rporate Tax Base in the Light of the IAS/IFRS and Directive 2013/34: A Comparative Approach

ed by Mario Grandinetti

ecent relaunch of the European Commission's Common Consolidated Corporate Tax Base TB) project promises a sorely needed leap forward in the harmonization of the rules by which anies calculate their taxable profits. In particular, the initiative hopes to remedy the severe r to cross-border business caused by the 'the accounting Tower of Babel' by which companies' ises are determined under national law. This thorough analysis and commentary covers the nce of accounting rules on tax, considering both generally accepted standards – international nting standards (IAS) and international financial reporting standards (IFRS) – and EU tive 2013/34. Three introductory chapters usher in detailed comparative overviews of the effect ise rules on taxation in nine EU Member States as well as in two other major EU trading ers, the United States and Brazil.

explaining the remarkable recent improvement in the comparability of accounts that represent rable preconditions for creating a single market for financial services within the EU, this book s every relevant detail, including the following and much more:

iterion of evaluation of alternative fixed assets based on revaluated amounts;
iterion based on fair value;
ovisions applicable to income statements, notes, reports, and financial statements;
iles applicable to the publication of documents;
ansparency in payments to governments;
ispositions on exemptions;
ierarchy of general provisions and principles;
alance sheet and profit and loss account;
mplifications for small and medium-sized enterprises (SMEs);
stem of creditors' protection; and
rotection of investors' interests.

book is a peerless explication of the taxation choices granted to Member States under IAS/IFRS U Directive 2013/34 and how they will be affected by ongoing Commission initiatives. Because ant, timely, reliable, and comparable information assumes a leading role in protecting the ests of investors, creditors, and other stakeholders, as well as in ensuring that all operators act on l playing field under equal conditions, the analysis presented here is of immeasurable value to ers, business persons, and officials concerned with taxation, not only in Europe but anywhere n the reach of international trade.

OTAX (European Universities Cooperating on TAXes) is a network of tax institutes currently isting of fifteen universities: WU (Vienna University of Economics and Business) in Austria, iolieke Universiteit Leuven in Belgium, Université Paris-I Panthéon-Sorbonne in France, ersität Osnabrück in Germany, Corvinus University of Budapest in Hungary, Libera Università rnazionale degli Studi Sociali in Rome (and Università degli Studi di Bologna for the research) in Italy, Fiscal Institute Tilburg at Tilburg University in the Netherlands, University of Lodz University of Warsaw in Poland, Universitat de Barcelona and Universitat de València in Spain, sala Universitet in Sweden, Universität Zurich in Switzerland, The University of Edinburgh in Jnited Kingdom, and Georgetown University in Washington DC, United States of America.

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CHAPTER 4

Accounting and Taxation: Belgium

Edoardo Traversa & Steven Peeters

§4.01 INTRODUCTION

This contribution addresses various issues with respect to the relationship between the determination of the financial results and the corporate income tax base under Belgian law.

First, the general principles with respect to this so-called Book-Tax Relationship in Belgium will be set out. Second, an overview will be provided of the main differences between the result of a company from a financial reporting and a tax perspective. Third, the extent to which the determination of the corporate income tax base in Belgium differs from the CCCTB will be examined. Finally, the impact of the implementation of Accounting Directive 2013/34/EU on the existing legislative framework will be discussed.

§4.02 GENERAL PRINCIPLES WITH RESPECT TO THE BOOK-TAX RELATIONSHIP[1]

[A] Determination of the Tax Base: Principles

The Belgian Income Tax Code ('*BITC*') does not contain an encompassing definition of the 'taxable profits'.

Hence, the starting point to determine the taxable income of companies is the variation of the net worth of the company during a financial year as reflected in the annual accounts of the company in accordance with Belgian Generally Accepted Accounting Principles ('*Belgian GAAP*'). Then, by application of express tax law provisions, that book result is either increased (e.g., by means of the non-deductibility of certain disallowed expenses and the taxation of granted abnormal or gratuitous advantages) or decreased (e.g., by means of the exemption of certain realized capital gains on shares and the Notional Interest Deduction (NID)) for tax purposes.

Belgium thus applies a principle of 'unity of annual accounts', which means that tax law does not provide its own set of rules to determine annual statements for tax purposes, but rather uses the annual accounts established for accounting purposes and subsequently adapts the result in accordance with specific tax law provisions.

This principle is not explicitly enshrined in the BITC, but the latter contains a few references to accounting law:

- The annual accounts of the company have to be added to the corporate income tax declaration of the company (Article 307, §3 BITC *jo.* declaration forms determined by royal decree).
- Certain tax law definitions refer to accounting law: '*The notions "intangible, tangible or financial fixed assets", "establishment costs" and "stocks and contracts in progress" have the meaning attributed thereto in the legislation on accountancy and annual accounts of companies.*' (Article 2, §1, 9°, BITC).

