# Belgium

Werner Heyvaert

## ABOUT THE AUTHOR

*Werner Heyvaert*

Werner Heyvaert is Of Counsel in the Brussels office of Jones Day. Werner's practice involves the tax aspects of domestic and international transactions, including structured and cross-border financings, mergers and acquisitions, local tax counseling, transfer pricing, VAT, indirect tax, and tax litigation. Werner has over 25 years of experience and has worked in Brussels, Luxembourg, and New York City. Among his clients are several mid-size U.S. investment companies, several Belgian family-owned industrial and construction companies, and a listed Belgian raw materials and advanced materials technology company. In addition, Werner has recently advised a global financial services company, one of the largest pharmaceutical groups in the world (on two acquisitions), one of the major shipping groups, a U.S.-based mining company and an international diamond trader. In a major survey conducted in 2005 by the Flemish business magazine, Trends, Werner was ranked high on the list of the most sought after Belgian lawyers. He is the former chairman of the Legal & Tax Committee of BVA (Belgian Venture Capital and Private Equity Association). He is also a member of the Legal and Tax Committee of the American Chamber of Commerce in Belgium, the Belgian branch of IFA (International Fiscal Association), and the Foreign Lawyers' Forum of the American Bar Association (ABA), Section of Taxation. Finally, Werner is Vice President of the Belgian Association of Tax Lawyers (BATL) and he was recently elected Board Member for Finance and VAT of the Association of Flemish Bar Associations (Orde van Vlaamse Balies).

E-mail: wheyvaert@jonesday.com
Telephone: +32 2 645 15 80

# Belgium

## I INTRODUCTION

Belgium is a small country: about 32,500 square kilometers (roughly 12,500 square miles), just over 11,000,000 inhabitants, centrally located in Western Europe, squeezed between France, Germany, the UK, the Netherlands and Luxembourg. For its economic well-being, Belgium heavily depends on exports as well as on inbound investments by non-Belgian businesses. For example, according to the Belgian-American Chamber of Commerce (AmCham Belgium), about 1,800 businesses in Belgium belong to a US-based multinational. Several of those multinationals have more than one business unit in Belgium.

Following the federal elections of 13 June 2010, Belgium has gone through an extended political deadlock situation. After more than one year of negotiations and bargaining, a new federal government could only be formed in November 2012. A caretaker government had been running the federal state for over 16 months. Amongst the political stumbling blocks were the seemingly insurmountable language-based differences between the economically flourishing Flanders in the northern part of the country, and the much less flourishing Wallonia in the south. While Flanders voted by and large for relatively conservative and nationalist political parties, Wallonia (and Brussels) clearly supported more leftist (socialist and green) political parties. By the end of November 2011, the cabinet formation negotiations were wrapped up successfully and a new government, led by Walloon chief of socialists, Mr. Elio Di Rupo, was sworn in. Immediately after its inauguration, the new government had to tackle serious budgetary challenges. Mr. Di Rupo and his cabinet opted for a mix of cost cutting and revenue raisers. On 28 December 2011 a first batch of revenue raisers saw the light of day (Belgian Official Gazette, 30 December 2011, fourth edition). Several other batches of revenue raisers were enshrined in new laws and some were in the pipeline at the time of writing.

In general, the M&A market is rebounding. In December 2012, Dealogic announced that the total value of announced transactions in which a Belgian party participated as either buyer, seller or target, had reached EUR 36.5 billion for the year 2012, compared

to only EUR 28.5 billion for the previous year. At the same time, the worldwide volume of acquisitions had dropped by 10%, to approximately US$ 2,500 billion. Included in the figure for 2012 was EUR 17.1 billion for the acquisition of (50%) of Mexican beer group, Grupo Modelo, by AB-InBev of Belgium, a deal that would subsequently be barred by the U.S. anti-trust authorities (see below). In addition, five out of the ten largest transactions of 2012 related to the banking crisis; for example, nearly-bankrupt Belgian-French bank Dexia was forced to sell its Turkish subsidiary to Sberbank of Russia, in a deal valued at EUR 3.02 billion.

Inbound acquisitions (Belgian targets being acquired by foreign buyers) are very common in Belgium, in part because the size of an average Belgian business is relatively small and prices are usually moderate in absolute terms.

