



BELGIUM

OUTLINE

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LIST OF ABBREVIATIONS

AFT	Algemeen fiscaal tijdschrift (Belgian tax magazine)
Agreement	Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments
BULL. BEL	Bulletin der Belastingen (Magazine of the Belgian tax Administration)
Directive	Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States
ECJ	European Court of Justice
FJF	Fiscale Jurisprudentie/Jurisprudence Fiscale (Belgian tax magazine on Case Law)
IR	<i>Impôt sur les revenus</i> (Belgian Income taxes Code)
KB WIB	<i>Koninklijk Besluit Wetboek van inkomstenbelastingen</i> (Royal Decree to the Belgian Income Tax Code)
Merger Directive	Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States
OECD	Organization for Economic Cooperation and Development
OECD MC	OECD Model Tax Convention 2003
Parent-Subsidiary Directive	Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
Pas.	Pasicrisie Belge (Belgian tax magazine on Case Law)
Savings Directive	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
WIB	<i>Wetboek van inkomstenbelastingen</i> (Belgian Income Taxes Code)

LIST OF LEGAL REFERENCES

Laws

- Law of 4 July 2004, published in the Moniteur Belge/Belgisch Staatsblad of 7 September 2004.
- Law of 22 December 1998, published in the Moniteur Belge/Belgisch Staatsblad of 15 January 1999.

Decrees

- Royal Decree of 22 December 2003, published in the Moniteur Belge/Belgisch Staatsblad of 31 December 2003.
- Royal Decree of 13 August 2004, published in Moniteur Belge/Belgisch Staatsblad on 7 September 2004.
- Royal Decree of 6 July 1997, published in the Moniteur Belge/Belgisch Staatsblad of 30 July 1997.

Clarification

- Clarification of the consequences of the application Art. 15 of the EU-Switzerland Savings Agreement, published in the Moniteur Belge/Belgisch Staatsblad of 29 June 2005.

Case law

- ECJ, C-283/94 Denavit International BV v. Bundesamt für Finanzen, 17 October 1996, European Court Reports 1996 Page I-05063.
- Supreme Court of Belgium, Court de Cassation/Hof van Cassatie, 20 June 2002, published in *Fiscoloog Internationaal*, 2002, no. 226, p. 3.
- Supreme Court of Belgium, Court de Cassation/Hof van Cassatie, 24 October 1996, FJF 1996/274.
- Supreme Court of Belgium, Court de Cassation/Hof van Cassatie, 27 September 1991, published in AFT 1992 p. 222.
- Supreme Court of Belgium Court de Cassation/Hof van Cassatie, 31 January 1986, *Haeghedooren*, published in Bull.Bel., no. 655, blz. 2467.
- Supreme Court of Belgium, Court de Cassation/Hof van Cassatie, 6 June 1961, *Brepols*, Pas. 1961, I, p. 1082.
- Belgian Lower Court, Court d'Appel Ghent/Hof van Beroep Gent, 1 April 2003, published in *Fiscoloog* 2003, no. 237, p. 4.
- Belgian Lower Court, Court d'Appel Bruxelles/Hof van Beroep Brussel, 29 June 1982 *Soeur Sourire*, published in FJF 1982, no.111.
- Belgian Lower Court, Court d'Appel Bruxelles/Hof van Beroep Brussel, 8 June 1982, published in FJF 1982, no.157.

PART I. IMPLEMENTATION OF THE DIRECTIVE

1. INTRODUCTION

1.1. GENERAL INFORMATION ON THE IMPLEMENTATION OF THE DIRECTIVE

The Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States (the "Directive") was transposed into Belgian law by Royal Decree of 22 December 2003. This Decree amended the Royal Decree implementing the Income Tax Code 1992 (RD/IC 92) to provide for an exemption of interest and royalties in the situations required by the Directive. In addition, a law was enacted on 4 July 2004 and an implementing Royal Decree issued on 13 August 2004 to amend Art. 266(2) IR/WIB in order to provide for an exemption of interest payments on zero bonds or capitalization bonds as required by the Directive (Law of 4 July 2004 and Royal Decree of 13 August 2004).

The additional law was necessary due to the Belgian hierarchy of norms. Under Belgian tax law, the taxation of interest and royalties is included in the Income Tax Code and its implementing Royal Decree. As a law supersedes a Royal Decree a law can only be amended by another law. Article 266(2) IR/WIB regulated that interest on zero bonds or capitalization bonds could not be exempt. Therefore, a further law was necessary to provide for an exemption for zero bonds and capitalization bonds in the situations covered by the Directive.

The following table shows the relevant provisions of the Belgian law implementing the Directive:

Articles of the Directive	Relevant sections of national laws
Art.1 (1)	IR/WIB Art. 266(2) and 280(4), DR IR/KB WIB, 105(6)(a), 107(1) and (6), 113(7) and 118(1bis)
Art. 1(2)	----
Art. 1(3)	----
Art. 1(4)	----
Art. 1(5)	----
(a)	----
(b)	----
Art. 1(6)	DR IR/KB WIB, 111(1)(d).
Art. 1(7)	DR IR/KB WIB, 107(6))
Art. 1(8)	DR IR/KB WIB, 105(6)(b)
Art. 1(9)	DR IR/KB WIB, Art. 117(6bis)
Art. 1(10)	DR IR/KB WIB, Art. 117(6bis)
Art. 1(11)	DR IR/KB WIB, Art. 117(6bis)
Art. 1(12)	DR IR/KB WIB, Art. 117(6bis)

Articles of the Directive	Relevant sections of national laws
Art. 1(13)	DR IR/KB WIB, Art. 117(6bis).
Art. 1(14)	DR IR/KB WIB, Art. 117(6bis).
Art. 1(15)	----
Art. 1(16)	----
Art. 2 (a)	IR/WIB, 19
Art. 2 (b)	----
Art. 3 (a)	DR IR/KB WIB, 105(6)(a)
Art. 3 (b)	DR IR/KB WIB, 105(6)(b)
Art. 3 (c)	---
Art. 4 (1)	IR/WIB 18(4), 54 and 344
Art. 4 (2)	IR/WIB, 26
Art.5 (1) and (2)	IR/WIB, 344
Art.7	Royal Decree of 22 December, 2003, Law of 4 July 2004 and Royal Decree of 13 August 2004.

1.2. TAX TREATMENT OF INTEREST AND ROYALTY PAYMENTS UNDER GENERAL TAX LAW

1.2.1. Domestic rules

a. Tax treatment at the level of the paying company

Deduction of interest and royalty payments

Interest and royalties are generally deductible from a company's taxable income provided that the payments are made for business purposes and the remuneration paid is not excessive. Also interest on loans to acquire a participation in another company is generally deductible.

Belgian tax law contains various specific provisions disallowing the deduction of interest and royalties. As a result, interest and royalties are not deductible in the following situations:

- the interest or royalties are directly or indirectly paid or attributed to any foreign company or permanent establishment which, according to the law of the country where they are established, are not liable to income tax or are particularly more favourably taxed than in Belgium (Art. 54 IR/WIB). A more favourable tax treatment is deemed to exist if tax in the foreign country is levied at a rate lower than 15%;
- the interest or royalty payments are excessive (Arts. 49 and 55 IR/WIB). In this situation, the excess payments are deemed to be a hidden profit distribution and reclassified as a dividend; or
- the interest payments are related to a debt which exceeds the total of paid-up capital at the end of the taxable period and taxed reserves at the beginning of the taxable period (Art. 18(3) IR/WIB).

Thin capitalization rules

Belgium applies two sets of thin capitalization rules. Firstly, a 1:1 debt/equity ratio applies to loans granted by individual directors, shareholders and non-resident corporate directors to their company (Art. 198(10) IR/WIB). Interest relating to debt in excess of this ratio is re-characterized into a non-deductible dividend. Furthermore, the interest rate may not exceed the market rate.

