



Council of the European Union
General Secretariat

Brussels, 12 November 2018

WK 13663/2018 ADD 1

LIMITE

**FISC
ECOFIN**

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	(Draft) Progress Report by the Code of Conduct Group (Business Taxation) to the ECOFIN Council of December 2018 - Annex: Belgium's notional interest deduction regime (BE018)

Delegations will find attached a document in view of the meeting of the Code of Conduct Group (Business Taxation) on 15 November 2018.

Belgium's notional interest deduction regime (BE018)

I/ AGREED DESCRIPTION

The following description was agreed by the Code of Conduct Group on 21 September 2018:

1. Name of the regime:

The regime is called «notional interest deduction» [EN], «Dédution pour capital à risque» [FR], «régime des intérêts notionnels» [FR], «Aftrek voor risicokapitaal» [NL] or «Notionele Intrest Aftrek» [NL] (hereafter, “NID”).

2. Year of introduction / entry into force:

The NID regime exists in the Belgian tax legislation since 1 January 2006 (tax assessment year 2007).

This regime has been amended in the framework of a global reform of the Belgian corporate income tax, adopted by the Belgian Parliament in a program-law dated 25 December 2017¹. The NID regime, as amended, is applicable to any taxable periods starting as from 1 January 2018 (tax assessment year 2019).

A revision of the anti-abuse framework has also been initiated at the beginning of 2018, in order to strengthen this regime. This process has led to the adoption of a law of 30 July 2018², inserting specific anti-abuse rules for the NID regime into the Belgian Income Tax Code.

3. Please attach (or provide a link to) the relevant legislation which introduced/amended your NID regime and any administrative guidance providing clarifications (if in a language other than English, please provide a translation):

- The Belgian Income Tax Code (hereafter, “BITC”). Relevant dispositions are article 205*bis* to 205*octies* (annex I).
- The law of 30 July 2018 inserting specific anti-abuse rules for the NID regime into the BITC. Relevant disposition is article 6 (annex II).
- Administrative guidance:
https://finance.belgium.be/en/ondernemingen/vennootschapsbelasting/belastingvoordelen/notionele_interestaftrek

4. Please describe the scope of entities that can claim a NID deduction (companies based in your country / treatment of PE of foreign companies):

Are eligible to the Belgian NID regime, any companies that are subject to:

¹ Published in the *Belgian State Gazette* dd. 29 December 2017; in force as from 1 January 2018.

² Published in the *Belgian State Gazette* dd. 10 August 2018; in force as from 20 August 2018.

- Belgian corporate income tax; or
- Non-resident corporate income tax.

This means that the measure is applicable to:

- Belgian companies;
- Belgian PE's of foreign companies;
- Non-profit organisations (international or national) and foundations subject to Belgian corporate income tax;
- Foreign companies that own real estate located in Belgium or hold property rights in such real estate.

However, the benefit of the NID regime cannot be attributed to companies that already benefit from certain other advantageous tax rules, i.e.:

- Companies located in a reconversion zone, as long as they benefit from the measures contained in the Act of 31 July 1984;
- Investment companies;
- Cooperative companies constituted in the context of workers participation;
- Shipping companies applying the “tonnage tax”;
- SMEs choosing to set up an investment reserve. These SMEs will not be allowed to apply the notional interest deduction for the taxable period during which they established an investment reserve, nor for the following 2 years.

Additional comments – Capital allocated to a foreign PE of a Belgian company

In the past, the capital allocated to a foreign PE of a Belgian company was not taken into account for the computation of the NID.

However, Belgium has been condemned by the Court of Justice of the European Union because of this exclusion of such capital for NID purposes (arrest Argenta Spaarbank, C-350/11 dd. 4 July 2013).

The European Commission has ensured that this judgment would be implemented by Belgium, by initiating the procedure EU Pilot 7985/15/TAXU. In that framework, Belgium has confirmed its position as follows:

- Principle: capital allocated to a foreign PE, situated within the a member State of the EU or the EEA, of a Belgian company, is taken into account for the computation of the NID;
- Nuance: the Belgian company will only benefit from the part of the NID relating to this foreign capital, to the extent and insofar this NID entitlement would exceed the benefits deriving from the foreign PE;

▪ Examples:

Belgium		Other EU/EEA country	
Company		PE	
Scenario 1		Scenario 1	
Total NID entitlement (incl. PE capital):	300	Benefits of the PE:	800
(Less): NID relating to PE capital (used at PE level):	-100	NID relating to PE capital:	100
	200	→ NID (100) is used at PE level and imputed on the PE benefits (800) → Total NID entitlement of the company (300) is reduced with this amount (100)	
Scenario 2		Scenario 2	
Total NID entitlement (incl. PE capital):	300	Benefits of the PE:	75
(Less): NID relating to PE capital (used at PE level):	-75	NID relating to PE capital:	100
	225	→ The NID used at PE level is limited to the amount of PE benefits (75) → Only the amount imputed at PE level (75) should be deducted from the total NID entitlement of the company (300)	

5. NID formula:

5.1. Reference Rate: please describe the formula to determine the deductible interest rate; provide the applicable rates for the previous years (since entry into force):

The measure enables the entities subject to Belgian corporate tax, as mentioned above, to deduct from their taxable income a fictitious interest calculated on the basis of their shareholder's equity (net assets).

Notional Interest Deduction = Notional interest rate x adjusted equity.

In the formula for the new NID regime, only the additional equity with regard to the average of the past five years will qualify as the base of calculation.

The deduction rates are the following:

Tax year	Formula (article 205^{quater}, BITC)	Rate	Threshold
2007	Rate = average of reference rates J (linear bonds on 10 years), as published on a monthly basis by the Fonds des rentes and as referred to by article 9, §1 of the law of 4 August 1992 on mortgage loans		6,5 %
2008	Rate = average of reference rates J (linear bonds on 10 years) for the year 2006		6,5 %
2009	Rate = average of reference rates J (linear bonds on 10 years) for the year 2007	4,307 %	6,5 %
2010	Rate = average of reference rates J (linear bonds on 10 years) for the year 2008	4,473 %	6,5 %
2011	Rate = average of reference rates J (linear bonds on 10 years) for the year 2009	3,8 %	6,5 %
2012	Rate = average of reference rates J (linear bonds on 10 years) for the year 2010	3,425 %	6,5 %
2013	Rate = average of reference rates J (linear bonds on 10 years) for the year 2011	3 %	3 %
2014	Rate = average of reference rates J (linear bonds on 10 years) for the months of July, August and September of the year 2012	2,742 %	3 %
2015	Rate = average of reference rates J (linear bonds on 10 years) for the months of July, August and September of the year 2013	2,63 %	3 %
2016	Rate = average of reference rates J (linear bonds on 10 years) for the months of July, August and September of the year 2014	1,63 %	3 %
2017	Rate = average of reference rates J (linear bonds on 10 years) for the months of July, August and September of the year 2015	1,131 %	3 %
2018	Rate = average of reference rates J (linear bonds on 10 years) for the months of July, August and September of the year 2016	0,237 %	3 %
2019	Rate = average of reference rates J (linear bonds on 10 years) for the months of July, August and September of the year 2017	0,746 %	3 %

Additional comments:

- SMEs are entitled to an upgrade of 0,5%. A company qualifies as an SME if it meets the criteria mentioned in article 15 of the Belgian Company Code.
- The rate applied for a given tax year cannot deviate for more than 1% from the rate applied for the previous tax year.
- If the financial year of a company is shorter or longer than 12 months, the reference rate is multiplied by the number of days in this financial year and divided by 365.

5.2. Equity: is your regime stock-based or an incremental regime?

Incremental regime

5.3. Equity: please define the equity on which the interest can be deducted:

Legal basis: article 205ter, BITC.

The equity to take into account in order to compute the NID is equal to 1/5th of the positive differential between:

- The amount of proper funds (“fonds propres” or “equity”) of the company at the start of the taxable period; and
- The amount of proper funds (“fonds propres” or “equity”) of the company at the start of the 5th previous taxable period.

The comparison between those elements should be based on the amounts of proper funds (“fonds propres” or “equity”) as reported in the company’s balance sheet (book-keeping).

For the purpose of the above comparison, the amounts of proper funds (“fonds propres” or “equity”) should however be reduced of some items (at the start of each concerned taxable period), as mentioned in new article 205ter, §2 of the BITC³.

Since the entry into force of the law of 30 July 2018 (aiming at inserting specific anti-abuse measures; see above, question 2), 3 additional items should be reduced from the proper funds before proceeding with NID computation:

- “the net tax value of claims on a taxpayer referred to in article 227 or on a foreign establishment, which is established in a country with which Belgium has not concluded any agreements or conventions, and which does not participate in the conclusion of any other bilateral or multilateral legal instruments allowing the exchange of information in tax matters, unless the company demonstrates that the transaction relies on legitimate financial or economic needs” (new article 205ter, §2, 7°)
- “capital contributions received from a taxpayer referred to in article 227 or from a foreign establishment, which is established in a country with which Belgium has not concluded any agreements or conventions, and which does not participate in the conclusion of any other bilateral or multilateral legal instruments allowing the exchange of information in tax matters, unless the company demonstrates that the transaction relies on legitimate financial or economic needs” (new article 205ter, §2, 8°)

³ ‘1° la valeur fiscale nette des actions et parts propres et des immobilisations financières consistant en des participations et autres actions ou parts ;

2° la valeur fiscale nette des actions ou parts dont les revenus éventuels sont susceptibles d’être déduits des bénéfices en vertu des articles 202 et 203.

