

Transfer Pricing Country Summary Belgium

July 2018

Legislation

Existence of Transfer Pricing Laws/Guidelines

The arm's length principle is codified in Article 185, Par 2, of the Belgian Income Tax Code 1992 (BITC 1992) (Wetboek van de Inkomstenbelastingen 1992 - Code des Impôts sur les Revenus 1992). This paragraph is the codification into the Belgian legislation of article 9 of the OECD Model Tax Convention.

In line with Action 13 of the OECD Base Erosion and Profit Shifting project, Royal Decrees containing the transfer pricing documentation forms were published in the Belgian official Gazette on 2 December 2016. The three-tier documentation approach includes Master file, Local file and Country-by-country reporting:

- Program act of 1 July 2016 (BS 04.07.2016), articles 53-64;
- Royal Decree of 28 October 2016 (BS 02.12.2016) - 'Country-by-country file'-form;
- Royal Decree of 28 October 2016 (BS 02.12.2016) - 'Master file'-form;
- Royal Decree of 28 October 2016 (BS 02.12.2016) - 'Local file'-form;
- Notification obligation;
- Notice explanation forms;
- Notice explanation forms – Erratum;
- Act dated 31 July 2017 stipulating conversion of several Directives regarding the mandatory automatic exchange of information in the field of taxation (MB 11.08.2017);
- Circular 04-09-2017.

Belgian tax legislation (article 307 BITC 92) foresees in a reporting obligation for (in)direct payments made to tax havens (in case these payments are minimum EUR 100,000 in the taxable period concerned). If payments to tax havens are not reported, they will be automatically treated as non-tax-deductible.

Two lists of "tax havens" should be taken into account for this reporting obligation: the "Belgian list" (article 179 RD/BITC 92) and the jurisdictions considered by the OECD as non-compliant as decided during the OECD's Global Forum on Transparency and Exchange of Information.

In the past, the "Belgian list" already included (1) the jurisdictions with a nominal corporate income tax rate below 10%. On the basis of the Program Act of 1 July 2016, the scope of the "Belgian list" has been extended to jurisdictions (2) that do not levy corporate income tax on income from domestic or foreign sources or (3) where the effective tax rate on foreign income is lower than 15%. In addition, it is explicitly mentioned that only jurisdictions outside the European Economic Area can fall within the scope of the reporting obligation. The definition of "jurisdiction" is also extended to "subdivisions" of recognized States that have an autonomous authority to levy corporate income tax.

Definition of Related Party

Belgian tax legislation does not give a proper definition of a related party.

The tax authorities state, in Article 26 of the BITC, that two parties are related if one of them participates directly or indirectly in the management, control or share capital of the other or if a third party or third parties participate directly or indirectly in the management, control or share capital of both parties.

The Royal Decree of 10 August 2009 refers to the International Accounting Standard 24 for further definitions of related parties. According to this standard, related parties fall under the following situations:

A person or a close member of that person's family is a related party if it:

- controls or has joint control over the reporting entity;
- influences over the reporting entity; or
- has a function in the key management of the related party or of a parent of the related party.

An entity is a related party of the related party if:

- The entity is a member of the same group as the reporting entity;
- One of the two entities is an associate or a joint venture of the other entity (or with a member of a group in which the other entity is a member);
- Both entities are joint ventures of the same third party;
- One of the entities is a joint venture of a third entity and the other is an associate of the third entity;
- The entity is a post-employment defined plan for the benefit of employees of the reporting entity or an entity related to this. The sponsoring employers fall under this definition if the reporting entity is itself a benefit plan;
- The entity is controlled or has joint control by a person which is considered a related party (see point 1);
- The entity is influenced by a person considered a related party (see point 1);
- The entity has in the board of the key management a member which is considered a related party; and
- The entity or a member of a group of which the entity is a part of, provides services for the key management personnel of the reporting entity or to the parent of the reporting entity.

