Directorate-General for Library,
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RESEARCH NOTE

Whether there are specific rules or general principles on the abuse of law in the area of direct taxation in the Member States

[…]

Subject matter: Examination of the presence of anti-abuse measures in relation to direct taxation in the legal orders of the Member States. Research designed to study the tax treatment in particular of cross-border payments of dividends and interest under a tax-saving scheme.

[…]

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[…]

SYNOPSIS

I. INTRODUCTION

1. The aim of this research note is to examine the possible presence of rules and/or general principles in the legal orders of the Member States on the abuse of law in the area of direct taxation. In that context, the question is whether artificial schemes designed to obtain tax advantages and devoid of economic interest in themselves may be set aside by the tax authorities on the basis of abuse of law, notwithstanding that they are created by legal acts that are valid under private law.

2. For this note, research was conducted in two stages. First, the laws of all the Member States with the exception of Cyprus, Greece and Malta were researched with the aim of identifying measures under substantive law or procedural law intended to combat abuse of law in the area of direct taxation.

3. In the second stage, the laws of **Belgium**, **Denmark**, **Finland**, **Ireland**, **Luxembourg**, the **Netherlands** and **Sweden** were studied in greater detail in order to describe the specific features of the anti-abuse measures identified. In that connection, particular attention was given to the 'reality' principle in Danish law.

II. INTRODUCTORY COMMENTS

4. The results obtained from the first stage of the research show that almost all the legislations examined contain one or more methods for combating abuse of law in the area of direct taxation. Those methods are preventive or penalising. They serve to ensure effective tax collection and hence tax compliance. That said, the criteria for identifying and applying the anti-abuse rules vary among Member States.

5. Indeed, while the criteria applied in order to combat abuse, in accordance with which a transaction [1] may be classified as abusive, [2] often relate to the normality or abnormality of the transaction in a given context, the degree of normality required may vary between the laws examined.

6. Notwithstanding the fact that the methods identified have different characteristics, they may be grouped into two categories.

7. The first category contains methods covered by legislation. There are, first, general anti-abuse provisions and, second, specific rules designed to prevent certain tax abuses. [3]

8. The second category contains anti-abuse rules or principles established by case-law. The fact that such a rule or principle has been established by a national court and not by the national legislature may give rise to concerns from the point of view of the principle of legality (*nullum tributum sine lege*) and the principle of legal certainty, which may explain why a significant minority of the legal orders studied uses that jurisprudential source method.

III. GENERAL RULES FOR COUNTERING ABUSE OF LAW

9. The results of the examinations carried out reveal a large number of anti-abuse rules in the area of direct taxation. Of the 24 legal orders examined, only one (that of Croatia) is characterised by the lack of legislation or a general principle for combating the abuse of law in the area of direct taxation. It is true that there is relevant legislation but it applies only to abuses arising when taxes are collected. [4] It does not therefore affect whether tax is payable on the transaction.

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1 In that regard, the Member States seem in general to adhere, in most cases by laying down specific tax rules, to the arm's length principle, which means that contractual terms relating in particular to the sale price between associated taxpayers must correspond to market conditions in order to be accepted as a tax base. In **Finland**, that principle forms part of the general anti-abuse rule.

2 Particularly in **Germany**, **Austria**, **Finland**, **France** and the **Netherlands**.

3 In that context, the question of the primacy of specific laws has been addressed in **Swedish** case-law, with no clear answer.

4 Thus, Article 172(1) of the General Tax Law provides that abuse of law in tax matters refers to conduct making it impossible to fulfil obligations stemming from tax liability. Paragraph 2 of that article provides that the procedure relating to such an abuse of law will be conducted only if it is impossible to recover the tax receivable from the taxpayer.

10. As for **Bulgaria**, there is anti-abuse legislation in the area of direct taxation, but its scope seems to be limited by an exhaustive list of the cases included in the definition of abuse of law. Therefore, the Bulgarian legal system does not seem to have a general anti-abuse rule for direct taxation.

11. Although the other legal orders examined have adopted provisions [5] or principles of general scope [6] in order to combat abuse of law in direct taxation, the means used in that regard vary between the respective Member States.