- At the time of writing, it was still uncertain how the business activities of the bankrupt Belgian video and television facilities group, Alfacam, would be continued. In December 2012 and January 2013, rumor had it that Indian conglomerate, Hinduja, would take over Alfacam prior to its being declared bankrupt, but that deal fell through.[1]
- In July 2013, it was announced that Brussels listed holding company, Punch, was selling its 67.5% interest in Belgian tech company, Xeikon, to a Dutch investment fund (Bencis) and a Belgian investment fund (GIMV XL) for EUR 110 million.[2]
- In May 2013, Pinguin N.V. of Belgium – member of the PinguinLutosa Food Group – announced that it had reached an agreement with McCain Foods Continental Europe, headquartered in France, about the sale of its Lutosa division, including the trade name 'Lutosa', a complete product line of frozen and other food products and two production sites. The seller was reported to have realized a capital gain of EUR 4 per share and decided to distribute EUR 2.40 per share to its shareholders in the form of a reduction of share capital (total amount of EUR 39.6 million).[3]
- Also in May 2013, it was reported that French engineering group SPIE was actively looking to acquire suitable Belgian target companies, after having acquired a family-owned business called VANO at the end of 2012, for an undisclosed price.[4]
- Also in May 2013, it was reported that Belgian listed chemicals group, Solvay, had agreed with London-based Swiss group Ineos (controlled by British tycoon, Jim Ratcliffe) to enter into a joint venture for its polyvinylchloride, or PVC, division as a first step to selling that division entirely to Ineos Group after four to six years.[5] It was reported that Ineos would pay Solvay EUR 250 million by the end of 2013 as an advance on the purchase price.

1. See: De Tijd, 12 December 2012, p. 15 and 26 January 2013, p. 3.
2. See: De Tijd, 19 July 2013, p. 4.
3. See: De Tijd, 31 May 2013.
4. See: De Tijd, 7 May 2013, p. 20.
5. See: De Tijd, 8 May 2013, p. 4.





- Another, much smaller, example is the sale of Belgian payment services company Ogone to French competitor and listed company Ingenico, for a price that valued the target company at EUR 360 million. Prior to the sale to Ingenico, Ogone was owned by the founders and U.S. based investment firm Summit Partners, which had acquired a stake in Ogone in 2010, when the total value of Ogone was about EUR 180 million.[6]
- In January 2013, it was reported that Belgian privately owned chocolate maker, Eden Chocolates, was attracting an equity injection from Chinese investors, in return for a stake of 20 – 30% in Eden Chocolates' share capital.[7]
- Also in January 2013, it was announced that Belgian businessmen Leon and Stijn Van Rompay sold Uteron Pharma to U.S. group Watson Pharmaceuticals, for an initial price tag of US$ 150 million and another US$ 155 million if and when certain milestones will be achieved.[8]

Conversely, outbound acquisitions (Belgian buyers acquiring foreign targets) are relatively rare.

- On 3 June 2013, Brussels listed holding company, GBL – controlled by Belgium's industrial tycoon, Albert Frère – announced that it had agreed to take over EXOR's 15% equity interest in Swiss listed company, SGS, a leader in the industry of inspection, verification, analysis and certification supporting the international trade in agricultural, mineral, oil and consumer products. SGS was incorporated in 1878 and has over 75,000 employees and over 1,500 branches and laboratories worldwide. In 2012, SGS reported sales of SFR 5.6 billion (EUR 4.5 billion). The price mentioned for the deal was EUR 2 billion.[9]
- In February 2013, it was reported that Belgian family-owned group Thermote & Vanhalst, has acquired German competitor Mateco from private equity investment firm Odewald. The buyer and the target company are both active in the specialty trucks and equipment business. No price was disclosed.[10]
- In September of 2012, Belgian organic detergents and soap manufacturer, Ecover, acquired its American competitor, Method, for an undisclosed price.[11] Although Ecover was established by Belgian entrepreneurs in 1979 and is still headquartered in Belgium, it is controlled for many years by a Danish investor through the privately owned investment company, Skagen.
- At the end of 2011, Belgium-based Ontex – a manufacturer of privately branded diapers – acquired its French competitor, Lille Healthcare, and in February 2013 it was further announced that Ontex acquired Serenity, an Italian competitor, from Artsana Group, pushing total sales of Ontex to EUR 1.4 – 1.5 billion.[12]

6. See: De Tijd, 30 January 2013, p. 4.
7. See: De Tijd, 19 January 2013, p. 15.
8. See: De Tijd, 23 January 2013.
9. Source: Belga, 3 June 2013.
10. See: De Tijd, 9 February 2013, p. 22.
11. See: De Standaard, 4 September 2012; De Tijd, 4 September 2012.
12. See: De Tijd, 12 February 2013, p. 15.

