Belgium Rushes New Tax Measures Through Parliament

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The lower house of the Belgian parliament on July 17 adopted a bill that would impose an alternative minimum tax on large companies that pay out dividends but do not pay any corporate tax, end the VAT exemption for legal services, and amend the tax treatment of Belgian investment companies to better comply with European law.

The government agreed on the tax measures on June 30 following an assessment of the 2013 budget and preparations for the 2014 budget. (Prior coverage.) Rather than submitting a bill to Parliament, the government had six members of Parliament, representing the six parties in government, submit the proposals as amendments to a bill under discussion by the commission for social affairs. This allowed the government to circumvent the obligation to submit proposed legislation to the Council of State for examination. The subterfuge was discovered when the press discovered that the government was going to require all taxpayers to declare their trusts, foundations, or offshore corporations. (Related coverage.)

The Senate must now decide whether it will review the bill. It is expected that the bill will soon be signed into law by new King Philippe and published in the official gazette.

Fairness Tax

The so-called fairness tax would be paid by large and midsize companies that pay out dividends but do not pay any corporate income tax because of the risk capital deduction (or notional interest deduction) or because of tax losses carried forward.

Small companies would be exempted. These are companies that have no more than 50 employees on average, annual sales not exceeding €7.3 million, and a balance sheet total not exceeding €3.65 million (article 15 of the Companies Code). Whether a company is a small company is to be determined on a consolidated basis and for the accounting year in which the dividends are paid out.

The fairness tax would also be paid by nonresident companies that have a permanent establishment in Belgium. In that case, the tax would be due on the Belgian part of the dividends, which is calculated as the percentage of the branch's net profit in the net profit of the company.

The fairness tax is effectively an alternative minimum tax that would be assessed separately from the corporate income tax system but would be due in addition to any other corporate income tax assessments (basic company income tax, 309 percent secret commissions tax). Like the corporate income tax, the fairness tax is not tax deductible, and no deductions or loss compensation can be taken into account when calculating the tax.

The tax would be charged at a rate of 5 percent (plus a 3 percent crisis surtax, making the effective rate 5.15 percent). Failure to prepay the tax during the accounting period would result in a tax increase.

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The tax would be due on the difference between the dividends paid out by the company during the year and the taxable profit on which the company pays company income tax after all authorized deductions.

Dividends include all distributions of profits that are assimilated to dividends by the income tax code, such as the reimbursement of the company's share capital that incorporated reserves, issue or share premiums, and so on. Liquidation distributions or the price paid for a redemption of shares and interest recharacterized as dividends are not included.

Fairness tax will be due only if the company has distributed dividends in excess of its taxable profit. Dividends that are paid out from taxed reserves built up before or in tax year 2014 are also excluded. Only a percentage of the remaining dividends is liable for the tax; that is, the proportion of the notional interest deduction and the losses carried forward over the taxable result of the year before any authorized deductions. The company cannot set off any deductions against the basis of the fairness tax.

The government will have to clear the fairness tax with the European Commission since it would also apply to dividends paid to a parent company that holds 10 percent or more of the shares of the subsidiary. Remarkably, the fairness tax seems similar to the Greek dividend tax that was condemned by the ECJ under the parent-subsidiary Directive in *Athinaiki Zithopiia AE v. Elliniko Dimosio* (C-294/99). (Prior coverage.)

Compliance With EU Law

The government announced that it will adapt Belgian tax rules to comply with the ECJ decisions in *Aberdeen Property Fininvest Alpha* (C-303/07), *Tate & Lyle Investments* (C-384/11), and *Commission v Belgium* (C-387/11). However, rather than granting the same benefits to foreign companies, the government has decided to limit the benefits for Belgian companies.

ECJ Decisions

In *Commission v. Belgium*, the ECJ condemned Belgium for charging withholding tax on dividends paid by Belgian companies to nonresident investment companies. The Court held that because Belgian investment companies could credit the withholding tax against their corporate tax liability and recover any positive balance, there was a difference in tax treatment. (Prior coverage.)

In *Tate & Lyle Investments* (C-384/11, July 12, 2012), the Court held that the Belgian regime on (deemed) dividends distributed by a resident company to a nonresident company, holding a participation of less than 10 percent in the capital of the resident company but with a purchase value of at least €1.2 million, is not compatible with the EU freedom of capital. (Prior coverage.)

Under Belgian tax law, Belgian corporate shareholders that hold less than 10 percent of the capital of a Belgian subsidiary can credit the dividend withholding tax against the company income tax and any excess is refunded. If the acquisition value of the participation is higher than €1.2 million (currently €2.5 million), the Belgian shareholder is also entitled to the participation exemption for the dividend received. Shareholders resident in another member state who hold the same participation

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are not entitled to either form of compensation. In *Tate & Lyle*, the dividend was a deemed dividend following a partial demerger of the company.

