

Employee Stock Options in the EU and the USA

FINAL REPORT

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Belgium

Contents

	Page
Belgium	
1. General remarks	1
1.1 History	1
1.2 Current situation	2
2. Key features of stock option plans	2
3. Taxation	4
3.1 Time of taxation	4
3.2 Taxable gain	5
3.3 Type of tax	7
3.4 Capital gains taxation	9
3.5 Tax consequences for the granting company	10
3.5.1 Social security contributions	10
3.5.2 Corporate tax deduction	10
3.5.3 Other	11
4. Issues for employees	12
4.1 Reporting obligations	12
4.2 Cashflow issues	13
4.3 Change in employee's residence status	14
5. Issues for employers	15
5.1 Reporting obligations	15
5.2 Withholding obligations	16

6.	Legal issues	18
6.1	Process/timeframe	18
6.2	Employment law	19
6.3	Data protection	22
6.4	Stock exchange issues	24
6.5	Securities law	28
6.6	Financial assistance	28
6.7	Other	28
7.	Sourcing shares for stock option plans	30
8.	Role and influence of existing shareholders	32
9.	Accounting	32
10.	Miscellaneous	34
11.	Special points of note	34
11.1	Mitigation of income tax	34
11.2	Mitigation of social security contributions	34
11.3	Mitigation of tax on sale of shares	34
11.4	Special provisions for SMEs	34

Belgium

1. General remarks ¹

1.1 History

- 1.1.1 Rules governing the taxation of stock options first developed through case law². Stock options were first specifically provided for in the Belgian income tax legislation through the law of 27 December 1984 (qualifying stock options). This income tax law stipulated that the benefit of stock options was, under certain conditions, free of income tax. Due to the very strict conditions, the practical use of this law was minimal and only 14 plans were implemented under this legislation. In addition, the law did not clarify the tax treatment of non-qualifying stock options which remained a bone of contention between the tax authorities and tax lawyers. The law of 27 December 1984 was abolished for options granted as from 1 January 1999 with the introduction of the law of 26 March 1999, governing the tax regime of employee stock options granted as from 1 January 1999.
- 1.1.2 In practice, the use of stock options as a remuneration technique was introduced in Belgium through US based multi-national companies employing individuals in Belgium.
- 1.1.3 Prior to 5 October 1999 there was also no social security legislation addressing the treatment of stock options, so that the social security treatment of stock options was also uncertain. However, there was a common understanding amongst practitioners that if the exercise price was not lower than the Fair Market Value (“FMV”) of the underlying share at the date of grant, no social security contributions were due. If the exercise price was lower, social security contributions were due on this difference.
- 1.1.4 In its decision of 19 January 2001 the Brussels Labour Court stated that for options granted before 1 January 1999 (to which the Royal Decree of 5 October 1999 does not apply), the exercise gain is in principle subject to Belgian social security contributions.
- 1.1.5 The introduction of stock option plans has not been aimed specifically at certain companies or with certain policy goals.

¹ Legislation

- 1. Tax law of 27 December 1984 on qualifying stock options
- 2. Tax law of 26 March 1999 on stock options granted as from 1 January 1999
- 3. Royal Decree of 5 October 1999 regulating the social security regime of stock options

² Examples of case law on stock options

- 1. Decision of Brussels Court of appeal of 2 May 2001 confirming position of tax authorities to tax the exercise gain (difference between exercise price and FMV upon exercise) of options granted before 1 January 1999 at exercise.
- 2. Decision of Brussels Labour Court of 19 January 2001 confirming position of social security authorities to subject spread (difference between exercise price and FMV upon exercise) of options granted before 1 January 1999 at exercise to social security contributions.

1.2 Current situation

- 1.2.1 Stock option plans became more popular amongst Belgian companies as from 1999, when the law of 26 March 1999 provided certainty with respect to the tax regime for options. This law applies to all stock options granted in the context of a professional relationship and provides for taxation at grant on a lump sum basis. The Council of Ministers on 18 January 2001 expressed its political willingness to adapt Belgian legislation to allow participants to choose between taxation at grant and taxation at exercise to encourage the use of stock option plans in Belgium³. To date there has been no confirmation that such a change will be put into effect.
- 1.2.2 The social security regime for stock options granted from 1 January 1999 was regulated by the Royal Decree of 5 October 1999, which stipulated that the benefit from stock options is exempt from social security contributions if no discount or certain benefit is granted.
- 1.2.3 As an indication of how widely stock option plans are used in Belgium almost all companies included in the BEL 20 (20 largest Belgian companies) have stock option plans. Based on a survey of 161 companies, 42% companies employing more than 50 employees had stock option plans. In general, only directors and managers receive options. Belgian medium and small companies – except for information technology start-up companies – in general do not have stock option plans. Based on a study performed by a financial magazine in October 2001, approximately 70,000 to 75,000 individuals have received stock options since the law of 26 March 1999 became effective. In the consulting, banking and insurance sector, between 15% and 25% of the executive employees have received stock options. An increasing number of Belgian companies are implementing stock option plans, and the use of stock option plans is encouraged by the Belgian government (as well as other kinds of employee profit participation, e.g. the law of 22 May 2001 on employee profit participation)⁴.
- 1.2.4 However, as Belgian legislation provides for taxation at grant for options granted as from 1 January 1999, employees risk paying taxes without ever receiving a benefit. It is our experience that the success of stock option plans is somewhat reduced because of this risk.

³ Communication following the Council of Ministers of January 18, 2001

Note on the 2002-2003 economical and social priorities from the Minister's Council of 18 January 2002.

⁴

- (i) Tendances, 25 October 2001 (business magazine)
- (ii) De Standaard, 27 September 2000 (Belgian Newspaper)
- (iii) PwC Practice & experience
- (iv) Tendances, 25 October 2001 (business magazine)
- (v) Study on salary packages ordered by PricewaterhouseCoopers and performed by Berenschot in January 2001
- (vi) PwC Practice & experience

2. Key features of stock option plans

2.1 Stock options in Belgium can be divided into two main categories, stock options granted prior to 1 January 1999 not qualifying under the law of 27 December 1984; and stock options granted post 1 January 1999. Options granted before 1 January 1999 that qualified under the law of 27 December 1984 are not considered here because very few options were granted under this regime because the conditions were strict. The two main categories of stock options are considered below.

2.2 Options granted prior to 1 January 1999 not qualifying under the law of 27 December 1984 (“pre 1999 options”)

2.2.1 There are no specific key features that are required for stock options granted prior to 1 January 1999.

2.3 Options granted post 1 January 1999

2.3.1 New legislation was passed in March 1999 (“March 1999 Law”) that stated that stock options are to be taxed at grant on a lump sum basis. The legislation defines an option as “the right to buy or to subscribe for a certain number of shares during a certain period at a certain price or at a price which can be determined, during a determined period of time”, and is applicable to all stock option plans. There are no specific key features (other than those provided in this definition) with which the stock option plan should comply to fall within the scope of application of the March 1999 Law. However, the law provides for a lower taxation if the plan meets the six conditions listed in section 2.3.3.1 below.

2.3.2 The March 1999 Law applies in any case where stock options are granted by reason of the participant’s professional activity. The March 1999 Law is applicable regardless of whether the participant carries out his activity as an employee, as a director (employed or self-employed) or as a self-employed sub-contractor.

2.3.3 *Key features to obtain reduced taxable benefit*

2.3.3.1 The conditions under which a lower taxable benefit in kind at grant will be recognised are:

- The exercise price must be definitively set at the time the employee is offered the option.
- The option must be subject to the following regulations, or the participant must commit himself to the following.
 - The option may not be exercised before the end of the third calendar year following the calendar year during which the offer was made.
 - The option may not be exercised after the end of the tenth calendar year following the calendar year during which the offer was made.
 - The option may not be transferred except in case of death.

- The downside risk of the option must not be hedged, directly or indirectly, by the person granting the option, nor by any person with whom a relationship of mutual dependence exists.
 - The option must relate to shares of the company for whom the participant works, or to shares of a group company that, from a Belgian accounting law perspective, has a direct or indirect shareholding in the company for whom the participant works.
- 2.3.3.2 There are no provisions requiring similar terms to be applied to all employees and nor are there any restrictions over the nature of the shares over which options may be granted under any particular plan.
- 2.3.3.3 Employees have a legal right to reject the grant of an option within 60 days of the date on which s(he) is notified of the offer/grant of the option. For tax purposes, the date of grant is deemed to be the 60th day following the grant/offer date.
- 2.3.3.4 “Shares” as defined in the March 1999 Law also include profit-sharing units as defined in Belgian Company Law (parts bénéficiaire/winstbewijs). Options to subscribe for shares in a Belgian company have a legal maximum term of 10 years.
- 2.3.4 *Key features without reduced taxable benefit*
- 2.3.4.1 There is no minimum or maximum term applicable. Options to subscribe for shares in a Belgian company have a legal maximum term of ten years.
- 2.3.4.2 Options may be granted over shares in a company that is not related to the group for which the participant is carrying out his professional activity. For example the employer may grant options on shares in an investment company or a real estate company. Shares as defined in the March 1999 Law also includes profit-sharing units as defined in Belgian Company Law (parts bénéficiaire/winstbewijs).
- 2.3.4.3 Employees have a legal right to reject the grant of an option within 60 days of the date on which s(he) is notified of the offer/grant of the option. For tax purposes, the date of grant is deemed to be the 60th day following the grant/offer date.

3. Taxation

3.1 Time of taxation

3.1.1 Pre 1999 options

3.1.1.1 The Belgian tax authorities have taken the position that pre1999 non-qualifying stock options are not subject to income tax at grant nor at vesting, but are subject to income tax at the date of exercise ⁵. This position was confirmed on 2 May 2001 by the Brussels Court of Appeal. The Court was of the view that the benefit arising from pre 1999 stock options is taxable upon exercise and only options that qualified under the Act of December 1984 were exempt from tax. The decision was much debated by tax practitioners and may currently be under appeal.

