New Belgian exit tax: Mainly a deterrent?

July 2025

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. Among the tax measures included in the Program Law is the 'exit tax', which makes a deemed liquidation dividend taxable in the hands of the shareholders of a Belgian company that emigrates or is absorbed by a foreign company. In addition to many practical difficulties, this exit tax may lead to double taxation and also raises fundamental questions of compatibility with European law. It seems to us, therefore, that this new tax will mainly have a dissuasive effect.

Emigration of company: Also deemed liquidation dividend for shareholder ?

Exit tax for corporate income tax purposes

For corporate income tax purposes, the emigration (the 'transfer of the principal establishment or the seat of management or administration') of a Belgian company abroad is assimilated to the liquidation of the emigrating company (Art. 210, § 1, 4° Belgian Income Tax Code). In such a case, the market value of the company's assets, after deduction of the fiscal capital, is considered a distributed dividend (Art. 210, § 2 Belgian Income Tax Code). Due to this tax fiction, latent capital gains on the assets of the emigrating company as well as its tax-exempt reserves are in principle subject to corporate income tax (Art. 208 *jo.* 209 Belgian Income Tax Code). However, this is not the case if the company transfers its registered office to another EU member state, at least if and to the extent that its assets and tax-exempt reserves are retained in a Belgian establishment of the emigrated company after the transfer of seat (Art. 214bis Belgian Income Tax Code).

Moreover, such an exit tax on latent capital gains is, for corporate income tax purposes, also imposed by the European ATAD Directive (Directive of July 12, 2016 'laying down rules to combat tax evasion practices that directly affect the functioning of the internal market,' Art. 5).

Also deemed liquidation dividend for shareholder ?

According to the central services of the Belgian tax administration, the aforementioned legal fiction applicable for corporate income tax purposes also affected the shareholders of the emigrating company. Indeed, according to the central services of the tax administration, the provision making share repurchase and liquidation proceeds taxable as dividends (Article 18, 1st indent, *2°ter* Belgian Income Tax Code) does not only relate to a 'standard' liquidation (within the meaning of Article 209 Belgian Income Tax Code) whereby a distribution of the wound up company's assets takes place, but also to acts assimilated to a liquidation by Article 210 Belgian Income Tax Code (such as a transfer of seat abroad).

However, the Belgian Tax Ruling Commission took a different view (see, eg, Advance Tax Ruling No. 2019.0254 of April 30, 2019). According to the Ruling Commission, in case of a transfer of seat in legal (and accounting) continuity, in reality no (full or partial) distribution of the emigrating company's assets takes place. In that case, according to the Ruling Commission, there is also no actual enrichment of the shareholders. After all, the shareholders do not receive an actual distribution from the emigrating company. This decision was also applied by the Ruling Commission for withholding tax purposes: since there is no attribution or payment of any movable income due to the transfer of seat in legal continuity, no withholding tax is due in accordance with Article 267 of the Belgian Income Tax Code. However, the Ruling Commission did typically point out that if the operation were to take place without legal (and accounting) continuity, there could indeed be an effective distribution of the corporate assets (with possible taxability as dividends and withholding tax being triggered).

The Ruling Commission's position was also followed in Belgian case law. When the Court of First Instance of

Walloon Brabant had to rule on whether or not withholding tax was due when a Belgian company transferred its seat to France in legal continuity, it pointed to the elements cited by the Ruling Commission. Moreover, the court pointed to the fact that Article 18, 1st indent, 2°ter Belgian Income Tax Code (which provides for the taxation of repurchase and liquidation proceeds as dividends) only refers to Articles 186, 187 and 209 Belgian Income Tax Code, and not to the fiction contained in Article 210, § 1, 4° Belgian Income Tax Code (which assimilates the transfer of seat to a liquidation). Moreover, according to the court, the latter provision is only applicable for corporate income tax purposes. Also, the fact that Article 210 Belgian Income Tax Code assimilates certain transactions to a liquidation, according to the court, shows that in reality no distribution of the company's assets takes place in such transactions. The court concluded that the text of Article 18, 1st indent, 2°ter Belgian Income Tax Code is clear and should be interpreted strictly. Consequently, there could not be a taxable dividend in the hands of the shareholders/physical persons following the transfer of seat to France (Court of Walloon Brabant, 3 February 2023, no. 21/96/A).