Relationships between head office and permanent establishment and between permanent establishments are also relationships that require that inter-company dealings be disclosed and documented for transfer pricing purposes.

Transfer Pricing Scrutiny

Since 2013, the Belgian transfer pricing unit of the tax authorities has been conducting a yearly wave of centrally selected transfer pricing audits. Beginning in February 2018, several hundred new investigations will be launched, with a standardized questionnaire, once again, as the starting point for the audit. The option for a 'pre-audit' meeting will be put forward more explicitly by the transfer pricing unit as part of the initial request for information, allowing the transfer pricing unit and the taxpayer to discuss material intercompany transactions and industry specific elements, as well as jointly assess what information in the standardized questionnaire is most relevant to the taxpayer's operations.

Transfer Pricing Penalties

Specific penalties from 1.250 EUR to 25.000 EUR apply in case of non-filing, incorrect or incomplete filing.

Advance Pricing Agreement (APA)

In March 2018 the Belgium Ministry of Finance issued a new notice explaining in detail the procedure for obtaining an Advance Pricing Agreement (APA). Furthermore, on 7 March 2018 the Circulaire 2018/C/27 was published containing the rules for dispute settlement in connection with the application of international tax treaties.

Documentation And Disclosure Requirements

Tax Return Disclosures

There is no formal transfer pricing disclosure requirements.

As of 1 September 2008, the following corporations need to report the non- arm's length transactions with related parties in their annual report:

- Companies listed on the stock market exchange;
- Companies that have shares traded on a Multilateral Trading Facility;
- Companies, which under Article 16, Par 1 of the Belgian Companies Code, are considered large groups.

The report must contain: the transaction amount, the relationship between the related parties and other relevant financial information. Exceptions from this rule apply to transactions made between group members if the subsidiaries within the group are owned by one of the members of this group.

Through the Royal Decree of 10 August 2009, corporations need to provide information regarding the nature and business purpose, the material risks and benefits that the company can encounter and all other information in order to correctly determine a financial overview.

Also, as of 2010, payments of at least 100,000 euros per taxable period made by Belgian permanent establishments to persons or entities established in tax havens, made directly or indirectly, need to be reported. The corporations need to fill the necessary information in form nr. 275F and attach it to the income tax return.

Level of Documentation

Belgium adopted the requirements of BEPS Action 13 of the OECD. The requirements apply as of financial years starting on or after 1 January 2016. These three-tiered documentation requirements are as follows:

- Master file, consistent with Annex I to Chapter V of the TP Guidelines.
The Master file should describe:
 - I. Organizational structure;
 - II. Description of MNE's business(es);
 - III. MNE's intangibles (as defined in Chapter VI of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations);
 - IV. MNE's intercompany financial activities;
 - V. MNE's financial and tax positions.
- Local file, consistent with Annex II to Chapter V of the TP Guidelines.
The Local file should describe:
 - I. General company information;
 - II. Detailed information about each business unit which exceeded the threshold for cross-border transactions with group entities in the last completed financial year;
 - III. Other documents (optional).
- Country-by-country report, consistent with Annex III to Chapter V of the TP Guidelines.
The country-by-country report should contain the following tables:
 - I. Overview of allocation of income, taxes and business activities by tax jurisdiction;
 - II. List of all constituent entities of the MNE group included in each aggregation per tax jurisdiction;
 - III. Additional information.

In addition, every Belgian group entity, which is obliged to file a country-by-country report, should file the country-by-country reporting notification form. It should specify whether the Belgian entity is the ultimate parent entity, the surrogate parent entity, or if none of these, who will be the filing company within the group.

Record Keeping

Belgian income tax legislation does not include any specific rules relative to keeping transfer pricing records or documentation, so the general income tax rules relative to keeping records and documentation apply.

Accordingly, all documentation useful to determine the taxable profit should be kept until the end of the fifth year or calendar year following the taxable period to which it relates.

