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Brussels, 13 December 2012

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from:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	6 December 2012
to:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No Cion doc.:	SWD(2012) 403 final - Volume 7/17
Subject:	Comission Staff Working Document Impact Assessment Accompanying the document the Communication from the Commission to the European Parliament and the Council - An Action Plan to strenghten the fight against tax fraud and tax evasion the Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters the Commission Recommendation on aggressive tax planning

Delegations will find attached Commission document SWD(2012) 403 final - Volume 7/14.

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EUROPEAN
COMMISSION

Brussels, 6.12.2012
SWD(2012) 403 final

Volume 7/14

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

the Communication from the Commission to the European Parliament and the Council - An Action Plan to strengthen the fight against tax fraud and tax evasion

the Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters

the Commission Recommendation on aggressive tax planning

{COM(2012) 722 final}
{SWD(2012) 404 final}

ANNEX 7

Jean-Pierre DE LAET
Head of Unit "Economic analysis, evaluation & impact assessment support"
Directorate General Taxation and Customs Union
European Commission
Rue De Spa 3 6/14 B 1000 Brussels

13 July 2012

Our Reference: 0120454/1/025810SKI.LSE
Your Reference: Specific Contract N° 12 implementing Framework Contract N° TAXUD/2010/CC/101

Dear Sir,

Subject: Draft final report on "Study including a data collection and comparative analysis of information available in the public domain on existing and proposed tax measures of the 14 EU Member States in relation to non-cooperative jurisdictions and aggressive tax planning"

We refer to the Specific Contract N° 12 implementing Framework Contract N° TAXUD/2010/CC/101 titled *"Study including a data collection and comparative analysis of information available in the public domain on existing and proposed tax measures of the 14 EU Member States in relation to non-cooperative jurisdictions and aggressive tax planning"* (below ***"the Study"***).

In accordance to this contract, we are pleased to provide you with the results of our Study.

We would like to thank you for the opportunity to work with the Commission on this interesting project.

Should you have any questions, do not hesitate to contact us.

Yours faithfully,

Ine Lejeune	Patrice Delacroix
Partner	Partner
Tax Services	Tax Services

PwC EU Services
Europees Economisch Samenwerkingsverband/Groupement Européen d'Intérêt Economique/
European Economic Interest Grouping
Maatschappelijke zetel/Siège social/Registered office: Woluwe Garden, Woluwedal 18,
B-1932 Sint-Stevens-Woluwe
T: +32 (0)2 710 4211, F: +32 (0)2 710 4299, www.pwc.com
BTW/TVA BE 0872.793.825 / RPR Brussel - RPM Bruxelles / INGBE16 3101 8056 4374 - BIC BBRUBEBB

Study including a data collection and comparative analysis of information available in the public domain on existing and proposed tax measures of the 14 EU Member States in relation to non-cooperative jurisdictions and aggressive tax planning

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Preface

This document constitutes the Report on the Study on existing and proposed tax measures in the European Union in relation to Non-Cooperative Jurisdictions and Aggressive Tax Planning including country data and a comparative analysis. The Study was conducted in three phases.

Phase 1. The first preliminary phase was mainly intended to define our approach. To ensure the relevance of this Study, but also its practicability, we decided, together with the European Commission, to limit the scope to a representative sample of 14 European Union Member States, namely Belgium, Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Spain, Sweden and the United Kingdom.

Phase 2. The second phase focused on country data-collection. For this purpose, we set up a model questionnaire aimed at collecting information in every participating country on current income tax legislation, as well as related legislative work or publicly available documents, on existing and proposed tax measures in relation to Third Countries. So as to gain a clear view on the questionnaire's propensity to provide the required level of detail and data, we completed the questionnaire for Belgium before providing it to the participating countries as a pilot, together with the blank questionnaire (to be completed). This pilot was meant to constitute a valid benchmark for all the other participating countries.

On 4 June 2012, the model questionnaire and the pilot for Belgium were circulated to the PwC member firms in each of the 14 participating countries.[1] The completed questionnaires were received during the days that followed.

Phase 3. During the third phase, i.e. the final report phase including the comparative analysis, we selected several criteria on the basis of the completed questionnaires in order to categorise the reported measures and, more broadly, compare the collected information with a view to drafting this Report. In doing so, we have identified the key features of the definitions and measures provided, reported them in additional summary tables, and written intermediate recapitulative statements that serve as a basis for our general conclusion.

Moreover, as this Study is based on several key documents (a model questionnaire, the pilot for Belgium, the first draft of the Report, etc.), these were reviewed by a Dedicated Multidisciplinary Quality Team composed of Ine Lejeune, Axel Smits, John Preston and Peter Merill, which assisted our

[1] "PwC" is the brand under which member firms of PricewaterhouseCoopers International Limited (PwCIL) operate and provide services. Together, these member firms form the PwC network. Each member firm in the network is a separate and independent legal entity and does not act as an agent for PwCIL or any other member firm. PwCIL does not provide any services to clients. PwCIL is not responsible or liable for the acts or omissions of any of its member firms, nor can it control the exercise of their professional judgment or bind them in any way.

Project Team throughout the Study to ensure the robustness of the methodology, data collection, assumptions and conclusions. Where needed, adjustments have been made on the basis of their comments so as, in each document, to reflect the high standards of quality we share and to attain as far as feasible the level of information sought by the European Commission.

The data collected is based on the provisions in force as of 31 May 2012. The Report was submitted to the European Commission in draft form on 27 June 2012. This final version is dated 30 June 2012.

This Study provides general guidance only. It does not constitute professional advice. The reader should not therefore act upon the information contained in this Report without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this review, and, to the extent permitted by law, PwC, its employees and agents accept no liability, and disclaim all responsibility, for the consequence of any party acting, or refraining from acting, in reliance on the information contained in this review or for any decision based on it.

Finally, we should like to thank all the PwC member firms involved, which have contributed to the success of this Study by the quality of their work.

Ine Lejeune	Patrice Delacroix
Global Relationship Partner	Partner, Project Leader

Executive Summary

The European Commission is currently drafting a Communication on good governance in the tax area in relation to the so-called concepts of Non-Cooperative Jurisdictions and Aggressive Tax Planning. In order to contribute to the assessment it is currently carrying out, the European Commission is looking for additional input and information on existing anti-abuse measures that apply, exclusively or otherwise, to Third Countries (i.e. non-EU/EEA countries).

In this context, we were engaged by the European Commission to perform the present Study, which has been conducted in three phases and included a data-collection service and a comparative analysis on existing and proposed tax measures in the European Union in relation to the concepts of Non-Cooperative Jurisdictions and Aggressive Tax Planning.

The first, preliminary phase was mainly intended to define our approach for the Study and its scope. To ensure the Study's relevance, and also its practicability, we decided, together with the European Commission, to limit the scope to a representative sample of 14 European Union Member States, namely Belgium, Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Spain, Sweden and the United Kingdom.

The second phase focused on country-data collection. For this purpose, we set up a model questionnaire aimed at collecting information in each participating country on the current income tax legislation, as well as related legislative work or publicly available documents, on existing and proposed tax measures in relation to Third Countries. To gain a clear view on the questionnaire's ability to provide the required level of detail and data, we completed it for Belgium before providing it to the participating countries as a pilot, together with the blank questionnaire (to be completed). This pilot was meant to constitute a valid benchmark for all the other participating countries.

On 4 June 2012, the model questionnaire and the pilot for Belgium were circulated to the PwC member firms[2] in each of the 14 participating countries. The completed questionnaires were received during the days that followed. If needed, further clarifications were requested so that the completed questionnaires were finalised on 26 June 2012.

[2] "PwC" is the brand under which member firms of PricewaterhouseCoopers International Limited (PwCIL) operate and provide services. Together, these member firms form the PwC network. Each member firm in the network is a separate and independent legal entity and does not act as an agent for PwCIL or any other member firm. PwCIL does not provide any services to clients. PwCIL is not responsible or liable for the acts or omissions of any of its member firms, nor can it control the exercise of their professional judgment or bind them in any way.

During the third phase, i.e. the final report phase including the comparative analysis, we selected several criteria on the basis of the completed questionnaires to categorise the reported anti-abuse measures and, more broadly, compare the collected information with a view to drafting this Report. In doing so, we identified the key features of the definitions and measures provided, reported them in additional summary tables, and wrote intermediate recapitulative statements that served as a basis for our general conclusion.

In particular, given the specific scope of the Study, the reported anti-abuse measures have been divided into two main categories: those specifically applicable to transactions with Third Countries ("Specific Measures") and other measures ("Non-Specific Measures"). Moreover, the Study also provides additional insight into the most recently reported Specific Measures ("New Specific Measures", i.e. measures enacted or substantially amended on or after 1 January 2007, plus possible future measures).

The Study also offers valuable insight into the essential concepts of NCJ and ATP. In fact, the data collected showed that few Member States have a clear definition of the terms "Non-Cooperative Jurisdictions" and "Aggressive Tax Planning", although many of them did report having various concepts that are akin to these key concepts. In this respect, it is interesting to note that anti-abuse measures in some participating countries apply to countries where the level of taxation is inappropriate (e.g. no taxation at all or a very low nominal/effective tax rate), whereas, in other Member States, the decisive criterion is the level to which countries cooperate in terms of exchange of information (which is more like the OECD approach). However, these countries, sometimes featuring on black, grey or white 'lists', are not always Third Countries.

The Study also finds that there are not many Specific Measures, i.e. measures specifically dedicated to tackle abuse or aggressive tax planning in relation to Third Countries. However, that does not mean that MSs do not have measures to fight what they consider to be abusive transactions in relation to Third Countries. Indeed, many anti-abuse provisions apply to Third Countries, even if these measures also usually apply in purely domestic situations or within the European Union. Moreover, we cannot rule out the possibility that some of these measures are, in practice, more often applied to transactions/arrangements with Third Countries than in purely domestic situations or within the European Union.

For instance, some Member States lay down more stringent rules for entities/taxpayers established/resident in countries with which they have no double tax treaty (or no double tax treaty including an exchange of information clause). Given the available network of double tax treaties within the European Union (and also Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC), there is much less a chance that these rules apply within the European Union than to Third Countries, so that, *de facto*, these rules might essentially be applicable to Third Countries. The case law of the Court of Justice of the European Union also restricts the scope of application of existing anti-abuse measures within the EU.

Notwithstanding the absence of a precise definition of "abuse", we can conclude that many MSs have a significant number of anti-abuse provisions in their legislation, covering many different forms of potentially abusive behaviour (according to the local tax legislation or administrative practice/case law), such as shifting profits to low tax jurisdictions, erosion of the tax base through excessive debt financing, etc.

This is particularly true if we consider that all Member States report having at least one general anti-abuse rule ("GAAR"), except the United Kingdom, where adoption of a general anti-abuse rule is nevertheless being discussed. In particular, the foundations for these GAARs can take various forms; ranging from the "abuse of law" principle, a "simulation" or "sham" theory to the "substance over form" principle. None of these measures applies to Third Countries only (let alone to Non-Cooperative Jurisdictions). On the contrary, they are often equally applicable regardless of the territorial scope of a given transaction (i.e. purely domestic situations, transactions within the European Union and transactions outside the European Union).

That said, based on the information collected, it is difficult to assess whether the anti-abuse provisions listed in the Study can be considered as effective in combating what the Member States consider as abusive: most countries did not report any (actual or predicted) quantitative impact of the identified abuses or the anti-abuse measures (i.e. tax revenues) or make any evaluation of the effectiveness and sufficiency of the measures. A limited number of them did, i.e. France, Germany, The Netherlands, Sweden and The United Kingdom have cited figures reflecting the expected budgetary impact of some measures.

The data collection is based on the law as at 31 May 2012. The Report was submitted to the European Commission in draft form on 27 June 2012. This final version is dated 30 June 2012.

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1. Objective and Scope of the Study

1. **Communication on Good Governance.** We understand that the European Commission (below ***"the Commission"***) is currently drafting a Communication on good governance in the tax area in relation to so-called Non-Cooperative Jurisdictions (below ***"NCJs"***) and so-called Aggressive Tax Planning (below ***"ATP"***). In order to contribute to the assessment it is currently carrying out, the Commission is looking for additional input and information on existing anti-abuse measures applying, exclusively or otherwise, to Third Countries (i.e. non-EU/EEA countries).

2. **Activities in scope.** The Study takes the form of a *data collection service* (combined with a comparative analysis) based on a *review* of the current income tax legislation applicable in the different Member States (below ***"MSs"***) and related legislative work. The report does not comprise any quantitative assessment (no financial estimates, cost-benefit analysis or impact assessment).

The scope of the Study is further defined as follows:

- In the framework of this Study, only Third Countries could be considered as NCJs, to the exclusion of any MS;
- ATP is only considered in relation to structures put in place with Third Countries, to the exclusion of structures put in place between MSs only;
- Only income/direct taxation is considered in the scope of the Study;
- The 14 MSs identified by the Commission for the Study are: Belgium, Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Luxemburg, Malta, the Netherlands, Spain, Sweden and the United Kingdom;
- The data collection service focuses on describing measures which have been enacted as from 1 January 2007 (up to 31 May 2012). Apart from that, we also list existing measures (with a brief explanation), which have been enacted prior to 1 January 2007 but which also fall in scope of the Study;
- As regards the measures included in the data collection service, the main purpose of the Study is to refer to measures specifically relating to NCJ and ATP. Nevertheless, we also refer in a high-level manner to Non-Specific Measures, which are not specifically relating to NCJ and ATP but which could also be applied in these cases;
- The data collection service is only based on the review of the MSs' existing income tax legislation (including double tax treaties and other international agreements), related public legislative work and public administrative doctrine (parliamentary works, parliamentary questions, practice notes, rulings, etc., provided it is available in the public domain). The data collection does not include a review of the available literature on the subject;
- Such review is to be carried out by the PwC network.

3. **Twofold Description.** The description of the current situation in the MSs comprises two main parts:

- **NCJ/Third Countries.** The various measures the MSs under review have taken against NCJs/Third Countries at the national level (and international bilateral level, if any). The description of an existing measure *covers inter alia* the problem supposed to be tackled by the provision in question (its stated objective). Besides, provided that the documentation under review does so, the report also includes the (expected) quantitative impact of the identified problems and of the measures taken against NCJs for the concerned MSs, e.g. their tax revenues. In case no quantitative information is available, this is mentioned in the report.

- **ATP.** The various measures the MSs under review have taken against ATPs (carried out by, *inter alia*, multinational companies) at the national level (and international bilateral level, if any). The description of an existing measure *covers inter alia* the problem supposed to be tackled by the provision in question (its stated objective). Besides, provided that the documentation under review does so, the report also includes an evaluation (post-enactment) made by the concerned MSs of the effectiveness and sufficiency of the measures taken by such MSs against ATP (including impact on MSs' revenues). In case no quantitative information is available, this is mentioned in the report.

2. Methodology

4. Based on the reporting obligations and timetable as set forth in the revised RfO of 2 May 2012, we prepared a timetable and identified the different project phases as set out below.

2.1. Phase 1 – Kick-off

5. As a first step, the project was presented and discussed with the key project team members (including the Project Leader and Project Team) to define their roles and expectations and to present the way forward.

The kick-off meeting took place on 16 May 2012 in the presence of the Commission, the Project Leader and the Project Team.

During the meeting, we have, amongst other things, discussed the approach for the drafting of the Questionnaire to be sent out to the PwC member firms, bearing in mind the objective of “data collection” as set forth in the RfO. In addition, the different project steps and timeline were validated during the said meeting.

2.2. Phase 2 – Intermediary Report

6. We drafted a Questionnaire to be sent out to the PwC member firms located in the different MSs.

7. The purpose of the Questionnaire was to obtain the required data in view of the data collection service as described above.

8. So as to have a clear view on the interpretation of the questions included in the Questionnaire, we suggested working with a "pilot" and thus having the Questionnaire already completed for one country. Such pilot allowed the Commission to assess whether the Questionnaire was suitable to provide the required level of details and data. It also gave the Commission the opportunity to provide for the necessary amendments where needed.

In order to be as time efficient as possible and given the timing constraint, we suggested having the Questionnaire filled in for Belgium as a pilot, also considering the very recent changes in tax legislation with respect to tax havens, etc. The Belgian pilot was thus considered as an interesting and valid benchmark for all other MSs and served as a guide to our experts of the PwC member firms for the completion of the Questionnaire with the data from their respective MSs.

Once finalised by the Project Team, the pilot was sent for comments and approval to the members of the Dedicated Multidisciplinary Quality Team.

9. A final step within this phase consisted in providing the intermediary report to the Commission, including a draft table of contents, the Questionnaire, the Belgian pilot and a status of the work carried out to date.

10. This intermediary report was sent to the Commission on 30 May 2012. It was followed by a conference call on 1 June 2012, in which the Commission made some suggestions and recommendations. On that basis, the intermediary report was finalised by PwC and approved by the Commission on 4 June 2012. The Questionnaire was then sent out to the PwC member firms.

2.3. Phase 3 – Final Report

11. Once the Commission has validated the draft intermediary report including the Questionnaire and the Belgian pilot, we liaised with the various PwC member firms located in the different MSs to obtain their input on the provided Questionnaire.

12. For the purposes of the final report, the input of 13 additional MSs as identified by the Commission was required. The MSs which provided their input during this phase were: Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Luxemburg, Malta, the Netherlands, Spain, Sweden and the United Kingdom.

13. To conclude this phase, a report was to be submitted to the Commission by 29 June 2012 at the very latest. This report includes an updated table of contents, a description of the methodology applied for

the purpose of the Study, the completed Questionnaires of the 14 MSs as listed above and a comparative analysis based on the input obtained from the PwC member firms.

2.4. Project Team

14. Our organisation model was based on a Project Team acting as a Central Contact, a Project Leader and a Dedicated Multidisciplinary Quality Team.

- **Project Leader:** For this project, the Project Leader was Patrice Delacroix (Tax Partner PwC Belgium, Member of the EU Direct Tax Group of the Global Financial Services Network and the EUDTG Working Group). Patrice has previously acted as a Project Leader for several other studies of the Commission including amongst others the Study on labour and corporate taxation of the financial sector, the Study on the taxation of financial instruments and the Feasibility Study on a Simplified "Relief at Source" System implementing the principles of the FISCO Recommendation[3]);

- **Project Team:** For this project, the Project Team was composed of the following persons:

  - Mathieu Protin (Manager, PwC Belgium). Mathieu also participated in the Commission's Study on labour and corporate taxation of the financial sector, the Study on the taxation of financial instruments and the Feasibility Study on a Simplified "Relief at Source" System implementing the principles of the FISCO Recommendation3);
  - Annemie Wynants (Manager, PwC Belgium). Annemie also participated in the Study on labour and corporate taxation of the financial sector;
  - Team of Corporate Tax Consultants of PwC Belgium;

- **Dedicated Multidisciplinary Quality Team:** For this project, the Dedicated Multidisciplinary Quality Team was composed of the following persons:

  - Axel Smits (Tax Partner PwC Belgium, Central Cluster International Taxation Leader, Intellectual Property expert);
  - John Preston (Tax Partner PwC UK, Global leader for tax policy, external relations and regulation, Member of PwC's Global Tax Leadership Team, Member of the Council of the UK's Chartered Institute of Taxation and a member of the Tax Faculty Committee of the Institute of Chartered Accountants in England and Wales);
  - Peter Merrill (Tax Partner PwC US, Partner-in-charge of the National Economics & Statistics Group, a centre of excellence for advanced statistical and economic analysis supporting the Tax, Advisory and Audit practices);

[3] Ongoing project.

– Ine Lejeune (Global Relationship Partner for EU Services to the EU Institutions and DG TAXUD, Tax Partner, Global Relationship Partner EU Institutions, Global Indirect Taxes Policy Leader.

