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Tax in Distressed Situations

BELGIUM

GENERAL

1. Does debt have a specific meaning for tax purposes?

Debt is not separately defined for Belgian tax purposes, hence in principle the civil law definition prevails.

In the Belgian civil code, a loan is defined as a contract whereby one party (the lender) delivers to the other party (the borrower), either an asset (which the recipient can use under an obligation to return it after use) or a certain quantity of consumable goods (under the obligation for the lender to return the same quantity of goods of an equal type and quality).

By contrast, equity in the framework of a company contract is defined as a contribution of funds or assets with a view to sharing the profits (and losses) that may arise therefrom.

The main criteria used by the Belgian courts to decide whether an instrument should qualify as debt or equity are as follows:

- Debt obligation (loan/bond):
  - The holder is entitled to return of its investment after a specified period;
  - In most cases, the loan carries a predetermined, fixed return, which is not per se linked to the company's result;
  - In the event of the debtor's liquidation or bankruptcy, the investor ranks above the shareholders (i.e has the right to be repaid before any funds are made available to shareholders).
- Equity:
  - Fully exposes the investor to the risk of the business (no assurance with respect to reimbursement of the original investment or the return);
  - The right to receive part of the liquidation surplus vests in its holders;
  - Provides shareholders rights to the investors (e.g. voting rights, rights of supervision, etc.).

Next to this, interest for Belgian (withholding) tax purposes is defined as "income from loans, including in rem security agreements, deposits and any other receivables". Absent a definition of "loan" under Belgian tax law, the qualification under Belgian civil law applies. Under Belgian civil law, a loan may arise when one party (the lender) makes available to another party (the borrower) capital, and is entitled to the repayment thereof. In other words, the qualification of a financial transaction as a loan requires the deployment of capital by the lender.

2. Do derivatives have a specific meaning for tax purposes?

The concept of a derivative is not expressly defined in Belgian tax law. Nevertheless, other administrative sources shed further light on the tax treatment of payments made under derivatives such as swaps or futures in Belgium.

The Belgian tax authorities are of the opinion that swaps essentially provide coverage against risks and future uncertainties such as interest rate fluctuations. As a consequence, the Belgian tax authorities deem that payments under swaps in principle do not qualify as interest for tax purposes (cf. supra). It is recognised that swaps are generally not entered into for the purpose of providing financing. It follows that payments under swaps not accompanied by a deployment of capital, cannot be considered interest payments given the absence of an underlying loan. Moreover, even in case (part of) the principal is transferred under a swap (as might be the case under foreign exchange swaps), the tax authorities take the view that the payments will not qualify as interest payments because it is generally not possible to determine accurately the amount of profit derived from swaps beforehand given the level of uncertainty. In this respect, swaps differ from loans, deposits and other receivables with the same nature as loans. The fact that payments under a credit default swap do not qualify as "interest" for Belgian withholding tax purposes is also confirmed by the Belgian ruling commission. However, in case of a "fake swap" (e.g. sale and repurchase contract over a fixed term with predetermined pricing), the Belgian tax administration takes the position that the realized surplus on the fake swap should be considered as interest.

A recent tax ruling further confirms that income and expenses incurred in the framework of FX swaps and cross-currency interest rate swaps may be considered as "economically equivalent to interest" under the Belgian interest limitation rule provided both parties to the arrangement adopt the same position. A contrario, one could conclude that such payments should thus not constitute "interest" in the strict sense.

In addition to the above tax definition of collateral arrangements, the Belgian Accounting Standards Commission has also issued a specific advice with respect to the accounting treatment of derivatives, in which it is acknowledged that there is no all-encompassing definition of a derivative for Belgian accounting purposes. The Commission however treats the following contracts as examples of such derivatives: (cross-currency) interest rate swaps, forward rate agreements, caps, floors, collars, commodity swaps or swaptions.

3. Generally, are intra-group debts treated differently to external debt for tax purposes?

Intra-group debts are, as a matter of principle, treated the same as third-party debts. Nevertheless, the specific intra-group character of a debt may lead to secondary questions such as, for example, the application of withholding tax or exemptions thereof, the arm's length character of the debt (or of a waiver thereof), the tax deductibility of the interest and economically equivalent expenses, etc.

For Belgian tax purposes, there is no unified definition of a "group" of companies with respect to debt-related aspects. For example:

- for the application of withholding tax exemptions and/or reductions (based on Belgian domestic law or double tax treaties), often a minimum participation in the capital of the debtor is required;
- for the application of the Belgian transfer pricing provisions (assessment of the arm's length character of (the conditions of) a loan), it is sufficient that two parties have "lien of interdependency" which can go beyond a common shareholder structure (e.g. exclusive commercial relationship);
- for the application of certain interest deduction restrictions, the concept of a "group" is defined with reference to Belgian company law, essentially considering that all entities under ultimate common control form a single "group".

4. Does it make a difference if debt is owed by a partnership or other pass through entity in distress to third parties versus to its partners?

Entities not having separate legal personality such as a simple partnership (a *maatschap / société simple*) under Belgian law are treated as transparent for Belgian tax and accounting purposes, and its assets, debts and obligations are deemed to be the assets, debts and obligations of the underlying partners *pro rata* their participation in the partnership (no liability cap for the partners). Other forms of partnerships, such as the *commanditaire vennootschap / société en commandite simple* avail of separate legal personality and may have debts and obligations separate from those of the partners.

Hence, for partnerships that do not avail of separate legal personality, a debt owed to its partners is a 'non-event' in the relationship between the partnership and the partner, but may give rise to contractual claims among the partners (in order to respect each partners' share in the partnership). A debt owed by such transparent partnership towards a third party, will be considered as a debt of the underlying partners each *pro rata* their share in the partnership.

For partnerships that avail of separate legal personality, a debt owed to its partners and a debt owed towards third parties are treated the same for tax and accounting purposes.

DEBT IMPAIRMENT

1. What are the key tax considerations on a debt impairment for the creditor?

If a company recorded an impairment on a receivable in the accounts, the question arises whether this cost is tax deductible in the hands of the creditor. A distinction should be made between a loss that can be considered final and a loss that is merely probable.

