New tax consolidation and interest limitation rules in Belgium and their impact on M&A transactions

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1. Tax consolidation
Table of contents

- Tax consolidation: overview
- PE vs. Subsidiary decisions
- Impact of mergers and other reorganizations
- Impact on acquisitions and divestures
- EU proof?
- Some conclusions
Table of contents

- Tax consolidation: overview
- PE vs. Subsidiary decisions
- Impact of mergers and other reorganizations
- Impact on acquisitions and divestures
- EU proof?
- Some conclusions
Consolidation Technique (High-level)

- What it is not:
  - No consolidated ‘group’ tax return
  - No ‘fiscal unity’ (Dutch system)
  - No ‘Organschaft’ (German system)

- Belgian approach in a nutshell
  - ‘Transfer’ of taxable profit (‘group contribution’)
  - Bilateral: ‘group contribution-agreement’
  - Annual option regime
  - Financially neutral due to a financial compensation
  - Domestic consolidation: Belgian taxable profits and Belgian tax losses

- Applicable as from tax year 2020
  (financial year starting on or after 1/1/2019)
Consolidation Technique (High-level)

**Schematically**

- **Profit**: +180
- **Loss**: -100
- **Group contribution**: ≥90%
- **Compensation**: P → S

**Tax**

- Deductible group contribution: -100
- Taxable group contribution: +100

**Financial**

- Cash-out: -25 (From tax year 2021)
- Cash-in: +25
Qualifying companies

- Direct participation ≥ 90%
- Parent/ Subsidiary/ Sister Company
  - Sister Company:
    - Joint direct (≥ 90%) Parent Company
    - Parent Company: Belgian or EEA (limitation to EEA less clear after Law of 30 July 2018?)
    - Companies held by common private individual shareholders do not qualify
- (Belgian PE of a) foreign company qualifies if established in the EEA

- Excluded entities:
  - Companies owning real estate privately owned by director
  - Companies with lump sum taxable basis (e.g. some PRIVAKS)
Qualifying companies

- Entities affiliated during an uninterrupted period of 5 years
  - Starting January 1st of the fourth calendar year preceding the relevant tax year
  - Impact on M&A-transactions
  - Impact of a (tax-neutral) restructuring?

<table>
<thead>
<tr>
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<th>TY -4</th>
<th>TY -3</th>
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<th>Financial year closing</th>
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<th>TY -1</th>
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<tr>
<td>2020</td>
<td></td>
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</tr>
</tbody>
</table>

- No requirement for qualifying affiliated companies to have financial years with identical start/closing date.
Qualifying companies: some examples

- **A**: 85%
- **B**: ≥ 90%
- **C**: ≥ 90%
- **D**: ≥ 90%
- **E**: 15%
Qualifying companies: some examples

A → B
A → C
B → D
C → E
Consolidation technique: group contribution-agreement

- ‘Group contribution-agreement’: characteristics
  - Bilateral
  - Parties: Belgian companies and/or permanent establishments
    - exception: deduction for ‘final losses’ (art. 205/5, §4 ITC)
  - Valid for one tax year (identical start/closing dates not required)
  - Due date: date submission tax return (mandatory annex)
    (preferably: date approval annual accounts?)

<table>
<thead>
<tr>
<th>Company A:</th>
<th>Company B:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/1/19</td>
<td>1/4/19</td>
</tr>
<tr>
<td></td>
<td>31/12/19</td>
</tr>
<tr>
<td></td>
<td>30/6/20</td>
</tr>
<tr>
<td>Annual accounts</td>
<td>Tax return</td>
</tr>
</tbody>
</table>
Consolidation technique: group contribution-agreement

‘Group contribution-agreement’: content

Amount of group contribution

- (\(\sum\) of) group contribution(s) received is not ‘capped’ up to current year’s tax loss.
- However, ‘excess’ group contribution cannot be further offset against TLCF, deduction for dividends received, etc. (‘minimum taxable basis’); no credit for foreign tax (‘minimum tax’). \textbf{Infringement of P/S Directive?}

- No ‘second-tier’ consolidation.
- Group contribution to Belgian PE of affiliated EER company: restriction if PE loss deducted at head office level?

