The Private Wealth & Private Client Review

Sixth Edition

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John Riches

The Law Reviews

THE PRIVATE WEALTH & PRIVATE CLIENT REVIEW

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PREFACE

I INTRODUCTION

At a macro level, the dominant trend affecting the private wealth arena in the last 12 months continues to be the impact of various supranational initiatives seeking greater transparency with respect to anti-money laundering regimes and tax information exchange. I propose to focus in this year's introduction on the central importance of the concept of 'beneficial ownership' and the theme of convergence in the increasingly interconnected arenas of anti-money laundering policy and tax information exchange.

The clearest examples of this trend can be found in the introduction of centralised beneficial ownership registers, especially in the European Union and the Crown Dependencies and Overseas Territories of the United Kingdom (generally collectively referenced as CDOTs).[1] There are two specific manifestations of this:

a corporate beneficial ownership registers; and
b trust beneficial ownership registers.

In parallel, 2017 has witnessed the first substantive reporting by the first wave 'adopters' of the Common Reporting Standard (CRS) in the context of the 2016 calendar year.

I would like to first reference the common definitions that connect CRS with beneficial ownership registers and then refer in detail to the UK domestic trust register that was introduced by Regulations adopted in June 2017[2] (2017 MLR) before noting some key developments in the CRS domain.

i Common use of beneficial ownership concept

The key 'source document' with respect to the concept of beneficial ownership is the Financial Action Task Force (FATF) 2012 Recommendations.[3] These recommendations were introduced as part of the international anti-money laundering policy but have been adopted as an essential element of the international tax information exchange policy implemented by the CRS.

1 These jurisdictions includes Jersey, Isle of Man, Guernsey, Cayman Islands, Bermuda and British Virgin Islands.

2 To give them their full title, 2017 No. 692, The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

3 FATF/OECD (2013), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations February 2012, FATF/OECD, Paris, available on www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

This is clearly confirmed in a CRS context by the CRS Commentary on the concept of controlling persons. Paragraph 132 of the interpretive notes to Recommendation 10 on Customer Due Diligence, states:

> *Subparagraph D(6) sets forth the definition of the term 'Controlling Persons'. This term corresponds to the term 'beneficial owner' as described in Recommendation 10 and the Interpretative Note on Recommendation 10 of the Financial Action Task Force Recommendations (as adopted in February 2012), 13 and* ***must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.***[4]

The FATF recommendations lead to a position where one essentially moves away from a strict legal definition of who might be entitled to enjoyment of an asset as a beneficial owner to an expanded concept. Under these rules, if it is not possible to identify a beneficial owner based on 'ownership interests' it is necessary to identify a beneficial owner based on 'control' even though the person or persons who control a legal entity have no capacity to call for the assets of the entity for their own personal benefit. In addition, as a last resort, if no 'ownership' or 'control' test can be satisfied, the final step is to look to the 'senior managing official' of the entity at the top of the ownership chain. This three-level ordering of who is to be regarded as the 'beneficial owner' is taken from the interpretive notes to Recommendation 10 of the FATF 2012 Recommendations:[5]

> *Identify the beneficial owners of the customer and take reasonable measures to verify the identity of such persons, through the following information:*
>
> *(i) For legal persons:*
> *(i.i) The identity of the natural persons (if any – as ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person or arrangement through ownership) who ultimately have a controlling ownership interest in a legal person; and*
> *(i.ii) to the extent that there is doubt under (i.i) as to whether the person(s) with the controlling ownership interest are the beneficial owner(s) or where no natural person exerts control through ownership interests, the identity of the natural persons (if any) exercising control of the legal person or arrangement through other means.*
> *(i.iii) Where no natural person is identified under (i.i) or (i.ii) above, financial institutions should identify and take reasonable measures to verify the identity of the relevant natural person who holds the position of senior managing official.*

The immediately following interpretive notes describe the steps to be taken to identify the beneficial ownership of a trust (or similar legal arrangement such as a foundation). In this case the approach is subtly different. They start with a composite list that blends together

4 Emphasis added.

5 FATF/OECD (2013), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations February 2012, FATF/OECD, Paris, available on www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf at pages 61-62.

those who might benefit personally with those who are perceived to have some 'control'. They state:

> *For legal arrangements:*
> *(ii.i) Trusts – the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership);*
> *(ii.ii) Other types of legal arrangements – the identity of persons in equivalent or similar positions.*

What is notable here is the introduction of a 'residual' concept of:

> *Any other natural person exercising ultimate effective control over the trust*

I will refer to this as the 'NPEEC' in the rest of this article.

Until recently, there has been a major problem with construing who might be regarded as an NPEEC in a trust context especially because there has been no guidance in a FATF or CRS context that sheds light on what is meant by 'control'. This has created uncertainty as to when a person has 'control' over a trust, for example, will it include someone who has power to remove a trustee, someone who can only exercise powers jointly with someone else or someone who holds only powers of veto rather than positive powers to act.