1. Interesting contributions in this respect: J. Kirkpatrick, 'L'influence du nouveau droit comptable sur le droit fiscal des sociétés en Belgique', *J.T.* 1982, 193-197; G. Gelders, 'Droit comptable et fiscalité', *Bull. contr.* 1984, 1246-1269; J.-P. Servais, 'Dissociation ou connexion entre le droit comptable et le droit fiscal? Examen critique à l'aune de vingt ans d'expérience belge', *Bull. Commission for Accounting Norms* 1997, 100-171; M. De Wolf, 'Droit comptable et droit fiscal: deux amants inséparables?', *Liber Amicorum Henri Olivier*, Brugge, Die Keure, 2000, 201-210; D. Garabedian, 'Bénéfice imposable et droit comptable' (noot onder Cass. 20 februari 1997), *RCJB* 2000, 530-557; J. Kirkpatrick and D. Garabedian, *Le régime fiscal des sociétés en Belgique*, Brussels, Bruylant, 2003, pp. 110-116; B. Colmant, 'Verband tussen het boekhoudrecht en het fiscaal recht van ondernemingen: enige aanknopingspunten en bedenkingen', *Accountancy & Tax* 2006/1, 23-31; H. Lamon and A. Van Bavel, 'IAS/IFRS pour les comptes sociaux de toutes les sociétés belges?', *DAOR* 2006, 348-383; A. Haelterman, *Vennootschapsbelasting doorgelicht*, Brugge, Die Keure, 2012, 53 *e.s.*; H. Lamon and A. Van Bavel, *Aspects fiscaux de la comptabilité et technique de déclaration fiscale*, Brussels, Larcier, 2013, 23-39; L. Pinte, 'Droit comptable et droit fiscal: rétrospective et perspectives', in C. DOCCLO (ed.), *Alabaster 1938-2013*, Limal, Anthemis, 2013, 395-417; K. Van Hulle, N. Lybaert and J.-P. Maes, *Handboek Boekhoud- en Jaarrekeningrecht*, Brugge, Die Keure, 2015, 32-35.

When reference is made to Belgian accounting law, it concerns the no consolidated financial statements of a Belgian company in accordance with Belgia GAAP. The Belgian corporate income tax is calculated at the level of each compar individually and no intragroup consolidation is allowed.

[B] Determination of the Tax Base: Two Methods[2]

From a more technical perspective, the BITC itself provides two methods for calcula ing the corporate income tax base: one which is based on the origin of the income, an the other on the allocation thereof. These two methods lead as a rule to the same resul

According to the *first method*, the tax base of a company is determined *i accordance with the origin of the income* acquired by a company. In this respect, Artic 183 BITC provides that the taxable income of a company is the same as the taxab income of individuals and that the amount thereof is determined in accordance wit the personal income tax rules applicable to profits earned by unincorporated unde takings.

It is generally accepted in Belgian law that all income generated by Belgia companies (whether such income arises from a commercial exploitation or fro movable or immovable property) is considered as professional income and is thus i principle taken into account for the determination of the tax base of the company.[3]

The *second method* does not take into account the origin of the income, but th *allocation* thereof. This method defines the tax base as the sum of (i) the increase of th taxed reserves; and (ii) the distributed dividends.

Article 185 BITC explicitly provides that corporate income tax is due on the tot amount of the profits, including distributed dividends. The express inclusion (distributed dividends does not materially change the scope of the taxable income, bu was added to underline the difference compared to the system prior to the 1964 ta reform.

[C] Link between Belgian GAAP Financial Accounts and Tax Accounts

As stated above, the taxable income of companies is based on the financial result adapted in accordance with tax specific exceptions.

The decision to link accounting law and tax law was made at the time of th adoption of the comprehensive accounting rules in Belgium in 1975-1976 and remaine valid as from then on. Prior to the adoption of these accounting rules, tax regulation were an important tool for the determination of acceptable accounting practices (in th absence of a comprehensive set of accounting rules).[4]

2. A. Haelterman, *Vennootschapsbelasting doorgelicht*, Brugge, Die Keure, 2012, 52-58.
3. Cass. 28 January 1969, *Pas.* 1969, I, 489.
4. K. Van Hulle, N. Lybaert and J.-P. Maes, *Handboek Boekhoud- en Jaarrekeningrecht*, Brugge, Di Keure, 2015, pp. 32-35.

At the time of the introduction of the accounting regulation, the following important principles were set out in the preparatory works of the accounting law of 17 July 1975 and the implementing Royal Decree of 8 October 1976.

First, the *dependency*[5] *of tax law on accounting law* as regards the determination of the taxable base for corporate income tax. This principle was referred to in the preparatory works of the Royal Decree of 8 October 1976 regarding the annual accounts: '*The rules with respect to evaluations, amortization, capital reductions and provisions for contingencies set out in this royal decree will be accepted by the tax administration for the determination of the tax base, except to the extent that tax laws explicitly derogate therefrom*'.[6] However, it took until 20 February 1997 before the Belgian Supreme Court[7] confirmed that this generally accepted relation had to be recognized as a legal principle.[8] Companies thus have to determine their taxable profits in accordance with Belgian accounting law, and are only allowed to deviate therefrom if explicitly provided for by Belgian tax law.[9] On the contrary, the tax administration is bound by a result that is in conformity with accounting law if no deviating tax provision exists.

