

Transfer Pricing Country Summary

Belgium

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1. Introduction

Belgium is part of the EU and a member country of OECD. Since 2016, Belgium has had formal transfer pricing documentation requirements to submit the master file (Form 275.MF), local file (Form 275.LF), country-by-country reporting (Form 275.CBC), and the notification of country-by-country reporting (Form 275 CBCNOT) for qualifying multinational groups.

2. Laws & Regulations

a) References to OECD/EU/Local Rules

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

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

There are no formal transfer pricing disclosure requirements according to Belgian Law.

b) Definition of Related Party

There is no detailed explanation for what a "related party" is in Belgian Law. The tax authorities state that two parties are related if one of them participates directly or indirectly in the management, control or share capital of the other, or if a third party or third parties participate directly or indirectly in the management, control or share capital of both parties (Article 26 of the BITC).

The Royal Decree of 10 August 2009 refers directly to the IAS 24 (International Accounting Standards) for further definitions of "related parties". According to this standard, a person or an entity can be considered as a related party. A person (or a close member of that person's family) is deemed related if that person has control or influence on the entity or has a management position there. An entity is deemed related if it's a subsidiary, fellow subsidiary, associate, joint venture or parent of the subject entity, or controlled, influenced, or managed by a person who is related.

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

c) Nature of Transfer Pricing Documentation

Recently in June 2021, Ghent Court of Appeal rendered a significant decision about the retroactive applicability of the OECD 2017 Guidelines. The case was about the royalty income arising from licensing of intangible assets by a related party (who is non-resident) of the Belgium taxpayer. Tax authorities argued that the taxpayer has performed DEMPE functions (development, enhancement,

maintenance, protection, and exploitation) for certain intangibles which would normally result in an increase of taxable income of the taxpayer because of the received royalties. The taxpayer appealed the action, arguing that the DEMPE concept which is presented in OECD's 2017 Guidelines cannot be applied retroactively.

The Court finally decided in favour of the taxpayer and held that only the 1995 version of the OECD Guidelines can be relied on in such cases because the matter of the dispute relates to 2007. The newer version of the guidelines can only be used to clarify older guidelines, without broadening their scope.

Therefore, it can be understood from the recent case law that although their actions are challenged, Belgian tax authorities are taking the most recent standards and applying them directly to cases at hand including the older ones.

d) Tax Havens & Blacklists

Belgian tax legislation (Article 307 BITC 92) foresees in a reporting obligation for (in)direct payments made to tax havens (in case these payments are minimum EUR 100,000 in the taxable period concerned). If payments to tax havens are not reported, they will be automatically treated as non-tax-deductible. There are two lists of "tax havens" that should be taken into account for reporting obligations: the "Belgian list" (article 179 RD/BITC 92) and the list of jurisdictions considered by the OECD as non-compliant.

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

e) Advance Pricing Agreement (APA)

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

f) Audit Practice

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

jointly assess what information in the standardized questionnaire is most relevant to the taxpayer's operations.

3. Transfer Pricing Documentation

a) Level of Documentation

Belgium adopted the requirements of BEPS Action 13 of the OECD. The requirements apply as of financial years starting on or after 1 January 2016. This three-tiered approach to transfer pricing documentation requires:

(i) a master file (pursuant to Annex I to Chapter V of the TP Guidelines) containing standardised information on organization structure, description of business, intangibles and intercompany financial activities that is relevant for all MNE group members;

(ii) a local file (pursuant to Annex II to Chapter V of the TP Guidelines) referring specifically to material transactions of the local taxpayer such as information on business units exceeding the crossborder transactions threshold, and general information on the company;

(iii) a Country-by-Country Report (pursuant to Annex III to Chapter V of the TP Guidelines) containing certain information relating to the global allocation of the MNE's income and taxes paid together with the list of all constituent entities of the MNE group included in each aggregation per tax jurisdiction.

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

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

b) Industry Analysis

By identifying value drivers for the relevant industry, a first indication of the level of profitability common in the industry is being given.

c) Company Analysis

A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

A detailed description of the business and business strategy pursued by the local entity including an indication of whether the local entity has been involved in or affected by business restructurings or

intangibles transfers in the present or immediate past year and an explanation of those aspects of such transactions affecting the local entity.