In the Anti-Money Laundering context, the 2017 MLR includes a definition of 'beneficial owner' and 'control' for the purposes of the Regulations. At Regulation 6 it states:

> *6.—(1) In these Regulations, 'beneficial owner', in relation to a trust, means each of the following—*
> *(a) the settlor;*
> *(b) the trustees;*
> *(c) the beneficiaries*
> *(d) where the individuals (or some of the individuals) benefiting from the trust have not been determined, the class of persons in whose main interest the trust is set up, or operates;*
> *(e) any individual who has control over the trust.*
> *(2) In paragraph (1)(e), 'control' means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to—*
> *(a) dispose of, advance, lend, invest, pay or apply trust property;*
> *(b) vary or terminate the trust;*
> *(c) add or remove a person as a beneficiary or to or from a class of beneficiaries;*
> *(d) appoint or remove trustees or give another individual control over the trust;*
> *(e) direct, withhold consent to or veto the exercise of a power mentioned in sub-paragraphs*
> *(a) to (d).*

A critical point to note here is that the mere existence of one of the relevant powers with respect to a trust is sufficient to be regarded as control even in circumstances where that power is not actually exercised. This is substantially different from the idea of a person who exercises effective management of a trust or a company in many tax contexts, The more conventional concept is a facts and circumstances test that requires the actual exercise of powers rather than the mere capacity to exercise them for control to be attributed to a person.

What is striking here is that in Regulation 6(2), both the holding of joint powers and that the withholding of consent or ability to veto the exercise of key powers is to be equated with 'control'. I will return to the specific implications for CRS Reporting in the context of trusts later – for now, it is sufficient to note the expansive definition of beneficial ownership which sits behind the various regimes.

A final point to note is that the scope of powers that can be held with respect to a trust that come within this incredibly wide concept of control extend substantially beyond the power to appoint and remove trustees.Thus powers that relate to changing the class of beneficiaries, varying or terminating the trust and powers to invest or deal with trust property are also to be equated with control.

ii UK Trust Register

I now turn to the UK Trust Register in its own terms. The reason I wish to consider this piece of domestic UK legislation in detail is because, as far as I am aware, it represents the first instance where a major 'onshore' jurisdiction with a domestic trust law has introduced a centralised beneficial ownership register for trusts. The 2017 MLR effectively implements the UK's obligations under the EU Fourth Money Laundering Directive ((EU) 2015/849 (4AMLD)) to introduce a UK trust register. The regulations have a wide context with respect to the combating of terrorist financing and the fight against organised crime more generally. It seems likely that they will be widely copied, especially by trusts administered in the CDOTs where the UK has substantial influence.

The Regulations require the UK tax authority (HMRC) to maintain a trust register. The trust register will principally apply to trusts with UK resident trustees. However, trusts with non-UK resident trustees are also within the scope of the register if they hold UK situate assets that generate the obligation to report to UK HMRC with respect to certain taxes, including income and capital gains tax, inheritance tax and stamp duty land tax. The scope of the register requires more extensive information to be reported and maintained than that required to be disclosed under CRS.

In addition to the information which would typically be disclosed for the purposes of CRS (see paragraph 11 above) it also necessary to provide HMRC with the following information:

a The trustees must provide information about certain professional advisers to the trust, namely those who provide 'legal, financial or tax advice[6]' to the trust.

b There is a requirement to provide 'a statement of accounts for the trust, describing the trust assets and identifying the value of each category of the trust assets'. CRS, in contrast, only requires a composite value for the notional 'account value' of the trust fund of the trust without breaking this value down into categories.

c In considering who might be regarded as a beneficiary, Regulation 44(5)(b) states that trustees must report information 'about any other individual referred to as a potential beneficiary in a document from the settlor relating to the trust such as a letter of wishes'. This means that reference has to be made to documents other than the trust deed itself which, in the longer term, is likely to create a significant degree of confusion and uncertainty over reporting given that there is no current requirement to undertake such an exercise that I am aware of in any CRS or other equivalent tax reporting context with regard to persons who are not named as current beneficiaries.

6 See regulation [ ] of 2017 MLR.

The UK Trust Register will (subject to the caveat noted below) only be accessible by law enforcement agencies in the UK and throughout the rest of the EU/EEA – the issue of what happens to this EU/EEA access post Brexit is presently unclear. The categories of persons with access to the UK Trust Register under 2017 MLR are arguably narrower than those described in Article 14 of 4AMLD. Article 14 states that:

> *persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud should also have access to beneficial ownership*

It is, therefore, possible that NGOs and investigative journalists with an anti-corruption profile could seek access to the UK Trust Register on the basis that the UK (as a current EU member) has failed to implement 4AMLD in full.

iii Trustee obligations under the UK Register

A trustee of a relevant trust[7] is obliged to:

a maintain an up-to-date register of the 'beneficial owners' of and advisers to the trust;

b provide HMRC with detailed information about the beneficial owners on an annual basis and with respect to the assets of the trust and their capital value;

c inform relevant persons[8] of:
- its status as a trustee;
- the beneficial owners of the trust; and
- any change of beneficial owners (within 14 days of the change occurring).

d respond to any request for information from any law enforcement agency with respect to the trust within the reasonable period specified in the notice of request.

iv Information about the trust under the UK Trust Register

With respect to the trust itself, it will be necessary to confirm:

a the name of the trust and its date of creation;

b a statement of accounts for the trust, describing the trust assets and identifying the value of each category of the trust assets;

c the place where the trust is administered;

d a contact address for the trustees; and

e the full names of any advisers who are being paid to provide legal, financial or tax advice in relation to the trust.