Secondly, a 7:1 debt/equity ratio applies to debt if the creditor (resident or non-resident) is exempt or taxed at a reduced rate in respect of the interest paid on the debt. Interest relating to debt in excess of this ratio is considered a non-deductible business expense (Art. 198(11) IR/WIB).

b. Tax treatment at the level of the beneficiary company

Interest and royalty payments to a Belgian beneficiary company

Interest and royalties derived by resident companies from a resident or non-resident company are subject to corporate income tax in the general manner. This tax is levied at the rate of 33.99% (including a 3 % surcharge) (Art. 215 IR/WIB).

Interest payments to a resident company are in principle subject to a 15% withholding tax, which is creditable against the corporate income tax and a refund may be claimed for any excess withholding tax (Arts. 269(1) and 280 IR/WIB). Various types of interest payments, however, are exempt from withholding tax if paid to a resident company that is subject to Belgian corporate income tax. The exemption applies to interest on government bonds,

registered bonds, mortgage loans on Belgian immovable property (Art. 107 DR IR /KB WIB). Also, interest received from a resident company on regular loans is not subject to withholding tax (Art. 107(2)(9) DR IR/KB WIB). However, interest on loans represented by securities is subject to a 15% withholding tax (Art. 269(1) IR/WIB).

Royalty payments to a resident company are not subject to withholding tax but only to corporate income tax on their net amount. This tax is levied at the rate of 33.99%, including a 3% surcharge (Art. 215 IR/WIB).

Cross-border interest and royalty payments

Interest and royalties paid by a Belgian company to a legal entity whose effective management is located outside Belgium are generally subject to Belgian withholding tax. However, the withholding tax is in many cases reduced under a tax treaty and in some cases an exemption applies because the taxation of such income is reserved to the state of residence of the beneficiary.

Tax treatment of outbound interest

Interest payments to a non-resident individual or company are generally subject to a 15% (25% for interest on loans concluded before 1 March 1990) withholding tax (*précompte mobilier/roerende voorheffing*), unless a particular exemption or reduction provided for by Royal Decree applies (Art. 269(1) IR/WIB). The most important types of exempt interest include interest on government bonds, registered bonds, mortgage loans on Belgian immovable property and bond interest paid to non-residents, interest on registered corporate bonds and interest on registered bonds issued by resident banks (Arts. 100(4)(b), 107(2)(1) and 110(2) DR IR/KB WIB).

Interest re-characterized as a dividend is subject to a 25% dividend withholding tax (Art. 269(1) IR/WIB). In the case of non-resident companies this is a final tax, whereas in the case of resident companies the tax is credited against the corporate income tax. However, in the case of non-residents, the dividends are not subject to withholding tax in Belgium if the requirements of the Parent-Subsidiary Directive are met.

Taxation of outbound royalties

Under Art. 269(1) IR/WIB, royalties paid from Belgian sources to a non-resident individual or company are subject to a 15% (25% for royalties based on agreements concluded before 1 March 1990) withholding tax on the gross amount of the royalties paid. The tax is final unless the non-resident derived income from other sources in Belgium. The 15% withholding tax is amongst others levied from the lease of personal property, as well as income derived from the use and concession of movable assets, including industrial, commercial or scientific property rights (Art. 17 IR/WIB).

c. Transfer pricing

Belgian tax legislation does contain a general provision on transfer pricing. The arm's length principle is defined with respect to cross-border transactions between affiliated taxpayers (Art. 185(2) IR/WIB). Furthermore, several specific anti-avoidance measures exist in order to prevent transfer pricing not in accordance with the arm's length principle.

These anti-avoidance provisions apply both in the case of a direct and indirect affiliation. The affiliation is direct where an enterprise is controlled by another enterprise. The affiliation is indirect where both enterprises form part of a group or are controlled by a third enterprise.

The anti-avoidance provisions cover the following situations:

- abnormal or gratuitous advantages granted by a resident company (Art. 26 IR/WIB);
- deductions where abnormal or gratuitous advantages are received (Art. 207 IR/WIB);
- payments to certain non-residents (Art. 54 IR/WIB); and
- the transfer of certain assets to tax havens (Art. 344(2) IR/WIB).

Under Art. 28 IR/WIB, abnormal or gratuitous advantages granted by a resident company to resident or non-resident companies must be added back to the income of the paying company, unless the advantage is added to the taxable income of the beneficiary. However, if the advantage is granted to a non-resident related person or to a non-resident located in tax haven jurisdictions, the amount of the advantage is always added back to the income of the Belgian company, regardless of whether or not the advantage is taxable abroad in the hands of the beneficiary.

Article 207 IR/WIB determines that Belgian companies receiving, directly or indirectly, abnormal or gratuitous advantages are not allowed to deduct from these advantages deductible gifts, the part of the investment deduction that exceeds the taxable profits and the dividends exempt under the participation exemption. Under the Belgian participation exemption the dividends received first must be added to taxable profit, whereafter 95% of those dividends may be deducted from taxable income. However, abnormal or gratuitous advantages treated as dividends cannot be deducted from taxable income under the participation exemption regime.

Furthermore, a company is not entitled to loss carry forward, if the company is directly or indirectly dependent of the company granting gratuitous or abnormal benefits.

Interest, royalties and fees for services paid by a resident company, directly or indirectly, to a non-resident company or a permanent establishment located abroad, are not deductible if the recipient in its country is resident outside the European Union and (a) is not subject to income tax or (b) is subject to an income tax regime which is considerably more favourable than that of the resident company (Art. 54 IR/WIB). This provision, however, does not apply if the taxpayer shows that the transaction is real and genuine and that the payment does not exceed a normal amount. In this context, a tax treatment is "considerably more favourable" if the nominal tax rate levied on the profits of the non-resident company is less than 15% or if the tax effectively levied on the profits of the company is less than 15%.

Article 344(2) IR/WIB provides that the sale, transfer or contribution of shares, bonds, claims, patents, trademarks, processes or cash to any non-resident taxpayer which is not subject to income tax or is subject to an income tax regime which is considerably more favourable than that of the resident company may be disregarded by the tax authorities. However, the company may show either that the transaction corresponds to legitimate business needs or that it received a real consideration producing an amount of income subject to the normal tax burden in Belgium, comparable to the tax which would have applied in the absence of the transfer.

d. Constructive dividends

If the payments made by a Belgian company to a related non-resident beneficiary or a permanent establishment are not at arm's length or the thin capitalization rules apply, those payments may be treated as a constructive dividend distribution. If an excess payment is made to a related company, the amount must be added back to the taxable income of the taxpayer and be treated as dividend distribution (Arts. 18(4), 26 and 55 IR/WIB).

Interest

Interest, which is not deductible as a result of the application of thin capitalization rules or the anti-avoidance provisions, is generally treated as a constructive distribution. This means that the payment is reclassified as a dividend, which is subject to a 25% withholding tax (Art.

269(2) IR/WIB). However, if the beneficiary is a Belgian parent company or permanent establishment of a non-resident company covered by an appropriate non-discrimination clause, the Belgian participation exemption applies if the relevant requirements are met. The most important are that the Belgian parent must hold in the subsidiary a participation of at least 10% or a participation with an acquisition value of at least EUR 1,2 million. Moreover, the shareholding must be kept for an uninterrupted period of at least 1 year.

If no exemption applies, the dividend withholding tax may be reduced under the relevant tax treaty.

Interest reclassified as a constructive dividend paid to a non-resident company may be exempt under the Parent-Subsidiary Directive if the relevant requirements are met.

Royalties

Excessive royalties are treated as follows:

- the excess royalties are added back to the taxable income of the paying company (Art. 26 IR/WIB); and
- the excess royalty may be treated as a hidden profit distribution and thus be subject to the 25% dividend withholding tax.

The dividend withholding tax may be reduced under the relevant tax treaty. Furthermore, the Parent-Subsidiary Directive may be applicable if the relevant requirements are met.

1.2.2 Treaties

Prior to the implementation of the Directive, the tax treatment of interest and royalty flows exempt under the Directive was covered by the relevant tax treaty between Belgium and the Member State concerned. Belgium has tax treaties with all other EU Member States.

a. Interest

Various Belgian tax treaties with EU Member States provide for a reduction of the withholding tax on interest to 10%. Under some treaties the rate is 0% for certain types of interest. Under the treaty with the Czech Republic a 0% rate applies to, inter alia, interest on bank loans and deposits.

