



Rencontre des groupements
français, belge & luxembourgeois

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Le Negresco - Nice

Session 1

- **The implementation of « anti-BEPS » measures in the 3 countries:
context and perspective**
- Philippe Durand (PwC), chair
- Caroline Docclo (Loyens & Loeff), Belgium
- Bruno Gibert (CMS Bureau Francis Lefebvre), France
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The implementation of « anti-BEPS » measures in the 3 countries: context and perspective

- ATAD/ recent developments
- Deadline for transposition postponed to 31 December 2018 (and application from 1 January 2019)
- The European Economic and Social Committee has already adopted its own opinion on 27-28 April 2016
- On 25 May 2016, the Council discussed the Dutch compromise text. After lengthy discussions, it agreed to postpone an agreement on the dossier to its meeting on 17 June 2016
- The adoption of the European Parliament report (consultation) is expected for 6 June 2016

The implementation of « anti-BEPS » measures in the 3 countries: context and perspective

- Anti-Tax Avoidance (Proposed) Directive
(Presidency compromise version to the COREPER: 9th Draft):
- Interest limitation rule
- Exemption “switch-over” clause
- CFC rules
- General anti-abuse rule
- Rule addressing hybrid mismatches between MS
- Rules for exit taxation
- Article 3: each provision only provides for a minimum level of protection
(i.e. MS are free to go further)

Anti-Tax Avoidance Directive

- Interest limitation rule – Content proposed

Aim: discourage MNEs from reducing tax base through inflated group financing

- **Principle** : net borrowing costs (all deductible borrowing costs minus taxable financial incomes) are deductible up to 30% of the taxpayer's tax-EBITDA
- **Option** for MS to exclude :
 - from the personal scope:
 - standalone entities ; and/or
 - financial undertakings
 - from the net borrowing costs:
 - loans concluded before 22 May 2016 (subsequent modifications excluded) ; and/or
 - non-recourse third party loans used to fund long-term public infrastructure projects taking place within the EU
- **Option** for MS to allow the deductibility of net borrowing costs up to 3 M€
- **Option** for MS to apply the rules at the level of the tax group (whether or not there is a consolidation of the results)

Large scope

- 1) Interest, economically equivalent costs & any expense connected with the raising of the finance
- 2) Related/unrelated loans

Tax-EBITDA

A kind of taxable earnings plus tax deductible net borrowing costs, depreciation and amortisation
Are excluded exempted income

Anti-Tax Avoidance Directive

- **Interest limitation rule – Content proposed**

- Two alternative **optional safe harbours** for MS applicable to members of consolidated group for financial accounting purposes :
 - (1) **Equity ratio**: net borrowing costs fully deductible if taxpayer ratio equity/total assets $\geq 98\%$ equivalent group ratio (provided the use of the same evaluation method)
 - (2) **EBITDA ratio**: net borrowing costs deductible up to group ratio multiplied by taxpayer tax-EBITDA (group ratio = group net third-parties borrowing costs/group accounting EBITDA)
- Three alternative **options** for MS:
 - (1) Unlimited carry-forward of disallowed borrowing costs
 - (2) Unlimited carry-forward and 3-years (max) carry-back of disallowed borrowing costs
 - (3) Unlimited carry-forward of disallowed borrowing costs and 5-years (max) carry-forward of unused interest capacity.

Equity safe harbour ratio
→ may be favourable for loss making companies & groups

EBITDA safe harbour ratio
more flexible

Not compulsory to include them

Anti-Tax Avoidance Directive

Interest limitation rule – France (1/2)

- **French tax law provides with a complete set of provisions limiting the interest deduction**
 - Art. 39 1 3° FTC: limitation on interest rate incurred on inter-company
 - Max. tax deductible rate is the higher between the safe harbor rate provided by FTA each year and the arm's length rate
 - Art. 212 I a FTC : traditional thin capitalization rules
 - Max. tax deductible rate is the higher between three ratios (1.5 times the company net equity; 25% of an adjusted EBIT; the amount of interest received from related parties)
 - Art. 209 IX FTC so called “Carrez Amendment” rules: a French acquiring company should fall into the scope of an interest recapture mechanism if it cannot evidence that:
 - the decisions in relation to the acquire target company are effectively taken by the French acquiring company; and
 - the French acquiring company effectively exercises control or influence over the acquired target company.
 - Art. 223 B FTC, so called “Charasse Amendment”: acquisition financial expenses recapture within tax group;
 - Article 212 bis FTC: global limitation so called “robot”: when net financial charges of a French company (or a tax consolidate group) exceeds M€3 for a given FY, these charges will only be tax deductible up to 75% of their total amount.
 - Article 212 I b FTC: Anti-hybrid rules: interest on loans granted by related companies (or assimilated) are not tax deductible if the tax effectively borne by the lender on such interest is less than 25% of the tax that would be borne by it if it had been established in France (i.e. at least 8,33%).

