include a clause stating that the APA will be terminated in case of a relevant change in law. The proposed legislation will obviously also have an impact on situations without an APA where downward adjustments based on transfer pricing principles are substantiated in relevant transfer pricing documentation and are claimed in the Dutch corporate income tax return. Our recommendation is to carefully assess the impact of the proposed legislation both in case of an APA and in absence thereof, to investigate possibilities for restructuring and to assess whether it is relevant to discuss a potentially envisaged restructuring with the Dutch tax authorities.
- We expect the proposed legislation to also have an impact on cases in which the subject-to-tax test as included in various articles in the Corporate Income Tax Act applies. Our recommendation is to assess in each case whether the proposed change in legislation has an impact on the application of the subject-to-tax test.
- The proposed legislation may potentially also have adverse tax consequences for companies with back-to-back and other financing/licensing/leasing activities. Where currently the transfer pricing review of such activities mainly focuses on whether the margin between inbound and outbound interest/royalty/lease payments is at arm's length, the proposed legislation will demand that the focus be shifted to the arm's length character of these payments. If, for example, the interest rate on a loan receivable is considered too low, the interest rate should be increased, but no similar adjustment can be made for the interest rate on the loan payable if no corresponding adjustment is made in the country of the creditor. We therefore recommend that the interest rates in borrowing and on-lending situations be carefully assessed to avoid these consequences.
- We expect that the qualification of a loan as business-like or non-business-like will become more important as a result of the implementation of the proposed legislation.
- It is unclear how the proposed legislation relates to OECD Action 9 and the latest amendments of the OECD Transfer Pricing Guidelines. The position of the OECD is that the activities actually carried out are decisive rather than the contractual allocation of risks. Yet, the proposed legislation intends to eliminate transfer pricing mismatches by taking the contractual terms of the transaction (e.g. the price) into account. This seems contradictory to the position of the OECD.

New loss compensation rules

Proposed changes of the loss compensation rules

As part of the Dutch Budget 2021, the Dutch government has proposed amending the loss compensation rules as laid down in the Dutch Corporate Income Tax Act. The entry into force date will be determined by a royal resolution and is expected to be 1 January 2022. If adopted, outstanding carry forward losses, which are still available in 2022 pursuant to the existing legislation, will no longer be restricted by the current six-year term. The one-year carry back term remains unchanged. On the other hand, losses can be offset in a certain year only up to a maximum of 50% of the taxable profit realised in that particular year. An exception applies with respect to the first one million euro of annual taxable profit realised which can be fully offset by losses. Hence, losses should generally not expire in time, but especially for multinationals it could take longer to utilise them.

Takeaways and tips

- *Direct impact on deferred tax asset position*
  As it is expected that this legislative proposal will be enacted before the end of 2020, corporate taxpayers availing of carry forward losses may need to reassess the deferred tax position for tax losses in their annual accounts. Following the new rules, losses can be carried forward indefinitely and may increase the deferred tax asset of taxpayers. However, the annual loss compensation limitation requires more future profits to indeed use all the available losses. As a result, it will be more challenging for taxpayers to substantiate reliably to what extent losses are expected to be recovered. Relevant aspects that could be taken into consideration in the reassessment of the deferred tax position for existing tax losses are inter alia the nature of the losses (e.g. occasional losses), possible tax optimisation as well as the taxpayer's successful profit prediction in recent years.

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- *Potential actions in 2021 and onwards?*
  Corporate taxpayers could investigate possibilities to rejuvenate older carry forward losses that will expire ultimo 2021. Following an official Decree (updated in 2014) issued by the Dutch State Secretary for Finance, anticipation of loss expiration is allowed provided that taxpayers do not achieve an 'occasional' tax benefit or set up artificial structures. This Decree gives some examples taxpayers could think of, e.g. realisation of hidden reserves through an intra-group transfer. Further, due to the new loss limitation rule, it becomes more important for taxpayers to manage at which moment costs can be taken into account or whether they can be postponed to avoid a loss in a financial year. This largely depends on the Dutch case law doctrine of 'sound business practice' (*goed koopmansgebruik*).