Under the tax treaty with Luxembourg the withholding tax on interest is 0% for interest, other than interest on bonds, if the recipient is an enterprise that owns less than 25% of the voting stock or capital in the Belgian company.

Under the tax treaty with the Netherlands the withholding tax on interest is, inter alia, 0% where the Netherlands beneficial owner is an enterprise and (a) the interest has not arisen from bearer securities representing loans or deposits or (b) the interest has arisen from bearer securities representing loans or deposits and the enterprise carries on a banking or insurance activity and holds the securities in question for at least 3 months preceding the date of payment.

Under the treaty with Poland a 0% rate applies to interest from any kind of loans granted by banking enterprises, not being loans represented by bearer securities.

Double taxation is avoided by means of the credit method.

b. Royalties

Most of the treaties with other EU Member States provide for a reduction of the withholding tax on royalties to 5% or 10%. The tax treaties with Cyprus, Denmark, France, Germany, Hungary, Ireland, Netherlands, Sweden and United Kingdom provide for exclusive taxation in the state of residence in respect of royalties. The treaty with Austria provides for exclusive taxation in the source state in case of a shareholding below 50% in respect of royalties. In other cases the withholding tax is 10%.

Double taxation is avoided by means of the credit method.

It should be noted that the definition of royalties is not similar in all the tax treaties concluded by Belgium. However, in most tax treaties, the term 'royalties' relates to:

'Remunerations of any kind received as a consideration for the use of or the right to use: any copyright of literary, artistic or scientific work (including cinematograph films and films or tapes for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process and information concerning industrial, commercial or scientific experience.'

Some tax treaties, following the OECD MC, do not treat remuneration paid in consideration for the use or the right to use industrial, commercial or scientific equipment as royalty payments falling under Art. 12 OECD MC (i.e. the treaties with Cyprus, Finland, France, Netherlands, Slovak Republic, Slovenia, Sweden and the United Kingdom). Such payments fall under the business profits article (Art. 7 OECD MC).

The tax treaty with France provides that income from the sale of certain assets and rights mentioned in the royalty article of the treaty shall be treated as royalty. In general, such income falls under the business profits article (Art. 7 OECD MC), or capital gains article (Art. 13 OECD MC) or other income article (Art. 21 OECD MC).

c. Conclusion

The definition for interest and royalties under tax treaties may deviate from the domestic and/or Directive definition.

2. SCOPE

2.1. PAYMENTS

2.1.1. Concept of interest

a. Definition

Belgium did not introduce a specific definition of interest when transposing the Directive, as a similar definition was already included in Art. 19 IR/WIB. The exemption applies to interest as defined in Belgian domestic law which covers interest payments, late payment interest charges (not including payments based on a judgment or late payments of debt), premiums and any other revenue derived from securities (whether or not carrying a right to fixed interest), loans not represented by securities, debt claims and cash deposits (Art. 19 IR/WIB and Administrative Commentary to the Income Tax Code 19/1 and 19/39). This definition covers most of the items included in Art. 2(a) of the Directive. The remaining items, i.e. interest on real estate certificates, zero-bonds and capitalization bonds, were exempted by the law of 4 July 2004 (by this law a new Art. 266(2) IR/WIB was implemented). Therefore, the Belgian interest definition appears to be identical to the definition of the Directive.

b. Exemption of hybrid financial arrangements

Belgium did not use the possibility provided for in Art. 4 of the Directive to exclude hybrid financial arrangements from the application of exemption from tax on interest payments.

c. Exemption of interest reclassified as profit distribution or conflicting arm's length (Art. 4(1)(a) and 4(2))

The interest exemption does not apply to interest on participating loans, convertible loans, perpetual loans etc, which are re-characterized as dividends. The same rule applies to interest payments, which constitute a profit distribution. Furthermore, interest, which is not deductible, is treated as a constructive distribution, either under the thin capitalization rules (see Introduction, 1.2.1. a. *Tax treatment at the level of the paying company*) or the transfer pricing rules (see Introduction, 1.2.1. c. *Transfer pricing*). Non-deductible interest paid to non-resident shareholders-beneficiaries is re-characterized as a constructive dividend distribution and subject to the 25% withholding tax. However, the rate may be reduced under the relevant tax treaty. If a constructive dividend is not covered by the dividend definition in the tax treaty, the payments are usually only taxable in the state of residence pursuant to the "other income" article of the treaty. If the relevant conditions are met, the dividend distribution will benefit from the exemption under the Parent-Subsidiary Directive.

2.1.2. Concept of royalties

a. Definition

Belgium did not introduce a definition of royalties. This was motivated by the fact that the Belgian Income Tax Code did not contain any definition before the implementation of the Directive. Moreover, there is no uniform tax treatment of royalties under Belgian domestic law. Royalties can be classified as movable income, miscellaneous income or professional income, which are taxed differently. The classification depends on the recipient, the underlying transaction and the context in which the royalties are received.

Article 111 DR IR/KB WIB only mentions that no withholding tax will be levied with respect to rental income, lease payments and payments for the use or licensing of tangible assets paid to related companies. Art. 111 DRIR/KB WIB lists the types of royalty payments which may be subject to a 15% withholding tax, including, inter alia, income from the rent, lease, use and licence of tangible assets and income obtained, outside the exercise of a profession, from sub-rent or transfer of rent of (un)furnished intangible assets. There is no reference to software payments, which therefore will be exempt.

The list of types of royalty payments mentioned under the Belgian law is narrower than that provided for in Art. 2(b) of the Directive as payments for the use of, or the right to use software are not included. However, the practical outcome will not deviate from the Directive as these payments are not subject to withholding tax under domestic provisions.

b. Classification of revenue from leasing and software

Revenue from leasing is either taxed as business income (Art. 23 IR/WIB) or as investment income (Art. 17(1)(3) IR/WIB), if the payments are not derived in the context of business income. Software payments are taxed as business income if they are derived in the context of a business, but not taxed as investment income.

Lease payments are covered by the Belgian definition of royalties and will benefit from the exemption under the Directive. Payments for software are not mentioned but also not subject to any withholding tax in Belgium.

c. Exclusion of royalties reclassified as profit distribution or conflicting arm's length (Art. 4(1) (a) and Art. 4(2))

Excessive royalties that conflict the arm's length principle fall under the general Belgian transfer pricing rules (see Introduction, 1.2.1. c. *Transfer pricing*). In certain cases excessive royalties may also fall under the provision of Art. 26 IR/WIB on gratuitous or abnormal advantages. Under this provision the payments may be reclassified as a hidden profit distribution and be treated as a dividend (see Introduction, 1.2.1. d. *Constructive distribution rules*).

2.2. COMPANIES

2.2.1. Types of companies benefiting from implementing provisions (Art. 3(a)(i))

a. Other types of entities

Belgium provides for an exemption from withholding tax with respect to interest and royalties distributed by a company resident in Belgium to an associated company and which take one of the forms listed in Annex to the Directive. The Belgian listed companies are those that take the form of:

- a corporation (*société anonyme "SA"/naamloze vennootschap "NV"*);
- a partnership limited by shares (*société en commandite par actions "SCPA"/commanditaire vennootschap op aandelen "CVOA"*);
- a limited liability company (*société privée à responsabilité limitée "SPRL"/Besloten vennootschap met beperkte aansprakelijkheid "BVBA"*); and
- public law bodies operating under private law.

In respect of the beneficiary associated company Belgium not only grants the benefit of the withholding tax exemption to non-resident companies listed in the Annex to the Directive, but also to resident companies.