2.5. Timetable

15. Given the very short timescale for this Study, the following timetable was agreed upon with the Commission.

Table 1: Timetable

Step 1.1 Preparation of kick-off meeting	
Step 1.2 Kick-off meeting	16 May 2012 (at the latest)
Step 2.1 Drafting of intermediary report including the Questionnaire and completion of Belgian pilot case	17/05 – 25/05
Step 2.2 Review of intermediary report by the Quality Team	28/05 – 29/05
Step 2.3 Providing of intermediary report to the Commission	30/05
Step 2.4 Feedback on intermediary report by the Commission (including conference call with PwC)	30/05 – 1/06
Step 2.5 Amendment of the Intermediary report – more precisely the Questionnaire – following the comments of the Commission	4/06
Step 2.6 Validation of the Intermediary report by the Commission	4/06
Step 3.1 Completion of validated Questionnaire by PwC representatives of 13 MSs	5/06 – 12/06
Step 3.2 Gathering of information and drafting of final report	13/06 – 22/06
Step 3.3 Review of draft final report by the Quality Team	25/06 – 26/06
Step 3.4 Providing of draft final report to the Commission	26/06 COB
Step 3.5 Feedback of the Commission on draft final report	28/06
Step 3.6 Providing of final report to the Commission	30/06

3. Data Collection

16. In order to proceed to the data collection, a Questionnaire was sent out to the PwC member firms. The Questionnaire sent to the various territories involved in this Study was introduced as stated in the following table. The blank questionnaire is enclosed in Appendix 1.

17. The input from the various PwC member firms is enclosed in Appendix 2.

Table 2: Introduction to the Questionnaire

Goal of the Study	The Study consists in a *data collection service* combined with a *comparative analysis* based on a review of the current income tax legislation (and the related legislative work) and information available in the public domain on existing and proposed tax measures of 14 EU Member States in relation to the so-called concepts of "Aggressive Tax Planning" (hereafter ***"ATP"***) and "Non-Cooperative Jurisdiction" (hereafter ***"NCJ"***). The Study is focussed on direct taxation – income and corporate tax – (primarily business taxation plus any necessary bridge to personal taxation such as the use of NCJs to avoid taxation of savings in particular). Note that ATP and NCJ are concepts which have no EU-wide definitions. Therefore, in order to circumvent this issue in the framework of this assignment, it has been decided that: • Only Third Countries could be considered as NCJs (to the exclusion of any EU Member State); and • Only operations/arrangements with Third Countries could be considered as ATPs (solely intra-EU operations/arrangements are out of scope).
Goal of the Questionnaire	This Questionnaire aims at collecting information on the current income tax legislation (and related legislative work or publicly available documents) on existing and proposed tax measures in your country in relation to Third Countries.
Assumptions	Please take into account the following assumptions when completing the Questionnaire: • Only income/direct taxation (including capital gains and WHT, where relevant) is considered in the scope of this Questionnaire. As mentioned above (if relevant) also comments on personal taxation might need to be included in the below Questionnaire plus quantitative information if available; • The input provided should only be based on the review of the income tax legislation (including double tax treaties and other international agreements), related official legislative work and official administrative doctrine (parliamentary works, parliamentary questions, practice notes, rulings, etc. – provided these documents are available in the public domain) and case law where required. It does not need to include any review of the available literature (doctrine) or of any other document which is not to be seen as official in your local territory.

<table>
<tr>
<td>In Scope Measures</td>
<td>

- **New Specific Measures:** The main purpose of the Questionnaire is to collect information on so called "New Specific Measures" comprising anti-abuse measures specifically relating to Third Countries when such measures:

  – Have been enacted after 1 January 2007 (new measures);

  – Have been substantially amended after 1 January 2007 (amended measures); or

  – Are currently discussed in bill of laws (possible future measures).

- **Other Measures:** Nevertheless, it should also comprise a high-level description of other measures comprising:

  – **Other Specific Measures:** Measures specifically relating to Third Countries that have been enacted before 1 January 2007 (and not substantially amended since 1 January 2007); as well as

  – **Non-Specific Measures:** Anti-abuse measures which are not only applicable in relation to Third Countries (regardless whether enacted before or after 1 January 2007).

  Such high-level description should include a summary of the measure (including also the purpose of the measure), the legal grounds, an impact assessment (when available), evaluation of the measure (when available) and also a high-level listing of the most relevant and recent case law (final or pending) in relation to the measure. As regards the case law, the main purpose is to provide a non-exhaustive overview of the main tendencies in relation to this measure. The overview is limited to listing the fixed case law since 1 January 2007 in relation to the measure, which can be considered as useful for a full understanding of the measure and its application in a certain Member State. Also, in case of so-called "landmark" decisions prior to 1 January 2007, these should also be mentioned in a summarised manner.

- **NCJ v. ATP Measures:** Besides, the Questionnaire intends to differentiate between Specific Measures targeting in particular NCJs or ATPs (regardless such measures are New or not). In broad terms, those measures could be defined as follows:

  – **NCJ Measures:** the focus is more on the country (almost irrespective of the transaction); whereas

  – **ATP Measures:** the focus is more on the operations/arrangements potentially concerned.

  Of course, the difference between these two types of measures can sometimes appear difficult (e.g. a measure only applicable to selected Third Countries and only relating to a specific type of transactions). In such a case the measure can be considered as both an NCJ Measure and an ATP Measure.

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<tr>
<td>Structure of the Questionnaire</td>
<td>Based on these criteria, the Questionnaire is divided in three parts which should be completed depending on the level of information required for the in scope measures:

• Part 1: Introduction: It includes some general introductory questions which summarize the overall situation in your country as regards the existing legislation on NCJs and ATPs. This part of the Questionnaire should only be completed once.

Part 2: General Information: It includes a general description of each anti-abuse measure reported in the Questionnaire (regardless of whether the measures in question have to be considered as New Specific Measures, Other Specific Measures or Non-Specific Measures). Part 2 should comprise a comprehensive overview of the anti-abuse measures existing (or currently discussed) in your local territory.

• Part 3: Detailed Information: It concerns detailed information on New Specific Measures only. This part should be completed for each and every New Specific Measure reported in Part 2.

Examples (Part 2 v. Part 3):

• An anti-abuse measure concerning any national or international transactions would be considered as a Non-Specific Measure. Only Part 2 should be completed;

• A reporting obligation of payments made to selected Third Countries enacted in 2009 should be considered as a New Specific Measure. Part 2 and Part 3 of the Questionnaire should be completed;

• A reporting obligation of payments made to selected Third Countries enacted in 2005 should be considered as an Other Specific Measure. Only Part 2 should be completed.</td>
</tr>
</table>

4. Comparative Analysis

4.1. Introduction

18. **Introduction.** This comparative analysis is based on the information collected from our PwC network as a result of the model Questionnaire as validated by the Commission in the framework of the preliminary report. As already indicated, this Questionnaire is composed of three parts:

- **Part 1: Introduction**: It includes some general introductory questions which summarise the overall situation in the respective MSs as regards the existing legislation on NCJs and ATPs.

  – **Definition of NCJ & ATP.** In this part, we have first addressed whether there is any formal definition of NCJ and ATP in the various MSs concerned by the Study.

  – **New Specific Measures v. Other Measures.** We have then addressed whether there exist so-called "New Specific Measures" which were defined, for the purpose of this Study, as anti-abuse measures *specifically relating to Third Countries* when such measures:

    - Have been enacted after 1 January 2007 (new measures);
    - Have been substantially amended after 1 January 2007 (amended measures); or
    - Are currently discussed in bill of laws (possible future measures).

    All other measures not falling within this category were qualified as being Other Measures for the purpose of this Study.

  – **Other Specific Measures v. Non-Specific Measures.** We have then asked whether the respective MSs have such Other Measures, yet differentiating between Other Specific Measures and Non-Specific Measures being defined, for the purpose of this Study, as follows:

    - **Other Specific Measures:** Measures specifically relating to Third Countries that have been enacted before 1 January 2007 (and not substantially amended since 1 January 2007); as well as
    - **Non-Specific Measures:** Anti-abuse measures which are not only applicable in relation to Third Countries (regardless of whether or not enacted before or after 1 January 2007).

  – **Legislative or Administrative Proposals.** Finally, in this first part, we requested the respective MSs whether there are currently proposals aimed at introducing new measures which could fall into the scope of the Study.

- **Part 2: General Information:** It includes a general description of each anti-abuse measure reported in the Questionnaire regardless of whether the measures in question have to be considered as New Specific Measures, Other Specific Measures or Non-Specific Measures. It comprises a comprehensive overview of the relevant anti-abuse measures existing (or currently discussed) in the respective MSs.

- **Part 3: Detailed Information:** It concerns detailed information on New Specific Measures only.

In the following sections, we propose short summaries of the various measures reported with respect to the various MSs complemented with tables comprising additional details.

4.2. Definition of NCJ

19. **NCJ v. ATP Measures.** As mentioned above, the Questionnaire intends to differentiate between Specific Measures (i.e. anti-abuse measures specifically relating to Third Countries) targeting in particular "NCJs" or "ATPs" although these concepts are not clearly defined.

For the purpose of this Study, and only with a view to being able to categorise to some extent the various measures existing in the different MSs, we have suggested in broad terms that the focus of "NCJ Measures" is more on the Third Country as such (almost irrespective of the transaction) whereas the focus of "ATP Measures" is more on the operations/arrangements potentially concerned with entities/companies/taxpayers/etc. established in such Third Country.

Of course, the difference between these two types of measures can sometimes appear difficult (e.g. a measure only applicable to selected Third Countries and only relating to a specific type of transactions). In such a case, the measure can be considered as both an NCJ Measure and an ATP Measure.

20. **Only France and Estonia have reported having a formal definition of an "NCJ".**

Although in Estonia an "NCJ" is not as such defined in tax law, the concept of a "low tax territory", which is defined in tax law, is clearly a concept which can be linked with an NCJ. According to Estonian tax law, a low tax territory is a foreign state or a territory with an independent tax jurisdiction in a foreign state, which does not impose a tax on the profits earned or distributed by a legal person or where such tax is less than one third of the income tax which would apply to the taxpayer if it were resident in Estonia. Considering the tax rate for personal income tax is flat 21%, a low tax rate territory is the territory where the applicable tax rate is below 6,93%[4]. Given all the MSs (and countries that have concluded a tax treaty with Estonia) are, as a general rule, considered as cooperative and automatically included by the Government in the "white list" of countries that are not considered as low tax rate territories, the definition of low tax territory is, in effect, limited to Third Countries.

[4] Cfr. Appendix 2, Estonia, Definition of NCJ, p86.

In France, the definition of an "NCJ" does not take into account the effective taxation regime applicable in a certain country. Indeed, a state or territory is defined as non-cooperative (Non-Cooperative State or Territory, below ***"NCST"***) if it meets the following criteria: (i) it is not a member of the European Union; (ii) its situation as regards transparency and exchange of information has been scrutinised by the OECD; (iii) it has concluded less than 12 Tax Information Exchange Agreements (below ***"TIEAs"***) before 1 January 2010; and (iv) it has not signed a TIEA with France.

21. **All other participating MSs do not report having a formal definition of an "NCJ".** However, it does not mean that these MSs do not have any anti-abuse provisions aimed at fighting against the use of schemes involving specific countries.

Indeed, many countries do report various measures which apply to e.g. "non-treaty countries" (Hungary), "countries with a low tax burden" (Belgium), "low-taxed jurisdictions" (Sweden), "countries with a tax regime that is substantially more advantageous than the local tax regime (Belgium)". However these rules generally do not provide for a formal definition of an "NCJ" and/or are generally equally applicable to MSs (including purely domestic situations) and Third Countries (cf. Table 3 below).

In addition, based on the provided input, for at least three Member States it has been reported that the reference to a "tax haven" can vary depending on the type of measure. For instance, in Belgium, the participation exemption regime does not apply in the case of dividends received from a company established in a Third Country of which the tax regime is considered as *substantially more advantageous than in Belgium*. For the purposes of this measure, the tax regime is considered as substantially more advantageous if the applicable nominal or effective tax rate is lower than 15%[5]. On the other hand, for the disclosure requirement of payments made to tax havens countries, Belgian tax law considers a low tax burden as a nominal corporate income tax rate lower than 10%[6]. Also in France, notwithstanding the fact that there is a formal definition of an NCJ, not all provisions which can be considered as relating to a "tax haven", refer to the formal definition of the "NCJ". Indeed, for purposes of the application of the anti-avoidance rule providing for the non deductibility of certain expenses paid out to a non-resident located in a low-tax-jurisdiction, a non-resident is located in a "low-tax-jurisdiction" in case it is subject to an effective taxation which is at least 50% lower than that of similar French residents[7]. Finally, also in Sweden similar discrepancies seem to be at hand. Indeed, for the purposes of the definition of a foreign corporation, i.e. a foreign legal entity subject to a taxation similar to the Swedish corporation income tax, the term similar taxation implies an effective rate of 14,5% (which corresponds to 55% of the Swedish Income Tax)[8]. However, for the application of the specific

[5] Cfr. Appendix 2, Belgium, Part 2: General Information, Measure n°6, p 32.
[6] Cfr. Appendix 2, Belgium, Part 2: General Information, Measure n°1, p 19 and Appendix 2, Belgium, Part 3: Detailed Information, Measure n°1, p 53.
[7] Cfr. Appendix 2, France, Part 2: General Information, Measure n°2, p 109.
[8] Cfr. Appendix 2, Sweden, Definition of NCJ, p 334.

interest stripping rule in Sweden, which applies in case interest income is allocated to a low tax jurisdiction, only an effective tax rate of 10% is required[9].

It is also interesting to note that anti-abuse measures in some MSs (such as Belgium, Cyprus, Estonia, Hungary, Ireland, Luxembourg, The Netherlands, Spain, Sweden and the United Kingdom) are applicable to countries where the level of taxation is considered as being not appropriate (e.g. no taxation at all, very low nominal/effective tax rate, not subject to a similar ore reasonable level of taxation) whereas in other MSs (such as Belgium, France, Germany, Malta and the United Kingdom) the decisive criteria is the level of cooperation of the countries in terms of exchange of information (which is more the OECD approach).

By way of example of this approach (besides the French example mentioned above), Germany considers a country as a Non-Cooperative Jurisdiction if (i) the respective country has not concluded an information exchange agreement with Germany that corresponds with Art. 26 of the OECD model agreement (2005) or (ii) the respective country does not provide information to an extent comparable to Art. 26 of the OECD model agreement (2005), and (iii) is unwilling to provide such information. However, Germany was not considered as having a definition of NCJ for the purpose of this Study since this rule does not only relate to Third Countries (but addresses all foreign countries). Belgium also defines a tax haven as a country which is considered by the OECD Global Forum on Transparency and Exchange of Information as a State that has not substantially and effectively applied the OECD exchange of information standard[10]. With respect to Spain, the specific concept of NCJ does not exist in tax legislation. However, similar concepts such as “tax haven” or “jurisdiction with nil taxation” are defined in Spanish tax law.

- “Tax haven” refers to a black list. In practice, the black list focuses essentially on Third Countries. Each jurisdiction will be excluded from the list if a double tax treaty with an exchange of information clause or a tax information exchange agreement is applicable between Spain and this country.
- “Jurisdiction with nil taxation” is defined in a law providing for measures to prevent tax fraud. It is more particularly defined as a jurisdiction that does not apply a similar or analogous tax to the Spanish personal income tax, corporate income tax or non-resident income tax. A similar or analogous tax is a tax whose main purpose is the taxation of income, even partially, regardless of whether the taxable event is the income, the profits or a similar element. This requirement is deemed to be met if the jurisdiction has signed a DTT with Spain.

In the United Kingdom, the legislation relates to lower levels of tax:

[9] Cfr. Appendix 2, Sweden, Part 2: General Information, Measure n° 1, p 337.
[10] This definition is not yet effective though as the work of the Peer Review Group is still ongoing.

- The current Controlled Foreign Company (below ***"CFC"***) rules only apply where a company is subject to a lower level of tax (s747(1)(c) ICTA 1988). Whether or not a company is subject to a lower level of tax is determined by reference to section 750 ICTA 1988;
- In the new CFC rules, sections 371MA - 371ME describe the "tax exemption", whereby a company is exempted from the CFC charge if the local tax is at least 75% of the corresponding tax.

The main consequences of the different approaches will be outlined below when commenting on the various measures referring to these notions.

Table 3: Definition of NCJ

BELGIUM	No	However, in Belgian tax law several notions or terms occur that could be linked to the notion of NCJ (e.g. "tax regime that is substantially more advantageous", "tax regime which is different than the common tax regime, country which "is considered by the OECD Global Forum on Transparency and Exchange of Information as a State that has not substantially and effectively applied the OECD exchange of information standard").
CYPRUS	No	Although in the Cyprus tax legislation there are references which may be linked to the concept of NCJ ("substantially lower tax burden that Cyprus tax burden")
DENMARK	No	Several of the anti-abuse measures are only targeted to jurisdictions outside the EU/EEA with which Denmark has not concluded a tax treaty.
ESTONIA	Yes	The Estonian tax legislation defines the concept of "Low Tax Territory" (i.e. territory with no taxation or a substantially lower taxation than in Estonia Considering the tax rate for personal income tax is flat 21%, a low tax rate territory is the territory where the applicable tax rate is below 6,93%[11]). Note that: • a country can be partially considered as "Low Tax Territory" if taxation regimes differ from one entity to another; • a company can be deemed not to be located in a "Low Tax Territory" if 50% of its annual income is derived from an actual economic activity (the latter concept is not defined in Estonian tax law); • a white list exists.
FRANCE	Yes	A state or territory is defined as non-cooperative if it meets several criteria (i.e. (i) if it is not a member of the European Union, (ii) if its situation as regards transparency and exchange of information has been scrutinised by the OECD, (iii) if it has concluded less than 12 Tax Information Exchange Agreements before 1 January 2010 and (iv) if it has not signed such agreement with France)[12] . A list of non-cooperative states/territories ("NCST") exists and is subject to strict rules (e.g. adding to or withdrawal from the list).
GERMANY	No	Some measures with regard to entities resident in a list of uncooperative countries/non-cooperative jurisdictions that do not adhere to the OECD standards on tax information exchange were introduced in 2009 by way of a tax act aimed at combating "tax evasion and harmful tax practices". Measures can only be applied if the country has been black-listed by the federal Ministry of Finance (i.e. no single country for the moment).
HUNGARY	No	A similar concept is however approached through the CFC regime (i.e. the requirement of the Hungarian private person ownership or income from Hungary was recently – in 2010 – incorporated in the CFC definition, resulting in the fact that it practically refers to Hungarian capital located in offshore territories).
IRELAND	No	There are however particular provisions in Irish tax law that provide for the tax benefits in relation to payments to and from Ireland on the basis that the income is subject to tax in the recipient foreign territory.
LUXEMBOURG	No	However, the concept of NCJ could be indirectly derived from several provisions of Luxembourg income tax law ("LITL"). Indeed, various provisions of the LITL are applicable to joint stock companies resident in Third Countries (i.e. non-MSs) to the extent that "[these companies] are fully liable in ([their] state of residence) to a tax corresponding to Luxembourg corporate income tax".

[11] Cfr. Appendix 2, Estonia, Definition of NCJ, p 86.
[12] Cfr. Appendix 2, France, Definition of NCJ, p 102.

MALTA	No	The only approach of this concept can be found in the "other jurisdictions exchanging information" regime (e.g. Malta does not exchange information with countries which do not enter in an agreement).
NETHERLANDS	No	Several notions could however be linked to the concept of NCJ, in particular the notion of "profit or income tax that is reasonable according to Dutch standards" provided in several dispositions.
SPAIN	No	However, similar concepts such as "tax havens" or "jurisdictions with nil taxation" are defined in Spanish tax law.
SWEDEN	No	Indirect effect of the definition of the term "foreign corporation" (i.e. "entity subject to taxation similar to Swedish corporation income tax")
UK	No	None

22. **White, Grey & Black Lists.** Half of the MSs (Belgium, Estonia, France, Germany, Spain, Sweden and the United Kingdom) refer to a limited "territorial" scope of application of certain measures, mentioning that they are only applicable when dealing with very specific countries. These MSs use lists to differentiate between "white", "black" and even "grey" countries.