3.1.1.2 Tax due is primarily withheld (see section 5.2). To the extent that the tax withheld is less than the final tax liability, the balance must be paid within two months following the receipt of the assessment notice, which legally has to be issued by 30 June of the second year following the income year.

3.1.2 Post 1999 options

3.1.2.1 Taxation as professional income arises in relation to the grant of an option ⁶. A tax liability arises on the 60th day following the offer of the options, unless the participant refuses the options in writing before that date.

3.1.2.2 The offer date is the date on which the employee is notified of the grant of an option, rather than the date the option is granted.

3.1.2.3 Tax is principally collected through withholding (see section 5.2). To the extent additional tax is payable (due to the insufficiency of withholding) the balance of the tax due is payable within two months following receipt of an assessment notice, which legally has to be issued by 30 June of the second year following the income year in which the date of grant fell.

3.1.2.4 Tax does not generally arise at exercise. However, if a participant who has been granted an option that satisfied the conditions for a reduced taxable benefit at grant subsequently exercises that option before the end of the third calendar year following the calendar year during which the option was offered, or after the expiration of the tenth calendar year during which the option was offered, then an additional taxable benefit arises at the time of exercise. An additional taxable benefit will also arise if the employee breaches any other condition, for example transfers the option other than on death⁷.

⁵ Administrative tax note clarifying the Law of December 27, 1984 (“a contrario” interpretation) Brussels Court of Appeal of 2 May 2001 regarding Pre 1999 non-qualifying share options (Contra: Opinion of most tax practitioners regarding Pre 1999 non-qualifying share options) Belgian Income Tax Code ruling the tax treatment of taxable pay and director’s fees.

⁶ Act of 26 March 1999 governing Stock Options

⁷ Act of 26 March 1999 governing Stock Options; Notice to employers of 21 April 2001

- 3.1.2.5 If an option agreement is amended after the grant, it is possible that such amendment could be regarded as a new, taxable, grant of an option.

3.2 Taxable gain

3.2.1 *Pre 1999 options*

- 3.2.1.1 The taxable gain is the spread, i.e. the difference between the FMV of the shares at exercise and the exercise price.

- 3.2.1.2 It is possible to reduce the tax liability at exercise of pre 1999 options for shares listed on a stock exchange but not for unlisted shares.

- 3.2.1.3 If shares acquired on exercising of an option are listed on a stock exchange and are made non transferable by mutual consent for a period of two years, the spread at exercise may be measured as the difference between 100/120th of the stock market price at the date of exercise and the exercise price. The same reduction of the stock market price will apply if the company buys its own shares and transfers them in such vast quantities that a drop in the price of these shares may be expected.

- 3.2.1.4 The Belgian Social Security Authorities are not bound by this tax rule; thus the full spread at exercise may be liable to Belgian social security contributions, if applicable.

3.2.2 *Post 1999 options*

- 3.2.2.1 The taxable value of a stock option is determined as stated below. If the participant pays a price for the grant of the option, the price paid can be deducted from the taxable amount⁸.

- 3.2.2.2 For options listed on a stock exchange, the taxable value is the closing price of the stock option on the last business day prior to the offer date.

- 3.2.2.3 For options not listed on a stock exchange the taxable value is calculated to be the sum of the Taxable Time Value and the Taxable Intrinsic Value as set out below.

3.2.3 *Taxable time value*

- 3.2.3.1 For options that have a life of up to five years, 15% of the FMV of the underlying shares at the time of the offer is taxable. For options that have a life of more than five years, the value will be increased by 1% for each year or part of a year over five years. For example, ten year options will have a taxable time value equal to 20% of the underlying share's value at the time of the offer.

- 3.2.3.2 The percentages of 15% and 1% may be reduced to respectively 7.5% and 0.5% if the conditions required to obtain the reduced taxable benefit are satisfied (see section 2.3.3.1).

⁸ Act of 26 March 1999 governing Stock Options

- 3.2.3.3 If the employee breaches any of the conditions for a reduced taxable benefit, the additional taxable benefit that arises is the difference between the reduced taxable benefit arising on grant and the full taxable benefit that arises on grant for non-qualifying options (for example, an extra 7.5% for a 5 year option). There are no penalties or late interest charges applicable.
- 3.2.3.4 This additional taxable benefit in kind is taxable in the income year during which the conditions for the reduced tax benefit are breached and is regarded as earned income for income tax purposes⁹.
- 3.2.4 *Taxable intrinsic value*
- 3.2.4.1 This is the discount, if any, on grant, being the difference between the FMV of the underlying shares at the date of the offer and the exercise price.
- 3.2.4.2 The total taxable benefit is reduced by any Belgian social security contributions or mandatory foreign social contributions due on the taxable benefit.
- 3.2.4.3 To calculate the Taxable Time Value and the Taxable Intrinsic Value, the FMV of the underlying shares needs to be calculated.
- 3.2.4.4 For shares listed on a stock exchange, the company offering the options can choose whether to use either:
- The closing price of the share on the last business day prior to the offer date.
 - The average price of the share on the stock exchange over the last 30 days prior to the offer date.
- 3.2.4.5 For shares not listed on a stock exchange, the actual value of the underlying share at the time of the offer is determined by the company granting the option on the advice of the statutory auditor of the company issuing the shares to which the options relate. For foreign companies, the price must be determined on the advice of the person who in accordance with the applicable foreign law has control of the company's accounts. The value may not in any case be lower than the net equity of the company divided by the number of outstanding shares (i.e. the book value of the shares) as shown in the last closed annual accounts of the company approved by the empowered body of the company, for example the General Assembly of stockholders or board of directors.¹⁰

⁹ Act of 26 March 1999 governing Stock Options

¹⁰ Act of 26 March 1999 governing Stock Options

Act of 10 August 2001 regarding the Personal Income Tax Reform (for the income tax rates)

Belgian Income Tax Code

Act of 26 March 1999 governing Stock Options

3.3 Type of tax

3.3.1 *Income Tax*

- 3.3.1.1 The benefit in kind recognised on the grant or exercise of an option is earned income. This is taxed, after deduction of any social security contributions, at Belgian progressive income tax rates varying between 25% and 52% (2002).
- 3.3.1.2 The taxable benefit is also subject to communal taxes (varying from 0% to 9%, calculated on the principal amount of taxes due) and a crisis levy (varying from 0% to 1%, but to be abolished gradually as from 1 January 2003).

3.3.2 *Social security contributions – pre 1999 options*

- 3.3.2.1 Although it is not clear in law, unofficial letters from the Belgian social security authorities indicate that if the exercise price is not less than the FMV of the underlying shares on the grant date, no social security contributions are due in relation to the option. This is regardless of whether the legal employer has implemented the stock option plan or borne the costs of the plan.¹¹
- 3.3.2.2 However, on the basis of a recent Court Case (Labour Court of Brussels of 19 January 2001), it appears the Belgian social security authorities may claim social security contributions on the spread at exercise. This applies only to options granted and exercised before 1 January 1999 where either those options were granted by the participant's employing company or the costs of the plan were recharged to the employing company. The rate of social security is 13.07% for employees, and for employers approximately 35% for White Collar workers and 50% for Blue Collar workers.
- 3.3.2.3 On the basis of this precedent, the administration could try to claim contributions for option exercises before 1 January 1999 (taking into account the statute of limitation of five years as from the date the contributions became due, the date of exercise).
- 3.3.2.4 An appeal has been launched against this court decision, but it may be some time before a final decision is available.
- 3.3.2.5 The Royal Decree of 5 October 1999 implementing the new social security treatment for post 1999 options states that it applies as from 1 January 1999 but does not explicitly state that it concerns only stock options granted from that date. If stock options granted prior to, but exercised after 1 January 1999 are also covered by the Royal Decree of 5 October 1999, no Belgian social security contributions will be due on the exercise gain. It is not certain however that the Belgian social security authorities would agree to exempt the spread at exercise of options granted prior to 1 January 1999¹².
- 3.3.2.6 Belgian social security contributions or mandatory foreign social security contributions are deductible for Belgian income tax purposes.

¹¹ Labour Court of Brussels of 19 January 2001 (first instance); Royal Decree of 5 October 1999; Implementation of Social Security Treatment of the Act of 26 March 1999.

¹² Royal Decree of 27 July 1967 regarding the social security liability for self-employed persons

- 3.3.2.7 For self employed directors the spread at exercise will be subject to self-employed social security contributions. These are capped; self-employed contributions are assessed at a rate of 16.7% on earnings up to €49,993 and 12.27% on earnings ranging between €49,993 and €73,127.¹³
- 3.3.2.8 There is also a special social security contribution applicable to all income of €732 per year or €61 per month. The contribution is computed every month and withheld in the payroll. A three monthly regularisation is computed. The basis for computation of the monthly contribution and the three monthly regularisation is the employee's gross remuneration subject to social security. Stock option income will only be taken into consideration for the computation of the monthly contribution and the three monthly regularisation to the extent that it is subject to employee social security contributions. An assessment notice is issued annually which shows the final amount due. The final amount due takes into account a different computation basis than the amounts taken into consideration to compute the monthly withholding in the payroll. The basis for the annual regularisation is the joint taxable income of the household (after deduction of the social security contributions and after the deduction of the lump sum professional expenses). All stock option income will thus be taken into consideration for the computation of the final amount due.¹⁴
- 3.3.3 *Social security contributions - post 1999 options*
- 3.3.3.1 There may be social security contributions implications for employees at the date of grant of a stock option. Social security contributions for employees is assessed only on the positive difference, if any, between the FMV of the shares at the date of the offer and the exercise price and on any guaranteed benefit provided by the option agreement or share option plan¹⁵. The rate is 13.07% and is deductible against the employee's income tax at grant.
- 3.3.3.2 Such social security contributions are only due where the general conditions requiring social security contributions are fulfilled; the benefit must be granted as a result of the execution of the employment relationship, the benefit must be capable of being valued in cash, the employee must be entitled to the benefit, and the benefit must be supplied by the employer¹⁶.
- 3.3.3.3 There may be a social security contribution liability for the employee on exercise of the option. While a participant would not normally be subject to income tax at the date of exercise of the option, the Belgian tax authorities could try to claim social security contributions on an additional benefit where the participant exercises his options in breach of the conditions required for a lower taxable benefit at grant.
- 3.3.3.4 There is also a special social security contribution applicable to all income of €732 per year or €61 per month as explained in section 3.3.2.8.