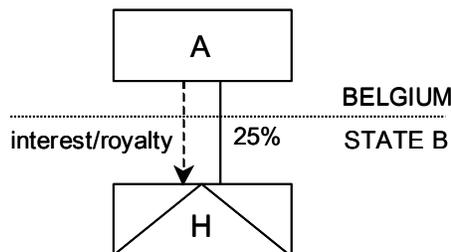
b. Hybrid entities

Belgium has not provided guidance with respect to application of exemption from withholding tax when interest or royalties are paid to or by hybrid entities. Therefore, conclusions on the tax treatment of payments can only be drawn from the general provisions transposing the Directive. The issue of tax treatment of payments in situations involving hybrid entities is considered based on three hypothetical situations described below:

- Case 1: a Belgian associated company pays interest and royalties to a hybrid entity H located in Member State B;
- Case 2: a Belgian hybrid entity H pays interest and royalties to an associated company in Member State A;
- Case 3: a Belgian associated company pays interest and royalties to an associated company through a hybrid entity H, the latter two located in Member State A.

Case 1: Payment to a hybrid entity

A Belgian associated company A pays interest and royalties to a hybrid entity H situated in Member State B. Belgium treats hybrid entity H as a transparent entity.



The implementing rules to the Directive do not address this issue neither with respect to interest nor with respect to royalties. Therefore, a conclusion can only be based on the general provision transposing the Directive. Articles 105(6)(a), (b) and 111(1)(d) DR IR/KB WIB require that the receiving EU associated company must fulfil the following requirements:

- (i) be resident in one of the EU Member States; and
- (ii) have one of the legal forms listed in the Annex to the Directive.

Furthermore, the associated company must be liable to corporate income tax, also in respect of its income in the Member State where its effective management is located, without being exempt. This follows from the Belgian anti-abuse provisions denying a deduction of interest and royalties if the recipient is not subject to tax (Arts. 54 and 198(11) IR/WIB).

In addition, it must, however, be noted that Art. 105(6)(b) DR IR/KB WIB provides that the participation in the associated company may be direct or indirect. The granting of the withholding tax exemption in case of indirect participations is more beneficial than required by the Directive. However, it has not been indicated how the indirect participation should be calculated. The Belgian administrative commentary to tax treaties uses both the proportionality and the majority rule.

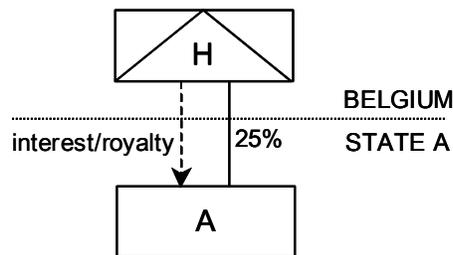
Consequently, Belgium most likely will not grant the benefit of the withholding tax exemption on interest and royalty income paid by the Belgian associated company if company H is not subject to corporate tax on its income. In this situation, such income is taxed at the level of

the members, and not at the level of the hybrid entity. The requirement of being liable to corporate income tax is therefore not met.

For these reasons, the withholding tax exemption under the Directive is most likely to be denied in situations where the payment is made to a hybrid entity.

Case 2: Payment from a hybrid entity

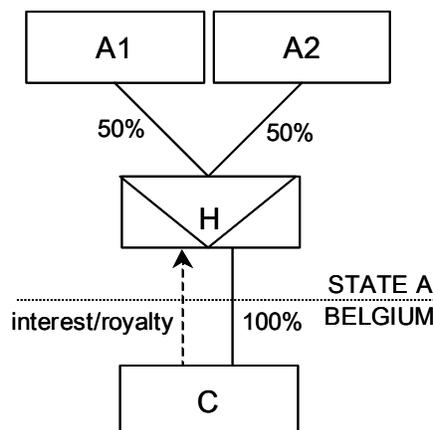
A hybrid entity H in Belgium pays interest or royalties to an associated company A in Member State A.



Payments by Belgian hybrid entities do not benefit from the withholding tax exemption in Belgium. Such entities are not listed as eligible companies under Art. 105(6)(a) DR IR/KB WIB (see 2.2.1. a. *Other types of entities* above).

Case 3: Payment through a hybrid entity

Companies A1 and A2 are the members of the hybrid entity H, all located in Member State A. The hybrid entity H holds all the shares in company C, located in Belgium. Belgium treats hybrid entity H as a transparent entity. Company A1 grants a loan to the hybrid entity H and the hybrid entity H grants a loan to the company C. Interest flows from the company C to a member A1 through the hybrid entity H.



As explained above Belgium also grants the benefits of the Directive in case of an indirect participation. This means that the benefits also may apply in case of an interposed hybrid entity or partnership, provided that the legal entity H and both companies A1 and A2 are listed in the Annex to the Directive. However, no precise guidance was given for this case neither in the parliamentary documents nor by the tax administration.

2.2.2. Residence requirement (Art. 3(a)(ii))

a. Implementation of the requirement

The benefits of the Directive will be granted if the interest or royalties are paid to a company resident in a Member State, which has a legal form, listed in the Annex to the Directive (Art. 105(6)(a) DR IR/KB WIB). Based on the principle of equal treatment, Belgium also grants the benefit provided for in the Directive to beneficial owners resident in Belgium (Art. 107(6) DR IR/KB WIB).

Under Belgian domestic law, the place of effective management is the decisive factor to determine the residence of the associated company. In addition, the company must be subject to tax without being exempt in the state where its effective management is located. According to Belgian literature, this requirement follows from the Belgian anti-abuse provisions denying a deduction of interest and royalties if the recipient is not subject to tax (Arts. 54 and 198(11) IR/WIB).

With respect to Belgian entities, the exemption from Belgian withholding tax applies only if the company has a legal form as listed in the Annex of the Directive (see 2.2.1. *a. Other types of entities*), which is subject to Belgian corporate tax without being exempt. It is not clear whether a payment by a Belgian company, having an eligible form under Art. 105(6)(a) DR IR/KB WIB, but having its effective management in another Member State would benefit from the withholding tax exemption. This issue will be discussed below (see *b. Application of the requirement in dual residence cases*).

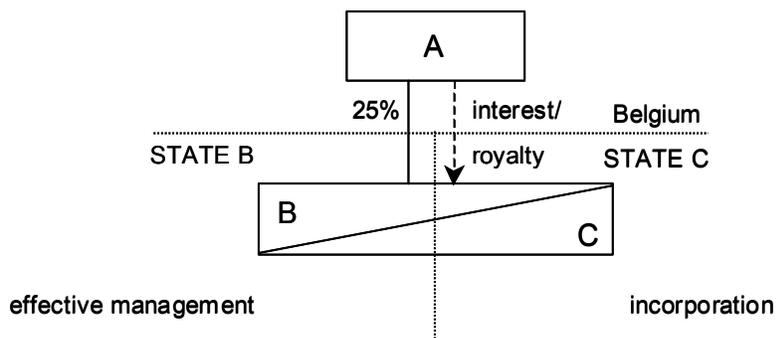
b. Application of the requirement in dual residence cases

There is no specific guidance with respect to application of exemption from withholding tax when interest or royalties are paid to or by dual resident companies. The conclusions on the tax treatment of such payments are drawn on the basis of general provisions implementing the Directive. The issue of tax treatment of payments in situations involving dual residency is considered based on three situations described below:

- Case 1: a Belgian associated company A makes an interest or royalty payment to a dual resident company BC incorporated in Member State C but with its effective management in State B;
- Case 2: a dual resident company BC incorporated in Member State C but with its effective management in Belgium makes an interest or royalty payment to an associated company A resident in Member State A;
- Case 3: a dual resident company BC incorporated in Belgium but with its effective management in State C makes an interest or royalty payment to an associated company A located in Member State A.

Case 1: Payment to a dual resident

A Belgian associated company A makes an interest or royalty payment to a dual resident company BC incorporated in Member State C but with its effective management in Member State B.



Articles 105(6)(a), (b) and 111(1)(d) DR IR/KB WIB require that the receiving EU associated company must fulfil the following requirements:

- (i) be resident in one of the EU Member States; and
- (ii) have one of the legal forms listed in the Annex to the Directive.