Second, it was decided on a political level that the reform of the accounting norms should be *neutral*, which means that it should not have a direct or indirect tax impact. In the preparatory works of the accounting law of 17 July 1975, it was in this respect clarified that: '*The Government does not intend to indirectly modify, by the provision to be adopted, to change the scope of the current tax legislation. It will ensure this neutrality and will take, if need be, the necessary legislative, regulatory or administrative initiatives*.'[10] In practice, due to the dependency principle, changes in the interpretation of accounting concepts inevitably have an impact on tax rules. In some instances,

5. In Belgium, this principle is often referred to as '*primacy* of accounting law over tax law'. The use of the term 'dependency' is preferable to avoid misunderstanding, as the financial accounts are only the reference point, from which tax law can deviate. This term is also used by EU institutions (see for example the Communication of 24 November 2003 from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'An Internal Market without company tax obstacles: achievements, ongoing initiatives and remaining challenges', COM(2003) 726 final).
6. Report to the King accompanying the Royal Decree of 8 October 1976 concerning the annual accounts of companies, *Belgian Official Gazette* 19 October 1976.
7. Cass. 20 February 1997, *Pas.* 1997, I, 253. In this case, the Court followed a three-step reasoning. First, the Supreme Court states explicitly the principle of dependency of tax law on accounting norms except express derogation in tax law: 'Considering that companies' taxable gains are determined in accordance with accounting rules, unless tax law provides for an explicit deviation therefrom'. Second, the Court controlled whether the accountancy treatment of the taxpayer was in conformity with applicable accountancy rules. Third, the existence of an explicit derogation in tax law was examined. This method was also set out by the Commission for Accountancy Norms in its Bulletin of March 1998, p. 2.
8. The Supreme Court refused in 1995 to accept that there is a general principle of law that accountancy law 'rules' tax law, see Cass. 5 May 1995, *Pas.* 1995, 457.
9. For example, the Court of Appeals of Ghent decided on 5 October 2004 that a taxpayer was not allowed to deduct a business expense in a certain financial year, as that business expense should already have been accounted for in the previous financial year in accordance with accounting law: Ghent, 5 October 2004, *TFR* 2005, 341, commented on by I. Van de Woesteyne, 'Tijdstip van aftrek van beroepskosten overeenkomstig artikel 49 WIB 1992', *TFR* 2005, 344-349.
10. Explanatory memorandum to the law of 17 July 2015 with respect to accountancy and annual accounts of companies, *Doc. parl.* Senat 1974-1975, nr. 436/1, 4.

it appeared that certain changes in the interpretation of accounting law had clear tax consequences.[11]

[D] Annual Accounts and Their Binding Effect

[1] Annual (Non-consolidated) Accounts in Accordance with Belgian GAAP

The financial accounts that constitute the basis for the calculation of the Belgian corporate tax base, are the annual (non-consolidated) accounts of the company. These statements have to be established in accordance with Belgian GAAP.

Based on Article 4 of EC Regulation nr. 1606/2002 of 19 July 2002 on the application of International Accounting Standards (IAS), Belgian publicly traded companies are, however, required to prepare their *consolidated* accounts in conformity with the IAS. In general, Belgium has not used its power under Article 5 of that regulation to require the use of IAS for (i) publicly traded companies with respect to their annual (non-consolidated) accounts; or (ii) other companies with respect to their consolidated[12,13] or annual (non-consolidated) accounts.[14]

There is thus currently no link between the IAS/IFRS norms and the determination of the corporate income tax base in Belgium.

The potential influence of the general introduction of IAS/IFRS on tax law has already been addressed in doctrine:[15]

> B. Colmant explained that the change to IAS/IFRS with respect to the annual (non-consolidated) accounts would automatically lead to a change of several tax rules, unless it were considered to break the link between accounting law and tax law. He is of the opinion that the IAS/IFRS would be inappropriate to determine the corporate tax base because of the different viewpoints compared to Belgian GAAP, and more in particular (i) the valuation of assets and liabilities on the basis of their fair value instead of on the basis of historical cost; (ii) the different meaning that is given to the realization principle; and (iii) the substance over form approach. He also pointed out that, in order to ensure that the equality principle would be respected, a transfer (for tax purposes) to IAS/IFRS would only be

11. Reference is made to Advice nr. 126/17 of the Commission for Accounting Standards regarding the acquisition of assets for no consideration. Regarding this issue, see also section §4.02[C][2].
12. All Belgian companies that have to establish consolidated accounts, may opt to establish them in accordance with IAS/AFRS norms. Such a decision is irrevocable.
13. An exception is provided for Belgian credit institutions and investment undertakings, which have to draw up their consolidated accounts in accordance with IFRS/IAS as from 1 January 2006 (Royal Decree 5 December 2004).
14. M. Wyckaert indicated that Belgium is resisting the pressure to further implement IFRS/IAS because of the existing link with tax law, but that the resistance will not continue forever. M. Wyckaert, 'Het vennootschaps- en het fiscaal recht: een gedwongen huwelijk of natuurlijke bondgenoten', in *Liber Amicorum Frans Vanistendael*, Herentals, Knops Publishing, 2007, (567) 571-572.
15. Regarding the impact of IAS/IFRS on Belgian company law, see D. Safran, 'Quelques incidences en droit de sociétés de l'application des norms comptables internationals IAS/IFRS', *T.B.H.* [illegible]

possible if all Belgian companies were obliged to establish their statements in accordance with IAS/IFRS.[16]

H. LAMON and A. VAN BAVEL argue that the impact of a potential change to IAS/IFRS norms would not be insurmountable, basing themselves on a study performed in 2005[17] which came to the conclusion that the differences between the tax rates of states are a consequence of the difference in nominal tax rate rather than a consequence of the difference in tax base.[18]