France has set up a complete set of provisions limiting the interest deduction that comply already with the aim of the ATAD but not necessarily with the text.

Anti-Tax Avoidance Directive

Interest limitation rule – France (2/2)

- **Comparison with the ATAD (Interest limitation and hybrid mismatches)**
 - Interest limitation rule (Art. 212 bis of the FTC v. Art. 4 of the ATAD)
 - **Similarities:**
 - Same purpose: limited tax deduction of the financial expenses
 - Same threshold: M€3
 - **Differences:**
 - *Calculation's method*: 25% recapture (French law) v. taxpayer's EBITDA 30% recapture (EU ATAD, similar to the German regime)
 - *EU ATAD allowance* offered to the EU Member State:
 - » allow the carry forward of the non deductible interest
 - » non application to financial entities
 - » optional safe harbor for MS in case of consolidated group
 - **Comment:**
 - *German pending constitutional case law related to German interest limitation rule*: questions regarding the constitutional treatment in France

Hybrid mismatches (Art. 212 I b of the FTC v. Art. 10 of the ATAD) – [for information]

- Broader scope of the last draft of the ATAD. Article 212 I b FTC provisions does not apply automatically to every “hybrid” situation
- Entities not included within the French definition of “hybrid”

Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (1/7)

ATAD

No “at arm’s length test”

BELGIUM

- Art. 49 CIR1992 (at arm’s length test)
Deductibility of costs (i) borne during the period (ii) in order to earn or keep taxable income (iii) if their authenticity and amounts are justified
- Art. 54 CIR1992 (at arm’s length test)
Limitation on interest paid directly or indirectly to a nonresident subject to a regime appreciably more favorable than in Belgium with respect to interest unless the transaction is genuine and the amount does not exceed normal limits
(See SIAT, 318/10 : # 49 TFEU)

Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (2/7)

ATAD

BELGIUM

No thin-capitalization rule

- Art. 55 CIR1992 (at arm's length test)
Limitation on interest if the rate does not conform to market rates (i) from the outset; or (ii) at the maturity date if floating rate
- Art. 18 CIR1992 (thin-capitalization rule)
Limitation on interest paid to a director if tainted debt/equity ratio exceeds 1/1
(equity = accumulated earnings at the beginning of the period + share capital at the end of the period)

Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (3/7)

ATAD

- Art. 4 (v. May 2016)

BELGIUM

- Art. 198(1)(11) CIR1992 (thin-cap. rule)

Scope

- Optional exclusion of standalone taxpayers (no related entity or PE)
- Optional grand-fathering clause (05/22/2016)

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Interest defined

“exceeding borrowing cost” =
“borrowing cost” – interest received

Interest *paid or attributed*
NB : 198(4) CIR1992 on central cash management

Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (4/7)

ATAD

- Art. 4 (v. May 2016)

Recipient (creditor)

All

Optional exclusion of nonrecourse third party financing related to EU long-term public projects

BELGIUM

- Art. 198(1)(11) CIR1992 (thin-cap.)

Related companies; or

Regime appreciably more favorable than in Belgium; but art. 198(3) CIR1992

Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (5/7)

ATAD

- Art. 4 (v. May 2016)

BELGIUM

- Art. 198(1)(11) CIR1992 (thin-cap. rule)

Exclusion (debtor)

Optional exclusion of financial undertakings
Optional exclusion of debtors within consolidated groups (ratio-requirements)

Leasing, factoring cies; public-private partnerships

Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (6/7)

ATAD

- Art. 4 (v. May 2016)

BELGIUM

- Art. 198(1)(11) CIR1992 (thin-cap. rule)

Limitation

P&L test:

30% * (EBITDA – exempted income)
Optional minimum deduction of
EUR3,000,000

B/S test:

Adjusted debt-equity ratio >5/1
(equity = accumulated earnings at the
beginning of the period + share capital at
the end of the period)

Carry forward or back

Forward or back (3/5yrs)

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Anti-Tax Avoidance Directive

Interest limitation rule – Belgium (7/7)

ATAD

- Art. 4 (v. May 2016)

BELGIUM

- issue

Limitation

30% * (EBITDA – exempted income)

“exempted income” =
DRD (RDT/DBI) ?
NID (DCR/NIA) ?