Engagements

- Loss-making entity commits to include the group contribution received as profit in its corporate tax return
- Profitable entity commits to an (effective!) payment amounting to the hypothetical CIT (i.e. tax saving resulting from group contribution).
**Group contribution: tax treatment**

- Profitable entity making the contribution:
  - ‘Deduction for group contribution’
  - Deduction ‘outside basket’ (art. 207 ITC)
  - Financial compensation paid: disallowed expense

- Loss-making entity receiving the contribution:
  - Inclusion in taxable base
  - No compensation with TLCF, deduction for dividends received, etc.
  - Financial compensation received: exempted
## Tax consolidation in numbers

<table>
<thead>
<tr>
<th></th>
<th>Un-consolidated</th>
<th></th>
<th>Consolidated</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
<td>B</td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td><strong>TAX</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Profit before tax (pre-consolidation)</td>
<td>+ 600</td>
<td>- 200</td>
<td>+ 600</td>
<td>- 200</td>
</tr>
<tr>
<td>Group contribution</td>
<td>-</td>
<td>-</td>
<td>- 200</td>
<td>+ 200</td>
</tr>
<tr>
<td>Financial compensation</td>
<td>-</td>
<td>-</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Taxable base or loss carried-forward</td>
<td>+ 600</td>
<td>- 200</td>
<td>+ 400</td>
<td>0</td>
</tr>
<tr>
<td>Corporate tax</td>
<td>150</td>
<td>0</td>
<td>100</td>
<td>0</td>
</tr>
</tbody>
</table>

| **ACCOUNTING**       |                 |         |              |         |
| Profit before tax (pre-consolidation) | + 600          | - 200   | + 600        | - 200   |
| Group contribution  | -               | -       | 0            | 0       |
| Financial compensation | -              | -       | - 50         | + 50    |
| Corporate tax       | - 150           | 0       | - 100        | 0       |
| Profit/loss after corporate tax | + 450          | - 200   | + 450        | - 150   |
## Tax consolidation in the CIT return

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
</tr>
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<tbody>
<tr>
<td>Reserves at FYE</td>
<td>450</td>
<td>-150</td>
</tr>
<tr>
<td>Adjustment for compensation received</td>
<td>-</td>
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<tr>
<td>Adjustment for group contribution received</td>
<td>-</td>
<td>+200</td>
</tr>
<tr>
<td>Disallowed expense (CIT)</td>
<td>+100</td>
<td>-</td>
</tr>
<tr>
<td>Disallowed expense (compensation granted)</td>
<td>+50</td>
<td>-</td>
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<tr>
<td>Result of taxable period</td>
<td>600</td>
<td>0</td>
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<tr>
<td>Deduction for group contribution granted</td>
<td>-200</td>
<td>-</td>
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<tr>
<td>Taxable</td>
<td>400</td>
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</table>
## Tax consolidation in numbers (2) (EUR .000)

<table>
<thead>
<tr>
<th>ASSUMPTIONS</th>
<th>A</th>
<th>B</th>
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<tbody>
<tr>
<td>Profit (loss) before tax</td>
<td>11,000</td>
<td>-15,000</td>
</tr>
<tr>
<td>Prior years’ tax losses</td>
<td>-15,000</td>
<td>-5,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TAX EFFECTS</th>
<th>Unconsolidated</th>
<th>Consolidated</th>
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<tbody>
<tr>
<td></td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>Profit or loss before tax</td>
<td>11,000</td>
<td>-15,000</td>
</tr>
<tr>
<td>Group contribution</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Utilization of prior years’ tax losses</td>
<td>-8,000</td>
<td>0</td>
</tr>
<tr>
<td>Taxable base or loss to be carried-forward</td>
<td>3,000</td>
<td>-15,000</td>
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<tr>
<td>Corporate Tax</td>
<td>750</td>
<td>0</td>
</tr>
<tr>
<td>Accumulated losses to be carried-forward</td>
<td>-7,000</td>
<td>-20,000</td>
</tr>
<tr>
<td>Accumulated losses to be carried-forward</td>
<td>-27,000</td>
<td>-</td>
</tr>
</tbody>
</table>
Table of contents