¹³ Belgian Income Tax Code

¹⁴ Labour Court of Brussels of 19 January 2001 (first instance).

Royal Decree of 5 October 1999 implementing the new social security treatment of the Act of 26 March 1999

¹⁵ Royal Decree of 27 July 1967 regarding the social security liability for self-employed persons.

¹⁶ Act of 26 March 1999 governing Stock Options
Belgian income tax code

3.3.3.5 For self-employed directors, the benefit in kind will be subject to Belgian self-employed social security contributions. These are capped; self-employed contributions are assessed at a rate of 16.7% on earnings ranging between €0 and €49,993 and 12.27% on earnings ranging between €49,993 and €73,127. Self-employed directors are personally responsible for the payment of their social security contributions.

3.3.4 *Effect of a recharge*

3.3.4.1 The social security treatment of all options granted at a discount or involving a guaranteed benefit may be affected by whether there is a recharge of stock option “costs” from the legal entity that grants the options to the subsidiary employing the option holder. If the options are granted at the discretion of a company that is not the legal employer, and the costs related to the discount/guaranteed benefit, if any, are not recharged at any point in time to the legal employer, there are arguments that the discount/guaranteed benefit is not subject to social security contributions for salaried persons. However if the options are granted upon the request of the legal employer (and the employee can claim the benefits resulting from the share option directly from the legal employer), the discount/guaranteed benefit will be subject to Belgian social security contributions for employees. If the option holder is employed by a Belgian branch of the company that grants the options, then social security for salaried persons will in any event be due.

3.4 **Capital gains taxation**

3.4.1 On a disposal of shares there should be no tax for the employee at the date of sale¹⁷. For both pre and post 1 January 1999 options, capital gains realised on the sale of shares acquired on an option exercise will be exempt from tax under the normal Belgian rules applicable to gains derived from an individual’s private investment portfolio¹⁸.

3.4.2 Neither will there be a liability to social security contributions for the employee at the date of sale¹⁹.

3.4.3 The employee has no reporting obligations at the date of sale of the shares.

3.4.4 If the shares are sold at a loss (i.e. for less than the price paid to acquire them at exercise) this loss cannot be offset against other capital gains in the year.

3.4.5 There is no wealth tax in Belgium.

3.5 **Tax consequences for the granting company**

3.5.1 *Social security contributions*

3.5.1.1 *Pre 1999 options*

3.5.1.1.1 An employer’s liability to social security contributions will apply in the same circumstances as for an employee (see section 3.3.2).

¹⁷ Belgian Income Tax Legislation
Act of 26 March 1999 governing Stock Options

¹⁸ Act of 26 March 1999 governing Stock Options
Belgian Income Tax Legislation

¹⁹ Act of 26 March 1999 governing Stock Options

3.5.1.2 *Post 1999 options*

3.5.1.2.1 For post 1999 options, there is a social security contribution liability for the employer on the grant of the option to the same extent that employee social security contributions are due. The rates are approximately 35 % for white collar workers and approximately 50% for blue collar workers.²⁰

3.5.1.3 There should be no social security contribution liability for the employer on the exercise of the option if no guaranteed advantage is granted at that time.

3.5.2 *Corporate tax deduction*²¹

3.5.2.1 If the legal employer grants options under a stock option plan, the implementation and administration costs will in principle be regarded as deductible expenses for Belgian corporate tax purposes. However, the difference between the FMV of the shares at exercise and the exercise price paid by the employees (“the spread”) will not be deductible as this is regarded as a capital loss and capital gains/losses are not taxable/deductible.

3.5.2.2 This is the case regardless of whether the shares used to meet option exercises are sourced by newly issued shares or shares purchased in the market.

3.5.2.3 Stock option plan costs (other than spread costs) that are recorded as expenses in the Profit & Loss account of the company will be deductible from taxable profits.

3.5.2.4 Where options are granted by a company that is not the employing entity (generally the parent company), stock option plan costs, including the spread at exercise, that are recharged to the employer will in principle be deductible. The Belgian tax authorities may take the view that spread costs included in a recharge are not deductible on the basis they are equivalent to a capital loss on the shares. However, there are very strong arguments to claim such a deduction given that the legal employer has not purchased or sold any shares.

3.5.2.6 A provision for the costs that the company may incur by reason of a re-charge agreement must be accrued annually in its financial statements once the company may expect to be re-charged which is normally when the re-charge agreement is concluded. The fact that costs will be charged back at a later date, such as exercise, is irrelevant. The provision will be deductible for the income year during which it is accrued. The provision will be adjusted each year to match as closely as possible the cost the company may be expected to be recharged. A tax deduction is claimed by means of a corporate tax return. Corporate tax returns must be lodged within a month following the approval of the financial statements by the General Assembly of Shareholders and in any event not later than six months after the closing date of the financial statements.

²⁰ Labour Court of Brussels of 19 January 2001 (first instance); Royal Decree of 5 October 1999 implementing the new social security treatment of the Act of 26 March 1999; Belgian Income Tax Legislation; Belgian Corporate Tax Legislation; Belgian Social Security legislation; Labour Court of Brussels of 19 January 2001 (first instance).

²¹ Belgian Corporate Tax Legislation

3.5.2.7 There is a need for an inter-company recharge agreement which should contain details of the methodology used to calculate the recharge amount. The recharge agreement should be implemented prior to the cost recharge and is usually entered into at the time of option grant. Ideally the inter-company recharge agreement should be applicable to all subsidiaries and not limited to the Belgian subsidiary.

3.5.3 *Other*

3.5.3.1 In the case of a recharge, it is not totally clear whether the on-charged costs fall within the scope of VAT; whether the payment is made in direct consideration of a service rendered by the parent company to its subsidiary needs to be established. If a VAT liability arises the extent to which it is deductible will depend on the company's VAT status.

3.5.3.2 If the recharge agreement is made by a foreign company and is subject to foreign VAT, whether the foreign VAT could be refunded would be determined under the applicable foreign VAT legislation.

3.5.3.3 *Other taxes*

3.5.3.4 *Stamp duty / transfer tax*²²

3.5.3.4.1 If a Belgian financial intermediary is involved in the purchase of the shares at exercise or when the shares are subsequently sold, the acquisition or sale will be subject to securities transaction tax.

3.5.3.4.2 The rate is 3.4/1000 for existing shares (1.7/1000 borne by the buyer, capped to €250, 1.7/1000 by the seller, capped to €250) or 3.5/1000 for newly issued shares, capped to €250 per transaction.

3.5.3.5 *Inheritance tax (if the options are exercised by the option holder's heirs or legatees)*²³

3.5.3.5.1 Stock options are subject to Belgian inheritance tax. The Belgian tax authorities have taken the view that Belgian inheritance tax will be levied when the heirs and legatees exercise the options. The assessment basis is the spread at exercise. The heirs and legatees are required to report the existence of such stock options in the inheritance tax return where options have not yet been exercised. When the inheritance tax return is filed heirs and legatees will be under the obligation to report the spread at exercise in an additional inheritance tax return.

3.5.3.5.2 There may be arguments to support the position that the option inheritance tax should be assessed on the economic value of the option at the date of death rather than at the date of exercise. This must be analysed on a case-by-case basis.

²² Belgian Securities Tax Legislation

²³ Belgian Inheritance Legislation

4. Issues for employees

4.1 Reporting obligations

4.1.1 *At grant*

4.1.1.1 The participant is not required to report the grant of a pre 1999 option.

4.1.1.2 The participant is required to report the stock option income recognised by reason of a post1999 option grant in his/her individual income tax return for the income year (calendar year) during which the 60th day following the option offer date falls. This means that the benefit arising by reason of options offered on or after 2 November of a given calendar year are regarded as income of the following income year²⁴.

4.1.1.3 The taxable stock option income arising at grant must be reported in the box Ta or Ta Dir of the individual statement 281.10 or 281.20 respectively in code 249 (employee), (299 for female employees) or 404 (directors), (429 for female directors) of the individual income tax return.

4.1.1.4 Where the reduced percentages (7.5% and 0.5%) have been used in a return to determine the taxable time value of the option, the participant must always indicate whether he still held these options at the end of the income year.

4.1.1.5 The individual income tax return has to be filed by 30 June of the year following the income year.

4.1.2 *At exercise*

4.1.2.1 For pre 1999 options the employee is required to report the spread at exercise in his/her individual income tax return for the income year during which he exercised the option²⁵. The return is due to be filed by 30 June following the income year.

4.1.2.2 The spread at exercise must be reported in code 250 for employees (300 for female employees) or 400 for directors, (430 for female directors).

4.1.2.3 For post 1999 options, the employee is also required to report any additional benefit realised because he failed to comply with the conditions for reduced taxable benefit at grant. This must be reported for the income year during which the conditions are breached²⁶.

4.1.2.4 The additional taxable benefit in kind must be reported in the box Tb or Tb Dir of the individual statement (281.10 or 281.20 respectively) in code 248 for employees, (298 for female employees) or 414 for directors, (439 for female directors) of the individual income tax return²⁷.

²⁴ Belgian Income Tax Code
Notice to the Employers of 21 April 2001.