A loss on a receivable that is probable but not certain (i.e. an impairment) can only be treated as tax-deductible subject to the following conditions:

- the loss that results from the impairment must, by its very nature, qualify as a tax-deductible business loss;
- the receivable to which the loss relates is not represented by bonds or other similar securities, whether registered or bearer;
- the loss must be clearly specified, i.e. it must relate to a duly identified receivable its likelihood must result from particular circumstances arising during the taxable period and continuing after the expiry of that taxable period;
- the impairment must be recorded at the closure of the taxable period and the amount must be shown in one or more separate accounts; and
- the impairment must be reported on a statement that must be joined to the tax return.

The impairment is temporary and can only be maintained for as long as the company can demonstrate the likelihood of the loss. The impairment must be reversed if the expected loss can no longer be justified, which implies that a taxable profit is recorded. If the loss becomes certain, the temporary impairment must be reversed, and a final loss must be recorded.

However, according to the Belgian tax administration, the above exemption is only available for impairments on trade receivables, and not for other receivables such as loans. Impairments on non-trade receivables should, according to this position, be non-deductible until the loss is effectively realised (timing difference only). This position has (in limited cases successfully) been challenged before the Belgian courts.

The tax deductibility of debt impairments in the framework of regulated debt reorganisations (cf. *infra*) benefits from more relaxed conditions at the level of the creditor.

2. What are the key tax considerations on a debt impairment for the debtor?

The impairment of debt by the creditor should have no adverse Belgian tax consequences for a debtor, as long as said impairment is not followed by an actual debt waiver to the benefit of the Belgian debtor (see *infra*).

DEBT AMENDMENT, REFINANCING AND NOVATION

1. What are the key tax considerations on a debt amendment?

As a general rule, a debt amendment that does not qualify as a novation or a refinancing, but merely a change to the terms and conditions of an existing debt, should not lead to accounting or tax implications in the hands of a Belgian debtor or creditor. Transfer pricing principles should be considered in case of an intercompany debt amendment.

For the purposes of the Belgian interest limitation rule (ATAD-compliant 30% tax EBITDA restriction), loans concluded before 17 June 2016 are "grandfathered" and not in scope of this rule, unless the agreement would have been fundamentally modified (e.g. amendments of the amount or interest rate) after that date. A (material) debt amendment would thus bring a grandfathered debt into scope of the Belgian interest limitation rule.

2. Does the deferral of any payments of interest or repayments of principal trigger tax consequences?

For Belgian corporate tax purposes, interest income and expenses are generally accounted on an accruals (rather than cash paid) basis. Belgian withholding tax on interest payments is due from the moment the creditor is able to avail of the interest, irrespective of the effective date of payment, as the income has been attributed to the creditor. Hence, deferral of interest payment under the explicit agreement with the creditor does not preclude the application of interest withholding tax upon the contractual interest due date.

However, when the income is unavailable to the creditor outside such agreement (e.g. in case of debtor insolvency which is a situation beyond the control of the beneficiary), the creditor cannot avail of the income and no withholding tax should be due until an effective payment is made.

The deferral of any repayment of principal should not trigger adverse Belgian corporate tax consequences for the debtor, unless no interest would be applied during the deferral period (which could be considered a taxable non-arm's length advantage). Assuming the debt was not discounted and has not been impaired by the creditor, repayment of principal should not give rise

to any adverse Belgian tax consequences for a Belgian creditor either. Where a debt was issued or acquired at a discount (or impaired), any repayment of principal which exceeds the tax value thereof, would be taxable in the hands of the creditor.

3. **What are the key tax considerations on a debt refinancing?**

   A debt refinancing has the following key Belgian tax considerations:

   - **Interest deductibility** will be determined with reference to the refinancing date as "starting date" of the loan (cf. grandfathering clause for the interest limitation rule).
   - **Withholding tax** will in principle apply at the rate of 30%, unless domestic or treaty-based exemptions or reductions can be applied.
   - In the hands of the Belgian debtor, the refinancing will be considered as a full repayment of the existing debt (incl. interest) and the taking out of a new debt. If there would be any discount on the repayment of the existing debt, the same rules as applicable to a debt waiver (cf. infra) should apply. Moreover, the refinancing of foreign currency denominated debt may trigger an FX result in its accounts recognized for tax purposes.
   - No Belgian stamp duties are due on a debt refinancing, other than an EUR 0.15 duty per copy for any documents concluded with a financial institution that are drawn op and executed or initialled in Belgium.

4. **Does rolling up interest or satisfying interest through issuing "payment in kind" notes give rise to any tax consequences?**

   It is irrelevant for Belgian (withholding) tax purposes whether interest is paid in cash, is accrued to the principal amount or is paid in kind: all forms of interest attribution are subject to the same (withholding) tax treatment.

5. **Does the novation of debt by a debtor to another group company trigger any adverse tax consequences?**

   Through the novation of debt, a loan (or other debt) will be transferred from the original (intra-group) debtor to another (intra-group) debtor. The debt between the original lender and the borrower is cancelled from a civil law perspective, and a new payable is created. A novation does not trigger a full contract take-over, but thus generates a new obligation.

   Given that legally a new loan is entered into, the terms of such loan should reflect arm's length conditions as per the date of conclusion of the loan.

   Upon the novation of debt, the original debtor will ordinarily owe the new debtor an amount equal to the debt assumed by the new debtor. Generally, this will take the form of a new intercompany balance between the two entities.

6. **Are there any specific tax considerations to bear in mind where the security / guarantee package is amended as part of the debt amendment / refinancing?**

   No adverse Belgian tax consequences should arise on entry into a guarantee by a Belgian guarantor or on the taking of security over a Belgian-based asset.

   A Belgian guarantor should be remunerated on an arm's length basis for providing a guarantee/ security.

   For specific types of securities (notably real estate), registration duties may be applicable for establishing or transferring such security (e.g. 1% registration duty and 0.3% mortgage duty on establishing a mortgage), calculated over the secured amount.