3° la valeur comptable nette des actifs corporels ou d’une partie de ceux-ci, dans la mesure où les frais y afférents dépassent de manière déraisonnable les besoins professionnels ;

4° la valeur comptable nette des éléments détenus à titre de placement et qui, par leur nature, ne sont normalement pas destinés à produire un revenu périodique imposable ;

5° la valeur comptable nette de biens immobiliers ou autre droits réels sur de tels biens dont des personnes physiques qui exercent un mandat ou des fonctions visés à l’article 32, alinéa 1er, 1°, leur conjoint ou leurs enfants lorsque ces personnes ou leur conjoint ont la jouissance légale des revenus de ceux-ci, ont l’usage ;

6° des plus-values exprimées mais non réalisées visées à l’article 44, § 1er, 1°, qui ne portent pas sur des éléments de l’actif visés aux 3° à 5°, des crédits d’impôt pour recherche et développement et des subsides en capital.’

- “capital contributions received from an associated company, when such contributions are directly or indirectly financed by means of loans subscribed by this associated company, for which this company deducts interest as business expenses” (new article 205^{ter}, §2, 9°).

These adjustments lead to the so-called “corrected” proper funds (“fonds propres” or “equity”) of the company, to be taken into account for NID computation.

The NID is only granted in case of a positive difference between the 2 terms of the comparison, i.e. only if there has been an increase of the proper funds (“fonds propres” or “equity”) of the company during the concerned 5-year period. The amount of the NID is computed by applying the NID rate on this increase.

6. Limitations applicable to the amount of notional interest deduction:

6.1: Does your legislation provide for a maximum amount of taxable income against which the NID can be claimed? If so, please describe the mechanism and state the lowest effective tax rate that can be achieved by using the maximum amount of NID:

The Belgian Income Tax Code (in its amended version in the framework of the current reform – see above) provides for a general limitation of some aggregated deductions in the framework of corporate income tax (« corbeille fiscale », hereafter “Tax Basket”), i.e.:

- Excess amount of definitively taxed income
- Excess amount of innovation income
- Professional losses
- NID

The sum of the abovementioned deductions cannot exceed EUR 1.000.000,00, increased with 70% of the part of the company’s income exceeding this amount of EUR 1.000.000,00 (after application of the other deductions foreseen in article 207, BITC).

6.2: Can the NID create losses? If so, please describe how those losses can be used by the taxpayers (carry-back, carry-forward, time and amount limitations):

No, the Belgian NID regime cannot create losses (the Tax Basket is only deductible to the extent there are enough profits on which it can be deducted. The excess deductible amount of the Basket can be carried forward).

7. Please describe the treatment of distributions made out of profits relieved from tax through a NID claim:

The qualification of the distributed income is not impacted by the fact that the profits out of which the distribution is made have benefited from the NID.

8. Please describe any limitations of scope in your legislation (exclusion of some specific assets, participations, treatment of foreign PE of a domestic company):

Eligible companies/entities: see question 4

Excluded assets: see question 5.3

9. Do you have specific anti-abuse provisions in your legislation that may apply in the following fields (if so, please explain the measure):

9.1: Intra-group loans and loans involving associated enterprises;

As already mentioned above, the anti-abuse framework has been strengthened by a law of 30 July 2018, amending article 205^{ter} of the BITC (see above; questions 2 and 5.3).

New article 205^{ter}, §2, 9° states that capital contributions received from an associated company cannot be taken into account for NID purposes when such contributions are directly or indirectly financed by means of loans subscribed by this associated company, for which this company deducts interest as business expenses.

This disposition aims at circumventing ‘double dipping’ mechanisms. The wording has been determined further to technical concertation with DG TAXUD of the European Commission.

9.2: Cash contributions and contributions in kind;

As already mentioned above, the law of 30 July 2018 has introduced a point 8° under article 205^{ter}, §2. Based on this new disposition, are excluded from NID computation:

- capital contributions received from a taxpayer referred to in article 227 [i.e. a non-resident taxpayer] or from a foreign establishment, which is established in a country with which Belgium has no exchange of information in tax matters allowed, unless the company demonstrates that the transaction relies on legitimate financial or economic needs (new article 205^{ter}, §2, 8°)

9.3: Transfers of participations;

9.4: The re-categorisation of old capital as new capital through liquidations and the creation of start-ups;

We should mention article 212 of the BITC. This provision states that, in the event of a merger, demerger, merger by absorption or any assimilated operations, the deductions that the absorbing/beneficiary company is entitled to under the NID regime shall be determined as if the transaction did not take place. This provision is applicable to any operations made as from 1st October 1993. It aims to guarantee the tax-neutral character of (de)merger operations and to prevent any artificial tax planning in the frame thereof.

9.5: The creation of subsidiaries;

See question 9.4.

9.6: Acquisitions of businesses held by associated enterprises;

See question 9.4.

9.7: Double-dipping structures combining interest deductibility and deductions under the AGI;

See question 9.1.

9.8: Increases in the amount of loan financing receivables towards associated enterprises as compared to the amount of such receivables at the reference date.

Additional comments from Belgium: EOI focus – New defensive measures

As already mentioned, the law of 30 July 2018 has introduced (a.o.) a point 7° and a point 8° under article 205*ter*, §2. Based on these new dispositions, are also excluded from NID computation:

- the net tax value of claims on a non-resident taxpayer or on a foreign establishment, which is established in a country with which Belgium has no exchange of information in tax matters allowed, unless the company demonstrates that the transaction relies on legitimate financial or economic needs” (new article 205*ter*, §2, 7°)
- capital contributions received from a non-resident taxpayer or from a foreign establishment, which is established in a country with which Belgium has no exchange of information in tax matters allowed, unless the company demonstrates that the transaction relies on legitimate financial or economic needs (new article 205*ter*, §2, 8°)

These dispositions constitute additional defensive measures toward jurisdictions that do not exchange tax information with Belgium (which is close to criteria 1 of the Code of Conduct).

10. Do you have a general anti-abuse provision in your legislation?

Yes, article 344 of the BITC.

The 1st paragraph of this disposition allows the Belgian tax authorities to disregard any (combination of) legal act(s) aiming to create a certain operation, when the authorities can demonstrate that this operation constitutes a “tax abuse”.

The “tax abuse” is defined in the law as:

- An operation by which the taxpayer would put himself outside of the scope of the law, in violation with the objectives hereof; or
- An operation whose essential purpose would be to benefit from a tax advantage foreseen by the law, in violation with the objectives hereof.

The 2nd paragraph of article 344 states that the Belgian tax authorities may also disregard any operations by which a Belgian taxpayer would sell, cede or transfer any assets or rights to a foreign taxpayer, when this last is, according to the tax legislation of his country, not subject to any taxes or is subject to a tax regime notably more favourable than the one that would be applicable in Belgium with regard to the income generated by the operation. The Belgian taxpayer may however avoid the

application of this anti-abuse disposition if he can demonstrate that the operation relies on real economic or financial needs.

11. Please describe the administrative procedures to benefit from the NID:

There are no specific formalities, in order to benefit from the Belgian NID.

The company only has to compute its NID entitlement and to report it in its Belgian corporate income tax return. An ad hoc form (n° 275 C) should also be joined to the tax return in this respect.

The tax authorities may proceed with any audits of the company's tax situation under the ordinary conditions and procedure rules foreseen in the BITC.

ANNEX - Data on the application of the (former) Belgian NID regime

Per your request, please find hereafter some data on the application of the Belgian NID regime.

In this respect, we would like to draw your attention to the following considerations:

- As indicated above, the **new** Belgian NID regime is applicable to any taxable periods starting as from January 1st, 2018 (tax assessment year 2019). Therefore, there is no data available yet on the application of this new regime;
- The tables below – that we are providing only for your information – relate to the **former** Belgian NID regime (tax years 2015 and 2016). The information contained in these tables may therefore not be representative of the new regime which is the object of the present notification;
- The below data relate to all companies subject to Belgian Corporate Income Tax for tax years 2015 and 2016, including small and medium enterprises without cross-border activities.