- Tax consolidation rules: overview
- PE vs. Subsidiary decisions
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- EU proof?
- Some conclusions
PE vs Subsidiary (inbound)
PE vs Subsidiary (outbound)
‘Final’ loss of affiliated company in other EEA member state

- Qualifying affiliated company
  - Established in EEA – subject to common corporate tax regime
  - Required affiliation: direct participation ≥ 90% and ≥ 5 year

- ‘Final’ losses
  - Definitive discontinuation of activities
  - ‘Recapture’ when restart activities within 3 years (non-proportional)
  - No deduction elsewhere in the group
  - Only losses incurred in FY when discontinuation occurs
  - PE losses as determined in accordance with Belgian ITC

- Group contribution-agreement
  - Subject to payment of financial compensation

- Capital loss on liquidation of EEA-subsidiary deductible
  (To the extent that paid-up capital is lost)
‘Final’ losses of PE in other EEA member state

- Qualifying PE:
  - PE in EEA
  - PE-profit exempt based on Double Tax Treaty
- ‘Final’ losses
  - Definitive discontinuation of activities
  - ‘Recapture’ when restart activities within 3 years (non-proportional)
  - No deduction elsewhere in the group
  - Only losses incurred in FY when discontinuation occurs, or accumulated PE-losses? (“losses that exist on discontinuation”)

- From tax year 2021 onwards
  - Financial years starting on or after 1/1/2020
- ‘Recapture’ for old PE-losses
  (tax losses deducted under current regime)
Table of contents

- Tax consolidation rules: overview
- PE vs. Subsidiary decisions
- Impact of mergers and other reorganizations
- Impact on acquisitions and divestures
- EU proof?
- Some conclusions
Merger by acquisition (1)

If the assets or part of the assets of a company have been transferred to the taxpayer or to a domestic or foreign company that is affiliated with the taxpayer within the period specified in the third paragraph following a merger by acquisition, demerger by acquisition or an assimilated transaction, a contribution of a branch of activity or a contribution of the generality of goods, for the purposes of the third paragraph, every company to which a part of the total assets of the taxpayer or of the company affiliated with the taxpayer belonged before the effective date of this merger, demerger, contribution or assimilated transaction is assimilated to the taxpayer or the domestic or foreign company related to the taxpayer and will also have to comply with the conditions of application of this third paragraph.
Merger by acquisition (2)

If the assets or part of the assets of a company have been transferred to the taxpayer or to a domestic or foreign company that is affiliated with the taxpayer within the period specified in the third paragraph following a merger by acquisition, demerger by acquisition or an equivalent transaction, a contribution of a branch of activity or a contribution of the generality of goods, for the purposes of the third paragraph, every company to which a part of the total assets of the taxpayer or of the company affiliated with the taxpayer belonged before the effective date of this merger, demerger, contribution or assimilated transaction is assimilated to the taxpayer or the domestic or foreign company related to the taxpayer and will also have to comply with the conditions of application of this third paragraph.
Merger by acquisition (3)

If the assets or part of the assets of a company have been transferred to the taxpayer or to a domestic or foreign company that is affiliated with the taxpayer within the period specified in the third paragraph following a merger by acquisition, demerger by acquisition or an equivalent transaction, a contribution of a branch of activity or a contribution of the generality of goods, for the purposes of the third paragraph, every company to which a part of the total assets of the taxpayer or of the company affiliated with the taxpayer belonged before the effective date of this merger, demerger, contribution or assimilated transaction is assimilated to the taxpayer or the domestic or foreign company related to the taxpayer and will also have to comply with the conditions of application of this third paragraph.
Partial demerger by acquisition (4)*

A - B = OK
A - C = OK
B - C = OK

D - C = not OK
(group contribution will be possible 5 years after the merger)
Partial demerger by incorporation (5)*

If the taxable person or a domestic or foreign company affiliated with the taxpayer is incorporated within the period referred to in paragraph 3 pursuant to a merger by the incorporation of a new company, a demerger by the incorporation of a new company, a mixed demerger or an assimilated transaction, for the purposes of this third paragraph, the taxpayer or the company affiliated with the taxpayer is assimilated to the company or to any company to which the total assets of the taxpayer or of the affiliated company belonged before the effective date of this merger, demerger or assimilated transaction.
Intra-group transfer of shares (6)