DEBT RELEASES

1. **Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?**

   GENERAL RULE

   From an accounting perspective, which as a matter of principle forms the basis for determining taxable income, the benefit of a debt waiver will give rise to an exceptional income in the hands of the Belgian debtor.

From a Belgian tax perspective, such benefit will constitute taxable income of the debtor. Such taxable income may be offset with current year losses, tax losses carried forward or other tax attributes, however the application of tax losses carried forward (and certain other tax attributes) is limited to EUR 1m + 70% of the remaining taxable basis.

However, for debt waivers between connected parties having a lien of interdependency, the debt waiver may be considered triggering a non-arm's length advantage by the Belgian tax administration (a so-called "abnormal or benevolent advantage"), the amount of the debt waiver is deemed to constitute the minimum taxable basis in the hands of the beneficiary to which no current year losses nor carried forward tax attributes can be offset.

The notion of "abnormal or benevolent advantage" comprises two conditions that must be met: the existence of an advantage and the abnormal or benevolent character thereof. An advantage is any enrichment of the beneficiary without an accurate and actual consideration. The advantage is abnormal if it is contrary to normal practice, custom or what is common in similar circumstances. The advantage is benevolent if it is granted without commitment or compensation.

The question of whether an abnormal or benevolent advantage has been granted in the case of a debt waiver depends on the facts and circumstances. Case law generally considers the particular economic circumstances. Granting benefits by a parent company to its subsidiary in financial difficulties could therefore under certain circumstances (for example to avoid bankruptcy and reputational damage) be considered as normal. The Belgian Supreme Court, however, confirmed that the taxpayer will need to demonstrate that it has a concrete interest in granting the benefit. To avoid discussions with the tax authorities, the taxpayer could request a ruling in this respect.

DEBT-TO-EQUITY SWAP

With respect to the tax implications of a debt-to-equity swap, please see infra.

REGULATED DEBT REORGANISATIONS

Several specific reorganisation procedures exist under Belgian law, which have been recently reformed following implementation of the EU Insolvency Directive. Since 2023, the following arrangements can be considered: (i) out-of-court proceedings under the form of an agreement before chambers of companies in difficulties, company mediator or amicable agreement; or (ii) judicial reorganisation proceedings, that can be public or private. Reference is made to "*What are the key insolvency procedures?*" for more information on these procedures.

As mentioned above, a reorganisation leading to a debt reduction will automatically give rise to an extraordinary profit subject to Belgian corporate income tax in the hands of a Belgian corporate debtor. In order not to jeopardize a successful (extra-) judicial reorganisation due to adverse (cash) tax consequences triggered by such debt waiver, a specific **tax exemption** has been introduced with respect to the extraordinary profit of the debtor triggered by a debt reduction in the framework of a regulated reorganisation homologated by court. As of 2024, this exemption has however been replaced by a spread taxation of the waiver gain. Under this new regime, the waiver gain is exempt upon the debt waiver but then gradually reintegrated in taxable basis for 25% per year in the third to the sixth year following the year of the execution of the agreement.

2. Does the release of debt trigger any withholding or indirect tax? If so are there any reliefs or exemptions?

A debt release should not give rise to any Belgian withholding tax exposure.

The release of debt in principle does not trigger VAT. However, if the creditor would request a refund of paid VAT on a taxable transaction, a credit note should be issued to the debtor indicating that the debtor should repay VAT to the Belgian State insofar as it was initially deducted. This obligation to repay initially deducted VAT by the debtor would however typically only arise in the case of debts in relation to supplies subject to VAT and not in relation to loan financing which is generally exempt from VAT.

If the release of debt results in the creditor making available goods to the debtor free of charge and for which the creditor has initially deducted VAT, the making available of goods must be considered as a deemed supply of goods subject to VAT.

The above also applies for the release of debt in restructuring proceedings. However, if these restructuring proceedings establish that a debt must be (partially) released, the Belgian VAT Code provides the moment when these debts can be considered as lost for the creditor and a VAT refund can be requested (insofar as the debts relate to supplies subject to VAT). This moment is generally the date of the decision by the court. As indicated, the VAT refund request requires the creditor to issue a credit note and the debtor to repay initially deducted VAT. The repayment of VAT to the Belgian State can be adjusted by the debtor in accordance with the restructuring proceedings.

3. Can a creditor claim a deduction in respect of any debt that is released?

According to the Belgian Accounting Standards Commission, a creditor that decides to waive the debt will need to account for either an impairment on the receivable (in the case of a conditional debt waiver) or a realized loss on the receivable (in the case of an unconditional debt waiver). As a result of the debt waiver, the creditor thus reduces its taxable basis which might be questioned by the Belgian tax authorities.

With respect to an impairment (further to a conditional debt waiver), please see *supra.*

In the case of a realized loss, the Belgian tax authorities may increase the taxable basis of a Belgian company (i.e. creditor) with abnormal or benevolent advantages granted by this company, unless these advantages are taken into account to determine the taxable basis of the debtor (escape clause). This will generally be the case if the debtor is also a Belgian company. The escape clause does – among others – not apply if the debtor is a non-resident taxpayer with which the creditor has any direct or indirect relationship of interdependence.

However, even if the debtor is a Belgian company, the tax authorities could still disallow the loss resulting from the debt waiver if it is not incurred with a view to acquiring or maintaining taxable income (among other conditions). Whether this is the case, depends on the circumstances.

With respect to the notion of "abnormal or benevolent advantage": see above – *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"*

With respect to a debt release in the framework of a regulated debt reorganisation, please see *supra.*

4. Is the position different if the debt being released is a trade debt?

From a Belgian tax perspective, the waiver of a trade debt is treated the same as any other debts (e.g. a formally documented loan). With respect to the tax treatment of an impairment on receivables, please see *supra* for the distinction between trade receivables and other loans.

5. Does the release of an uncalled guarantee obligation trigger any adverse tax consequences? Is the position different if the guarantee has been called?

Assuming it is not recognised as a liability for accounting purposes, the release of an uncalled guarantee obligation (being a contingent contractual promise) should not have any adverse Belgian tax consequences.