Data on the application of the (former) Belgian NID		
Tax year 2015		
Number of companies subject to Belgian Corporate Income Tax	508 294	
	Number of companies	Amount (EUR)
NID - Belgian income	234 423	12 795 186 577,00
NID - Income exempted by Double Tax Treaty	13	8 966 135,14
NID carry-forward - Belgian income	9 527	596 342 547,00
NID carry-forward - Income exempted by Double Tax Treaty	1	20 728,89
Total taxable basis (all companies)	38 074 329 260,00	
Total taxable basis (companies applying a NID/carry-forwarded)	30 050 862 221,00	
Tax year 2016		
Number of companies subject to Belgian Corporate Income Tax	513 576	
	Number of companies	Amount (EUR)
NID - Belgian income	240 809	8 507 185 773,00
NID - Income exempted by Double Tax Treaty	10	100 564,02
NID carry-forward - Belgian income	7 732	646 246 152,00
NID carry-forward - Income exempted by Double Tax Treaty	2	8 756,01
Total taxable basis (all companies)	42 272 060 538,00	
Total taxable basis (companies applying a NID/carry-forwarded)	33 421 204 234,00	

Additional questions to Belgium

1. **9.2 (add): Are there anti-abuse rules that prevent a group from changing existing equity to incremental equity e.g., when a parent company makes a cash contribution to its subsidiary or to relocate equity by using equity from other companies in the same group? If yes, does the rules also cover existing equity originating from abroad, when a foreign company makes a cash contribution to its subsidiary resident in Belgium?**

No, the Belgian legislation does not include any specific measures preventing the conversion of old to new capital in case of cash contribution or relocation of equity between parent companies.

However, as mentioned in our answer to question 10 of the Commission's previous questionnaire, Belgium does have a general anti-abuse measure (**article 344 of the BITC**). In case there would not be any economic logic behind a relocation of capital and that the operation would only be made for tax reasons, then the tax authorities use this GAAR to disregard the operation.

You will also see in our answer to question 4 that **article 207 of the BITC** is often invoked by the ruling authorities to reject the application of the NID regime in case of:

- "Abnormal or voluntary advantages" received by the company;
- Change in the control of a company during the income year that would not rely on specific legitimate needs of economic or financial nature.

As such, article 207 of the BITC can be considered as a measure that is appropriate to counter abusive use of the NID regime.

2. **In your reply to question 5.1, we understand that there is a 3% threshold applicable when the NID rate as normally calculated is lower. Could you explain the economic rationale of this 3% threshold?**

The 3% threshold has been chosen for budgetary reasons.

From the table you provided, we see that since 2014, the rate is calculated using the average of reference rates (linear bonds on 10 years) for July, August and September of N-2. Why is the calculation now limited to this three month period?

The reference to a 3-month period (July to September) instead of a 12-month period (January to December) has been chosen for the sake of simplicity. This reference also enhances legal certainty for the taxpayer since, for a given year (N), the applicable NID rate is known earlier (i.e. at the end of September of N-2, rather than the end of December of N-2).

It should be underlined that rates are, by nature, volatile. Therefore, a reference to a 3- or 12-month period does not prejudice on the variation (upwards/downwards) thereof. The reference to a 3-month period may possibly be more/less advantageous for the taxpayers than a reference to a yearly period; this cannot be anticipated.

3. In your reply to question 5.3, you explain that the equity to take into account is 1/5th of the positive difference between the amount of proper funds of the company at the end of the taxable period and the amount of proper funds at the end of the 5th previous taxable period. How did you define this 5 year period as appropriate?

By using a 5-year period, we obtain a balance between:

- a period that is long enough to avoid short-term abuse and to create an incentive to maintain the capital within the company;
- a period short enough to maintain an easy way of controlling and an incentive to raise the capital.

4. In your reply to question 10, you present your GAAR. Could you provide examples of cases where you made use of the GAAR and rejected transactions where the tax authorities considered the use of the NID as a tax abuse?

Based on the information available at this stage, we can inform the Commission that the Belgian ‘General Tax Administration’ (Administration Générale de la Fiscalité or “AGfisc” [FR], Algemene Administratie Fiscaliteit or “AAfisc” [NL]) has performed some specific audit actions with regards to the NID in 2012, 2013, 2014 and 2015. These actions did not focus exclusively on the utilization of the GAAR (article 344, §1 of the BITC). Based on the feedback received from these actions, the GAAR was invoked by the AGfisc/AAfisc in 7 files in 2012 and in 2 files in 2013.

It should be underlined that this information is not complete, since another division of the Belgian tax authorities, called ‘Special Tax Inspection’ (Administration Générale Inspection Spéciale des Impôts or “AG ISI” [FR], Algemene Administratie Bijzondere Belasting Inspectie or “AA BBI” [NL]) – which is in charge of files of big organized tax fraud – also performs specific audits with respect to the NID. We have not had the opportunity to collect the data of this division in view of the answer to the present questionnaire.

5. If applicable, could you provide the number of rulings granted on the NID regime with detail on the number of cases where the ruling request had a positive/negative outcome?

Please find below an overview of the number of rulings rendered between 2007 and 2016 with respect to the Belgian NID regime:

Year	Number of rulings NID
2007	13
2008	8
2009	12
2010	7
2011	8
2012	7
2013	5
2014	1
2015	2
2016	3

We would like to draw your attention to the following considerations:

- Since 2014-2015, there are almost no new NID-files introduced to the rulings authorities anymore. The few files introduced generally concern prolongations of former rulings.
- In case of negative outcome, the ruling authorities often justify their position by invoking **article 207 of the BITC**:
 - No deduction (therefore, no NID) can apply on the portion of the profits that derives from “abnormal or voluntary advantages”⁴ received by the company (article 207, al. 7).
 - No deduction (therefore, no NID) can apply in case of change in the control of a company during the income year, that would not rely on specific legitimate needs of economic or financial nature. This prohibition of deduction is applicable for the year during which the change of control occurred, but also for any subsequent income years (article 207, al. 8).

6. We thank you for the data you provided under additional question 1. We would be grateful if you could specify:

- a. Our understanding is that, in 2016, amongst 513 576 companies subject to Belgium CIT, only 240 809 used the NID. Could you confirm our understanding and, if so, how can you explain this large number of companies not using the NID?**

Yes, we confirm that the Commission’s understanding is correct. More precisely, in 2016, out of 513.576 companies subject to corporate income tax:

- 240.809 applied the NID on Belgian sourced-income of the year;
- 10 applied the NID on foreign-sourced income of the year (non-exempted by DTT);
- 7.732 applied carry-forwarded NID on Belgian sourced-income of the year;
- 2 applied carry-forwarded NID on foreign-sourced income (non-exempted by DTT).

The fact that a large number of companies do not use the NID can be explained by the following factors:

- **Order (and limitation) of the deductions under the Belgian tax law**

Under the Belgian law, the corporate tax base is determined as follows:

- Variation of the reserves (can be positive/negative, i.e. can result in a profit/loss) + Non-deductible expenses + Distributed dividends
- Ventilation based on the income provenance (where applicable)
- [Less]: Deductions:
 - a. Non-taxable items
 - b. Definitively taxed income (*cf.* Parent-Subsidiary Directive) & exempted movable income
 - c. Deduction for patent income
 - d. Deduction for innovation income

⁴ The notion of “advantage” implies an enrichment of the beneficiary. The term “abnormal” refers to an opposition to the normal course of things, established rules or practices. The term “voluntary” refers to something that would be granted without compensation for the person who allocates it, or without constituting the execution of an obligation.

e. NID

f. Carried-forward losses (from previous tax years)

g. Deduction for investment

h. Deduction of stock NID

= TOTAL TAX BASE

As you can see, the NID is only applied if there are enough profits subsisting after the deduction of elements a) to d).

You will find some figures regarding the above parameters for tax years 2014, 2015 and 2016 (*former NID regime*) in Annex (figures 1 to 5).

Besides, as mentioned in our answer to question 6 of the Commission's previous questionnaire, a general limitation of some aggregated deductions (« corbeille fiscale », hereafter 'Tax Basket') has been introduced in our tax law in the framework of the recent reform of the Belgian CIT (*new NID regime*). This Tax Basket will be applicable to the following deductions:

- Excess amount of definitively taxed income
- Excess amount of innovation income
- Professional losses
- (*new*) NID

The sum of the abovementioned deductions cannot exceed EUR 1.000.000,00, increased with 70% of the part of the company's income exceeding this amount of EUR 1.000.000,00 (after application of the other deductions foreseen in article 207, BITC).

The Tax Basket is only deductible to the extent there are enough profits on which it can be deducted. As such, the NID cannot create losses.

▪ **Specific tax regimes excluding the application of the NID**

The Belgian tax law foresees specific tax regimes for companies meeting certain conditions (we refer in this respect to our answer to question 4 of the Commission's previous questionnaire). Such regimes are non-compatible with the NID regime. In practice, the specific regime that companies apply for the most is the so-called 'investment reserve'. SME's choosing to set up an investment reserve are not allowed to apply the NID for the taxable period during which they established the investment reserve, nor for the following 2 years.

You will find some details regarding the application of the investment reserve for tax years 2014, 2015 and 2016 in Annex (figure 5).

- b. **On data relating to your former regime, could you specify the proportion of directly or indirectly foreign owned companies, of PEs of foreign companies and of Italian owned companies. When providing data on foreign owned companies, could you please specify whether it is majority (over 50% owned directly or indirectly) foreign owned companies?**

Unfortunately, no data available. However, such data is less relevant as not related to the new NID regime (*).