[2] *Binding Effect of the Annual Accounts*

The annual accounts are in principle *binding vis-à-vis the company* for tax purposes. This means that the tax liabilities of a company can be determined based on the annual accounts as approved by the annual meeting of shareholders, and that the company may in principle not amend these accounts subsequently in order to avoid or mitigate tax liabilities deriving from the financial situation that they reflect. In this respect, the commentary of the tax administration to the BITC mentions: '*the annual accounts approved by the general meeting of shareholders irrevocably binds the company, except when it concerns material mistakes or errors.*'[19]

The binding effect does not apply in the event that the annual accounts are affected by an error. This was confirmed by the Belgian Supreme Court.[20] This is a logical conclusion in the light of the principle that tax liability arises from the law and is based on the actual situation of the taxpayer, beyond what is reflected in accounting documents.[21] In a recent note, the Belgian Commission of Accountancy Norms[22] explained that there are two types of errors that may be corrected in order to ensure that that the annual accounts give a true and fair view of the company:

- Material (clerical) errors (e.g., typos, a profit that is erroneously entered on a wrong account, calculation errors and other manifest errors that are independent from any legal assessment).
- Errors in law or in fact, which may even contain a certain element of assessment, or even a valuation error.

16. B. COLMANT, 'Verband tussen het boekhoudrecht en het fiscaal recht van ondernemingen: enige aanknopingspunten en bedenkingen', *Accountancy & Tax*, nr. 1/2006, pp. 23-31.
17. O. JACOBS, Ch. SPENGEL, Th. STETTER and C. WENDT, 'EU Company Taxation in Case of a Common Tax Base: A Computer-based Calculation and Comparison Using the Enhanced Model of the European Tax Analyser', *Intertax* 2005, pp. 414-428.
18. H. LAMON and A. VAN BAVEL, 'IAS/IFRS pour les comptes sociaux de toutes les sociétés belges?', *DAOR* 2006, (348) 370.
19. Commentary to the Belgium Income Tax Code, nr. 340/31.
20. Cass. 12 May 1989, *Pas.* 1989-1990, II, nr. 521, commented on by J. KIRKPATRICK and D. GARABEDIAN, 'La rectification du bilan de la société anonyme en droit privé et en droit fiscal', *RCJB* 1992, pp. 317-347.
21. A. HAELTERMAN, *Vennootschapsbelasting doorgelicht*, Brugge, Die Keure, 2012, p. 64.
22. Commission for Accountancy Norms, Advice 2014/4 of 23 April 2014: 'Correction of the annual accounts'.

An error has to be distinguished from a judgment call of the company in an area where applicable accountancy rules leave some margin of appreciation (e.g., with respect to the valuations of assets where a margin of appreciation exists, the distribution of a dividend) and where the decision is in itself not illegal.[23] The company is not allowed to revise such judgment calls.[24]

Moreover, the annual accounts are not binding vis-à-vis the company when they are in contradiction with applicable accounting standards.

In section §4.02[B] of this contribution, we already stated that the *tax administration has to respect the decisions* made by the taxpayer in the annual accounts to the extent that (i) the accountancy treatment is in compliance with applicable accountancy laws; and (ii) tax law does not provide for an explicit derogation of accountancy law.

A recent application of this binding link between accounting law and tax law for the tax administration is the case *Bloomsbury v. Belgian State*, in which the Court of Justice of the European Union ('*CJEU*') issued an order on 6 March 2014.[25]

That case concerned the transfer of shares for no consideration between two Belgian companies.[26] Bloomsbury, the acquirer of the shares, had not included this acquisition in its annual accounts in accordance with the Belgian GAAP principle that the value of assets has to be determined based on their historical cost (i.e., acquisition price minus depreciations and capital reductions). The tax administration was of the opinion that the participation should have been included in Bloomsbury's annual accounts in accordance with the principle that the annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profits and loss (provided for in Article 2, paragraph 3 of the Fourth Directive nr. 78/660/EEC of 25 July 1978). The tax administration argued this with the aim of taxing the real value of the asset at the ordinary corporate income tax rate, as it has the power to include undervaluations of assets in the corporate income tax base if such undervaluations are inconsistent with accounting law.

In its judgment, the CJEU first recalls that, although the Fourth Directive does not aim at establishing the conditions under which the annual accounts of companies may or must serve as a basis for the determination of the corporate income tax base by the tax authorities, it is in no way excluded that annual accounts can be used by Member States as a reference base for tax purposes (as is the case in Belgium), and that the Fourth Directive does not prohibit the Member States from correcting the effects of the accounting rules to determine their taxable profit.[27] Afterwards, the CJEU decided that the fact that an asset is undervalued is a necessary corollary of the choice to value

23. With respect to the difference between a 'material error' and a 'judgment call', see W. D'HAESE, 'Het boekhoudrecht in relatie tot de vennootschapsbelasting', in M. DE JONCKHEERE (ed.), *Een reis doorheen de fiscale basisbeginselen*, Brugge, Die Keure, 2011, pp. 191-195 and S. HUYSMAN, *Fiscale winst. Theorie en praktijk van het fiscale winstbegrip in België*, Kalmthout, Biblo, 1994, 249 e.s.
24. Cass. 2 February 1977, *JDF* 1977, 129.
25. Order in *Bloomsbury NV v. Belgian State*, C-510/12, ECLI:EU:C:2014:154 (only in French and Dutch), in which the Court confirmed its judgment in *Belgian State v. GIMLE*, C-322/12, ECLI:EU:C:2013:632.
26. In the GIMLE case, it concerned the acquisition of assets for a low consideration.
27. Bloomsbury, para. 16 and GIMLE, para. 28.

assets on the basis of their historical cost rather than on their true value, and that the principle that the annual accounts have to give a true and fair view does not permit a derogation from this first principle when the acquisition price is manifestly lower than the true value of the assets.[28] As a consequence of this judgment, the Court of Appeals of Ghent decided on 21 April 2015 that the tax administration could not tax the undervaluation of the shares because the undervaluation was not inconsistent with the applicable accounting provisions.[29]

§4.03 DIFFERENCES BETWEEN THE FINANCIAL INCOME AND TAXABLE INCOME

[A] Introduction

As mentioned before, the annual variation of the net worth of a company is the reference point for determining the Belgian corporate income tax base of that company, except if expressly provided for in tax law.