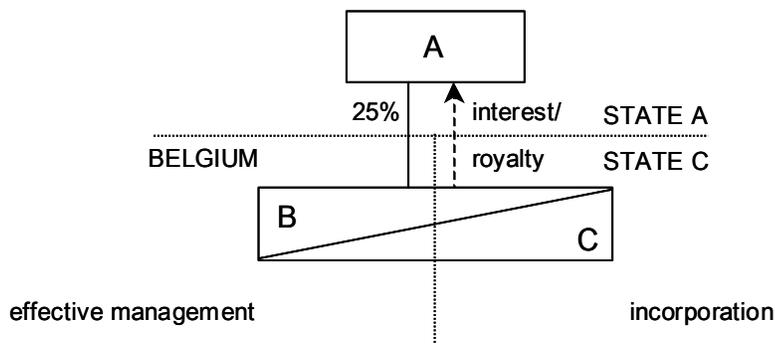
As mentioned above, the place of effective management is the decisive factor to determine the residence of the associated company (see *a. Implementation of the requirement* above). Furthermore, the associated company must be liable to corporate income tax, also in respect of its income in the Member State where its effective management is located, without being exempt. Furthermore, it must be noted that Belgium only considers the foreign company to be subject to tax, if the tax levied is comparable to the tax levied in Belgium. This is deemed to be the case of the tax is levied at a rate of at least 15%.

The issue of dual residence of the recipient dual company must be solved under the provisions of the tax treaty between Member States B and C. Assuming that the tax treaty between B and C is identical to the OECD MC, the company BC will be considered resident for treaty purposes in Member State B where its effective management is located (Art. 4(3) of the OECD MC).

In the case at hand, the company BC meets the residency requirement mentioned in (i) above and is resident in the place where its effective management is located. Provided that the company BC has the legal form as listed in the Annex to the Directive and provided that the tax in Member State B is levied at a level comparable to the tax levied in Belgium, Belgium will grant the withholding tax exemption in respect of the payment made to the dual resident company BC.

Case 2: Payment by a dual resident with the place of management in Belgium

A dual resident company BC incorporated in Member State C but with its effective management in Belgium makes an interest or royalty payment to an associated company A resident in Member State A.



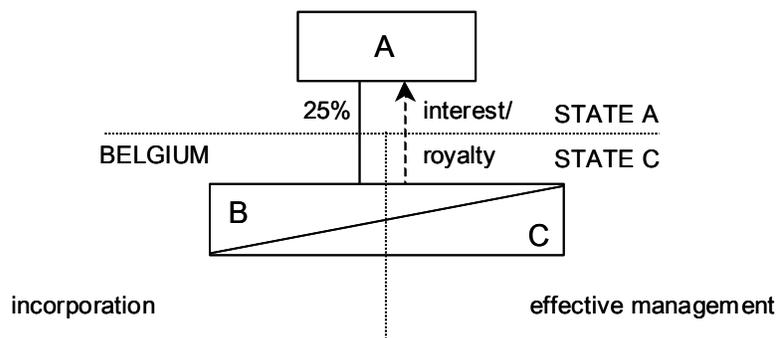
Belgium applies the Directive to payments made by companies having a legal form listed in the Annex to the Directive (Art 107(6) DR IR/KB WIB). In this respect it must be noted that the Belgian implementation law does not contain any reference to a permanent establishment except for a provision that the benefits of the Directive do not apply to a permanent establishment established outside the EU (Art 107(6) DR IR/KB WIB). However, from the general wording of the provision and the legal unity between permanent establishment and the headquarter it follows that the benefits of the Directive also apply to Belgian permanent establishments of the Directive-listed companies.

Therefore, Belgium will not levy a withholding tax under the Directive, in case company BC is incorporated in State C as Belgium would apply the Directive to any company having a legal form listed in the Directive and not only to the Belgian legal forms listed therein.

In principle, Belgium may levy a withholding tax if based on the effective management criterion as included in the OECD MC a company is deemed to be resident in Belgium. However, in this case no withholding tax will be levied as Belgium also applies the exemption to other companies of the Annex.

Case 3: Payment by a dual resident with the place of incorporation in Belgium

A dual resident company BC incorporated in Belgium but with its effective management in State C makes an interest or royalty payment to an associated company A located in Member State A.



Article 107(6) DR IR/KB WIB grants a withholding tax exemption to interest and royalties paid by a company listed in the Annex to the Directive (see 2.2.1. *a. Other types of entities*), provided that the company is liable to Belgian corporate tax without being exempt. For the determination of whether or not the company is liable to Belgian corporate income tax, it must be determined in which country the Belgian incorporated company is resident under the Belgium-State C tax treaty.

For this determination it is assumed that the tax treaty between Belgium and Member State C follows the OECD MC, which means that the tie-breaker rule under Art. 4(3) of the tax treaty between Belgium and Member State C will designate Member State C, where the effective management is located, as the country of residence for tax treaty purposes. The interest or royalty payment will be deemed to arise in Member State C, so that Belgium may not levy a withholding tax, unless the interest deduction is attributable to a permanent establishment.

If the interest payment is attributable to a permanent establishment in Belgium, Belgium has to apply the withholding tax exemption under the Directive. As explained above it may be concluded that the Directive also applies to Belgian permanent establishments of companies listed in the Annex to the Directive, despite the fact that Belgian implementation law does not refer to a permanent establishment.

2.2.3. Subject-to-tax requirement (Art. 3(a)(iii))

a. General

The Belgian implementing Decree does not incorporate the subject-to-tax requirement. However, from the Belgian anti-abuse provisions denying a deduction of interest and royalties if the recipient is not subject to tax it is deduced that the beneficiary associated company must be subject to tax (Arts. 54 and 198(11) IR/WIB). Most scholars reason that this means that the exemption under the Directive will only be granted if the paying company is subject to tax in its country of residence. However, no guidance is provided as to the interpretation of such subject-to-tax requirement.

b. Proof to demonstrate compliance with the subject-to tax requirement

The law does not require to submit any particular proof with respect to the compliance subject-to-tax criterion.

c. Application of the requirement to hybrid entities

As the Decree transposing the Directive did not exclude hybrid entities, the subject-to-tax criterion would also be applicable in that case.

2.2.4. Associated company (Art. 3(b))

Belgium applies the Directive ownership threshold of 25% (Art. 107(6) DR IR/KB WIB). However, the Belgian transposition also applies the exemption from withholding tax to indirect holdings.

Consequently, according to Belgian law two companies are "associated companies" if:

- (i) one company has a direct or indirect minimum holding of 25% in the capital of the other; or
- (ii) a third EU company has a direct or indirect minimum holding of 25% in the capital of the two companies.

There is no guidance with respect to the calculation of an indirect holding. Scholars refer to the Belgian practice under Belgian tax treaties under which a proportionality rule or a majority rule is applied. The outcome can be quite different as illustrated by the following examples of calculation:

- under the proportionality rule the indirect participation test is met if company A has a 75% shareholding in intermediary company B and B has a shareholding of 33.34% in company C;
- under the majority test it is sufficient if company A has a shareholding of 51% in B, which owns at least 25% of the shares of company C.

In line with the Parent-Subsidiary Directive, Belgium only applies the criterion of a minimum holding in the capital and not that of a minimum holding of the voting rights.

Belgium did not exclude the application of the Directive to hybrid entities but so far no guidance has been provided concerning the application of the holding threshold to hybrid entities.

2.2.5. Beneficial ownership (Art. 1(4))

Articles 107(6) and 111(1)(d) DR IR/KB WIB define the beneficial ownership as the beneficiary company (*Bénéficiaire effectif/uiteindelijke gerechtigde*) which must satisfy the paying company or paying agent that it is the beneficial owner of the income. The paying company is obliged to provide an attestation that the beneficiary of the income is the owner or usufructuary of the shares, rights or goods with respect to which the payments are made.

As the concept of beneficial ownership was not previously defined in Belgian law, and the tax administration has not clarified the concept, its interpretation is unclear. The concept could be interpreted legally or economically. Most Belgian scholars take the view that a legal interpretation should be given to the concept of beneficial ownership. This means that the beneficial owner is the person or entity holding a right in rem (*droit réel/zakelijk recht*) to the assets generating the income.