# France

Sophie Jouniaux, Agnès Charpenet, Michael Khayat, Xavier Berre and David Caupers

## ABOUT THE AUTHORS

*Xavier Berre*

Xavier Berre practices in the Tax Group of Baker & McKenzie in Paris and focuses on international and corporate taxation. He joined the Tax Group of Baker & McKenzie SCP in 2007 as a trainee and became an associate in January 2009. Xavier Berre holds a postgraduate degree in corporate taxation from the University of Paris Dauphine and a postgraduate degree in banking and finance law from the University of Paris I Panthéon Sorbonne. Xavier was admitted to the Paris Bar in 2009.
E-mail: xavier.berre@bakermckenzie.com
Telephone: +33 1 44 17 59 54

*David Caupers*

David Caupers practices in the Tax Group of Baker & McKenzie in Paris and focuses on international and domestic taxation. He joined the Tax Group of Baker & McKenzie SCP in 2011 as a trainee and became an associate in January 2012. David Caupers holds a Master 2 in International Taxation from the University of Paris II Panthéon-Assas, partially completed in the Ecole des Hautes Etudes Commerciales (HEC), and a Master 1 in Tax Law from the University of Paris I Panthéon-Sorbonne. David was admitted to the Paris Bar in 2012.
E-mail: david.caupers@bakermckenzie.com
Telephone: +33 1 44 17 64 17

*Agnès Charpenet*

Agnès Charpenet practices in the Tax Group of Baker & McKenzie in Paris and leads the Employee Benefit practice of the Paris office. Her experience is focused on compensation of employees, executives and managers, in domestic and international context. Agnès Charpenet graduated from the University of Paris XI Sceaux Law School. In 1997, Agnès received a post graduate diploma from the University of Paris-Cergy Pontoise Law School with a specialization in business law and taxation (DESS Droit des Affaires et Fiscalité) as well as a special degree in business law (DJCE). Agnès joined the Tax group of Baker & McKenzie SCP in December 1988 and was admitted to the Paris Bar in January 1999. She was elected Local Partner at Baker & McKenzie in February 2007.
E-mail: agnes.charpenet@bakermckenzie.com
Telephone: +33 1 44 17 53 78

*Sophie Jouniaux*

Sophie Jouniaux practices in the Tax Group of Baker & McKenzie in Paris and focuses on international and corporate taxation, in particular with mergers-acquisitions, international tax planning and restructuring. Sophie Jouniaux graduated from the University of Strasbourg where she received both a Master and a post graduate diploma in Commercial Law and Tax. Sophie has joined Baker & McKenzie in 2002. She was elected as Local Partner at Baker & McKenzie in January 2008.
E-mail: Sophie.jouniaux@bakermckenzie.com
Telephone: +33 1 44 17 59 79

*Michael Khayat*

Michael Khayat practices in the Tax Group of Baker & McKenzie in Paris. He is a member of the Wealth Management group where he advises and assists French and foreign private individuals in the legal and tax aspects of domestic and international wealth management. He is also a member of the European Employee Benefit Practice Group of Baker & McKenzie where he focuses on compensation of employees and executives in a domestic and international context, employee benefit and international mobility. Michaël graduated from the Paris Dauphine University, where he received a Master in Corporate taxation. He has previously studied accounting and finance (French CPA degree and Bachelor in Finance & accounting from Paris Dauphine University). Michaël joined Baker & McKenzie as an Associate in 2007 and was admitted to the Paris bar in 2007.
E-mail: michael.khayat@bakermckenzie.com
Telephone: +33 1 44 17 65 34



# France

## I INTRODUCTION

### [A] Overview of France

#### *[1] General Information*

##### *[a] Location and Population*

France is the largest country in Western Europe with Metropolitan France covering over 550,000 km$^2$ (> 210,000 sq miles) in a single time zone (Greenwich +1 hour).

France encompasses many overseas territories and departments worldwide (Martinique, Guadeloupe, La Réunion, Mayotte, New Caledonia, French Polynesia, Wallis and Futuna, St Pierre and Miquelon, French Guyana).

The resident population is over 60 million with over 3 million foreigners. The main cities are Paris (Metropolitan area: > 10 million), Lyon, Marseille, Lille (Metropolitan area: > 1 million), Bordeaux, Toulouse, Nantes, Nice, Rouen and Grenoble (Metropolitan area: > 0.5 million).

##### *[b] Constitution and Legal System*

France is governed by the 1958 Constitution of the Fifth Republic, a *de facto* cross of democratic parliamentary and presidential systems of government.

