The new Netherlands-Belgium tax treaty

On June 21, 2023, the Netherlands and Belgium signed a new tax treaty. This treaty - that still needs to be ratified by both countries - completely revises the 2001 treaty, which was last amended by protocol in 2009. The new treaty will apply at the earliest from January 1, 2024 (but probably only from January 1, 2025) and will subsequently replace the current treaty. This memorandum summarizes some important aspects of the new treaty.

The multilateral instrument
The new treaty contains various provisions based on the multilateral instrument (hereinafter: MLI), including the 'principal purpose test' (hereinafter: PPT). The aim of the MLI is to incorporate a number of measures resulting from the OECD project against Base Erosion and Profit Shifting (hereinafter: BEPS) into tax treaties, including the existing and the new treaty between Belgium and the Netherlands.

Carrying on a business
Under the new treaty, the expression 'carrying on a business' includes 'the exercise of a profession and other activities of a self-employed nature'. As a result, the article about working on a self-employed basis will lapse. The country that is authorized to tax income from self-employment will in the future be determined by the article on business profits.

Domicile
The domicile article remains essentially unchanged. Where a company is regarded by both countries as a resident, the company will continue to be deemed to be established in the country in which the effective management is exercised. The Protocol to the new treaty contains criteria for determining the country of effective management. In contrast to many other tax treaties that the Netherlands has concluded, the domicile article in respect of companies in the new treaty with Belgium does not contain a Mutual Agreement Procedure.
The domicile of natural persons – as in the current treaty – is determined by where a person has a permanent home at his disposal. If a person has the disposal of a permanent home in both countries, he is deemed to be a resident of the country where the center of vital interests lies (as is also the case in the current treaty).

Permanent establishment
The permanent establishment article contains three amendments, all of which stem from the MLI:

1. the anti-fragmentation provision for building, construction and installation activities, so that the splitting up of contracts no longer offers the possibility of avoiding a permanent establishment;
2. the provision as a result of which there is sooner a permanent representative in the other country, which allows the other country to tax profits sooner than is currently the case;
3. the provision whereby the placing of activities, such as ancillary activities and activities of a preparatory nature, in different group companies no longer prevents the creation of a permanent establishment. This means that the

country in which the activities take place is entitled to tax profits sooner than is currently the case. The other country must then grant a tax exemption in order to avoid double taxation.

Two elements of the business profits article have been amended. Firstly, in the new treaty the following provision is added to deemed independence in the current treaty (the comparison of the permanent establishment with an independent business performing the same or similar activities under the same or similar circumstances): "(...) taking account of the functions performed, assets used and risks taken by the business through the permanent establishment and other parts of the business."
The latter is a generally internationally accepted transfer pricing principle, with no substantive change apparently envisaged. Another amendment ensures that a treaty partner, following an adjustment of the permanent establishment profit on the basis of this principle by the other treaty partner, applies a corresponding adjustment of the permanent establishment profit and provides access to a mutual agreement procedure concerning the double taxation that could result from such an adjustment if that adjustment were not followed (in full).

Dividend
The new dividend article contains a tax exemption by the source state for dividends paid by a company established in one country to a company established in the other country, provided that the parent company holds at least a 10% shareholding and the parent company holds the shares in the subsidiary/participation for at least 365 days. This is a significant improvement over the current treaty, in which the source country is entitled to levy 5% tax on participation dividends. It is still unclear whether the 0% rate can be applied in all cases where the 10% participation requirement and the annual holding requirement are met, or whether prior approval of the source state is required. This should be apparent from the common explanatory memorandum, once it is published, and the implementing regulations.

Article 10(9) contains a specific provision for the Box 2 shareholder who, together with his company, has emigrated from the Netherlands to Belgium and who receives dividends from his company relocated to Belgium during the first ten years after emigration, while a protective Box 2 assessment is still outstanding. In that case, the Netherlands may levy half of the general rate of the Belgian withholding tax, i.e. (50% x 30% =) 15%. As far as we are concerned, this amendment has little significance since the amendment of the Dutch Tax Collection Act (*Invorderingswet*) on September 15, 2015, because every dividend subsequently leads to collection of the protective assessment, taking account of the Dutch and Belgian taxation of the dividend (the deferral was previously only terminated with a payment of 90% or more of the profit reserves). It is likely that this amendment should be seen as an 'extra lock on the door' for the Netherlands in order to now also be able to effectively collect payment of the protective assessment in the case of dividend payments by companies whose registered office has been moved to Belgium. This is the case unless paragraph 9 should be read in such a way that Belgium is entitled to levy 30% and the Netherlands

15%, as a result of which the dividend would be subject to 45% tax in total (although in our view this cannot be the intention of the contracting states).

Interest
Under the current treaty, the Netherlands may under certain circumstances levy 10% tax if interest is paid by a debtor in the Netherlands to a creditor in Belgium (and vice versa). The right for the source country to levy 10% tax lapses in the new treaty. This is a clear simplification and improvement over the current treaty.

Compared to the current treaty, no substantive change appears to have been made with regard to interest arising from a receivable that falls under the tax regime for providing personal assets to a company.

Capital gains
The capital gains article has been simplified, but does not appear to have substantively changed. It is explicitly stipulated that Belgium cannot tax the increase in value of shares for which the Netherlands has imposed a protective Box 2 assessment. However, in the absence of capital gains tax on shares in Belgium, this provision does not (yet) have any significance, perhaps with the exception of holding companies that are taxed in Belgium on the basis of various income. This provision only takes on real significance if Belgium were to introduce capital gains tax on shares.