Below is an overview of some important differences between the income for accounting purposes and for tax purposes.

[B] Tax Provisions Decreasing the Corporate Income Tax Base

[1] Dividend Received Deduction ('Participation Exemption')

In accordance with the EU Parent-Subsidiary Directive,[30] Belgium grants a deduction from the corporate income tax base of 95% of the dividend income received on shares in resident and non-resident companies (not limited to the EEA) subject to the following requirements: (i) holding at least 10% of the equity of the company or shares with an acquisition value of at least EUR 2.5 million; (ii) holding the shares for an uninterrupted period of at least one year in full ownership; and (iii) satisfaction of the 'subject-to-tax' condition at the level of the distributing entity.

As a consequence of the CJEU *Cobelfret*[31] case, excess deductions in a taxable period from an EEA company and some tax-treaty countries may be carried-forward.

The 5% of the dividends that is not exempt, may be offset by (deductible) costs incurred by the company.

28. Bloomsbury, paras 17-30 and GIMLE, paras 29-42.
29. H. Putman, 'Verkrijging volledig om niet: evenmin waardering aan werkelijke waarde', *Fiscoloog* 2014, nr. 1382, p. 8; S. Van Crombrugge, 'Verkrijging activa ten kostelozen titel: fiscus verliest achterhoedegevecht', *Fiscoloog* 2015, pp. 7-8; H. Putman en J. Vanhecke, 'Verkrijging activa beneden marktwaarde: altijd, soms of nooit onmiddelijke winsterkenning?', *TFR* 2015, pp. 575-590.
30. Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
31. Judgment in *Belgian State v. Cobelfret*, C-138/07, ECLI:EU:C:2009:82.

[2] Exemption for Capital Gains on Shares

Capital gains on shares realized by a Belgian company are tax exempt if the following conditions are met: (i) the subject-to-tax condition is met at the level of the company whose shares are sold; (ii) the seller holds the shares for at least one year in full ownership; and (iii) the seller qualifies as a 'small company'.[32]

If the subject-to-tax condition is not met, capital gains on shares are subject to ordinary corporate income tax at a rate of 33.99%.

If the subject-to-tax condition is met, but the shares were not held for a minimum duration of one year, the so-called short-term capital gain is taxed at a separate rate of 25.75%, irrespective of whether the company qualifies as a small company.

If the subject-to-tax condition is met, the shares were held for at least one year and the company does not qualify as a small company, the capital gain is subject to a separate tax of 0.412%. This is a minimum tax against which no tax assets can be offset.

[3] Notional Interest Deduction (NID)

The NID, which is officially called 'deduction for risk capital' (better known in literature as 'allowance for corporate equity', allows a company to decrease its corporate income tax base with a fictitious interest for its equity. The equity that is taken into account equals the net assets of the company at the end of the previous financial year, corrected with certain adjustments.[33] The rate of the NID is determined yearly on the basis of the Belgian Government Bonds over ten years. The NID rate is increased by 0.5% for small companies. For the taxable period 2015 (tax year 2016), the NID rate equals 2.13% for small companies and 1.63% for other companies.

Initially, excess NID could be carried-forward over seven years. Due to budgetary constraints, the government decided to abolish this possibility as from tax year 2012.

According to the explanatory memorandum of the law of 22 June 2005 introducing the NID, the main objective of this measure was to put debt financing and equity financing on an equal footing. However, the introduction of this mechanism also needs to be understood as an attempt to create an attractive alternative for the favourable tax

32. A small company is a company that does not fulfil more than one of the following criteria: (i) average employees (FTE): 50, (ii) average turnover (excl. VAT): EUR 9,000,000 and (iii) balance sheet total: EUR 4,500,000. For tax purposes, the criteria mentioned above have to be considered on a consolidated basis together with their affiliated companies. See also Chapter 5 below.
33. Among others, the difference between the net book value of the assets and the liabilities attributable to a foreign permanent establishment had to be excluded if the income from that permanent establishment was not taxable in Belgium pursuant to a double taxation convention. This exclusion was considered inconsistent with the freedom of establishment by the CJEU in *Argenta Spaarbank NV v. Belgian State*, C-350/11, ECLI:EU:C:2013:447. See also: R. Neyt and S. Peeters, 'Balanced Allocation and Coherence: Some Thoughts in Light of Argenta and K', *EC Tax Review* 2014, pp. 64-75.

regime of coordination centres, which was abolished because of its incompatibility with state aid rules.[34]

The utilization of the NID is restricted by the so-called *Fairness Tax* as of tax year 2014. This is a separate corporate income tax of 5.15%, which is, broadly speaking, due on an amount of dividends that is declared during a certain taxable period on profits that benefited from NID or carried-forward tax losses.[35] This rule is not applicable to small companies.