Also the tax administration seems to apply a legal interpretation to the concept of beneficial ownership. This follows from the official commentary on Belgium's tax treaties which defines the beneficial owner of interest and royalties as the owner or usufructuary of the securities, the creditor, the lender or depositor (Belgian Treaty Commentary 11/204, 11/226(5) and 11/231 with respect to interest and 12/204 with respect to royalties).

Finally, the legal approach was also confirmed by Belgian case law in which it was held that a person or company can only be a recipient of income if a right in rem (ownership or usufruct) with respect to the assets exists (Court de Cassation/Hof van Cassatie 27 September 1991, Court d 'Appel Bruxelles/Hof van Beroep Brussel, 29 June 1982 *Soeur Sourire*, Court d 'Appel Bruxelles/Hof van Beroep Brussel, 8 June 1982).

The legal approach would mean that the withholding tax exemption also would be granted to a conduit company which is not merely interposed to benefit from a tax treaty.

As the concept of beneficial ownership is not implemented in Belgian tax law, there is no link with a subject-to-tax criterion. As explained above (2.2.3. Subject-to-tax requirement), the subject-to-tax criterion is also not included in Belgian law, but follows from the anti-abuse provisions which deny the deduction of interest and royalty payments to a company which is not subject to tax. However, the beneficial owner must show that it:

- (i) has its effective management in an EU Member State; and
- (ii) has one of the legal forms listed in the Annex.

Presuming that the Belgian tax authorities will apply a subject-to-tax criterion, the beneficiary company would also have to prove that it has met this criterion.

2.3. PERMANENT ESTABLISHMENTS

2.3.1. Definition (Art. 3(c))

None of the Directive's provisions regarding a permanent establishment, including its definition, were included in the Belgian Royal Decree implementing the Directive. The only provision implemented concerns the exclusion of payments to a permanent establishment outside the European Union (Art. 107(6) DR IR/KB WIB). Furthermore, it is not clarified whether the general permanent establishment concept of Belgian domestic law, the concept of permanent establishment under each separate treaty between Belgium and the Member State concerned, or a specific concept to be developed for the purpose of application of the Directive, applies.

However, it must be noted that under the definition of the term "permanent establishment" in domestic law, a non-resident company is taxable if it has a fixed place of business through

which the business of the enterprise is wholly or partly carried on (Art. 229(1) IR/WIB). This definition is the same as the one included in Art. 3(1)(c) of the Directive.

Furthermore, it is indicated that the concept of permanent establishment includes a seat of management, a branch, an office, a factory, a workshop, an agency, a mine, a quarry or any other place of exploitation of natural resources, a building site or construction project the duration of which exceeds an uninterrupted period of 30 days, a storage room and a stock of merchandise (Art. 229(1)(1)-(10) IR/WIB).

An agent, other than an agent of an independent status acting in the ordinary course of its business, is considered to be a permanent establishment of the non-resident for whose account he is acting, even if this agent has no authority to conclude contracts on behalf of the non-resident (Art. 229(2) IR/WIB).

An associate of an entity, which has no legal personality is deemed to have a permanent establishment if it has its registered office, its main office or its place of management in Belgium or if the entity earns certain Belgian-source income listed in Art. 229(2) IR/WIB.

The concept of permanent establishments under tax treaties is generally based on the OECD MC but no guidance has yet been provided on whether those definitions also apply here.

2.3.2. Application of source rules (Art. 1(2))

At this stage, we are not aware of any instances where Belgium as the source state would have interpreted Art. 3 (c) of the Directive more narrowly than Art. 5 of the OECD MC and as a consequence would have imposed withholding tax on interest or royalty payments from its sources to an associated company in another Member State.

2.3.3. 'Tax-deductible expense' requirement (Art. 1(3))

Articles 1(3) of the Directive concerning the 'tax-deductible expense' requirement has not been implemented. Currently, Belgian tax law does not contain a provision that the exemption applies only to interest and royalty payments, which are deductible.

However, excess interest and royalty payments and interest on profit participations are re-classified into dividends in which case it must be investigated whether the requirements for the application of the Parent-Subsidiary Directive are met.

2.3.4. Beneficial ownership (Art. 1(5))

Belgium has not implemented Art. 1(5) of the Directive concerning the situation where the beneficial owner is a permanent establishment. However, Arts. 107(6) and 111(1)(d) DR IR/KB WIB indicate that the exemption of the Directive is not granted with respect to payments by and to a permanent establishment located outside the EU. This means that payments to a permanent establishment established in another Member State will qualify for the application of the Directive.

Furthermore, under Belgian international practice a permanent establishment is deemed to be the beneficial owner of interest and royalty payments if the corresponding debt claims, rights, using rights or information are assets of the permanent establishment, which in its country of establishment is subject to tax. The Belgium position was confirmed by case law (Court de Cassation/Hof van Cassatie 20 June 2002, and Court d'Appel Ghent/Hof van Beroep Gent 1 April 2003).



2.3.5. Permanent establishment in a third country (Art. 1(6))

In Belgium, the exemption from tax under the Directive does not apply to permanent establishments located outside the EU (Arts. 107(6) and 111(1)(d) DR IR/KB WIB).

3. PROCEDURE

Belgium grants the withholding tax exemption under the Directive for interest and royalties accrued as from 1 January 2004.

The exemption will be granted at source if the recipient submits an attestation to the paying agent. The attestation must substantiate that the paying and receiving company of the interest and royalties have been associated for an uninterrupted period of at least 1 year (see 3.1. Minimum holding period). The inclusion of a commitment that the shares will be kept for 1 year cannot prevent that an amount equal to the withholding tax must be retained (see 3.1.2. Relief before the minimum holding period is satisfied). If no attestation is submitted, the exemption will not be granted. At the end of the one-year period, the receiving company may however claim a refund of the withholding tax levied in the source state (see 3.4. Application for refund).

3.1. MINIMUM HOLDING PERIOD (ART. 1(10))

3.1.1. General

In line with the transposition of the Parent-Subsidiary Directive Belgium requires a minimum holding period of 1 year for granting the benefits of the Directive (Art. 105(6)(b) DR IR/KB WIB).

The requirement must be met at the time when the payment is made. Decisive is the date of registration of the shares in the register of shareholders.

3.1.2. Relief before the minimum holding period is satisfied

If the holding period requirement is not yet met, the Belgian company must temporarily retain an amount equal to the withholding tax (Art. 117(6bis) DR IR/KB WIB). The amount withheld does not have to be transferred to the tax authorities immediately. When the minimum holding period is satisfied the Belgian company must remit this amount to the recipient. As soon as it becomes clear that the requirement is not satisfied, the retaining company must pay the withholding tax (including interest) to the tax authorities.

The Belgian system is based on the *Denkavit* decision (ECJ, C-283/94 *Denkavit International BV v. Bundesamt für Finanzen*, 17 October 1996). Prior to that decision, the exemption of dividends under the Parent-Subsidiary Directive was subject to the condition that the one-year holding period was completed. This was modified by a Royal Decree of 6 July 1997 which determined that if the holding period was not yet completed, no withholding tax was due, but that the tax had to be retained.

3.1.3. Appeals

Under Belgian law an amount equal to the withholding tax must be retained until the withholding period is completed. When the one-year holding period is completed, it may be repaid to the beneficial owner. If the attestation requirement is not met, a refund must be requested.

3.2. ATTESTATION (ART. 1(11) AND 1(13))

3.2.1. General

The Belgian Royal Decree implementing the Directive provides that, in order to benefit from the withholding tax exemption, the beneficiary company must submit an attestation before the interest and royalty payment is made. The requirements are the same as for the Parent-Subsidiary Directive. The attestation to be submitted to the paying company must include the following information (Art. 117(6bis) DR IR/KB WIB):

- the beneficiary is a Belgian company or a company of a Member State as defined by the Directive;
- if applicable, that the third company holding the associate companies is a company of a Member State;
- the debtor, the beneficial owner or the third company has held full ownership of a direct or indirect participation of 25% in the share capital of, respectively, the beneficial owner or the debtor, or both, during an uninterrupted period of at least one year at the time the interest or royalties are attributed or paid; and
- the beneficial owner is the (legal) owner or usufructuary of the assets generating the interest or royalties and that such assets have not been part of the assets of a permanent establishment outside the EU during the period to which the interest or royalties relate.