Liquidation losses

The Dutch government published a legislative proposal on Budget Day 2020 to restrict the deduction of liquidation losses on subsidiaries held by Dutch corporate taxpayers.

1. A liquidation loss on a subsidiary will be maximised on EUR 5 million, unless:
   a. the taxpayer has a controlling interest in the subsidiary; and
   b. the subsidiary is a resident of an EU or EEA member state, or certain designated countries that have an association agreement with the EU (only Turkey currently qualifies); and
   c. both of these conditions have been satisfied throughout a period of five calendar years preceding the moment on which the dissolution of the subsidiary is completed (subject to limited exceptions).
2. A liquidation loss is only deductible if the subsidiary's dissolution is completed within three calendar years following the year in which the activities of the subsidiary were discontinued or a decision to that end was taken, unless the taxpayer demonstrates that a delay in the dissolution is not tax driven.

Similarly, discontinuation losses on foreign permanent establishments are limited to EUR 5 million for non-EU/EEA permanent establishments. Such losses are entirely disallowed from deduction if the dissolution of a permanent establishment exceeds the abovementioned three-year period, unless the taxpayer demonstrates that a delay in the dissolution is not tax driven.

The proposal includes look-through rules that limit a liquidation loss on a qualifying directly held subsidiary if that subsidiary owns non-qualifying lower tier subsidiaries or permanent establishments.

These restrictions are expected to enter into force on 1 January 2021.

Tip
Dissolutions of subsidiaries that are currently in progress and can be affected by the proposed measures mentioned under 1 above (non-EU/EER or not controlled subsidiaries) must be completed by 31 December 2020 at the latest in order for a liquidation loss to be fully tax-deductible. With respect to all dissolutions that are currently pending, the three-year limitation mentioned under 2 above starts at 1 January 2021. Consequently, dissolutions that are currently in progress must be completed by 31 December 2023 in order for any liquidation loss to be tax-deductible under the new rules.

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Withholding taxes

It has been a challenging year in the Netherlands from a withholding tax perspective. The legislative proposal for the conditional withholding tax on interest and royalties will enter into force as of 1 January 2021, an additional withholding tax on dividends as of 2024 was announced and a member of parliament proposed introducing an 'exit tax' in the dividend withholding tax for certain cross-border reorganisations.

The Dutch government focuses on payments from Dutch entities to related entities in (perceived) tax haven jurisdictions. Whether or not such entities have 'substance' is not relevant for the withholding tax on interest and royalties and the proposed additional withholding tax on dividends. This demonstrates that the Netherlands intends to end such payments to tax havens, irrespective of whether the payments are made for genuine business purposes.

Withholding tax on interest and royalties as of next year
As of 1 January 2021, a withholding tax on interest and royalty payments to related entities (in general, >50% of voting rights) in certain low-taxed or EU-blacklisted jurisdictions ('LTJs') will apply. Additionally, payments to certain hybrid entities or payments in 'abusive situations' may also be covered, even if the payment is made to an entity not resident in an LTJ. The rate of the withholding tax will be the headline corporate income tax rate (25% in 2021).

Takeaways and tip
From a practical perspective, it is important to note that there are several situations that may be covered by the withholding tax that are less straightforward. These include, for instance, interest-free loans from group companies in LTJs, certain lease payments to LTJs and payments not made directly to an LTJ but indirectly (e.g. a 'back-to-back' situation). Furthermore, the presence of substance (either at the level of the Dutch entity or the LTJ entity) is not relevant for the withholding tax.

For MNEs, it is recommended verifying whether there are any interest or royalty payments by Dutch entities to related entities in low-taxed or EU-blacklisted jurisdictions or to certain hybrid entities or in 'abusive situations', as these may be covered by the withholding tax as of 2021. Restructuring may have to be considered if not done yet. Also payment of accrued interest or royalties before 1 January 2021 should be considered to avoid application of the withholding tax on later payments of accrued interest.