The Court held that providing a mechanism to reduce the tax impact only for Belgian resident shareholders with participations with acquisition values of €1.2 million or more (currently €2.5 million) but less than 10 percent was prima facie an infringement of the free movement of capital.

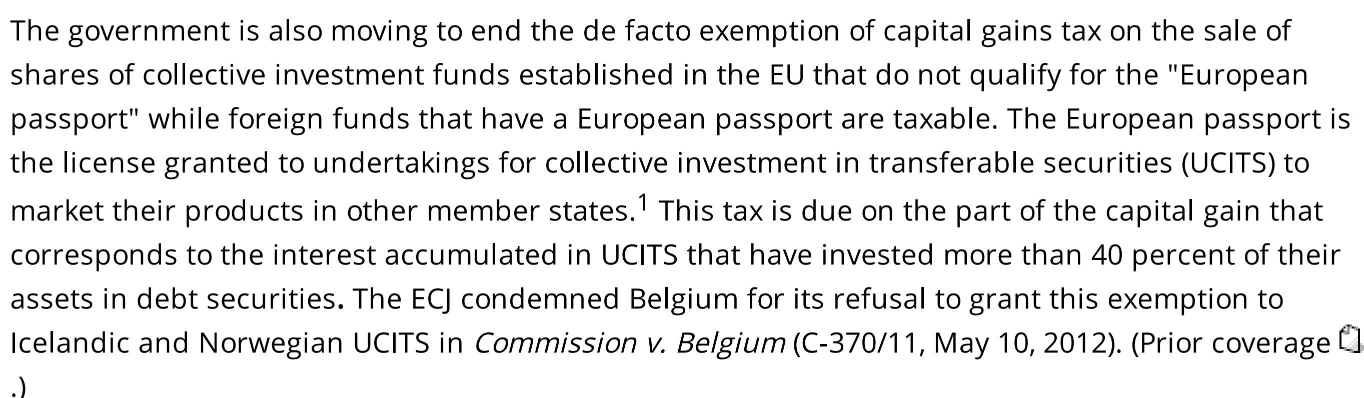
Withholding Tax on Dividends

To comply with *Commission v. Belgium*, the bill provides that Belgian investment companies will not be allowed to credit and recover the full withholding tax on the dividends they receive against corporate income tax. There is an exception for compartments of investment companies that are held exclusively by pension funds (organisms for the financing of pensions).

The government has not yet made any proposals to adapt the tax rules in line with the decision in *Tate & Lyle Investments*. It was rumored that the minimum participation level (10 percent or a minimum acquisition value of €2.5 million) for the participation exemption (the Belgian dividend received deduction) would be aligned with the parent-subsidiary directive. This would mean that only Belgian parent companies that hold a minimum participation of 10 percent (irrespective of the acquisition value) would be entitled to deduct 95 percent of the dividends received and that parent companies that held a participation under 10 percent would be excluded even if the acquisition value was higher than €2.5 million. However, this proposal does not appear in the bill.

The government also wants to put intermunicipal companies on the same footing as other companies. The withholding tax on the dividends they distribute will be increased from 15 percent to 25 percent.

Shares of Collective Investment Funds



The government is also moving to end the de facto exemption of capital gains tax on the sale of shares of collective investment funds established in the EU that do not qualify for the "European passport" while foreign funds that have a European passport are taxable. The European passport is the license granted to undertakings for collective investment in transferable securities (UCITS) to market their products in other member states.[1] This tax is due on the part of the capital gain that corresponds to the interest accumulated in UCITS that have invested more than 40 percent of their assets in debt securities. The ECJ condemned Belgium for its refusal to grant this exemption to Icelandic and Norwegian UCITS in *Commission v. Belgium* (C-370/11, May 10, 2012). (Prior coverage .)

VAT on Legal Fees

The services of lawyers would be subject to VAT at 21 percent as of January 1, 2014. Belgian *avocats* were the only European lawyers who remained exempt from VAT after their Greek colleagues became subject to VAT in July 2010.

The exemption for notaries and bailiffs was lifted in 2012. When they objected before the Constitutional Court, the Court held that the introduction of the VAT for notaries was not

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discriminatory, but it mentioned that "the government's objective to generate funds for the Treasury and to pursue European harmonization would be better served if the government also lifted the VAT exemption for lawyers" (Case 2012-141, Nov. 14, 2012).

Other Taxes

The bill introduces an extra tax on banks that seeks to raise an additional €40 million in 2013 and €171 million in 2014. It would also increase excise duties as of August 1, 2013, for alcohol and as of January 1, 2014, for tobacco.

Marc Quaghebeur, partner, De Broeck Van Laere & Partners, Brussels

FOOTNOTE

[1] In accordance with article 4 of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

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