Conversely, where the borrower has defaulted and the guarantee called, the position is more complex. Where the guarantee has been called the obligation to make the payment under the guarantee would have crystallised and so, for accounting purposes, may be treated as a current liability. Hence, if and to the extent a guarantee has been called but is ultimately not enforced, if could be considered as a (implicit) debt waiver. We refer to questions *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"* and *"Can a creditor claim a deduction in respect of any debt that is released?".*

Furthermore, the release of a called guarantee, or even not calling a guarantee obligation which can contractually be called, could be qualified as an abnormal or benevolent advantage by the Belgian tax administration (if intervening between parties having a lien of interdependency). The Belgian tax implications of such abnormal or benevolent advantage in the hands of the creditor, resp. guarantor (mutatis mutandis to that of a debtor) are set out in sections *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?" and "Can a creditor claim a deduction in respect of any debt that is released?"* above.

6. Do any adverse tax consequences arise on the release of liabilities owed under a derivative contract?

The starting point is that the release of liabilities owed under a derivative contract will generally

give rise to an accounting credit and so taxable income for a Belgian debtor. We refer to questions *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"* and *"Can a creditor claim a deduction in respect of any debt that is released?".*

DEBT FOR EQUITY EXCHANGE

1. What are the key tax considerations on a debt-for-equity exchange for the creditor?

Upon the contribution, the contributed receivable will disappear from the company's balance sheet and will in principle be replaced by shares received in exchange for the contribution. As Belgian tax law does not contain any deviating rules, the accounting treatment of the contribution is decisive for the tax consequences.

The question at what value the contribution should occur is debatable. From an accounting perspective, the Belgian Accounting Standards Commission is of the opinion that a receivable which is not fully recoverable can be contributed at both the nominal value or the (lower) real economic value (i.e. taking into account the recoverable value).

If the contribution occurs at real economic value, the debtor will recognize a taxable profit since the debt is written off at nominal value whereas the capital of the company is only increased for the (lower) amount of the real value of the debt claim. Although the company may have tax losses carried forward to offset the taxable profit, the company may be confronted with the limitations in tax law on the use of these losses as described above (see section *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"*). The creditor will receive shares of the debtor at real economic value in exchange for the contribution and will account for a loss on receivables which is in principle tax deductible.

If the contribution occurs at nominal value, the debtor does not need to recognize a taxable profit since the debt is simply written off and the capital is increased by the same amount. The creditor will receive shares of the debtor at nominal value in exchange for the contribution. The company will need to account for an impairment on shares in the case of a lasting loss of value or devaluation justified by the situation, profitability or prospects of the subsidiary. This impairment is accounted for as a cost which is not tax deductible in Belgium.

From a Belgian tax perspective, the debtor will generally prefer a contribution at nominal value whereas the creditor will prefer the contribution to occur at real economic value. Opposing views have been expressed in literature on whether an asymmetrical contribution (i.e. the contribution of a not-fully-recoverable receivable to the capital of the debtor at nominal value while the creditor values the shares obtained at the occasion of the contribution at real economic value) is possible from an accounting and tax perspective. The Belgian Supreme Court ruled on 11 June 2020 that accounting law does not allow for an asymmetrical contribution. According to the Supreme Court, the shares received in exchange for the contribution of the receivable must also be valued at the nominal value if – at the level of the debtor - the contribution is valued at nominal value. In a cross-border context, i.e. in the case of a Belgian debtor and a foreign creditor, it may in some circumstances still be possible to apply an asymmetric approach (recognition of nominal value at the level of the Belgian debtor and fair market value at the level of the foreign contributing company).

2. What are the key tax considerations on a debt-for-equity exchange for the debtor?

We refer to section *"What are the key tax considerations on a debt-for-equity exchange for the creditor?"* with respect to the Belgian tax considerations for the debtor.

Within the framework of a regulated debt reorganisation procedure (see supra), a debt could also be contributed to the capital of the debtor at a lower than nominal value triggering debt waiver income at the level of the debtor. For the Belgian tax consequences, reference can be made to section *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"*, which applies, *mutatis mutandis*, to such a debt-for-equity exchange.

3. Where warrants or similar instruments are issued as part of a debt restructuring does this trigger any adverse tax consequences?

Where a debtor issues warrants ("subscription rights" under Belgian law) as part of a debt restructuring, such should be considered as a payment in kind. Insofar the market value of the subscription rights is lower than the nominal amount of the debt claim, this could be considered as a partial debt waiver, for which we refer to questions *"Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?"* and *"Can a creditor claim a deduction in respect of any debt that is released?".*

4. What are the key tax consequences of capital contributions by a parent company into its subsidiary?

AT THE LEVEL OF THE RECEIVING SUBSIDIARY

From an accounting perspective, a contribution of cash or other assets is in principle a mere balance sheet operation that does not influence the profit and loss account of the receiving company. The cash or other assets will be accounted for as an equity component on one side of the balance sheet and as an asset on the other side. In certain circumstances, a contribution of labour is possible.

In accounting law, every asset is, in principle, valued at its acquisition value. With respect to contributions, the acquisition value is defined as the contribution value, which corresponds to the negotiated value of the contribution. The contribution value cannot exceed the price that, at the time of the contribution or use for professional purposes, should be paid on the market for the purchase of the assets concerned.

Belgian tax law in principle does not deviate from accounting law with respect to the accounting treatment and valuation upon the capital contribution. Two exceptions are noteworthy in this respect:

- although company law allows the contribution of labour in certain company forms as a remuneration for the issuance of shares, this contribution is explicitly excluded from the fiscal notion of capital. If the governing body would decide to account for an equity component, this component will thus be treated as a taxable equity increase in the hands of the receiving company; and
- if an individual contributes shares to a company and realizes a capital gain that is tax-exempt (subject to conditions), the fiscal capital of the receiving company is limited to the acquisition value of the contributed shares at the level of the contributor. The difference between the market value of the shares and the acquisition value constitutes a taxable reserve. This equity increase is, however, not taxed at the moment of contribution, but this qualification is relevant for withholding tax purposes in case of a future capital reimbursement.

