Belgian holding company regime – tightening of the minimum participation requirement

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A Program Law containing a first wave of the Arizona coalition’s tax measures has been adopted by the Belgian Parliament on 18 July 2025. This note focuses on the reform of the dividend received deduction (DRD) and the exemption for capital gains on shares in the corporate income tax, more specifically the tightening of the so-called minimum participation requirement. Although the final reform included in the Program Law deviates from the governmental agreement, the most important restriction remains that for participations of less than 10%, the ‘fixed financial asset’ condition is (re)introduced, unless the shareholder qualifies as a ‘small company’. This will mainly impact companies that hold substantial share portfolios purely as investments. Moreover, it is to be expected that this new condition will give rise to legal uncertainty and discussions.

DRD Regime

Under the DRD regime, dividends received by a parent company from its subsidiary are exempt from corporate income tax under certain conditions, in order to avoid economic double taxation of corporate profits (Art. 202-205 Belgian Income Tax Code).

The DRD regime constitutes the Belgian implementation of the European Parent-Subsidiary Directive (Directive 2011/96/EU of 30 November 2011). This Directive provides that profit distributions between subsidiaries and parent companies established in the European Union must in principle be tax-free.

The Belgian corporate income tax exemption for capital gains on shares (Art. 192 Belgian Income Tax Code) is based on the DRD regime. As from assessment year 2019, the conditions to benefit from the DRD regime and the capital gains exemption have been aligned: capital gains on shares are only exempt to the extent that the dividends from the relevant shares qualify for the DRD regime (Art. 192 Belgian Income Tax Code). An amendment to the DRD conditions therefore generally also affects the capital gains exemption for corporate income tax purposes.

For both regimes, the following three basic conditions currently apply:

- the ‘minimum participation requirement’: the shareholder must hold a participation in the distributing company of at least 10% or with an acquisition value of at least EUR 2,500,000 (Art. 202, §2, 1st indent, 1° Belgian Income Tax Code); for the record: the 10% threshold is the threshold provided for in the Parent-Subsidiary Directive; the threshold of EUR 2,500,000 is an alternative threshold that also grants access to the DRD regime for companies that do not reach the 10% threshold of the Parent-Subsidiary Directive;
- the ‘permanence requirement’: the shares must be held or have been held in full ownership for an uninterrupted period of at least one year (Art. 202, §2, 1st indent, 2° Belgian Income Tax Code); and
- the ‘taxation requirement’: a series of exclusions for cases where the required (minimum) tax level in the hands of the subsidiary is not met or in case of abuse situations (again with certain exceptions) (Art. 203 Belgian Income Tax Code).

The minimum participation requirement and the permanence requirement do not apply, however, to shares held in investment companies or regulated real estate companies and shares held by such companies (Art. 202, §2, 3rd indent Belgian Income Tax Code). The same applies to shares in, among others, intermunicipal companies and autonomous municipal companies.

Governmental Agreement

The governmental agreement announced a significant tightening of the minimum participation requirement.

It was announced that the minimum acquisition value of participations of less than 10% would be raised from EUR 2,500,000 to EUR 4,000,000. This increased minimum acquisition value would furthermore be tied to the condition that the relevant participation must have the nature of a 'fixed financial asset' in order to qualify for the DRD regime and the capital gains exemption.

The governmental agreement also provided that this tightening would not apply to small and medium-sized enterprises (Art. 2, §1, 4°/1 Belgian Income Tax Code), but only 'for and between large enterprises.'

No changes were announced with regard to the 10% threshold, which is also in line with the Parent-Subsidiary Directive.

Program Law

The Program Law deviates in two respects from the governmental agreement as regards the announced tightening of the minimum participation requirement.

Indeed, the minimum acquisition value of participations representing less than 10% of the capital of the dividend-distributing company is not raised to EUR 4,000,000, but remains at EUR 2,500,000. However, this minimum acquisition value is now coupled with the additional condition that the participation must have the nature of a fixed financial asset, as announced in the coalition agreement.