- c. **When concerning foreign owned companies, do you have data on the country of the parent company and when were these taxpayers incorporated?**

Unfortunately, no data available. However, such data is less relevant as not related to the new NID regime (*).

- d. **Amongst the 33.4 billion EUR of NID entitlement in 2016, how much is attributable to each of the above categories?**

Unfortunately, no data available. However, such data is less relevant as not related to the new NID regime (*).

(*) Important remark on sub-questions b) to d)

We would like to underline that, in practice, all the Belgian companies are benefitting from the NID in similar proportions (i.e. +/- 45%), and regardless their legal forms.

You will find more details in this respect under figure 8 (*cf.* Annex). For example, you will see that SPRL's – which are much less susceptible to be owned by foreign companies than SA's – applied the NID in the same proportions as SA's for tax years 2014, 2015 and 2016.

These considerations demonstrate that the Belgium NID regime is not ring-fenced.

(*) Important remark on sub-questions b) to d)

We would like to underline that, in practice, all the Belgian companies are benefitting from the NID in similar proportions (i.e. +/- 45%), regardless their legal forms.

You will find more details in this respect under figure 8 (*cf.* Annex). For example, you will see that SPRL's – which are much less susceptible to be owned by foreign companies than SA's – applied the NID in the same proportions as SA's for tax years 2014, 2015 and 2016.

These considerations demonstrate that the Belgium NID regime is not ring-fenced.

- e. **Please provide similar detail on data for years 2014 and 2015.**

See the Annex.

- f. **On your new regime, for which no data is yet available, could you please provide**

- **an analysis of the policy underlying the measure, based on consultation documents, impact assessments or other sources prepared when it was introduced, and;**
- **relevant statistical information, including for example, the estimated costs and/or benefits of the measure, the number of taxpayers expected to use it, etc.**

You will find below an overview of the expected results of the introduction of our new NID regime in terms of impact on the total corporate tax base (in millions EUR):

- 1st line: expected enlargement of the tax base due to the suppression of our former NID regime;
- 2nd line: expected reduction of the tax base due to the application of our new NID regime;
- 3rd line: balance.

As you can see, the replacement of our former NID regime by the new regime should have a positive impact on the total corporate tax base in Belgium.

	Expected impact on the total corporate tax base (in mios EUR)			
	2018	2019	2020	Onwards BAU (*)
Suppression of former NID regime	+ 2 409,90	+ 3 207,60	+ 5 149,90	+ 7 357,00
Introduction of new NID regime	-132,60	-176,50	-283,40	-404,90
Balance	+ 2 277,30	+ 3 031,10	+ 4 866,50	+ 6 952,10

(*) Onwards 'Business As Usual' (BAU): Expected impact under a normal situation as from income year 2021.

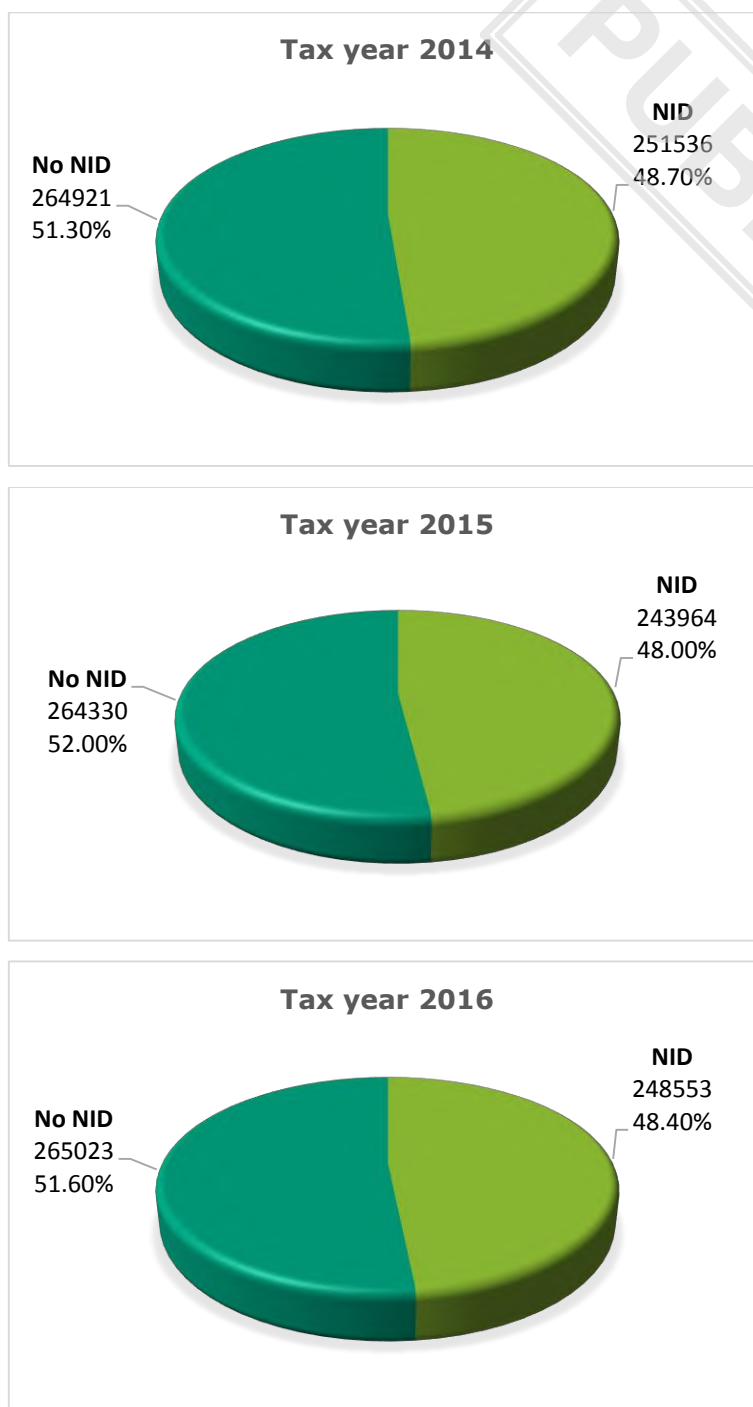
ANNEX

Data on the application of the (former) Belgian NID regime

▪ **FIGURE 1 - General data for tax years 2014, 2015 and 2016**

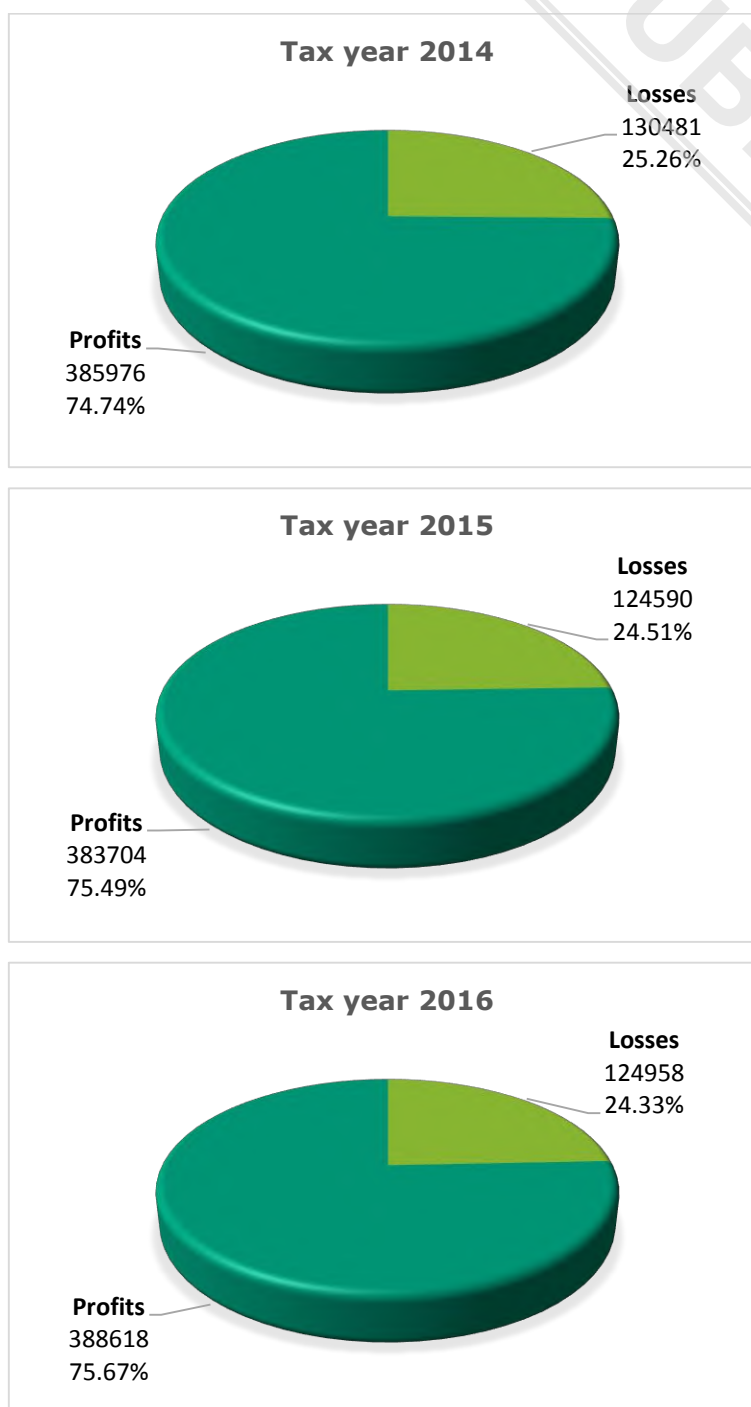
Tax year 2014		
Number of companies subject to Belgian CIT	516 457	
	Number of cies	Amount (EUR)
NID - Belgian income	237 331	13 342 715 679 €
NID - Income non-exempted by DTT	24	1 069 160 €
NID carry-forward - Belgian income	14 172	574 639 128 €
NID carry-forward - Income non-exempted by DTT	9	50 148 €
TOTAL	251 536	13 918 474 115 €
Total taxable basis (all cies)	35 196 715 076 €	
Total taxable basis (cies applying a (carry-forwarded) NID)	28 825 763 059 €	
Tax year 2015		
Number of companies subject to Belgian CIT	508 294	
	Number of cies	Amount (EUR)
NID - Belgian income	234 423	12 795 186 577 €
NID - Income non-exempted by DTT	13	8 966 135 €
NID carry-forward - Belgian income	9 527	596 342 547 €
NID carry-forward - Income non-exempted by DTT	1	20 729 €
TOTAL	243 964	13 400 515 988 €
Total taxable basis (all cies)	38 074 329 260 €	
Total taxable basis (cies applying a (carry-forwarded) NID)	30 050 862 221 €	
Tax year 2016		
Number of companies subject to Belgian CIT	513 576	
	Number of cies	Amount (EUR)
NID - Belgian income	240 809	8 507 185 773 €
NID - Income non-exempted by DTT	10	100 564 €
NID carry-forward - Belgian income	7 732	646 246 152 €
NID carry-forward - Income non-exempted by DTT	2	8 756 €
TOTAL	248 553	9 153 541 245 €
Total taxable basis (all cies)	42 272 060 538 €	
Total taxable basis (cies applying a (carry-forwarded) NID)	33 421 204 234 €	