With respect to individuals identified as beneficiaries or NPEECs it will be necessary to provide:

a full name and date of birth;

b details of the individual's role or roles in relation to the trust; and

c unique tax reference number of the individual.

7 Essentially a trust within scope of reporting.

8 Essentially financial in institutions and other professional persons with reporting regulations under AML rules.

Where a corporate entity is involved in a trust, one is obliged to 'look through' that entity and identify the individual(s) who control it; they are subject to disclosure in their own right.

v CRS developments

In a CRS context, I would like to consider two key areas. The first is the issue of local guidance and fragmentation, especially with respect to trust reporting. The second is the vexed issue of reporting protectors and its overlap with the NPEEC concept.

vi Fragmentation

On fragmentation, it is notable that during 2017, many jurisdictions issued their own local guidance on certain issues. To take a few examples:

a Canada: as in the case of the Foreign Account Tax Compliance Act (FATCA), Canada takes the position that other than in certain instances where banks or similar entities are concerned, most trusts with professional trustees are to be regarded as passive non-financial entities (NFE) not reportable financial institutions (RFI).

b Singapore: Singapore has issued guidance that permits settlors who are excluded as beneficiaries to report a nil value in terms of the value of their equity interest in the notional account represented by the trust fund.

c Bermuda: a trust where the settlor reserves a right to direct investments is not to be regarded as an RFI even though its trustee is a financial institution.

d Cayman Islands: all financial institutions are required to file a nil report even though they are non-reporting FIs. This is contemplated in CRS but is likely to create a significant degree of extra reporting in large and complex trust structures.

The concern here is that there will be substantial confusion over what to report where local guidance generates positions that contradict OECD's own commentary or the position taken in other jurisdictions generally. It is also likely that a pattern of jurisdictional arbitrage will emerge.

vii Protectors

On the issue of reporting protectors, it is well known that there is an inconsistency in the class of persons who are to be identified as the controlling persons of a trust when compared with those who to be identified as holding an equity interest in a trust. The two lists of persons are substantially similar except that the latter makes no express reference to 'protectors'. This has led to a great deal of confusion and divided opinion on when protectors are required to be reported. OECD in an FAQ issued in June 2016 takes the view that protectors must always be reported but a strict reading of the wording of the Model Treaty leads to the conclusion that they should only be disclosed as holders of an equity interest where they satisfy the test as a NPEEC.

What is interesting is that, in the context of the UK Trust Register, 2017 MLR do not make express reference to protectors either. Instead, as noted above, they refer to 'any individual who has control over the trust' and then refer to the powers over the trust that are to be equated with 'control'.

viii NPEECs and control

I would like to consider the question of who is to be regarded as 'exercising control' and who might be regarded as an NPEEC for CRS purposes if one follows the approach adopted in 2017 MLR.

It is interesting to note that, in commenting on the issue of control under the Controlling Persons heading in the CRS Handbook at paragraph 227, the OECD states:

> *The account held by a trust will also be reportable if it the trusts has one or more Controlling Persons that are Reportable Persons. The concept of Controlling Person used in the CRS is drawn from the 2012 FATF Recommendations on beneficial ownership. As such, the Controlling Persons of a trust are the settlor(s), trustee(s), beneficiary/ies, protector(s) and any other natural person exercising ultimate effective control over the trust.* ***This definition of Controlling Person excludes the need to inquire as to whether any of these persons can exercise practical control over the trust.***[9]

It is reasonable to conclude that OECD's intention was to follow the FATF expansive definition of beneficial ownership which is not based on a conventional legal analysis of matters such as control but, instead, to ensure that those persons reported under CRS include those with the capacity to exercise substantial influence over how a trust is run.

This approach is echoed in OECD's comments at paragraph 214 of the Handbook with respect to those to be regarded as holding an equity interest in an RFI Trust. This states:

> *The Equity Interests are held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust.* ***The reference to any other natural person exercising ultimate effective control over the trust, at a minimum, will include the trustee as an Equity Interest Holder.***[10]

The fact OECD uses the phrase 'at a minimum' is confirmation of this expansive approach.

My view is that the definition of control from MLR 2017 could well be widely adopted in a CRS context to assist in defining NPEECs with respect to trusts. If this does indeed happen, it will mean that virtually all protectors with significant powers with respect to trusts will be reportable as NPEECs, thus rendering the debate about whether protectors of RFI trusts are reportable as such largely academic.

II CONCLUSION

The year 2017 has witnessed some important developments in beneficial ownership reporting. The convergence of the expanded concept of who is to be regarded as a beneficial owner or exercising control in the tax reporting and AML arena looks set to be a dominant trend in the years ahead. Advisers should be very conscious of this, not only in advice on existing wealth ownership structures but also in the design of new ownership structures.