The case therefore seemed to be settled in favour of the shareholder: the fiction of liquidation in case of emigration of a Belgian company did not apply to the shareholders of the emigrating company, at least if the transfer of seat took place in legal (and accounting) continuity. This absence of taxation does not necessarily lead to a loss of tax base for the Belgian Treasury: future dividends and capital gains on shares of the emigrated company are subject to their normal tax regime for the (Belgian) shareholder. This is only different if the shareholder subsequently emigrates also . Perhaps this last hypothesis in particular explains the aforementioned strict attitude of the central services of the Belgian tax administration, as well as the government's decision to introduce a new exit tax.

A similar discussion can also arise in case of a cross-border taxable merger or (partial) demerger that is carried out in legal (and accounting) continuity : again, it may be unclear whether this gives rise to the 'distribution' of a dividend subject to withholding tax, or rather to a potential capital gain realised by the shareholder of the absorbed or demerged company due to the exchange of shares.

Governmental Agreement

Apparently, the new government wanted to change this status quo. Under the title 'exit tax,' the governmental agreement mentioned succinctly that *'the emigration of a legal entity will be treated for tax purposes as a fictitious liquidation of the legal entity'.*

Since such emigration was previously already treated for corporate income tax purposes as a liquidation of the emigrating company (see above, Art. 210, § 1, 4° Belgian Income Tax Code), it was clear that this new measure would aim at the taxation at the level of the shareholders of the emigrating company.

Program Law

The Program Law indeed extends the tax fiction of liquidation to the shareholders of the emigrating company. Going forward, these shareholders will be considered to receive a (deemed) liquidation dividend.

New category of dividends

To this end, a new category of income qualifying as dividends is inserted in Article 18 Belgian Income Tax Code. Henceforth, explicitly taxable as a dividend is *'the part of a company's assets which, in application of article 209 [Belgian Income Tax Code], qualifies as a distributed dividend for corporate income tax purposes'* in the event of a transfer of seat of a Belgian company abroad, as well as in the event of a cross-border merger, demerger or assimilated transaction (new Article 18, 1st indent, *2°quater* Belgian Income Tax Code). Each shareholder is of course only taxable on the deemed liquidation dividend in proportion to its participation in the company concerned.

Importantly, the scope of the exit tax is not limited to actual emigrations, but also covers the aforementioned reorganisation transactions. This is somewhat understandable, since such reorganisation transactions may *de facto* have a similar effect as the emigration of the legal entity concerned.

However, the (deemed) liquidation dividend is, according to the law, only taxable 'to the extent that this dividend relates to assets' which, as a result of the emigration or reorganisation transaction, 'are no longer used or retained in Belgium' (ie, in a Belgian establishment). In this respect, the explanatory memorandum refers to transactions that 'do not (or no longer) fall within the scope of Article *214bis* Belgian Income Tax Code'; as mentioned, that article relates to cross-border transfers of seat within the EU whereby the assets and tax-exempt reserves of the emigrating company remain behind in a Belgian establishment.

In our view, the condition of 'retention' of the assets in Belgium also means that in case of a later transfer from the Belgian establishment (eg to the foreign head office, so that this condition is no longer met), the taxability of the original deemed liquidation dividend could still be triggered, even if this transfer only takes place years after the original transaction. The emigrating, acquired or demerged Belgian company will therefore be well advised to determine both the deemed liquidation dividend and the identity and allocation of its shareholding at the time of the transaction in view of the possible deferred application of the exit tax. In other words, shareholders could still be confronted with the taxability of the deemed liquidation dividend a long time after the transaction, even though they are no longer shareholders of the emigrated, acquired or demerged company at that time.