While the legal system is of Roman law tradition, the modern foundations of the unified French legal system were established under the emperorship of Napoleon (1800–1810) but some territories have maintained local particularities for historical or geographical reasons (namely Alsace-Moselle, Corsica and France's overseas territories).

*[c] Economy and Trade Agreements*

France is a member of most major international organizations (EU, UN, OECD, WTO, etc.). It has concluded a great number of international treaties and agreements with foreign countries and has, as of today, one of the world's largest network of tax treaties. France is a member of Euroland.

### *[2] Investment Factors*

*[a] Government Incentives*

Full incentives and tax reductions are granted when setting up in some areas of high unemployment or when creating a new business or expanding an existing business.

*[b] Foreign Investments Regulation*

The Regulation applies to all non-French investors, including citizen of EU Member States although the latter are treated more favourably than citizen of non-EU countries. French investors are also subject to the Regulation upon investing abroad or investing in France through foreign investment vehicles.

The regulation of foreign investments in France distinguishes investments:

- Subject to the filing of an administrative return

  An administrative return must be filed with the Ministry for the Economy, Industry and Employment (*Direction Générale du Trésor*) for investments that create new companies where the investment exceeds EUR 1.5 million, and for transactions that result in the acquisition of all or part of a line of business, or the acquisition of a direct or indirect equity interest in a French company amounting to more than a third of its shares or voting rights (unless the investor already has a majority interest in the French company).

  Some types of investments are exempted from such filing requirement.
- Subject to prior authorization

  Prior authorization from the Ministry for the Economy, Industry and Employment must be sought for investments in certain business sectors (e.g., gambling; private security services; equipment designed to intercept communications; the production of goods or provision of services relating to the security of information systems; encryption and decryption systems for digital applications; businesses certified for national defence; trade in weapons, etc.). Certain limited exemptions apply.

  The following three limitative criteria may be used by French authorities to determine whether a foreign investment may be deemed compliant with the preservation of French national interests: (1) preservation of industrial capacities on the French territory; (2) the continuity of supplies; (3) the compliance with contractual commitments contained in certain existing





contracts. It should be noted though that French authorities may condition their authorization to specific commitments from the foreign investors.
- Subject to the filing of a declaration for statistical purposes

  Some investments are subject to the filing of a declaration for statistical purposes only with the Bank of France (e.g., acquisition by a foreign investor of 10% or more of the equity or voting rights in a resident company when the investment exceeds EUR 15 million) or the Ministry for the Economy, Industry and Employment (e.g., acquisition by a foreign investor of real estate located in France for an amount exceeding EUR 1.5 million).

  Although in practice joint filing by different investors or common filing for different regimes are possible, the above-mentioned regimes must be viewed as strictly independent one from another.

*[c] Sources of Finance*

All major international banks and financial institutions currently operate in France. The Paris Stock Exchange is highly active and enjoys tight relations with all other major financial markets.

## [B] General Legal System

### *[1] During an Audit*

Article L. 13 C of the Book of tax procedures provides that certain taxpayers can voluntarily request a tax audit under certain conditions. If the French tax authorities conclude this with no tax reassessment, this finding may not be amended by the French tax authorities in the event of future audits. If this audit leads to a tax reassessment, the penalties for late payment will be reduced by 30%.

Moreover, Article L. 62 of the Book of tax procedures provides that the taxpayers subject to a tax audit can accept before any reassessment notice is issued to correct errors and omissions made in good faith. In this case, and provided it files an additional return within 30 days and pays the reassessed amounts at this moment, late payment interests could be reduced to 70%.

### *[2] During the Adjustment Procedure*

*[a] After Issuance of a Tax Reassessment Notice and before Tax Collection Notices*

From a procedural standpoint, the use of administrative appeals postpones the collection of the tax reassessments. Therefore, the collection of tax (through the sending of a tax collection notice) cannot be made before the decision of the tax committee has been rendered.

# The Netherlands

Maarten J.M. van der Weijden, Margriet E. Lukkien and Mónica Sada Garibay

## ABOUT THE AUTHORS

*Maarten J.M. van der Weijden*

Maarten J.M. van der Weijden, tax partner, is chairman of the Executive Board of Loyens & Loeff N.V. He is a member of the international Tax practice group of Loyens & Loeff N.V. He worked in the New York office of Loyens & Loeff in 1988–1989 and in 1996–1999. He advises clients on Dutch corporate tax and dividend tax aspects in international structuring and restructuring, financial products, and structured finance products. Maarten studied Tax Law in the University of Leiden (1986) and Taxation (LL.M.) in the New York University School of Law (1988). Maarten is a member of the Dutch Association of Tax Advisers (NOB), of the American Bar Association (ABA) and of the International Fiscal Association (IFA). He is further secretary of the Dutch branch of the IFA.