John Riches
RMW Law LLP
London
September 2017

9 Emphasis added.
10 Emphasis added.

Chapter 9

BELGIUM

Ferenc Ballegeer[1]

I INTRODUCTION

Taxation of individuals in Belgium depends partly on the region where the individual lives (i.e., where he or she has his or her principal place of residence). Belgium is a federal state and consists of three regions: the Brussels Capital Region, the Flemish Region and the Walloon Region. The main tax laws were originally conceived at the national level.

Following subsequent state reforms, aspects of gift and inheritance tax (including applicable rates and exemptions) and, more recently, aspects of personal income tax, have been regionalised. Consequently, the taxation of individuals is diverging from one region to another and it is expected that this evolution will continue, although the basic rules remain controlled by the national government.

Matters such as property law, gifts and succession law are national law and based on the Civil Code. Hence, contractual freedom is the basic principle in these areas of the law.

Belgium has not enacted legislation aimed specifically at attracting foreign wealthy individuals. Specific tax incentives are focusing on companies, especially in the science and technology sectors.

Foreign wealthy individuals who choose to become Belgian residents, and thus administer their worldwide businesses and assets from Belgium, benefit from the same rights and obligations as Belgian nationals.[2] As Belgian residents for tax purposes, they have access to the extensive network of treaties for the avoidance of double taxation that Belgium has with other jurisdictions across the globe.

In these turbulent times, the consensus remains so far uncontested that Belgium must continue to put itself in line with good legal and tax practices applicable in other jurisdictions within the European Economic Area and its internal market.

To illustrate what the jurisdiction has to offer to private individuals, Belgium does not apply its capital gains tax regime to capital gains within the scope of the normal administration of private assets. The scope of 'normal administration' is quite large and applies, in principle, notwithstanding the importance of the capital gain involved. It must be noted, however, that this 'normal administration' principle is under increasing pressure, following some recent share deals that were widely commented on in the national press. It seems rather unlikely, however, that the principle would be overturned in the short term.

1 Ferenc Ballegeer is a Belgian lawyer and the founder of FB-Private Wealth Law.

2 Article 11 Civil Code.

A second example is that a gift of moveable assets does not have to be subject to gift tax. Belgian gift tax is a stamp duty: there is no obligation to register a gift of moveable assets. Depending on the region where the donor resides, inheritance tax is due on unregistered gifts from the three or seven years preceding the donor's decease.

It must be noted that within the scope of this chapter, only the basic principles of existing legislation and new developments can be mentioned. The terminology used herein refers to the terminology of Belgian law.

II TAX

i Personal income tax

Private individuals who are Belgian residents for tax purposes are subject to personal income tax on the basis of their worldwide income, notwithstanding their nationality. Non-residents may be subject to Belgian income tax on their Belgian source income (non-resident income tax).

Personal income tax involves income from real estate, income from moveable assets, professional income and a residuary category. In the latter category, there is no catch-all approach, since income within the scope of the normal administration of private assets is not taxable.

Income tax rates are progressive, and even relatively moderate income is subject to high rates.[3] The first €7,090 is exempt from personal income tax. The basic tariff scheme is as follows:

a 25 per cent from €0.01 to €11,070;
b 30 per cent from above €11,070 to €12,720;
c 40 per cent from above €12,720 to €21,190;
d 45 per cent from above €21,190 to €38,830; and
e 50 per cent from above €38,830.

Interest and dividend income are taxed at a flat rate, which has been increased several times and significantly over the last few years. As from 1 January 2017, interest and dividend income tax is now at the basic rate of 30 per cent.

What differentiates Belgium is, first of all, its capital gains tax regime. Capital gains within the residuary category of taxable income, arising from whatever speculation or operation, are taxable, except for capital gains arising within the scope of the normal administration of the private assets of the taxpayer. These principles apply also to capital gains on shares, which is of particular interest for private individuals as the notion of 'normal administration' has quite a large scope. Consequently, capital gains on share or asset deals may be tax-exempt.

A specific tax regime applies to capital gains on shares in a Belgian corporate legal person (i.e., legal persons that are companies) that are transferred to a legal person outside the European Economic Area, if and to the extent the taxpayer holds (or held) directly or indirectly 25 per cent in the Belgian corporate legal person. The applicable basic rate is 16.5 per cent, even if the operation would be within the scope of the 'normal administration' test.

Taxable capital gains (i.e., capital gains outside the scope of the exception and specific rule) are taxed at a basic rate of 33 per cent.

3 The amounts in euros are applicable to taxable income from the year 2017.

Especially in the past, the advantageous Belgian capital gains regime was at the basis of merely internal (within the same group of companies) operations aimed at withdrawing cash or assets from a corporate legal person without paying dividend tax (now 30 per cent). Anti-abuse rules and more restrictive ruling practices in recent years aimed to curb these operations. Since 1 January 2017 a new specific anti-avoidance rule has been put in place to further restrict such operations.

It is also noteworthy to mention the Belgian expat tax regime. Qualifying expats are, sometimes fictiously, considered as non-resident taxpayers for income tax purposes. They are taxable in Belgium on their Belgian source income only. The additional relocation costs paid by their employer are not considered to be part of their taxable salary (professional income). As for the company employing the expat, these relocation costs are tax-deductible in its corporate income tax.

'Look-through' tax

In 2012, Belgium strengthened its general anti-abuse rule significantly to arrangements in breach of the purpose of a tax rule or a tax benefit.