It should also be noted that the exception to the new exit tax for assets retained in Belgium is not limited to 'intra-European' transfers or reorganisations, contrary to what is the case for corporate income tax purposes (cf. the aforementioned Article *214bis* Belgian Income Tax Code, which only applies to the transfer of registered office within the EU). Where a cross-border transfer of seat or reorganisation transaction to a 'third country' cannot occur tax neutral for corporate income tax purposes, it will, on the other hand, not give rise to the application of the new exit tax in the hands of the shareholders to the extent that the assets remain in Belgium. The same applies to intra-European transactions that cannot be tax-neutral for corporate income tax purposes for another reason (eg because they have tax avoidance as their main objective within the meaning of Article *183bis* Belgian Income Tax).

The deemed liquidation dividend is reduced by the amount of corporate income tax owed by the Belgian company emigrating or involved in the reorganisation operation. In particular, this concerns the tax on the taxable profits of the year of emigration or reorganisation, on the latent capital gains and on any tax-exempt reserves.

No withholding tax, but obligation to declare and issue tax statements

The deemed liquidation dividend will not be subject to withholding tax because, according to the explanatory memorandum, '*no actual income is granted or made payable*'. Note that in doing so, the legislator is in fact adhering to the Ruling Commission's (and case law's) previous point of view.

This absence of withholding tax means that shareholders who are considered to receive a deemed liquidation dividend will have to declare this dividend in their income tax returns.

Since shareholders are often not aware of the existence of a deemed liquidation dividend and the amount thereof, the emigrating Belgian company (or Belgian company involved in the reorganisation operation) must prepare and deliver individual tax statements to the shareholders so that the latter can fulfil their declaration obligation.

In the absence of such statements, the secret commissions tax will be levied in the hands of the Belgian company or, if assets are only transferred abroad some time after the transaction, in the hands of its Belgian establishment (amended Articles 219 and 233 Belgian Income Tax Code). This secret commissions tax amounts to 100% of the deemed dividend to shareholders-physical persons and 50% of the deemed dividend to shareholders-legal entities. This extension of the secret commissions tax to the deemed liquidation dividend is designed to give the companies concerned maximum incentive to produce the necessary tax statements.

Personal scope

The new exit tax applies to shareholders subject to personal income tax as well as to shareholders subject to corporate income tax, legal entities income tax, or non-resident income tax. For shareholders-Belgian tax residents, according to the legislator, this results directly from the addition of the deemed liquidation dividend to the dividend definition in Article 18 Belgian Income Tax Code, read in conjunction with Article 183 (corporate income tax) and Article 221, 1st indent, 2° Belgian Income Tax (legal entities income tax). For shareholder-companies, it is additionally clarified that deemed liquidation dividends are also eligible for the dividend received deduction (new Art. 202, § 1, 3° Belgian Income Tax Code)

- For *personal income tax purposes*, the deemed liquidation dividend will be taxable at the separate dividend tax rate, generally 30 % (cf. Article 171, 1st indent, 3° Belgian Income Tax). The question arises whether the deemed liquidation dividend can also qualify for the reduced rate of 20% or 15% resulting from the *VVPRbis* regime (cf. Art. 171, 1st indent, *3°sexies* Belgian Income Tax Code). Although this does not seem to be the intention, Article 171 Belgian Income Tax Code has not been amended to explicitly exclude also the deemed liquidation dividend from the specific separate rates under the *VVPRbis* regime. Article 171 Belgian Income Tax Code still refers to Article 269, § 2 Belgian Income Tax Code (which contains the reduced withholding tax rate), while the latter provision now only excludes the dividends *'referred to in Article 18, 1st indent, 2°ter and 3° Belgian Income Tax Code'* from the reduced withholding tax (and therefore not the deemed liquidation dividend included in the new Article 18, 1st indent, *2°quater* Belgian Income Tax Code).
- In our view, the application of the exit tax in the *legal entities income tax* can also give rise to ambiguity. After all, in the legal entities income tax, the tax on movable income is equal to the withholding tax (Art. 221, 1st indent, 2° Belgian Income Tax Code *jo.* Art. 225, 1st indent Belgian Income Tax Code). However, as pointed out above, the explanatory memorandum explicitly confirms that no withholding tax can be applied to the deemed liquidation dividend because no actual income is attributed or paid. If the withholding tax is not withheld by the payor of the income (in accordance with legal and regulatory provisions), it is payable by the recipient subject to the legal entities income tax *'to the extent that a withholding tax is due in accordance with the legal and regulatory provisions in force'* (Art. 262, § 1 Belgian Income Tax Code). In our opinion, however, this does not seem to provide a legal basis for the legal entity-shareholder to pay the withholding tax on the deemed liquidation dividend. Indeed, *no* withholding tax is due *'in accordance with the legal and regulatory provisions'* in the absence of

attribution of any actual income. Thus, in our view, to apply the exit tax to legal entities subject to the legal entities income tax would have required that the deemed liquidation dividend is made subject to a separate tax rate of 30% as a specific category of taxable income.