- **FIGURE 2 - Amongst companies subject to Belgium CIT, proportion of companies that applied the NID for tax years 2014, 2015 and 2016**

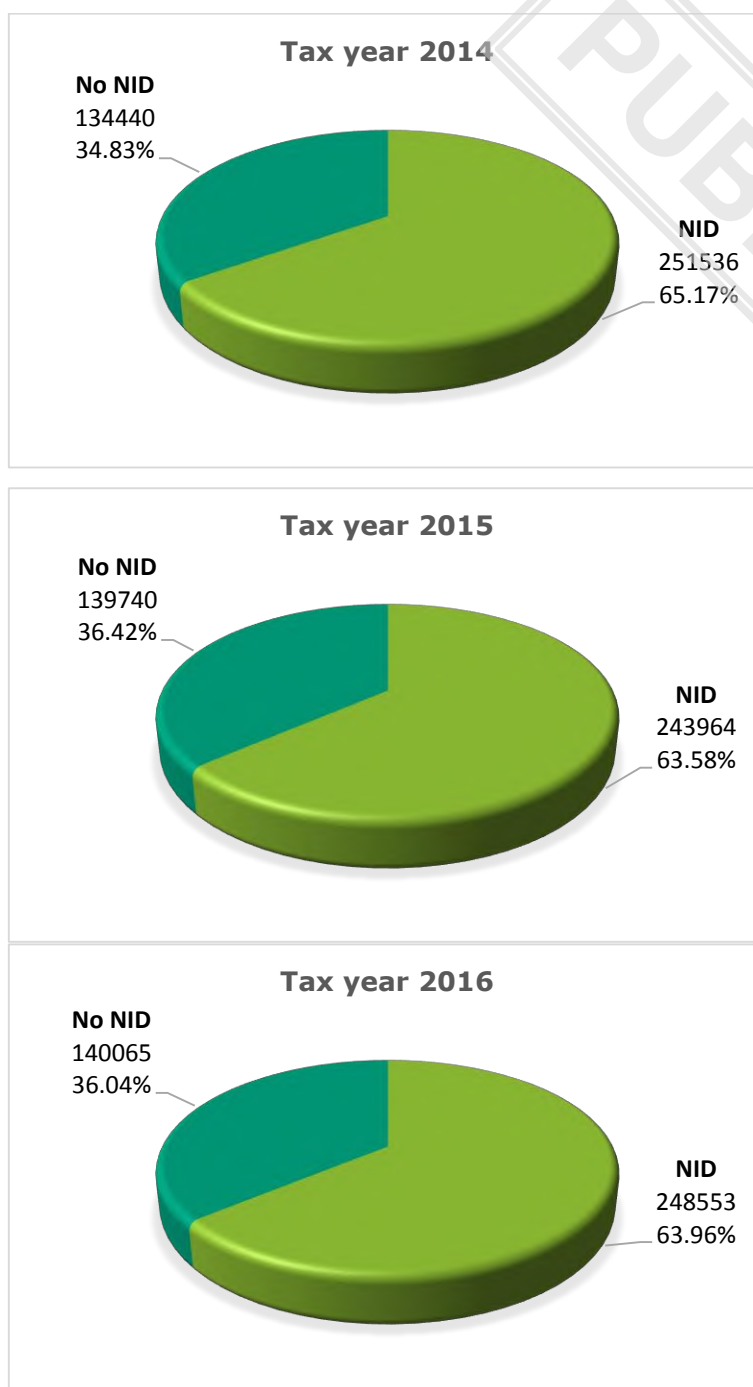


- **FIGURE 3 - Amongst companies subject to Belgium CIT, proportion of companies with a negative tax base (losses) VS. a positive tax base (profits) for tax years 2014, 2015 and 2016**

As mentioned above, companies with a negative tax base cannot apply the NID.



- **FIGURE 4 - Amongst companies with profits, proportion of companies that applied the NID for tax years 2014, 2015 and 2016**



- **FIGURE 5 – Details of companies having an investment reserve (IR) for tax years 2014, 2015 and 2016**

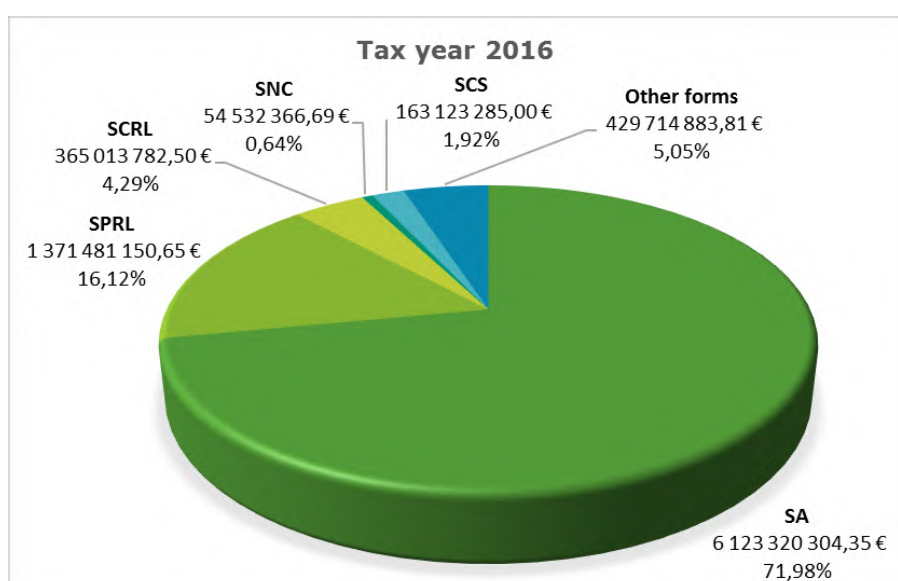
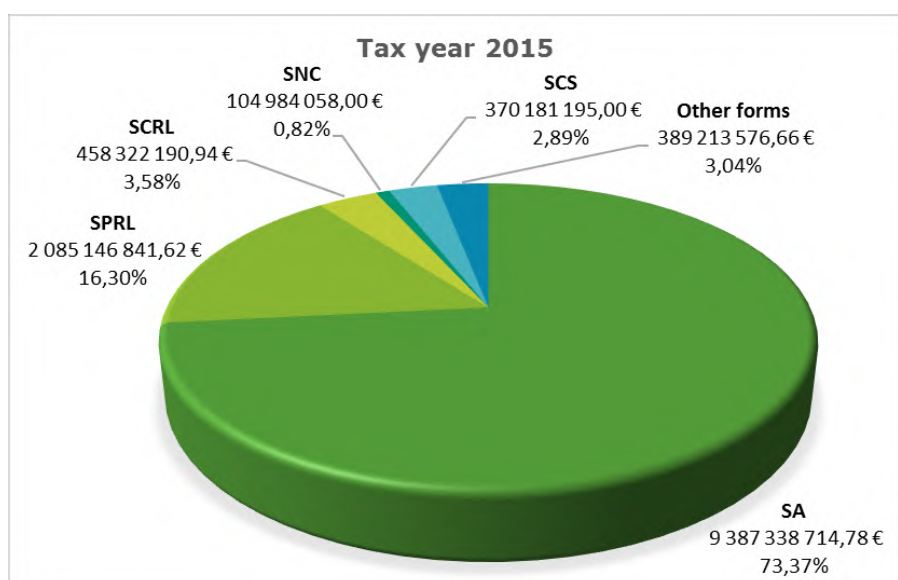
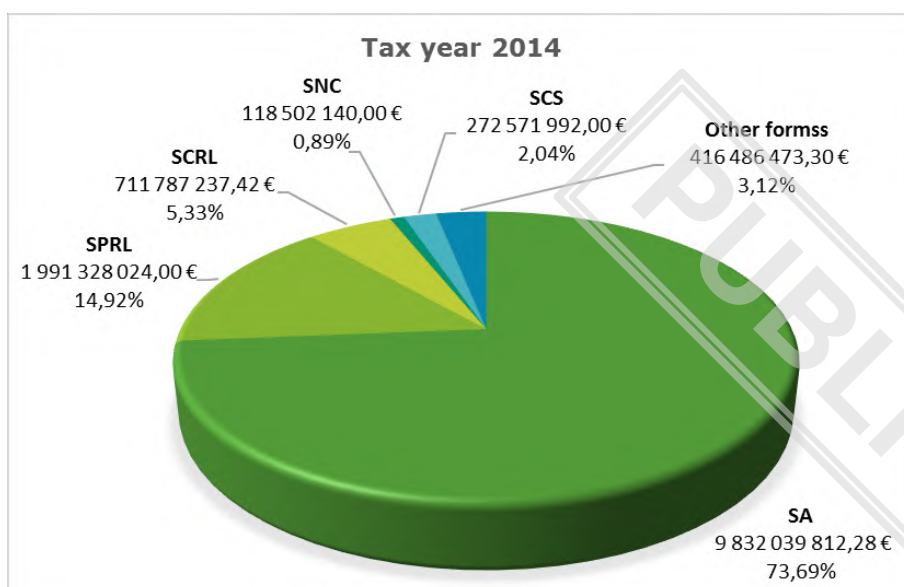
As mentioned above, SME's choosing to set up an investment reserve are not allowed to apply the NID for the taxable period during which they established the investment reserve, nor for the following 2 years.