A - B = OK
A - C = OK
B - C = OK

A-C = OK
A - B = not OK
C-B = arguably OK
Intra-group transfer of shares (pursuant to a merger) (7)

A-B = OK
B-C = OK
A-C = not OK

A-C = not OK
Group contribution will be possible 5 years after the merger
If the taxable person or a domestic or foreign company affiliated with the taxpayer is incorporated within the period referred to in paragraph 3 pursuant to a merger by the incorporation of a new company, a demerger by the incorporation of a new company, a mixed demerger or an assimilated transaction, for the purposes of this third paragraph, the taxpayer or the company affiliated with the taxpayer is assimilated to the company to which the total assets of the taxpayer or of the affiliated company belonged before the effective date of this merger, demerger or assimilated transaction.
If the taxable person or a domestic or foreign company affiliated with the taxpayer is incorporated within the period referred to in paragraph 3 pursuant to a merger by the incorporation of a new company, a demerger by the incorporation of a new company, a mixed demerger or an assimilated transaction, for the purposes of this third paragraph, the taxpayer or the company affiliated with the taxpayer is assimilated with the company or with any company to which the total assets of the taxpayer or of the affiliated company belonged before the effective date of this merger, demerger or assimilated transaction.
If the taxable person or a domestic or foreign company affiliated with the taxpayer is incorporated within the period referred to in paragraph 3 pursuant to a merger by the incorporation of a new company, a demerger by the incorporation of a new company, a mixed demerger or an assimilated transaction, for the purposes of this third paragraph, the taxpayer or the company affiliated with the taxpayer is assimilated to the company or with any company to which the total assets of the taxpayer or of the affiliated company belonged before the effective date of this merger, demerger or assimilated transaction.
Merger by Acquisition (11)

A-B = OK
A-C = not OK
B-C = not OK
B-D = OK
B-E = OK
D-E = OK

A-B = not ok (possible 2 years after the merger)
B-D = not ok (possible 5 years after the merger)
B-E = not ok (possible 5 years after the merger)
D-E = OK(?)
Contribution of a branch of activity in an existing company (12)*

If the assets or part of the assets of a company have been transferred to the taxpayer or to a domestic or foreign company that is affiliated with the taxpayer within the period specified in the third paragraph following a merger by acquisition, demerger by acquisition or an assimilated transaction, a contribution of a branch of activity or a contribution of the generality of goods, for the purposes of the third paragraph, every company to which a part of the total assets of the taxpayer or of the company affiliated with the taxpayer belonged before the effective date of this merger, demerger, contribution or assimilated transaction is assimilated to the taxpayer or the domestic or foreign company related to the taxpayer and will also have to comply with the conditions of application of this third paragraph.
Contribution of a branch of activity in a new company (13)*

If the taxable person or a domestic or foreign company affiliated with the taxpayer is incorporated within the period referred to in paragraph 3 pursuant to a merger by the incorporation of a new company, a demerger by the incorporation of a new company, a mixed demerger or an assimilated transaction, for the purposes of this third paragraph, the taxpayer or the company affiliated with the taxpayer is assimilated to the company or with any company to which the total assets of the taxpayer or of the affiliated company belonged before the effective date of this merger, demerger or assimilated transaction.

A-B = not OK

group contribution will be possible 5 years after the incorporation
Cross border seat transfer (14)

\[ \text{A-B} = \text{OK} \quad \text{A-VI B} = \text{OK?} \]

- \( > 5 \text{y} \)
- \( > 90\% \)
Table of contents

- Tax consolidation rules: overview
- PE vs. Subsidiary decisions
- Impact of mergers and other reorganizations
- Impact on acquisitions and divestures
- EU proof?
- Some conclusions
Practical cases regarding 5-year period

- Company A purchases shares in company B on 10 October 2015 and sells the shares on 20 December 2021.
- Financial year of both companies are per calendar year.

- Is tax consolidation possible in financial year 2019 (tax year 2020)?
- Is tax consolidation possible in financial year 2019 if shares in company B are sold 10 December 2020 (instead of December 2021)?
Practical cases regarding 5-year period

- Company A purchases shares in company B on 10 October 2015 and sells the shares on 20 December 2021.