- For *non-residents*, the deemed liquidation dividend has been explicitly included in the tax base of the non-residents income tax (amended Art. 228, § 2, 2° Belgian Income Tax Code). However, the effective application of the exit tax to non-residents seems less straight forward. As discussed above, the deemed liquidation dividend is not subject to withholding tax precisely because no actual income is allocated or made payable.

Therefore, the obligation to declare the deemed dividend in the tax return would also apply with respect to non-residents, 'in accordance with the double tax treaties applicable to non-resident shareholders', the explanatory memorandum states.

However, it is highly questionable whether Belgium, as the source state under the applicable double tax treaties, will have any taxing power at all over the deemed liquidation dividend to foreign shareholders. In our view, the answer to this depends on whether a double tax treaty can, at all, apply to 'fictitious' income. At least, based on the wording of most double tax treaties, this does not seem to be the case. For example, the dividend article (Art. 10 OECD Model Convention) talks about dividends 'paid' by a company. The same seems to be true of the treaty provision on business profits (Art. 7 OECD Model Convention), which seems to assume actual 'profits.' Finally, internal law 'fictions' that could affect taxing power generally do not apply for the purposes of double tax treaties.

Prevention of double taxation and liquidation reserves

The new exit tax could of course give rise to double taxation, for example if the emigrated company later effectively realises the latent capital gains on its assets transferred abroad and distributes those to its shareholders. These shareholders have already been taxed a first time on the same latent capital gain included in the deemed liquidation dividend as a result of the emigration or reorganisation transaction, or the subsequent transfer out of the Belgian establishment.

That is why the law adds a new category of exempt movable income to Article 21 Belgian Income Tax Code: 'dividends paid' by the emigrated company or company involved in the reorganisation operation are not taxable 'to the extent that the taxpayer has demonstrated that they result from the realisation of assets transferred abroad' as a result of the emigration or reorganisation operation. The exemption applies 'up to the amount' that 'qualified as a dividend' in the hands of the taxpayer at the time (new Art. 21, 1st indent, 15° Belgian Income Tax Code). Hence, only the amount of the (distributed) capital gain that exceeds the latent capital gain at the time of emigration or reorganisation will be additionally taxable as a dividend. A similar corrective measure is also introduced for shareholder-companies, in the form of a new exemption for this type of dividend (new Art. 202, § 4 Belgian Income Tax Code).

Note that this exemption therefore only applies in respect of the *same* taxpayer who was already a shareholder at the time of the emigration or reorganisation transaction. Therefore, the exemption does not apply if the subsequent dividend is received by a new shareholder who acquired shares from the previous shareholder, although (economic) double taxation also arises in this case.

In addition, this exemption seems difficult to apply in practice. Often the shareholder will not be able to prove that the subsequent dividend 'results from' the realisation of assets transferred abroad at the time of emigration or reorganisation or at any later time. The Council of State also questioned the concrete application of this exemption. In response, the government stated that this proof is 'deliberately left open,' but that, in general, it would be 'most straightforward' for the shareholder, on the one hand, to ask the distributing company for 'an attestation or declaration' indicating the elements referred to in the exemption, and, on the other hand, to rely on 'his own tax return' showing that the deemed liquidation dividend 'was taxed'. This too, of course, raises questions. Indeed, it also seems that the distributing company will not always be able to certify with certainty that the distributed profits resulted from the realisation of assets that were transferred abroad, eg, if operating distributable profits not resulting from the realisation of such assets were also generated.

