

# Tax Newsletter

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## **Can a company with a negative net equity be part of a merger or spin-off?**

- The accounting net equity (NE) of a company is its B/S total minus both accruals and debts.
- The fiscal NE reflects a company's fiscal value and equals its accounting NE decreased by tax-free revaluation gains and increased by some hidden (taxable) reserves (art. 184ter, §3 of the Belgian Income Tax Code).
- Assume a company being involved in a merger or spin-off with a negative accounting NE due to start-up losses (start-up) or significant investments (scale-up); can that reorganization thus be implemented?
- The Commission for Accounting Standards (CAS) has confirmed before that, even in such circumstances, the merger or spin-off can take place if the company has a positive market value. This results from the definition of the exchange ratio to issue new shares upon merger or spin-off (Advice CAS 2022/01). The Belgian tax ruling commission shares this view (see e.g. Decision 2021.0246).
- In case of (partial) spin-off, the accounting NE of the company to be spun-off should be divided over the various companies at hand. The CAS advises to align this allocation to a maximum extent with the allocation of the fiscal NE (Advice CAS 2009/8-11). Specifically, if the fiscal NE is negative, the accounting NE should be divided in proportion to the fiscal value of the various assets to be allocated to the companies involved (Advice CAS 2022/01).
- In case of spin-off, it can happen that the company spins-off an asset with a negative fiscal NE due to the fact that a revaluation gain is sticking on that asset. This is as such not an obstacle for the spin-off transaction, but may entail that the sum of the accounting NE of the companies after spin-off is lower than the accounting NE of the company to be spun-off. The CAS advises that the companies after spin-off thus record an 'accumulated accounting result' for the difference (with a corrective amount to be reported in the corporate tax return). However, this modus operandi may not increase the distributable reserves of one of the companies at hand. Indeed, the cause of this issue is a revaluation gain which, in principle, cannot be distributed as a dividend. If so, the CAS recommends to record the difference as an 'intangible reserve' (Advice CAS 2025/01).