In case of offsetting of carried forward tax losses over a longer period than the above five-year term, the records relative to the taxable period in which the tax losses were incurred, should be kept until the date the Belgian tax authorities are authorized to audit the taxable period during which the carried forward tax losses are offset (in principle three years as from the first day following the taxable period during which the carried forward tax losses are offset).

Note that other Belgian legislation (company law, VAT legislation) can prescribe longer periods of record keeping than the above five-year term.

Documentation must be in writing but may be kept, under certain conditions, electronically.

Language for Documentation

Documentation should in principle be drafted in one of the official Belgian languages (Dutch, French or German) depending upon the location of the company concerned.

However, the Belgian tax authorities agree that, as stated in the European Code of Conduct, transfer pricing documentation in another commonly understood language (e.g. English) should be accepted as much as possible.

For the Country-by-Country Report there is a strong encouragement to be filed in English.

Small and Medium Sized Enterprises (SMEs)

The Tax administration does not request as much and detailed information from smaller and less complex enterprises (SMEs included) than it does from large and complex enterprises.

For a definition of "small companies" and "small groups" reference is made to Belgian company law and to the recommendation of the EU Commission regarding micro, small and medium-sized companies of the Administrative Circular letter nr° Ci.RH.421/580.456 (AOIF 40/2006) of 14 November 2006 - Paragraphs 25-28.

The country-by-country report has to be filed for MNE groups having a total consolidated group revenue of 750 million euro or more. The Master File and Local File have to be introduced by

constituent entities who exceed one of the following thresholds in the financial year prior to the financial year for which has to be reported:

- total of 50 million euro of operational and financial income;
- balance sheet total of 1 billion euro;
- yearly average workforce of 100 FTEs.

The second part of the Local file form only needs to be filed in case of:

- one of the 3 above mentioned thresholds has been exceeded;
- there is more than 1 million euro of cross border intercompany transactions. In that case, the second part of the Local file has to be completed for the business units exceeding the 1 million euro threshold only.

Deadline to Prepare Documentation

Except for the deadline to submit documentation (see below), there is no requirement on periodic document preparation; however, documents related to transfer pricing must be updated at the time of transfer pricing transactions. Thus, the preparation should be contemporaneous.

Deadline to Submit Documentation

The deadline for submitting information to the Belgian tax authorities upon their request is 1 month. This general rule also applies to requests regarding transfer pricing. An extension for 1 or 2 months can be obtained after the Circular letter Ci. RH.81/626.947 (AA Fisc. Nr. 15/2013) was published. This mentions the conditions in which a corporation is granted an extension for filling the income tax return. The deadline can be extended with certain exception and needs to be justified by a serious reason or a major force case.

Master file

The master file is required as of fiscal year 2016. It has to be filed with the Belgian tax authorities 12 months after the end of the fiscal year of the ultimate parent entity.

Local file

The Local File considering the local Belgian entity has to be filed together with the tax return.

Country-by-Country Report

The Country-by-Country Report has to be filed within 12 months after the filing of the group.

Country-by-Country reporting notification form

The Country-by-Country reporting notification form has to be filed ultimately on the last day of the financial year the notification relates to.

Statute Of Limitations

The standard statute of limitations is 3 years as from the first day following the taxable period concerned. If the taxpayer did not comply with the tax legislation because he had the intention to mislead or to damage, the standard statute of limitations is extended to 7 years.

Transfer Pricing Methods

Consistent with the OECD Transfer Pricing Guidelines, the CUP method, the resale price method, the cost-plus method, the profit split method and the transactional net margin method (TNMM) are acceptable. Other methods may also apply, provided that the resulting pricing is in accordance with the arm's length principle. Taxpayers should seek to apply the most appropriate method in light of their facts and circumstances, and may apply secondary methods to strengthen their position, although there is no requirement to perform analysis under more than 1 method.

Comparables

Belgium follows the guidance on comparability analysis outlined in Chapter III of the TP Guidelines. The Belgian National Bank provides a benchmark financial data for annual accounts, comparables are also available via Amadeus or Belfirst databases.