AT THE LEVEL OF THE CONTRIBUTING COMPANY

Upon the contribution of cash or other assets, the contributed assets will disappear from the company's balance sheet and will in principle be replaced by shares received in exchange for the contribution.

The shares that the contributing entity will receive in exchange for the contribution will in principle be valued at the negotiated value of the contribution. The acquisition value of the shares received in exchange for a contribution that does not consist of cash or that arises from the conversion of receivables shall correspond to the conventional value of the goods contributed or of the receivables converted. However, if that conventional value is lower than the market value of the assets contributed or receivables transferred, the acquisition value shall equal this higher market value (from an accounting perspective).

If the conventional value exceeds the book value of the contributed asset, the contributing company will realize a capital gain on the asset. Capital gains are in principle taxed at the ordinary Belgian corporate income tax ("**CIT**") rate. If the contributed assets are shares, the capital gains realized on these shares may be exempt from CIT, subject to conditions. If the conventional value is lower than the book value of the asset that is contributed, the contribution will give rise to a loss on the asset. These losses are in principle tax deductible, unless the asset consists of shares.

The tax treatment of the contribution of labour in a BV or CV at the level of the contributing company remains uncertain.

FEES AND TRANSACTION COSTS

1. **Is there any adverse tax impact in respect of common restructuring fees, for example, consent fees?**

   Payment of such a fee should not give rise to any Belgian withholding tax.

   From a Belgian corporate income tax perspective, such fees should be considered as tax-deductible if it can (i.a.) be demonstrated that they are made or incurred to obtain or maintain taxable income (cf. *infra*). However, consent fees and arrangement fees in relation to loans are, for the purpose of the Belgian interest limitation rule, treated as expenses economically equivalent to interest and are thus in scope of the earnings stripping rule. Other types of fees may, depending on their characteristics, also fall within the scope of this deduction limitation.

   Provided that any fee is paid solely for the purposes of (re)negotiating credit, management of the credit by the person granting it or (re)negotiation of debts, such fee should generally be treated as an exempt supply for Belgian VAT purposes. These VAT exempt activities will in principle have a negative effect on the right to deduct input VAT of the entity charging the restructuring fee.

2. **Are transaction costs deductible for tax purposes and is any VAT recoverable?**

   Transaction costs that are at arm's length should be tax deductible if they are (i) made or incurred in the taxable period, (ii) to obtain or maintain taxable income, and (iii) the reality and amount of the expense can be evidenced.

   Notably condition (ii), the so-called "finality condition" will be key, as the company will need to demonstrate that it has a certain expediency in bearing the expense.

   Depending on the characteristics of the expense, it may be considered as economically equivalent to interest, and thus in scope of the interest limitation rule (cf. *supra*).

   The recoverability of VAT follows the general position and whether the transaction costs have a direct and immediate link with the VAT taxable activities of the VAT taxable person granting a right to deduct input VAT.

   As a general rule, typically on a debt restructuring a Belgian debtor may be able to recover VAT it incurs in connection with its own costs and expenses but, depending on the facts, is in principle not entitled to recover VAT on fees incurred by creditors which the borrower settles.

DEBT ENFORCEMENT

1. **Aside from insolvency proceedings, what are the key methods of enforcement and their tax impact?**

   Any security interest may be enforced only with respect to a due and payable debt. Enforcement procedure depends on the type of security.

   - *Pledge on receivables*: the pledgee is entitled to collect principal amount and interests of the pledged receivables and to apply them to the secured obligations (if and when due and payable).
   - *Pledge granted by pledgors that are not consumers over other movable assets such as tangibles, trade receivables, IP rights or a business*: foreclosure is subject to notice that the pledgee intends to enforce the pledge, triggering a 10 day waiting period (which is shortened to 3 days in case of perishable goods or goods subject to fast value reductions), after which the pledgee is entitled to instruct a bailiff to rent out the goods or sell them by way of a public or private sale. In addition, the pledgee may appropriate the goods if agreed by the pledgor in the pledge agreement or at any later time, subject to the condition that the agreement states that the value of the goods at the moment of appropriation will be determined by an expert or, for goods traded on a market, according to the market price.
   - *non-possessory pledge (such as, for instance, a register pledge over the business of the pledgor):* the pledgee will need to obtain the pledged assets from the pledgor. If the pledgor does not deliver the pledged assets voluntarily, the pledgee will need to obtain a court order, ordering the pledgor to deliver the assets to the pledgee.
   - *Pledge on shares:* unless otherwise agreed, the pledgee is entitled, without prior court approval, or even prior notification, to foreclose on the pledged shares by selling them and

applying the proceeds thereof to the secured obligations (if and when due and payable). The proceeds should be applied first to any interest payable and subsequently to any remaining principal amount. Provided that the parties have agreed thereto, the pledgee may also appropriate the pledged shares in accordance with the valuation rules and procedures agreed between parties. The courts have the right to exercise a subsequent ('a posteriori') control to verify whether the conditions in connection with the enforcement of the pledged assets and the agreed valuation rules have been respected and satisfied.

If the sales of assets on behalf of the debtor triggers a gain, the latter will be taxable as ordinary taxable income, except if a specific exemption applies (e.g. shares).

2. If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?

Creditors will usually enforce pledges through selling the assets and applying the proceeds to the secured obligations as explained above. In this scenario, the creditor does not take ownership over the equity or assets. However, where the creditor takes possession of the assets, for instance by way of appropriation of pledged shares or movable assets, the following summarizes the key tax considerations:

- **Belgian corporate tax**. When a creditor takes ownership of assets (whether equity, real estate, or movable property) as a result of debt enforcement, the transfer must be valued at fair market value. Said transfer may trigger a taxable gain or a tax deductible loss depending on the book value of the assets in the hands of the debtor (except with respect to shares for which the gain may be exempt and the loss would in any case be non-deductible).

- **Belgian transfer taxes**. If real estate is transferred to the creditor, registration duties will generally apply. These taxes range between 12% and 12.5%, depending on the region (Wallonia, Flanders, or Brussels-Capital). In addition, a tax on stock exchange transactions may be due upon the transfer of listed securities (0.35% for shares, equity instruments, and funds (including ETFs) and 0.12% for bonds and debt securities).