Additional withholding tax on dividends to low-taxed or EU-blacklisted jurisdictions as of 2024
The Dutch government has announced that it intends to implement an additional withholding tax on dividends as of 1 January 2024 and published a draft legislative proposal for consultation on 25 September 2020.

Takeaways and tip
The additional withholding tax will in essence entail a surcharge for dividend payments made directly or indirectly to shareholders in an LTJ. It will only apply for dividends paid to group companies (in general, >50% of voting rights).

Furthermore, the additional withholding tax will also cover distributions by 'non-holding cooperatives', that are not subject to the general dividend withholding tax.

It is recommended that Dutch taxpayers check whether there are direct or indirect shareholders in an LTJ, to verify whether the additional withholding tax may become applicable.

Proposed ‘exit tax’

A member of the opposition has submitted a legislative proposal to parliament that would introduce an ’exit tax’ for the dividend withholding tax in case of certain cross-border reorganisations. The proposed exit tax currently has a retroactive effect until 18 September 2020.

The exit tax applies in case of a transfer of the place of effective management, cross-border merger, demerger or share-for-share merger to a ‘qualifying state’. A qualifying state is a jurisdiction that does not levy a withholding tax on dividends or that allows for a step-up to fair market value upon an international reorganisation for purposes of its dividend withholding tax. Under the exit tax, the Dutch company would be deemed to have distributed all of its profit reserves to its shareholders immediately prior to the reorganisation. Collection of the tax would however be postponed until and insofar as distributions would be made in the future.

The proposal is currently under discussion with the Second Chamber of Parliament. The Dutch Council of State, an advisory body to the government, has rendered a very critical advice with respect to the proposal and it is unclear whether the proposal is allowed under EU law and tax treaties. It is currently not clear whether there will be a political majority for the proposal and therefore whether it will be enacted into law.

Domestic developments in Belgium

Loss carry-back and some other recent measures

Loss carry back
In principle, tax losses can only be carried forward and no carry-back to previous tax years exist in Belgium. However, in order to improve the cash position of businesses and companies, a one-time possibility has been introduced to carry back losses incurred during the COVID-19 crisis to compensate the taxable profits of the previous financial year.

Qualifying companies will be able to offset the estimated loss incurred in the subsequent (i.e. the COVID-19) year against the taxable profit realised during a financial year that closes between 13 March 2019 and 31 July 2020. Technically, the taxable reserves in the corporate income tax return are reduced by the amount of the estimated loss through the creation of a tax-exempt reserve. The exemption cannot be higher than the adjusted result of the taxable period, up to an absolute maximum of EUR 20 million. The amount that has been exempted is added to the taxable basis in the subsequent COVID-19 year in order to avoid a double deduction of the same loss. In addition, the taxable basis will be increased if the amount of the exemption is taxed in a subsequent year at a lower tax rate than the rate applicable at the moment the estimated loss was used to offset the taxable basis. This measure was introduced in order to neutralise the benefit of this lower tax rate.

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Investment deduction
The investment deduction is a tax deduction that comes on top of the deduction of the depreciation on eligible assets. The one-time investment deduction is calculated as a percentage of the acquisition value related to the investments. The base rate for investments by small and medium-sized enterprises (SMEs) is in principle 8 per cent. Due to the COVID-19 crisis and in order to stimulate business investments in these difficult times, the base rate had already been set at 25% for investments made between 12 March 2020 and 31 December 2020. An agreement has been reached to extend this increased rate of 25% by two additional years.

Reconstruction reserve
A legislative proposal has been approved allowing companies to exempt part of their profits realised in assessment years 2022, 2023 and 2024 by booking these profits to an exempt 'reconstruction reserve' for the purpose of strengthening their solvency which was affected by the COVID-19 crisis. This reconstruction reserve thus allows future profits to be treated in a fiscally advantageous manner, provided that the equity and the level of employment are maintained and the company has no links with tax havens.