<table>
<thead>
<tr>
<th></th>
<th>CY x-4</th>
<th>CY x-3</th>
<th>CY x-2</th>
<th>CY x-1</th>
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<tbody>
<tr>
<td></td>
<td>2016</td>
<td>2017</td>
<td>2018</td>
<td>2019</td>
<td>2020</td>
</tr>
</tbody>
</table>

- Is tax consolidation possible in financial year 2019?
  - Tax consolidation OK

- Quid if the shares in company B are sold 20 December 2020?
  - Tax consolidation NOT OK
  - Quid income tax return TY 2020?
How do consolidation rules impact acquisitions/divestures?

- Horizontal group structure (instead of vertical structures) (due to 'direct participation'-requirement)
- Asset deal by operational company (that already meets the 5-year holding requirement) (subsequent (partial) demerger by incorporation: no adverse impact)
- Acquisition company established in EER
- Stock option or warranty plan: attention for ≥ 90% direct participation requirement
- Divesture: potential adverse impact on 5-year holding requirement (5 year from January 1st of 4th calendar year preceding the relevant tax year) (impact of postponed closing; suspensive conditions)
Acquisition company: Parent company outside EER

- What if US company acquires a Belgian group?

A

≥ 90% > 5y

B

A-B = OK
A-C = OK
B-C = OK
C-D = OK

C

D

≥ 90% > 5y

E
Acquisition company: Parent company outside EER

BEFORE 30-07-2018 ACT

- Art. 205/5. § 2. Het bedrag van de groepsbijdrage wordt vastgesteld in een in paragraaf 3 en 4 bedoelde groepsbijdrageovereenkomst die wordt gesloten tussen de belastingplichtige en een in aanmerking komende binnenlandse of buitenlandse vennootschap. Een in aanmerking komende binnenlandse of buitenlandse vennootschap is een vennootschap:

  - die beschikt over een deelneming van ten minste 90 pct. van het kapitaal van de belastingplichtige, of;
  - waarvan het kapitaal voor ten minste 90 pct. wordt aangehouden door de belastingplichtige, of;
  - waarvan het kapitaal voor ten minste 90 pct. wordt aangehouden door een andere binnenlandse of buitenlandse vennootschap en deze andere binnenlandse of buitenlandse vennootschap beschikt over een deelneming van ten minste 90 pct. van het kapitaal van de belastingplichtige.

Een buitenlandse vennootschap komt enkel in aanmerking indien deze gevestigd is in een lidstaat van de Europese Economische Ruimte.
Voor de toepassing van dit artikel is een binnenlandse of buitenlandse vennootschap die verbonden is met de belastingplichtige een vennootschap:

- die beschikt over een deelneming van ten minste 90 pct. van het kapitaal van de belastingplichtige, of;
- waarvan het kapitaal voor ten minste 90 pct. wordt aangehouden door de belastingplichtige, of;
- waarvan het kapitaal voor ten minste 90 pct. wordt aangehouden door een andere binnenlandse of buitenlandse vennootschap en deze andere binnenlandse of buitenlandse vennootschap beschikt over een deelneming van ten minste 90 pct. van het kapitaal van de belastingplichtige.

Een buitenlandse vennootschap wordt voor de toepassing van dit artikel enkel als een in aanmerking komende buitenlandse vennootschap aangemerkt indien deze gevestigd is in de Europese Economische Ruimte.
Acquisition company: Parent company outside EER

B - C = not OK?
C - D = OK
Acquisition company: Parent company outside EER

\[ E' \]

\[ \begin{align*} \text{E'-B} &= \text{NOT OK} \\ \text{E'-C} &= \text{NOT OK} \\ \text{B-C} &= \text{OK?} \\ \text{C-D} &= \text{OK} \end{align*} \]
Do’s and Don’ts in acquisition – divesture context

- Stock option plans / warrant plan: attention for ≥ 90% direct participation

- Alternatives
  - Profit certificates
  - Different categories of shares (ordinary shares and shares with preference)

A-B = OK
Table of contents

- Tax consolidation rules: overview
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- Practical cases: mergers and other reorganizations
- Impact on acquisitions and divestures
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- Some conclusions
EU proof?