Tax year 2014	
Number of cies have an IR at the beginning of the tax year	52 234
➤ Amongst which no NID authorized (year of the RI + 2 years)	19 840
Number of cies have an IR at the end of the tax year	50 737
➤ Amongst which no NID authorized (year of the RI + 2 years)	20 077
Tax year 2015	
Number of cies have an IR at the beginning of the tax year	50 046
➤ Amongst which no NID authorized (year of the RI + 2 years)	19 111
Number of cies have an IR at the end of the tax year	50 000
➤ Amongst which no NID authorized (year of the RI + 2 years)	19 816
Tax year 2016	
Number of cies have an IR at the beginning of the tax year	49 988
➤ Amongst which no NID authorized (year of the RI + 2 years)	19 171
Number of cies have an IR at the end of the tax year	50 330
➤ Amongst which no NID authorized (year of the RI + 2 years)	20 264

- **FIGURE 6 – Details of legal forms of companies subject to Belgium CIT and ventilation of the NID per legal forms for tax years 2014, 2015 and 2016**

Tax year 2014		
Legal form	Number of cies	
SA	97 103	
SPRL	357 982	
SCRL	10 886	
Société en nom collectif (SNC)	13 780	
Société en commandite simple (SCS)	21 281	
Other forms	15 425	
TOTAL	516 457	
Application of a NID on Belgian income	Number of cies	Amount (EUR)
SA	46 030	9 832 039 812
SPRL	167 952	1 991 328 024
SCRL	4 949	711 787 237
Société en nom collectif (SNC)	4 929	118 502 140
Société en commandite simple (SCS)	8 423	272 571 992
Other forms	5 048	416 486 473
TOTAL	237 331	13 342 715 679
Tax year 2015		
Legal form	Number of cies	
SA	93 232	
SPRL	353 921	
SCRL	10 631	
Société en nom collectif (SNC)	13 743	
Société en commandite simple (SCS)	22 091	
Other forms	14 676	
TOTAL	508 294	
Application of a NID on Belgian income	Number of cies	Amount (EUR)
SA	44 811	9 387 338 715
SPRL	166 601	2 085 146 842
SCRL	4 891	458 322 191
Société en nom collectif (SNC)	4 868	104 984 058
Société en commandite simple (SCS)	8 563	370 181 195
Other forms	4 689	389 213 577
TOTAL	234 423	12 795 186 577
Tax year 2016		
Legal form	Number of cies	
SA	91 019	
SPRL	358 642	
SCRL	10 543	
Société en nom collectif (SNC)	14 766	
Société en commandite simple (SCS)	24 093	
Other forms	14 513	
TOTAL	513 576	
Application of a NID on Belgian income	Number of cies	Amount (EUR)
SA	44 421	6 123 320 304
SPRL	171 743	1 371 481 151
SCRL	4 853	365 013 783
Société en nom collectif (SNC)	5 290	54 532 367
Société en commandite simple (SCS)	9 755	163 123 285
Other forms	4 747	429 714 884
TOTAL	240 809	8 507 185 773

- **FIGURE 7 – Ventilation of NID amounts (EUR) per legal forms for tax years 2014, 2015 and 2016**



▪ **FIGURE 8 - Proportion of companies applying the NID per legal forms for tax years 2014, 2015 and 2016**

Tax year 2014			
Legal form	Total cies	Cies applying NID (number)	Cies applying NID (%)
SA	97 103	46 030	47,40%
SPRL	357 982	167 952	46,92%
SCRL	10 886	4 949	45,46%
Société en nom collectif (SNC)	13 780	4 929	35,77%
Société en commandite simple (SCS)	21 281	8 423	39,58%
Other forms	15 425	5 048	32,73%
TOTAL	516 457	237 331	45,95%
Tax year 2015			
Legal form	Total cies	Cies applying NID (number)	Cies applying NID (%)
SA	93 232	44 811	48,06%
SPRL	353 921	166 601	47,07%
SCRL	10 631	4 891	46,01%
Société en nom collectif (SNC)	13 743	4 868	35,42%
Société en commandite simple (SCS)	22 091	8 563	38,76%
Other forms	14 676	4 689	31,95%
TOTAL	508 294	234 423	46,12%
Tax year 2016			
Legal form	Total cies	Cies applying NID (number)	Cies applying NID (%)
SA	91 019	44 421	48,80%
SPRL	358 642	171 743	47,89%
SCRL	10 543	4 853	46,03%
Société en nom collectif (SNC)	14 766	5 290	35,83%
Société en commandite simple (SCS)	24 093	9 755	40,49%
Other forms	14 513	4 747	32,71%
TOTAL	513 576	240 809	46,89%

II / FINAL ASSESSMENT

[The following assessment was agreed by the Code of Conduct Group on 15 November 2018:]

Criterion	1a	1b	2a	2b	3	4	5	OA
Notional interest deduction (NID)	X	?	X	?	X	X	X	X

Significantly lower level of taxation: “Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code”

The general tax rate in Belgium is 33%⁵. As of tax assessment year 2019 (taxable period 2018) it is set at 29%, and as of 2021 (taxable period 2020) at 25%.

The notional interest deduction in Belgium was first introduced as of tax year 2006. It was substantially reformed on 25 December 2017 and the revised deduction entered into force as of 2018⁶ (hereafter "NID")⁷.

The scope of this draft assessment covers the newly introduced rules on 25 December 2017 and the corresponding anti-abuse measures adopted on 30 July 2018 (aiming at inserting specific anti-abuse measures).

The measure enables the entities subject to Belgian corporate tax to deduct from their taxable income a *fictitious interest* calculated on the basis of their shareholder's **equity increase**.

In the NID formula, only the additional equity (also known as "capital à risque") will qualify as the base for the calculation. The Belgian NID⁸ is thus an incremental one, and is calculated as a percentage of a company's net equity increase, as follows. The equity increase to take into account to compute the NID is equal to **1/5th of the positive difference between**⁹:

- the amount of proper funds¹⁰ (capitaux propres; "fonds propres" or "equity") of the

⁵ 33.99% with the crisis contribution of 3%; applicable for the taxable period 2017.

⁶ Published in the *Belgian State Gazette* dd. 29 December 2017; in force as from 1 January 2018.

⁷ Applicable to any taxable periods starting as from 1 January 2018 (tax assessment year 2019)

⁸ Relevant dispositions are article 205bis to 205octies *Belgian Income tax Code*.

⁹ The comparison between those elements should be based on the amounts of proper funds ("fonds propres" or "equity") as reported in the company's balance sheet (book-keeping).