Director's remuneration
The new director's article distinguishes between (1) the activities performed by a director under the articles of incorporation in his capacity as such a director and (2) the other activities.
The country in which the company of which someone is a director is established may tax the 'real' director's remuneration. The remuneration for the other activities may be taxed in accordance with the income from employment article. This may mean that a director is liable for tax in both countries, depending on the nature and location of the activities.

Professors, lecturers, athletes and artists
The specific provisions for professors, lecturers, athletes and artists have lapsed. From now on, they are covered by the business profits article and income from employment article.

Pension
The pension article has not been changed compared to the current pension article. Even the threshold of EUR 25,000 remains unchanged, while it would have made sense to index this efficiency threshold, which dates from 2001, to a substantially higher amount in 2023. In view of the legislative change in Belgium, as a result of which pension benefits accrued in the Netherlands have for some time been taxed in Belgium in all cases at a progressive rate, it is to be expected that this efficiency threshold has become less relevant, but that is not the case where 'real' annuity payments are concerned. In Belgium, these are still taxed on the basis of 3% of the

annuity capital multiplied by the applicable withholding tax rate (currently 30%). It would have been to the credit of the contracting states if they had raised the efficiency threshold for annuity payments.

Double taxation relief
Under the new treaty, on the basis of the MLI only from a Dutch perspective, two amendments have been included in the provision for the avoidance of double taxation. On the one hand, a 'switchover clause' has been added, as a result of which the Netherlands no longer has to grant an exemption, but only a credit to its residents if Belgium applies the treaty to exempt income or only taxes dividends at a limited rate. An example in which this can play a role in practice is in the case of a different qualification of the allocation of taxation on severance payments to frontier workers. A second amendment is the addition of a provision regulating the way in which hybrid entities avoid double taxation.
From a Belgian perspective, a 'subject to tax' clause is now included in the double tax relief provision that relates to the exemption method, which means that an exemption is only granted if the Netherlands actually includes the relevant income in the taxation. Moreover, instead of being included in the protocol to the treaty, the treaty itself now provides for the calculation of the Belgian municipal surtax without taking the application of the treaty provisions into account. Therefore, if income under the treaty is exempt in Belgium, municipal surtax may still be payable.

No crediting of Dutch dividend tax
Under the new treaty, Belgium does not have to credit the Dutch dividend tax (15%) that is levied on dividends paid from the Netherlands to a natural person who is a resident of Belgium. The tax burden on Dutch business profits distributed to a shareholder in Belgium is therefore 25.8% Dutch corporate income tax plus 15% Dutch dividend tax plus 30% Belgian personal income tax plus Belgian municipal surtax (total burden of about 57%, depending on the Belgian municipality where the shareholder lives). This impedes cross-border business activities. It is disappointing that the countries have not found a solution for this.
A solution to this double taxation may be found, where appropriate, by initiating a mutual agreement procedure between the two states (see below).

Principal purpose test (PPT)
The new treaty contains the PPT that had already entered into force on January 1, 2022 with regard to the current treaty as a result of the MLI. The PPT provides that a treaty benefit, such as a tax reduction or exemption, will not be granted if, taking all relevant facts and circumstances into account, it can reasonably be concluded that obtaining the treaty benefit was one of the main reasons for an arrangement or transaction that led directly or indirectly to that benefit, unless it is established that granting the benefit in these circumstances would be consistent with the object and purpose of the treaty. As a last resort, provision is made for a catch all clause with a mutual agreement procedure.

Non-discrimination
The new non-discrimination article prohibits states from taxing stateless persons more heavily than nationals. Furthermore, the states are not obliged to grant their residents personal deductions, allowances and reductions to the extent that such deductions, allowances and reductions are granted by the other contracting state.

Compensation schemes for frontier workers
Both the general and the special compensation scheme for frontier workers are maintained. What is new is the provision that the general compensation scheme does not apply to income from share option rights that are taxed in the Netherlands in a different year than in Belgium. Belgium in principle taxes share option rights when they are granted, while the Netherlands taxes when they are exercised (apart from lock-up situations, when the Netherlands sometimes taxes at the end of the lock-up period).

Mutual agreement procedure
The article in which the already existing Mutual Agreement Procedure is included is amended in the new treaty in accordance with the MLI. This allows taxpayers under the new treaty, as was already the case in 2022 due to the application of the MLI, to initiate a MAP procedure in both states (previously only in the state of residence). In addition, a possibility has been added in the treaty, which also allows a MAP procedure to be initiated to avoid double taxation in cases not covered by the treaty.

Dynamic interpretation
It can be inferred from the protocol to the treaty that the contracting states advocate a dynamic interpretation of the treaty, i.e. an interpretation that may change if the OECD commentary changes.

Final remarks
The common explanatory memorandum to the treaty is not yet available. Once it has been published, it will probably be possible to clarify a number of the amendments (even) better. Furthermore, we are awaiting the parliamentary debates and any clarifications that may arise from them, as well as the implementation regulations. A lot of water will still have to flow down the Meuse and Scheldt rivers before the new treaty enters into force, however: the treaty still has to be submitted to the Council of State and subsequently requires the approval of the various parliaments in Belgium (a total of six) and the Lower and Upper House of Parliament in the Netherlands.

If you have any questions as a result of the above, your Meijburg advisor would be pleased to answer them for you.

KPMG Meijburg & Co
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