²⁵ Belgian Income Tax Code

²⁶ Act of 26 March 1999 governing Stock Options; Belgian Income Tax Code

²⁷ Belgian Income Tax Code; Notice to the Employers of 21 April 2001

4.2 Cashflow issues

- 4.2.1 For pre 1999 options, in order to alleviate any cash flow problem, the employee can choose to make a “cashless exercise” (purchase and immediate sale of the shares) or sell the appropriate number of shares to cover the tax liability arising at exercise. There is no specific method to alleviate cash flow issues provided by the law²⁸.
- 4.2.2 For post 1999 options, the classic methods of funding the Belgian income and social security contribution liabilities at option grant is the making of an interest-free loan by the employer, or the grant of a cash bonus which after tax and social security contributions corresponds to the tax due on the taxable option benefit. If an employee is given an interest-free loan this is a taxable benefit in kind. This benefit will be subject to social security contributions and income tax on the FMV rate for such a loan.
- 4.2.3 A participant may decide to sacrifice a part of his future gain by issuing so-called “mirror options”. “Mirror options” are options granted by the participant to a third party that is not the employer (generally a bank or a financial institution) in consideration of the payment by this third party of an option premium that matches the Belgian income tax/social security contribution burden the participant is liable to. Such an arrangement will be possible provided the actual value of the stock options held by the participant is worth more than the participant's tax burden²⁹.
- 4.2.4 The income and social security taxes paid by reason of a grant of stock options or where the conditions for reduced taxation are breached is final and is neither creditable or refundable.

4.3 Change in employee’s residence status

4.3.1 Pre 1999 options

- 4.3.1.1 If an employee is tax resident at the exercise of the option but was not tax resident at the date the option was granted, the spread at exercise will be taxable³⁰. Social security contributions are due if the beneficiary is subject to Belgian social security contributions at the moment of grant or exercise.
- 4.3.1.2 If the employee is not tax resident at exercise but was tax resident at the date of grant, then for income tax purposes no taxation should arise provided the employee is not subject to Belgian income tax on his employment income or director’s fees at the date of exercise. No social security contribution should apply on the spread at exercise.

²⁸ Administrative tax note clarifying the Law of December 27, 1984 (“a contrario” interpretation) Brussels Court of Appeal of 2 May 2001 regarding Pre 1999 non-qualifying share options (Contra: Opinion of most tax practitioners regarding Pre 1999 non-qualifying share options) Belgian Income Tax Code ruling the tax treatment of taxable pay and director’s fees

²⁹ Act of 26 March 1999 governing Stock Options
Act of 27 June 1969 (Social Security Act). Royal Decree of 28 November 1969.
Act of 12 April 1965 regarding the protection of the employees’ remuneration.
Royal Decree of 5 October 1999 governing the social security treatment of share options.
Act of 26 March 1999 governing share options.

³⁰ Belgian Income Tax Code

4.3.1.3 If the employee is not resident at grant, not resident at exercise but resident in between, then no liability to tax or social security contributions should arise provided the employee is not subject to Belgian income tax on his employment income or director's fees at the date of exercise.

4.3.2 *Post 1999 options*

4.3.2.1 If the employee was not a resident taxpayer at the date of grant and was not liable to tax in Belgium on the earned income relating to the professional activity by reason of which the options were granted, the exercise of the option while resident cannot be considered a taxable event for the employee³¹.

4.3.2.2 If the employee is not tax resident at exercise but was tax resident at the date of grant then despite the fact that the participant would not be taxed on his earned income at the date of exercise, the Belgian tax authorities may try to claim that an additional benefit in kind arises if the participant initially claimed and then failed to meet the conditions for reduced taxable benefit at grant. The tax liabilities could however be restricted by double tax treaty provisions.

5. **Issues for Employers**

5.1 **Reporting obligations**

5.1.1 *At grant*

5.1.1.1 Reporting obligations will have to be complied with by the Belgian employer (or branch if appropriate)

5.1.1.2 No reporting requirements exist in respect of the grant of pre 1999 options.

5.1.1.3 For post 1999 options, the employer is required to report the stock option income together with the participant's other taxable remuneration to the tax authorities on individual salary slips (Form 281.10 for employees and 281.20 for key executives) and summary statements (respectively Form 325.10 or Form 325.20) by 31 March of the year following the year during which:

- The 60th day following the option offer date occurred.
- The participant breaches the conditions for a reduced taxable benefit, if applicable.

5.1.1.4 The taxable benefit must be reported in the box Ta (individual statement 281.10) or Ta Dir (individual statement 281.20) after deduction of consideration paid to acquire the stock option and after deduction of employee social security contributions, if any.

5.1.1.5 The box "Buitenlandse ven/Sociétés étrangères" should be ticked if a non-resident company without a Belgian establishment grants the option³².

³¹ Act of 26 March governing Stock Options; Belgian Income Tax Code

³² Act of 26 March 1999 governing Stock Options

Belgian income tax Code

Act of 27 June 1967 (Social Security Act) and Royal Decree of 28 November 1969 (Social Security Decree).

- 5.1.1.6 If the employer fails to comply with this reporting formality the taxable benefit in kind will be added to the company's own taxable income and will be subject to corporate tax. In addition the tax authorities could assess a special tax equal to 309% of the benefit in kind.³³
- 5.1.2 *At exercise*
- 5.1.2.1 For pre 1999 options, Article 57 of the Belgian Income Tax Code states that taxable pay and taxable director's fees borne by a Belgian company or branch must be reported on appropriate salary forms (code T or TDir of *individual* forms 281.10/281.20 and summary forms 325.10/325.20). The Belgian company that granted the options or a Belgian subsidiary that acted as an intermediary of a foreign legal entity by remitting the spread at exercise (in cash or in shares) to the participant will have to report the spread at exercise after deduction of possible employee social security contributions, if any³⁴. The same reporting obligation will arise for the Belgian branch of a foreign entity for which the participant is carrying out his professional activity and for a Belgian employing subsidiary to which the stock option costs are charged back by a foreign company.
- 5.1.2.2 The reporting obligations must be complied with by 31 March of the year following the income year during which the options were exercised. Failing to comply with this reporting obligation will trigger assessment of a special tax equal to 309% of the spread at exercise. The special tax is fully deductible for corporate income tax purposes.
- 5.1.2.3 Where (i) the stock options have been granted at the discretion of a foreign resident company and (ii) the Belgian employing subsidiary is not involved directly or indirectly in the administration of the exercise of the options and (iii) the stock option costs are not borne by the Belgian employing subsidiary, there will be no obligation to report the option exercise.
- 5.1.2.4 For post 1999 options, the local employer will have a reporting obligation in relation to the exercise of the share option, if an additional taxable benefit arises because by exercising his options the participant breached the conditions for the reduced taxable benefit.³⁵
- 5.1.2.5 There will be no reporting obligation for the employer at the sale of the shares acquired through the exercise of either pre or post 1999 options.

³³ Act of 26 March 1999 governing Stock Options; Belgian Income Tax Code; Act of 27 June 1967 (social security Act) and Royal Decree of 28 November 1969 (Social Security Decree)

³⁴ Belgian Income Tax Code

³⁵ Act of 26 March 1999; Notice to Employers of 21 April 2001; Belgian Income Tax Code

5.2 Withholding obligation

5.2.1 *Pre 1999 options*

5.2.1.1 *Wage income tax*

5.2.1.1.1 If the plan has been implemented by a Belgian resident company or by a foreign company having a Belgian branch within which participants are employed, the spread at exercise will be subject to withholding income tax. The same withholding requirement will arise for a Belgian subsidiary that acts as an intermediary of a foreign legal entity in remitting the spread at exercise (in cash or in shares) to the participant.³⁶

5.2.1.1.2 If the options have been granted at the sole discretion of a non-resident entity without any intervention of the Belgian employer and the Belgian employer is not involved in the administration of the exercise, then no income tax withholding obligation will arise for the Belgian employer.

5.2.1.1.3 The income tax is withheld from the employee's professional income, including the spread at exercise, via the payroll.

5.2.1.1.4 The tax must be remitted to the Belgian tax authorities within the fifteen days following the month during which exercise took place. In addition, the employer or the responsible entity has to report the tax that has arisen at exercise in a monthly wage income tax return to be lodged within the same fifteen days.

5.2.1.1.5 The income tax is computed on the basis of the scales and percentages for exceptional remuneration, as determined by the Royal Decree relating to income tax under which the tax rate depends on the employee's earnings. The rate at which the wage income tax is levied should in principle be close to the participant's applicable top marginal rate.

5.2.1.2 *Social security contributions*

5.2.1.2.1 If a liability to social security contributions arises, the employer will have to remit the employer and employee's social security contributions to the authorities and comply with reporting formalities. The employer has to withhold the employee's social security contributions on a monthly basis from the employee's gross cash remuneration.

5.2.1.2.2 The employer has to remit the social security contributions to the social security authorities *Rijksdienst voor Sociale Zekerheid (RSZ)/Office Nationale de Sécurité (ONSS)* quarterly within one month following the quarter during which the option was exercised.

³⁶ General practice of the Belgian Tax Authorities regarding Pre 1999 non-qualifying share options
Brussels Court of Appeal of 2 May 2001 regarding Pre 1999 non-qualifying share options
(Contra: Opinion of most tax practitioners regarding Pre 1999 non-qualifying share options)
Belgian Income Tax and Social Security Legislation
Labour Court of Brussels of 19 January 2001 (first instance).