As mentioned, this exemption only applies up to the amount of the part of the (foreign) dividend corresponding to the deemed liquidation dividend previously taxed as a result of the emigration or reorganisation. Obviously, only the amount of the dividend 'net at the border' is taken into account.

The explanatory memorandum further clarifies that this exemption can be applied several times if 'the realised capital gain is not distributed in one go, but spread over several years' : the application of the exemption can then 'be applied several times' until the 'realised capital gain has been completely distributed'. In that case, the shareholder would thus have to request a new certificate or declaration from the distributing company with each successive dividend in order to apply the exemption....

Finally, Article 21 Belgian Income Tax Code is amended to clarify that a deemed liquidation dividend is not taxable to the extent that it arises from the liquidation reserves of the emigrating company or company involved in the reorganisation (amended Art. 21, 1st indent, 11°).

(In)compatibility with EU law ?

A fundamental question is whether the new exit tax is compatible with European law. Our initial analysis is that this may not be the case.

Tax without cash

Indeed, the exit tax may give rise to a tax cost for shareholders, without any income actually received. They could therefore face liquidity problems as a result of the emigration or reorganisation. Such a liquidity disadvantage constitutes a typical restriction of the freedom of establishment and free movement of capital, as it may discourage a company from transferring its seat to another EU member state. To be compatible with European law, such restrictions must be justified by overriding reasons of general interest, be appropriate to achieve the objective pursued and not go beyond what is necessary (the proportionality test).

The only corrective measure currently provided for to partially offset the liquidity disadvantage caused by the exit tax is the possibility of deferring payment of the exit tax over five years (new Art. 413/1, § 1, 1st indent, 8° Belgian Income Tax Code). This by analogy with the existing possibility of spreading payment of any corporate income tax due in the event of an intra-European transfer of seat or reorganisation. However, this arguably seems insufficient to respect EU fundamental freedoms.

The Council of State, in its opinion on the exit tax, was also very critical of the compatibility of the exit tax with European law and recommended at least the inclusion of additional justification in the explanatory memorandum. The Council of State also pointed out the difference in treatment between, on the one hand, shareholders with shares in an emigrating company who do not themselves transfer their tax residence outside Belgium and, on the other hand, shareholders with shares in a company which transfers its registered office within Belgium. The Council of State pointed out that only the first category of shareholders is subject to exit tax, although with respect to both categories Belgium retains its taxing powers. The Council of State added that this first category of shareholders is also treated in the same way as shareholders with shares in an emigrating company, who themselves are also emigrating, although the Belgian State does not lose its taxing powers over the first category of shareholders.

Disproportionality

According to the legislator, however, the present exit tax does not violate EU fundamental freedoms. First and foremost, the intention would be to 'strengthen the internal coherence of the national tax system'. In addition, the legislator also refers to the objective of 'ensuring, in accordance with the territoriality principle, a balanced distribution of taxing power between Belgium and other member states or third countries, linked to a temporal component'. Belgium would seek to exercise its taxing power 'on the distribution of profits and latent capital gains accrued in its territory during the period in which the company in question had its tax domicile in Belgium, without these profits also being taxed by way of a withholding tax withheld by a member state or a third country on these dividends'.

The aforementioned differences in treatment cited by the Council of State could also, according to the legislator, be justified under this 'territoriality principle'. The government, in response to the Council of State's comments, also appeared to cite, in addition, that in 'some important exit cases that have manifested themselves in recent years,' the exit of the company is often followed by the exit of the physical person, so that it can be assumed that in many cases there will be tax planning around this exit tax if residents would be exempt from it.

However, this justification seems far from sufficient in light of the proportionality test. The exit tax is indeed also applicable to shareholders who are and remain Belgian tax residents, and thus remain under Belgian tax jurisdiction after the emigration or reorganisation. As indicated above, Belgium in no way loses its taxing rights in this case, eg with respect to dividends paid by the emigrated or absorbing company. Nor can a general suspicion of tax fraud or tax evasion justify a restriction to the freedom of establishment or free movement of capital. Moreover, the Belgian exit tax will not prevent the 'host state' from still withholding tax (at source) on future dividends that may (partly) arise from capital gains accrued on Belgian territory.