E-mail: maarten.van.der.weijden@loyensloeff.com
Telephone: +31 20 578 55 10

*Margriet E. Lukkien*

Margriet E. Lukkien, senior tax adviser, is member of the international Tax practice group of Loyens & Loeff N.V. in Amsterdam. She worked in the London office of Loyens & Loeff in 2007–2010. She advises multinationals (especially North-American-based) and banks on Dutch corporate tax and dividend tax aspects in international structuring and restructuring. She also advises frequently on aircraft leasing structures. Margriet studied Tax Law (*cum laude*) in the University of Amsterdam (2003) and Taxation (LL.M.) in the New York University School of Law (2004). Margriet is a member of the Dutch Association of Tax Advisers (NOB), secretary of the NOB's International Tax Affairs committee, a member of the International Fiscal Association (IFA) and of the International Bar Association (IBA). She won the IBA Taxation Scholarship for the IBA

annual congress in Vancouver 2010 and she is now Session Reporters Liaison Officer of the IBA Taxes Committee.
E-mail: margriet.lukkien@loyensloeff.com
Telephone: +31 20 578 54 18

*Mónica Sada Garibay*

Mónica Sada Garibay, tax adviser, is a member of the international Tax practice group of Loyens & Loeff N.V. in Amsterdam. She advises clients (specially Latin-American based) on tax issues in international structuring and restructuring. Mónica studied Law and Tax Law (both with *honours*) in the Universidad Panamericana (Mexico City, 2006 and 2007) and the Master of Advanced Studies in International Tax Law (with *honours*) in the International Tax Center of the University of Leiden (2010). Mónica is a member of the International Fiscal Association (IFA).
E-mail: monica.sadagaribay@loyensloeff.com
Telephone: +31 20 578 54 61



# The Netherlands

## I INTRODUCTION

### [A] General Legal System

The Netherlands[1] has a long tradition of a beneficial climate for businesses and consequently often a Dutch acquisition vehicle is used in transactions. One of the main reasons for this is the attractive and well-established Dutch tax regime for holding activities, consisting primarily of the Dutch participation exemption and the extensive bilateral tax treaty network of the Netherlands (about 90). Furthermore, the possibility to obtain advance tax rulings from Dutch Revenue is facilitating this and also the lack of comprehensive controlled foreign company legislation plays an important role in this respect.

Dutch tax law consists of statutes, regulations, administrative guidance and judicial decisions. The statutory tax law consists of various tax acts; for each type of tax in principle a separate tax act applies, unless cross-reference clauses broaden the scope of a specific tax act. The tax acts most relevant for the general overview given in this chapter on Dutch tax aspects of merger and acquisition transactions are the Corporate Tax Act 1969 ('CTA'; *Wet op de vennootschapsbelasting 1969*), the Dividend Withholding Tax Act 1965 ('DTA'; *Wet op de dividendbelasting 1965*), the Income Tax Act 2001 ('ITA', *Wet inkomstenbelasting 2001*), the Value Added Tax Act 1968 (*Wet op de omzetbelasting 1968*) and the Legal Transactions Tax Act 1970 (*Wet op belastingen van rechtsverkeer 1970*). The tax regulations consist of various decrees issued by the Dutch Government and the Dutch Ministry of Finance pursuant to their delegated authority based on the various tax acts and serve as a binding implementation of the relevant tax acts. Administrative guidance is given by the Dutch Ministry of Finance as well in the form of decrees. Such decrees serve as guidance for interpreting the tax acts and are not binding. There are no courts in the Netherlands dedicated to tax matters only. Tax disputes are in first instance dealt with by the Lower Courts (*Rechtbanken*). Subsequently, Lower Court decisions may be appealed to one of the four Courts of Appeal

1. The terms 'the Netherlands' and 'Dutch' used in this chapter refer solely to the European part of the Kingdom of the Netherlands.

(*Gerechtshoven*), where the special tax section handles the tax disputes. Further appeal can be filed with the Supreme Court (*Hoge Raad*), which has specific judges dealing with tax disputes. The Supreme Court does not deal with factual matters, but only with the interpretation of the law and procedural matters.