- Black lists: In Belgium, the reporting obligation currently only applies in the case of payments to tax haven countries which are specifically listed in a Royal Decree[13]; Another list applies in the framework of the participation exemption regime to qualify countries "where the common tax regime is deemed to be substantially more advantageous than in Belgium". For Spain, the qualification as a tax haven pursuant to a list entails the application of various Specific Measures, such as the measure in relation to the tax residence of entities located in a tax haven[14], the measure providing for the non-deductibility of expenses paid to tax havens[15], the measure providing for the limitation on transfer of rights to use intangible assets in case of tax havens[16], the measure providing for the limitation of the specific ETVE regime in case of tax havens[17], the measure in relation to the valuation of transactions with tax havens[18], the measure in relation to the information of transactions with tax havens[19] and the measure providing for the non-application of withholding tax exemptions of income obtained through tax havens[20]. In Germany, the measures on Non-Cooperative Jurisdictions can only be applied, if the respective country has been listed by the Federal Ministry of Finance, however until today no single country has actually been listed.
- Grey lists: In Sweden, the list used in the framework of the CFC legislation is divided into black, white and grey-listed countries, whereby certain countries are entirely black-listed (i.e. CFC

[13] Cfr. Appendix 2, Belgium, Part 2: General Information, Measure n°1, p 19 and Appendix 2, Belgium, Part 3: Detailed Information, Measure n°1, p 54.
[14] Cfr. Appendix 2, Spain, Part 2: General Information, Measure n°1, p 306.
[15] Cfr. Appendix 2, Spain, Part 2: General Information, Measure n°2, p 307.
[16] Cfr. Appendix 2, Spain, Part 2: General Information, Measure n°8, p 314.
[17] Cfr Appendix 2, Spain, Part 2: General Information, Measure n°11, p 319.
[18] Cfr. Appendix 2, Spain, Part 2: General Information, Measure n°13, p 321.
[19] Cfr. Appendix 2, Spain, Part 2: General Information, Measure n°15, p 324.
[20] Cfr. Appendix 2, Spain, Part 2: General Information, Measure n° 17, p 306.

taxation will take place), others are entirely white-listed (i.e. no CFC taxation will take place) and finally some are grey-listed (certain operations in a country may be black or white-listed).

- A country mentioned on the OECD's "white list" will automatically be removed from the French list of NCSTs. Estonia also makes reference to a white list of territories which are not regarded as low tax rate territories and thus with respect of which many Specific Measures are not applicable. The United Kingdom (white list) also uses a list in the framework of its CFC legislation to define countries to which the CFC legislation does not apply.

23. Generally, in case a Member State is using a black list, transactions with counterparties located in a country which occurs on a black list will generally fall in scope of a particular measure. Whereas when dealing with countries included on a white list, this will generally imply that certain measures are not applicable. Only Sweden has referred to a so-called "grey list" which includes countries which are as such not black listed, but for which certain operations or certain taxpayers (e.g. which can benefit within their country of residence from a specific tax regime) are black or white listed[21].**Comparison of Lists.** On specific request of the Commission, we provide in Table 4 below a high level comparison of the different territories listed on the lists provided.

It should be pointed out that, as a rule, the black and grey lists used by the MSs in scope of the Study do not comprise other MSs[22]. As regards Countries of the European Economic Area (below ***"EEA"***) only Liechtenstein appears on black lists. The table below therefore only comprises Third Countries (including Liechtenstein).

The starting point of the comparison is the negative cases (i.e. territories fully or partially considered as blacklisted). Territories mentioned on white lists are thus only mentioned insofar as they are also mentioned on other lists.

Legend:

- To ease the reading, territories listed on black lists (left part of the table) by,

  – two MSs are highlighted as follows: X
  – three MSs are highlighted as follows: X
  – more than three are highlighted as follows: X

- Territories listed on the right part of the table are territories mentioned on existing white lists and mentioned on other MSs' black or grey lists.

[21] Cfr Appendix 2, Sweden, Part 2: General Information, Measure n°3, p 340.
[22] With the exception of Sweden but only in specific cases (concerns Belgium, Bulgaria, Cyprus, Estonia, Hungary, Ireland, Luxembourg, Netherlands), Spain (concerns Cyprus, with divergent interpretations though) and the United Kingdom but only in specific cases (concerns Belgium, Greece, Hungary, Italy, Luxembourg, Malta, Netherlands, Portugal, Spain)

We would like to draw the attention to the fact that this comparison only takes into account the lists as they are currently available as per 31 May 2012. This comparison could of course evolve in the future and is therefore to be understood as indicative, especially the work done for the moment by the OECD Global Forum on Transparency and Exchange of Information, which could influence the future composition of the said lists.

Table 4: Comparison of Existing Lists

Abu Dhabi		X							
Afghanistan	X								
Ajman		X							
Alderney	X								
Andorra		X				X			
Anguilla		X	X		X				
Antigua and Barbuda					X				
Argentina							X[28]		
Aruba			X						
Australia						X[29]			X
Bahamas		X							
Bahrain		X			X	X			
Belize	X					X[30]			
Bermuda		X	X		X				
Bosnia - Herzegovina	X								
Botswana				X					X
British Virgin Islands	X	X	X		X				
Brunei				X	X	X[31]	X[32]		
Burundi	X								
Canada						X[33]			X
Cap Green	X								

23 That is to say a nominal or effective tax rate below 15%.
24 That is to say a nominal tax rate below 10%.
25 In case of countries not belonging to, or being excluded ("excepted") from the "white list", there is a burden on the taxpayers to prove that the entities there are not considered to be located on the "low tax rate territory" (i.e. taxpayer has to prove that the tax rate there is higher than 1/3 of the tax applicable to individuals in Estonia, more than 50% of the income of the entity there is derived from actual economic activity, etc.).
26 That is to say a an effective tax rate on the income below 14.5%.
27 It should be noticed that the UK CFC legislation is currently undergoing reform and the list might be amended in a near future.
28 Companies obtaining exemption from tax on income from transactions, activities or operations carried on in, or from goods located in, tax free areas in accordance with Law 19640 of 16th May 1972.
29 Only for income from banking operations that are not taxed under the ordinary income tax regime.
30 Only for income not taxed under the ordinary income tax regime.
31 Only for income not taxed under the ordinary income tax regime.
32 Companies qualifying as "pioneer companies" under the Investment Incentives Enactment 1975.
33 Only for income from banking operations that are not taxed under the ordinary income tax regime.

Cayman Islands		X	X		X				
Central African Republic	X								
Chile							X[34]		
Comoros	X								
Cook Islands	X				X				
Costa Rica						X[35]			
Cuba	X								
Djibouti						X			
Dominican Republic	X				X				X
Dubai		X							
Dutch Antilles			X						
Egypt							X[36]		
Equatorial Guinea	X								
Falkland Islands					X				X
Faroe Islands							X[37]		
Federation of Micronesia	X	X							
Fiji					X				X
Fujairah		X							
Gibraltar	X		X		X	X			
Grenada	X				X				
Guatemala				X					
Guernsey	X	X	X		X	X			
Guinea - Bissau	X								
Haiti	X								
Herm Island	X								
Hong Kong			X			X[38]	X[39]		
Iran	X								
Iraq	X								

[34] Companies obtaining exemption from tax under Law 16,441 of 1st March 1966 on income from property located in the Department of Isla da Pascua or from activities developed in that Department.
[35] Only for income considered to arise in another territory and not subject to tax.
[36] Companies which do not fall within the scope of Article 111, Book 2 of Law 157 of 1981 because they do not operate in Egypt.
[37] Companies deriving interest from Faroese financial institutions from which tax is deducted at source under Law 4 of 26th March 1953.
[38] Only for income considered to arise in another territory and not subject to tax.
[39] Companies deriving income in or from the Hong Kong Special Administrative Region and submitting tax returns to the authorities of that Region.

Isle of Man	X	X			X	X		X	
Jersey	X	X	X		X	X		X	
Jethou		X							
Jordan					X				
Kenya							X[40]		
Kiribati	X								
Laos	X								
Lebanon					X	X[41]			
Liberia	X				X	X			
Liechtenstein (EEA)	X				X	X			
Macau	X		X		X	X	X[42]		
Malaysia							X[43]		
Maldives	X	X				X			
Mariana Islands					X				
Marshall Islands	X		X	X					
Mauritius					X				
Mayotte	X								
Moldavia		X						X	
Monaco	X	X			X	X			
Montenegro		X				X[44]			
Montserrat	X		X	X	X				
Morocco						X[45]	X[46]		
Namibia	X								
Nauru		X		X	X				
Niue	X			X					
North Korea	X								
Oman	X				X				
Pakistan							X[47]		

40 Companies having income exempted from tax under paragraph 11 of Schedule 1 to the Income Tax Act 1973.
41 Only for income from banking and finance, other financial and insurance services.
42 From 20th December 1999, companies deriving income in or from the Macao Special Administrative Region and submitting tax returns to the authorities of that Region.
43 (1) Companies exempt from tax in accordance with section 54A of the Income Tax Act 1967 (shipping). (2) Companies subject to tax at 5 per cent in accordance with sections 60A and 60B of the Income Tax Act 1967 (inward reinsurance and offshore insurance). (3) Companies deriving dividends from a company or companies deriving income from one or more of the activities referred to in paragraphs (1) and (2) above. (4) Companies obtaining a tax benefit under the Offshore Companies Act (Island of Labuan) 1990.
44 Only for income from such banking and finance, other financial and insurance services that are not taxed under the ordinary income tax regime.
45 Only for income from banking and finance, other financial and insurance services that are not taxed under the ordinary income tax regime as well as income from coordination centres.
46 Companies receiving a tax benefit under Law 58–90 of 1992 (offshore financial centres).
47 Companies deriving royalties, commissions or fees which are exempt from tax under paragraph 139 in Part I of the second Schedule to the Income Tax Ordinance 1979.

Palau		X							
Panama	X					X[48]			
Philippines				X			X[49]		
Puerto Rico							X[50]		
Ras al Khaimah		X							
Saint - Vincent and the Grenadines	X				X				
Saint Christopher and Nevis	X								
Saint Lucia	X				X				
Saint-Barthélemy		X							
Saint-Pierre-et-Miquelon	X								
Samoa	X								
San Marino						X[51]			
Sao Tome and Principe	X								
Sark		X							
Seychelles	X				X	X			
Sharjah		X							
Singapore						X[52]	X[53]	X	
Solomon Islands					X				X
Somalia	X								
Sri Lanka							X[54]		

[48] Only for income considered to arise in another territory and not subject to tax.

[49] (1) Companies authorised under Presidential Decree 1034 of 30th September 1976, or under Presidential Decree 1035 of 30th September 1976, to operate an offshore Banking Unit or a Foreign Currency Deposit Unit as defined in those Decrees. (2) Companies receiving interest on deposits with a Foreign Currency Deposit Unit, or other interest subject to the reduced rates of tax under section 27(D) of the National Internal Revenue Code 1997.

[50] (1) Companies obtaining a tax benefit under section 2(o) of the Industrial Incentive Act 1978 (designated service industries). (2) Companies obtaining a tax benefit under section 25 of the International Banking Centre Regulatory Act 1989 (International Banking Entities).

[51] Only for income from such banking and finance, other financial and insurance services that are not taxed under the ordinary income tax regime.

[52] Only for income from such banking and finance, other financial and insurance services that are not taxed under the ordinary income tax regime.

[53] (1) Any company obtaining tax concessions under Ministry of Finance Regulations pursuant to section 43A, and sections 43C to 43K, of the Income Tax Act. (2) Companies obtaining exemption from tax on the income of a shipping enterprise in accordance with section 13A of the Income Tax Act. (3) Companies obtaining relief from tax in accordance with sections 45 to 55 (international trade incentives), and sections 75 to 84 (warehouse and service incentives), of the Economic Expansion Incentives (Relief from Income Tax) Act. (4) Companies deriving dividends from a company or companies deriving income from one or more of the activities falling within paragraphs (1) to (3) above.

Switzerland						X[55]		X	
Tanzania							X[56]		
Thailand						X[57]	X[58]		
Tunisia							X[59]		
Turkey						X[60]		X	X
Turks and Caicos Islands		X	X		X				
Tuvalu	X								
Umm al Qaiwain		X							
United Arab Emirates						X			
USA							X[61]		
US Samoa	X								
US Virgin Islands			X		X				
Uzbekistan	X								
Vanuatu		X			X				
Virgin Islands	X								
Wallis and Futuna		X							

54 Companies obtaining relief or exemption from income tax under any of the following provisions of the Inland Revenue Act 1979– (a) section 8(c)(iv) (foreign currency banking units); (b) sections 10(d) and 15(b) (income derived from approved bank accounts); (c) section 10(e) (interest of newly resident companies); (d) section 15(cc) (services rendered outside Sri Lanka); (e) section 15(p) (re-export of approved products).
55 Only for income from banking and finance, other financial and insurance services
56 Companies relieved or exempted from income tax under section 15(1) or (1A) of the Income Tax Act 1973.
57 Only for income from banking operations that are not taxed under the ordinary income tax regime.
58 Companies obtaining a tax benefit under Royal Decree 280 of 22nd September 1992 (offshore banking units).
59 Companies obtaining exemption from, or reduction of, tax under Law 76/63 of 12th July 1976 (financial and banking institutions dealing with non-residents).
60 Only for income from such banking and finance, other financial and insurance services that are not taxed under the ordinary income tax regime.
61 Domestic International Sales Corporations as defined in section 992(a) of the Internal Revenue Code 1954.

4.3. Definition of ATP

24. **No ATP Definition.** As mentioned above, the focus of "ATP Measures" is more on the operations/arrangements potentially concerned with entities/companies/taxpayers/etc. established in Third Countries (and in Third Countries *only*).

It appears from the information received that none of the concerned MSs reported having ATP Measures.

The reason for this is essentially to be found in the fact that only a few MSs reported Specific Measures (i.e. anti-abuse measures specifically relating to Third Countries)[62]. Considering ATP Measures are only a subdivision of the Specific Measures, the number of ATP Measures is logically even more limited.

25. **Non-Specific Measures.** Nevertheless, most of the MSs concerned have anti-abuse measures aimed at fighting against potentially harmful transactions/arrangements (see also section 4.6.7 below). These measures generally apply equally to MSs (including purely domestic situations) and Third Countries.

[62] Regardless of whether these measures are to be considered as New Specific Measures or Other Specific Measures.

Table 5: Definition of ATP

BELGIUM	No	There is a general anti-abuse rule in Belgium which refers to the notion of “tax abuse” and which is equally applicable to all taxpayers irrespective of the country of residence of the counterparty (thus not specifically targeted to transactions with NCJs).
CYPRUS	No	There is a general anti-abuse provision in Cyprus which gives the right to the tax authorities to disregard transactions which are suspected to be fictitious or not genuine and are carried out with an aim to reduce the taxable base. This provision applies to all taxpayers irrespective of the country of residence of the counterparty.
DENMARK	No	A number of cases suggest a “substance-over-form” principle, where a transaction can be reclassified or set aside in certain circumstances. However, it is not backed by legislation and is not a clear doctrine.
ESTONIA	No	Instead, some provisions of Estonian tax law are based on the principles of “abuse of law” and “substance over form”.
FRANCE	No	There is a general anti-abuse rule which refers to the notion of “abuse of right” and which is equally applicable to all taxpayers irrespective of the country of residence of the counterparty (thus not specifically targeted to transactions with NCJs).
GERMANY	No	The concept of “abuse of legal arrangements” exists in German law and is embodied in a general anti-abuse provision. Based on the jurisprudence, a legal arrangement is considered to be abusive, if it is inappropriate or inadequate compared to the economic intention, that is aimed at achieving a tax reduction and that cannot be justified by economic or other relevant non-tax reasons. However, this concept covers all countries (even 100% German situations).
HUNGARY	No	The concept is however approached by different anti-avoidance provisions: substance-over-form principle; exercise of rights within their meaning and intent, which cannot be the intent to obviate the provisions of tax law; non-tax deductibility of costs and expenses of a transaction entered into for the sole purpose of reducing tax.
IRELAND	No	The concept is however approached by different tax provisions (e.g. general anti-avoidance rule and mandatory disclosure reporting obligation).
LUXEMBOURG	No	The concept is however approached by the anti-avoidance provisions of “simulation” and “abuse of law”.
MALTA	No	However, any scheme which reduces the amount of tax payable by any person is disregarded when it is artificial or fictitious or it is not, in fact, given effect to.
NETHERLANDS	No	However, various concepts in anti-abuse provisions may be invoked by the Dutch tax authorities to prevent undesirable types of ATP (e.g. “abuse of law” concept, thin capitalisation provision and anti-dividend stripping measure).
SPAIN	No	But Spanish tax law uses similar concepts as “conflict in the application of tax law” (formerly “tax law abuse”) and “simulation”.
SWEDEN	No	However, general anti-abuses rules can also be used against tax planning’s put in place with third countries (e.g. a legal action that significantly lowers the taxable base in Sweden, and the effect contradicts the general purpose of the legislation, can be overlooked in specific circumstances (Swedish Tax Avoidance Act))
UK	No	However, there are several pieces of anti-avoidance legislation which are not applicable unless the main purpose of the scheme – or one of the main purposes of the scheme – is to achieve a UK tax advantage (e.g. the current Controlled Foreign Companies rules and the Anti-Arbitrage rules).

4.4. General Overview of Available Measures

26. **Number of Anti-Abuse Measures.** 165 measures were reported across the various MSs. More than half of the MSs have reported 10 or more anti-abuse measures, being Belgium, Denmark, France, Germany, Ireland, the Netherlands, Spain and the United Kingdom.

However, as already mentioned above, since there is no definition of ATP and NCJ, and even no definition of what anti-abuse provisions consist of, it is likely that some legal provisions have not been reported as anti-abuse measures in scope of this Study.

27. **Transfer Pricing.** For instance, it appears that in the Netherlands and Hungary, Transfer Pricing provisions are not regarded as “anti-abuse provisions” but merely as part of the general principles of the tax systems and apply both domestically and cross-border.

28. **Exit Taxation.** Another good example is the exit taxation provisions, the perception of which can vary across countries. Indeed, the German tax law, for instance, also comprises measures providing an exit taxation when either taxpayers or assets are relocated abroad. More in particular,

- If an individual ceases to be resident in Germany, according to Section 6 Foreign Tax Act, all qualifying shareholdings (at least 1 percent) are deemed to have been sold at fair market value;
- For assets belonging to a German business, any loss or restriction of the right to tax built-in gains upon the transfer of the asset will trigger an exit tax, either because the asset is deemed to have been withdrawn from the business (which has to be recorded at fair market value and is thus realizing built-in gains) in the case of businesses run by individuals and partnerships (Art. 4 Sec. 1 sent. 3 Income Tax Act) or because the asset is deemed to have been sold at fair market value in case of corporations (Art. 12 sec. 1 Corporate Income Tax Act). This loss or restriction of the German right to tax might be (i) a result of the relocation of the asset itself or (ii) of the transfer of the seat of a corporation (and (iii) – but much debated – in case a double tax treaty with Germany enters into force that limits or excludes the German right to tax such capital gains).

However, these provisions should not be considered as anti avoidance provision in the meaning of the Study that aims at ATP or NCJs. These provisions merely aim at securing German tax claims as it otherwise could not be monitored by the German tax authorities, whether the built-in gains are realized sometime in the future, when the underlying assets are sold.

In intra EU/EEA cases, the resulting exit tax will be deferred without any interest accruing and without the need to provide a collateral for the deferred tax liability until actual realization or a similar triggering event occurs (however it has been recently discussed in literature, whether the latest decision in the CJEU’s case "National Grid Indus" could be interpreted in a way allowing such interest and collateral).

Similar to transfer pricing, the exit tax provisions in the Netherlands ensure that the Netherlands is able to effectuate its taxing right regarding profits accrued on its territory (principle of territoriality). Characterising the Dutch exit tax rules as anti-abuse rules thus seems to go further than what these rules actually are: rules protecting/determining the Dutch taxable base. It even seems that neither the Dutch legislator nor Dutch Courts regards the exit tax provisions as anti-abuse provisions.

Other countries share the same vision, Belgium, Spain and Sweden for instance.

29. **Withholding Tax.** We have noticed that the same kind of concerns can also arise with respect to withholding tax (below ***"WHT"***) on outbound payments since some Member States, such as Denmark, Ireland, Luxembourg, Spain and Sweden, consider the WHT (or a higher rate of WHT towards some countries) as an anti-abuse measure. Other countries which have not reported such measures might consider the fact that a reduced WHT rate or a WHT exemption is not available as the mere result of the application of the normal tax legislation (considering in particular the interactions between double tax treaties and local tax legislation: the higher WHT rate apply, by default, in the absence of an applicable double tax treaty, and not the opposite).