Anti-Tax Avoidance Directive

Interest limitation rule – Luxembourg (1/2)

- Current Tax Law

- Art 45 ITL :

The expenses that are considered to be deductible for tax purposes are those exclusively caused by the enterprise

The expenses that are economically connected with tax exempt income are not deductible for tax purposes

- Article 56 ITL

“When an enterprise participates, directly or indirectly, in the management, control or capital of another enterprise, or where the same individuals participate, directly or indirectly, in the management, control or capital of two enterprises and where, in either instance, the two enterprises are, with their commercial or financial relations subject to conditions made or imposed which differ from those which would have been made between independent enterprises, the profits of these enterprises are to be determined under conditions prevailing between independent enterprises and taxed in consequence. “

- Administrative practice requiring a 15/85 equity to debt ratio for financing of shareholdings (Participation exemption – recapture rule – Timing difference)

Anti-Tax Avoidance Directive

Interest limitation rule – Luxembourg (2/2)

- Directive - main points of concern
 - Luxembourg companies relatively highly indebted (e.g M&A activity)
 - Rebalancing with equity raises Net Wealth Tax issue
 - German Federal Tax Court (BFH 14.10.2015), earning strippings rules similar to proposed rule in the ATAD violates fundamental tax principles
 - Pending at German Constitutional Court level.
 - Current proposal of a limitation of losses bfw (Lux tax reform)

Anti-Tax Avoidance Directive

- **Switch-over /CFC rules - Content proposed**

Aim: ensure taxation of income in respect of businesses in a low tax third country

- No exemption but credit on two kinds of low taxed foreign incomes if they do not arise from active business:
 - (1) profit distribution received from an entity in a 3rd country; and
 - (2) proceeds from the disposal of shares held in an entity in a 3rd country
- Test for 'low tax' set at 40% of the statutory tax rate in the MS of the taxpayer (i.e. the company disposing of the shares/receiving the distribution)
- Does not apply where a DTA is in place between the MS of the taxpayer and the 3rd country concerned
- **Option** for MS to disallow the deduction of capital losses from the disposal of shares from the scope of the provision

EU innovation against CFC loopholes

Not an OECD's recommendation

No control requested

Free movement of capital issue?

Unspecified tax credit amount

e.g. on capital gains, carry forward of credit?

New safe harbour

Definition and assessment of the concept of active business?

A controversial provision

Despite the safe harbour clause and PE exclusion, there is no consensus

Anti-Tax Avoidance Directive

- **Switch-over /CFC - rules Content proposed**

Aim: eradicate incentive of shifting income

- **CFC targeted** (three conditions) :

- **Form:** entity or PE of which profits are not taxable in the MS of the controlling taxpayer (does not include transparent entity)
- **Stake:** (in)direct (incl. associated enterprises) > 50% voting/capital/profits
- **Level of taxation:** profits subject to ETR < 50% of the ETR that would have been charge if located in the MS of the controlling taxpayer

ETR = CIT paid by the CFC/total taxable income computed according the MS's legislation of the controlling taxpayer (excluding PE's income which are not taxable in the jurisdiction of the CFC)

CFC may be an entity resident or a PE located in another MS or in a 3rd country

Extensive definition of associated enterprises

based on 25% voting/capital/profits (direct/indirect control or under such common control)

Non controlling stake

Free movement of capital?

Disputed parts

application within EU & maintaining two approaches

Anti-Tax Avoidance Directive

- **Switch-over /CFC - rules Content proposed**

- Two **alternatives / options** for MS :

- **(a) entity-based approach:**

- Target: non-distributed CFC income deriving from tainted incomes (i.e. broadly passive & intra-group income from services and buy/resale transactions)
 - Safe-harbour (mandatory for CFC in EU/EEA country): not applicable if CFC set up for valid commercial reasons & effective economic activity (may contravene EU law for some MS)
 - Optional exclusion :
 - 1. any entity or PE if 1/3 (or less) of their income are tainted ; and/or
 - 2. financial undertakings if 1/3 (or less) of their tainted income comes from transactions with associated enterprises
 - Computation: in accordance with the rules of CIT in the MS of the controlling taxpayer (losses not deductible from the tax base but carry-forward can - **option** - be allowed by the MS)
- **Elimination of economic and juridical double taxation**