12. The anti-abuse rules identified in the legal orders examined are designed in different ways. In general, several criteria must be fulfilled for that rule to be applicable. [7] Instances of abuse are identified inter alia by reference to the *purpose* of the tax legislation (part A.). Instances of abuse may also be identified by considering the *actual content* of the legal act or transaction examined of the operations concerned (part B.). However, in practice, the two criteria relating to the purpose of the legislation at issue, on the one hand, and to the actual content of the operations in question, on the other, are often applied in combination and also with other criteria, such as the taxpayer's intention (part C.).

A. THE CRITERION OF THE PURPOSE OF THE LEGISLATION

13. Some Member States [8] lay down, as a criterion of abuse of law, the circumvention of the purpose of the tax legislation by one or more operations. That is particularly the case in **Sweden**, where that criterion is the main criterion for identifying an abuse of law. That method of identification raises questions in particular where the legislature, while being aware of the possibilities of tax optimisation, has omitted

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5 **Germany**, **Austria**, **Belgium**, **Spain**, **Estonia**, **Finland**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Poland**, **Portugal**, **Romania**, the United Kingdom, **Slovakia**, **Slovenia**, and **Sweden** have adopted an anti-abuse provision of general scope.

6 **Denmark** and the **Czech Republic** have no anti-abuse legislation of general scope but an anti-abuse principle established by doctrine and/or by the case-law. In **France** and the **Netherlands**, there is an anti-abuse principle established by the case-law together with relevant legislation. However, that legislation is not applied in practice in the Netherlands.

7 Some national contributions address, in that regard, issues of constitutionality and burden of proof. That matter will not be discussed any further in this synopsis.

8 That is the case in the laws of **Belgium**, **France** (for cases of fraudulent evasion of the law), **Hungary**, **Italy**, **Luxembourg**, the **Netherlands**, **Poland**, the **United Kingdom** and **Sweden**.

to legislate against such possibilities, or even when the legislature has omitted to react to new operations designed to take advantage of an unforeseen loophole in that legislation (that last circumstance is taken into consideration in particular in **Netherlands** law, unless the taxpayer has a genuine and specific interest other than evading tax in carrying out the transaction or legal act). In that regard, questions also arise concerning the principles of legality and legal certainty: to what extent must the taxpayer endure anti-abuse measures if the laws are inadequate? [9]

B. THE CRITERION OF THE ACTUAL CONTENT OF THE TRANSACTION

14. Another criterion for characterising a legal act or a transaction as an abuse of law is that of its actual content. [10] The approaches taken for determining the actual content of an act differ throughout the Member States both in the detail and in the terminology [11] used, while remaining true to a more or less common aim. For some Member States, investigation of the actual content is required when a legal act does not have a legal form which corresponds to the nature of the transaction or to the actual objective pursued (**Germany**, **Austria**, **Bulgaria**, **Estonia**, **Finland**, **Hungary**, **Ireland**, **Italy**, **Lithuania**, **Poland**, the **Netherlands**, **Slovakia** and **Slovenia**). Other Member States envisage such transactions in the light of the concepts of 'legal fiction' or 'fraudulent evasion of the law' (**Spain**, [12] **France** [13] and **Portugal** [14]). In any event, the formal appearance of the legal act in question is compared with the transaction which is economically appropriate to the aim

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9 In **Poland**, anti-abuse legislation adopted in 2002 was annulled by the Constitutional Court on the ground that it infringed those principles (judgment of the Constitutional Court of 11 May 2004, K 4/03, OTK ZU 5A/2004, pos. 41, J.O. No 122, pos. 1288).

10 The English expression 'substance over form' is often used in that regard. In particular **Spain**, **Finland**, **Hungary**, **Ireland**, **Italy**, **Lithuania**, the **Netherlands**, **Portugal**, **Slovakia** and **Slovenia** apply an approach based on the actual content of the act or transaction examined.

11 The terms 'abuse of law' and 'tax avoidance' seem to be the most commonly used in the rules and principles studied here.

12 That comparison does not apply in the case of simulation in which the alleged legal situation is different from the actual situation.