¹⁰ I. Capital

A. Capital souscrit

B. Capital non appelé

II. Primes d'émission

III. Plus-values de réévaluation

IV. Réserves

A. Réserve légale

B. Réserves indisponibles

1. Pour actions propres

2. Autres

C. Réserves immunisées

D. Réserves disponibles

V. Bénéfice reporté

Perte reportée

VI. Subsidies en capital

company at the start of the taxable period; and
- the amount of proper funds (*capitaux propres*; “*fonds propres*” or “*equity*”) of the company at the start of the 5th previous taxable period¹¹.

For the purpose of the above calculation, the **amounts of the above mentioned proper funds** at the start of the relevant taxable period **are reduced** by certain items, as per new article 205ter, §2 BITC¹² (see under criterion 3 – *Limitations of the scope* - assets excluded from the NID base).

Variations (upwards/ downwards) in value of the assets during the tax year are also taken into account. By law of 30 July 2018, three additional items should be reduced from the proper funds before proceeding with NID computation (point 7° to 9°) in order to prevent certain abuse situations.

These adjustments lead to the so-called “**corrected**” **proper funds** of the company used for NID computation purposes (*capital à risque*).

The amount of the NID is subsequently computed by applying the NID rate on this equity increase. The NID rate for 2018 represents the average of reference rates J (linear bonds on 10 years) for the months of *July, August and September of the year -2, thus of 2016*; and so on. It is 0.237% for 2018 and 0.746% for 2019 respectively. The NID rate can also be set through Royal decree, but always with a threshold set at 3%. The SME are entitled to an upgrade of 0.5%, i.e. 0.737% for 2018 and 1.246% for 2019, with a threshold set at 3.5%. The rate applied for a given tax year cannot deviate for more than 1% from the rate applied for the previous tax year.

This reduction of the tax base may lead to a significantly lower level of taxation.

¹¹ E.g. This leads to the equity increase (*capital à risque*) e.g. between taxable year 2017 – taxable year 2012
The amount of the equity for a taxable year in which the taxpayer did not exist yet equals 0 for that year.

¹² article 205ter, §2, 1° -9°:

- 1° la valeur fiscale nette des actions et parts propres et des immobilisations financières consistant en des participations et autres actions ou parts;
- 2° la valeur fiscale nette des actions ou parts dont les revenus éventuels sont susceptibles d’être déduits des bénéfices en vertu des articles 202 et 203;
- 3° la valeur comptable nette des actifs corporels ou d’une partie de ceux-ci, dans la mesure où les frais y afférents dépassent de manière déraisonnable les besoins professionnels;
- 4° la valeur comptable nette des éléments détenus à titre de placement et qui, par leur nature, ne sont normalement pas destinés à produire un revenu périodique imposable;
- 5° la valeur comptable nette de biens immobiliers ou autre droits réels sur de tels biens dont des personnes physiques qui exercent un mandat ou des fonctions visés à l’article 32, alinéa 1er, 1°, leur conjoint ou leurs enfants lorsque ces personnes ou leur conjoint ont la jouissance légale des revenus de ceux-ci, ont l’usage;
- 6° des plus-values exprimées mais non réalisées visées à l’article 44, § 1er, 1°, qui ne portent pas sur des éléments de l’actif visés aux 3° à 5°, des crédits d’impôt pour recherche et développement et des subsides en capital.
- 7° la valeur fiscale nette des créances sur un contribuable visé à l’article 227 ou sur un établissement étranger, qui est établi dans un pays avec lequel la Belgique n’a pas conclu un accord ou une convention, ni participe à la conclusion d’un autre instrument juridique bilatéral ou multilatéral, qui permettent l’échange d’informations en matière fiscale, à moins que la société ne prouve que l’opération répond à des besoins légitimes de caractère financier ou économique;
- 8° les apports en capital reçus d’un contribuable visé à l’article 227 ou d’un établissement étranger, qui est établi dans un pays avec lequel la Belgique n’a pas conclu un accord ou une convention, ni participe à la conclusion d’un autre instrument juridique bilatéral ou multilatéral, qui permettent l’échange d’informations en matière fiscale, à moins que la société ne prouve que l’opération répond à des besoins légitimes de caractère financier ou économique;
- 9° les apports en capital reçus d’une société liée lorsqu’ils trouvent directement ou indirectement leur origine dans des prêts souscrits par une société liée dont celle-ci déduit les intérêts à titre de charges.

Criterion 1: “whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents”

Criterion 1 contains two elements. The first element is whether the measure is exclusively available to non-residents or transactions with non-residents (criterion 1a). The second element is whether it is only or mainly used by non-residents or for transactions with non-residents (criterion 1b).

1a) Criterion 1a) concerns the de jure application of the measure. The Belgium NID applies and is available to all legal entities based in Belgium without any restriction in terms of shareholding (resident or non-resident shareholders) or in terms of business sector. Both companies subject to Belgian CIT or to Non-resident CIT are eligible. **We have therefore proposed a cross ("X") for criterion 1a).**

1b) Criterion 1b) is used to complement the assessment under criterion 1a) which only looks at the literal interpretation of the measure. It takes account of the de facto effect of the measure. Where the majority of taxpayers (or counterparties to transactions) benefitting from the measure are in fact non-residents the measure will fall foul of criterion 1b).

In light of the recent introduction of the NID, it is unlikely that statistical or impact data is either available at this stage, or representative enough to reflect its comprehensive effects. Moreover, the agreed description only provides data on the effects of the former NID and some estimates on the budgetary impact of the NID. This remains therefore a horizontal issue for those assessments submitted to the Group that lack statistical data. To the extent that our draft assessment is based on currently available information, we suggest that the group reserves the possibility of a potentially different outcome of a future assessment based on more complete information regarding the concrete effects. Thus, we do not have information to determine whether the NID is pre-dominantly used by non-residents (or related parties).

Criterion 2: “whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base”

As regards criterion 2 the division between criteria 2a and 2b is done in the same way as in the case of criterion 1 (i.e. de jure interpretation and de facto analysis). In general, a measure is caught by criterion 2 if the advantages are ring-fenced from the domestic market so that they do not affect the national tax base. In most cases, the evaluation against criterion 2 follows closely that of criterion 1.

2a / 2b We refer to what is mentioned above under criteria 1a) and b).

Criterion 3: "whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages"

According to the standard practice for the evaluation of the potentially harmful measures against criterion 3, a measure is caught by this criterion if there are no express requirements with regard to real economic activities and notably any requirement with respect to employment obligations.

Such express requirement aims at ensuring that the activities generating the income are undertaken by the taxpayer benefiting from the preferential tax regime.

Notional interest regimes such as the *Belgian déduction pour capital à risque* are different from other preferential tax regimes in that their tax benefits are not based on income generated or the

activity performed but on the policy goal to tackle the debt bias, making it difficult to expect a correlation between income-generating activities and benefits.

Such a regime should nonetheless be properly contained by appropriate anti-abuse measures in order to tackle tax-planning opportunities.

Firstly, it is worth noting that the Belgian regime is an incremental regime that limits the windfall effect associated with a regime based on the stock of equity. In addition, the computation method takes into account 1/5th of the relevant equity increase. By using a 5-year period, the intention is to reach a balance between: a period that is long enough to avoid short-term abuse and to create an incentive to maintain the capital within the company and a period short enough to maintain an easy way of controlling and an incentive to raise capital.

Paragraph L of the Code of Conduct states that: "anti-abuse provisions or countermeasures contained in tax laws and in double taxation conventions play a fundamental role in counteracting tax avoidance and evasion". In past assessments, the Code Group has taken into account, in the overall assessment of various regimes, the existence of appropriate anti-abuse provisions or countermeasures. In order to avoid tax planning and address abusive situations in applying NID, the below enumerated *limitations of the scope* and *anti-abuse measures* have been identified in a previous assessment.¹³

In particular, Belgium NID regime includes the following **limitations of scope**:

First, the benefit of the NID regime cannot be attributed to certain companies or in respect of certain assets.

Companies that already benefit from other advantageous tax rules cannot claim the NID:

- Investment companies;
- Cooperative companies;

¹³ Limitations of scope:

- Exclusion of own shares: this exclusion prevents the possibility for a company to increase its equity and simultaneously subscribe the new shares.
- Exclusion of shares held in other resident and non-resident legal persons: this exclusion tackles the possibility to cascade the ACE through chains of equity injection.
- The application of the allowance may not create nor increase tax losses. Consequently, a negative result due to this deduction does not generate a loss carry forward.
- Assets not necessary for conducting business: this is a classical exclusion in NID systems to avoid benefiting from NID on assets that do not generate taxable income (for instance, luxury goods, artwork, etc.).
- No deduction of NID with regard to capital which is allocated to a foreign permanent establishment. If the foreign PE were a legal person (a subsidiary), the parent company holding its capital would have to exclude those shares from the ACE base.