As an example, it should be mentioned that Sweden levies 30 % WHT on dividends abroad, although there are several exemptions available. Sweden also deems a foreign recipient of a royalty to have a permanent establishment in Sweden (which makes the recipient liable to tax here), but this is waived due to the provisions of a double tax treaty with Sweden allowing only the recipient company to tax the royalty income.

30. Contrary to the above, France has reported a distinct WHT rate of 50% that will be applied in case of outbound payments (dividends, interest and payments in consideration of the supply of any kind of services) to beneficiaries located in an NCJ[63]. **Advance Tax Rulings/Advance Opinions.** Upon request from the Commission, we have checked whether advance tax rulings mechanisms exist in the concerned MSs. This is indeed the case in many MSs, e.g. in Belgium, Estonia, France, Germany, Hungary, Ireland, Luxembourg, the Netherlands, Spain, the United Kingdom. However, for none of these countries these tax ruling mechanisms have been reported spontaneously in the answers to the questionnaire. This is due to the fact that the advance tax rulings mechanisms are not regarded as being anti-abuse provisions or being used to get clearance on particular tax plannings. Indeed, the purpose of advance rulings mechanisms is generally to offer taxpayers / investors in a given country the legal certainty so as to get a sufficient level of comfort in understanding the tax consequences of a contemplated transaction / operation.

As an example, with respect to the United Kingdom, previously, companies could write to HMRC (the UK tax authorities) to apply for advance clearance on transactions under HMRC's "Code of Practice 10".

[63] Appendix 2, France, Part 2: General Information, Measure n°12, p 125.

Code Of Practice 10 now only applies to non-business customers (i.e. mainly individuals) and companies are covered by the non statutory business clearance procedure. However it should be noted that HMRC will not consider a clearance application which overtly involves tax planning/avoidance. Providing that is not the case, a company can get clearance. Similarly, in Estonia, the Taxation Act establishes that tax authorities have the right to refuse issuing an advance ruling the aim of the transaction is tax avoidance.

In the Netherlands, article 4 of the Administrative Circular "Besluit Fiscaal Bestuursrecht" of 5 July 2011 establishes that no advance clearance will be given if a taxpayer presents a fact pattern that qualifies under the criteria of abuse of law. If, in that case, the taxpayer tries by slightly modifying the facts to arrive at a situation that can just not be qualified as abuse of law, this is characterised as finding the fiscally acceptable border ("fiscale grensverkenning") and no advance clearance will be given for such cases.

In Belgium, an advance decision may not be granted in the area of income taxes where at the time the application is filed, essential elements of the operation or transaction described are linked to a tax haven that does not cooperate with the OECD.

31. **Number of Measure not Relevant as Such.** As a result, we cannot draw conclusions on the sole basis of the number of anti-abuse measures reported in each MS.

32. **Specific Measures v. Non-Specific Measures.** Although we have tried to categorise various types of measures according to the scope of application, i.e. only applicable to Third Countries (Specific) or not (Non-Specific), it appears from the information collected that it is not always easy to make that distinction for various reasons. Indeed, in some cases, the text of the law is not always clear, or the text of the law is applicable to all types of countries but in practice only applies to selected countries (including or not Third Countries only). In addition, the case law of the Court of Justice of the European Union (below ***"CJEU"***) may also impact the applicability of some measures within the EU (and by extension the EEA).

Moreover, nothing precludes Non-Specific Measures from efficiently tackling particular situations involving foreign countries (Third Countries or not) so that the distinction between Specific Measures and Non-Specific Measures may not be an appropriate criterion to measure the efficiency of a given measure. In other words, even if only few Specific Measures were reported for a given MS, it does not *per se* mean that such MS is less efficient in fighting against ATP involving Third Countries.

33. **Specific Measures.** From the data collection, it appears that 49 Specific Measures exist across the various MSs concerned, out of which 18 are New Specific Measures and 31 are Other Specific Measures.

Amongst these Specific Measures, 1 is reported as an ATP Measure (being an Other Specific Measure), 43 are NCJ Measures (17 New and 26 Other) and 5 are considered as both ATP and NCJ Measures (1 New and 4 Other).

We mention these measures according to their type in section 4.5 below (which are then further detailed in Appendix 2).

34. **Non-Specific Measures.** 116 Non-Specific Measures were reported to exist in the various MSs (including purely domestic situations) of which most are generally equally applicable to MSs and Third Countries.

We describe in more details some of these measures according to their type in section 4.6 below.

35. **Table.** The table below gives an overview of the available measures per category (New Specific Measures, Other Specific Measures, and Non-Specific Measures) and per MS (being the 14 MSs selected by the Commission).

Table 6: General Overview of Available Measures

BELGIUM	0	1	0	1	0	2	0	0	13	not exclusively	16	Yes
CYPRUS	0	0	0	0	0	0	0	0	5	Yes	5	No
DENMARK	0	0	0	0	0	0	0	0	10	not exclusively	10	No
ESTONIA	0	0	0	0	0	5	0	5	2	Yes	7	No
FRANCE	0	8	0	8	0	0	0	0	7	Yes	15	No
GERMANY	0	0	0	0	0	0	0	0	11	not exclusively	11	No
HUNGARY	0	3	0	3	0	0	0	0	5	Yes	8	No
IRELAND	0	2	0	2	0	7	2	9	6	Yes	17	No
LUXEMBOURG	0	1	0	1	0	0	2	2	5	Yes	8	Yes
MALTA	0	0	0	0	0	0	0	0	9	Yes	9	No
NETHERLANDS	0	0	0	0	0	0	0	0	14	Yes	14	Yes
SPAIN	0	1	0	1	0	10	0	10	9	not exclusively	20	Yes
SWEDEN	0	0	1	1	1	1	0	2	3	not exclusively	6	Yes
UK	0	1	0	1	0	1	0	1	17	Yes	19	Yes
# TOTAL	0	17	1	18	1	26	4	31	116		165	

** Are those measures generally equally applicable to MSs (including purely domestic situations) and Third Countries?*

4.5. New Specific Measures

36. **Definition of NCJ v. Specific Measures.** As explained above, there are 18 New Specific Measures (none of them relating to ATP) out of which 8 concern France, which has recently defined the concept of NCJ in its tax legislation.

Section 238 O-A of the French Tax Code provides for a definition of an NCJ which is based on the exchange of information of a specific state or territory (with France in particular). Based on this new definition introduced in the French Tax Code, a number of recent measures have been adopted specifically aimed at NCJs.

Apart from France, the number of New Specific Measures per country is rather limited. Only Belgium, France, Hungary, Ireland, Luxembourg, Spain, Sweden and the United Kingdom have reported New Specific Measures.

In addition, all New Specific Measures are very specific and well-defined measures. It thus mostly concerns well-scoped measures aimed at preventing certain specific forms of tax avoidance. Based on the input received, we have for instance not found any reference to a general measure prohibiting or preventing any type of transaction or connection with Third Countries.

37. **New Specific Measures.** The New Specific Measures reported are listed below and further detailed in Appendix 2:

- Belgium
  - Reporting obligation for payments to tax havens
- France
  - Anti-avoidance rule regarding the payments made to non-residents located in a NCST
  - CFC regime strengthened for income from entities located in a NCST
  - Exclusion from participation exemption regime for dividends paid by a NCST
  - Transfer pricing documentation requirements for operations or transactions realised by French companies with foreign entities located in a NCST
  - Exclusion from exemption regime for capital gains on the sale of participations held in companies located in a NCST
  - 50% WHT on outbound payments to entities located in a NCST
  - 50% taxation on real estate capital gains realised in France by entities located in a NCST
  - 50% taxation on the capital gains resulting from the sales of shares in French companies realised by entities located in a NCST

- Hungary
  - Non-tax deductibility of payments made to a CFC and documentation requirements
  - Restrictions relating to the reported shareholdings
  - Restrictions related to participation in a CFC
- Ireland
  - Specific cash-pooling interest relief
  - Exemption from Irish WHT for payments of royalties to non-resident companies
- Luxembourg
  - Exchange of information provisions in DTTs with dozens of Third Countries
- Spain
  - Limitation on Transfers of Right of Use Intangible Assets to Tax Havens (Patent Box)
- Sweden
  - Interest stripping rules
- The United Kingdom
  - TIEAs with offshore financing centres

38. **Increased Burden for Third Countries.** Some measures, whether general or with a focus on specific schemes, are more severe in the case of dealings with an NCJ. For instance, additional documentation requirements, additional conditions to be complied with when dealing with an NCJ or increased tax liability when dealing with an NCJ could apply.

In France, for instance,

- In the case of deduction of expenses resulting from transactions with NCJs the general proof requirements are strengthened. Complementary proof is thus needed to be able to deduct said expenses, as opposed to when dealing with non-NCJs[64].
- In the case of operations or transactions realised by French companies with foreign entities located in an NCJ, the French taxpayer is obliged to provide additional Transfer Pricing documentation (as opposed to the general information on the affiliated companies or specific information on the audited company which needs to be provided in any event). In such a situation, the French taxpayer will be obliged to provide all tax documentation in relation to the company located in an NCJ,

[64] Cfr Appendix 2, France, Part 2: General Information, Measure n°2, p 109.

which is required by the French tax authorities for French companies (e.g. annual balance sheet, profit-and-loss account, form DADS 1)[65];

- The general applicable tax rate for real estate capital gains realised in France by a non-resident amounts to 33.33%. However, this rate is increased to 50% if the capital gains are realised by an entity located in an NCJ.

4.6. Other Measures

39. **Introduction.** In this section, we describe both the Other Specific Measures and Non-Specific Measures reported by the various MSs. We present these measures according to their purpose and characteristics instead of on the basis of their territorial scope (Third Countries only or not). This eases the comparison of the various existing measures in each MS.

On that basis, we have divided the existing measures according to the following categories:

- CFC regulations
- Transfer Pricing measures
- Deductibility of expenses
- Measures on outbound income
- Measures on inbound income
- Disclosure Requirements
- General anti-abuse provisions
- Various Measures

4.6.1. CFC Regulations

40. **Introduction.** A general overview of all measures reported with respect to the selected MSs which can be qualified as measures in relation to the taxation of income of foreign entities that qualify as Controlled Foreign Companies is provided at the end of this section. This section thus relates to measures that generally organise the taxation at the level of the parent company of all or part of the income from its CFCs. The purpose of the CFC-legislation, as described by most Member States (i.e. Denmark [66], Sweden [67]and the United Kingdom [68]), is clearly to avoid or prevent tax planning via low tax jurisdictions whilst eroding the national tax base.

41. **Eight MSs with CFC Rules**. These Member States are Denmark, Estonia, France, Germany, Hungary, Spain, Sweden and the United Kingdom. The level of complexity of these regimes varies from

[65] Cfr Appendix 2, France, Part 2: General information, Measure n°10, p 123.
[66] Cfr Appendix 2, Denmark, Part 2: General information, Measure n°4, p 75.
[67] Cfr Appendix 2, Sweden, Part 2: General information, Measure n°3, 340.
[68] Cfr Appendix 2, The United Kingdom, Part 2: General information, n°2, p 364.

country to country but all of them provide that the controlling entity would be taxed on all or part of the income from its CFCs. The elements which determine the complexity of these rules include (i) the various conditions in order for a foreign entity to be considered as a "CFC" (i.e. notion of the CFC, see below for more comments), (ii) the determination of the income which will be subject to the CFC rules, (iii) the possibility to deduct cost from the "CFC-income" and (iv) the possibility to provide for the counterproof in certain circumstances. The main elements of these regimes are detailed below.

42. **Notion of CFC.** In essence, the term "Controlled Foreign Company" makes an explicit reference to the link between two entities; one entity controlling, directly or indirectly, another entity. However, some CFC regimes use other criteria, not specifically concerning the notion of "control", to define their scope of application. Therefore, in addition to the link between two entities (shareholding, voting rights, assets, etc.), the other main elements that will be taken into account to identify CFCs will be, in the hands of the "controlled" entity, the nature of its activities (taxable basis composition, assets composition, "effective trading or manufacturing activity", "real economic activity", etc.), its location (country with "privileged tax regime", location in a "low tax rate territory", etc.) or the taxation regime of all or part of its income ("low-taxed" income, etc.). Apart from Denmark, all other Member States which have reported the CFC-regulation refer to a specific level of taxation which is required in order to assess whether or not the foreign entity is located in a tax haven:

- In Estonia, the CFC-regulation refers to entities located in low tax territories. As mentioned above, this concept is defined in the Estonian tax legislation as a foreign state or a territory with an independent tax jurisdiction in a foreign state, which does not impose a tax on the profits earned or distributed by a legal person or where such tax is less than one third of the income tax which would apply to the taxpayer if it were resident in Estonia. Considering the tax rate for personal income tax is flat 21%, a low tax rate territory is the territory where the applicable tax rate is below 6,93%[69];
- The CFC-regulation of France details that it is only applicable in case a foreign legal entity is located in a country with a privileged tax regime. A privileged tax regime is a tax regime providing for a taxation of a foreign entity of less than 50% of the income tax liability which the foreign entity would incur in France, should the activity have been performed in France[70];
- In Germany, the CFC-regulation refers to "low taxed income" in the hands of the foreign entity. Low taxed income is income which is taxed below 25%[71];
- For Hungary, it is required that the effective tax rate is below 10% or that the non-resident company did not pay any tax equivalent to corporate tax in order for the CFC-regulation to apply[72];In Spain and the United Kingdom, the taxpayers are subject to a CFC-regulation in case the

[69] Cfr. Appendix 2, Estonia, Definition of NCJ, p86.
[70] Cfr Appendix 2, France, Part 2: General Information, Measure n°1, p 106.
[71] Cfr Appendix 2, Germany, Part 2: General Information, Measure n°4, p 163.
[72] Cfr Appendix 2, Hungary, Definition of NCJ, p 177.

tax paid by the foreign company is less than 75% of the amount that would have been paid in Spain or the United Kingdom on such income[73,74];

- Sweden refers to a an effective tax rate applicable in the hands of the foreign legal entity of below 14,5% (which corresponds to 55% of the Swedish corporate income tax)[75].

In Denmark, the Danish CFC regulation also applies in case of a foreign subsidiary which is located in a low tax jurisdiction. However, in Denmark no reference is made to a specific tax rate in this respect. It is also mentioned that no black or white lists are applicable in this respect[76].

Finally, Sweden and the United Kingdom have also reported to dispose of a "white list" or "excluded territories exemption" following which, even if the foreign entity is located in a tax haven according to the respective principles as mentioned above, the CFC-regulation will nonetheless not be applicable in case the foreign entity is located in a jurisdiction included on the white list in Sweden [77], or considered as an excluded jurisdiction for UK purposes[78].

Based on this, the eight CFC regimes cumulate, in a more or less pronounced way, several criteria to define their scope of application. For instance, the French CFC rules combine the "link" criterion ("more than 50% directly or indirectly owned foreign subsidiaries and branches") with the location (country with a "privileged tax regime") and the activities criteria ("effective trading or manufacturing activity"). To the contrary, Estonian CFC rules are limited to a location criterion (entities located in a "low tax rate territory") and based on a concept of "control" that is defined by law.

Interestingly, in Estonia, profits of the entities located in low tax rate territories are included in the taxable income of the Estonian resident individuals controlling such entity, notwithstanding whether the entity has distributed any dividends or not. CFC income is not included in the taxable income of Estonian resident companies (as Estonian resident companies are not subject to corporate tax on retained earnings, it would be useless to attribute income to resident companies).

43. **Income concerned**. We have seen two different approaches. On the one hand, some CFC regimes lead to the taxation of all of the CFCs' income in the hands of the controlling entity (France, Hungary, Sweden,Denmark and the UK) while, on the other hand, other regimes lead to a taxation of certain income depending on their nature (e.g. "passive income" in Spain or Germany) or their tax regime (e.g. "low-taxed" passive income in Germany).

[73] Cfr Appendix 2, Spain, Part 2: General Information, Measure n°10, p 316.
[74] Cfr Appendix 2, The United Kingdom, Part 2: General Information, Measure n°2, p 365.
[75] Cfr Appendix 2, Sweden, Part 2: General Information, Measure n°3, p 340.
[76] Cfr Appendix 2, Denmark, Part 2: General Information, Measure n°4, p 75-76.
[77] Cfr Appendix 2, Sweden, Part 2: General Information, Measure n°3, p 342-344.
[78] Cfr Appendix 2, The United Kingdom, Part 2: General Information, Measure n°2, p 365-366.

44. **Impact of the EU freedoms**. The EU freedoms potentially have an important role to play in defining the limits of the CFC rules. This became concrete in Germany, where, following the Cadbury-Schweppes decision of the CJEU, the CFC rules were adapted and no longer apply to subsidiaries located in the European Union (or the European Economic Area) when it is proved that a real economic activity is performed in their state of residence. In addition, several jurisprudence decisions (including the Cadbury-Schweppes decision but also national jurisprudence) have clearly focused the debate on the compatibility of the United Kingdom's CFC rules with the EU freedoms, namely on the fact that an arrangement must be considered as artificial or not, leading to a reform of the United Kingdom's CFC rules that will apply for accounting periods beginning on or after 1 January 2013.

45. **Impact of the Double Tax Treaties**. Two countries have pointed out compatibility issues existing between their CFC rules and the Double Tax Treaties they concluded, the solutions retained in the domestic law and jurisprudence being radically different. Indeed, Sweden has reported two decisions of the Supreme Administrative Court where the Swedish CFC rules were applied over the applicable Double Tax Treaty (treaty override). But after severe criticism, the Supreme Administrative Court took a step back and affirmed that the relevant Double Tax Treaty should generally be applied over the CFC rules. To the contrary, without mentioning landmark decisions on this specific topic, Germany reported a treaty override measure according to which any Double Tax Treaty has to be disregarded for the application of the German CFC rules.

Table 7: CFC Regulations

DENMARK	Sec. 32, CTA		The income of a foreign subsidiary may be taxed in the hands of its Danish parent company if the subsidiary constitutes a CFC. A foreign subsidiary is considered as a CFC provided that certain conditions relating to its shareholding/voting rights (>50% held by a Danish parent company), its taxable basis (>50% CFC income) and the nature of its assets (>10% CFC assets) are met.	CFC definition focused on subsidiary's characteristics No black or white list exists	
ESTONIA	Sec. 21, EITA		Profits of the entities located in "low tax rate territories" (i.e. absence of taxation or taxation lower than 1/3 of the taxation of Estonian resident individuals – cf. Sec. 10, EITA) are included in the taxable income of the Estonian resident individuals controlling such entity, notwithstanding whether the entity has distributed any dividends or not.	CFC definition focused on subsidiary's location (low tax rate territory or not) A white list exists	
FRANCE	Sec. 209 B, FTC (Sec. 104, L. 2004-1484, 30 Dec. 2004) Decree 2006-1309, 25 Oct. 2006 (Sec. 102 SA-102 ZB Appendix II, FTC)	Tax guidelines 4 H-1-07, 16 Jan. 2007	French corporations are required to include in their taxable income profits made by their more than 50% (or, under certain circumstances, 5%) directly or indirectly owned foreign subsidiaries and branches located in a country with a privileged tax regime (taxation <50% than taxation that would been incurred in France) unless it proves that the foreign entity carries an effective trading or manufacturing activity.	CFC definition focused on subsidiary's characteristics and location In principle, not applicable to subsidiaries (or branches) located in another EU country unless artificial arrangement set up to circumvent French tax law (burden of proof = French tax authorities)	Two decisions ("SIFA" and "Compagnie des Glénans" cases) providing useful information on the methods for evaluating the "preferential tax regime" were reported.