- 5.2.1.2.3 For larger companies paying a quarterly contribution for social security purposes of at least €6,197, the social security contributions must be paid to the RSZ/ONSS on a monthly basis by means of advanced payments. For a given quarter, employer and employee social security contributions are then remitted by means of monthly prepayments (payable by the 5th), which are determined on the basis of the social security contributions due for a previous quarter. If based on the quarterly social security contributions return, the actual social security contributions due for a given quarter exceed the three monthly prepayments, the excess must be remitted to the social security authorities by the end of the month following the given quarter.
- 5.2.1.2.4 In order to avoid a shortfall in withholding the employee and the employing company should have agreed on an appropriate method to ensure that no shortfall occurs. This should be included in the plan rules. A common method used is “cashless exercise”; the purchase and immediate sale of some or all shares in sufficient quantity to pay the tax liability to the employer. The employer is legally obliged to pay sufficient withholding tax to the tax administration regardless of whether it has been recovered from the employee. Unless specified in the plan, we believe the employer may not have the right to refuse the delivery of the shares if he does not have the cash for paying this withholding tax³⁷.
- 5.2.2 *Post 1999 options*
- 5.2.2.1 There may be withholding requirements on the grant of an option:
- 5.2.2.2 If the person who grants the share option is a Belgian resident entity (for example, the employer or another resident taxpayer or a foreign company having a Belgian branch by whom participants are employed), there will be a requirement to withhold income tax on the taxable benefit that arises on grant, or if the participant breaches the conditions for the reduced taxable benefit.
- 5.2.2.3 If the stock options have been granted at the sole discretion of a non-resident entity without any intervention of the Belgian employer and the Belgian employer is not involved in the administration of the exercise, then no income tax withholding obligation will arise for the Belgian employer.
- 5.2.2.4 The income tax must be remitted to the Belgian tax authorities within fifteen days following the end of the month during which the taxable benefit arose. In addition, the employer or the responsible entity have to report the tax that has arisen at exercise in a monthly wage income tax return to be lodged within the same fifteen day timescale.
- 5.2.2.5 The income tax is computed on the basis of the scales and percentages for exceptional remuneration, as determined by the Royal Decree relating to income tax under which the tax rate depends on the employee’s earnings. The rate at which the wage income tax is levied should in principle be close to the participant’s applicable top marginal rate.

³⁷ Labour Court of Brussels of 19 January 2001 (first instance).
 Royal Decree of 5 October 1999 implementing the new social security treatment of the Act of 26 March 1999.
 Belgian Income Tax Legislation.
 Belgian Corporate Tax Legislation
 Belgian Social Security legislation
 Labour Court of Brussels of 19 January 2001 (first instance).

- 5.2.2.6 On exercise, the employer will have a withholding obligation only to the extent an additional taxable benefit arises because the participant has breached the conditions for the reduced taxable benefit. The tax must be withheld either from the option income (by way of cashless exercise, see 4.2.1) or from any other cash pay.³⁸

6. Legal issues

6.1 Process/timeframe

- 6.1.1 Depending on the complexity of a particular plan, we estimate that the complete implementation of a stock option plan will take approximately six months³⁹.

- 6.1.2 The following matters will have to be considered when implementing a plan⁴⁰:

- Orientation and development phase to determine what type of plan suits the company's needs, leading to establishment of a framework/concept plan.
- Validation of the concept (from a financial, legal, tax and social security point of view).
- Drafting of the plan rules and all related agreements and documentation as well as all the necessary administration arrangements.
- Adoption of the plan by the board of directors, and, in most cases, approval of the general shareholders meeting will be required (see section 6.4).
- If applicable, submission to Works Council and trade union delegation (see section 6.4).
- If the offer is deemed to be a "public call on savings", drafting of a prospectus and submission of such prospectus to the approval of the Belgian Banking and Finance Commission ("BBFC") at least one month before the start of the offer period (see section 6.4).
- Communication of the plan to employees.
- Grant of options.

³⁸ Act of 26 March 1999 governing Stock Options; Belgian Income Tax Code

³⁹ General Practice - PwC / Landwell experience

⁴⁰ General Practice - PwC / Landwell experience + references in the following legislations:

- Belgian Companies Code ("BCC");
- Works' Council;
- Article 26 of the Royal Decree No. 185 of 9 July 1935;
- Royal Decree of 7 July 1999; and

Royal Decree of 31 October 1991 on the prospectus to be published in case of a public issue of securities.

6.2 Employment law

- 6.2.1 Representatives of employees such as Works Councils and trade union delegations need to be informed and consulted prior to the implementation of a stock option plan. The trade union delegation should be provided with all relevant information such as plan rules, brochures for the employees, etc. However, they do not need to approve the proposed stock option plan. The employer is not obliged to take their remarks, critics or proposals into account⁴¹.
- 6.2.2 Since the grant of stock options forms part of the remuneration for employment, there can be no discrimination between men and women, either directly or indirectly, (for example on the basis of a distinction between full-time and part-time employees if the latter mainly consists of women). There can also be no discrimination between those employed on the basis of an open-ended employment contract and those employees employed in a comparable situation on a fixed term employment contract⁴².
- 6.2.3 On the recruitment of new employees and the grant of stock options to them, no discrimination is allowed on the basis of sex, civil status, age, nationality, religion, race, membership of a trade-union or other organisation, ethnic origin, etc.
- 6.2.4 Under Belgian employment legislation, generally an employer can terminate an employee's employment at any time independent of the underlying motives. The employer is only obliged to respect the legally required notice period or to make a payment in lieu of notice or pay an indemnity. Such notice period/severance pay or indemnity should cover all material and moral damages suffered as a consequence of the unilateral dismissal⁴³.

⁴¹ Article 15 a) of the Act of 20 September 1948 (Works Council), article 14 of the Collective Bargaining Agreement n° 5 of 24 May 1971 (trade-union delegation).

⁴² Act of 7 May 1999 as to the equal treatment of men and women (employees in service);

- Collective Bargaining Agreement n° 38 as to the equal treatment in general (as for the recruitment of employees);
- Act of 30 July 1981 in respect of antiracism;
- European Directive of 28 June 1999 concerning the framework agreement on employment for defined duration concluded on European level between the social partners (to be soon implemented in Belgian legislation);

European Directive of 29 June 2000 prohibiting any discrimination in general (to be soon implemented into Belgian legislation).

⁴³ Labour Court of Appeal of Antwerp of 9 June 1995 (case law) and Pieter De Koster/ Inge Vanderreken (doctrine) in respect of the compliance of the insertion of a condition of resolution in a share option plan.

- Articles 32, 37, 39 and 63 of the Act regarding Employment Agreements of 3 July 1978 regarding the termination of an employment contract and the specific provisions for Blue Collar workers in respect of 'unfair or unlawful dismissal'.
- Article 1382 and 1134 of the Belgian Civil Code; Labour Court of Appeal of Antwerp of 18 March 1994, the same Court of 2 September 1997 (article 1134) and, Labour Court of Appeal of Verviers of 13 January 1997 and Labour Court of Appeal of Liège of 26 May 1998 (article 1382) in respect of the legal basis for a wrongful or unfair dismissal for White Collar workers.

Labour Court of Brussels of 28 October 1994 and Labour Court of Appeal of Liège of 15 February 1999 regarding the grant of damages on top of the indemnity for protected employees.

- 6.2.5 Belgian employment legislation only contains a provision regarding unfair or unlawful dismissal in specific situations; a general prohibition on unfair dismissal for Blue Collar workers, and, a prohibition on dismissing certain categories of protected employees (e.g. pregnant women, members of the Works Council) whether blue collar or white collar. In these cases a special indemnity is fixed by law. Although a general prohibition in respect of unfair dismissal for white collar workers has not been included in Belgian employment legislation, Belgian case law accepts such prohibition on the basis of the general principles of the Belgian Civil Code. Such dismissal is then qualified as a “wrongful act” or “non-execution of the employment contract in good faith”. Because of the general principle that an employer can dismiss for any reason, the sphere of application of “unfair or unlawful dismissal” is quite narrow; it only concerns flagrant unfair dismissals, e.g. flagrant abuse of the power to dismiss or the dismissal of certain protected employees mentioned above. If case law qualifies a dismissal as being unfair or unlawful, the employees concerned can claim damages on top of the notice period/severance pay and/or the specific indemnity (for some categories of protected employees).
- 6.2.6 Generally, an employee whose employment has ceased other than by reason of unfair or unlawful dismissal cannot claim any damages from the employer in respect of unvested options if the stock option plan includes a specific provision that options will lapse in the event their employment contract is terminated or the option lapses except for termination in circumstances specified in the plan, (a “condition of resolution”). Belgian case law and doctrine accept that stock options granted under a condition of resolution comply with the requirements of Belgian employment legislation and in fact most stock option plans do include such a provision. It should be noted that in order to secure the lower taxable benefit, options cannot be exercised for than three years from grant in any circumstance other than death, so it is possible that an employee could be dismissed before three years and lose the options.
- 6.2.7 Without such a condition of resolution, it is possible that an employee could successfully claim damages resulting from his loss of the right to exercise the granted stock options due to his dismissal. Currently, there is no case law in this respect. However, the fact that Belgian case law denies damages in the event of a condition of resolution, could suggest that damages could be due if no condition of resolution has been included in a plan. A condition of resolution will not prevent damages in the case of unfair or wrongful dismissal but, as explained above, Belgian courts rarely accept that a dismissal is “unfair or unlawful”.
- 6.2.8 The employer must pay holiday pay (single and double holiday pay) on the fixed and the average variable remuneration of the last twelve months before the employee’s main vacation. “Remuneration” for calculating holiday pay is the same as for social security contributions so that certain stock option benefits would be regarded as variable remuneration and holiday pay is therefore due.
- 6.2.9 To avoid the creation of acquired rights the plan should stipulate that the grant of benefits resulting from the plan does not create any entitlements for the future. Such an explicit provision in a plan forming part of the employment agreement will avoid the creation of a “custom” on which the employee could claim an entitlement to future benefits from stock options.