The tax system is administered by Dutch Revenue (*Belastingdienst*). Dutch Revenue is part of the Dutch Ministry of Finance, but functions in most respects independently. Generally speaking, officials of the International Tax Affairs division within the Dutch Ministry of Finance are involved in policy decisions, among others for proposed legislation and the negotiation of tax treaties. Dutch Revenue deals with the collection of all taxes by applying Dutch tax law. Dutch Revenue is well approachable to discuss tax aspects of taxpayers and transactions. It has historically been willing to provide taxpayers advance certainty on the tax treatment of certain transactions. Reference is made to section I[B][3] for more details.

## [B] General Tax Environment

The Dutch chapter contains a general overview of Dutch tax aspects of merger and acquisition transactions, which often play a role in structuring cross-border acquisitions. The Dutch tax implications of various forms of acquisitions of a Dutch company are discussed for the seller, acquiror and the target company. The principal taxes covered are corporate tax (*vennootschapsbelasting*), dividend withholding tax (*dividendbelasting*), real property transfer tax (*overdrachtsbelasting*) and value added tax ('VAT', *omzetbelasting*). Income tax (*inkomstenbelasting*) is discussed only insofar as the seller is an individual. The Netherlands does not levy registration taxes or stamp duty.

Because of the diversity of cross-border acquisition structures it is impossible to address all possible Dutch tax aspects that may be relevant in merger and acquisition transactions. The topics covered such as application of the participation exemption, deduction of financing costs, formation of a 'Fiscal Unity' (*fiscale eenheid*) and preservation of tax losses, can be said to play an important role in many acquisition transactions. The financing of acquisition transactions in the Netherlands is generally structured in a sophisticated manner and often involves optimal leverage of the deal, especially in case of private equity like transactions. Consequently, there will often be a demand to push down the debt incurred by the acquisition vehicle (often a Dutch holding company) to finance the transaction down to the level of the target company. This highly relevant topic is also addressed. Before the Dutch tax aspects of merger and acquisition transactions are set out in section II, first a general overview is given below covering the Dutch corporate tax regime (see section I[B][1]), Dutch dividend withholding tax aspects (section I[B][2]), the approach of Dutch Revenue (see section I[B][3]), and the types/classification of mayor business entities in the Netherlands (see section I[C]).





### [1] *Corporate Tax*

#### [a] *Base and Rate*

Pursuant to the CTA corporate tax is in principle levied over the worldwide profits of entities tax resident in the Netherlands.[2] The CTA treats an entity as tax resident either if it is managed and controlled in the Netherlands or if it is incorporated under Dutch law[3]. The latter is for example the case for Dutch incorporated public companies with limited liability (*Naamloze Vennootschap*, 'NV') and Dutch incorporated private companies with limited liability (*Besloten Vennootschap met beperkte aansprakelijkheid*, 'BV'), the two most commonly used forms of doing business in the Netherlands. Entities not tax resident in the Netherlands are only liable to corporate tax for their Dutch source income.

As per 1 January 2011, corporate tax is imposed at a rate of 25%, but a rate of 20% applies for the first EUR 200,000 of profits. All income is taxed at the same corporate tax rate, i.e. no distinction is made between for example ordinary income and capital gains. An exception applies for qualifying income which is elected to be taxed in the so-called innovation box, pursuant to which such income is partially (approximately 80%) excluded from the taxable basis as a result of which such income is effectively taxed at a rate of approximately 5%. Furthermore, the CTA contains special tax regimes for investment companies that qualify as a tax free investment institution (*vrijgestelde beleggingsinstelling*, 'VBI'), which is generally exempt from corporate tax, and companies that qualify as a fiscal investment institution (*fiscale beleggingsinstelling*, 'FBI'), which are subject to a zero rate of corporate tax. The CTA also contains a limited number of subjective exemptions (e.g., for qualifying pension funds or qualifying charities). In addition, the CTA contains special rules for the taxation of insurance companies. It is assumed for purposes of the Dutch chapter that the seller, acquiror nor the target is subject to any of these special regimes.

#### [b] *Preventing Double Taxation*

Historically, legal double taxation of the worldwide profits of Dutch resident taxpayers is prevented or limited under the provisions of tax treaties entered into by the Netherlands, the Tax Arrangement for the Kingdom of the Netherlands ('TAK', *Belastingregeling voor het Koninkrijk*) or under the 2001 Dutch unilateral decree for the avoidance of double taxation (*Besluit voorkoming dubbele belasting 2001*, 'Unilateral Decree'). Generally, the Netherlands applies an exemption method for active income. However, as per 1 January 2012 the method for the prevention of international double

2. Exemptions might apply to prevent legal or economic double taxation.
3. Exceptions to the incorporation fiction apply for certain tax provisions. The most important exceptions relate to tax facilities for statutory mergers and demergers and to the formation of a consolidated tax group; the residence of a company must then be determined on the basis of its place of effective management. Furthermore, a tax treaty could set aside the incorporation fiction.