Following international developments, notably the series of 'leaks' in recent years, Belgium enacted a legal obligation, initially for private individuals, to declare the existence of trusts and similar legal arrangements as well as foreign legal persons (i.e., having legal personality distinct from its shareholder or settlor) of which they are settlor or third-party beneficiary in their yearly tax return.[4] As far as the latter are concerned, this involved mainly legal persons from outside the European Economic Area, not subject to tax at all or subject to a low tax rate.[5]

These new rules involve a self-assessment exercise for Belgian residents: first of all they need to assess whether the legal arrangement(s) or foreign legal person(s) of which they are settlor or third-party beneficiary must be declared.[6] Since 2016 also legal persons subject to the legal persons income tax, such as foundations (see below), may be subject to this duty to declare legal arrangements and foreign legal persons of which they are settlor or third-party beneficiaries.

The second part of the self-assessment exercise is the new 'look-through' tax since 2016 for private individuals subject to personal income tax and legal persons subject to legal persons income tax: a duty to declare the revenue of the legal arrangement or legal person of which they are settlor. This revenue is now taxable income of the private individual or legal person, settlor of the legal arrangement or legal person directly insofar as the taxpayer cannot prove that a third-party beneficiary within the European Economic Area received or is entitled to the revenue.

Following the most recent Panama Papers leak, there is increasing pressure to at least evaluate the existing 'look-through' tax and possibly even further strengthen it. The reader understands that the purpose of this legislation is discouraging offshore tax planning.

4 The tax duties imposed on settlors and third-party beneficiaries of legal arrangements or legal persons are often referred to as 'Cayman tax'.

5 EEA: EU Member States, Iceland, Norway and Liechtenstein. So far only three EEA legal persons are within the scope of this Belgian legislation: the Liechtenstein 'Stiftung', the Liechtenstein 'Anstalt' and the Luxembourg 'Société de Gestion de Patrimoine Familial'.

6 Please note that settlor and third-party beneficiary are defined by the Belgian Income Tax Code. The notions differ from what may be understood by it in other jurisdictions.

In response to a parliamentary question, the finance minister answered that the look-through tax also applies to 'double structures' (i.e., legal entities constituted by legal arrangements or legal persons). The reasoning is that it would be unacceptable to avoid its application by setting up 'double structures'.[7]

The significant increase in interest and dividend income tax that was mentioned earlier is a noteworthy recent development, illustrating a 'tax shift' from a very high taxation of professional income to taxation of other types of income (such as interest and dividend income) and towards taxation of non-sustainable behaviour and consumption.

ii Inheritance tax

Belgian inheritance tax is due on the worldwide assets of the deceased if the deceased had his or her principal place of residence in Belgium at the time he or she passed away. The applicable regional tax regime is the tax regime of the residence of the deceased in the five years preceding his or her death. The top rate for descendants and spouses or partners is 27 per cent (Flemish Region) and 30 per cent (Brussels Capital Region or Walloon Region).

Recent developments

Although essential aspects of inheritance (and gift) tax are regionalised, the collection of these taxes remained entrusted to the national tax administration. Since 2015, the Flemish Region collects the inheritance (and gift) tax allocated to its territory itself.

This has given rise to differing administrative interpretations of sometimes long-established legislation and practices at the national level even if the law was not altered by the Flemish parliament. Consequently, legal uncertainty arose as to some important aspects of inheritance tax law or existing planning schemes in the Flemish Region. To resolve this, the Flemish tax administration puts forward its view to issues in this regard by means of administrative positions.

An example of an unresolved matter is the residency test in the Flemish inheritance tax. The residency test refers to a complex of factual circumstances indicating that a person has its principal place of residence in Belgium. Contrary to Belgian income tax, Belgian (and Flemish) inheritance tax do not provide in a legal presumption that persons registered in Belgium (including expats and other immigrants) are considered to have their tax residency for inheritance tax purposes in Belgium (or in the Flemish Region), the principle being that presumptions overturning the burden of proof must be created by law.

If necessary, it would, therefore, be up to the tax administration to prove that the deceased was a Belgian resident for inheritance tax purposes.

The Flemish tax administration, however, proclaimed that persons registered in the Flemish Region are deemed to have their tax residency for inheritance tax purposes in the Flemish Region. The Flemish tax administration put forward that it would be up to the heirs to prove that the deceased was not a tax resident, thus overturning existing rules without altering the law. The statement by the Flemish tax administration does not mention expats or other registered immigrants in Belgium, even if they do not have their principal place of residence in Belgium. This has created legal uncertainty.

7 Kaaimantaks. 'Dubbelstructuren', *Fiscoloog*, 25 May 2016, nr. 1477, p.14.

As for the Brussels Capital Region and the Walloon Region, the national tax administration continues to collect the Brussels and Walloon inheritance and gift tax. No such presumption is applicable in these regions.

As mentioned before, since 1 January 2017 a new specific anti-avoidance rule has been put in place to further restrict internal operations aimed avoiding dividend tax.