- 6.2.10 The employer can only unilaterally change the provisions of the stock option plan within certain strict limits. If the plan is regarded as a unilateral document of the employer, a unilateral modification/early termination of the plan by the employer can only be made if the plan or related documents allow this. If the stock option plan and related documents are to be regarded as “an agreement” and not as a unilateral document of the employer, such agreement can only be unilaterally modified or terminated by the employer if it concerns a non-essential element of the employment. Legal authors agree that a grant of stock options is a non-essential element of the employment agreement. A provision in the plan confirming this supports the arguments that unilateral modification or termination is permitted.
- 6.2.11 Moreover, because it concerns a non-essential element, such modification or termination of the stock option plan cannot be regarded as a unilateral termination of the employment contract itself, and the employer is therefore not liable to pay severance pay to the employee by reason only of such modification and/or early termination.
- 6.2.12 With regard to language legislation in Belgium all contact between employer and employee has to be put into the appropriate language dependent on the location of the employer’s place of business or exploitation seat to which the employee is linked (seat of effective management or centre of activities of the subsidiary or branch).
- 6.2.13 If the employer’s place of business is located in the Brussels Region, the plan documents must be drawn up in French for the French-speaking members of the staff and in Dutch for the Dutch-speaking members of staff. If this condition is not fulfilled, the plan documents are only partially void (i.e. only the employee can claim the nullity of the documents) and the company can fulfil the condition retroactively. Although not legally binding, a translation of the plan documents (e.g. in English) may also be provided.
- 6.2.14 If the employer’s place of business is located in the Flemish Region, the plan documents must be drawn up in Dutch and if it is situated in the Walloon Region the plan documents must be drawn up in French, regardless of the mother tongue of the employees concerned. If this condition is not fulfilled, the plan documents are only partially void. The employer can retroactively regularize this nullity by having the documents translated into the correct language.

6.3 Data protection⁴⁴

- 6.3.1 Following the law of 8 December 1992 concerning the protection of the personal environment towards database processing, data protection issues must be taken into consideration. There must be legitimate grounds for processing the data. Since the processing of the data is necessary in order to run the stock option plan, there will be legitimate grounds for processing data necessary for the execution of the plan.

⁴⁴ The law of 8th December 1992 concerning the protection of the personal environment toward database processing

- 6.3.2 A prior notification of the database to the Commission for the Protection of the Personal Environment will be necessary if data is transmitted to persons other than the data controller. Some information has to be provided to the data subject. Some rights (e.g. access to the database) and obligations have to be respected while processing the data. Finally some specific rules apply in the case of transfer of the data outside of the European Union.
- 6.3.3 There are exemptions from notification for specific types of processing operations which do not entail particular risks, for example payroll administration, administration of personnel provided several conditions are met.
- 6.3.4 In principle the setting up of a stock option plan, can be classified as “payroll administration”. As such, there is no legal obligation to notify the Commission provided that the data will not be transferred to third parties.
- 6.3.5 Under Belgian law, personal data can be processed (collected and further used) if:
- The data subject has unambiguously given his consent or her consent; or data processing is necessary for the performance of a contract or in order to enter into a contract requested by the data subject.
 - In the case of a stock option plan, it is arguable that the collecting of the personal data is necessary for the performance of a contract or in order to enter into a contract requested by the data subject, and that the data controller has a legitimate interest in doing so.⁴⁵
 - Data controllers are required to give information to the data subjects whenever they process personal data, unless the data subjects already have this information.
 - Data subjects must be informed beforehand of:
 - The identity of the controller (name and address of the data controller).
 - The purpose of the processing.
 - The right to refuse processing of his/her data if the data will be used for direct marketing purposes.
 - The categories of data involved.
 - The recipients of the data.
 - The specific rights of the data subjects, such as the right of the data subject to access, review and update his personal data. Furthermore, they must be informed whether or not it is obligatory to answer the questions posed in the questionnaire (if a questionnaire is used to gather the personal data of the employees).

⁴⁵ Notification to Commission for the protection of the personal environment (“Commissie voor de bescherming van de persoonlijke levenssfeer”; “la Commission de la protection de la vie privée”).

- 6.3.5.7 Data subjects must have access to the personal information the employer holds and processes in a database. Furthermore, the person must be able to correct, amend and to delete that information where it is inaccurate, excessive, of which the registration is prohibited, or kept for a longer period than is necessary in relation to the purpose of the processing.
- 6.3.5.8 In this report data controllers are required to observe several principles. These principles aim at protecting the data subjects. Data should be accurate, relevant and not excessive in relation to the purpose for which they are processed. As a consequence, data should be kept for no longer than it is necessary in relation to the purpose of the processing.
- 6.3.5.9 Belgian law establishes that data can be transferred to countries inside the EU since its continued protection is guaranteed in all the Member States. Personal data can only be transferred to countries outside the EU where there is adequate protection for such data. In order to determine whether there is adequate protection, the Belgian data protection law provides several criteria.
- 6.3.5.10 However, if a country situated outside the EU does not guarantee adequate protection, it will be possible to transfer the personal data to this country under the condition that amongst others:
- The employee has unambiguously given his or her consent with respect to data transfer to all relevant parties.
 - The transfer of the data is necessary for the performance or conclusion of a contract concluded between the employee and the data controller (e.g. the execution of the share option plan).
- 6.3.5.11 If the data subject suffers damage because his personal data are processed in a way which does not conform to the rules and principles of the data protection law, the following sanctions may be applicable under Belgian law⁴⁶.
- 6.3.5.12 Belgian database protection law stipulates that any data subject who has suffered damage as a result of an unlawful processing of personal data must receive compensation from the data controller for the damage he or she suffered. The data controller is exempted from this liability if he can prove that he is not responsible for the event giving rise to the damage suffered.
- 6.3.5.13 Belgian database protection law provides for criminal sanctions. Depending on the infringement that has occurred, the sanctions that can be imposed on the data controller are the following:
- Fines of up to €500,000, depending on the kind of infringement.
 - Publication of the court decision in a newspaper to be determined by the Court.
 - Confiscation of the automatic data processors (for example hard-disks of computer on which the personal data are processed).

⁴⁶ (The law of 8th December 1992 concerning the protection of the personal environment towards database processing.)

- Prohibition on managing data processing or processing personal data for two years.
- Imprisonment of from three months up to two years and/or fines of up to €500,000 (in the case of repeated offenders).
- Obligation to delete the personal data processed into the database.

6.3.5.14 The Commission for the Protection of the Personal Environment has the authority to give advice and/or recommendations, whether on their own initiative or following a complaint.

6.3.5.15 If there is an infringement of Belgian privacy law, the Commission can even transfer the file to the public ministry ('Openbaar Ministerie'). In that case it is possible that criminal sanctions will be imposed.

6.3.5.16 The Commission can lodge a claim before the Belgian court if they are of the opinion that there is an infringement of database protection law. A claim before the court can also be lodged by the data subject. As a consequence of either of those actions, civil remedies may be imposed. However, the complaints lodged before the Commission are often solved via mediation, in which the Commission acts as a mediator trying to reconcile both parties.

6.3.5.17 The Commission for the Protection of the Personal Environment has the authority to investigate the complaints made to it in respect of infringement on data protection law. The Commission also intends to set up a "Inspectorate General" who will be charged with controlling whether Belgian undertakings are complying with database protection law. This Inspectorate General has not yet been set up.

6.3.5.18 To date, the sanctions outlined have rarely been imposed.

6.4 Stock exchange issues

6.4.1 Generally, shareholder approval will be necessary for the introduction of a stock option plan by a Belgian Company. However, this will depend on the type of stock option plan and whether or not the issue of shares subject to the option will occur within the framework of the so-called "authorized capital".

6.4.2 Companies may grant traditional stock options (that is options granting the right, during a determined period, to purchase a certain number of shares at a determined or determinable price⁴⁷) or warrants (rights to subscribe for newly issued shares).

⁴⁷ The law of 26 March 1999
Belgian Companies Code ("BCC")
PwC / Landwell experience

- 6.4.3 The grant of traditional stock options is a purely contractual commitment by the issuing company and it is important to check the relevant company has the authority to enter into the contract. If the options do not relate to the shares of the company granting the options, shareholder approval is not required for example if the options relate to a foreign parent's shares and the competent corporate body to implement such a plan is the board of directors⁴⁸. If on the other hand, the options relate to shares of the Belgian company granting the option, the company will necessarily have to acquire its own shares in order to deliver them to the participant. The acquisition of a company's own shares is strictly regulated by articles 620 et seq. BCC, which requires, *inter alia*, a decision by the general meeting of shareholders for the purchase of shares and the subsequent sale to the participants. As a result, most companies will obtain shareholder approval as from the start of the implementation process.
- 6.4.4 A warrant plan involves a capital increase and therefore requires the approval of a general meeting of shareholders held before a notary public. Such a capital increase will often entail the exclusion of the pre-emption rights on the part of the existing shareholders, which is also subject to the approval of the shareholders⁴⁹.
- 6.4.5 Although Belgian company law provides for exceptions from the need for shareholder approval (e.g. a capital increase within the framework of the authorised capital⁵⁰ or a purchase of shares solely destined to be granted to employees of the company)⁵¹ these exemptions are usually inadequate to deal with the requirements of a stock option plan. The actual implementation of either a traditional stock option or warrant plan can of course be left to the board of directors.
- 6.4.6 Depending on the type of scheme to be implemented, a number of other corporate formalities may have to be adhered to.
- 6.4.7 As far as the type of information that has to be disclosed to the shareholders, this will again depend on the type of scheme to be implemented. For warrants, the information will need to be quite detailed as ultimately, the shareholders themselves will have to set the main terms and conditions of the warrants. For traditional stock options, it will be up to the board of directors to set all terms and conditions of the plan and determine the conditions of the purchase of the shares. However as shareholder approval will be required at the time the actual shares have to be acquired, it is suggested that companies disclose as much detail as possible to the shareholders (e.g. provide them with a copy of the rules of the plan).
- 6.4.8 There is requirement to issue a prospectus if the scheme qualifies as a "public call on savings"⁵², that is:
- The offering of securities is accompanied by an advertising campaign directed at more than 50 non-institutional investors in Belgium.