13 **France** distinguishes between two situations constituting an abuse of law: situations of simulation (a fictitious act) and situations of fraudulent evasion of the law (the acts concluded are genuine, but the legal scheme can only be explained by the intention to circumvent a binding tax rule).

14 In **Portugal**, the tax legislation highlights, in that regard, situations in which 'artificial' and 'fraudulent means' are used to reduce, eliminate or defer paying tax.

pursued (**Germany**, **Austria**, **Bulgaria**, **Estonia** and **Poland**). Thus, in Luxembourg law, transactions constituting an 'inappropriate action' may be classified as abusive. Moreover, it may be noted that, in **Sweden**, the criterion of actual content of the transaction or of the legal act concerned has not been established by legislation but is applied as a matter of course to ensure that, through interpretation and in spite of its apparent form, the true content of the transaction prevails in the act concerned.

15. As regards identifying the actual content of the legal act or of the transaction examined it is necessary to distinguish between, on the one hand, unambiguous situations in which the court or tax authority may adhere to the same principles as a court of ordinary jurisdiction, [15] since the tax term covering the legal act at issue corresponds to a concept of civil law and, on the other hand, the more problematic situation characterised by the fact that the operation examined falls within the scope of a purely fiscal term that has no equivalent in civil law. [16] The tax court may, if appropriate, go as far as not taking into account certain acts, even those which are perfectly valid under civil law and are not simulations, in order to put a purely fiscal concept in its place. [17] By contrast, it seems that the approach generally adopted in the legislations examined is that of reclassification of the act by the tax court in order to take account of its actual content. For the sake of completeness, we should note however that acts that are *simulated and therefore devoid of legal effect* under private law are also not taken into account for the purposes of tax law.

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[15] In that regard, it is apparent from the research carried out in connection with this research note that some Member States, including in particular **Belgium**, **France** and **Poland**, take a rather formalistic approach in which the civil law form of the legal act concerned is widely recognised and followed by the tax court. In **Ireland**, until the reform culminating in the introduction of the general anti-abuse rule in 1989, the civil law approach was so strict that it was possible to speak of a generally applicable principle of 'form over substance'. In **Austria**, it seems that, in so far as a tax concept refers to a civil law concept, the tax concept must be interpreted in accordance with civil law. On the other hand, if the tax concept refers to an economic concept, the tax court will examine the transaction at issue taking an economics based approach ('*wirtschafliche Betrachtungsweise*'). In **Germany**, the general anti-abuse clause laid down by law also takes an approach based on the economic content of the legal act concerned. However, that approach seems applicable not only in the case of a tax provision referring to an economic concept but also to situations in which a tax provision refers to a concept of civil law; see *Cahiers de droit fiscal international*, volume LXXXVIIa, 2002, p. 56.

[16] At the same time we should note that the same terms may coexist in civil law and tax law, while having different meanings according to the branch of law concerned.

[17] Such a method applies in the **Netherlands** and its presence in **Swedish** case-law has been discussed by academic lawyers.

C. THE OBJECTIVE PURSUED BY THE TAXPAYER

16. Other criteria for identifying an abuse of law refer particularly to the taxpayer's intention of obtaining a tax advantage. [18] We note however that in **Danish** law the taxpayer's intention to avoid tax is usually irrelevant.

17. On the other hand, **Belgium**, **Estonia**, **Finland**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, the **Netherlands**, **Romania** and **Slovakia** expressly provide for a subjective element requiring that the tax advantage may be presumed to have constituted the reason for carrying out the transaction or legal act.

18. In that regard, different thresholds are applied in the different Member States in order to determine whether the anti-abuse measures apply. Accordingly, in **Austrian**, **French** [19] and **Hungarian** law, there is only an abuse of law when tax avoidance has been the taxpayer's *one and only aim*. In the **Netherlands**, a *decisive* tax reason suffices. In **United Kingdom** law and in **Irish** law, the attempt to obtain a tax advantage must have been the taxpayer's *main objective*. In **Swedish** law, the general anti-abuse clause requires tax avoidance to have been the *predominant* reason for drawing up the legal act in question. [20]

19. In order for a situation to be regarded as constituting an abuse of law, the question has been raised as to whether it is necessary to analyse the legal acts individually or whether it is possible to take a group of several staggered transactions into account in order to identify an abuse of law. That possibility exists in particular in **Spanish**, **French** [21] and **Swedish** law, under the *abnormal management act* theory, in **Irish** law, in an examination of the *reasonableness* of the transactions in question, and in **Italian** and **Netherlands** law, as regards the latter under the *fraus legis* doctrine.