- PE
  - A
    - ≥ 90%
    - B
      - ≥ 90%
      - C
    - ≥ 90%
  - A
    - ≥ 90%
    - B
      - dividend: 100
        - LOSS -200
      - PROFIT +600
### EU proof? Compliant with P/S Directive?

<table>
<thead>
<tr>
<th></th>
<th>Profit retained</th>
<th></th>
<th>Profit distributed</th>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Subsidiary</td>
<td>Parent</td>
<td>Subsidiary</td>
<td>Parent</td>
</tr>
<tr>
<td><strong>TAX</strong></td>
<td></td>
<td></td>
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<tr>
<td>Profit before tax (pre-consolidation)</td>
<td>+ 600</td>
<td>- 200</td>
<td>+ 600</td>
<td>0</td>
</tr>
<tr>
<td>Group contribution</td>
<td>-200</td>
<td>+200</td>
<td>- 200</td>
<td>+ 200</td>
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<tr>
<td>Dividend received deduction</td>
<td>-</td>
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<td>0</td>
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<tr>
<td>Taxable base or loss carried-forward</td>
<td>+ 400</td>
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<td>+ 400</td>
<td>+ 200</td>
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<tr>
<td>Corporate tax</td>
<td>100</td>
<td>0</td>
<td>100</td>
<td>50</td>
</tr>
</tbody>
</table>
Table of contents

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What to think about the ‘Belgian approach’ to consolidation?

- EU-proof?

- Affiliation criteria (direct ≥ 90%-participation) : (too) stringent

- 5-year affiliation requirement: overkill effects

- ‘Anti-abuse’-rule for group reorganizations: overkill effects

- Flexible system
Some conclusions for practitioners

- Consider tax consolidation when making ‘subsidiary vs PE’ decisions
  - Or convert existing subsidiary into PE
- Consider group restructurings in order to optimize tax consolidation
  - But be aware of potential adverse impact of restructurings
- Consider future consolidation opportunities when structuring an M&A-transaction
- Consider tax consolidation as an alternative to TLCF utilization on stand-alone basis (avoid ‘basket’-restriction)
  - But TLCF-utilization may be preferable if upcoming restructuring
- Plan ahead when calculating tax prepayments
2. Interest limitation rules
Table of content

- Interest limitation rules: overview
- Case: group funding
- Case: acquisition financing
- Case: real estate investment
Table of content

- Interest limitation rules: overview
- Case: group funding
- Case: acquisition financing
- Case: real estate investment
Interest limitation rules at a glance

- Non-deductibility of “exceeding” borrowings costs

- **Exceeding borrowing cost** ("financieringskostensurplus")
  - Net funding cost: borrowing cost *minus* interest revenues
  - > definition of “interest” in Income Tax Code (art. 19 ITC)
  - Also includes “economically equivalent” costs and revenues

  ■ To be further clarified by Royal Decree (based on the definition of borrowing costs provided by ATAD).
Interest limitation rules at a glance

“Borrowing costs’ means interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with the raising of finance as defined in national law, including, without being limited to, payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds, amounts under alternative financing arrangements, such as Islamic finance, the finance cost element of finance lease payments, capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest, amounts measured by reference to a funding return under transfer pricing rules where applicable, notional interest amounts under derivative instruments or hedging arrangements related to an entity’s borrowings, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds” (art. 2, (1) ATAD).
Interest limitation rules at a glance

- Excluded loans (not taken into account for determining the exceeding borrowing cost):
  - Interests on loans concluded before 17 June 2016 (unless if substantially modified)
  - Interest on PPP loans

- Thresholds
  - The exceeding borrowing costs will be disallowed if they exceed the highest of two thresholds:
    - 30% of the ‘tax adjusted’ EBITDA
    - De minimis threshold of € 3 million
Interest limitation rules at a glance

- ‘Tax adjusted’ EBITDA =

  Result of the tax year (‘eerste bewerking’)

  + Tax deductible depreciations and amortizations

  + Tax deductible exceeding borrowing costs (disallowed interest is already included in the result of the tax year)

  ─ Dividend income qualifying for participation exemption

  ─ 85% of income qualifying for innovation deduction

  ─ 80% of the income qualifying for patent income deduction

  ─ Profits qualifying for treaty exemption

  ─ Profits arising from a qualifying PPP-project

  ─ Group contribution granted to affiliated company (tax consolidation)
Scope

- Belgian legal entities subject to CIT and Belgian establishments subject to non-resident CIT.