Finally, in each case, where there is a change of control (or a break of a tax group) this can give rise to adverse tax consequences (see "*Are there any adverse tax consequences arising from a change of control or break of a tax group*?")

3. Are any specific tax considerations arising on payments or transferring security under guarantees as opposed to the debt?

Below is a high-level summary of the Belgian tax treatment of payments or transferring security under guarantees:

- **Belgian corporate tax**. The payment by the guarantor will ordinarily trigger a new recourse claim against the debtor which is a balance sheet operation without impact on the P&L. A subsequent final loss on the receivable on the debtor should be tax deductible assuming the guarantee arrangement is an arm's length transaction.

- **Belgian withholding tax**. Payments by a guarantor in principle do not qualify as interest for Belgian withholding tax purposes. Interest for Belgian withholding tax purposes is defined as income from loans, including in rem security agreements, deposits and any other receivables. The qualification of interest requires an underlying deployment of capital (such as an underlying loan granted by the recipient of the interest). Such deployment of capital is absent in the hands of the guarantor. Next to this, in the context of a guarantee, it is confirmed by legal scholars that a guarantor is not bound by the principal obligation of the debtor but is only bound by its own, separate, obligation of indemnification. As a result, payments under a guarantee do not legally qualify as interest. Consequently, no Belgian withholding tax is due on payments by the guarantor.

With respect to the release of guarantees see above "*Does the release of an uncalled guarantee obligation trigger any adverse tax consequences? Is the position different if the guarantee has been called?*"

With respect to Belgian tax issues arising on the transfer of security see above "*If the enforcement results in the creditor taking ownership of equity or assets, what are the key tax considerations to bear in mind?*"

4. **Are there any adverse tax consequences arising from a change of control or break of a tax group?**

   In the case of an acquisition or change of control of a Belgian company during the taxable period, a Belgian company's tax attributes, including, among others, the tax losses carried forward, will be forfeited if the change of control is not motivated by legitimate financial or economic needs. This rule intends to prevent the improper use of the company for the primary purpose of avoiding tax by making the company's losses tax deductible.

   For the definition of the term "control", reference should be made to the Code of Companies and Associations (the "**CCA**"). This term should be understood as the legal or factual authority to exercise a decisive influence on the nomination of the majority of the directors or partners of the company or on the orientation of its business. The CCA also contains a number of irrefutable presumptions of control, such as holding the majority of the voting rights that are attached to the total outstanding shares of the company concerned, or in cases of joint control.

   No extensive guidelines exist on the question of whether a change of control could be considered meeting legitimate financial or economic needs. However, the Belgian tax authorities generally accept the presence of legitimate financial or economic needs in case: (i) the change of control concerns a company in distress whose employment level and activity carried out prior to the acquisition or change of control are (wholly or partially) maintained; or (ii) the transfer of the shares or managers of the Belgian company takes place within the same consolidated group of companies. When the consolidation takes place abroad, there is a "consolidated group of companies" to the extent the financial accounts of the company are included in the consolidated accounts which are prepared in accordance with the European Directive 2013/34/EU of 26 June 2013 or in accordance with similar rules as set out in the aforesaid EU Directive.

   The Belgian Supreme Court ruled that this list is not exhaustive and that all circumstances with respect to all parties involved in the acquisition or change of control, including the shareholders, must be considered to determine whether sufficient financial or economic needs are present. The change of control should not be mainly tax driven.

   Belgian income tax does not have the concept of a "tax group" (only a limited for of group contribution is possible, for which an annual election should be made).

   A change of control in principle has no impact for Belgian VAT purposes. However, if a VAT taxable person is part of a VAT unity, a change of control could result in the VAT taxable person being required to exit the VAT unity. Consequently, the exiting VAT taxable person concerned can no longer enjoy the intra-unity transactions falling outside the scope of VAT.

5. **Where equity / assets are indirectly transferred as part of an enforcement, does that trigger adverse tax consequences?**

   Where there is a change of control see "*Are there any adverse tax consequences arising from a change of control or break of a tax group*?"

   An indirect transfer of Belgian shares or assets (i.e. by transferring shares of the underlying equity or assets holding company) should not trigger adverse Belgian tax consequences.

6. **Is any claw back permissible where a distressed company pays taxes for which a solvent shareholder is liable?**

   Under Belgian tax law, there are no such clawbacks.

ACQUISITION OF DEBT

1. **Does the acquisition of a creditor's interest in distressed debt trigger any adverse direct tax consequences for the debtor?**

   Where the creditor changes, the debtor will need to consider whether the new creditor's form, relationship to debtor or jurisdiction of tax residence has any impact on the debtor's ability to deduct interest on the debt for Belgian corporate tax purposes.

2. **Does the acquisition of distressed debt trigger any adverse withholding or indirect tax consequences for the debtor?**

   Where the creditor on a debt changes, the debtor will need to consider whether any Belgian withholding tax arises on interest payments to the new creditor which will depend (i) on the nature of the instrument used, and (ii) on the status of the person liable to pay and/or the

beneficiary of the interest (location and form). Where a Belgian withholding exposure arises, it will turn on the contractual drafting whether it is the creditor or debtor that bears that cost.

The acquisition of distressed debt itself typically does not result in indirect tax consequences such as VAT for the debtor. However, if the restructuring involves the transfer of assets or services, VAT implications may arise.