Outlook: taxation on investment accounts

The national budget agreement (a political agreement by the national government) from July 2017 involves a taxation on investment accounts (accounts on which financial instruments are held). The rate would be 0.15 per cent on the value of the assets. On the basis of what is known at this point the tax would only apply above €500, 000.[8]

Legislative proposals to implement the budget agreement may be expected in the second half of 2017.

iii Recent developments in income tax regarding cross-border structuring

The look-through tax, as mentioned above, should also be highlighted here.

Worth mentioning further is that legal persons that are subject to legal persons' income tax, such as foundations, are subject to the look-through tax on revenue of legal arrangements or legal persons of which they are settlor.

Another matter to be mentioned concerns a Belgian issue regarding the EU Parent Subsidiary Directive that exempts dividend payments between associated companies from withholding tax. The minimum participation to benefit from the exemption is 10 per cent. Under 10 per cent, the exemption from withholding tax does not apply.

Should a Belgian parent company have received dividends that were subject to a withholding tax at the level of the subsidiary, Belgian corporate income tax provides for a 'dividends received deduction' (DRD) at the level of the Belgian parent company: subject to conditions, 95 per cent of the dividends received are deductible from the parent's taxable profit (corporate income tax). As for the parent subsidiary exemption, the DRD applies as from a minimum participation of 10 per cent, but the Belgian DRD is also applicable under 10 per cent if the purchase price of the participation is a minimum of €2.5 million.

The latter DRD rule, however, is not applicable if the parent company is not a Belgian company. The European Court of Justice held this contrary to the free movement of capital.[9] Since 28 December 2015, the Belgian withholding tax on such dividend payments is (subject to conditions) reduced to 1.6995 per cent (which corresponds to the DRD deduction) for parent companies within the European Economic Area or in a jurisdiction with which Belgium has a double taxation treaty.

In December 2016, the existing catch-all rule in the Belgian non-resident income tax regime (NRIT) has been modified to the benefit of private clients. The principle is that non-resident tax payers pay NRIT on their Belgian source income. A catch-all rule exists to avoid non-taxation of income that would have been taxable if the taxpayer was a resident taxpayer. The catch-all rule now applies only to professional income from 'whatever service'

8 This text has been finalised in July 2017 also.

9 Court of Justice of the European Union, Case C 384/11 (*Tate & Lyle Investments v. Belgium*).

the non-resident taxpayer rendered. The new rule applies retroactively on income as from 1 July 2016. If no other Belgian taxation on it would be due, Belgian income of non-residents from private investments are also out of scope of the catch-all rule.

III SUCCESSION

i Forced heirship rules

Belgium's succession law will be modernised significantly in 2018. Belgium will prune its forced heirship rules and adopt more flexible rules allowing donors and testators to give away or to bequeath more. However, the forced heirship principle is withheld.

Belgium's succession law is Civil Code-based and, therefore, forced heirship rules apply. Descendants and spouses are the main protected heirs, but without descendants, spouse or legal partner, ascendants are also protected heirs. The latter changes: ascendants will no longer be protected heirs.

Legal partners are not protected by forced heirship rules. They have a limited intestate claim on the inheritance (i.e., they are entitled to the usufruct of the family home).

The forced heirship rules do not prevent giving away more than the unprotected portion of one's assets, nor do they prevent someone from bequeathing more than the unprotected portion. Protected heirs have the right to take back what was given away beyond the forced heirship rules or may object to the execution of a will that would have failed to take care of their rights.

If the deceased has children, the unprotected portion of the estate is half the estate (one child), one-third of the estate (two children) or one-quarter of the estate (three or more children). This changes: the unprotected portion will be half of the estate regardless of the number of children. The spouse is entitled to at least the usufruct of half of the estate. Spouses are entitled to the usufruct of the family home, even if the value of it would be more than half of the estate. The usufruct is the right to use an asset and the right to collect the revenue of an asset.

Belgium is bound by the EU Succession Regulation. Belgian forced heirship rules may be put aside if a different applicable succession law on the basis of the regulation would be applicable following a valid and effective choice of law. To a limited extent, an agreement as to succession will become possible under Belgian law.

Contractual arrangements between spouses or legal partners determine the composition of the estate. Without a matrimonial contract, spouses have a limited community regime: earnings are common, whereas gifts and inherited assets remain outside the community. Legal partners without an agreement are subject to rules comparable to a separation of goods.

Both marriage and legal partnership are open to same-sex couples.

ii Co-maternity

Since 1 January 2015, Belgium has had a co-maternity law. The female spouse of the mother of the child is automatically the co-mother of the child. The female legal partner of the mother can recognise the child and become the co-mother.

Consequently, forced heirship rules apply given the co-maternity relation between co-mothers and the children of their spouse or legal partner.

iii Future developments

Following the modernisation of Belgian succession law, it is expected that matrimonial property law and property law between partners will also be dealt with in the near future.

IV WEALTH STRUCTURING & REGULATION

i Overview of commonly used vehicles

Commonly used vehicles for structuring private wealth in Belgium include partnerships and corporate legal persons (i.e., legal persons that are companies). Less commonly used is the private foundation.

The principle that a trust is ruled by its applicable law is recognised in Belgium.[10] Belgian law, however, does not provide for its own trust arrangement. The principle is that trust arrangements may not violate forced heirship rules, but if the trust fund (i.e., the property held in trust) is held abroad, forced heirship claims may be ineffective.