Additionally, this restriction does not apply if the shareholder is a small company, as defined in Article 2, §1, 5°, c)bis of the Belgian Income Tax Code (which refers to the criteria contained in Art. 1:24 of the Belgian Companies and Associations Code). This is a company that exceeds not more than one of the following criteria: 50 employees, an annual turnover of EUR 11,250,000 and a balance sheet total of EUR 6,000,000. The tightening of the minimum participation requirement therefore applies, contrary to what was announced in the governmental agreement, not only 'for and between large enterprises', but also to participations held by 'medium-sized enterprises' as defined in Article 2, §1, 4°/1 of the Belgian Income Tax Code. These are enterprises with less than 250 employees and an annual turnover of at most EUR 50,000,000 or a balance sheet total of at most EUR 43,000,000.

In other words, companies that are not 'small companies' and hold a participation of less than 10% but with an acquisition value of at least EUR 2,500,000 will in the future only be able to benefit from the DRD and capital gains exemption if the participation has the 'nature of a fixed financial asset'.

Contrary to the EU Parent-Subsidiary Directive?

The 'fixed financial asset' condition has therefore been reintroduced into the Belgian DRD regime. It already existed between assessment years 2004 and 2011, at that time also for participations of 10% or more until it was considered by both the European Commission and Belgian courts to be incompatible with the Parent-Subsidiary Directive. Indeed, Member States may not add general additional conditions to the application of the Parent-Subsidiary Directive (cf. recitals 31 and 32 of the CJEU Denkavit judgment of 17 October 1996; joined cases C-283/94, C-291/94 and C-292/94). Requiring participations to qualify as 'fixed financial assets' was such a general condition. This condition was therefore abolished in 2011.

Seemingly to preempt the same criticism, the additional 'fixed financial asset' condition is now only introduced for participations of less than 10% (which nonetheless meet the minimum acquisition value of EUR 2,500,000). The explanatory memorandum to the law states in this regard that the Parent-Subsidiary Directive does not apply if the 10% threshold is not reached, which is why additional conditions may be imposed.

In its opinion regarding the draft law, however, the Council of State expressed a reservation in this regard. The Parent-Subsidiary Directive states that the status of parent company is granted to 'at least any company of a Member State that holds a participation of at least 10%' (Art. 3, 1, a), i)). The Council of State deduces from this that the words 'at least' imply that the 'status of parent company' may also be granted for participations of less than 10% and that Member States are allowed to take a more flexible stance in this regard. It then states that if a Member State chooses to introduce such a more flexible regime, this does not mean that it steps outside the scope of the Parent-Subsidiary Directive. Reference is made here to case law of the Court of Justice on the permanence requirement (ECJ 26 October 2017, no. C-39/16). Based on this, the Council of State indeed expressed doubts about whether the Parent-Subsidiary Directive permits other—rather qualitative—conditions such as the 'fixed financial asset' condition, even for participations of less than 10%.

It is an interesting question, but in the end the doubts of the Council of State do not seem well-founded in our view. As mentioned, the European case law on which the Council of State relies concerns the permanence requirement (retention of the shares for a minimum period). However, that condition constitutes a possible tightening compared to the general applicability conditions of the Parent-Subsidiary Directive, as opposed to providing an alternative lower minimum participation threshold (such as in Belgium with the EUR 2,500,000 threshold). In the latter case, this is not a restriction, but rather a relaxation.

Indeed, the Parent-Subsidiary Directive allows Member States to choose not to apply the Directive to companies that have not held their participation for an uninterrupted period of at least two years (Directive, Art. 3, 2), b)). It is this specific provision that the Court of Justice referred to in the case cited by the Council of State when stating that it does not constitute a 'general exception' to the application of the Parent-Subsidiary Directive, but rather provides Member States with an option that may be transposed into national law by those that wish to do so. The introduction of a permanence requirement for participations that fall under the Parent-Subsidiary Directive can therefore be regarded as a transposition of a specific provision of the Directive to which additional conditions cannot necessarily be added.

Participations that do not meet the 10% threshold, on the other hand, do indeed generally fall outside the scope of the Parent-Subsidiary Directive. The Council of State appears to overlook that, with respect to participations of less than 10%, the Court of Justice explicitly ruled in the Tate & Lyle case that these do not fall under the Directive but must be assessed under primary EU law (cf. CJEU, 12 July 2012, C 384/11.

In other words, a reduced alternative minimum participation requirement, as in the Belgian DRD regime, does not, in our view, *ipso facto* confer the status of 'parent company' within the meaning of the Parent-Subsidiary Directive to companies holding a participation of less than 10% but with a minimum acquisition value of EUR 2,500,000. The term 'parent company' is used only in Article 106 of the Royal Decree implementing the Belgian Income Tax Code in the context of the full withholding tax exemption for dividends between parent and subsidiary companies; this exemption only applies to participations of at least 10%.