# United Kingdom

Patrick Mears and Michael McGowan

## ABOUT THE AUTHORS

*Patrick Mears*

Patrick Mears has 30 years of tax experience including 23 years as tax partner with international law firm, Allen & Overy LLP in London. He has in particular provided UK tax advice in the fields of domestic and cross border mergers and acquisitions, domestic and cross border reorganisations, IPOs, transfer pricing and tax investigations, domestic and international banking, project and structured financing, capital markets issues and securities trading and lending. He has also advised non UK authorities on their domestic tax regimes and bilateral tax arrangements and is a frequent speaker at international conferences. Patrick would like to acknowledge the support and assistance given to him by his colleagues in the Allen & Overy tax department in producing the United Kingdom section.
E-mail: patrick@mears.eu

*Michael McGowan*

Michael McGowan has 23 years of tax experience including 16 years as a tax partner with international law firms in London and New York. He is a UK tax partner with Sullivan & Cromwell LLP. He has in particular provided UK tax advice on a wide range of domestic and cross-border mergers, acquisitions, demergers, and other restructurings, as well as IPOs and a wide variety of financing transactions, including project financing, securitisations, leasing, tax-based structured financing, derivatives transactions and the setting-up of mutual funds. He speaks frequently at conferences and publishes regularly in major journals (notably, on cross-border tax issues). He has also advised on a number of tax disputes, both within and outside the UK. Michael wishes to acknowledge the extensive assistance provided by his colleagues, Andrew Thomson and Emma Hardwick, in drafting the United Kingdom section.
E-mail: mcgowanm@sullcrom.com

# United Kingdom

## I INTRODUCTION

### [A] General Legal System

The UK is an open trading economy with a flexible labour market and is an attractive investment location for global companies. English remains the predominant language of business throughout the world and the UK's institutions, and in particular its legal system, are respected around the world. The UK has a large and sophisticated financial sector and is a recognized centre for the trading of currency, shares, bonds and other financial instruments.

### [B] General Tax Environment

The UK has extensive and complex tax legislation. The work of the current, but hopefully not of the future, UK tax practitioner has been made more challenging by the tax law rewrite project – a project the aim of which was to rewrite the UK's direct tax legislation to make it clearer and easier to use, without changing the law. The project began in 1997, and two final enactments in 2010 brought the project to an end. Seven separate Acts running to over 4,000 pages in total were published. It is perhaps not surprising that, in addition to being voluminous, the UK's tax system is also complex. The Government set up an Office of Tax Simplification in July 2010; so far, however, its successes have lain more in removing unused legislation than in making the legislation that is used any simpler. The UK has significant inbound as well as outbound investment, and in general its corporate law, political and regulatory environments are seen as 'business friendly', and particularly so for international business.

Over the period 1997–2008, revenue from corporation tax provided around 8.5% of total Government revenue.[1] As with most other OECD countries, the UK's corporate tax base corresponds to a measure of company profits net of allowances for interest payments and presumed depreciation costs. The company's statutory accounts are

1. OECD Revenue Statistics; corporation tax as a percentage of total taxation.

generally the starting point for determining what is meant by 'profits'. The UK has an extensive network of bilateral tax treaties and is, of course, a member of the EU – this has a significant impact on the tax treatment of cross-border transactions.

Capital and potentially taxable profits, have become increasingly mobile between jurisdictions so the UK has not been immune from international tax competition. The UK's move, albeit a belated one, towards a more territorial corporate tax system – with exemptions for gains on substantial shareholdings and for dividends, and an option to exempt profits of non-UK permanent establishments – can be seen in this context. The same is true of the recently reformed controlled foreign companies regime.