- **(b) transactional approach:**

- Target: non-distributed CFC income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage (transfer pricing approach)
- Optional exclusion: entity or PE
 - 1. with accounting profits \leq €750 000 and non-trading income \leq €75 000; or
 - 2. of which the accounting profits \leq 10% of its operating costs for the tax period (excluding costs of goods sold overseas & payments to associated enterprises)
- Computation: amounts generated through assets and risks which are linked to significant people functions carried out by the controlling company (based on the arm's length principle)

Anti-Tax Avoidance Directive

Switch-over /CFC – France (1/3)

- **French Anti-abuse rules (art. L 64 of the French Procedural Code - “FPC”- and art. 145, 6 k of the FTC)**
 - French general anti-avoidance rule: art. L 64 FPC:
 - FTA are allowed to disregard an agreement/transaction on the grounds that:
 - (i) it has a fictitious character; or
 - (ii) the agreement/transaction can be considered as having as its sole purpose to avoid taxes which the “real transaction” would have been subject to. When the French tax authorities resort to the abuse of law theory, they reassess the amount of tax that would have applied to the “real” economic transaction and are allowed to apply heavy penalties (80% of the tax avoided plus interest for late payment).
 - Finance Law for FY 2014 (December 19th, 2013) article L 64 FPC shall apply to transaction considered as having as its main purpose to avoid taxes
 - French Constitutional Court refused this modification of the L 64 FPC criterion (French Constitutional Court, December 29th, 2013, No 2013-685)
 - Participation exemption regime: Art. 145, 6, k of the FTC (Finance Law 2016 of 29 December 2015) [for information]:
 - Implementation of a GAAR clause in accordance with the EU Parent-Subsidiary Directive n°2011/96.
 - No application of the participation exemption regime to the distributions paid within the framework of a scheme (or series of schemes) which main purpose (or one of the main purposes) is to obtain a tax advantage
 - Safe harbor: serious commercial motivation reflecting the economic reality
- **Comparison with the ATAD (art. L 64 FPC and 145 6 k FTC v. art. 7 of the ATAD)**
 - The criterion of the “main purpose/one of the main purposes” only apply for participation exemption in France. The ATAD general anti-avoidance rule is stricter
 - Constitutional treatment in France. The French Constitutional Court has already rejected such general criterion in a case where automatic penalties were provided (abuse of law, art. L 64 FPC). No penalties have been provided by the ATAD
 - The French tax authorities would have two alternative reassessment basis: (i) French abuse of law with 80% penalties and (ii) ATAD anti-abuse rule with no automatic penalties
 - Safe harbor provided by the ATAD: valid commercial reasons. Scope of the safe harbor to be confirmed

Anti-Tax Avoidance Directive

Switch-over /CFC – France (2/3)

- **French switch-over**

- Anti-abuse set of provisions for transactions with Non-Cooperative State or Territory (NCST): non-application of participation exemption regimes, limitation of deduction of payments to beneficiaries located in NCSTs, increase of withholding tax rate applicable to payments to persons located in NCSTs
- Amended Finance Law 2014 has included a general measure by which the exemption provided under the French participation exemption regime could not be applied if the profits distributed were related to an activity not subject to foreign CIT. However this measure has been rejected by the Constitutional Court (Decision December 29th, 2014, No. 2014-708 DC)

- **Comparison with the ATAD (art. 6 of the ATAD)**

- Larger scope of the ATAD (standard income tax rate applicable in the local country)
- Limitation of the ATAD:
 - application limited to distribution and capital gains
 - no application of the switch-over clause if a convention for the avoidance of double taxation is in place between the Member State of the taxpayer and the third country where the branch/subsidiary is situated

Anti-Tax Avoidance Directive

Switch-over /CFC – France (3/3)

- **French CFC rules (Art. 209 B of the FTC)**
 - Taxation in France on a deemed distributed income when a French company subject to French CIT operates a branch outside of France, or holds directly, indirectly or constructively 50 percent or more of the shares, financial rights or voting rights of a legal entity established or set up in a foreign country, and (ii) the branch or legal entity is subject to a privileged tax regime within the meaning of article 238 A of the FTC
 - Safe harbours:
 - within the EU (article 209 II FTC): an EU entity should be left outside the scope of article 209 B, unless it can be regarded as part of an artificial arrangement set up to circumvent French tax legislation
 - outside the EU (article 209 B III of the FTC): an entity should be left outside the scope of article 209 B if activities carried on by the foreign subsidiary have a purpose and an effect other than allocating profits to a low-tax jurisdiction. such condition is deemed to be fulfilled when the activities carried on abroad are mainly commercial or industrial
- **Comparison with the ATAD (Art. 209 B of the FTC v. art. 8 of the ATAD)**
 - Similar requirements (holding and effective tax rate) :
 - Entity approach:
 - similar to the French 209 B regime but French regime does not limit to passive income
 - safe harbour provided by the ATAD: valid commercial reasons, similar to the French non-EU safe harbour clause (209 B III of the FTC)
 - Transactional approach (not covered by the art. 209 B):
 - scope close to the French abuse of law definition
 - determination of the taxable income: transfer pricing approach