In any event, a less far-reaching alternative would have been to defer the taxation of the deemed liquidation dividend until the shareholder actually leaves the Belgian tax jurisdiction by emigrating abroad himself.

Moreover, in our view, the interaction with the announced general capital gains tax on financial assets cannot be overlooked either when applying the proportionality test. Reportedly, this capital gains tax would also be applicable in case of emigration of the owner of financial assets abroad, whereby the market value of the assets at the time of such emigration would serve as the deemed sales price for the purpose of applying the capital gains tax. The application of this measure would therefore already allow Belgium, in a certain way, to tax any latent capital gains on the assets of the emigrated company, which would also be reflected in the value of the shares of the said company, when the shareholder emigrates from Belgium (at least as far as shareholders-physical persons or legal entities subject to the legal entities income tax are concerned).

In addition, one can also question whether the designed exit tax does not go beyond what is necessary in other respects. For example, it appears that there is no way to take into account any depreciation (or capital losses) that would occur after the emigration or reorganisation operation in relation to the latent capital gains that were taxed as a deemed liquidation dividend. The Council of State also pointed this out, citing ECJ case law (ECJ 7 September 2006, No. C-470/04, *N*, para. 54). The government's response shows that, in its view, the European case law cited has since been superseded. Also, according to the government, a corrective rule that takes into account such impairments or capital losses would ‘further erode the fiscal efficiency of the exit tax’. Again, it is highly debatable whether this justification can suffice to establish compatibility with EU law.

We also believe that the subsequent exemption, upon actual distribution of a dividend corresponding (in part) to the already taxed deemed liquidation dividend, may be inoperable in practice (see above), which contributes to the disproportionality of the exit tax. Indeed, for shareholders who have since emigrated abroad themselves, double taxation on such a dividend is likely to be unavoidable. Indeed, the new state of residence will generally not grant an exemption for the part of the dividend corresponding to the deemed liquidation dividend already taxed in Belgium.

Therefore, while the application of an exit tax for corporate income tax purposes is now a well-known and accepted measure, also at European level (cf. the European ATAD Directive), this seems to be much less the case for an exit tax at the level of the shareholders of the emigrating or reorganised company. Indeed, the fundamental difference is that the taxing power over the profits of the emigrating company for corporate income tax purposes by definition disappears after emigration, while this is not necessarily the case for the taxing power over the income of the (Belgian) shareholders of the emigrated company.

Entry into force

The provisions of the Program Law relating to the exit tax will take effect as from the date of publication of the Program Law in the *Belgian Official Gazette*, and apply to emigrations or relevant reorganisation transactions occurring as of that date.

The exit tax relates to ‘fiscal’ transfers of seat, namely the transfer of the principal establishment or seat of management or administration abroad. As a result, a transfer of the corporate (statutory) seat occurring as from the date of publication of the Program Law in the *Belgian Official Gazette* will not, in our view, be subject to the exit tax if it appears that the company had previously already transferred its ‘fiscal’ seat abroad or retains its ‘fiscal’ seat in Belgium despite the transfer of statutory seat.

Conclusion

The new exit tax probably deserves the prize for the best ‘bad idea’ of the new Belgian government. As mentioned, the Belgian State currently loses tax base mainly when the emigration of a company is accompanied by the emigration of the shareholder. Closing this loophole is certainly a valid choice. However, the government's approach leads to situations of double taxation. Moreover, the arrangement seems disproportionate and probably violates European law.

Also, the elaboration of the exit tax comes across as an administrative ‘bullying’, due to the linking of the tax to whether or not assets are retained within a Belgian establishment and the obligation for the emigrated or acquiring company to issue tax statements. In fact, it would have sufficed to link the exit tax to the emigration of the individual shareholder, something that is, moreover, part of the general capital gains tax that the government is currently developing. Moreover, it remains to be seen how that new general capital gains tax will interact with the exit tax and, more specifically, whether a correction for double taxation will be provided for.

In conclusion, this new exit tax will mainly discourage Belgian companies from emigrating or reorganising abroad. It may therefore also make Belgium less attractive for internationally operating companies looking for a suitable seat location for a new business activity or holding company.

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