Belgium plans to adopt a more equitable, simple and neutral tax system

On 30 September 2020, seven political parties managed to reach an agreement on the formation of a new Belgian government. In these times of the coronavirus pandemic, the agreement pleads for a solidary, prosperous, sustainable and safe Belgium with, among other things, attention to good health care, a modernised social security system, an increased employment rate, fairer and simpler taxation and a climate-friendly environment. The Minister of Finance presented his policy note on 4 November 2020.

No concrete proposals are available yet but the following guidelines relevant for businesses expressed a more equitable and neutral tax system:

- Belgium will constructively support the international initiatives at OECD and EU level, for example, in respect of the Common Consolidated Corporate Tax Base, Pillar One (nexus and allocation rules in a digitised economy) and Pillar Two (minimum taxation for businesses). An international agreement is preferred but if no action is taken at international level by 2023, the intention is to implement a digital service tax on a unilateral basis;
- The government will prepare a broader (mainly personal income) tax reform to improve the tax system, including a reduction of taxes on labour and a gradual shift from alternative rewards to rewards in Euros;
- Taking into account the climate challenge, taxation will be used as a steering instrument in order to create a climate-friendly environment. In this respect, Belgium intends, for example, to create an emission-free company car fleet by 2026.
- Measures will be introduced to further enhance tax compliance, for example, through tax audits that target non-compliant taxpayers or taxpayers that meet a certain risk profile by using new data mining techniques. In addition, more cooperation is envisaged between the various tax administrations and a separate centre will be established for foreign taxpayers in order to share knowledge and expertise and to enhance joint tax audits of companies forming part of a group.
- In order to improve the relationship between taxpayers and tax administration, the collaboration with partners will be further developed by, amongst other things, increasing the number of participants to the Co-operative Tax Compliance Programme.

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Application of the Danish cases to withholding taxes in Belgium

In the Danish cases of 26 February 2019, the CJEU ruled on, amongst other things, the constituent elements of abuse and the meaning of the term ‘beneficial ownership’. These cases had in common that intermediary (holding) companies were used between entities established in third countries and Danish operating companies in order to obtain an exemption from Danish withholding tax on either interest or dividend payments.

Takeaways and tips

Recent experiences show that the impact of this jurisprudence on existing structures should not be underestimated. Although the Belgian tax authorities did not issue guidance on the impact of the criteria provided by the CJEU in the Danish cases, more detailed questions in relation to substance and beneficial ownership with respect to foreign holding companies and finance structures can be observed during tax audits. In Belgium, the concept of ‘beneficial ownership’ is traditionally given a legal interpretation rather than an economic interpretation. Recent audits show that the Belgian tax administration’s interpretation of beneficial ownership seems to evolve to a more economic interpretation of the concept following the Danish cases.

In order to ensure that holding and finance structures are acceptable from a Belgian tax perspective, it is key that the business reasons for the structure can be demonstrated, sufficient substance is available to support these business reasons and cash flows are closely monitored if third countries are involved.

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Domestic developments in Luxembourg

The main tax measures proposed in the 2021 Budget bill of law ('the Bill') concern a new tax for certain Luxembourg investment funds on income from Luxembourg real estate and changes to employee incentive plans.

Real estate investments

The new real estate tax, at a flat rate of 20%, will apply to specialised investment funds ('SIFs'), so-called 'Part II' undertakings for collective investment ('UCIs') and reserved alternative investment funds ('RAIFs'), that are, briefly put, not a tax-transparent partnership or a fonds commun de placement ('FCP'). The tax applies to income and gains derived from Luxembourg real estate assets held directly and indirectly if they are held through partnerships or FCPs.

Targeted real estate income includes gross rental income, capital gains upon the transfer of a Luxembourg real estate asset (at the moment of a sale, contribution, merger, liquidation, etc.) and income from the disposal of 'shares' in certain tax-transparent entities and FCPs. The latter to the extent that the value of these 'shares' reflects the value of real estate located in Luxembourg, including when these transfers do not lead to cash generation (e.g., intra-group restructuring).