	Sec. 209 B III *bis*, FTC Sec. 22, I-0 of L. 2009-1674, 30 Dec. 2009	Tax guidelines 14 A-5-12, 10 May 2012 (§25 et seq.)	Specific measures regarding NCST: • Regarding the general “real activity” safeguard clause for taxation of benefits in France, if the foreign company is located in a NCST, the burden of proof is shifted from the tax authorities to the French company. Accordingly, the taxpayer must demonstrate that (i) the foreign entity or permanent establishment is principally engaged in commercial or industrial activities and that (ii) the passive income and remuneration ratios derives from the foreign entity or permanent establishment do not exceed the thresholds provided by section 209 B III of the FTC (less than 50% of the revenues are not with affiliates and if less than 20% of its income is “passive”). • Regarding the foreign tax paid on passive income received by the CFC entity, such tax is in principle credited against the corresponding French tax, provided that the foreign tax is comparable to French corporate tax. The tax credit is however excluded for WHTes on passive income received by the foreign entity and levied by NCSTs.	CFC definition focused on the subsidiary’s taxation regime (comparable or not) and/or location (NCST or not) A white list of NCSTs exists (regularly updated)	
GERMANY	Art. 7-14, Foreign Tax Act (Außensteuergesetz (AStG))		Any corporate entity not subject to taxation in Germany is classified as a CFC (i) if more than 50% of the voting rights or shares are held by one or more German taxpayers unlimitedly subject to tax (individual and/or corporate) and (ii) if the foreign entity earns low-taxed passive income (taxation <25%). Only the low-taxed passive income is considered as a deemed dividend (“transactional approach”). CFC rules do no longer apply to EU/EEA subsidiaries proving that they are engaged in real economic activity in their state of residence.	CFC definition focused on the subsidiary’s characteristics Taxation limited to “low-taxed” passive income	No domestic landmark decisions reported but the Cadbury-Schweppes CJEU decision had an impact on the CFC regime (real economic activity test for EU/EEA subsidiaries)
	Art. 20, sec. 1, Foreign Tax Act (Außensteuergesetz (AStG))		Bearing in mind that German CFC rules are in many cases in conflict with tax treaties, the German legislator has ensured the applicability of these rules by including an explicit unilateral treaty override with respect to the CFC rules according to which any tax treaties on the avoidance of double taxation have to be disregarded for the application of the German CFC rules.		

	Art. 20, sec. 2, Foreign Tax Act (Außensteuergesetz (AStG))		If a German resident has a permanent establishment abroad which earns profits that are subject to the exemption method (under the applicable treaty) but would have been subject to the German CFC rules had they been derived through a CFC, Germany will not grant the exemption method but, instead, will grant the credit method for foreign taxes paid.	Transactional approach and treaty override apply (see above)	
HUNGARY	Sec. 7 (1) g) and gy), CITA Sec. 8 (1) m), CITA		In the case of a dividend income received from a CFC or a gain received from retirement in the shareholding in a CFC, this income may be deducted from the taxpayer's corporate income tax base only if the taxpayer applied a "tax base adjustment" (corporate income tax base of the taxpayer increased by non-distributed year-end profits of the CFC) either in the previous years or in the current year.	Burden of proof in the hands of the taxpayer Highly connected with deductibility measures	
SPAIN	Art. 107, CITA		A taxpayer must include in its taxable basis certain "passive income" (i.e. income subject to a taxation that is less than 75% of the taxation that would have been due in Spain) obtained from a foreign "linked" company (i.e. holding >50% in the share capital, equity, results or voting rights).	Measure focused on the link with the subsidiary and its taxation on its "passive income" Taxation condition presumed for subsidiaries residing in a tax haven	
SWEDEN	Chap. 39 a, Swedish Income Tax act (*Sw: Inkomstskattelagen (1999:1229)*)		A person taxable in Sweden with a certain participation (>25% of share capital or voting rights) in a foreign legal person may become subject to tax on the income of that person if it is considered as "low-taxed" (deemed "low-taxed" if the effective tax rate is below 14.5%). However, based on three lists (a white one, a black one and a grey one), certain jurisdictions (or certain operations in these jurisdictions) could not be concerned by the CFC rules.	Measure focused on the subsidiary's nature (CFC or not) and taxation ("low-taxed" or not) A white, a black and a grey list exist	Three decisions of the Supreme Administrative Court on the compatibility between the CFC rules and the Double Tax Treaties were reported. Finally, the SAC affirmed that the DTT should prevail over CFC rules.
UK	Sec. 747-756, ICTA 1988 Schedules 24-26		If a foreign company is controlled in the UK and subject to a "lower level of taxation" (i.e. less than 75% of the comparable UK rate) then the company is a CFC and, if none of the exemptions apply (e.g. "low profit exemption", "exempt activities" and "excluded territories") its profits will be apportioned to and taxed in the UK.		Several decisions (both at national and European level) have questioned the EU compatibility of the CFC rules so that a new CFC regime will soon be applicable (cf. below).

	Schedule 20, Finance Bill, 2012 (future measure) – will be inserted as Part 9A, TIOPA, 2010		Under the new (draft) legislation, a non-UK resident company will constitute a CFC if it is controlled by a UK resident person (or persons). If none of the entity level exemptions apply (e.g. "low profit exemption", "low profit margin exemption", "tax exemption" and "excluded territories exemption"), only the profits of the CFC that are attributable to the UK will be apportioned to and taxed in the UK (legislation sets out several factors to attribute the profits).	This measure is expected to be applicable for accounting period beginning on/after 1 Jan. 2013 The list of the "excluded territories" is included in the draft law (thus subject to amendments). It should include most EU territories and many Third Countries	

4.6.2. Transfer Pricing Measures

46. **Introduction.** A general overview of all measures reported with respect to the selected MSs which can be qualified as anti-abuse measures in relation to Transfer Pricing is provided at the end of this section.

As a preliminary remark, as already mentioned (see paragraph 27 above), we would like to recall that it appears that in the Netherlands and Hungary , Transfer Pricing provisions are not regarded as "anti-abuse provisions" but merely as part of the general principles of the tax systems and apply both domestically and cross-border. Therefore, it does not mean that MSs with respect to which no Transfer Pricing anti-abuse measures have been reported do not have Transfer Pricing provisions in their direct tax legislation.

47. **All participating MSs have Measures in relation to Transfer Pricing**. Belgium, Cyprus, Denmark, Estonia, France, Germany, Ireland, Luxembourg, Malta, Spain, Sweden and the United-Kingdom, have reported specific measures in relation to the arm's-length requirement of transactions.

48. **Almost all reported measures provide for an adjustment of the taxable income**. The measures reported provide for an adjustment of the taxable basis if the arm's-length condition is not fulfilled.

In France**,** a documentation requirement included in tax law obliges large companies to provide their Transfer Pricing documentation to the tax authorities upon the request of the latter. The documents need to be provided within 30 days following the request and should include general information on the affiliated transaction and specific information on the audited company. Besides, additional information requirements apply in the case of transactions with an "NCJ" as defined under French tax law.

49. **Certain measures are only applicable in the case of transactions with an "NCJ" or tax haven**. In Belgium, France, Spain and the United Kingdom the reported Transfer Pricing measures specifically relate to transactions with entities located in an "NCJ" or tax haven.

In Belgium, abnormal or benevolent advantages granted are always added back to the taxable basis of the Belgian grantor when the beneficiary is located in a country where it is not subject to tax or subject to a tax regime which is notably more advantageous than the tax of the company established in Belgium. In such a case, the rule applies irrespective of whether it concerns related entities or not.

As mentioned above, in France, additional documentation requirements apply in the case of transactions with an "NCJ" as defined under French tax law.

Spain provides that transactions with entities located in tax havens are valued at fair market value, provided that this value does not result in a taxation in Spain which is lesser than the one that would have been applicable based on the agreed value or deferral of taxation. Additionally, it is compulsory to prepare Transfer Pricing documentation if the Spanish taxpayer has transactions with tax havens (even if the amount thresholds, which exempt from the preparation of Transfer Pricing documentation, are not exceeded). This rule would not apply to EU tax havens if the taxpayer proves that the incorporation and operations have a sound business purpose and the entity executes business transactions. As mentioned above, in Spain there is no definition of a tax haven but a list of jurisdiction which are considered as tax havens. This list also includes states or territories within Europe and/or the European Union (such as Cyprus)[79].Finally, in the United Kingdom, under the Transfer Pricing basic rule, where a transaction occurs with non-arm's length terms then the profits and losses of a potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision. However, there is an exemption to this rule for small and medium companies (Section 166), unless an exception in Section 167 applies[80]. One such exception is that the other affected person or a party to a relevant transaction is a resident of a non-qualifying territory, where a qualifying territory is defined as one with double taxation agreements in place including a non-discrimination provision (or a territory defined as a qualifying territory in the regulations). Therefore, a small/medium sized company may be subject to the Transfer Pricing requirement explained above (where it may otherwise have been excluded from these requirements) if it is resident in a territory which does not have a double taxation agreement in place with the United Kingdom which contains a non-discrimination provision. The United Kingdom has Double Tax Treaties in place with all the EU Member States which contain a non-discrimination provision. Therefore it is expected that only Third Countries will be affected by this rule.

[79] Cfr Appendix 2, Spain, Definition of NCJ, p 301.
[80] Cfr Appendix 2, The United Kingdom, Part 2: General Information, Measure n°6, p 371-372.

Table 8: Transfer Pricing Measures

BELGIUM	X		Art. 26 of the BITC	Any "abnormal or benevolent" advantage granted by an enterprise established in Belgium should be added back to its taxable basis, unless such advantage is taken into account in the hands of the beneficiary. Such advantage should be added to the taxable basis in any event if it is granted to a foreign related entity or if it is granted to a foreign entity which is not subject to tax or subject to a tax regime notably more advantageous than the tax regime of the company established in Belgium. Abnormal or benevolent advantages comprise all the non-arm's-length transactions.	This article is in principle not applicable in the case of Belgian beneficiaries. In addition, the burden of proof lies with the tax authorities
	X		Art. 79 and 207 of the BITC	If a Belgian resident receives an abnormal or benevolent advantage from a related entity, it cannot offset its taxable basis resulting from these abnormal or benevolent advantages received using current year losses, etc. Abnormal or benevolent advantages comprise all the non-arm's-length transactions.	The burden of proof lies with the tax authorities
CYPRUS	X		Section 33 of the Income Tax Law N118(I)/2002	If transactions between related parties are carried under terms and conditions that are different to those that would have applied on similar transactions between unrelated parties, the tax authorities have the power to adjust the taxable income so as to compensate for lost tax revenue.	
DENMARK	X	X	The Danish Tax at Source Act, Section 2, and the Danish Tax Control Act, Section 3 B	Danish transfer pricing rules apply to transactions between related parties (e.g. intergroup transactions) whether the transactions are made between residents or non-residents. The rules apply when a company or person directly or indirectly owns at least 50% of the share capital or 50% of the voting rights in another company.	Companies are obliged to disclose in the annual tax return certain information regarding type and volume of intra-group transactions. Companies also are obliged to maintain detailed and extensive transfer pricing documentation to substantiate that intra-group transactions are conducted in accordance with arm's-length principles. A company is subject to fines for failure to comply with the documentation rules.
ESTONIA	X	X	Article 18 of Regulation No. 53	As a general rule, all Estonian group companies and permanent establishments are obliged to prepare transfer pricing documentation to prove arm's length nature of the intercompany transactions.	An exemption applies to small and medium-size enterprises (SME) unless they have conducted transactions with entities located in low-tax territories.

FRANCE	X	X	Sec. L 13 AB LPF	Upon request of the tax authorities, large companies must provide further documentation on their Transfer Pricing policy. This information includes general information on the affiliated companies and specific information on the audited company. As from 1 January 2011, complementary disclosure requirements apply to transactions undertaken with companies located in an NCJ jurisdiction as defined under French tax law.	If the taxpayer cannot provide the required information, fines of EUR 10,000.00 or 5% of the adjusted profits, whichever is higher, can be imposed.
GERMANY	X		Art. 1 FTA	Any transaction between a German company and related parties which is not in line with the arm's-length principle can be considered as a hidden distribution or contribution. This entails the adjustment of the income of the company as well as a dividend WHT becoming due.	
IRELAND	X		sections 835A-835H Taxes Consolidation Act 1997	The Transfer Pricing rules apply to all trading transactions between related party group companies and the requirement is for the pricing to be at arm's length and be supported by sufficient documentation. If the pricing is found not to be at arm's length, the rules provide for one way adjustments to increase the taxable profit in Ireland either through imputation of taxable income (where income is understated) or restricting a tax deduction (where expense is overstated).	
LUXEMBOURG	X		Art. 56 and 164 LTL	In the case of a transfer of profits to a related company – resident, MS or third country – (directly or indirectly related) which cannot be justified, the profits of the resident company may be reassessed by the tax authorities. This entails that the hidden profits should be reintegrated in the taxable income of the resident company.	
MALTA	X		Art 5 (6) & (7) of the ITMA	In the case of transactions between a resident and a related non-resident person which have as an effect that the resident person has no profit or less than the ordinary profits that might be expected to rise from the business, the non-resident person shall be assessable and chargeable to tax in the name of the resident person.	
SPAIN	X		Art. 16 of the CITA	The tax authorities can review whether transactions between related parties have been executed at fair market value and, if not, make the relevant valuations and tax adjustments	

	X		Art. 17.2 of the CITA	Transactions with entities located in tax havens are valued at fair market value, provided that this value does not result in a taxation in Spain which is lesser to the one that would have corresponded to the agreed value or deferral of the taxation.	The transactions should be documented according to Spanish Transfer Pricing rules
SWEDEN	X		Par. 10-20, Chapter 14 of the SITA	Agreements between related parties can be overlooked for the part they depart from what would have been agreed upon between unrelated parties.	
UK	X		Sec. 166 and 167 of TIOPA 2010	Small and medium-sized companies can benefit from an exemption of the basic Transfer Pricing rule that all transactions should occur at arm's length. However, this exemption is not available in the case of transactions with residents located in a non-qualifying territory (i.e. countries with which the UK has not concluded any Double Tax Treaty or a Double Tax Treaty without a non-discrimination article).	

4.6.3. Deductibility of Expenses

50. **Introduction.** A general overview of all measures reported with respect to the selected MSs which can be qualified as linked to the deductibility of expenses is provided at the end of this section.

This section only relates to measures which in first instance limit or deny the deductibility of certain expenses. We have thus not commented on general Transfer Pricing measures, which were already commented above.

51. **Measures in relation to the deduction of interest expenses were reported with respect to all MSs**. All participating MSs have reported measures in relation to the deductibility of interest expenses. Apart from Hungary and Malta, all participating MSs also have specific rules in relation to interest deductibility.

Indeed, in Hungary and Malta the deductibility of interest is included in a broader provision also relating to other types of expenses, which are classified as "costs and expenses" for Hungary and also include discounts and premiums paid for Malta.

In Hungary, costs and expenses are not deductible in case:

- They relate to transactions entered into for the sole purpose of reducing tax[81]; or
- In case they are paid out to an NCJ as defined under Hungarian tax law. In this case the taxpayer can however still deduct the given costs and expenses provided he can prove that the costs and expenses were incurred for the benefit of its economic operations[82].

Both measures in Hungary are aimed at protecting the corporate income tax base.

In Malta, the scope of application of the reported measure is more restrictive as it only applies to interest, discount or premiums paid which relate to immovable income located in Malta and which are paid out by a Maltese resident to a related person. The purpose of this measure is to avoid that such income which is tax exempt in Malta, as it is paid out to non-resident Maltese and related person, is also deductible in the hands of the paying entity[83]. Again the purpose of such measure can be described as protecting the tax base in Malta.

52. **Six thin capitalisation rules reported.** Within the framework of the current Study Belgium, Denmark, Hungary, Luxembourg, the Netherlands and the United Kingdom have reported a thin capitalisation rule.

[81] Cfr Appendix 2, Hungary, Part 2: General Information, Measure n°3, p 185.
[82] Cfr Appendix 2, Hungary, Part 3: Detailed Information, Measure n°1, p 191.
[83] Cfr Appendix 2, Malta, Part 2: General Information, Measure n°6, p 270.

There is no uniform debt-to-equity ratio in these different MSs. Belgium has reported a ratio of 7/1. This ratio however is amended to a 5/1 ratio (applicable as from 1 July 2012). In Denmark the overall ratio is set at 4/1, whereas Luxembourg has reported a 85/15 ratio. In the United Kingdom, there is no debt-equity ratio but the thin capitalisation rules apply the Transfer Pricing rules to loan relationships between connected parties. Therefore the aim of the thin capitalisation legislation is to prevent groups granting excessive loans to UK companies (who would not be able to borrow this amount/borrow on these terms on an arm's-length basis) in order to obtain a deduction for UK tax purposes. In the Netherlands according to the thin capitalisation provision the taxpayer is under-capitalised if one of the following two ratios is exceeded: (i) debt-equity ratio of 3:1 or (i) the average concern ratio (the taxpayer may choose the more beneficial ratio).

Both Belgium and Denmark have reported a general thin capitalisation rule in the case of interest paid to related entities. In Luxembourg the thin capitalisation rule only applies on the intra-group financing of participations.

Apart from the thin capitalisation rule for intra-group financing, the thin capitalisation rule in Belgium is also applicable in the case of interest payments made to beneficiaries which are not subject to an ordinary income tax or which, as far as the interest income is concerned, can benefit from a regime which is significantly more advantageous than the Belgian tax regime.

53. **Three countries have measures which provide for a limitation of deductibility based on an "Earnings Before Income Tax (Depreciation and Amortisation)" approach**. Denmark, Germany and Spain have specific rules limiting the deductibility of interest expenses based on the EBIT (Denmark) or the EBITDA (Germany and Spain). In Denmark, the deduction of interest is limited to 80% of the EBIT income of the company. In both Germany and Spain interest expenses are not deductible if they exceed 30% of the EBITDA. All three countries have a minimum threshold in order for this rule to apply. The threshold is different for each country: DKK 21.3 million (Denmark), EUR 3 million (Germany) and EUR 1 million (Spain).

54. **Measures specifically aimed at payments to "NCJ" or tax haven countries**. Belgium, Estonia, France, Hungary, Ireland and Spain have measures which are specifically aimed at costs or expenses incurred in relation to beneficiaries (i) which are not subject to an ordinary income tax or which, as far as the interest income is concerned, can benefit from a regime which is significantly more advantageous than the Belgian tax regime (Belgium); (ii) which are located in low tax rate territory (Estonia); (iii) which are subject to an effective taxation of less than 50% than that of similar French tax residents; (iv) which are located in an NCJ jurisdiction as defined under domestic tax law (France, Hungary and Spain) or (v) which are resident in a non-tax territory (Ireland).

Between the different Member States as referred to above, disposing of measures specifically aimed at payments to "NCJ" or tax haven countries, only Spain disposes of a list of tax haven countries which is also applicable for the purposes of this measure. The given list of tax haven companies is included above (cfr Table 4, Comparison of existing lists).

Apart from Ireland, the given measures (in Belgium, Estonia, France, Hungary and Spain) apply irrespective of whether the payment is performed between related companies.

In addition, these rules apply in all countries, with the exclusion of Ireland, to any type of expense or cost paid out. Only Ireland has limited the scope of this deductibility rule as it only applies to payments of short interest to a related group company.

55. **Three countries have reported measures in relation to hybrid mismatch arrangements**. Denmark, Ireland and the United Kingdom have reported certain measures in relation to hybrid mismatch arrangements. Apart from certain specific measures for Denmark, both Denmark and Ireland have a measure which restricts the deductibility of interest if the interest income is not taxed in the hands of the beneficiary due to the fact that it is considered as equity income in the hands of the beneficiary. Ireland refers in this respect specifically to the figure of the "Profit Participating Loan", nevertheless, it also limits the scope of application mainly to interest payments to beneficiaries located in Third Countries with which Ireland has not concluded a Tax Treaty. The United Kingdom also a measure against hybrid mismatch arrangements, the purpose of which is to "tackle arbitrage, where companies seek to gain a tax advantage by exploiting differences within and between tax codes and excessive claims for double taxation relief"[84].

56. **Nearly all measures are included in local tax law**. Apart from Luxembourg, all measures which have been reported in relation to the deductibility of expenses are included in local tax law.

Only Luxembourg has commented on a measure which results from the administrative practice and which provides for a thin capitalisation rule in the case of intra-group financing of participations.

[84] Cfr Appendix 2, The United Kingdom, Part 2: General Information, Measure n°5, p 370.