In case the holding period requirement is not yet met, the following additional information must be included:

- the date when the minimum holding was acquired;
- a commitment that the minimum holding will be maintained for at least 1 year; and
- a commitment that the debtor will be informed if the holding falls below 25%.

Furthermore, with respect to interest paid on securities, e.g. bonds and real estate certificates, it is required that the beneficial owner was the (legal) owner or usufructuary of those securities during the entire period to which the interest relates (Art. 118(1bis) DR IR/KB WIB). The receiving company may mention in the attestation that this requirement is met, but is not obliged to do so.

As Belgium did not implement Art. 1(13) of the Directive that an attestation is valid for a certain period, it is expected that domestic rules will be applied. Under the domestic procedure, an attestation must be provided to the paying company each time when a withholding tax return is filed, i.e. within 15 days after the interest or royalty was paid (Art. 85 DR IR/KB WIB).

The attestation must be drawn up in the language applicable for the municipality where the relevant tax office is situated, i.e. in Dutch or French.

No special form or format is required for the attestation and a signature or approval of the foreign tax authorities is not required. The attestation may also be submitted by a local representative instead of by the beneficial owner or third company.

3.2.2. Appeals

In case no attestation is submitted a refund of the withholding tax paid can be requested (see 3.4. Application of refund).

3.2.3. Relief before the holding period requirement is satisfied

Unless the attestation requirement is not met, Belgium does not levy a withholding tax when the holding period is not yet completed, but the amount of the withholding tax must be maintained (see 3.1.2 Relief before the minimum holding period is satisfied).

3.3. DECISION ON APPLICATION OF THE RELIEF (ART. 1(12))

Belgium does not require a decision on the application of the relief.

3.4. APPLICATION FOR REFUND (ART. 1(15) AND 1(16))

Belgium applies the system of an exemption at source. In case withholding tax is unduly paid, e.g. when an attestation was not delivered on time, a refund procedure applies.

3.4.1. General

If the withholding tax was unduly levied at source, companies may claim a refund with the tax administration. The Royal Decree to implement the Directive did not contain any procedural rules. Therefore, the general domestic rules concerning a refund of withholding tax apply.

As Belgium has concluded tax treaties with all other EU Member States the general treaty procedure may apply. A refund of withholding tax can be requested if the following cumulative criteria are met:

- the beneficial owner must be a resident of the other contracting State under the relevant tax treaty;
- the beneficial owner may not have a permanent establishment or fixed base with which the shareholding, debt claim, right or assets producing the income are effectively connected; and
- the refund procedure only applies to the withholding tax withheld on normal payments in case of a dependent relationship between the debtor and recipient. Consequently, the procedure does not apply with respect to the part of the interest and royalty payments which is excessive.

A refund can be claimed with a standard form, 276 Int-Aut for interest and 276 R-Aut for royalties.

A refund must be requested within a period of 3 years starting on 1 January of the year following the year in which the interest or royalties were paid or made payable (Art. 376(3) IR/WIB and Court de Cassation/Hof van Cassatie. 31 January 1986, *Haeghedooren*).

The claim must contain the following information:

- the contested information;
- a description of the facts, means and conclusion;
- a signature of the requesting company; and
- documentary proof that the withholding tax was actually paid.

The tax authorities must issue a decision on a refund based on the presented facts within a period of 3 years (Art. 376 (3) IR/WIB).

The beneficial owner must file the refund form in twofold with the competent tax authority in its country of residence. One form is kept by that tax administration, whereas the other is returned to that company, stating that the company is resident there. Thereafter, the form must be sent to the Belgian tax administration for non-residents, where the forms also can be requested.

The address is:



Contrôle Bruxelles Étranger
Place Jan Jacob 10
1000 Bruxelles

Controle Brussel Buitenland
Jan Jacobsplein 10
1000 Brussel

If the requirements of the attestation are met, the withholding tax exemption applies immediately. If those requirements are not met, a refund must be requested within the period mentioned above.

For 2005, the legal interest rate payable by the tax authorities in case of a refund is fixed at 7% per year. The same rate applies to interest for late payment due by the taxpayer (Arts. 418 and 419 IR/WIB and Art. 47 of the law of 22 December 1998). Such interest compensation is also due with respect to a refund of withholding tax to non-resident taxpayers for which the tax constitutes a final tax (Court de Cassation/Hof van Cassatie, 24 October 1996).

An interest compensation will be paid as from the end of the second month following the month in which an assessment had to be imposed or a decision on a refund had to be taken. An assessment can be imposed until 30 June of the year following the assessment year concerned.

4.4.2. Appeals

If the tax administration did not process the claim for refund within the deadlines described in 3.4.1. General, the taxpayer may appeal before the Lower Court.

4. FRAUD AND ABUSE (ART. 5)

4.1. MEASURES UNDER ART. 5(1) OF THE DIRECTIVE

4.1.1. Domestic

In addition to the domestic transfer pricing concept (see 1.2.1. c. *Transfer pricing*), Belgium applies a general anti-abuse provision to disregard abuse constructions. In addition, various specific anti-abuse provisions, which deny the deduction of interest, apply.

The general Belgian anti-abuse provision is based on the simulation doctrine (*théorie de la simulation/simulatieleer*). Under this doctrine the Belgian tax authorities may disregard sham transactions. In Belgian case law it was confirmed that parties may choose the structure which will result in the lowest tax burden, even if the structure is not the most obvious one, as long as the structure is not incompatible with Belgian tax law (Court de Cassation/Hof van Cassatie, 6 June 1961, *Brepols*). In this situation no simulation exists if the parties accept all the consequences of the transactions.

Pursuant to this case law a general re-characterization rule was introduced which allows the tax authorities to disregard and re-characterize a transaction if it is only aimed at tax avoidance (Art. 344(2) IR/WIB). For the application of the general anti-abuse provisions it must be determined whether the acts concerned can be characterized in various ways. Thereafter it must be determined whether the characterization chosen was only aimed at tax avoidance. In that case, the transaction will be re-characterized.

A specific anti-abuse provision was introduced to tackle coupon stripping (Art. 118(1bis) DR IR/KB WIB). Under this provision, interest received on securities, e.g. bonds and real estate certificates, are only tax exempt if the beneficial owner has been the (legal) owner or usufructuary of the securities during the entire period to which the interest relates. If securities are obtained during an interest period, the new beneficial owner may claim a refund of the withholding tax for interest accrued after acquisition (Art. 119(1) DR IR/KB WIB).

Furthermore, various specific provisions apply which deny the deduction of interest (see 1.2.1. a. *Tax treatment at the level of the paying company*).

4.1.2. Agreement-based

The tax treaties between Belgium and several Member States contain anti-abuse provisions. However, no clarification has been provided on whether the tax authorities will apply those provisions to transactions covered by the Directive.

4.2. MEASURES UNDER ART. 5(2) OF THE DIRECTIVE

Belgium did not implement any specific anti-abuse provisions to deny the benefits of the Directive.

4.3. COMPARISON WITH SIMILAR MEASURES UNDER PARENT-SUBSIDIARY AND MERGER DIRECTIVES

Belgium did not implement any specific anti-abuse provisions concerning the Parent-Subsidiary and the Merger Directive.

5. SUMMARY

Belgium generally implemented the Directive. However, the provisions concerning the definition of interest and royalties, the treatment of a permanent establishment and various provisions concerning the procedure are not implemented.

Nevertheless, in most cases the Belgian domestic provisions are similar to the Directive.

Objective scope

Belgium did not implement the interest definition of the Directive as the Belgian domestic definition already covered most items of that definition. The remaining items, i.e. interest on real estate certificates, zero-bonds and capitalization bonds, were exempted by law of 4 July 2004 (this law provided for a new Art. 266(2) IR/WIB).

Furthermore, Belgium did not exclude hybrid financial arrangements.