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18 That criterion is expressly laid down by the law particularly in **Belgian** and **French** law (for acts constituting fraudulent evasion of the law).

19 With regard to situations of fraudulent evasion of the law; that criterion is not required for fictitious acts.

20 In that regard, in **Swedish** law that intention is considered to be an objective factor.

21 In **French** law, the abnormal management act and abuse of law do not necessarily cover the same situations. However, it is apparent from the case-law that the provisions relating to abuse of law are not applicable where an abnormal management act may be regarded as the basis for a recovery.

20. In some Member States, it seems that there are several parallel general anti-abuse rules. That is the case in **France** (*procédure de l'abus de droit* [22] and *théorie jurisprudentielle),* in the **Netherlands** (*richtige heffing* and *fraus legis*), [23] and perhaps in **Sweden** (general anti-abuse clause and '*regard à travers*' theory). Moreover, **Polish** law lays down two provisions designed to prevent tax avoidance, the former based on the motive of circumventing the purpose of the legislature, and the latter referring to the actual content of the legal act at issue.

21. The contributions relating to the various laws indicate that the consequence of a finding of abuse of law is either to set aside the transaction or contested legal act and establish its appropriate form, or to reclassify that transaction or legal act in order for it to match the reality.

IV. EXAMPLES OF APPLICATION UNDER GENERAL OR SPECIFIC RULES DESIGNED TO PREVENT ABUSE OF LAW

22. In the second stage, two very well-defined hypotheses were examined in the legal orders covered.

23. The first hypothesis concerns the situation of a set of contracts designed to optimise the tax treatment of a parent paying a maintenance allowance. That scheme involves a donation made by that parent to his or her child, followed by the grant of a loan by the child to the parent, in the same amount as the donation, that generates interest payable by the parent to the child. That scheme disguises the payment of maintenance allowances, which are not tax deductible, as payments of interest that in principle are tax-deductible, which has the effect of reducing the tax liability of the parent concerned.

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22 Article L. 64 of the Book on Tax Procedures.

23 In practice, that principle replaced the anti-abuse provision as a means of combating tax avoidance.

24. The second hypothesis concerns the existence and application of rules covering a financial scheme consisting of the insertion, between the company which pays interest or dividends and that which actually receives them, of one or more companies that have their seat in another Member State with a favourable tax regime and with no *raison d'être* other than being a factor in tax planning arrangements.

A. INTEREST PAID FROM A PARENT TO HIS OR HER CHILD

25. Neither the **Belgian** legislature nor the **Belgian** courts seem to have addressed the question of the tax treatment of interest paid by a parent to his or her child on a loan granted by the latter using the money obtained as a donation from that parent.

26. In **Denmark**, a specific rule laid down by law applies to debts assumed by a parent in favour of his or her child. The rule in question precludes, in that situation, the deduction of the interest on those debts. Moreover, tax on the return on a gift from parent to child is levied on the giver until the year of the child's 18th birthday.

27. In **Finland**, the general anti-abuse clause laid down by the law on taxation procedures contains a 'reality' principle that is often applied to transactions between parents and children. However, there is no specific legislation or case-law concerning the situation in which a parent gives the child an amount that the child lends to the parent in order for the latter to be able to deduct the corresponding interest. On the other hand, as regards the tax on donations, which falls within the scope of an anti-abuse clause laid down by the law on taxation of successions and donations, and which corresponds to the clause applicable to income taxation, provided that they are granted in the form of a waiver of repayment of a loan of an amount equal to the annual amount exempt from tax and that they are made in a loan agreement concluded between members of the same family, donations are normally accepted by the tax court on condition that the loan fulfils the criteria of the reality principle.