In November 2010 HM Treasury and HMRC published a document[2] confirming the Government was prioritizing corporate tax reform. The stated intention was for the UK to have a more 'competitive, simple and more stable tax system' so 'creating the right conditions for business investment'. Unusually, the document included a Corporate Tax Road Map setting out how the Government intended to approach the reform of the corporate tax system over the 2010 to 2015 period. The stated principles for corporate tax reform were much as one might expect: (i) lowering rates while maintaining the tax base; (ii) maintaining stability; (iii) being aligned with modern business practice; (iv) avoiding complexity; and (v) maintaining a level playing field for taxpayers. As evidence of the Government's seriousness about corporate tax reform a joint HM Treasury and Department for Business Innovation and Skills document[3] prioritised creating 'the most competitive tax system in the G20' as the first of the Plan for Growth's four 'overarching ambitions'. The document went on to identify three 'measurable benchmarks' for the UK corporate tax system: (i) the lowest corporate tax rate in the G7 and among the lowest in the G20; (ii) the best location for corporate headquarters in Europe; and (iii) a simpler, more certain tax system.

In September 2006 the UK's Institute of Fiscal Studies announced the commencement of the Mirrlees Review, a comprehensive academic study on tax reform. The goal of the Review was to identify what makes a good tax system for an open developed economy in the 21st century and to suggest how the UK tax system could be reformed to move in that direction. The review was published in two volumes. The first volume, *Dimensions of Tax Design*,[4] consisted of a set of specially commissioned chapters dealing with different aspects of the tax system, accompanied by a series of commentaries by different expert authors, voicing differing opinions on the issues discussed. The second volume, *Tax by Design*,[5] set out the conclusions of the Review. '[The Review] shows how the current system is inefficient, overly complex and frequently unfair.'[6] The Review identified seven major flaws in the UK tax system – one of which relates specifically to corporate tax. 'The current system of corporate taxes discourages

2. Corporate Tax Reform: delivering a more competitive system.
3. The Plan for Growth March 2011.
4. http://www.ifs.org.uk/mirrleesReview/dimensions.
5. http://www.ifs.org.uk/mirrleesReview/design.
6. Mirrlees Review Press Release 14 September 2011.





business investment and favours debt finance over equity finance. Its lack of integration with other parts of the tax system also leads to distortions over choice of legal form. Corporate taxes have also been subject to increasing international pressures.' The conclusions, insofar as they specifically relate to the taxation of large companies, stated 'The corporate tax system favours debt finance over equity finance increasing the tendency towards an excess reliance on debt.' The review proposed that an 'Allowance for Corporate Equity' should be introduced. This would ensure equal treatment of equity-financed and debt-financed investments and that only profits above a normal return to capital invested are taxed. The Review suggested that this reform could increase national income by as much as 1.4% (more than 20 billion GBP at current prices). The Government has taken no action to follow the Mirrlees recommendations (except in consulting on the integration of the income tax and social security systems, although that is currently on hold) and it is unlikely that it will do so in the short to medium term.

The UK does not have a general anti-abuse of law doctrine applicable to tax, nor a codified doctrine of substance over form, and has not had a general anti-avoidance rule (or GAAR). The courts have, however, taken to adopting a purposive interpretation of taxing statutes which has the effect of striking down perceived artificial tax avoidance.[7] In addition the UK has for some time had a series (indeed an ever increasing series) of anti-avoidance purpose-test-based rules dotted around the tax code (so-called mini-GAARs) as well as more targeted anti-avoidance rules (so-called TAARs). In contrast, the UK's VAT rules are derived from and implement EU VAT law, which does contain an 'abuse of law' doctrine.[8]

The Government has proposed legislation for a general anti-abuse rule (also abbreviated to GAAR), which is expected to be enacted and to come into effect for arrangements entered on or after Royal Assent to the Finance Act 2013 (likely to be in July 2013). The GAAR will apply to most UK taxes, but not VAT nor stamp duty.

The Government has stated that the GAAR is to be 'targeted at artificial and abusive arrangements … introducing a 'broad spectrum' general anti-avoidance rule would not be beneficial for the UK tax system.'[9] This is to be achieved by restricting the GAAR to arrangements which 'cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances'[10] (the 'double-reasonableness test'). Where the GAAR applies, it will counteract, on a just and reasonable basis, the tax advantage that would otherwise be obtained.

There are no specific penalties for entering into a scheme to which the GAAR applies; but where the GAAR applies and the taxpayer has not taken the GAAR into account in

7. See Supreme Court decision in *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners [2011] STC 114 3*, but note Court of Appeal decision in *Mayes v Revenue and Customs Commissioners [2011] STC 1269*.
8. First set out by the ECJ in *Halifax plc and others v Customs and Excise Commissioners* (Case C-255/02).
9. *A General Anti-Abuse Rule: Consultation document*, 12 June 2012, section 2.1
10. Finance Bill 2013, as published on 3 July 2013, clause 207