Belgium did not introduce a definition of royalties because no definition exists under Belgian domestic law and royalties are not treated in a uniform way. As a result, Art. 111 DR IR/KB WIB only indicates that no withholding tax will be levied with respect to rental income, lease payments and payments for the use or licensing of tangible assets. Although this list is narrower than the list under Art. 2(b) of the Directive, no withholding tax is levied on other types of royalty payments under domestic law.

Subjective scope

Belgium generally implemented Art. 3(a)(i) of the Directive. Furthermore, the subjective scope in Belgium is much broader than required by the Directive as Belgium also provides for an exemption from withholding tax in domestic situations, which is based on the non-discrimination principle.

Finally, Belgium also applies the Directive to indirect participations, which means that hybrid entities might benefit from a withholding tax exemption. However, so far no guidance was issued concerning the application of the Directive to indirect participations. Therefore, it is not clear how to calculate whether an indirect participation qualifies.

Belgium grants a withholding tax exemption to payments made by companies having a legal form listed in the Annex and a Belgian permanent establishment of EU listed companies.

It is not clear whether Belgium requires that the receiving company must be subject to tax. The requirement is not inserted in the implementing Royal Decree. However, most Belgian scholars argue that the requirement applies, which they deduce from the fact that Belgian tax law contains specific provisions that interest and royalty payments are not deductible if the recipient is not subject to tax.

Belgium did not implement the definition of "permanent establishment" of the Directive as Belgian domestic law already contained a definition similar to that of the Directive.

The term "beneficial owner" is narrowly defined in Belgium as an exemption from withholding tax is only granted if the recipient is the owner or usufructuary of the asset producing the income.

Procedure

The implementing Royal Decree did not provide for many procedural rules concerning the application of the Directive. In line with the Parent-Subsidiary Directive, Belgium provides for a withholding tax exemption at source, by means of an attestation. As the implementing Royal



decree did not address the issue, the domestic attestation procedure will most likely apply. This would mean that an attestation must be presented for each single payment.

The withholding tax exemption applies if the shares are held for an uninterrupted period of one year. When the holding period is not yet completed at the time of payment, the amount of the withholding tax must be retained. After completion it can be paid to the beneficial owner. At the time it is certain that the holding period will not be met, the retained tax must be paid to the tax authorities, with interest.

In case the withholding tax was unduly levied a refund can be requested. However, the procedure deviates from the Directive in particular because the tax authorities have to decide on an official tax exemption or refund within a period of 3 years after the refund request was submitted.

Fraud and abuse

In the case of sham transactions Belgium will apply its general anti-abuse provision. Furthermore, Belgium most likely will apply the anti-abuse provisions of its tax treaties. Belgium did not implement any specific provision denying the benefit of the Directive, as it did not with respect to the Parent-Subsidiary and the Merger Directive.

PART II. THE AGREEMENT

Belgium did not adopt any legislative measures to implement the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (the "Agreement"), but on 29 June 2005 a clarification note was published concerning the consequences of Art. 15 of the Agreement with respect to the Belgium-Switzerland tax treaty on income and capital of 28 August 1978.

1. SCOPE

1.1. PAYMENTS

1.1.1. Concept of interest

With respect to the definition of interest the clarification refers to the definition of the Directive. Belgium did not implement this definition, as the definition in domestic law was already quite similar. In addition, Art. 266(2) IR/WIB was amended to cover the items which were not yet covered by the Directive.

As for the Directive, no specific provision was implemented in order to exclude hybrid financial arrangements.

Under Belgian domestic law excessive interest payments will always be reclassified into a dividend, unless the loan supplied constitutes an informal capital supply. As this approach also applies to the Directive, it may be presumed that it also will apply to the Agreement. However, the clarification does not contain any guidance on this point.

1.1.2. Concept of royalties

Also with respect to the concept of royalties, the clarification refers to the definition of the Directive. Belgium did not implement that definition, as Belgian domestic law did not contain a definition because no uniform tax treatment for royalties applies, Art. 111 DR IR/KB WIB only mentions that no withholding tax will be levied with respect to rental income, lease payments and payments for the use or licensing of tangible assets.

Under Belgian domestic law, excessive royalty payments will always be reclassified into a dividend. As this approach also applies to the Directive, it may be presumed that it also will apply to the Agreement. However, the clarification does not contain any guidance on this point.

1.2. COMPANIES

1.2.1. Types of companies benefiting from Art. 15(2) of the Agreement

The clarification indicates that the Agreement applies the following Swiss legal forms:

- société anonyme/Aktiengesellschaft/società anonima;
- société à responsabilité limitée/ Gesellschaft mit beschränkter Haftung/società a responsabilità limitata; and
- société en commandite par actions/Kommanditaktiengesellschaft/società in accomandita per azioni.

1.2.2. 'Affiliated' companies

As regards the holding requirement Belgium strictly follows the text of the Agreement. Therefore, companies are affiliated by a direct minimum holding of 25% for at least 2 years or by a third company which has directly a minimum holding of 25% in both the capital of the first company and the capital of the second company for at least 2 years.

This deviates from the Belgian implementation of Directive which sets a one-year holding period and in addition also applies to indirect participations. Also for the application of the Parent-Subsidiary Directive only a one-year holding period is required.

1.2.3. Residence requirements

Pursuant to the residence requirement a company must be resident in a Member State or a permanent establishment must be situated there, whereas the other company must be resident in Switzerland or a permanent establishment must be situated there.

Furthermore, none of the companies may under the tax treaty with a third state be a resident of that state and none of the permanent establishments may under the treaty with a third state be situated in a third state.

1.2.4. Subject-to-tax requirement

The clarification indicates that receiving companies must be subject to corporation tax without being exempt in particular with respect to interest and royalty payments.

2. PROCEDURE

The clarification does not provide any particular guidance with respect to the procedure used for obtaining the relief. However, it may be presumed that that the domestic procedural rules apply as is the case with respect to the Directive.

3. SUMMARY

The application of the Agreement in Belgium from many aspects is similar to the application of the Interest and Royalties Directive and the Parent-Subsidiary Directive.

The main differences are that for the application of the Agreement a 2-year holding period is required, whereas for both Directives the required holding period is one year. Furthermore, the benefits of the Interest and Royalties Directive are also granted in the case of an indirect participation, whereas the clarification of the Agreement does not mention that it will be applied in the case of indirect participations.

ANNEX

Table of the maximum withholding tax rates on interest and royalty payments under the tax treaties between Belgium and the EU Member States.

EU Member State	Interest (%)	Royalties (%)
Austria	15	0/10<1>
Cyprus	10	0
Czech Republic	0/10<2>	5/10<3>
Denmark	10	0
Estonia	10	5/10<3>
Finland	10	5
France	15	0
Germany	15	0
Greece	10	5
Hungary	15	0
Ireland	15	0
Italy	15	5
Latvia	10	5/10<3>
Lithuania	10	5/10<3>
Luxembourg	0/15<4>	0
Malta	10	0/10<5>
Netherlands	0/10<6>	0
Poland	0/5<7>	5
Portugal	15	10
Slovak Republic	10	5
Slovenia	10	5
Spain	10	5
Sweden	10	0
United Kingdom	15	0

<1> The 10% rate applies if the Austrian company owns more than 50% of the capital of the Belgian company.

<2> The lower rate applies, inter alia, to interest on bank notes and deposits.

<3> The lower rate applies to equipment leasing.



- <4> The lower rate applies to interest, other than interest on bonds, if the recipient is an enterprise that owns less than 25% of the voting stock or capital in the Belgian company.
- <5> The lower rate applies to copyright royalties, including films.
- <6> The zero rate applies where the Netherlands beneficial owner is an enterprise and (a) the interest has not arisen from bearer securities representing loans or deposits or (b) the interest has arisen from bearer securities representing loans or deposits and the enterprise carries on a banking or insurance activity and holds the securities in question for at least 3 months preceding the date of payment.
- <7> The lower rate applies to interest from any kind of loans granted by banking enterprises, not being loans represented by bearer securities.