28. In **Ireland**, under the general anti-abuse clause laid down by the *Taxes Consolidation Act 1997*, currently included in section 811C thereof, transactions which have not been undertaken primarily for purposes other than to obtain a tax

advantage may be regarded as an abuse of law. Those transactions may involve one or more persons (including individuals) and an indeterminate number of transactions. The tax authority is empowered in its application of that general anti-abuse rule to look beyond the form of those transactions and take into account the actual substance of the act. To the extent that an overall examination reveals that the transactions in question are not reasonable, the tax advantage sought may be refused. Notwithstanding that general rule, a specific rule is laid down, in section 813 of that legislation, for loans and rents between individuals (in some cases, between members of a family) which are designed, in reality, to reduce the debtor's tax base. The same criteria are applicable in that the tax authority examines the main objective of the transaction in order to determine whether it could be tax avoidance.

29. In contrast, **Luxembourg** law does not seem to provide measures for the situation of a donation between parent and child followed by a loan. If the case is considered to be an abuse of law, the general anti-abuse principle laid down in paragraph 6 of the tax adjustment law allows the tax authority to set aside legal constructions or operations justified solely by tax objectives. In that event, tax will be levied under the rules applicable if an appropriate legal solution can be chosen. [24]

30. **Luxembourg** case-law provides examples of abuse of law under paragraph 6 of the tax adjustment law on the part of a taxpayer, who is a legal person, wishing to avoid tax by means of a debt transfer. [25]

31. In the **Netherlands**, the tax courts have applied the *fraus legis* theory as a generally recognised anti-abuse measure in Netherlands tax law. Thus, in the case-law, loans contracted by parents in favour of children have led a Netherlands Court of Appeal to consider the interest paid by the parents as non-deductible payments. It should be noted that that court refused the deduction of the interest on those loans not on the basis of a reclassification or a simulation, but because it considered that the decisive reason for the legal acts concerned was to obtain a deduction for non-deductible costs.

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[24] It seems, in that regard, according to case-law relating to operations between legal persons, that a reclassification of interest as dividends is possible under the anti-abuse clause; see the judgment of 4 February 2010 of the Administrative Court in Case No 25957C, *Mantelkauf*.

[25] See the judgment of 7 February 2013 of the Administrative Court in Case No 31320C.

32. In **Swedish** law, according to case-law going back to the 1960s, [26] transactions consisting of a gift of money from a parent to his or her child followed by a loan granted by the child to that parent have been disregarded from a taxation point of view. Regarding such a situation, the Supreme Administrative Court of Sweden has held that the interest paid by that parent in fact constitutes periodic allowances that are not deductible by the parent. The short time that elapsed between the two transactions of gift and loan led the Supreme Administrative Court to consider that the gift was a simulation, since the loan was the only genuine transaction between the parties. That case-law has subsequently been confirmed, inter alia by a judgment of 2009, namely after the adoption of the general anti-abuse law.

B. INTEREST PAID BY A RESIDENT COMPANY TO A NON-RESIDENT CONDUIT COMPANY

33. As a preliminary matter, it may be noted that, even in the absence of legislation, in the laws examined concerning withholding taxes on interest to be paid to a conduit company situated in another Member State, it is apparent from the contributions to the research note presented below that an anti-abuse measure in the form of a refusal of the tax deduction of those payments in the source State seems to be a means used. [27]

34. In **Belgian** law, there is a specific provision ruling out the right to *deduction* for interest paid to a foreign entity, and particularly to a holding company, the income of which is not taxed or is subject to a tax regime that is significantly more favourable than that to which that income is subject in Belgium. In contrast, it does not seem that measures for applying a withholding tax in that context have been laid down in Belgian legislation.

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[26] See Case RÅ 1965 Fi 1894. See, also, RÅ 1964 Fi 94, and, for more recent case-law, RÅ 2009 not 96.

[27] The choice of such a method may be due to concerns for simplicity; indeed, it may possibly allow the tax authority not to take into account the potential implications of a double taxation convention.