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (1/10)

ATAD

- Art. 6 (v. May 2016)

BELGIUM

- Art. 202 et s. CIR1992

Scope

Distributing entity is in a third country
AND
no DTC applies

Same regime applies to dividends from EU and non-EU cics (DRD):

- 10% sh/h or EUR2,500,000 value
- uninterrupted 1 year holding period
- Full ownership (Vergers du Vieux Tauves, C-48/07)
- 95% deduction (not available for dividends earned through a foreign establishment whose income are exempted pursuant to a DTC)
- Carryforward (Cobelfret, c-138/07)

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (2/10)

ATAD

- Art. 6 (v. May 2016)

BELGIUM

- Art. 202 et s. CIR1992

Switch point

Rate applicable to the distributing entity
< 40% of the rate applicable to the
recipient

Exclusions : art. 203 CIR1992

- Distributing cy benefits from a regime appreciably more favorable ...
- Distributing cy earns income from a third country where tax holidays apply
- Distributing cy earns income from a foreign establishment subject to a regime appreciably more favorable ... (proportion)
- Distributing cy redistributes dividends that do not qualify (unless it is subject to a regime similar to Belgium and resides in a treaty country)

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (3/10)

ATAD

- Art. 6 (v. May 2016)

BELGIUM

- Art. 202 et s. CIR1992

Switch point

Rate applicable to the distributing entity
< 40% of the rate applicable to the
recipient

Compare : $33.99\% * 40\% = 13.60\%$

Regime appreciably more favorable than in
Belgium:

- Nominal rate < 15%
- Effective rate < 15 %
- No EU Member States

Black list in art.73/4quater AR/CIR92

- Effective rate at a global level (if income earned through a PE) < 15%
- Not applicable if distributing cy and its PE within the EU

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (4/10)

ATAD

- Art. 6 (v. May 2016)

BELGIUM

- DTC (Model 2010)

Scope

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- DRD regime applies
- If dividends do not satisfy the subject-to-tax test, DRD granted to dividends paid out of income from the active conduct of a business
- If DRD is not granted, *switch* to foreign tax credit (WHT on dividends at source)

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (5/10)

ATAD

- Art. 6 (v. May 2016)

BELGIUM

- Art. 192 CIR1992

Scope

Proceeds from the disposal of shares
in a third country entity

AND

No DTC applies

Not applicable if DTC applies

Exemption of capital gains on shares if:

- Uninterrupted 1 year holding period
- Subject-to-tax requirement for DRD regime satisfied

Nevertheless cics that are not “small cics” pay a 0.412% tax on the “exempted gain”

No relief in DTCs

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (6/10)

ATAD

- Art. 8 (v. May 2016)

BELGIUM

- Art. 344(2) CIR1992

Scope

- Subsidiary in a third country (direct or indirect participation > 50%),
or
- PE situated in a third country

AND

Effective tax rate < 50% of the rate applicable to the parent

Any nonresident benefitting from a regime appreciably more favorable than in Belgium

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (7/10)

ATAD

- Art. 8 (v. May 2016)

BELGIUM

- Art. 344(2) CIR1992

Taxable basis increased

a) Categorical approach : *Undistributed* interest, dividends, royalties, income from financial activities, income from interco sales and services with no added value;

OR

b) Transactional approach:
Undistributed income arising from non-genuine arrangements.

Income from shares, bonds, receivables and other debentures, intellectual property and cash transferred by the taxpayer.