[4] Other Significant Measures Decreasing the Corporate Income Tax Base

- Carry-forward of tax losses without time limitation.
- Deduction of 80% of the income derived from patents that are (partly or fully) self-developed or improved in the company's Belgian or foreign research centre. For small companies, the benefit of the deduction is no longer subject to the condition that the patent is developed or improved in a research centre of that company. The remaining part of the income can still be offset by costs or other tax assets.
- Investment deduction.[36]

[C] Tax Provisions Increasing the Corporate Income Tax Base

[1] Disallowed Expenses: General Provision

In general, professional expenses are deductible by companies in Belgium if the following conditions are satisfied: (i) the cost must be linked to the exercise of the business; (ii) the cost must be incurred or borne during that taxable period; (iii) they must be made to obtain or retain taxable income; and (iv) the existence and the amount of the cost must be justified by the taxpayer. Costs that do not satisfy these conditions are disallowed and have to be added to the tax base.

[2] Disallowed Expenses: Express Provisions

The BITC also expressly disallows certain expenses made by a company. Some examples:

34. Advocate General Mengozzi included a short description of the tax regime applicable to coordination centres and the state aid procedures related to it in his opinion in the case *Argenta Spaarbank NV v. Belgian State*, C-350/11, ECLI:EU:C:2012:580.
35. M. Dhaene and A. Brohez, 'De fairness tax: een grondige analyse en enkele bedenkingen omtrent de verenigbaarheid met hogere rechtsnormen', *TFR* 2013, 897-914.
36. For a description of the investment deduction, please see the brochure of the Belgian Federal Public Service of Finances: http://financien.belgium.be/nl/binaries/brochure-investment-deduction-2014_tcm306-260937.pdf.

- corporate income tax itself and certain other taxes;
- losses on shares, except to the extent that these losses are incurred at the time of a full distribution of the capital of a company and that the losses cover the capital that is represented by those shares;
- payments to blacklisted jurisdictions and jurisdictions that are considered to be non-compliant by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes if (i) those payments are not listed in an annex to the corporate income tax return;[37] or (ii) even if the payments are listed, if the taxpayer does not prove that they are made in the framework of real and genuine transactions and to other entities than wholly artificial arrangements;
- Interest above certain thresholds (thin-cap rules, see below).

[3] Thin-Cap Rules

Belgian tax law provides for a 5 to 1 thin-cap rule with respect to (i) loans whereby the beneficial owner is not subject to income taxes, or, with regard to interest income, is subject to a tax regime which is substantially more advantageous than the Belgian tax regime; and (ii) intragroup loans.

The interest paid on qualifying debt is not deductible for Belgian tax purposes to the extent that the qualifying debt exceeds five times the equity. In this respect, equity is the sum of (i) the taxed reserves at the beginning of the taxable period; and (ii) the paid-up capital at the end of the taxable period.

A similar refusal of interest deduction exists for interest paid to individuals that are shareholders or directors of the company as well as to (non-resident) corporate directors. In that case, the acceptable debt-equity ratio is 1 to 1.

[4] Excess Depreciations

[a] Introduction: Depreciations in Belgium[38]

Tangible and intangible assets having a limited lifetime may be depreciated or amortized, and such depreciations (amortizations) are in principle tax deductible. In accordance with Article 61 BITC, depreciations (amortizations) are considered as deductible business expenses to the extent (i) that they are based on the acquisition value or investment value; and (ii) that they coincide with a decrease in value that has occurred during the taxable period.

Depreciations (amortizations) are calculated either on a straight-line basis or on a declining basis.

37. The tax administration stated in a circular letter that the sanction on non-deductibility cannot apply solely because of the absence of a declaration if the payment is made to an entity in the EU or in a country with which Belgium has concluded a double convention with a non-discrimination clause.
38. For a more detailed discussion of depreciations in Belgium, see Cl. Chevalier, *Vademecum Vennootschapsbelasting*, Brussels, Larcier, 2013, 420-520.

According to the *straight-line method*, a fixed annual amount is deducted over the asset's useful life.

Tax law provides certain specific indications in this respect, for example:

- Intangible assets (e.g., goodwill, patents) have to be depreciated over a period of at least five years. As an exception, intangible assets relating to research and development can be deducted over a period of at least three years.
- The tax administration has given certain indications in its commentary of what it considers reasonable depreciations, e.g., 3% for industrial buildings or 5% for commercial buildings or offices.

The *method for calculating depreciations on a declining basis* allows the company to opt for accelerated depreciations on certain assets.[39] Pursuant to this method, the depreciation percentage of the first year is, at most, double the percentage that would apply if the straight-line depreciation method were used. As from the second year, the depreciation amount is determined annually by multiplying the remaining value after the deduction of the previous year by the same percentage in the first year. However, as from the year in which the result of this multiplication is lower than the amount that would have been allowed if the straight-line depreciation method were used, the amount of the straight-line depreciation method may be used for depreciation. The depreciation value may not be higher than 40% of the acquisition value of the asset.

This accelerated method is provided for in tax law, but Belgian accounting law accepts the application thereof in the financial statements. However, the difference between the accelerated depreciations and the justified amount from an economic perspective has to be disclosed in the explanatory notes to the financial statements.

