

## Tax alerts

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25 June 2009

#### Circular on participation exemption issued

The Belgian government agreed on 15 May 2009 to comply with the European Court of Justice (ECJ) decision in the *Cobelfret* case (*Cobelfret v Belgium* (C-138/07)), in which the Court upheld that the Belgian dividends received deduction (DRD) regime is incompatible with article 4(1) of the EC Parent-Subsidiary Directive because it fails to effectively refrain from taxing dividends in some situations. The government has now issued an administrative circular setting out its position on the effects of the *Cobelfret* decision.

The Belgian government had previously approved a draft circular confirming a broad interpretation of the ECJ decision and its impact on the DRD regime. In particular, the government decided that (current and carried forward) “excess” DRD that relates to dividends from companies resident in Belgium or another EU/EEA Member State may be claimed, provided the conditions for the DRD were met at the time the dividends were received.

The final circular confirms this position and includes the following clarifications:

**Territorial scope:** The carry-forward of “excess” DRD only applies to dividends from companies resident in:

- The European Community, including Belgium (as from 1992, when the Parent-Subsidiary Directive became effective); and
- The European Economic Area (i.e. the EU, plus Iceland, Liechtenstein and Norway) for dividends paid as from 1 January 1994 (the date the EEA Agreement became effective).

No “excess” DRD is allowed for dividends from companies resident outside the EEA (the treatment of such dividends is currently before a Belgian national court after the ECJ refrained from deciding on this issue in another case (*KBC v Belgium* (C-439/07))).

**Participation requirement:** DRD (and “excess DRD”) may be claimed provided the minimum participation requirement in Belgian domestic law was met at the time the dividends were received (5% (or 10% as from tax year 2004) or an acquisition value of at least EUR 1.2 million). As such, the circular does not impose the more stringent minimum participation requirements of the Parent-Subsidiary Directive (a gradual reduction to 10% for dividends received as from 1 January 2009).

**Order of application of current-year DRD:** Belgian taxpayers are allowed to first deduct the DRD related to non-EEA dividends (if and to the extent there is a Belgian taxable basis) and then deduct and possibly carry forward

any “excess” DRD related to EEA dividends.

**Use of excess DRD carried forward:** “Excess” DRD carried forward may be used to offset taxable income of subsequent tax years; however, the deduction must be taken before the deduction for (i) any current year and carried forward notional interest and patent income deductions and the investment deduction/credit, and (ii) any carried forward losses. In other words, a new carry-forward item would be created.

**Administrative requirements:** The circular requires that taxpayers use a specific form to report the “excess” DRD from tax years 1992-2009 and the amount carried forward to tax year 2010.

## Comments

Companies should review their (historic) DRD situation and take appropriate action in their tax return with respect to any “excess” DRD relating to dividends received since 1992.

In anticipation of the decisions of the Belgian courts on the compatibility of the DRD regime with the EC free movement of capital as regards dividends from non-EU/EEA resident companies, we believe that proactive / protective action should be considered (e.g. claiming “excess” DRD in a tax return and/or filing an administrative claim and/or making a request for *ex officio* relief).

## Contact

If you have any questions concerning the items in this publication, please contact one of the tax professionals at our Deloitte office in Belgium:

- Jan Roels, [jroels@deloitte.be](mailto:jroels@deloitte.be), + 32 2 600 67 09
- Pascal Van Hove, [pvanhove@deloitte.com](mailto:pvanhove@deloitte.com), + 32 2 600 67 70
- Angdré Claes, [aclaes@deloitte.com](mailto:aclaes@deloitte.com), + 32 2 600 66 70
- Brecht Sohier, [bsohier@deloitte.com](mailto:bsohier@deloitte.com), + 32 2 600 67 60

For general inquiries contact:

- [DTTGlobalTax@deloitte.com](mailto:DTTGlobalTax@deloitte.com), + 44 (207) 007 0120

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Berkenlaan 8a  
1831 Diegem  
Belgium

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