A partnership is a body without legal personality, ruled by its by-laws (i.e., the partnership agreement). Both private individuals and legal persons may participate in a partnership. A partnership may be used as a vehicle to administer private and business assets, or as a holding company. As there are few legal constraints and no publication formalities to partnerships, it is a flexible and private planning instrument. A partnership may facilitate a gift as the rules to administer the gift can be laid down in the by-laws instead of having to be detailed as conditions to a gift by a private individual.

Corporate legal persons are also widely used as planning vehicles, in particular as holding companies. Corporate legal persons are subject to publication formalities, but may offer a more adequate framework for asset protection and administration than a partnership, especially if more complex relations with third parties are involved. Corporate legal persons have a legal personality distinct from their shareholders. Belgian law provides for a corporate legal person with only one shareholder.

Private foundations are legal persons and are construed to set apart assets for a philanthropic purpose. A private foundation does not have shareholders. Private foundations are subject to publication formalities. A private foundation is administered by at least three directors. The obligatory philanthropic purpose may be taking care of family members.

A private foundation can be dissolved once its purpose has been realised. The principle rule is that its assets must then be assigned to the philanthropic purpose. Its by-laws, however, may provide that the settlor or his or her successors may take back the property that was put into the foundation or its equivalent value if the purpose of the foundation has been realised.

ii Overview of the tax regime

Contributions of assets to a vehicle

It must be repeated that within the scope of this chapter, only the basic principles can be mentioned.

10 Article 124 Private International Law Code.

Belgian capital duty is a (national) stamp duty. Its rate has been reduced to zero per cent and cannot be increased again by Belgian law, thanks to EU legislation.[11] Contributions of moveable assets to a partnership do not have to be registered in Belgium. No Belgian capital duty is therefore due.

In the (presumably uncommon) situation where immoveable assets are put into a partnership that has either its centre of effective management in Belgium or its registered office in Belgium and its centre of effective management outside the EU, such contribution must be registered, but the rate is zero per cent (i.e., the contribution must be registered, but in fact no proportional capital duty is due as the rate is zero per cent).

Contributions of assets to a corporate legal person must be registered and are subject to a capital duty of zero per cent.[12] Belgian capital duty is due if the corporate legal person has either its centre of effective management in Belgium or its registered office in Belgium and its centre of effective management outside the EU.

To contributions of property with a residential purpose or used as such situated in Belgium, a different and more onerous tax regime applies. Such contributions are subject to the stamp duty applicable to a sale of immoveable property (the basic rate is 10 per cent in the Flemish Region and 12.5 per cent in the Brussels Capital Region and in the Walloon Region.

As for contributions to private foundations, the principle is that these are subject to a flat rate of 7 per cent in the Brussels Capital Region and in the Walloon Region. In the Flemish Region the flat rate of 5.5 per cent for 'gifts' to private foundations also applies to contributions to a private foundation.[13]

Income tax

As a body without legal personality, a partnership is considered tax transparent. Income of a private partnership allocated to private individuals is taxable on the basis of their share in the partnership. Such income is subject to personal income tax if the shareholder is a private individual and Belgian-resident for tax purposes. NRIT may be due on the Belgian source income of partnerships held by non-resident persons.

Belgian corporate legal persons are subject to Belgian corporate income tax (CIT). 'Belgian' means that the company has either its registered office, its principal establishment or its centre of effective management in Belgium.

Although a series of deductions may apply, the basic CIT rate is 33.99 per cent. Given developments in neighbouring countries, however, particularly but not exclusively in the UK, the aforementioned budget agreement decreases the CIT to 29 per cent in 2018 and to 25 per cent in 2020. For SMEs the CIT would be decreased to 20 per cent in 2018 on the first €100,000 of taxable profits. A minimum CIT for large corporate legal persons, i.e. with taxable profits of at least €1 million, would be introduced to compensate for these tax cuts. The purpose of these measures is to keep Belgium aligned with its neighbours and predominant trade partners.

Private foundations that have their registered office, principal establishment or centre of effective management in Belgium are subject to the legal persons' income tax. As regards the legal persons' income tax, only the revenue defined by law is taxable. Interest and dividend income is taxable and has to be subjected to a withholding tax (the basic rate is 30 per cent).

11 Article 8, 2° Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.

12 Article 19, 5° and Article 115 Stamp Duty Code.

13 Ruling 16049 of 14 November 2016.

Since 2015 (i.e., revenue from 2015), legal persons subject to legal persons' income tax, including private foundations, are subject to the above-mentioned look-through tax.

Recent developments: tax on transactions of listed financial instruments

The tax on transactions in listed financial instruments has been modified as from 1 January 2017. The following are now also regarded as taxable Belgian transactions: orders (such as a purchase, sell) via a foreign intermediary; (1) by a private individual having its principal place of residence in Belgium; and (2) by a corporate legal person acting for a registered office or an establishment in Belgium. The tax may thus also apply if no Belgian intermediary intervenes. Bonds and the like are subject to a rate of 0.09 per cent; other financial instruments (such as shares) are subject to a rate of 0.27 per cent and often even 1.32 per cent.