[b] Disallowed Excess Depreciations

If the depreciations exceed the amount that is acceptable from a tax perspective, the excess amount has to be added to the corporate income tax base of the company for that year. The disallowed 'excess depreciations' may, however, be recovered by the company in the following years.

§4.04 CCCTB

[A] Introduction

On 16 March 2011, the European Commission launched its proposal for a Council Directive on a Common Consolidated Corporate Tax Base ('CCCTB Draft Directive').[40]

39. This method may not be used for (i) cars, cars for dual use, minibuses and certain light trucks, and (ii) fixed assets if the use of such assets has been ceded by the taxpayer applying the depreciations to a third party.
40. Proposal of 16 March 2011, for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121/4.

The CCCTB Draft Directive contains a set of rules that are independent from the accounting and tax rules of the Member States to determine the corporate tax base of companies or groups of companies in the European Union.

The implementation of the CCCTB in Belgium would have a significant impact on the corporate income tax base. In this respect, A. Roggeman concluded in her Ph.D. dissertation that such an implementation would lead to an increase in the average tax burden of a large company of 16% and of an SME of 14%.[41] This study disregarded the effect of potential consolidation, and thus limited itself to the assessment of the Common Consolidated Tax Base (CCTB).

The main reasons for such a difference will be set out in the next section.

[B] Main Differences between CCCTB and Belgian Corporate Income Tax Base[42]

[1] Absence of Link with Accounting Rules: Definition of Profit

From a structural viewpoint, it is striking that the CCCTB is not based on the income of the company determined in accordance with applicable accounting rules, but rather contains an independent set of rules to establish the corporate income tax base.

Accordingly, the CCCTB Draft Directive contains a definition of tax base referring to the independent definition of revenues (Article 10 *jo.* 4(8) of the Draft CCCTB Directive). Such an encompassing definition does not exist in Belgian corporate income tax law (see section §4.02[A] above).

[2] Tax Consolidation

A very remarkable difference in the two systems is the mandatory tax consolidation between group members, a feature which is included in the CCCTB Draft Directive (Articles 54-60), but is currently not provided for in Belgian income tax law. The introduction of consolidation in Belgium would have a significant impact as it would enable groups to compensate losses on a group level.

As a consequence of group tax consolidation, transactions entered into between group members may be disregarded (Article 59(1) of the Draft CCCTB Directive). This renders transfer pricing in an intragroup context within the European Union less sensitive.

41. A. Roggeman, *Essays on the Common Consolidated Corporate Tax Base*, Ph.D. dissertation U Gent Faculty of Economics and Business Administration (supervisor Prof. dr Ph. Van Cauwenberge), http://hdl.handle.net/1854/LU-5857306. The study was based on the European Tax Analyzer ('ETA'):Ch. Spengel, M. Ortmann-Babel, B. Zinn and S. Matenaer, 'A Common Corporate Tax Base for Europe: An Impact Assessment of the Draft Council Directive on a CC(C)TB', *World Tax Journal*, 2012, pp. 185-221.
42. The aim of this part is to give a short description of the main differences between the CCCTB and the Belgian corporate income tax base. For an extensive discussion: S. Mertens, 'De Common Consolidated Corporate Tax Base: een revolutie inzake vennootschapsbelasting?', *AFT* 2015/1 pp. 33-59.

In this respect, it is of note that no thin-capitalization rule is included in the CCCTB Draft Directive (either for consolidated group companies or for group companies outside the EU).

In June 2015, the Commission re-launched the CCCTB project. On that occasion, it was suggested to start with a CCTB and postpone the consolidation until a second phase. Postponing the consolidation on an EU level leads to a later introduction of the concept of tax consolidation in Belgium.

[3] Belgian Tax Incentives

The introduction of the CCCTB would significantly reduce the power of Belgium to design its own tax incentives. The most important tax incentive that does not fit within the CCCTB as proposed by the Commission is the NID (see section §4.03[B][3] above), given the considerable effect of that measure on the effective tax rate of companies. Besides, more specific tax incentives such as the patent box deduction and the tax shelter for the audio-visual industry are also not included in the CCCTB.

[4] Income from Dividends and Capital Gains on Shares

The CCCTB Draft Directive provides for a general exemption of income received from profit distributions and for proceeds from a disposal of shares (Article 11(c)). From a Belgian perspective (and in the light of the Parent-Subsidiary Directive), it is remarkable that these exemptions are not subject to minimum requirements with respect to the size of the participation and the minimum holding period. On the contrary, the CCCTB Draft Directive does require the satisfaction of a subject-to-tax condition, in the absence of which exemption is not granted (see the so-called Switch-over clause provided for in Article 73).

Although a full exemption is granted, Article 14(g) provides that the costs incurred to lead to such an exempt income are not deductible and that such costs shall be fixed at a flat rate of 5% of that income unless the taxpayer demonstrates that the actual cost incurred is lower. With respect to dividend exemption, the (rebuttable) 5% rate is reminiscent of the Belgian participation exemption, which allows a 95% deduction plus the possibility to deduct the remaining 5% following normal rules on business expenses (see section §4.03[B][1] above). With respect to capital gains on shares, a similar rule does not currently exist in Belgian corporate income tax law.

[5] Depreciations (Amortizations)

The depreciation rules provided for in the CCCTB Draft Directive differ significantly compared to the rules that are currently applicable in Belgium. Some examples:

- Buildings: depreciation over 40 years is considerably longer than 20 years or 33 years, as is acceptable in Belgium.