Table 9: Deductibility of Expenses

BELGIUM	Business expenses (including interest expenses)	Business expenses (including interest expenses)	Art.54 of the BITC	Certain types of business expenses (interest expenses, license retributions, etc.) are not deductible when paid out to beneficiary who is not subject to tax on such income or if the applicable tax regime for such income is substantially more favourable than the one applicable to such income in Belgium.	Possibility for counterproof (payment corresponds to real and sincere transactions and does not exceed normal limits)
	Interest expenses		Art. 55 of the BITC	Interest expenses are not deductible if the amount is not corresponding to the applicable market rate bearing in mind the specific facts and circumstances.	Non-applicability of the rule for interest paid out to financial entities (National Bank, etc.)
	Interest expenses		Art. 198, 11° of the BITC	In the case of interest paid to a beneficiary who is part of a group to which the Belgian debtor also belongs, a 5/1 thin capitalisation rule is applied.	This rule has been adopted, but has not yet entered into force. If no Royal Decree is published the rule will be applicable as from 1 July 2012
	Interest expenses		Art. 198, 11° of the BITC	In the case of interest paid to a beneficiary who is not subject to an ordinary income tax regime or who, as far as the interest income is concerned, is subject to a taxation system which is significantly more advantageous than the Belgian tax regime, a 7/1 thin capitalisation rule is applied. A new rule has been adopted to amend said thin capitalisation ratio to 5/1. This rule has however not yet entered into force.	This rule has been adopted, but has not yet entered into force. If no Royal Decree is published the rule will be applicable as from 1 July 2012
CYPRUS	Interest expenses		Art. 11 of the ITL	Interest expense which relates or is deemed to relate to the acquisition of assets not used in the business is not deductible for tax purposes.	The rule also applies if a loan exists but cannot specifically match with the acquisition of assets used for business purposes
		All types of expenses	Art. 9 of the ITL	Business expenses which are not supported by underlying documentation are not deductible.	
DENMARK		All types of expenses	Sec. 5G of the TAA and Sec. 31.2 of the CTA	The measure aims at avoiding multiple deduction of expenses.	Measure in relation to hybrid mismatch arrangements
		Payments done by Danish transparent companies		Under certain circumstances both Danish companies (as well as a PEs of foreign companies) can be considered as transparent companies. In such a case payments done by these companies to their foreign parent company (or head office) are not deductible as they are deemed to occur within the same legal entity.	Measure in relation to hybrid mismatch arrangements

	Payments qualified as interest under Danish tax law		Sec. 2B of the DCTA	In the case of a hybrid financial instrument which is considered as debt under Danish tax law, but as equity under the tax legislation of the country of residence of the counterparty, the instrument will nonetheless be treated as equity for Danish income tax purposes. This entails no deduction of interest expenses or capital loss and application of a WHT on the "deemed dividend payment".	Measure in relation to hybrid mismatch arrangements
		Distributions by a Danish fiscally transparent entity	Sec. 2C of the DCTA	In the case of en entity which is considered as fiscally transparent for Danish tax purposes, but as a separate taxable entity for foreign tax purposes, the entity will be subject to the same tax treatment as Danish resident companies (i.e. distributions will be considered as dividend distributions also subject to WHT).	Measure in relation to hybrid mismatch arrangements
	Interest payments		Sec. 11 of the CTA	The deduction of gross interest and related party debt is disallowed to the extent that the overall debt to equity ratio exceeds 4/1.	Thin capitalisation rule
	Financing costs (interest, losses on debts, receivables, losses on shares, etc.)	Financing costs (interest, losses on debts, receivables, losses on shares, etc.)	Sec. 11B of the CTA	According to the asset-based rule if financing costs paid by a Danish company exceed an amount of DKK 21.3 million (on a stand-alone basis or if part of a joint tax group), the deduction of these costs is limited to 4.5% of the tax basis of certain assets.	
	Interest payments		Sec. 11C of the CTA	The interest deduction is limited to 80% of the EBIT (earnings before interest and tax) income of a Danish company, with a minimum deduction of DKK 21.3 million.	
ESTONIA	Different types of payments, including interest payments	Different types of payments (interest payments, payments of fines, advances, etc.)	Art. 52 of the EITA	Certain payments performed to entities located in a low tax rate territory are not considered as business expenses and are therefore not deductible and subject to a 21/79 corporate income tax (similar as hidden profit distributions).	
	Interest payments		Art. 29(7) of the EITA	If interest payments done by an Estonian taxpayer exceed the arm's-length rate, the interest exceeding the arm's-length amount is subject to 21% WHT on gross amount.	
FRANCE		Different types of expenses (remuneration, fees and similar payments)	Sec. 238 A of the FTC	Expenses resulting from transactions undertaken by French companies with non-residents which are subject to an effective taxation which is less than 50% than that of similar French residents, are non-deductible.	Possibility of counterproof (payment related to an effective operation and not related to an "abnormal" act of management)

		Financing costs for the acquisition of shares	Sec. 40 of the FFA	The deduction of financing costs for the acquisition of shares (of which the acquisition value exceeds EUR 1 million) is limited based on a specific ratio if the French acquiring company is not able to demonstrate that it takes the decisions relating to these shares and that it actually exercises the control and influence over the acquired company.	The limited deductibility only applies as from the year of acquisition until the eighth anniversary of the acquisition. The counterproof can only be provided in the year of acquisition
	Interest payments		Sec. 223 B al. 7 of the FTC	The deduction of interest is limited within a tax group when a company is purchased from a related party and joins the tax group afterwards. This rule applies even if there is no intra-group debt.	The limited deductibility of interest only applies during 8 years following the purchase of the company from a related party
		Different types of payments (remuneration, fees and similar payments)	Sec. 238A paragraph 3 of the FTC	There is a general interdiction of the deduction of expenses resulting from transactions with non-resident entities located in a non-cooperative jurisdiction as defined in the FTC.	Possibility for counterproof (the main purpose and effect of the transaction is not to shift income outside France and also a reporting requirement on a detailed tax return)
GERMANY	Interest payments		Art. 4h ITA and Art. 8a CITA	If the net interest payments exceed a threshold of EUR 3 million, interest expenses are non-deductible to the extent that net interest payments exceed 30% of the EBITDA (earnings before interest, taxes, depreciations and amortisations). Exceptions are available and related to the "stand-alone exception"(is the German business part of an affiliated group?) and "equity-test" (comparison of the equity ratio of the company as opposed to the equity ratio of the group).	Interest which cannot be deducted as a result of this measure can be carried forward in time subject to certain conditions
HUNGARY		Different types of payments	Sec. 1(2) of the CITA	If the sole purpose of a transaction is the reduction of Hungarian tax, any tax reduction, benefit or tax relieving provision may not be applied.	
		Different types of payments	Sec. 8 (1) d) and Point A) 9 of Annex 3 of CITA	Costs and expenses incurred in relation to a CFC (as determined under Hungarian tax law, notion of "NCJ") do not qualify as business expenses and cannot be deducted from a tax perspective.	Possibility of counterproof (prepare specific documentation for each transaction)
	Interest payments		Paragraphs (1) j) and (5) of Section 8 of CITA.	According to the Act LXXXI of 1996 on corporate tax and dividend tax, the total of the interest expense and the tax base decreasing transfer pricing adjustment, relating to certain amount of liabilities exceeding three times the equity is not deductible from the company's corporate income tax base.	
IRELAND	Interest payments		Sec. 110 TCA 1997	Interest deduction on profit participating loans is restricted if it is not paid to a qualifying company (including mainly companies located in third countries with which Ireland has not concluded a DTT). Generally, the purpose of the measure is to avoid a reduction of the Irish tax base, where the interest income is not being taxed in the hands of the beneficiary.	Measure in relation to hybrid mismatch arrangements

	Interest payments		Sec. 452A TCA 1997	Payments of short interest (interest on loans of less than 1 year) to a 75% related party group company resident in a non-tax territory are reclassified as non-deductible distributions. In the case of interest payments performed by a qualifying company the interest will nonetheless be partially or entirely deductible depending on the effective tax rate applied in the non-treaty jurisdiction.	
	Interest payments		Sec. 130(2B) TCA 1997	In the case of interest paid as a result of funds borrowed for non-trade purposes (i.e. interest on funds borrowed to buy shares in a company) from a non-treaty resident 75% group company, the interest is reclassified as a non-deductible distribution.	
	Interest payments		Sec. 817C TCA 1997	The amount of interest deductible as trading expense is limited. This measure attempts to match the timing of the interest deduction in the Irish trading company with the timing of the taxation in the hands of the beneficiary.	
LUXEMBOURG	Interest payments		(Administrative practice)	Thin capitalisation rules are applied based on an administrative practice. In the case of intra-group financing of participations, a 85/15 debt-to-equity ratio applies. If the investment is financed with less than 15% equity, the surplus will be recharacterised as a hidden distribution of profits. This entails that the surplus will not be deductible and will be subject to a WHT of 15%.	
MALTA	Different types of payments including interest	Different types of payments (interest, discount or premium paid)	Art. 26 (h) of the ITA	Certain payments of interest are not tax deductible in the hands of the debtor if it relates to immovable property situated in Malta and the interest is exempted as it is paid to a non-resident Maltese person which is also a related person.	
NETHERLANDS	Interest payments		Art. 15ad CITA 1969	The deduction of interest on acquisition debt will be restricted if a Dutch company is acquired by a Dutch holding company with which it subsequently joins in a fiscal unity. The restriction applies to interest (including costs) related to third and related party debt with which the acquisition is financed. Based on this measure it is no longer possible to offset interest costs incurred by the parent company on acquisition debt against profits generated by the acquired company.	
	Interest payments		Art. 13l CITA 1969 (proposed)	The interest deduction limitation will apply to excessive interest expenses on debt relating to participations (“participation debt”). A mechanical formulaic rule determines the participation debt amount. The non-deductible interest expenses will equal the fraction (average participation debt/average total debt) multiplied by the total interest expenses of the Dutch taxpayer.	

	Interest payments		Article 10d CITA 1969	According to the thin capitalisation provision the taxpayer is under-capitalised if one of the following two ratios is exceeded: (i) debt-equity ratio of 3:1 or (i) the average concern ratio. In this case, interest deduction on inter-company loans is restricted.	
	Interest payments		Art. 10a CITA 1969	Interest deduction is restricted if certain transactions take place (tainted transactions, e.g. a dividend distribution or a capital contribution).	Interest deduction is nevertheless secured if both (i) the loan and (ii) the "tainted" transaction were carried out for predominantly sound business purposes Interest deductible if subject at the level of the creditor to a profit or income tax that is reasonable according to Dutch standards
SPAIN		Different types of expenses	Art 14.1.g) of the CITA	Expenses derived from transactions executed, directly or indirectly, with entities resident in tax havens or paid through entities resident in tax havens are not tax deductible.	Possibility of counterproof (transactions have been effectively carried out)
	Interest expenses		Art. 14.1.h CITA	Interest expenses paid to related parties and relating to the acquisition of shareholdings or contributions to the capital of group companies are not tax deductible.	Possibility of counterproof (transactions have sound business purposes)
	Interest expenses		Art. 20 of the CITA	Interest deduction is only available for net interest expenses up to 30% of the EBITDA (including some adjustments) provided the net interest expense exceeds EUR 1 million (the first EUR 1 million being deductible, even though it exceeds the 30% of the EBITDA). This rule does not apply to credit institutions or a taxpayer which is part of a group of companies.	Interest deduction which cannot be applied can be carried forward up to maximum 18 years. If the net interest expense is less than the 30% EBITDA, the difference would be used to increase the limit -30% EBITDA- in the 5 following years
SWEDEN	Interest expenses		Paragraph 10a-e, Chapter 24 of the SITA	Interest expenses due to a related party, used to finance the acquisition of shares from a related party, are non-deductible.	Possibility of counterproof (the interest income is subject to an effective tax rate of at least 10% and there are sound business reasons for both the debt and the acquisition)
UK	Interest expenses		Part 4 of TIOPA 2010	Interest payments to related entities are not deductible if they can be considered as not being at arm's length. Only the portion of the interest expense which meets the arm's-length condition is deductible.	
		Different types of expenses	Part 6 TIOPA 2010	The purpose of this measure is to "tackle arbitrage, where companies seek to gain a tax advantage by exploiting differences within and between tax codes and excessive claims for double taxation relief"	

4.6.4. Measures on Outbound Income

57. **Introduction.** A general overview of all measures reported with respect to the selected MSs which can be qualified as linked to outbound income is provided at the end of this section.

As a preliminary remark, as already mentioned (see paragraph 29 above), some countries consider the WHT (or a higher rate of WHT towards some countries) as an anti-abuse measure, as it concerns measures which generally foresee in a (higher) WHT rate which will be applied in case of payments to beneficiaries located in countries with which the Source State has for instance not concluded a double tax treaty. Whereas for other countries, they consider that it is just the result of the application of their normal tax legislation (based on the interactions between double tax treaties and local tax legislation: the higher WHT rate will be applied by default, in the absence of an applicable double tax treaty, and not the opposite).

58. **Nine MSs have reported measures in relation to outbound income**. Belgium, Denmark, Estonia, France, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom have specific measures in the case of income paid by a resident entity to a non-resident entity. The types of outbound income included in these measures are dividends (Belgium, Denmark, France, Ireland, Luxembourg and Spain), interest (Belgium, Denmark, France, Ireland and the United Kingdom), royalties (Denmark and Ireland), capital gains on shares (France and Spain), capital gains on real estate (France) and payments in consideration of the supply of services (Estonia and France). The implications of these measures will be outlined in the below paragraphs.

59. **Most measures imply the outbound income to have been paid to an "NCJ" or tax haven country.** All measures on outbound income which have been listed by the MSs are only applicable if the outbound income is paid out to beneficiaries located (i) in countries with which no "Tax Information Exchange Agreement" has been concluded (Denmark), (ii) in non-tax treaty jurisdictions (Belgium, Denmark, Ireland, Luxembourg and the United Kingdom) (iii) in low tax territories (Estonia), (iv) in "NCJs" as defined under domestic tax law (France) and in (v) tax havens (Spain).

60. **Almost all measures refer to a reduction or exemption of (withholding) tax which is not available for these outbound payments**. Apart from 2 measures in Estonia and Ireland, all other measures (reported by Belgium, Denmark, France, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom) refer to the non-applicability of an internal reduced tax rate or exemption if these outbound payments are performed to entities as define above.

In Estonia, services provided by non-resident entities located in a tax haven are considered to be provided on Estonian territory and therefore a WHT of 21% is imposed. In addition, Ireland provides for the possibility of a residual charge to Irish income tax in the case of interest paid to non-residents located in a non-treaty territory.

Table 10: Treatment of Outbound Income

BELGIUM	X	X			Art. 107, §2, 10°, and 106, §5, RD/BITC	Belgian tax law provides, under certain conditions, for some WHT exemption in case of payment of Belgian source movable income (interest and dividends) paid to non-resident taxpayers. Some anti-abuse measures apply in specific circumstances.	
DENMARK	X				Section 65 DTSA	For dividends paid out on portfolio shares to a foreign shareholder, a reduced WHT rate of 15% is only applicable (instead of the general rate of 28%) if the beneficiary is located in a country with which Denmark has concluded a "Tax Information Exchange Agreement".	
		X			Section 65 D DTSA	Provided no specific exemptions apply (for instance in relation to the CFC legislation), the general WHT exemption on interest is not available for interest paid to a foreign group member company that is tax resident outside the European Union and outside any of the states with which Denmark has concluded a tax treaty. A WHT of 25% is levied.	
			X		Section 65 C DTSA	Royalties are subject to a 25% WHT in Denmark. Based on the Double Tax Treaties concluded by Denmark and the EU Interest & Royalty Directive, an exemption is generally available. However, such exemption does thus generally not apply for beneficiaries located outside the European Union with which Denmark has not concluded a Double Tax Treaty.	
ESTONIA				X	Art. 29 (3), Ar. 41 p 11 and Art. 43 (1) (1) of the EITA	Services provided to an Estonian resident by an entity located in a low tax rate territory are considered to be provided on the Estonian territory. As a result hereof the payments in relation to the services are subject to a 21% WHT on the gross amount.	
FRANCE	X	X		X	Sec. 125 A, 125-0 A, 119 bis, 182 A bis, 182B 39 duodecies and 219 of the FTC	For outbound payments (i.e. dividends, interest and payments in consideration of the supply of any kind or services), a 50% WHT is applicable to these payments if the beneficiary is located in a "NCJ" jurisdiction as defined under French tax law.	There is a possibility of counterproof (in the case of *bona fide* commercial reasons)
				X	Sec. 244bis, Sec. 244bis A of the FTC	Real estate capital gains realised in France by a non-tax resident are taxed at a 33, 1/3% tax rate. If the beneficiary is located in a "NCJ" jurisdiction as defined under French tax law, the WHT rate is increased to 50%.	
				X	Sec. 244bis B of the FTC	Capital gains realised in France upon the sale of shares of a French company by a non-tax resident are taxed at 19%. If the beneficiary is located in an "NCJ" jurisdiction as defined under French tax law, the WHT rate is increased to 50%.	
IRELAND			X		Sec. 242A of the TCA 1997	Payments of patent royalties by a company resident in Ireland to a non-resident company may be liable to an Irish WHT of 20%. An exemption is generally available upon certain conditions and provided that the beneficiary of the payments is located in an MS or a country with which Ireland has concluded a Double Tax Treaty which imposes a tax that generally applies to interest receivable in that territory. In the case of payments to non-treaty territories a WHT exemption is generally not available.	

		X			Sec. 246 (3) (h) TCA 1997	Payments of interest made by a company resident in Ireland to a non-resident company may be liable to an Irish WHT of 20%. An exemption is generally available upon certain conditions and provided that the beneficiary of the payments is located in an MS or a country with which Ireland has concluded a Double Tax Treaty which imposes a tax that generally applies to royalties receivable in that territory. In the case of payments to non-treaty territories, a WHT exemption is generally not available.	
		X			Sec. 198 TCA 1997	Payments of interest by a company resident in Ireland to a non-resident company may be liable to a residual charge to Irish income tax chargeable on the non-resident company. An exemption from this residual charge is generally available upon certain conditions and provided that the beneficiary of the payments is located in an MS or a country with which Ireland has concluded a Double Tax Treaty which imposes a tax that generally applies to interest receivable in that territory. In the case of payments to non-treaty territories, a WHT exemption is generally not available.	
	X				Sec. 172D TCA 1997	Dividends paid by a company resident in Ireland to a non-resident company may be liable to an Irish WHT of 20%. Different exemptions are available based on the EU Parent Subsidiary Directive, or in the case of dividends paid to a beneficiary which is located in an MS or a country with which Ireland has concluded a Double Tax Treaty, etc. Apart from some specific exemptions that may apply, there is no general exemption in the case of dividend payments to non-treaty resident companies.	
LUXEMBOURG	X				Art. 147 LITL	Dividends paid by a company resident in Luxemburg to a non-resident company may be liable to a WHT of 15%. Different exemptions are available based on the EU Parent Subsidiary Directive, or in the case of dividends paid to a beneficiary which is located in an MS or a country with which Luxembourg has concluded a Double Tax Treaty, etc. Apart from some specific exemptions that may apply, there is no general exemption in the case of dividend payments to non-treaty resident companies.	
NETHERLANDS	X				Art. 4 of the DDWTA	If the receiver of the dividend is not the beneficial owner, there is no WHT exemption on dividends available.	The purpose of this measure is to avoid dividend stripping
	X				Art. 1(7) of the DDWTA	This measure introduces a dividend WHT liability for a Dutch Coop (cooperative society) if a Coop is inserted in a corporate structure with the aim of avoiding (foreign) WHT.	
SPAIN	X			X	Art. 118 of the CITA	Generally dividends paid by a ETVE to a non-resident entity or capital gains realised upon the disposal of an ETVE are considered as non-Spanish sourced income and thus fall outside the scope of Spanish (withholding) taxation. This non-subjection is however not applicable if the beneficiary is located in a tax haven jurisdiction.	

	X				Art. 14.1.h. of the NRITA	Dividends paid by a company resident in Spain to a non-resident company may be liable to a Spanish WHT. Specific exemptions are available based on the EU Parent Subsidiary Directive. These exemptions are not available for beneficiaries located in a tax haven.	
	X	X			Art. 14.2 of the NRITA	Certain exemptions from WHT applicable to non-resident entities without a permanent establishment in Spain are not applicable if the income has been obtained through a tax haven.	
UK		X			(Pending proposal)	Currently WHT is only levied on yearly interest but not on interest relating to loans of less than one year. In addition, many WHT exemptions are available in the case of interest payments to a beneficiary located in a tax treaty jurisdiction. A possible change has been suggested to also levy a WHT on interest relating to loans of less than a year. This would severely impact interest payments to non-treaty jurisdictions.	