3. What are the key tax considerations for the purchaser of a creditor's interest on the acquisition of distressed debt?

From a creditor's perspective the key Belgian tax considerations follow the choice of acquisition vehicle. Once that vehicle has been chosen, the creditor would need to consider amongst others, whether:

- There would be any Belgian withholding tax exposure on interest payments it receives from the Belgian debtor. Various exemptions may be available depending on the status and tax residency of the purchaser.
- There would be any withholding exposure on interest payments it makes, including, for instance, on debt funding it has received. It will be important to determine whether the vehicle complies with anti-abuse rules (e.g. PPT in tax treaties) and is actually the beneficial owner of any interest it receives where "back-to-back" financing is in place considering recent scrutiny of the Belgian tax administration with respect to back-to-back transactions in relation to the application of Belgian withholding tax exemptions.
- A Belgian purchaser vehicle would be subject to Belgian corporate tax in respect of interest arising on the debt. Where there is "back-to-back" financing in place, applying both ordinary deductibility principles as well as transfer pricing principles, it may not be possible to fully offset any interest expense accruals (on debt owed by the Belgian vehicle) against interest income accruals (on the debt owed to the Belgian vehicle) resulting in Belgian corporation tax leakage. Also the application of the Belgian 30% tax EBITDA interest deduction limitation (implementation of ATAD) should be considered, certainly if the interest income arises intra-group (in certain circumstances ignored for determining net interest), whereas the interest expense is in relation to a third party (fully considered for determining net interest), as such mismatch may lead to a significant net interest expense.
- The acquisition of distressed debt itself typically does not result in Belgian indirect tax consequences such as VAT for the creditor. The purchaser of the distressed debt must however meet specific conditions to be able to request the refund of the VAT (instead of the original creditor) on debt that can be considered as lost.
- Finally, in the event that the creditor vehicle is incorporated outside of Belgium it will be necessary to consider the governance arrangements of the vehicle to ensure that it does not become tax resident outside of its jurisdiction of incorporation on the basis of effective management and control being exercised from elsewhere (including Belgium), or whether certain Foreign Direct Investment limitations apply.

4. Are there any particular beneficial regimes accessible to a purchaser of a distressed debt portfolio?

Belgian tax law has specific tax regimes for qualifying investment companies. One form concerns the undertaking for the investment in receivables (*Instelling voor de belegging in schuldvorderingen/Société d'investissement en créances*) which is a regulated status for securitization and investment vehicles specifically investing in debt claims. Formally subject to CIT, the undertaking for the investment in receivables benefits from a special tax regime. It is only taxable on its received abnormal and benevolent advantages and certain disallowed expenses. The interest deduction limitation is not applicable, as a result of which an investment structure using an undertaking for the investment in receivables should not have any tax leakage.

INSOLVENCY PROCEEDINGS

1. What are the key insolvency procedures?

Belgian law distinguishes two main insolvency proceedings: i) bankruptcy and ii) judicial reorganisation. As of 1 May 2018, the rules applicable to both types of proceedings have been brought together in a new Book XX of the Code of Economic Law (the CEL).

JUDICIAL REORGANISATION PROCEEDINGS

The general purpose of judicial reorganisation proceedings is to preserve, under court supervision, the continuity of (part of) a company in distress or (part of) its activities. It grants the company in distress protection against the existing creditors by allowing it either (i) to negotiate an amicable settlement, or (ii) to negotiate a collective agreement ('reorganisation plan'). The amicable settlement or reorganisation plan can be obtained through a private or a public judicial reorganisation procedure. The main difference between the two options is (i) the absence of publicity given to the private reorganisation procedure, and (ii) the absence of automatic and general moratorium on creditors' enforcement rights ('moratorium') in case of opening of a private reorganisation procedure. In addition, the company can opt for a transfer under court's supervision of (part of) the company's activities to one or more third parties. Once the court-ordered transfer of (part of) the company's activities or assets is completed, the (remaining part of the) company must be liquidated (either via a bankruptcy or a liquidation procedure).

The company in distress is, in principle, free to choose among these three options and may even opt for a different approach for each of its activities. The initially chosen option can also be amended during the procedure.

Next to the court supervised procedures, a debtor may aim to obtain an out-of-court settlement. Under certain conditions book XX CEL also facilitates certain protections regarding out- of-court amicable settlements that meet certain minimum conditions.

BANKRUPTCY PROCEDURE

Under Belgian law, a company is in a state of bankruptcy when it (i) faces a persistent cessation of payments, and (ii) has lost the trust of its creditors. Both conditions must be met. Once both conditions are met, the bankruptcy proceedings can be instituted with the court at the request of the company itself or at the request of a third party. A company which meets the bankruptcy conditions must file a petition in bankruptcy within one month as of the date of cessation of payments. Failure to file timely may not only entail the personal liability of the directors, but also constitute a criminal offence. Third parties with the necessary legal interest (such as the public prosecutor, the creditors or the tax authorities) can initiate bankruptcy proceedings by means of a writ of summons served upon the insolvent company. If it can be established that a company in judicial reorganisation is obviously not in the position to guarantee the continuity of (part of) its activities, the preliminary closing of the judicial reorganisation can be ordered and – to the extent the bankruptcy conditions are met – the company can be declared bankrupt.

2. What are the key tax considerations arising upon entry into an insolvency procedure?

As regards the beneficial tax regimes applicable with respect to debt waivers in the framework of a regulated reorganisation procedure, reference is made to "*Does the release of debt trigger taxable income for the debtor? If so are there any reliefs or exemptions?*" and "*Can a creditor claim a deduction in respect of any debt that is released?*" above.

Upon bankruptcy, the company remains subject to the ordinary Belgian corporate income tax regime implying a.o. the obligation to annually file a corporate income tax return. This obligation rests on the directors of the company, who can be held liable in case of fault or negligence in the filing of the tax return. The liquidator may complete the declaration by himself but is not legally obliged to file the declaration of the bankrupt company. The sanctions that are applicable in case of non-declaration cannot affect the liquidator, but its civil liability may be at stake.

3. Does entry into an insolvency procedure impact tax groupings?

When a VAT taxable persons who is a member of VAT unity enters in insolvency (including standard bankruptcy, judicial reorganization via a collective agreement or the transfer under judicial authority), it is required exit the VAT unity. The representative of the VAT unity should inform the VAT authorities of the mandatory exit within 15 days following exit.

4. Are there any specific tax set offs available in an insolvency?

The Belgian legislator introduced a mechanism of set off for the tax claims in favour of the tax authorities. The State has an almost unlimited right to compensate tax debts and receivables, regardless of their object. This has been introduced into the Belgian code for the amicable and enforced recovery of tax and non-tax debts. There can also be a set-off with debts to be paid by a codebtor or reimbursements to be made to the codebtor.