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New restrictions on real estate investments by Luxembourg private wealth companies
Under current rules, Luxembourg private wealth companies ('SPFs') cannot directly invest in real estate (be it in Luxembourg or elsewhere). This restriction will now be extended. SPFs may also no longer indirectly hold real estate via a partnership or a FCP. This prohibition concerns all real estate assets, also those situated outside Luxembourg. This provision will be applicable starting from 1 July 2021 and there will be no transitional regime.

Increased registration duties
The government also proposed an increase in registration duties for contributions of real estate situated in Luxembourg to the capital of a civil or commercial company. These contributions will be subject to a registration duty of 2.40% as from fiscal year 2021 (currently 0.6%) and to a transfer tax of 1% (currently 0.5%).

Changes to accelerated amortisation for real estate assets
Finally, it is proposed lowering the rates and period of the accelerated amortisation, respectively from 6% to 4% and from 6 years to 5 years or less after the construction of the real estate asset.

Tax regime for bonuses granted to employees

Luxembourg will introduce a bespoke tax regime for bonuses granted to employees linked to the employer's annual results. These bonuses would be exempt for 50% from the employee's Luxembourg personal income tax, while being fully tax deductible at the level of the employer as operational expenses.

The exemption is capped at 25% of the annual gross remuneration of the employee. The employer will need to comply with certain conditions, notably that the aggregate amount of bonuses awarded under this regime may not exceed 5% of the employer's annual result for the year preceding the grant.

This regime will only be available for employees who are (i) Luxembourg taxpayers with income derived from an employment activity and (ii) affiliated to the Luxembourg social security regime or a social security regime covered by a bilateral or multilateral social security convention which applies to Luxembourg.

In parallel, the current circular on the stock-option regime will be abolished as per year-end.

Other tax measures

Following CJEU C-749/18, the Bill proposes allowing the formation of a horizontal fiscal unity with companies that are already vertically integrated without triggering the potentially adverse effects of a dissolution of such vertical fiscal unity within the minimum 5-year period. This requires the integrating company to remain the same. In addition, the switch should merely lead to an extension of the current fiscal unity. Groups wishing to benefit from this special rule have until the end of the 2022 tax year to request it. After this deadline, the general principles governing the dissolution of an integrated group will apply to the entities concerned.

For investment funds set up as UCIs governed by the law of 17 December 2010 (currently subject to a fixed annual subscription tax of 0.05% of the net asset value), a decreasing subscription tax rate will be set for assets in 'environmentally sustainable economic activities' as from 1 January 2021.

Lastly, a 'Carbon tax' will be introduced in the form of an additional autonomous excise duty on oil and gas products. The applicable rates anticipate the increase in the price of carbon in 2022 and to EUR 25 per ton of CO_2 and EUR 30 per ton of CO_2 in 2023.

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Domestic developments in Switzerland

The Swiss corporate tax reform

The year 2020 marked the entry into force of the Swiss Tax Reform and AHV Financing bill ('TRAF') that introduced significant changes to the corporate tax landscape. As part of TRAF, special tax regimes that previously applied mostly at cantonal level, such as the holding or mixed company regime, were abolished, whereas the reform also introduced OECD BEPS compliant measures, such as a patent box and R&D deductions as well as a limited notional interest deduction.

As these changes technically mean that certain taxpayers will be subject to a higher effective tax rate as of 1 January 2020, TRAF also includes a transitional provision allowing for a (limited) phasing-in of the higher tax rate. In short, to the extent that a taxpayer was previously exempt or partially exempt from taxation under one of the special tax regimes, the reform allows for a tax-neutral step-up in basis with tax-effective depreciation over five to ten years ('Depreciation Model') or for a taxation of profit tax at a reduced tax rate ('Separate Rate Model'). As these measures have to be implemented either in the 2019 or 2020 tax return (depending on the method chosen and the canton of residence), the year 2020 saw considerable demand for tax modelling and negotiation to tailor this transitional mechanism to the specific case of each taxpayer.