Although not explicitly stated in the explanatory memorandum to the Program Law, the purpose of the (re)introduction of the 'fixed financial asset' condition appears to be the closer alignment of the DRD regime with the scope and underlying objectives of the Parent-Subsidiary Directive. Participations held solely for investment purposes are therefore generally excluded from the DRD regime and the capital gains tax exemption on shares.

Notion of 'Fixed Financial Assets'

The Belgian Income Tax Code does not contain a specific definition of 'fixed financial assets' but merely refers to the meaning attributed to this notion under accounting law (Art. 2, § 1, 9° Belgian Income Tax Code).

Accounting law itself does not provide a clear definition of this concept either. However, Article 3:89 of the Royal Decree implementing the Belgian Companies and Associations Code describes which shares may be recorded as fixed financial assets. The explanatory memorandum to the Program Law confirms that this accounting provision must serve as the starting point, as further interpreted by the positions of the Belgian Commission for Accounting Standards.

Accounting law identifies three categories under which shares can be recorded as 'fixed financial assets':

- 'associated enterprises,' implying the exercise of 'control';
- 'enterprises with which there is a participation relationship,' ie non-associated enterprises where 'influence on management' can be exercised; and
- 'other fixed financial assets.' Shares are recorded under this residual category if, by creating a durable and specific link with the issuing company, they promote the shareholder company's own business activities.

Shares that do not fall under one of these categories cannot be regarded as fixed financial assets. They must be recorded as 'investments'.

According to the explanatory memorandum, the principles of this accounting provision must also be applied in substance to entities to which this provision does not directly apply. This concerns, in any case, credit institutions, insurance companies and brokerage firms, which are not generally subject to standard accounting legislation.

Durable and Specific Link

The categorisation into three sections provided for in accounting law (see above) indicates that the concept of 'fixed financial assets' on the one hand presupposes a certain durability and on the other hand a specific link with the issuing company. It is primarily the nature of this latter link with the issuing company that determines the distinction between the various balance sheet categories. From a tax perspective, it can be expected that the third category, 'other fixed financial assets,' will be of particular importance, since it by definition relates to participations of less than 10%.

An important question will therefore be whether the shares, by creating a durable and specific link with the issuing company, promote the shareholder company's own business operations. The explanatory memorandum states that this depends on the factual aspects of the situation in question, taking into account the nature of the relationships between the companies involved. Thus, this is a factual question, one for which no rebuttable or irrebuttable presumptions apply (as is the case for the concepts of 'control' and 'influence over the management of the company,' see Art. 1:14 and 1:22 of the Belgian Companies and Associations Code). The explanatory memorandum further clarifies that the assessment of the nature of the participation takes place at the time of attribution or payment of dividends. For the application of the capital gains exemption on shares, this test will most likely need to take place at the moment the capital gain is realised.

Shares held solely as an investment of 'excess cash' will normally not be regarded as fixed financial assets.

By contrast, participations of less than 10% in companies with which the shareholder maintains a specific business relationship (eg, a supplier or customer), or participations that guarantee the financing of certain corporate projects (eg, those dependent on the dividend policy of the distributing company), may be considered strategic and therefore classified as fixed financial assets. The same applies to participations below 10% when held in view of a possible strategic combination, such as a merger or acquisition. Moreover, one could reasonably argue that any sufficiently identifiable link between the nature of the activities of the shareholder-company and those of the company in which the shares are held may justify a classification as fixed financial assets (eg, an investment in a company that develops or manages technology that could become specifically relevant to the shareholder-company's business activities).

The required specific link may also be evidenced by a shareholders' agreement granting the shareholder, for example, information or governance rights. Participations of less than 10% may also be regarded as fixed financial assets when holding such participations is part of the core activity of the shareholder-company (as, for example, evidenced by its articles of association). When such participations have an acquisition value of at least EUR 2,500,000, the minimum participation requirement may thereby be fulfilled. Finally, in our view a participation of at least EUR 2,500,000 held by Company A in Company B qualifies as fixed financial assets when another Company C exercises control over both A and B. The fact that Company C exercises (indirect) control over Company B partly through the participation held by Company A is, in our opinion, sufficient for this participation to be classified as fixed financial assets.