⁴⁸ Article 522 BCC

⁴⁹ Article 596 BCC

⁵⁰ Article 581 BCC

⁵¹ Article 622, §2, 3°

⁵² Royal Decree of 7 July 1999

- A call is made on intermediaries for the placement of the offered securities (with the exception of certain qualified intermediaries listed in article 3, 2° of the Royal Decree of 7 July 1999).
 - More than 50 non-institutional investors are solicited by the offering in Belgium.
- 6.4.9 If one of these criteria is met, article 26 of Royal Decree No. 185 of 9 July 1935 will apply, meaning that a draft prospectus and all other relevant documents should be submitted for approval to the Belgian Banking and Finance Commission (BBFC) at least one month before the public offer takes place (i.e. one month prior to the date of communication of the plan to the employees)⁵³.
- 6.4.10 Several penalties can be enforced for failure to comply. The company or its directors can be subject to specific criminal sanctions in case of non-compliance of imprisonment of from a month to a year and/or fines of €1.25 to €250 (multiplied by 200)⁵⁴.
- 6.4.11 In addition, a non-compliant offering can be regarded as an “event of default” which can give rise to an injunction ordered by the President of the commercial court of Brussels. Any interested party can seek such an injunction⁵⁵.
- 6.4.12 Finally, as non-compliance with article 26 of the Royal Decree N°185 is a criminal offence, any interested party (including regulators and employees) may invoke the absolute nullity of the offer and may claim indemnification (e.g. reimbursement of the taxes paid at grant). Please note that the situation cannot be regularised through some sort of ratification by the company or even the Belgian Banking and Finance Commission (“BBFC”) afterwards and that no statute of limitations is applicable.
- 6.4.15 Under certain conditions, a partial exemption from prospectus requirements can be obtained from the BBFC if the offer is only made to present or former employees of the issuing company or of its affiliated undertakings (article 10c of the Royal Decree of 31 October 1991). In such a case, only a so-called “abridged prospectus” will need to be drafted⁵⁶.
- 6.4.16 The content of such abridged prospectus must include⁵⁷:
- Information regarding the persons responsible for the content of the prospectus as well as the control of the accounts of the company.
 - Full details regarding the offer itself, the rules of the plan and the underlying shares.
 - General information on the issuing company and its capital.

⁵³ Article 26 of the Royal Decree No. 185 of 9 July 1935

⁵⁴ Article 42 of the Royal Decree N°185 (which refers to the sanctions imposed by article 204 of the Consolidated Commercial Companies Acts, which is now replaced by article 652 BCC).

⁵⁵ Article 220 §2, 2° of the Act of 4 December 1990 on financial transactions and financial markets.

⁵⁶ Royal Decree of 31 October 1991 on the prospectus to be published in case of a public issue of securities. Circular of the Belgian Banking and Finance Commission (“BBFC”) of November 1999 relating to the content of the file to be introduced with the BBFC within the framework of a public issuance of stock options to employees of companies not listed on a Belgian stock exchange.

⁵⁷ Circular of the Belgian Banking and Finance Commission (November 1999)

- Information regarding the activities of the issuing company.
 - Information regarding the assets, financial position and the results of the issuing company.
 - Detail on the recent developments and prospects of the issuing company.
 - If applicable, recent information on the share price evolution of the underlying shares.
 - Finally, full detail on the tax and social security treatment of the plan for the employees concerned.
- 6.4.17 In addition to the abridged prospectus, the following documents relating to the issuing company will have to be communicated to the BBFC:
- The last annual report (and if available the last interim report) of the issuing company.
 - If applicable a copy of any other reports required by Belgian Company law.
 - A copy of the minutes of the board/shareholder meeting having approved the plan.
 - A copy of the articles of association of the issuing company.
 - Any other relevant document relating to the plan or to the issuing company.
- 6.4.18 This information and documentation requirement will not be fundamentally different for companies already listed on a Belgian stock exchange. It may however be simplified as such companies are already subject to periodical information requirements. In addition, if new shares are issued within the framework of the stock option plan, those shares will also need to be listed on the stock exchange.
- 6.4.19 Finally, if the issuing company is a foreign entity, it will, in addition to filing a prospectus prior to making its first public offer in Belgium, need to deposit its articles of incorporation at the Clerk's Office of the Commercial Court of Brussels (article 88 BCC)⁵⁸.
- 6.4.20 There are no restrictions on employees holding foreign shares (or options over foreign shares) in Belgium.

⁵⁸ Royal Decree of 18 september 1990 on the prospectus to be published in case of a listing of securities on the primary market of the stock exchange.

6.5 Securities law

- 6.5.1 There are no securities law restrictions on the number of individuals who can participate in a stock option plan. There is a requirement to file/register the plan, if the offer qualifies as a public call on savings (see 6.4.8 above)⁵⁹.

6.6 Financial assistance

- 6.6.1 There are some prohibitions on a company giving financial assistance for the purchase of its own shares.⁶⁰ According to article 329 (for a private limited liability company) and 629 BCC (for a public limited liability company), the principal types of Belgian corporate entities may not advance funds, make loans or provide security for a loan with a view to the acquisition by third parties of its own shares or profit sharing certificates.
- 6.6.2 There are a number of limited exceptions to this rule. One of these exceptions relates to funds, loans and securities granted or advanced to employees of such entity for the purposes of their acquisition of its shares or profit sharing certificates.
- 6.6.3 The amounts used by the company for financial assistance purposes must be amounts that are available for distribution in accordance with articles 320 and 617 BCC. The net assets of the company, as evidenced from the last annual accounts, must not have fallen below, or must not as a result of the distribution/assistance fall below, the amount of the paid up capital or if higher, the amount of capital requested to be paid-up. Any breach of these articles will render the transaction null and void. Any interested party can invoke this nullity. Furthermore, criminal sanctions are imposed by articles 347 and 648 BCC, i.e. imprisonment of a month up to a year and/or fines of €1,25 to €250 (multiplied by 200)⁶¹.

6.7 Other

6.7.1 Foreign exchange control filings

- 6.7.1.1 There are no foreign exchange requirements in Belgium.

6.7.2 Employee shareholders

- 6.7.2.1 The rights to vote and receive dividends etc., that the employee has prior to exercise will depend on the type of plan that is implemented. Under a traditional stock option plan the employees will not have any particular rights (such as voting and dividend rights) prior to exercise except as provided in the plan.
- 6.7.2.2 Warrant holders on the other hand enjoy certain special rights conferred on them by the Belgian Companies Code.
- 6.7.2.3 Firstly, warrant holders have the right to attend the general shareholders' meetings of the company but only with a consultative vote⁶². Once participants have been granted

⁵⁹ Article 26 of the Royal Decree No. 185 of 9 July 1935

⁶⁰ (article 329 §2,1° and 629 §2,2° BCC). Articles 329 and 629 BCC.

⁶¹ Articles 347 and 648 BCC

⁶² (article 537 BCC)

warrants, they need to be invited to attend these meetings and are entitled to inspect and receive copies of any of the documents which legally have to be presented to the shareholders⁶³.

- 6.7.2.4 Secondly, article 501 §1 BCC states that, as from the time warrants have been issued until they expire, the company may not reduce the benefits conferred by the terms of issue or by law, save as provided for in sub-article 2 of that article or as specifically provided in the terms of issue⁶⁴.
- 6.7.2.5 Also, notwithstanding any contrary provision in the articles of association of the company or the terms of issue, if the company increases its capital by a contribution in cash, the warrant holders will be able to exercise their warrants and receive shares, even if the terms of issue would not permit them to do so, and participate as shareholders in the projected capital increase insofar as the existing shareholders also have this right.
- 6.7.2.6 Warrant holders do not have any dividend rights up until the date of exercise of their warrants.
- 6.7.2.7 The formalities necessary to enable an employee to transfer his shares vary for registered shares, bearer shares and shares in a dematerialised form⁶⁵.
- 6.7.2.8 A transfer of registered shares is valid between the vendor and the purchaser as soon as there is a mutual consent to such transfer. However, to make the transfer enforceable on the company and third parties, the transfer and the identity of the new shareholder must be notified to the company for entry in the shares register of the company⁶⁶.
- 6.7.2.9 A transfer of bearer shares is valid and enforceable towards all parties from the time the physical transfer of the certificate representing the bearer share takes place.
- 6.7.2.10 Shares in a dematerialised form are represented by an entry on a share account with a recognized institution (article 468 BCC). A transfer of such a share will result in the crediting of such share account. Currently, it is not possible under Belgian law to issue shares in a dematerialised form as the necessary royal decrees for the implementation of the dematerialisation technique have not yet been enacted.
- 6.7.2.11 Apart from these very general rules, the transfer may be subject to specific formalities or restrictions on transferability set out in the articles of association of the company concerned, the plan rules or the terms of issue or, if the shares are listed on a specific market, to the transfer formalities required by such market.
- 6.7.2.12 There are no costs associated with the transfer of shares apart from any applicable taxes (such as stamp duty, transfer tax or inheritance tax) in Belgium. However, if a third party administrator or financial institution is involved in the transfer or if the transfer is made on a regulated market, specific costs may arise. Usually an employee

⁶³ (article 533 BCC). Article 533 and 537 BCC

⁶⁴ Article 501 BCC

⁶⁵ Article 465 and 468 BCC

⁶⁶ (article 465 BCC)

bears all costs related to a transfer of shares following the exercise of the option or warrant.