- Excluded entities:
  - ‘Standalone’ company
  - Not part of a “group”
  - No foreign establishment
  - No direct or indirect participation of ≥ 25% (voting rights, capital or profits)
  - No (individual or corporate) shareholder holding directly or indirectly a participation in the company of ≥ 25%
  - SPV for PPP-projects
  - Financing sector entities (a.o. certain investment companies)
  - Leasing- and factoring companies
Carry-forward of disallowed exceeding borrowing costs

- Disallowed exceeding borrowing costs can be carried forward
- No time limitation
- Utilization in subsequent tax year is limited to the interest margin for that tax year (i.e. to the positive difference between the threshold and the exceeding borrowing costs).
- Not limited by the “basket system”
- Not subject to article 207 WIB (change of control)
Entry into force

- Initially: tax year 2021 (FY starting on or after 1 January 2020).
- Law amended: tax year 2020 (FY starting on or after 1 January 2019).
- Grandfathering rule:

  Loans concluded before 17 June 2016 (which have not been fundamentally modified): still subject to the 5/1 – debt-equity rule (art. 198, 11° ITC)
Calculation at group level (ad hoc consolidation)

- Adjustments for affiliated (art. 11 Company Code) Belgian entities (companies and permanent establishments):

  - Calculation of *exceeding borrowing costs*: interest (and ‘economically equivalent ‘costs) payable to, and income obtained from affiliated Belgian entities (other than excluded entities) are disregarded. *(EU proof?)*

  - Calculation of the EBITDA: (+) costs payable to and (-) income obtained from affiliated Belgian entities (affiliation during the entire taxable period?). *(EU proof?)*

  - The *de minimis threshold* (€ 3 million) is “proportionally” allocated between Belgian affiliated entities (affiliation during the entire taxable period?) (allocation key to be determined by royal decree).
Transfer of (excess) interest capacity to affiliated entity

- ‘Interest deduction agreement’
  - Rationale: alternative to ‘Group EBITDA’-escape, but limited to Belgian entities
  - Bilateral
  - Affiliation criterion: art. 11 Company Code
  - Applicable for 1 tax year
  - Due date: filing date for CIT returns
- Transfer of ‘interest capacity’
  (but transfer can exceed ‘excess interest capacity’)
- Financial compensation:
  - Optional
  - If compensation is paid: tax saving for the entity receiving additional interest capacity
Table of content

- Interest limitation rules: overview
- Case: group funding
- Case: acquisition financing
- Case: real estate investment
Group funding structure

<table>
<thead>
<tr>
<th></th>
<th>ProdCo</th>
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<td>15.000.000</td>
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<tr>
<td><strong>Threshold (30%)</strong></td>
<td>0</td>
<td><strong>4.500.000</strong></td>
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Group funding structure

HOLDCO

A

Bank

Dividend 1,000,000

DBI

Interest 1,000,000

Holdco

<table>
<thead>
<tr>
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<th>Holdco</th>
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<tr>
<td>Taxable income</td>
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<tr>
<td>DRD</td>
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<tr>
<td>EBITDA (tax adjusted)</td>
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<tr>
<td>Threshold (30%)</td>
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Group funding structure

Dividend 1.000.000

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<tr>
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<td>0</td>
<td>1.000.000</td>
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<thead>
<tr>
<th>DRD</th>
<th>HOLDCO</th>
<th>B</th>
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<td>+ 1.000.000</td>
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<th>EBITDA (tax adjusted)</th>
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<th>Threshold (30%)</th>
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<th>Non deductible interest</th>
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<td>0</td>
<td>1.000.000</td>
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Group funding structure

Dividend 1.000.000

<table>
<thead>
<tr>
<th></th>
<th>HOLDCO</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable income</td>
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<td>DRD</td>
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<tr>
<td>Correction (ad hoc conso)</td>
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<td>EBITDA (tax adjusted)</td>
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<tr>
<td>Threshold (30%)</td>
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</tr>
<tr>
<td>Non deductible interest</td>
<td>+1.000.000</td>
<td>0</td>
</tr>
</tbody>
</table>
Group funding structure