Anti-abuse rules targeting specifically transactions between related parties: The proposal for an EU Directive on a common consolidated tax base (CCCTB) contains an allowance for growth and investment (AGI). Art. 11(6) of the CCTB reads as follows:

The Commission shall be empowered to adopt delegated acts in accordance with Article 66 to lay down more detailed rules against tax avoidance, and more particularly in the following fields relevant to the AGI:

- (a) intra-group loans and loans involving associated enterprises;
- (b) cash contributions and contributions in kind;
- (c) transfers of participations;
- (d) the re-categorisation of old capital as new capital through liquidations and the creation of start-ups;
- (e) the creation of subsidiaries;
- (f) acquisitions of businesses held by associated enterprises;
- (g) double-dipping structures combining interest deductibility and deductions under the AGI;
- (h) increases in the amount of loan financing receivables towards associated enterprises as compared to the amount of such receivables at the reference date.

- Shipping companies applying the “tonnage tax”;
- SMEs choosing to set up an investment reserve (such SMEs will not be allowed to apply the NID for the taxable period during which they established an investment reserve, nor for the following 2 years); or
- Certain companies located in a reconversion zone.

Some assets are excluded and do not constitute equity increases, avoiding cascading NID effects, by reducing the amounts of the net equity taken into account:

- own shares;
- participations in other entities;
- assets not necessary to performing the economic activity, either because their costs exceed reasonably the business needs of the company; or they are not normally meant to generate a periodical taxable income;
- shares generating income that is potentially deductible from benefits according to the national implementing rules of the PS Directive (Revenus Définitivement Taxés);
- real estate assets/ rights for the use of the company's associates;
- unrealized capital gains not related to the corresponding equity items;
- R&D tax credits; and
- subsidies in capital (i.e. investment aid granted by the public authorities).

Second, the Belgian NID regime cannot create losses. The Tax Basket (see below) is only deductible to the extent there are enough profits from which it can be deducted. The excess deductible amount of the Basket can however be carried forward to subsequent tax years.

Third, capital allocated to a foreign PE (of a Belgian company) situated within a Member State of the EU or EEA is taken into account for the computation of the NID. However, with a limitation, in particular the Belgian head office company will only benefit from the part of the NID relating to this foreign capital, to the extent and insofar this NID entitlement would exceed the amount of the benefits deriving from the foreign PE (Belgium applying exemption with progression method).

Fourth, a general limitation is set in the amended version of the BITC. The threshold of EUR 1.000.000 [increased with 70% of the part of the company's income exceeding this amount of EUR 1.000.000] (after application of the other deductions foreseen in article 207, BITC) cannot be exceeded through the sum of the following deductions ("corbeille fiscale"/ Tax Basket):

- Excess amount of definitively taxed income (RDT);
- Excess amount of innovation income;
- Professional losses;
- NID.

Last, the BITC sets also an order of deductions, the NID ranking 5th after other deductions allowed when computing the corporate tax base: non-taxable items, RDT as per PS Directive, deduction for patent income and deduction for innovation income.

Belgium's NID regime includes **specific anti-abuse measures**¹⁴ that address several intra-group abusive situations:

- **Intra-group loans and loans involving associated enterprises:** capital contributions (apports en capital: 205^{ter}, §2, 9°)¹⁵ received from an associated company cannot be taken into account for NID purposes when such contributions are **directly or indirectly** financed by means of

¹⁴ law of 30 July 2018, amending art 205^{ter} BITC

¹⁵ Capital contributions: contribution in cash, contribution in kind or sweat equity contribution.
Apports en capital: apport en numéraire, apport en nature ou apport en industrie.

loans subscribed by an associated company, and for which this company deducts interest as business expenses. This disposition aims at circumventing ‘double dipping’ mechanisms or cascading through intra-group loans.

- **Equity contributions in cash and in kind:** capital contributions (apports en capital: 205ter, §2, 8°) received from a non-resident taxpayer or from a foreign PE, which is established in a country with which Belgium has no exchange of information in tax matters allowed, are not taken into account for NID computation, unless the company demonstrates that the transaction relies on legitimate financial or economic needs. On one hand, by excluding cash contributions, it should prevent a group from circulating a cash contribution through foreign companies/PE to multiply the NID at the level of the country granting the deduction or to hide a double-dipping structure. The exclusion of contributions in kind would address the issue of transferring assets to a subsidiary in order to transform the assets into equity in the hand of the subsidiary and artificially increase the NID base of a group of companies.

- **The re-categorisation of old capital as new capital through liquidations and the creation of start-ups¹⁶:** in the event of a merger, demerger, merger by absorption or any assimilated operations, the deductions that the absorbing/beneficiary company is entitled to under the NID regime shall be determined as if the transaction did not take place. This provision is applicable to any operations made as from 1st October 1993. It aims to guarantee the tax-neutral character of (de)merger operations and to prevent any artificial tax planning in the frame thereof. These provisions do not seem to address directly the situation of a pure liquidation operation - an existing company (subsidiary), with retained earnings is liquidated, therefore increasing the parent company equity through the incorporation of the retained earnings of the subsidiary. Subsequently, a new company is created by the parent company and if the participation held by the latter in the subsidiary (initially liquidated) was not excluded to reduce the NID base, it would leave scope for abuse. However, the combination of exclusion of shares held in resident and non-resident companies with the anti-abuse rule on related parties loans and the GAAR could tackle this abuse.

The creation of subsidiaries: There are no provisions directly addressing this issue, but again the combination of the exclusion of shares held in resident and non-resident companies with the anti-abuse rule on related parties loans and the GAAR could tackle this abuse.

Acquisitions of businesses held by associated enterprises: A group would increase its NID base by transferring to a group company a business that was already held by a Belgian subsidiary or a sister company; the price paid by the group company to the Belgian company would increase its equity although the business remains within the same group of companies. There are no provisions directly addressing this issue, but again the combination of the exclusion of shares held in resident and non-resident companies with the anti-abuse rule on related parties loans and the GAAR could tackle this abuse.

Double-dipping structures combining interest deductibility and NID deductions: Intra-group loans and loans involving associated companies, directly or indirectly, cannot be taken into account for NID purposes.

A **general anti-abuse rule¹⁷ (GAAR)** completes the framework of specific anti-abuse provisions.

The Belgian tax authorities can disregard any (combination of) legal act(s) aiming to create a certain operation, when they can demonstrate that this operation constitutes a “tax abuse”. The “tax abuse” is defined in the law as: - an operation by which the taxpayer would put himself outside of

¹⁶ article 212 of the BITC

¹⁷ article 344 of the BITC

the scope of the law, in violation with the objectives hereof; or - an operation whose essential purpose would be to benefit from a tax advantage foreseen by the law, in violation with the objectives hereof.

The Belgian tax authorities may also disregard any operations by which a Belgian taxpayer would sell, cede or transfer any assets or rights to a foreign taxpayer, when this last is, according to the tax legislation of his country, not subject to any taxes or is subject to a tax regime notably more favourable than the one that would be applicable in Belgium with regard to the income generated by the operation. The Belgian taxpayer may however avoid the application of this anti-abuse disposition if he can demonstrate that the operation relies on real economic or financial needs.

The GAAR could potentially be used in those cases not covered by the SAAR, such as to prevent the conversion of old to new capital in case of cash contribution or relocation of equity between parent companies.

In case there would not be any economic logic behind a relocation of capital and the operation would only be made for tax reasons, the tax authorities could potentially use this GAAR to disregard the operation.

Also, the tax authorities can disregard certain deductions, including the application of the NID regime (Article 207 of the BITC) if “Abnormal or voluntary advantages” are received by the company; or there is a change in the control of a company during the income year that would not rely on specific legitimate needs of economic or financial nature.

As such, articles 207 and 344 of the BITC could be considered as a measure that is appropriate to counter other abusive use of the NID regime

Moreover, based on the information available at this stage, and despite its application to the former NID provisions the Belgian general Tax Administration informed to have performed specific audit actions with regards to the former NID in 2012, 2013, 2014 and 2015. These actions did not focus exclusively on the utilization of the GAAR (article 344, §1 of the BITC). Based on the feedback received from these actions, the GAAR was invoked in a dozen of files in 2012 and 2013.

The combination of the specific and general anti-abuse rules seems to directly or indirectly target most of the potential abusive cases and especially intra-group transactions.

Criterion 4: “whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD”

The measures do not contain such elements that would be relevant from the point of view of internationally accepted principles as referred to in criterion 4 of paragraph B of the Code.

Criterion 5: “whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”

There are no specific formalities, in order to benefit from the Belgian NID. The company only has to compute its NID entitlement and to report it in its Belgian corporate income tax return. An ad hoc form (n° 275 C) should also be joined to the tax return in this respect. The tax authorities may proceed with any audits of the company’s tax situation under the ordinary conditions and procedure rules foreseen in the BITC.

All preconditions necessary for the granting of a tax benefit should be clearly laid down in publicly available laws, decrees, regulations etc. before a measure can be considered transparent.

Overall assessment: “Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community”

With respect to the general limitations of the Belgian NID and considering the targeted specific anti-abuse measures regarding transactions between related parties combined with the general anti-abuse rule, the regime is considered as not harmful.