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (8/10)

ATAD

- Art. 8 (v. May 2016)

BELGIUM

- Art. 344(2) CIR1992

Carve out

CFC set up for valid commercial reasons and carries on an economic activity (staff, equipment, premises)

Optional exclusion of non EEA CFCs

Transfer of assets for valid economic reasons or taxpayer received an adequate compensation producing income subject to a normal tax burden when compared to the situation where no transfer had taken place

Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (9/10)

ATAD

- Art. 8 (v. May 2016)

BELGIUM

- Art. 344(2) CIR1992

Carve out

Optional de minimis rules :

- categorical approach : $\leq 33\%$ of the CFC's income fall in the categories
- transactional approach: profits \leq EUR750,000, etc. (not applicable if purpose of avoiding tax charge)

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Anti-Tax Avoidance Directive

Switch-over /CFC – Belgium (10/10)

ATAD

- Art. 9 (v. May 2016)

BELGIUM

- Art. 344(2) CIR1992

Avoidance of double taxation

Credit for the tax borne by the CFC

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Upon distribution by the CFC or disposition of the CFC, income caught by art. 8 is deducted from the amount of taxable distributed amounts or taxable sales proceeds

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Anti-Tax Avoidance Directive

Switch-over /CFC – Luxembourg (1/2)

- Current Tax Law
- No CFC rules
- No « stricto sensu » Switch over rules

GAAR

General anti avoidance rule (§ 6 StanpG) *“Taxes may not be evaded or mitigated by abuse of forms or constructions which are legal under civil law.*

In the case of abuse, taxes should be levied as they would have been levied under the legal construction appropriate to the economic operations, facts and circumstances”

SAAR

Participation exemption regime requires that subsidiary (article 166 ITL)/ mother company (article 147 ITL) is fully taxable. Fully taxable means, a statutory rate corresponding to half of the Luxembourg corporate income tax (10,5%) and a determination of the taxable basis similar to the Luxembourg one (Parliamentary comments – Law of July 9, 2004)

The traditional method followed by Luxembourg to eliminate double taxation in its DTA is exemption. Some DTAs provide for tax credit (e.g Germany, Mauritius, Brazil) to avoid potential double exemption.

Anti-Tax Avoidance Directive

Switch-over /CFC – Luxembourg (2/2)

Potential impacts

- Limited for Switch over clause, for participation exemption regime, effective taxation of 10,5% on a comparable tax basis corresponds to 50% of Lux tax rate (higher than the 40% of the Directive) – DTA countries not included.
- Impact for PE under CFC rules (No exclusion for DTA countries – Treaty override issue).
- Discrepancies between Member States due to level of CIT rate

Anti-Tax Avoidance Directive

- **Exit taxation Content proposed**

Aim: prevent tax base erosion with tax jurisdiction transfers without ownership change

- Exit taxation is triggered in case of:
 - transfer of assets from a head office to a PE in another MS or a 3rd country
 - Transfers of assets from a PE to a PE to a head office or PE another MS or a 3rd country
 - transfer of tax residence to another MS or a 3rd country
 - transfer of PE's business to another MS or a 3rd country
- **And** if no longer right to tax the transferred assets due to the transfer
- Taxpayer's right to defer the payment if transfer in another MS or EEA country (if agreement on mutual assistance for recovery of tax claims):
 - through instalments over 5 years
 - MS may required interests and/or a guarantee (only if actual risk)
 - end of deferral in situations where the recovery is jeopardized
- Mandatory step-up value of the assets transferred in the other MS (unless there is a discrepancy with the market value)
- Article non applicable to some temporary transfer of assets

Broadly a codification of CJEU's case law

Step-up guaranteed
but insecure (potential conflict on the market value between MS)

Some MS's reservation due to lack of similar domestic rules

Anti-Tax Avoidance Directive

Exit taxation France (1/1)

- **French exit tax (art. 221-2 of the FTC)**
 - Former article 221-2 FTC: transfer of corporate seat entails the consequences of a cessation of business (i.e. immediate taxation of latent gains) except in case of transfer within the UE and if a PE (“Permanent Establishment”) being maintained in France
 - 2011: ECJ case law National Grid Indus (C 371/10 November 29th, 2011)
 - 2012 (amended financial law): French legislator has taken into account the tax consequences of this case law
 - Art. 221-2 of the FTC: tax neutrality of the transfer of seat of a French company in a EU member country (*i.e.* it does not entail the consequences of the cessation of business).
 - Tax neutrality of the transfer is subject to a PE being maintained in France;
 - Assets transferred into the new country of incorporation : immediate taxation of the unrealized gain on the transferred assets. The company may opt to defer the payment of the French CIT due by spreading the payment over five years and paying annual instalments of 20% of the amount due.
- **Comparison with the ATAD (art. 221-2 of the FTC v. art. 5 of the ATAD)**
 - EU tax regime similar to the French exit tax
 - Exit tax due in case of cross-border transfer (PE to seat / Seat to PE...);
 - Deferral of payment.