- Intangible assets: depreciation over 15 years if the period of grant or legal protection cannot be determined, while the general rule in Belgium is 5 years.
- Depreciations of most other assets are calculated on the basis of an asset pool, of which a yearly 25% can be depreciated. In Belgium, the depreciation of assets has to be determined on an individual basis and not pooled.

§4.05 ACCOUNTANCY DIRECTIVE

Belgian tax law contains several specific rules or exceptions for 'small companies' compared to large companies. Some examples: (i) the NID percentage for small companies is 0.5% higher compared to the one applicable to other companies; (ii) small companies are not subject to the long-term capital gains tax of 0.412%; (iii) the Fairness Tax is not applicable to small companies; and (iv) proceeds paid out to shareholders of small companies are, under certain circumstances, subject to lower withholding tax rates.[43]

Belgian tax law does not contain a separate definition of 'small company', but refers to the definition used in company and accounting law.

The definition of a 'small company' used in company and accounting law (Article 15 Company Code) was recently changed to meet the requirements of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings ('*Accounting Directive*')

Prior to the implementation of the Accounting Directive, a small company was defined as a company that does not satisfy more than one of the following criteria: (i) average employees (FTE): 50; (ii) average turnover (excl. VAT): EUR 7,300,000; and (iii) balance sheet total: EUR 3,650,000. A company that has more than 100 employees (FTE) qualified in any event as a small company. The criteria mentioned had to be considered on a consolidated basis with all affiliated companies.

The following changes were made by the law of 18 December 2015 that implemented the Accounting Directive into Belgian law:[44]

- The turnover and balance sheet total *thresholds* were indexed, leading to the following criteria: (i) average employees (FTE): 50: (ii) average turnover (excl. VAT): EUR 9,000,000; and (iii) balance sheet total: EUR 4,500,000. Moreover, the additional criterion providing that any company having at least 100 employees is a large company, was abolished.
- The *change of status* from a small company to a large company or vice versa will only have effect if, based on the criteria, a company should be classified differently on the basis of the balance sheets of two subsequent financial years.

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43. For an overview of all specific measures applicable to small companies: C. De Backere, 'Standpunt. Naar een autonome fiscale kmo-definitie? De kleine vennootschap als kmo in fiscalibus: stand van zaken en toekomstperspectieven', *TRV* 2014, 758-772.
44. Law of 18 December 2015 regarding the implementation of the Accounting Directive, *Belgian Official Gazette* 30 December 2015.

In that case, the rules of the other regime will apply to that company as of the financial year following those two years. In other words, a company does not change its status because it qualifies only one financial year for another regime.
- The thresholds no longer have to be examined on a *consolidated basis*, except for parent companies (including companies constituting a consortium) and companies that are established with the sole aim of circumventing the obligation to report certain information.

In principle, these changes also have an effect on the application of the specific tax rules applicable to 'small companies'. Accordingly, the amended thresholds and the amended rules regarding the change of status of 'small company' are also relevant for tax law purposes.

However, the rule that the criteria have to be determined on a consolidated basis with all affiliated companies will remain valid for tax purposes. This means that the definition of small company for corporate and accountancy purposes will no longer be exactly the same as the one applicable for tax purposes. Accordingly, certain companies can qualify as a small company for corporate and accounting purposes, while they are considered large companies from a tax perspective.

With regard to the link between accounting and tax, it is interesting to note that the Central Economic Council[45] stated the following in its advice regarding the implementation of the Directive: '*The council indicates that there is a close connection in Belgium between accountancy and tax. The council wants to keep this as it is. Thus, simplifications of the accounting obligations may only be implemented to the extent that the connection with tax is not put into danger and that financial reporting remains to constitute the basis for correct tax calculations of companies.*'[46]

Moreover, the Belgian legislator introduced a separate category of 'micro-companies'. A micro-company is a company that does not exceed one of the following criteria: (i) average employees (FTE): 10; (ii) average turnover (excl. VAT): EUR 700,000; and (iii) balance sheet total: EUR 350,000. In the *tax shift* negotiations of summer 2015, the government decided in this respect to provide more beneficial tax regimes already to start-up companies qualifying as micro-companies compared to the regime that applies to small companies.

§4.06 CONCLUSION

According to Belgian law, the (non-consolidated) financial results of a company pursuant to Belgian GAAP constitute the reference point for the determination of the corporate income tax base. Deviations from the financial results are, in principle, only permissible if provided for by express tax provisions. As the determination of the tax base is linked to Belgian GAAP accounts, IAS/IFRS does not affect the tax base.

45. The central council in which representatives of employers and employees are represented.
46. Advice regarding the implementation of the new accounting directive, CCE/CRB 2015-0600, http://www.ccecrb.fgov.be/txt/fr/doc15-600.pdf.

From a Belgian perspective, the remarkable features of the CCCTB are group consolidation and the absence of a link between the determination of the tax base and the corporate income tax base. Moreover, the non-existence of the NID and the different depreciation rules are highly relevant.

Accounting Directive 2013/34/EU is implemented in Belgian law by the law of 18 December 2015. From a Belgian tax perspective, the amendments to the definition of 'small companies' are the most interesting, as this concept is also referred to in tax law. In this respect, it is of note that a (limited) difference is made between the concept of 'small companies' within accounting/corporate law and tax law.