- **BANK**: interest 1,000 \(\rightarrow\) FINCO
- **FINCO**: interest 200 \(\rightarrow\) OPCO
- **HOLDCO**: royalty 1,000 \(\rightarrow\) FINCO
- **OFCO**: dividend 200 \(\rightarrow\) FINCO

Net sales 1,500 \(\rightarrow\) OPCO
## Group funding structure

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<thead>
<tr>
<th></th>
<th>HoldCo</th>
<th>FinCo</th>
<th>Opco</th>
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<tr>
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<td>Intra-group adjustments</td>
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<tr>
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<tr>
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</table>
Table of content

- Interest limitation rules: overview
- Case: group funding
- **Case: acquisition funding**
- Case: real estate investment
Acquisition financing

BIDCO

< 5 Y

TARGET

≥ 5 Y

SUB

Interest 1.000

BANK
## Acquisition financing

<table>
<thead>
<tr>
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<th>Transfer of interest capacity</th>
<th>Group contribution and transfer of interest capacity</th>
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<td>Group contribution</td>
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</tr>
<tr>
<td>Exceeding borrowing cost</td>
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<tr>
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<td>Threshold</td>
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<td>300 + 700</td>
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<td>Tax loss carry-forward</td>
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Table of content

- Interest limitation rules: overview
- Case: group funding
- Case: acquisition funding
- **Case: real estate investment**
Impact on real estate investments

<table>
<thead>
<tr>
<th>SPV</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

Real estate
• 26,000

Equity
• 7,800

Debt
• 18,200

Revenue
• 1,560

Amortization
• 624

Interest
• 382

Miscellaneous expenses
• 94
## Impact on real estate investments

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Result before taxation</td>
<td>460</td>
</tr>
<tr>
<td>Amortization</td>
<td>624</td>
</tr>
<tr>
<td>(Net) borrowing costs</td>
<td>382</td>
</tr>
<tr>
<td>EBITDA</td>
<td>1.466</td>
</tr>
<tr>
<td>Limitation (30% x 1.1466)</td>
<td>440</td>
</tr>
<tr>
<td>(Net) borrowing cost</td>
<td>382</td>
</tr>
<tr>
<td>Taxable income</td>
<td>460</td>
</tr>
<tr>
<td>Result after taxation</td>
<td>345</td>
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Cash-trap
## Impact on real estate investments

<table>
<thead>
<tr>
<th></th>
<th>Cash-trap</th>
<th>Subordinated loan 6000 EUR at 3.5%</th>
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<tbody>
<tr>
<td>Result before taxation</td>
<td>460</td>
<td>250</td>
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<tr>
<td>Amortization</td>
<td>+624</td>
<td>+624</td>
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<tr>
<td>Net borrowing cost</td>
<td>+382</td>
<td>+592 (382 + 210)</td>
</tr>
<tr>
<td>EBITDA</td>
<td>1.466</td>
<td>1.466</td>
</tr>
<tr>
<td>Limitation 30% x 1.466</td>
<td>440</td>
<td>440</td>
</tr>
<tr>
<td>(Net) borrowing cost</td>
<td>382</td>
<td>592</td>
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<tr>
<td><strong>Surplus</strong></td>
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<td><strong>152</strong></td>
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<td>Taxable income</td>
<td>460</td>
<td>402 (250 + 152)</td>
</tr>
<tr>
<td>Result after taxation</td>
<td>345</td>
<td>302</td>
</tr>
</tbody>
</table>
Impact on real estate investments

- Broad impact and adverse tax effects of Belgian Interest limitation rule
  - Subordinated loans
    - Higher return on investment
    - No tax motives
  - Vacancy
    - Creating tax loss situation
Impact on real estate investments

- Also important
  - Thin cap rules: interests which exceed the threshold are lost
  - Interest limitation rules: unlimited carry forward of disallowed borrowing costs
  - 30% of EBITDA or de minimis threshold of 3 mio EUR
  - Exclusion
    - GVBF/FIIS
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