35. The connection between that provision of the Belgian income tax code and the tax exemption obligations laid down in Directive 2003/49/EC [28] is not apparent from its content. However, an application of the general anti-abuse clause laid down by the income tax code may be envisaged, provided that the situation constitutes an infringement of the purpose of that code. However, the Belgian case-law does not seem to have addressed the situation in question.

36. **Danish** law has not laid down any anti-abuse rule concerning interest falling within the scope of Directive 2003/49/EC. However, a scheme that involves a conduit company resident in a Member State other than Denmark faces the argument that that conduit company is not the actual beneficiary of that interest, and therefore that tax may be withheld in Denmark. In 2015, the legislature adopted two provisions to prevent fraud or abuse in connection with interest and dividends closely modelled on Article 1(1) and (2) of Directive 2011/96/EU concerning dividends.

37. In **Finland**, there seems to be no specific anti-abuse measure in respect of interest paid to a beneficiary established for tax purposes in a Member State other than Finland. Even though withholding tax on interest paid from a debtor in Finland to a creditor established in another Member State is not provided for by Finnish legislation, there is case-law according to which the *deduction* of interest paid between associated companies has been refused on the basis of the general anti-abuse clause laid down by the law on income tax procedure. Accordingly, the Supreme Administrative Court of Finland has held that a '*debt push down*' scheme did not correspond to reality and had been put in place with the aim of avoiding tax.

38. In **Ireland**, in line with what has already been observed above, reference should be made to the general anti-abuse clause laid down by the tax law. Furthermore, in connection with the specific anti-abuse rules, some of which concern the transfer of assets and income abroad, it should be pointed out that the criteria applied by the legislature are, again, those of the main objective of avoidance and whether the transaction constitutes a commercial activity exercised in good faith.

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[28] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157, p. 49).

39. In **Luxembourg** there seems to be no specific legislation or case-law with regard to withholding tax on interest paid abroad in order to prevent abuse of law. The applicability of the general principle of abuse of law, laid down in paragraph 6 of the tax adjustment law, has therefore not been examined in such a situation.

40. **Netherlands** law does not seem to lay down specific legislation with regard to the prevention of abuse of law in the event of payments of interest to an entity established in a Member State other than the Netherlands. It should be pointed out in that regard that the Netherlands legislature, in the transposition into Netherlands law of Directive (EU) 2016/1164, [29] considered that the *fraus legis* theory achieves the aim of that directive, which is why it did not consider it necessary to transpose the general anti-abuse clause contained therein.

41. The **Swedish** legislature has not, to date, adopted legislation allowing for the withholding of tax on interest payments covered by Directive 2003/49/EC. However, specific provisions have been adopted prohibiting the *deduction* of interest used as a means of reducing or eliminating tax. That anti-abuse measure has been held compatible with that directive by the Supreme Administrative Court of Sweden, and in particular with the prohibition against the levying of a withholding tax contained therein.

C. DIVIDENDS PAID FROM A RESIDENT COMPANY TO A NON-RESIDENT PARENT COMPANY

42. **Belgium** transposed into national law the anti-abuse clause in Directive 2011/96/EU, [30] as amended by Directive 2015/121/EU, [31] allowing for the taxation of dividends paid to a non-resident parent company. Until that transposition, it seems that Belgium did not take the opportunity to introduce an anti-abuse clause to that effect. However, prior to that time the authority was already able to avail itself of the general anti-abuse clause in order to deny a tax advantage that was contrary to the purpose of the income tax code, such as exemption from

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29 Council Directive (EU) 2016/1164 of 12 July laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ L 193, p. 1).

30 Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 345, p. 8).

31 Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 21, p. 1).

withholding tax on dividends, paid to a parent company that was resident for tax reasons in a Member State other than Belgium. However, that specific situation does not seem to have been dealt with by the Belgian courts.

43. **Danish** law had no anti-abuse rule in respect of dividends falling within the scope of Directive 1990/435/EC. However, a scheme that involves a conduit company resident in a Member State other than Denmark is faced with the argument that that conduit company is not the actual beneficiary of those dividends and consequently that a withholding tax may be levied in Denmark. In 2015, the legislature adopted two provisions to prevent fraud or abuse in relation to interest and dividends closely modelled on Article 1(1) and (2) of Directive 2011/96/EU concerning dividends.