Anti-Tax Avoidance Directive

Exit taxation Belgium (1/4)

ATAD

- Art. 5 (v. May 2016)

BELGIUM

- Art. 44 (183, 235) and 210 CIR1992

Scope

- Assets transferred from the head office to a foreign PE
- Assets transferred from a PE to a foreign head office
- Transfer of tax residence abroad
- Transfer of the business of a PE in so far as the PE State no longer has *the right to tax* the transferred assets

- Unrealized gain
- Unrealized gain
- Art. 210 CIR1992
- Unrealized gain

Anti-Tax Avoidance Directive

Exit taxation Belgium (2/4)

ATAD

- Art. 5 (v. May 2016)

BELGIUM

- 210 CIR1992

Taxable basis

(market value of the *assets* at the time of exit) – (value for tax purposes of the same *assets*)

(market value of the net asset of the cy.) – (value of the share capital)

However, in case of transfer to another EU Member State, no taxation on:

- items that are permanently maintained in a Belgian establishment of the cy that are used to obtain income in such establishment;
- exempted accumulated earnings of the cy to the extent that they are included in the equity of the establishment (art. 214bis CIR1992).

Anti-Tax Avoidance Directive

Exit taxation Belgium (3/4)

ATAD

- Art. 5 (v. May 2016)

BELGIUM

- 210 CIR1992

Carried over basis

The value of the assets determined by the Member State of departure is the starting value in the Member State of destination unless this does not reflect the market value.

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Tax attributes are maintained in the Belgian establishment under the conditions of Art. 214bis CIR1992 (art. 229(4) CIR 1992

Anti-Tax Avoidance Directive

Exit taxation Belgium (4/4)

ATAD

- Art. 5 (v. May 2016)

BELGIUM

- Art. 44 (183, 235) and 210 CIR1992

Recovery procedure

- Payment of tax in installment over 5 years if move to an EU Member State or an EEA country with an administrative assistance agreement equivalent to Dir. 2010/24/EU
- Late interest
- Collateral unless possible recovery against a related party

- Tax due immediately
- Interest rate = 7%

Anti-Tax Avoidance Directive

Exit taxation Luxembourg (1/1)

- Current Tax Law

Exit tax under articles 38 ITL and 172 ITL (Transfer / migration assimilated to a liquidation)

Immediate taxation of unrealised capital gains unless a PE is maintained in Luxembourg

New law 26 May 2014, further to CJEU Case law (C-371-/10 « National Grid Indus BV, C-9/02 « Hughes de Lasteryrie du Saillant »).

§ 127 LGTL

Deferral payment of exit tax as long as the taxpayer remains owner of the assets and is tax resident in EEA member state or DTA country with exchange of information clause in line with art 26 Mod OCDE.

Deferral granted upon request, without any late interest charges any without any guarantee deposit.

Documentation demonstrating continued ownership of assets required annually.

Directive tax regime similar to the Luxembourg exit tax except 5 years rule.

Tax transparency package

Content/ proposals

- Directive amending Directive 2011/16/EU as regards *mandatory automatic exchange of information* (8 December 2015) 1/3

Scope

- Advance cross border tax rulings that relate to a cross-border transaction or to the question of whether or not activities carried on by a person in another jurisdiction create a permanent establishment
- Advance pricing agreements (uni-/bi-multilateral)
- “any agreement, communication, or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit”

Tax transparency package

Content/ proposals

- Directive amending Directive 2011/16/EU as regards *mandatory automatic exchange of information* (8 December 2015) 2/3

Over which period?

- Rulings and APAs issued, amended or renewed **after 31 December 2016** (< 3 months after the end of the calendar year)
- **Before 1 January 2018, rulings and APAs:**
- - Issued, amended or renewed within a period beginning five years before **1 January 2017**
- - Issued, amended or renewed between **1 January 2012 and 31 December 2013**, such communication shall take place under the condition that they were still valid on **1 January 2014**
- - Issued, amended or renewed between **1 January 2014 and 31 December 2016**, such communication shall take place irrespective of whether they are still valid
- - Issued, amended or renewed **before 1 April 2016** to a particular person or a group of persons, excluding those conducting mainly financial or investment activities, with a group-wide annual net turnover of less than EUR 40 000 000

Tax transparency package

Content/ proposals

- Directive amending Directive 2011/16/EU as regards *mandatory automatic exchange of information* (8 December 2015) 3/3

Recipients of the information

- Basic set information on all rulings and apa's should be accessible to all member states and the Commission
- Role for the Commission to standardize this and to develop and maintain database
- Commission will monitor and evaluate the exchange of information
- Commission **not** allowed to use this information for any other purpose (e.g. selection of cases for state aid investigations)
- Standard form to be co-ordinated with OECD – FHTP

Tax transparency package

Content/ proposals

- CBCR 1/4
- *Who must report?*
- EU-headquartered groups with consolidated turnover in excess of EUR 750m
- medium and large-sized EU subsidiaries and branches that are part of groups with non-EU headquarters and consolidated turnover in excess of EUR 750m
- does not apply to banks and other financial institutions reporting under Article 89 of CRD IV, provided such reporting covers all the group's activities
- companies reporting payments to governments under Chapter 10 of the EU Accounting Directive will also have to comply with the new public CbCR requirement.