Outlook

The gradual but significant decrease in CIT as from 2018 has been discussed above.

On the basis of the above-mentioned budget agreement the tax on transactions of listed financial instruments would increase as follows from 2018: 0.09 per cent would become 0.12 per cent; 0.27 per cent would become 0.35 per cent.

Inheritance tax

The share of a deceased person in a partnership is subject to inheritance tax. The same applies to shares of a deceased person in a corporate legal person.

The inheritance tax regime for private foundations is very different and may offer opportunities for private individuals that are Belgian residents for inheritance tax purposes insofar as the philanthropic purpose of the private foundation is sincere and the directors act accordingly. It is noteworthy to mention that a general anti-abuse rule also applies to inheritance tax (and gift tax).

The decision to grant benefits to a private individual, not the settlor or one of the directors (as this is prohibited by law) and always within the scope of the philanthropic purpose of the foundation, would not be subjected to inheritance tax as this is a decision by the directors of the foundation on the basis of its by-laws. This would apply if and to the extent that the by-laws normally cannot be considered as a contract granting a direct right to a beneficiary. The national tax administration (competent for the Brussels Capital Region and the Walloon Region) confirmed in 2015 its previous individual rulings on the matter.[14]

The Flemish tax administration, competent since 2015 for gift tax within its territory, seems to adhere to this.[15]

The national tax administration ruled in 2014 that benefits granted by a foundation (during the lifetime of the settlor) would not be subject to gift tax or income tax.[16] The Flemish tax administration seems to adhere to this.[17]

Regarding trusts, the competent tax administrations have maintained their much-criticised position that benefits obtained from a trust should either be subject to

14 Ruling No. 2015.083 of 13 May 2015. A ruling is a decision on a case-by-case basis and does not technically apply to other cases.

15 Ruling 16049 of 14 November 2016.

16 Ruling No. 2014.593 of 16 December 2014.

17 Ruling 16049 of 14 November 2016. The ruling does not deal with income tax.

inheritance tax at the time of death of the settlor (non-discretionary trusts) or at the time the benefit is granted (discretionary trusts). Please note that the notions 'discretionary' and 'non-discretionary' as used by the Belgian tax administrations may not have the same meaning under the law that governs the trust.

iii Developments in anti-money laundering rules

As the reader will be aware, Belgian lawyers, notaries, financial institutions and accountants, *inter alia*, are subject to strict anti-money laundering rules according to EU standards. This involves client identification obligations, including identification of beneficial owners.

Belgium needs to implement the Fourth Anti-Money Laundering Directive, which requires 'corporate and other legal entities incorporated' in Belgium to obtain and hold 'adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held'.[18] This information must be centralised and made accessible to the competent authorities and financial intelligence units of Member States 'without any restriction'.

Belgian financial institutions have to file the identity of their clients and the reference number of their contracts (not the amounts or transactions) to a central register. This register has now been made accessible for all tax matters. It must be noted that not only the tax administration has access to the central register, but also notaries.

V CONCLUSIONS & OUTLOOK

The Belgian capital gains tax regime remains friendly to private individuals, as capital gains within the scope of the normal administration of private assets are tax exempt.

Gifts of moveable assets do not have to be subjected to Belgian gift tax; however, afterwards inheritance tax may apply.

There is a large consensus in Belgium that aggressive tax evasion should be tackled effectively and to some extent there is even a tendency to gold-plate international rules or standards on the matter. Less aggressive tax evasion schemes (e.g., dealings within a group of companies) were also curbed in recent years. The greater scope of the Belgian tax on transactions of listed financial instruments may also be mentioned.

The previous government introduced an obligation for private individuals who are Belgian residents for tax purposes to declare trust-like legal arrangements and not-taxed or low-taxed foreign legal persons in their yearly income tax return. The present government enacted a look-through tax for these legal arrangements and legal persons, applicable to private individuals and legal persons, subject to legal persons' income tax.

18 Article 30 Directive 2015/849/EU of 20 May 2015.

As from 2018 the corporate income tax rate (CIT) will be decreased gradually but significantly to 25 per cent.

The new succession law eases Belgian forced heirship rules and thus grants more planning opportunities and flexibility to private individuals. The new succession law will also allow, within boundaries, agreements as to succession. The second phase of this modernisation should follow shortly: a new matrimonial property law for spouses and partners.

It is also expected that Belgian company law will be modernised significantly in the near future. The guiding principles here are to reduce the number of corporate structures and to enable more flexibility as to enhance the attractiveness of Belgian corporate structures, in particular from an international perspective.

Appendix 1

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Ferenc Ballegeer has been a lawyer since 2001 and is a member of the Brussels Bar. Ferenc founded FB-Private Wealth Law in 2012. FB-Private Wealth Law assists international and Belgian private clients, expats and their families with regard to tax law and estate planning. Ferenc is an active member of the International Association of Young Lawyers (AIJA) and chairs the Regional Taxes Task Force of the American Chamber of Commerce in Belgium (AmCham Belgium). He is invited regularly as a speaker on estate planning and tax topics. Ferenc is also a board member of çavaria, the Flemish LGBTI organisation.

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