It remains to be seen whether a circular letter or administrative guidance will follow in which the Belgian tax administration further interprets the 'fixed financial assets' condition using specific examples.

Whether shares qualify as fixed financial assets must primarily be assessed by the shareholder's board. It is therefore advised to properly document the reasons why shares are considered fixed financial assets and to record these shares accordingly in the accounts.

What ultimately matters is that shares are fixed financial assets 'by nature'. Although shares that meet the definition of fixed financial assets should usually also be recorded as such in the company's accounts, an incorrect recording as an 'investment' alone should not necessarily prevent companies from claiming the DRD or capital gains exemption.

For the same reason, the fact that the introduction of the fixed financial assets requirement prompts a company to revise and correct the accounting treatment of shares should not, in our view, be considered problematic or abusive if the accounting classification as fixed financial assets can be justified.

Furthermore, it should be noted that according to general accounting rules, shares in 'associated enterprises' or in 'enterprises with a participation relationship' (see above, the second category), which were acquired or subscribed with a view to resell or are intended to be transferred within twelve months, *may* be recorded under (or transferred to) the 'other investments' category. Although we consider it defensible that such shares retain their *nature* as fixed financial assets despite such classification as an 'investment,' it seems advisable to record and retain them under the fixed financial assets category to avoid unnecessary discussion regarding the application of the DRD regime or the capital gains exemption. After all, this is merely an accounting possibility and not an obligation.

Withholding Tax Exemption

Foreign corporate shareholders holding a participation in a Belgian company of less than 10% but with an acquisition value of at least EUR 2,500,000 may, under certain conditions and limitations, benefit from an exemption from Belgian withholding tax on dividends. This exemption can be claimed either through a refund procedure or even at source (Article 264/1 Belgian Income Tax Code). The exemption was introduced in response to the *Tate & Lyle* judgment of the EU Court of Justice, in which Belgium was condemned for violating the free movement of capital. According to the Court, such foreign companies may not be treated less favourably than a Belgian shareholder in a comparable situation. If the conditions of the Belgian DRD regime are met, Belgian corporate shareholders generally do not bear any tax due to the DRD regime and the fact that the withholding tax may be credited (and reimbursed).

The Program Law now extends the tightening of the minimum participation requirement—specifically the requirement that the shares must have the nature of fixed financial assets—to this *Tate & Lyle* withholding tax exemption for foreign corporate shareholders holding a participation in a Belgian company of less than 10% but with an acquisition value of at least EUR 2,500,000.

This may raise questions of interpretation, since non-resident shareholders may naturally apply different accounting classifications. The explanatory memorandum first refers, for interpreting the fixed financial assets condition in the case of foreign corporate shareholders, to the explanation used for Belgian corporate shareholders. On the other hand, the memorandum also mentions that reference can be made to the definitions and annexes included in the European Accounting Directive (Directive 2013/34/EU of 26 June 2013), as well as (insofar as useful) to IFRS 10 (on consolidated financial reporting and the concept of control under IFRS).

It is however important to note that the definition of fixed financial assets in Belgian accounting rules is stricter than that prescribed by the European Accounting Directive, which defines fixed assets as 'those assets which are intended for use on a continuing basis for the undertaking's activities' (Article 2.4 of the Directive). In other words, the Directive requires durability but not specificity, and it also does not require that the shares promote the corporate shareholder's own business operations; the latter is a characteristic of a 'participation' only (see Article 2.2 of the Directive). In previous opinions, the Belgian Commission for Accounting Standards has adopted a rather strict interpretation of the concept of 'fixed financial assets' under Belgian accounting law, without taking into account the more flexible approach under the European Accounting Directive (see CBN Opinion NFP/5 on the accounting of an investment portfolio, albeit by a private foundation; CBN Opinion 147/1 on the accounting of fixed-income securities).

The question therefore arises whether the Belgian tax administration could challenge that shares, which are qualified and recorded as fixed financial assets under the accounting rules applicable to a foreign corporate shareholder (eg, based on the definitions in the European Accounting Directive or possibly IFRS 10), are fixed financial assets by nature under the stricter Belgian definition. Due to the explicit reference to these international accounting standards in the explanatory memorandum, this does not seem likely. However, this could then potentially result in a 'reverse discrimination,' whereby foreign shareholders are treated more favourably than domestic shareholders (who face the stricter concept of 'fixed financial assets').