Tax transparency package

Content/ proposals

- CBCR 2/4
- *Which country have to be covered?*
- The reporting will cover all countries in which a group operates, regardless of whether the group has its headquarters inside or outside the European Union, as set out below (see also later paragraphs on the situation for groups with non-EU headquarters).
- The data listed below has to be disclosed by country for EU Member States
- The data must also be disclosed separately for each jurisdiction that is included by the European Union on a list of tax jurisdictions that do not meet certain criteria for good tax system governance
- The data may be aggregated for all other countries

Tax transparency package

Content/ proposals

- CBCR 3/4
- *What has to be reported?*
- 1. a brief description of the nature of the activities
- 2. the number of employees
- 3. the amount of the net turnover, in aggregate, including the turnover with related parties
- 4. the amount of profit or loss before tax
- 5. the current year current income tax accrued (excluding deferred tax and uncertain tax positions)
- 6. the amount of income tax paid in the year
- 7. the amount of accumulated earnings.
- A narrative explanation at group level should be included to reconcile differences between the amounts of tax accrued and the amounts of tax paid.

Tax transparency package

Content/ proposals

- CBCR 4/4
- *Main differences EU/OECD*
- the EU proposal is for public reporting – not in OECD
- not all elements included in OECD CBCR are included in the public version (revenues are reported only globally and the disclosure does not include tangible assets or share capital)
- the wording of the items to be disclosed differs slightly
- public reporting is on a country base for EU MS and for certain countries regarded as having inadequate tax governance, but aggregates all other countries together. Under OECD rules, data has to be reported for each and every tax jurisdiction
- The Commission's impact assessment suggests that the intention is for companies to use their existing OECD data, but the draft legislation is not explicit in this regard
- Public CbCR includes a narrative explanation at group level for differences between tax paid and current tax accrued which is not required under OECD CbCR.

Tax transparency Package

France (1/1)

- **French tax law on exchanges of information**

- Transfer pricing requirements (art. L 13 AA of the FTC)

- 2009 (Amended Financial law for 2009): transfer pricing documentation requirements (information on the group of which the French taxpayer is part, information on the French company itself including, Advance Pricing Agreements...)
- 2014 (Financial law for 2014): the transfer pricing documentation includes rulings awarded to related parties by foreign tax authorities for transfer pricing documentation covering financial years ending as from January 1st 2014. According to the French Constitutional Court, this obligation does not include rulings that companies do not have at their disposal (Decision No. 2013-685 DC, December 29th, 2013)
- No automatic communication of information: the FTA claim for such information within a tax audit

- Disclosure

- 2014 (Financial law for 2014): provided a prior declaration requirement of tax optimization schemes
- This provision has been rejected by the Constitutional Court (Decision No. 2013-685 DC, December 29th, 2013) which has considered that the concept of "tax optimization scheme" was too general and vague, which, combined with a high level of penalties, created restrictions on the freedom of enterprise

- Publication of fraudulent schemes

- 2015: FTA decided to frequently publish illustrations of fraudulent schemes. Currently 17 abusive schemes have been published on various themes, such as the deductibility of financial expenses, tax treaty abuse, labour outsourcing, wage perception in undeclared account

Tax Transparency package

Luxembourg (1/1)

- OECD & DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation
 - Luxembourg commitment to exchange of information on “Tax ruling”
 - Form 777E (mix between OECD and EU Data requirements) to be filed
- Main concern : Respect of Taxpayers’ fundamental rights.

Preliminary ruling request from Luxembourg’s *Cour Administrative* to the Court of Justice in Berlioz Investment Fund case (C-682/15), which questions the compatibility of Luxembourg Law of 25 November 2014 (suppressing judicial review of a decision to exchange information) with the requirements of the Charter of Fundamental Rights of the European Union.

The implementation of « anti-BEPS » measures in the 3 countries: context and perspective

- THANK YOU FOR YOUR ATTENTION