4.6.5. Measures on Inbound Income

61. **Introduction.** A general overview of all measures reported with respect to the selected MSs which can be qualified as linked to inbound income is provided at the end of this section.

62. **Three MSs have reported specific anti-channelling measures in the case of a Foreign Tax Credit (below *"FTC"*).** In the case of foreign movable income for which an FTC is available, in Belgium, tax law provides that the FTC is not creditable in the case of channelling. Channelling entails that the lender in reality has acted on behalf of a third party who has provided the necessary funds for the transaction and who assumes the credit risk of the operation. Also in Cyprus and Malta a similar rule exists to avoid companies to be used as vehicles set up for the benefit of the FTC.

63. **In the case of a participation exemption regime, the regime generally provides for subject-to-tax conditions.** When a participation exemption regime is provided so as to exempt dividends or capital gains in the hands of a local taxpayer, the regime generally requires certain conditions to be complied with. All countries who have referred to this regime mention that one of the conditions for the participation exemption regime to apply is that the distributing company complies with a "subject-to-tax condition".

Again the interpretation of the "subject-to-tax" condition between the various countries is different. In Belgium, Luxembourg and Spain, reference is made to the local tax regime to assess whether the "subject-to-tax" condition is met in the hands of the distributing company. In order for the condition to be complied with in these countries, the company distributing the dividend (or which is underlying the capital gain on shares) should be subject to a foreign tax which is similar to the local tax regime or not substantially more advantages than the local tax regime. In Belgium, tax law specifies that this requires a nominal or effective tax rate of at least 15%. In Luxembourg, it is specified that the distributing company should be subject to an effective tax rate of at least 50% of the official rate of Luxembourg corporate income tax. In Spain, the non-resident entity must be subject to a tax which is similar as the Spanish corporate income tax.

In order for the subject-to-tax condition to be complied with in France, the distributing company may not be located in an "NCJ" as defined under French tax law whereas in Estonia, dividends received from subsidiaries located in "low tax rate territories" do not qualify for the participation exemption regime.

In Denmark, there is a rule specifically addressing hybrid mismatch arrangements according to which dividends received are no longer tax exempt if the subsidiary is able to claim a tax deduction for the dividends. The rule does not apply if the dividends are covered by the EC Parent-Subsidiary Directive.

Finally, Ireland does not exempt capital gains on shares relating to a company which is not located in an EU Member State or in a state with which Ireland has concluded a Double Tax Treaty.

Table 11: Treatment of Inbound Income

BELGIUM			X	FTC	Art. 37 and Art. 285-289 of the BITC	In the case of foreign movable income (such as interest or royalties) an FTC is available upon certain conditions. An FTC is not creditable in the case of channelling. Channelling entails that the lender in reality has acted on behalf of a third party who has provided him with the necessary funds and who assumes the credit risk of the operation.	
	X			Participation exemption regime	Art. 202 and 203 of the BITC	A Belgian company can benefit from a participation exemption regime for dividends it receives provided certain quantitative and qualitative or "subject to tax" conditions are met. One of these conditions requires that the company distributing the dividend is subject to a foreign tax similar to the Belgian corporate income tax or is not located in a country where the common tax regime is substantially more advantageous than in Belgium.	A tax regime is considered substantially more advantageous if the nominal or effective tax rate is below 15%. MSs are considered not to have a tax regime which is substantially more advantageous.
		X		Other (capital gain exemption)	Art. 192 of the BITC	In the case of a capital gain realised on shares by a Belgian company, the capital gain can be exempted from Belgian corporate income tax provided certain conditions are met. These conditions also include the qualitative or "subject to tax" conditions as applicable for dividends received.	
CYPRUS			X	FTC	Art. 35 and 36 of the ITL	In order to avoid Cypriot companies to be used as vehicles set up for the benefit of the FTC, the FTC is computed on a source-by-source basis.	
	X			Participation exemption regime	Article 3 of the SDC Law	No exemption is granted for dividends derived from substantially passive and low-taxed source.	Low-taxed is interpreted to mean below 5%.
DENMARK	X			Participation exemption regime	Section 13 CTA	This is a rule specifically addressing hybrid mismatch arrangements. Dividends received by a Danish parent company are no longer tax exempt if the subsidiary is able to claim a tax deduction for the dividends. The rule does not apply if the dividends are covered by the EC Parent-Subsidiary Directive.	As from 2011, the rule also applies if the deduction has been made in a lower tier subsidiary and the dividend has not been taxed in a subsidiary inserted between the subsidiary claiming the deduction and the Danish parent company.
ESTONIA	X			Participation exemption regime	Art. 50 (1) of the EITA	Dividends received from subsidiaries located in low tax rate territories do not qualify for the participation exemption regime.	
FRANCE	X			Participation exemption regime	Sec. 145, paragraph 6-j of the FTC	As from 1 July 2011, dividends received from subsidiaries located in "NCJ" as defined under French tax law cannot benefit from the participation exemption regime.	

		X		Other (capital gain exemption)	Sec. 39 duodecies and 219 of the FTC	As from 1 July 2011, the exemption regime for capital gains on shares is not applicable for capital gains realised on shares from subsidiaries located in "NCJ" as defined under French tax law .	
HUNGARY	X	X		Participation exemption regime and Other (capital gain exemption)	Sec. 7 (1) g) and gy), CITA Sec. 8 (1) m), CITA	100% of the dividend income and gain (as defined in Hungarian legislation) may be deducted from the corporate income tax base, except for dividend received from CFCs and gain related to shareholdings in CFCs.	
IRELAND	X			Other	Sec. 129 A of the TCA 1997	In the case of dividends paid from one Irish tax resident company to another Irish tax resident company, no exemption from Irish tax is available if the dividend results from profits which have been earned by an Irish resident paying company before it become an Irish tax resident. This measure aims at avoiding repatriation of profits from a foreign subsidiary through migration of residence into Ireland followed by a dividends distribution.	
		X		Other (capital gain exemption)	Sec. 626 B and Sec. 626 C of the TCA 1997	Capital gains on shares made by an Irish resident company upon the disposal of qualifying shareholdings cannot benefit from a tax exemption if the company being disposed of is not located in an EU Member State or in a country with which Ireland has not concluded a Double Tax Treaty.	
		X		Other (capital gain exemption)	Sec. 616 of the TCA 1997	Transfer of chargeable assets between companies in the same Irish capital gains tax group are deemed to take place at no gain/no loss. As non-EU resident companies cannot participate in such a capital gains tax group, they cannot benefit from the said exemption.	
LUXEMBOURG	X			Participation exemption regime	Art. 166 of the LTL	A company can benefit from a participation exemption regime for dividends it receives provided certain conditions are met. One of these conditions requires that the company distributing the dividend is subject to a foreign tax similar to the Luxembourg corporate income tax.	This equivalent taxation rule requires that the distributing company in the country of residence is subject to an effective tax rate of 50% of the official rate of Luxembourg corporate income tax
MALTA			X	FTC	Art. 95 of the ITA	In the case of a series of transactions which are affected with the sole or main purpose of reducing the amount of tax payable by any person in Malta by use of the FTC, the taxpayer can be assessed as if the provisions of the tax credit did not apply.	

NETHERLANDS	X			Participation exemption regime	Art. 13 and 13a CITA 1969	The participation exemption does not apply to participations held as a portfolio investment (intention test). The provision contains an "escape" to ensure that the Dutch participation exemption does apply to a subsidiary, although it is "held as a portfolio investment". This "escape" applies if the subsidiary is subject to a profit tax resulting in a degree of taxation that is reasonable according to Dutch standards (subject to tax test) or if it has sufficient "active" assets (asset test).	
			X	FTC (income PE)	15g CITA 1969	Generally, income from a foreign permanent establishment ("PE") is exempt at the level of the Dutch head office (the exemption, a so-called "object exemption", applies to both profits and losses of the foreign PE. Under certain conditions, a (less favourable) tax credit instead of a tax exemption applies (art. 15g CITA 1969). This is the case, generally speaking, where: (i) the activities of the PE consist of "passive" financing activities and (ii) the PE's profits are not subject to a tax that is reasonable according to Dutch standards.	
SPAIN	X	X		Participation exemption regime	Art. 21 of the CITA	A participation exemption regime is available for dividends and capital gains from non-resident entities provided that certain conditions are met. One of these conditions requires that the non-resident entity must be subject to a tax which is similar to Spanish corporate income tax. This rule is not met (the subject to tax condition) in the case of income obtained from subsidiaries resident in a tax haven jurisdiction.	In the case of an EU tax haven jurisdiction the taxpayer can provide the counterproof (sound business purpose)
			X	Other (income PE)	Art 22 of the CITA	Income resulting from foreign branches is only tax exempt provided certain conditions are met. One of the conditions is that the branch has been subject to a tax which is similar to Spanish corporate income tax and the branch is thus not located in a tax haven.	

4.6.6. Disclosure Requirements

64. **Introduction.** A general overview of all measures reported with respect to the selected MSs which can be qualified as linked to disclosure requirements is provided at the end of this section.

This section only relates to measures which impose a mandatory reporting requirement of certain transaction or payments. We have thus not commented in this section any general obligation which may apply for instance as regards documentation requirements from a Transfer Pricing perspective (cf. section 4.6.2 above).

65. **Six MSs reported specific disclosure requirements**. Belgium, France, Hungary, Ireland, Spain and the United Kingdom reported specific disclosure requirements which need to be complied with.

66. **Four of the eight measures only apply in the case of transactions with an "NCJ" or tax haven country**. Most measures which apply in the hands of taxpayer claiming a tax relief, deduction, etc. are only applicable if the transaction underlying the tax relief, deduction, etc. occurs with and "NCJ" or tax haven.

Belgium, France, Hungary and Spain all provide that in the case of expenses or costs as a result of transactions with entities located in a tax haven (Belgium and Spain) or an "NCJ" as defined under local tax law (France and Hungary), the taxpayer should comply with a specific disclosure requirement.

67. **The disclosure requirement generally applies to the taxpayer involved in a transaction**. Generally the disclosure requirement applies in the case of effective payments as a result of transactions with entities located in an "NCJ" as referred to above. Only Spain, Ireland and the United Kingdom provide a disclosure requirement which does not refer to a deduction of costs or effective benefit of a tax relief. In Spain a general disclosure requirement is currently suggested to disclose foreign bank accounts or securities held abroad[85]. Also Ireland and the United Kingdom require promoters which have assisted in a scheme which exceeds a certain value or has certain hallmarks to report this to a central body[86,87].

68. **Most recent measures (as opposed to other measures reported in the Study)**. Based on the information collected, it appears that the disclosure requirements included in the Study can all be considered as fairly recent measures. Indeed from the six countries which have reported to have specific disclosure requirements, these measures have only been enacted as from 2004 in five of the six countries (Belgium, France, Hungary, Ireland and the United Kingdom).

[85] Cfr Appendix 2, Spain, Part 2: General Information, Measure n°16, p 325.
[86] Cfr Appendix 2, Ireland, Part 2: General Information, Measure n°16, 225.
[87] Cfr Appendix 2, The United Kingdom, Part 2: General Information, Measure n°15, p 384.

69. **Penalties if reporting obligation is not complied with**. Generally, all countries provide that if the taxpayer has not complied with the provided disclosure requirement, the tax relief or deduction will be denied (Belgium, France and Hungary). In Hungary also additional penalties might become due if the disclosure requirement is not complied with.

70. **Protective and proactive purpose**. Most countries have adopted such measures in order to protect the national tax base (France and Hungary). Nevertheless other countries have also specifically mentioned a more proactive purpose for the disclosure requirements.

Belgium has stated that according to the Parliamentary Works, the disclosure requirement should enhance the efficiency of the tax audits performed by the tax authorities. In Ireland and the United Kingdom, the disclosure requirement which applies to the promoters of certain tax-related transactions are intended to gather details of particular transactions with a view of legislating against schemes that can be viewed as aggressive.

In Ireland and the United Kingdom the specified transactions which should be reported are described as transactions which:

- Involve the confidentiality of the promoter or person implementing the transaction;
- Result in a premium fee for the promoter;
- Is intended to have standardised or substantially standardised documentation;
- Involves loss schemes (both in case of individuals or companies), employment or pension schemes, income into capital schemes and income into gift schemes[88,89].

[88] Cfr Appendix 2, Ireland, Part 2: General Information, Measure n°16, p 226-227.
[89] Cfr Appendix 2, The United Kingdom, Part 2: General Information, Measure n°15, p 385.

Table 12: Disclosure Requirements

BELGIUM	Direct or indirect payments to recipients located in tax haven	Companies subject to Belgian corporate income tax or Belgian non-resident income tax	Art. 198, 10° and Art. 307 of the BITC	Since 1 January 2010, companies subject to Belgian corporate income tax are obliged to declare direct or indirect payments which exceed EUR 100,000 during the taxable period and which are paid to recipients established in so-called tax havens. For the purposes of this measure a specific list has been established listing the different tax haven countries.	If the payments are not reported, the payments are not deductible. The purpose of the measure is to enhance the efficiency of the tax audits performed by the Belgian tax authorities. If the Belgian tax authorities question certain payments upon a tax audit, the taxpayer should prove that the payments have been performed in the framework of real and sincere transactions and with persons other than artificial constructions
FRANCE	Different types of payments (remuneration, fees and similar payments)	French companies incurring expenses charged out by entities located in NCJ (as defined under French tax law)	Sec. 238A paragraph 3 of the FTC	Expenses resulting from transactions undertaken by French companies with non-residents located in an NCJ (as defined under French tax law) are only deductible provided certain conditions are met. Since 1 January 2011 the French paying company claiming the deduction should also record the expense on a detailed tax return.	If the reporting obligation is not complied with, the expenses are not deductible. The purpose of the measure is to avoid the shifting of profits to countries with a preferential tax regime
HUNGARY	Costs and expenses incurred in connection to payments performed to a CFC	Hungarian entities and foreign entities qualifying as taxpayers according to the CITA	Sec. 8 (1) d) and Point A of Annex 3 of CITA	In order for costs and expenses paid to a CFC to be tax deductible, the Hungarian taxpayer must prepare a specific documentation per agreement supporting the business purpose of the payments to CFCs including amongst others, the name of beneficiary, the registered seat of beneficiary, the tax number of beneficiary, etc.	If the reporting obligation is not complied with, the expenses are not deductible. Moreover in the case of lack of documentation, the Hungarian tax authorities may asses a penalty of HUF 2 million per missing documentation, which may also be increased in the case of repeated default. The purpose of the measure is to defend the Hungarian corporate income tax base
IRELAND	Specified transactions that may result in benefitting from a tax relief	Promoters of certain tax related transactions. Only in very limited circumstances, the users of the transactions are required to provide details	Sec. 817D-817R TCA 1997	The Finance Act of 2010 introduced a new mandatory disclosure obligation on promoters of certain tax-related transactions to give details of those transactions to the Revenue Commissioners shortly after they are marketed or made available for use. The reporting obligations apply to transactions irrespective of the country of residence of the counterparty.	The purpose of the reporting obligation is to gather details of particular transactions with a view to legislate against schemes that are viewed as aggressive

SPAIN	Transactions with entities in tax havens or shares in entities located in tax havens	Spanish taxpayers	(Included in the instructions of the corporate income tax return)	Transactions with entities located in tax havens or shares in entities located in tax havens should be reported in the corporate income tax return.	
	Bank accounts and securities held abroad	Spanish taxpayers	Draft bill against tax fraud	The Draft bill of measures against tax fraud includes a provision according to which taxpayers must inform if they have foreign bank accounts or hold securities abroad.	If the taxpayers do not comply with this reporting obligation, they face a (minimum) penalty of EUR 10,000. In addition, the income which has not been declared will not be prescribed. The Draft has been approved on April 13, 2012
UK	Transactions such as the issue/transfer of shares/debentures exceeding £100 million unless certain specific conditions are complied with	Reporting body	Schedule 17 of the Finance Act 2009	Under the International Movement of Capital rules, the reporting body must report a “reportable transaction” to an officer of Revenue and Customs within 6 months of the transaction.	The purpose of this rule is to gather information. Through these rules, information is obtained in relation to major international transactions of UK groups
	A scheme should be reported if it meets the required “Hallmarks”, such as where the promoter strives to keep the scheme confidential, etc. It generally concerns arrangements which enable a person to obtain a tax advantage or where the main benefit that might be expected to arise is a tax advantage.	Promoters marketing certain tax avoidance schemes and arrangements	Part 7 of the Finance Act 2004	The tax avoidance disclosure regime includes a mandatory disclosure obligation on promoters of certain tax-related transactions to give details of those transactions to the HMRC.	

4.6.7. General Anti-Abuse Rules

71. **Introduction: GAARs.** A general overview of all measures reported with respect to the selected MSs which can be qualified as general anti-abuse rules (below "GAARs") is provided at the end of this section. In a nutshell, GAARs can be summarised as rules applied generally that prevent taxpayers from entering into abusive transactions/planning, generally for the sole (or main) purpose of avoiding or reducing a tax charge.

72. **All the countries have reported one or more GAARs.** A total of 22 measures have been reported by 14 countries. Except Denmark, Cyprus, Germany and the Netherlands, all the reporting countries have two or more rules.

The measures are generally laid down in primary law. Of the 22 measures, only four are based on case law or derived from tax-administration practices (Denmark, France, the Netherlands and Sweden). In particular, the reported measures have generally been part of the legal system for a while. Only one reported measure has not yet been enacted (the United Kingdom) and another has been significantly amended very recently (Belgium).

73. **Types of GAARs.** In a nutshell, the reported measures can be categorised according to the following concepts/principles:

- abuse of law: the law is formally complied with but in a way that is not compatible with its spirit;
- the substance-over-form principle: the law is formally complied with but there is a lack of substance supporting the transaction/restructuring so that the tax authorities can disregard its form;
- the simulation/sham concept: a transaction is entered into by parties but not adhered to by them because another transaction, which is adhered to, alters or negates the first transaction.

The GAARs reported in the Study are briefly summarised in the following table.

Table 13: General Anti-Abuse Rules

BELGIUM		X	X	Art. 344, §1, BITC	The administration is not bound to recognise legal acts or series of legal acts effecting one and the same transaction if it establishes by means of presumptions or by other means of proof and on the basis of objective circumstances that tax abuse results.	Possibility of counter-evidence; the "Purposes" of some provisions could be unclear; "Other reasons" broader than legitimate economic or financial reasons Related concept: Simulation ("sham") doctrine	Many decisions concerning the former provision led to its being reformulated Provision too recent: no decision currently available
CYPRUS	X			Art. 33, ACTL L.4/78	Where a Cypriot tax-resident company or individual enters into any transaction which the Director of Inland Revenue considers to be "artificial" or "fictitious", this may be disregarded and taxable income may be adjusted accordingly.		
ESTONIA			X	Art. 83(4), ETA	Based on the Estonian "abuse of law" principle, fictitious transactions will not be taken into account for tax purposes (i.e. if a fictitious transaction is entered into in order to conceal another transaction) so that provisions concerning the concealed transaction apply to determine tax liability.	These two provisions are equally applicable to all taxpayers irrespective of the country of residence of the counterparty	One decision by the Supreme Court (3-3-1-42-11, 26 Sept. 2011) seems to have set a new trend in developments regarding these two provisions by attributing profits of a non-resident company to an Estonian resident, leading to taxation of these profits in the hands of the Estonian resident (hidden profit distributions)
	X			Art. 84, ETA	The Estonian "substance-over-form" principle means that, if it is evident from the terms of a transaction or act that it is performed for the purposes of tax evasion, conditions corresponding to the actual economic effect of the transaction or act apply for tax purposes.		