Separately, most cantons reduced their effective corporate income tax rate as of 1 January 2020, with tax rates at the lower end being in Zug (11.91%), Lucerne (12.32%), Basel (13.04%), Vaud (13.79%) and Geneva (14.00%).[5]

5 All rates including federal income tax.

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The average combined tax rate in Switzerland is now at approximately 16% with certain cantons announcing to look into further reducing the effective rates to 8.5% depending on international developments under the OECD's Pillar Two proposal.

Takeaways and tip
As tax returns for 2020 will not become due until late 2021, we expect that this trend will continue and that there are still many businesses that have not started or completed their analysis on the tax implications. Due to the changes introduced in many European Member States under the ATAD as well as under US-related guidance, a holistic approach is typically required to ensure that changes or measures applied to a Swiss group entity do not, for instance, disqualify the direct parent entity from receiving a participation exemption on dividend received from the Swiss subsidiary.

Finally, due to the change to the tax corporate tax landscape and the possibility to apply a step-up in basis for any assets or business relocated to Switzerland, 2020 also brought with it requests for relocation proposals to Switzerland with some multinationals relocating to or increasing their presence in Switzerland. As Switzerland does not introduce CFC rules or other subject-to-tax tests, some groups have relocated their holding activities to Switzerland. MNEs which have not done this, may consider this and investigate its advantages in 2021.

Acquisition of Swiss targets

Due to Swiss withholding tax practice, the acquisition of Swiss targets has ongoing challenges both for multinational enterprises as well as private equity deals. Due to the economic environment, 2020 also saw a fair amount of acquisitions of Swiss targets, especially by private equity ventures.

One of the main hurdles has been the constant change and tightening of the practice of the Swiss federal tax administration ('SFTA') with respect to relief from the general 35% dividend withholding tax. As a general rule, Switzerland does not levy withholding tax on intra-group dividend both in a domestic as well as international context (provided that a double tax treaty allows for a 0% rate). Also, Switzerland does not levy withholding tax on the repayment of additional paid-in capital ('APIC'). As certain private equity firms as well as US investors, for instance, may not generally be in a position to claim a 0% rate, the creation of APIC has been a frequent mechanism applied to achieve a withholding tax-exempt repatriation structure. The SFTA has increased its scrutiny both for private equity structures and the creation of APIC in general by following the current international trend of arguing abuse at any given opportunity.

Takeaway and tip
Swiss targets acquired by private equity firms should carefully analyse their repatriation structure with respect to Swiss dividend withholding tax if they operate through a Swiss acquisition vehicle. To the extent that the acquisition vehicle has been financed with debt or APIC, the SFTA may fully or partially deny a reduction of Swiss dividend withholding tax imposed on dividends up-streamed from the target entity if certain requirements are not met. The upside is that the SFTA has shown some willingness to reconsider its practice if approached upfront.

Separately, the creation of APIC is a popular tool for corporate reorganisations and relocations of businesses to Switzerland as these reorganisations are typically structured as a type of inversion through the contribution of shares to a newly created Swiss holding entity. Depending on the post-transaction restructuring, the SFTA's recent approach may however mean that the withholding tax exempt status of APIC could be denied (retroactively) if not structured properly.

These 'macro' trends for tax purposes are expected to continue in 2021 as the tax landscape certainly has not reduced in terms of complexity.

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Closing date of publication

This publication closed on 20 November 2020. This means that later developments have not been included in this publication. Please note that many of the developments and changes addressed in this year-end tax bulletin are based on relevant legislative proposals, some of which are expected to enter into force on 1 January 2021 and others at a later date. As some of these proposals still need to be adopted by the relevant legislative bodies in the Netherlands, Belgium, Luxembourg and Switzerland, it is uncertain whether and which of these proposals will enter into force. Moreover, if these proposals do enter into force, this may be in an amended form.

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