Key competitors and customers.

d) Functional Analysis

In conducting a functional analysis, an assessment is made of the significant activities and responsibilities that are performed by the related parties relevant to the Intercompany Transactions under review, the tangible and intangible assets that are employed, and the risks that are borne in undertaking the business activities. Such an assessment is consistent with the recommendations that have been made in the OECD Guidelines in paragraph 1.51.

e) Choice of Transfer Pricing Method

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

f) Economic Analysis – Benchmark Study

Belgium follows the guidance on comparability analysis outlined in Chapter III of the OECD TP Guidelines.

The Belgian National Bank provides a benchmark financial data for annual accounts, comparables are also available via commercial databases like Amadeus and Belfirst.

g) Inter-company (IC) Legal Agreement

Although an Inter-company legal agreement formalizes the business and financial relationship between group entities, the legal agreements have a lower ranking since the OECD 2017 Guidelines made the "conduct of parties" the prevailing concept.

h) Financial statements

Since the OECD 2017 Guidelines made the "conduct of parties" the prevailing concept, parties need to also make sure their conduct is in line with what is reported in their accounts.

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

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

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

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

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

i) Production Process for TP Relevant Returns, Documents, Forms and Financials

In the chart below, the existence of the filing requirements with the details of which format is used, the latest filing date, notification requirement and its deadline, thresholds to be applied in case it exists, and the required languages are demonstrated. Each of this information can be seen respectively for CIT, master file, local file, CbCR, local forms, annual accounts and segmented P&L documentations.

	Prepare or File?	Format	Deadline	Notification Deadline*	Threshold* (Yes/No)	Local Language (Yes/No) *(If "No", it can be filed in English)
Corporate Income Tax	File	Local GAAP	the latest on the last day of the seventh month following the end of the financial year	No	No	Yes
Master File	Prepare	OECD Guidelines 2017	within 12 months after the last day of the group's financial year	No	Yes	No
Local File	Prepare	OECD Guidelines 2017	Late September	No	Yes	No
CbCR	File	OECD Guidelines 2017	within 12 months after the last day of the group's financial year	End of the financial year.	Yes	No

275 Form-LF	File	Available on the website of the tax authority	at the same time as the income tax return	No	Yes	Yes(Dutch/French)
275 Form-MF	File	Available on the website of the tax authority	No later than 12 months after the last day of the group's reporting period	No	Yes	Yes(Dutch/French)
275 Form-CBCR	File	Available on the website of the tax authority	No later than 12 months after the last day of the group's reporting period	Yes	Yes	Yes(Dutch/French)
Annual Accounts	Prepare	Local Tax GAAP	the latest on the last day of the seventh month following the end of the financial year	No	Yes	No
Segmented P&L	Prepare	Excel/Other	Ready upon filing CIT/TP documents.	No	No	No

* Belgium has signed the MCAA agreement for the filing of CBCR.

* Belgium does not request as much and detailed information from smaller and less complex enterprises (SME's included) than it does from large and complex enterprises.

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

- The master file is required to be filed with the Belgian tax authorities 12 months after the end of the fiscal year of the ultimate parent entity.
- The Local File considering the local Belgian entity has to be filed together with the tax return. However, for FY 2020 the deadlines are extended until 28 October 2021 regarding the Local file reporting that is submitted with 275LF form. In order to benefit from the extension, the

company must exceed either €50 million of operational and financial income, €1 billion on the balance sheet total, 100 full-time of annual employees on average.

- The Country-by-Country Report has to be filed within 12 months after the filing of the group.
- The Country-by-Country reporting notification form has to be filed ultimately on the last day of the financial year the notification relates to.

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

j) Mandatory Language

Documentation should in principle be drafted in one of the official Belgian languages (Dutch, French or German) depending upon the location of the company concerned. However, the Belgian tax authorities agree that, as stated in the European Code of Conduct, transfer pricing documentation in another commonly understood language (e.g. English) should be accepted as much as possible.

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

k) Notification Requirement

Every Belgian group entity, which is obliged to file a country-by-country report, should file the country-by-country reporting notification form. It should specify whether the Belgian entity is the ultimate parent entity, the surrogate parent entity, or if none of these, who will be the filing company within the group. The Country-by-Country reporting notification form must be filed ultimately on the last day of the financial year the notification relates to.

l) Record Keeping

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

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

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

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

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

m) Penalties and Interest Charges

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