An exception applies with respect to pre-insolvency claims of the tax authorities which cannot be compensated with post-insolvency liabilities (e.g. tax refunds). Restrictions also apply with respect to compensations during a regulated reorganisation procedure.

5. Is the tax authority a preferential creditor in an insolvency?

Insolvency proceedings are a case of competition between creditors. In this context, the Belgian tax administration is a creditor that holds several privileges, enabling it to recover its debt. Indeed, when a company enters insolvency, for tax and non-tax debts, the Belgian tax authorities have a general privilege on revenues and movable assets of any nature that belong to the debtor and co-debtor, except on ships and boats. There is also a priority in terms of rank for the debts that relate to:

- withholding tax on professional income
- withholding tax on revenues from movable assets
- VAT
- Administrative and tax fines
- Accessories linked to those withholding taxes, taxes and fines.

Moreover, the tax and non-tax debts are guaranteed by a legal mortgage on all assets that belong to the debtor and co-debtor, that are in Belgium and eligible to be mortgaged. The mortgage only become enforceable against third parties once it has been registered by the creditor (the tax administration) which gives it its date and rank.

6. Are directors or other managers personally liable for tax debts in an insolvency?

In Belgium, directors or other managers of a company can be held personally liable for certain tax debts in specific circumstances, particularly when it involves misconduct, negligence, or fraudulent activities that lead to the company's insolvency. While directors are generally shielded from personal liability by the principle of limited liability, there are exceptions under Belgian law where personal liability for tax debts can arise. These exceptions are designed to hold directors accountable for mismanagement or illegal actions.

Here are the key instances in which directors or managers can be personally liable for tax debts during an insolvency:

- Under Belgian law, directors can be held personally liable for tax debts if it can be proven that their actions (or inactions) led to the company's failure to pay its tax obligations through wrongful conduct (based on general tort law principles). Such claim can be made based on a civil party action in the framework of criminal proceedings as well as civil liability grounds in front of civil courts.
- In addition, authors and accomplices of tax fraud are jointly and severally liable to tax debts of the debtor of the tax (which may also apply to directors with respect to tax debts of the company).
- Finally, the law provides under certain conditions for a presumption of fault of the directors with respect to unpaid wage withholding tax and VAT of the company.

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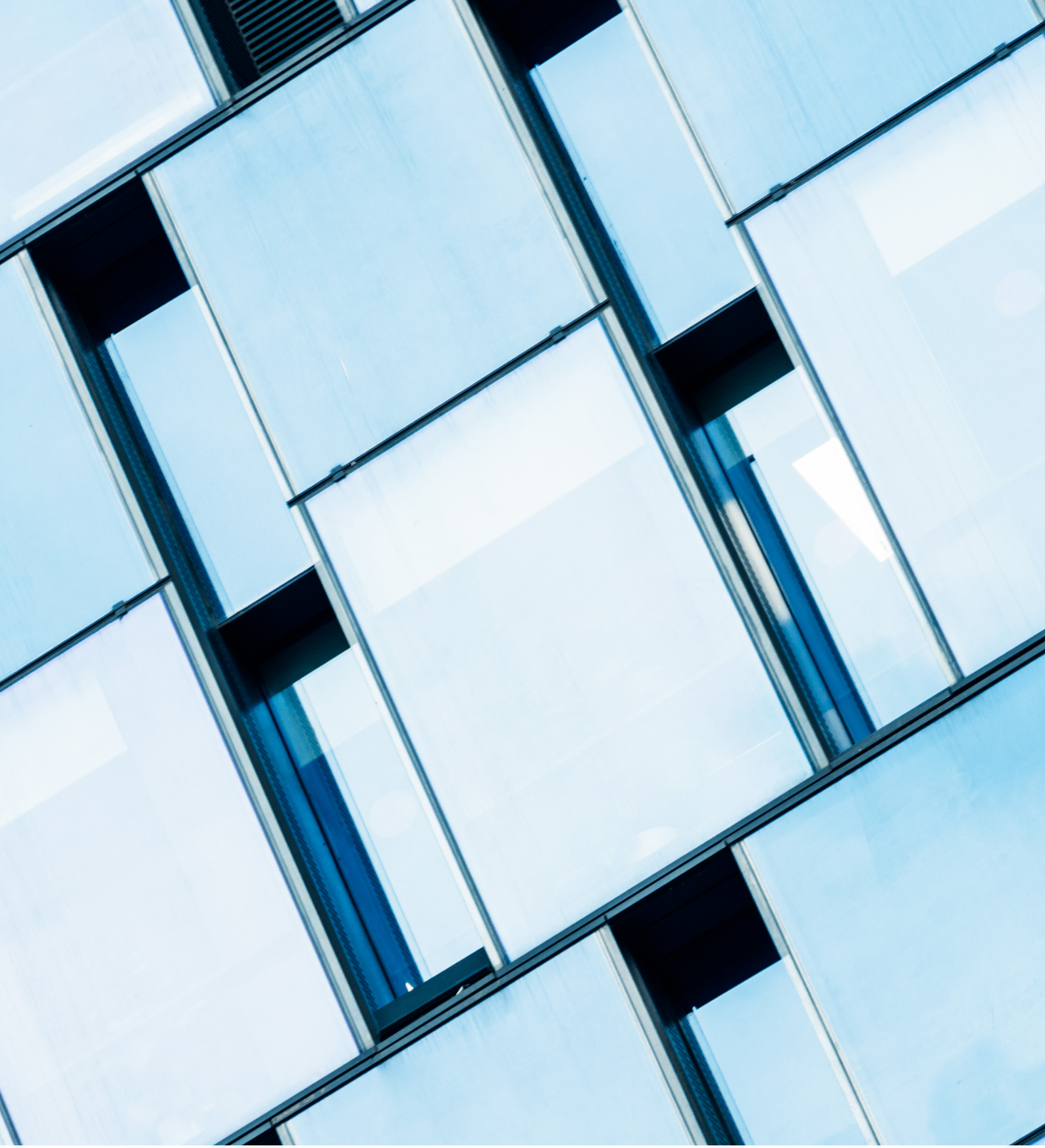

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