FRANCE			X	Art. L 64, French Proceedings Code	The abuse of law procedure enables the FTA to disregard transactions or acts carried out by a taxpayer if such transactions or acts are fictitious or if they have as their sole purpose the avoidance of French taxes that the taxpayer should have borne in the normal course of its activity and when the tax benefit of the transaction is contrary to the intent of the legislator. If the abuse of law is proved, the FTA are entitled to reassess avoided tax and to add a penalty of 40% to that tax (increased to 80% if the taxpayer is the principal investigator or beneficiary).		The Supreme Administrative Tax Court fixed the limits of the abuse of law principle in its Janfin decision
			("Normal act of management")	(Case law concept)	According to French tax case law, a company engages in an abnormal act of management if it bears an expense or deprives itself of a profit without being able to show that it is in its own interests to do so.	Burden of the proof on the FTA	Many court cases but solutions generally depend on the facts Interesting case by the Versailles Administrative Court of Appeal concerning a share buy-back deal
GERMANY			X	Art. 42, General Fiscal Code (Abgabenordnung (AO))	The purpose of this measure is to avoid non-taxation or a reduced tax charge by "abuse of legal arrangements" contrary to the spirit (if not the wording) of the tax law. In such cases, the tax is due as if an arrangement considered appropriate had been chosen by the taxpayer.	Provision amended by the Legal Tax Act of 2008; now legally defining abusive transactions (a notion developed by the courts) and avoiding incompatibility issues between this general provision and the special anti-avoidance rules	
HUNGARY	X			Sec. 1 (7), Act on Rules of Taxation	This principle requires arrangements to be classified according to their commercial substance, though it does not specify any further detail. It gives the tax authority the right to recharacterise transactions if their substance differs from their declared legal classification.	Burden of proof on the taxpayer Recharacterisation is not considered unconstitutional Limited established court practice regarding interpretation	Two Resolutions of the Supreme Court have been reported (BH2002.509 and BH2002.702); it should be borne in mind that, in Hungary, Supreme Court decisions are not binding on the tax authority
			X	Sec. 2 (1), Act on Rules of Taxation	This provision gives the tax authority the right to recharacterise transactions if a taxpayer has not executed its rights within their meaning and intent	Recharacterisation not considered unconstitutional Limited established court practice regarding interpretation	Two Resolutions of the Supreme Court have been reported (BH2005.332 and BH2011.327); it should be borne in mind that, in Hungary, Supreme Court decisions are not binding on the tax authority

IRELAND	X		X	Sec. 811, Taxes Consolidation Act 1997	This measure is designed to counteract transactions which lack commercial reality and are put in place with a view to reducing or avoiding a charge to Irish tax, i.e. the so-called "tax avoidance transaction" or "tax avoidance scheme". If the transaction is found to be a "tax avoidance scheme", the Irish tax benefit arising from it will be denied and this will result in a tax liability together with interest and penalties owed on the underpayment of tax.		Only one case (Revenue Commissioners v. O'Flynn Construction) confirming the Revenue's ability to look at the purpose for which tax relief was introduced in determining whether a transaction is a "tax avoidance scheme"
LUXEMBOURG		X		§5, Steueranpassungs-Gesetz ("StAnpG")	Where the agreement is found to be a "sham" (put in place to conceal another agreement), the tax authorities will tax the outcome of the "real" transaction that should have occurred without simulation.		
	X		X	§6, Steueranpassungs-Gesetz ("StAnpG")	This measure applies when the route chosen to carry out a transaction is one which would not usually be taken – and there is a lack of other (non-tax) reasons justifying this choice – leading to tax liability being circumvented. In that case, the fiscal consequences that the taxpayer wanted to circumvent are applied.		In its decision no. 18971 (11 May 2005), the Administrative Court took a more "substance-over-form" approach to this measure in a case concerning tax residence
MALTA	X			Art. 51(1), ITA	Any scheme which reduces the amount of tax payable by any person is disregarded when it is artificial or fictitious or it is not, in fact, given effect to. The relevant person is assessable accordingly.		A landmark decision (Enterprises' Limited v. Frank Bowers) specified that there is nothing wrong if a person legitimately makes use of the methods available in the law to reduce his ultimate tax liability, provided, naturally, that any planning falls within the parameters allowed by law
			X	Art. 51(2), ITA	This measure allows the Maltese tax authorities to nullify or modify schemes and connected advantages obtained as a direct or indirect result of any scheme whose sole or main purpose was to obtain any advantage which has the effect of avoiding, reducing or postponing liability to tax, or to obtain any refund or set-off of tax.		

			X	Art. 42, ITA	Arrangements including a series of transactions effected with the sole or main purpose of reducing the amount of tax payable by a person by reason of operation of the investment income provisions (which broadly allow for a lower tax rate of 15%) are disregarded. In such cases, the person is assessable as if the aforesaid provisions did not apply.		
			X	Art. 51(4) and (5), ITA	Specific deductions are allowed on income resulting from a scheme or a change in the shareholding of a company only if it has not been put in place or performed solely or mainly for the purpose of obtaining the benefit of any loss or of any capital allowances so as to avoid liability to tax.		Much case law, but on a case-by-case analysis so that it is difficult to provide a summary of the main case law.
NETHERLANDS			X	(Case law concept)	On the basis of the *fraus legis* concept, the tax authority has an instrument to challenge transactions (or sets of transactions) by taxpayers that are contrary to the purpose of the law.	If *fraus legis* is applied successfully, transactions are eliminated / substituted to arrive at an outcome that is in line with the object and purpose of the law.	Since this is a case law concept, the courts are decisive on applying this measure (e.g. HR, 26 May 1926 – first application of the concept – and HR, 21 Nov. 1984 – development of the main criteria of the concept)
SPAIN		X		Art. 16, SGTA	In the event of sham or simulation, the taxable event will be the transaction actually carried out by the parties. This can be a partial (another transaction is executed) or a full (no transaction is executed) simulation.		
			X	Art. 15, SGTA	When a taxable event is wholly or partially avoided or when taxable income is reduced by acts or means where the following circumstances are met (i) the acts, whether individually or jointly, are contrived or unsuitable for the result attained; or (ii) as a result of the acts, there are no significant legal or economic consequences beyond tax savings. If a tax assessment is made under this rule, the tax is imposed on those acts or businesses that are avoided.	On an annual basis, the Spanish Tax Authorities publish a set of tax collection and audit objectives which are used as guidance and focused on in their tax audits. These guidelines explain which transactions are going to be challenged by the tax authorities. The guidelines specifically state that the fight against tax fraud is a priority.	

SWEDEN			X	Tax Avoidance Act (Sw: Skatteflyktslagen (1995:575))	A legal act undertaken by a taxpayer may be disregarded if it results in a significant tax benefit for the taxpayer and the tax benefit has been the main reason for it; the final, decisive criterion is that taxing the situation as presented would be contrary to the purpose of the legislation.	Measure only applied in court cases, i.e. the Tax Agency may not apply it in levying tax without a court ruling and, thus, it has to request the court to apply the law.	Many cases, but on a case-by-case analysis so that it is difficult to provide a summary of main case law. However, most recently (HFD 2012 ref 6), the Supreme Administrative Court refused to apply the GAAR in a case relating to interest deductions where it was clear that the interest-stripping rules were not applicable
	X			(Administrative practice/case law concept)	Where an agreement or transaction is incorrectly labelled, the Tax Agency or Administrative Court may tax the agreement or transaction according to its true meaning, by applying the ordinary interpretive methods of civil law.	The measure may not be used to recharacterise the agreement itself (e.g. characterising debt as equity); the legal form of an agreement is thus generally upheld for tax purposes.	In two cases (no. RÅ 2004 ref. 27 and RÅ 2008 not. 169), the Supreme Administrative Court rejected the "true meaning" approach taken by the Swedish Tax Agency
UK			"reasonable tax planning"	Consultation document released on 12 June 2012	This future measure will target business and individuals that do not undertake "sensible and responsible tax planning", i.e. tax planning that *"can [not] reasonably be regarded as a reasonable exercise of choices afforded by the provisions of the Acts"*.	Could lead to additional corporation tax revenue of £2.1 bn a year	n/a (future measure)
			X	Interest: Sec 441 and 442, CTA 2009 Manufactured payments: Sec. 799 and 800, CTA 2010	A company is not entitled to any relevant tax relief so far as this is in respect of interest or a manufactured payment where the payment is attributable to the unallowable purpose, i.e. one of the reasons why the company is party to them is not among the business/commercial purposes of the business.		First Tier Tribunal - A.H. Field (Holdings) Limited vs. HMRC (March 2012) in favour of HMRC: FTT determined that tax avoidance was a main purpose of entering into the loan note and therefore that the borrowing costs were not deductible for tax purposes.

4.6.8. Various Measures

74. **Introduction.** The purpose of this section is to give a non-exhaustive overview of other reported anti-abuse measures that do not fit in the aforementioned categories of measures but are nevertheless not sufficiently representative so as to constitute a separate category of measures.

75. **Measures in relation to the use of tax losses.** Certain countries have reported some specific measures in relation to the use of tax losses which fall in scope of the current Study. In most cases the measures prevent or limit the use of losses in the case of a change of control of company as a result of change in shareholders due to a sale of shares or as a result of a restructuring. This is for instance the case in Belgium, Germany, Spain and the UK. The purpose of such measures in the given countries is to avoid the trading of loss-making companies by another company to reduce the tax liability of the latter.

Again, we cannot exclude that some countries have decided not to report this kind of measures, like for exit taxation, Transfer Pricing rules, etc. (cf. above), these rules being probably not be considered as anti-abuse provisions in every cases.

76. **Anti-treaty shopping provision**. Germany has adopted an anti-treaty shopping provision which prevents that a treaty or a directive is applied with the sole purpose of reducing the German WHT. As a result of this provision a foreign entity is not entitled to the benefit from a treaty or a directive if, amongst other things, its shareholders would not be entitled to this benefit in their own name and there are no commercial or other significant non-tax reasons for interposing the foreign entity. The burden of proof in this respect lies with the foreign company. It should demonstrate that there are economic or sufficient non-tax reasons, etc.

77. **Exit charge on migration of a company**. Ireland has an exit charge provision if a company moves its tax residence outside Ireland. Exceptions to this rule apply for instance if the Irish company is controlled by a company located in a country with which Ireland has concluded a Double Tax Treaty. Therefore, if the Irish company is controlled by a non-treaty resident, this exclusion does not apply. Similarly, the United Kingdom also that there is a deemed disposal of assets on company ceasing to be resident in the United Kingdom.

For the remaining, we refer to our previous comment made under paragraph 28 above.

78. **Specific provisions included in Double Tax Treaties**. The Netherlands have reported to have included specific anti-abuse provisions in certain Double Tax Treaties. For instance the Treaties with Hong Kong and Japan contain a specific limitation of benefits clause.

Luxembourg has reported that it has signed a significant number of Double Tax Treaties with Third Countries (for instance with Liechtenstein, Monaco, San Marino, etc.) which include the "exchange of information provision" as included in the OECD Model Tax Convention.

79. **Rules in relation to the residency**. In Spain, the tax authorities could presume that entities located in tax havens or countries with a low taxation have their tax residency in Spain provided certain conditions are met.

4.7. Pending Proposals or Future Measures

80. **Pending proposals or future measures**. Based on the input provided in the Questionnaire, some countries have reported pending proposals or future developments regarding anti-abuses measures. We list below the most relevant ones.

In Sweden, a reinforcement has been proposed for the current interest stripping rules. This amendment should enter into force as from 1 January 2013. As a result of this reinforcement the scope of application of the interest stripping rules would be extended to all intra-group loans, instead of merely loans granted for the purpose of acquiring a related party.

Also Spain has mentioned that a new measure is being proposed that obliges taxpayers to inform the tax authorities if they have bank accounts and securities held abroad. This obligation has been included in the Draft bill of measures against tax fraud, which has been approved on April 13, 2012.

With respect to Belgium, the thin capitalisation rule has been amended by the Programme Act of 2012, which replaces the former 7/1 debt-equity ratio with a new rule introducing a (general) 5/1 debt-equity ratio. This new thin capitalisation rule has not yet entered into force. Indeed the new Programme Act states that the entry into force would be determined by a Royal Decree, which has not yet been published, and in any case on 1 July 2012 at the latest.

In Germany, the Government published a white paper on 14 February 2012 suggesting different wide-ranging provisions aiming on tax planning like e.g.

- Exclusion of losses of foreign permanent establishments
- Extended anti-loss trafficking rules/net operating losses forfeiture in the case of mergers
- Limitation of "leveraged buyouts" (debt-pushdown structures) by way of limitation of interest expense deduction
- Avoidance of double-dip benefit through hybrid financing structures
- Treatment of cross-border investments in partnerships

However, the Government's draft bill of the Annual Tax Act 2013 presented on 23 May 2012 does not contain any of those proposed provisions. Thus, currently there are no official proposals available, aiming at introducing new measures which could fall in the scope of this Study. Furthermore, the measures indicated in the white paper do no specifically aim at Third Countries.

In the Netherlands, Art. 13l CITA 1969 was proposed in June 2012 as a measure to reduce the *Bosal* gap. In the *Bosal* judgment (C-168/01), the CJEU held that the Netherlands should allow the deduction of interest expenses at the level of a Dutch parent company if these interest expenses were used to finance the acquisition of/fund a non-resident, EU subsidiary. As the interest expenses are (generally) deductible, and the income is (generally) exempt, this had significant budgetary consequences. Consequently, the Dutch Government has now announced a measure to limit the deduction of interest expenses on a loan that was used to acquired/fund a subsidiary.

Finally, in the United Kingdom, the rules regarding CFC are being amended for accounting periods beginning on or after 1 January 2013 and there are proposed changes to taxation of interest, which include removing the distinction between yearly interest and interest that is not yearly, such that all interest would be subject to WHT. This would mean that interest to territories without a Double Tax Treaty would be subject to WHT (and therefore this would apply only to third countries without a Double Tax Treaty). In addition, there is the draft GAAR proposal.

4.8. Impact Assessments and Evaluation

81. **Limited Information Available**. It appears from the Study that very few information was available with respect to (expected) quantitative impact of the identified problems and of the measure (i.e. tax revenues) and with respect to the evaluation made by the concerned MSs of the effectiveness and sufficiency of such measures. This could most probably be explained by the absence of quantitative assessment, by the fact that most of the measures are relatively old, following which the quantitative assessment which might have been performed initially (if any) is no longer representative or usefull today, or because such information is considered as confidential. Another element which can entail that there is no relevant quantification available in relation to a measure, is the fact that a measure has been implemented in a Law containing various measures or together with other measures. In such a case any impact assessment or evaluation will generally be a global assessment not linked to a specific measure included in the Law, therefore no relevant figures for the purposes of the current Study will be available.

Some information is nevertheless available for the following countries:

For Germany, the quantitative effect of the specific measure in relation to the use of tax losses (anti-loss trafficking rule) is estimated at EUR 1.475 mio per year.

Prior to the entry into force of the interest stripping rules in Sweden**,** the Swedish Tax Agency released a survey in which they estimated that the deductions for the deemed artificial party debt reduced the

Swedish tax income with SEK 7 billion. Post enactment of the interest stripping rules, the Swedish Tax Agency mentioned in its latest report that the total interest reductions were back at the level of 2003-2006, meaning again an increase of the interest deductions. As Sweden has adopted an amendment to this rule, extending the scope to all intra-group loans (instead of loans granted for the purpose of acquiring a related party), a new assessment is made providing for an estimated increase of the Swedish tax income with SEK 6.29 billion.

In the Netherlands, quantitative impact assessments were mentioned with respect to two Non-Specific Measures, being the restriction on the deduction of interest on acquisition debt (EUR 31 mio. (2012), EUR 62 mio. (2013), EUR 93 mio. (2014), EUR 124 mio. (2015), and EUR 155 mio. (after 2015) and the restriction on the deduction of interest on participation debt (EUR 150 mio).

In the United Kingdom, the 2011 budget report sets out the expected cost of the full reform to the CFC rules (£210m in 2012-13, £540m in 2013-14, £770m in 2014-15 and £840m in 2015-16). With respect to the upcoming General Anti-Avoidance Rule, the Liberal Democrats had initially estimated that it could raise £2.1bn per year in corporation tax. However, this figure is likely to be smaller if the scope of the GAAR is narrowed (as suggested in Graham Aaronson's report). With respect to the anti-arbitrage measures, the Budget 2005 report sets out the expected Exchequer yield as a result of this policy to £130m in 2005-6, £200m in 2006-7, and £200m in 2007-8 (indexed figures).

France also reports some quantitative information with respect to its thin capitalisation rule.

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5. Conclusion

82. **Context**. The European Commission is currently drafting a Communication on good governance in the tax area in relation to the so-called concepts of Non-Cooperative Jurisdictions (NCJs) and Aggressive Tax Planning. In order to contribute to the assessment it is currently carrying out, the Commission is looking for additional input and information on existing anti-abuse measures applying, exclusively or otherwise, to Third Countries (i.e. non-EU/EEA countries).

83. **Scope**. In this framework, data has been collected and analysed with respect to 14 European Union Member States (Belgium, Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Spain, Sweden and the United Kingdom).

84. **Classification**. Given the specific scope of the Study, the reported anti-abuse measures existing in the selected Member States (MSs) have been divided into two main categories: those specifically applicable to transactions with Third Countries ("Specific Measures"), and other measures ("Non-Specific Measures").

Moreover, the Study provides additional insight into the most recent Specific Measures reported in the various Member States ("New specific measures", defined as measures enacted after 1 January 2007 or substantially amended after that date, as well as possible future measures).

85. **Definitions**. Based on the data collected, it appears that few of the 14 Member States in scope of the Study have a clear definition of the terms "Non-Cooperative Jurisdictions" and "Aggressive Tax Planning" to the extent of their (i) only relating to Third Countries but (ii) only where those countries present specific characteristics (being non-cooperative in one way or another).

On the other hand, many countries did report having various concepts that are akin to these definitions. In this respect, it is interesting to note that anti-abuse measures in some Member States apply to countries where the level of taxation is considered as inappropriate (e.g. no taxation at all or a very low nominal/effective tax rate), whereas, in other Member States, the decisive criterion is the level to which they cooperate in terms of exchange of information (which is more like the OECD approach). However, those countries are not always Third Countries. The concepts are sometimes crystallized in black, grey or white 'lists'.

86. **Specific Measures**. The Study also finds that there are not many Specific Measures, i.e. measures specifically dedicated to tackling abuse or aggressive tax planning in relation to Third Countries. However, that does not mean that Member States do not have measures to fight what they consider abusive transactions in relation to Third Countries. Indeed, many anti-abuse provisions do apply to Third Countries, even if they usually also apply in purely domestic situations or within the European Union.

Moreover, we cannot rule out the possibility that some of these measures are, in practice, applied more often in transactions/arrangements with Third Countries than in purely domestic situations or within the European Union. Some Member States even lay down more stringent rules for entities/taxpayers established/resident in countries with which they have no double tax treaty (or no double tax treaty with an exchange of information clause). Given the available network of double tax treaties within the European Union (and also Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC), the chance that these rules might apply within the EU is much lower compared to Third Countries, so that *de facto* these rules might essentially apply to Third Countries. The case law of the Court of Justice of the European Union also restricts the scope of application of the existing anti-abuse measures within the EU.

87. **Significant Number of Anti-Abuse Measures**. Notwithstanding the absence of a precise definition of "abuse", we can conclude that many Member States have a significant number of anti-abuse provisions in their legislation, covering many different forms of potentially abusive behaviour (according to local tax legislation or administrative practice/case law), such as shifting profits to low tax jurisdictions, erosion of the tax base through excessive debt financing, etc.

88. **GAAR.** Plus, all Member States report having at least one general anti-abuse rule ("GAAR"), which can take various forms. The foundations of these GAARs range from the "abuse of law" principle, to the "sham" transaction theory, to the "substance over form" principle. Generally, none of these measures applies only to Third Countries (let alone to NCJs); on the contrary, they are often equally applicable regardless the territorial scope of a given transaction (i.e. purely domestic situations, transactions within the European Union and transactions outside the European Union).

89. **Quantification**. Finally, based on the information collected, it is difficult to assess whether the anti-abuse provisions listed in the Study can be considered as effective in combating what the Member States consider as abusive: most did not report any (actual or predicted) quantitative impact of the identified abuses or of the anti-abuse measures (i.e. in terms of tax revenues) or make any evaluation of the effectiveness and sufficiency of the measures. A limited number of countries did nonetheless cite figures reflecting the expected budgetary impact of some measures.

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Appendices:

1. Blank questionnaire
2. Questionnaires filled in for the 14 Member States