6.7.3 *Foreign Exchange Notifications*

6.7.3.1 Even though there are no exchange controls in Belgium, for statistical purposes, the Belgo-Luxembourg Exchange Institute (“BLEI”) must be notified of transactions with non-residents. If a Belgian resident bank handles the transaction and the money is transferred to a foreign account of a non-resident, then the bank will take care of this notification procedure. If not, the Belgian company will need to notify the BLEI itself and give the nature of and/or reason for incoming and outgoing transfers⁶⁷.

6.7.4 *Warrants*⁶⁸

6.7.4.1 If warrants are issued by a Belgian company, the following considerations should be taken into account:

- Legally, the term of a warrant cannot exceed ten years (article 499 BCC); furthermore, if the warrants are granted primarily to persons other than the company’s or its subsidiaries’ employees, the term may not exceed five years (article 500 BCC).
- Special rights are granted to warrant holders.
- A warrant can only be issued by a Belgian public limited liability company and a limited partnership with shares.
- Once the warrants are exercised, the auditor of the company will have to certify the number of warrants exercised and the board of directors of the company will have to pass a deed of capital increase of the company before a Notary Public in Belgium (article 591 BCC). Once the notarial deed is passed, the warrants will be issued directly to the employees.

7. **Sourcing the shares for the stock option plans**

7.1 A Belgian company can choose whether to use newly issued shares (by issuing warrants) or market purchase shares and satisfy exercises under a stock option plan.

7.2 It is possible for a Belgian company to hold its own shares. However, this is strictly regulated by Belgian Company Law.

7.3 The acquisition of a company’s own shares is subject to the following conditions:

- The decision to acquire own shares must be taken by the shareholders (and holders of other securities issued by the company) by a 4/5 majority vote.

⁶⁷ The Law of 2 January 1991 on the BLEI and the Royal Decree of 13 April 1997 on Foreign Payments and the Belgian Balance on Payments.

⁶⁸ Article 591 BCC
Articles 496 et seq. BCC

- The nominal or par value of the shares so acquired may not exceed 10% of the issued share capital.
- The funds used for the acquisition must be funds available for distribution as determined in articles 320 and 617 BCC which stipulate that net assets must be high enough.
- The shares being acquired must be fully paid-up.
- The offer to purchase must be made to all shareholders under identical conditions.

7.4 These conditions will need to be met at the time the company acquires its own shares. Shareholder approval, by a 4/5 majority, will also be required upon resale of the shares to the employees unless the shares were initially acquired with a view to their distribution to employees only (and not directors, consultants or other third parties) and on the condition that the shares will be sold to the employees within a one-year period from their acquisition⁶⁹. However this is rarely used as companies initially purchase shares at option grant, which is frequently more than a year before option exercise.

7.5 In addition, for so long as the company itself holds the shares, there must be an unavailable reserve equal to the acquisition value of the shares⁷⁰.

7.6 The strict conditions set out in articles 321 et seq. and 620 et seq. BCC pose a major problem for most companies willing to implement a traditional stock option plan. Some alternatives to avoid the application of some of these rules exist, for example in arrangements with financial institutions (e.g. through the so-called “over the counter”-options or through transferable options) or in-group entities where the shares are acquired by a subsidiary. In the latter case, most restrictions remain, but the obligation to hold an unavailable reserve is not applicable. Once a direct or indirect subsidiary has acquired shares in its parent, rules on cross participations will be applicable, which limit the maximum number of shares that can be held.

7.7 Given these very strict conditions for the acquisition and holding of own shares by a company or by its direct subsidiary, it is quite difficult for a Belgian company granting options over its own shares to hedge itself against a increase in the value of the shares. The main alternatives are a share warrant plan, which has the disadvantage of providing the warrant holder with a number of rights prior to exercise, or hedging mechanisms with financial institutions (which are often quite expensive, certainly for unlisted companies).

8. Role and influence of existing shareholders

8.1 There are no additional rules for shareholders over and above the need to give shareholder approval in certain circumstances as set out in 6.4 above.

⁶⁹ (article 321 et seq. and 620 et seq. BCC)

⁷⁰ (article 623 BCC)

9. Accounting

9.1 Belgian generally accepted accounting principles do not address the specific issue of how to account for options. The only guidance available on the subject of stock options at present is to be found in the three opinions issued by the Belgian Accounting Standards Commission on accounting for options on shares, which we summarise below.

9.2 Options to acquire existing shares

9.2.1 On grant, the contractual exercise price is recorded in off-balance sheet memorandum accounts (class 09), and maintained there until the option is exercised or expires. If the amounts are material, they must be disclosed in the notes to the annual accounts⁷¹.

9.2.2 Any premium received upon grant of the option may be recognised immediately in income (“allowed alternative treatment”), although the preferred treatment is to defer the premium until the option is exercised or expires.

9.2.3 During the life of the option, the grantor is bound to account for the risk that the cost of acquiring the shares it may have to deliver if the options are exercised is greater than the exercise price it will receive when the option is exercised.

9.2.4 Under the allowed alternative treatment, the full amount of this risk should be accrued as a provision. Under the preferred treatment, the difference between the full amount of the risk and the amount of the deferred premium should be accrued.

9.2.5 Quantification of this risk is relatively easy when the options in question are similar to those for which there is a market. In the absence of a market, quantification of the risk becomes more complex. If the options in question have the same characteristics as options traded in a liquid market, the market value of the traded option should be used to measure the risk. Where they are not the same, for example because the options granted to employees are not negotiable or are subject to other restrictions, their fair value needs to be calculated using an option-pricing model that allows their specific characteristics to be factored into the calculation.

9.2.6 If the amounts of deferred premium / accrued liability involved are material, they should be disclosed in the notes to the statutory accounts.

9.2.7 At the end of the life of the option, any deferred premium or accrued liability balance remaining in the issuer’s accounting records is reversed into income.

9.2.8 If the option is exercised, the grantor will record (i) the cost of acquiring the shares to be delivered, ii) the receipt of the exercise price paid by the person exercising the option and (iii), the difference between those two amounts, being a loss on disposal of the shares⁷².

9.3 Options to acquire shares to be issued (warrants)

⁷¹ Accounting Standards Commission opinion # 167 / 1 – “Accounting for stock options (considered as separate, unhedged transactions)”

⁷² Accounting Standards Commission opinion # 139 / 7 – “Accounting for subscription rights issued”

9.3.1 For warrants issued free of charge, while appropriate disclosure of their existence and terms is required if material, recognition in the issuer's accounts is not required as long as the warrants are not exercised⁷³.

9.3.2 For warrants issued at a price, in addition to providing appropriate disclosure, the issuer should record any amounts received in exchange for the warrants as share-issue premium in equity.

9.4 Hedged options on shares

9.4.1 An Accounting Standards Commission opinion stipulates that, if the grantor company hedges the options it grants to employees, the impact of the option on the issuer's financial statements may be different to that set out above, as well as the timing.

9.4.2 For example, if the issuer obtains a perfect hedge by purchasing a call option with exactly the same characteristics as the option it is granting, the net result of the two transactions is irrevocably fixed, so that any gains, losses, income and expenses are recorded at the time the hedging option is acquired.

9.4.3 On the other hand, if the grantor already owns the shares it has committed to delivering under the option, the exact amount of any potential gain or loss on disposal of those shares can be determined, being the difference between the exercise price to be received if the option is exercised and the cost of acquiring the corresponding shares. However, the likelihood of realising any such gain or loss depends on whether the employee exercises the option or not. If there is a market for options with the same characteristics, this probability will be quantified as being the price attributed to the option by that market. If not, the issuer will have to resort to option-pricing models to assess the probability of occurrence, in which case the rule is to recognise probable losses immediately but defer probable gains until realisation upon exercise of the option.

9.5 General

9.5.1 Strictly speaking Belgian companies that grant options to their employees are not explicitly required under existing accounting regulations to recognise the cost of the services rendered by their employees and which the options granted are intended to remunerate.

9.5.2 If the Belgian Accounting Standards Commission were consulted on the subject, it is reasonable to expect that it would look to guidance available elsewhere in order to develop a suitable approach for Belgium.

⁷³ Accounting Standards Commission opinion # 167 / 2 – “Accounting for hedged positions on shares”

10. Miscellaneous

10.1 Use of a trust

- 10.1.1 Belgium does not recognise the use of a trust. The use of similar mechanisms e.g. the use of an “Administratie-kantoor” is highly uncommon for the purposes of stock option plans in Belgium.

11. Special points to note

11.1 Mitigation of income tax

- 11.1.1 There are no special rules enabling tax on income that accrues over several years to be mitigated.

11.2 Mitigation of social security contributions

- 11.2.1 It is not possible to mitigate the social security contributions liability on the exercise of pre 1999⁷⁴ or the grant post 1999 options⁷⁵.

11.3 Mitigation of tax on sale of shares

- 11.3.1 Capital gains on the sale of the shares acquired on an option exercise by the employee will be exempt from tax under the normal Belgian rules applicable to gains derived from an individual’s private investment portfolio.
- 11.3.2 On the other hand, capital losses are not deductible⁷⁶.

11.4 Special provision for SMEs

- 11.4.1 There is no special provision in Belgian stock option legislation for SMEs.

⁷⁴ Belgian Securities Tax Legislation

⁷⁵ Royal Decree of 28 November 1969.

Act of 12 April 1965 regarding the protection of the employees’ remuneration.

Act of 26 March 1999 governing Stock Options

⁷⁶ Belgian Income Tax Legislation

Note: Individual country reports have been prepared covering employee stock options in the EU and the USA. These individual reports are of a general nature and subject to change based on individual circumstances. PricewaterhouseCoopers has also provided the EU with an overview report. This overview report sets out the basis on which the individual reports were prepared and should be referred to as necessary. In particular, it should be noted that the information in the reports is current as at 1 January 2002, unless otherwise stated. In the case of certain known subsequent changes, reference may be made on occasion but a full update exercise has not been carried out. Further information can be obtained from PricewaterhouseCoopers.