

# Tax alert

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## News

### Belgium applies Participation Exemption on EU-dividends in line with Cobelfret case

In the Cobelfret v. Belgium (C-138/07) case the European Court of Justice ("ECJ") ruled that the Belgian participation exemption is incompatible with article 4 (1) of the Parent-Subsidiary Directive. For further information on this decision we refer to our Tax Alert of 12 February 2009.

As a reminder, prior to the Cobelfret decision, the Belgian dividend participation exemption was not guaranteed if the parent company, receiving the dividends, incurred a tax loss or realized a fiscal result which was lower than the amount of the dividend participation. In such a case the balance of the participation exemption could not be carried forward to the next assessment year which resulted in a definite loss of the (excess) dividend participation exemption ("DRD" for dividend received deduction).

On 15 May 2009, the Belgian government has agreed on the principles of a draft circular letter of Finance Minister Didier Reynders which explains how the Belgian participation exemption regime must be applied and interpreted in order to be in accordance with the principles as laid down in the Cobelfret case :

- For dividends distributed as of assessment year 1992, Belgian recipients will now be able to carry forward tax losses resulting from an excess DRD to subsequent assessment years
- Tax losses resulting from the excess DRD will, in principle, follow the same rules as those applicable to tax losses carried forward as provided for in the Belgian Income Tax Code.
- For the determination of qualifying DRD, the domestic law participation threshold (currently 10%) will be taken into account, regardless the fact that Cobelfret decision is based on the Parent-Subsidiary directive which provides for declining thresholds (i.e. 25%, 20%, 15% to 10% (\*see footnote)).  
The above rules only apply to EU dividends. Pending the ECJ's decision in the KBC (C-439/07) case, the "old" regime will remain applicable for dividends received from subsidiaries located in non-EU countries.

For now, this looks like a favorable implementation of the Cobelfret case. More details will be available upon the actual publication of the circular letter, which can be expected in June 2009.

*Note : initially the parent company had to hold at least 25% of the shares in the subsidiary company for the participation exemption to apply. The 2003 Directive 2003/123/EC adjusting the Directive 90/435/EEC held that this minimum shareholding*

*was reduced gradually to 10%, as follows :*

- *20% from 1 January 2005 to 31 December 2006 ;*
- *15% from 1 January 2007 to 31 December 2008 ; and*
- *10% from 1 January 2009.*