To benefit from this withholding tax exemption, the shareholder must confirm in writing that the shares have the nature of fixed financial assets by providing a certificate to the Belgian dividend-paying company (amended Article 264/1, § 2, 3° Belgian Income Tax Code). The Belgian distributing company may, when applying the exemption at source, generally rely on this certificate and, in our view, does not have an active duty to verify its correctness.

Legal Uncertainty?

Although the introduction of the 'fixed financial assets' condition for participations below 10% seems to better align with the actual objectives of the DRD regime and the Parent-Subsidiary Directive, it will likely lead to increased legal uncertainty in applying the DRD regime and the capital gains exemption on shares. The interpretation of the concept of 'fixed financial assets' is inherently factual and partly subjective. The question of whether shares meet this description—specifically, whether a sustainable and specific link exists with the company in which the shares are held—could become a challenging point of discussion during future tax audits.

In the past, when the 'fixed financial assets' condition still applied generally under the DRD regime, the Ruling Commission interpreted this requirement rather leniently (see eg Advance Tax Ruling No. 2010.050 of 9 March 2010). It remains to be seen whether the Ruling Commission will interpret the condition as leniently now that it has been reintroduced.

This raises the question of what the most appropriate way is to obtain prior legal certainty regarding whether shares have the 'nature of fixed financial assets'.Since the notion of 'fixed financial assets' is an accounting concept, one might consider requesting an accounting ruling ('Individual Decision on Accounting Law') from the Belgian Commission for Accounting Standards regarding the interpretation of this concept, and in particular the fulfilment of the 'specificity requirement.'

However, when a request for an accounting ruling primarily has tax consequences, no such accounting ruling can in principle be issued—unless the primacy of accounting law has already been recognised, the applicant agrees to consult with the competent tax authority, or agrees to submit a request for an advance tax ruling to the Belgian Ruling Commission (Article III.93/1, § 4, 1st indent, 3° Code of Economic Law).

As regards the interpretation of 'fixed financial assets' for the purposes of the minimum participation requirement, the primacy of accounting law seems well established. This is evident from the fact that, as discussed above, both Article 2, § 1, 9° of the Belgian Income Tax Code and the explanatory memorandum to the Program Law explicitly refer to accounting law (and to the opinions of the Commission for Accounting Standards). It therefore seems possible for the Commission for Accounting Standards to issue an accounting ruling on the application of the term 'fixed financial assets' without (formally) consulting the tax administration or the Ruling Commission.

Still, the question remains what the interaction in practice will be between the Commission for Accounting Standards and the tax administration, especially the Ruling Commission, regarding the interpretation of the concept of fixed financial assets. The tax administration is, at least in theory, not bound by an accounting ruling from the Commission for Accounting Standards. Since tax rulings issued by the Ruling Commission are binding in principle (under Article 23 of the Ruling Act of 24 December 2002), taxpayers may still prefer to have the qualification as 'fixed financial assets' confirmed by the Ruling Commission instead of the Commission for Accounting Standards. In principle, at least one member of the Ruling Commission must also sit on the Commission for Accounting Standards body responsible for accounting rulings, so some convergence may be expected between the accounting rulings of the Commission for Accounting Standards and the tax rulings of the Ruling Commission (Article III.93/1, § 5 Code of Economic Law).

Entry into Force

The amendments to the DRD and capital gains tax exemption will apply as from assessment year 2026. The entry-into-force clause in the law contains an anti-abuse provision, stating that any change to the financial year-end made on or after 3 February 2025, which is not justified by reasons other than the avoidance of income tax, will have no effect on the application of the tightened DRD and capital gains exemption.

By contrast, the changes relating to the withholding tax exemption will take effect on the date of publication of the Program Law in the *Belgian Official Gazette*.

Companies affected by the changes to the minimum participation requirement may need to take action to limit the damage. For example, note that capital gains on shares that no longer meet the minimum participation requirement will be fully taxed at normal rates, not just the capital gain accrued after the new rules take effect. A radical way to avoid this 'retrospective' effect—at least for companies whose financial year does not coincide with the calendar year—is to dispose of the shares in assessment year 2025, in order to still benefit from the capital gains exemption.

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