44. Since 2012, **Danish** law has laid down an anti-abuse rule with regard to the use of conduit companies resident in Denmark for the purposes of the abuse of tax law. Thus, dividends redistributed by a Danish subsidiary to its non-resident parent company are taxed in Denmark to the extent that the Danish company is not the beneficial owner of the dividends that it has received and then redistributed, subject to Directive 2011/96/EU. In that regard, the concept of 'beneficial owner' is to be interpreted in accordance with the commentaries on Article 10 of the OECD Model Tax Convention on Income and on Capital. [32]

45. In Danish case-law there is a so-called 'reality' principle. The aim of that principle is for tax to be levied in accordance with the economic reality and actual content of the taxpayers' operations rather than on the basis of their formal configuration. Accordingly, the principle means that taxation is linked to economic reality and not to classification of the facts by means of concepts of private law that normally prejudice the application of tax provisions. The principle cannot be raised against a taxpayer who makes a 'detour' in order to obtain a tax advantage, thus avoiding the purpose of a tax provision, if there is no discrepancy between the form and content of that detour. [33]

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[32] That article states inter alia that a conduit company cannot normally be regarded as the beneficial owner if, even though it is the formal owner, it has very narrow powers in practice, which renders it a mere fiduciary or administrator acting on account of the interested parties (Article 10.1 of that Model Convention, in the 2003 version of the commentaries in question).

[33] That approach is therefore different from the approach, adopted inter alia by **Sweden**, according to which such detours may constitute an abuse of law.

46. **Finnish** law had no specific legislation relating to abuse of law in connection with a payment of dividends abroad before 2016, the date on which Article 1 of Directive 2011/96/EU was transposed. There seems to be no case-law concerning the applicability of the general anti-abuse clause provided by law for such transactions.

47. In **Ireland**, as already described above, the general anti-abuse clause laid down in the tax law may potentially apply to schemes falling within the scope of Directive 2011/96/EU.

48. In **Luxembourg**, there seems to be no specific legislation or case-law with regard to a withholding tax on dividends leaving the country in order to avoid abuse of law. The applicability of the general abuse of law principle, laid down in paragraph 6 of the tax adjustment law, has therefore not been examined in such a situation.

49. As with the examination of the situation concerning interest, Netherlands law also does not seem to have adopted legislation or case-law allowing for the levying of withholding tax on dividends paid by a subsidiary resident in the **Netherlands** to a parent company resident in another Member State. However, the *fraus legis* principle may also be applied in that situation.

50. As regards **Swedish** law, this has specific anti-abuse legislation regarding dividends paid abroad. That legislation applies inter alia to dividends that fall within the scope of Directive 2011/96/EU in so far as there is a scheme or a series of schemes constituting an abuse under European Union law. [34]

V. CONCLUSION

51. Almost all the Member States that have been the subject of this examination provide for a measure of general application to combat the abuse of law in the area of taxation, particularly direct taxation.

52. Accordingly, as well as specific legislation designed to prevent such abuse, the legal orders that are the subject of this research contain general principles enshrined by the legislature or by the case-law for the prevention or combating of abuse of law.

53. The methods employed in connection with those general principles for combating the abuse of law vary between the different laws and are difficult to categorise according to those methods in the light of the complexity that is often characteristic of the principles in question.

54. However, to summarise a little, it is possible to distinguish between, on one hand, those laws that apply an approach according to which a transaction or legal act, or a combination of the two, constitutes an abuse of law where it is contrary to the *purpose* of the tax legislation, notwithstanding the fact that those legal acts are perfectly valid under civil law and, on the other hand, those laws which rely on the *actual content* of those transactions or legal acts, adopting an economically based approach to that objective. However the general rules in question often combine aspects of both those criteria.

55. A finding of abuse of law in tax matters usually results in the fiscally flawed acts not being taken into account when the transactions at issue are taxed. That result is achieved *mainly* by not taking the legal acts in question into consideration, or by reclassifying them in accordance with the economic reality of the transactions at issue.

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[34] A case relating to that situation is currently being examined by the Supreme Administrative Court of Sweden.