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Background

The IBFD has been asked to survey the country legislation and practices in Austria, Belgium, Denmark, France, Germany, Ireland, Luxemburg, Spain, Sweden, Switzerland and the UK with respect to the following questions:

1) When the state issues a certificate of residence to its own residents for treaty purposes, what are the substance requirements that the state has to consider? Is it necessary, for example, to meet some substance requirements, such as:

i. Use of premises
ii. Performing economic (business) activities
iii. Employees
iv. Bank accounts
v. Being subject or liable to tax (or minimum tax)

None of the countries impose any specific substance requirements such as the use of premises or the performance of economic activities when issuing certificates of residence to resident companies. In each country, a request must be filed with the tax authorities (either by way of application letter or prescribed form), including basic information on the applicant taxpayer, such as the name, address and fiscal/tax or registration number, and information for the purpose of which tax treaty the certificate will be used.

In addition, Austria, Belgium, France, Germany, Luxembourg, Ireland, Switzerland and the United Kingdom, require information on the foreign income to be relieved from withholding tax, such as an indication of the type of income to be received, the approximate time of accrual and the name and address of the debtor/distributing company. In Denmark, Spain and Sweden, no additional information regarding the expected income is required.

Belgium, France and Luxembourg, moreover, require the applicant of a certificate of residence to provide evidence that he is not only liable to taxation but also subject to taxation.

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Please note that the answers to this question are generally limited to a resident company which status as a resident is not disputed by the country concerned, for example, because it is a domestically registered company.

We also note that for most of the countries we examined, a place of effective management or a similar criterion may be used to determine residence status and substance may be taken into account in this context. However, this information is already summarised in "*Substance – aligning international tax planning with today's business realities*"[1] and is not covered here.

Furthermore, we did not consider any impact of or substance requirements imposed under general anti-abuse rules applicable in the respective countries.

2) Does the state have rules that are similar to Article 8c of the Dutch Corporate Income Tax Act (CITA)? If so, please provide a brief description of the rules.

There are no rules in the tax legislation of the examined countries which are comparable to Article 8c of the Dutch Corporate Income Tax Act.

However, under Danish law there is an anti-avoidance rule which gives weight to the bearing of sufficient risk. This anti-avoidance rule was enacted in order to prevent the circumvention of the 10% capital requirement for subsidiary shares, and the 50% voting power requirement for group shares for purposes of the domestic participation exemption. Under the Danish participation exemption, in general, dividends and capital gains on subsidiary shares and group shares are exempt, which makes it attractive to try to meet the ownership requirement applicable to subsidiary and group shares by interposing a holding company.

The effect of the anti-avoidance rule is that dividends and capital gains from the subsidiary are attributed to the shareholders of the parent company and not to the parent company itself. The anti-avoidance rule applies only if the majority of the shareholders of the parent company are Danish resident companies or PEs of foreign companies.

[1] Axel Smits and Isabel Verlinden, PWC (2009).

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Under the anti-avoidance rule, the share income is disregarded as income of the parent company (intermediary) if:

- the primary function of the intermediary is ownership of subsidiary or group shares;
- the intermediary does not exercise a ***genuine economic business activity*** in respect of the shareholding;
- the intermediary does not fully own the subsidiary;
- the shares in the intermediary are not listed on a regulated market; and
- more than 50 % of the share capital in the intermediary is directly or indirectly owned by companies, that could not receive tax free dividends and gains if the shares in the specific subsidiary were directly owned.

3) Does the state have rules that are similar to the Decree IFZ 2004/126M on finance companies? If so, please provide a brief description of the rules.

There are no rules in the tax legislation of the examined countries which are comparable to the Dutch rule found in Decree IFZ 2004/126M on finance companies, except for Belgium and Luxembourg.

Belgium

Based on the Belgian law of 24 December 2002, which introduced the possibility to request an advance tax ruling, the Belgian Ruling Commission issued various rulings providing that (intra-group) finance companies may claim an exemption from Belgian withholding tax if the following conditions are met:

- the company is resident in Belgium or has a permanent establishment in Belgium;
- the company is part of a group of associated companies;
- only activities for the benefit of the group are carried out;
- services of an exclusively or predominantly financial nature are provided;
- the intra-group financing company's equity may only be used to finance other group companies;
- no substantial participation is held, which investment value exceeds 10% of the fiscal net value of the intra-group finance company; and

- the company has qualified personnel.

Examples of such rulings are Ruling No. 2010.151 of 15 June 2010, Ruling No. 800.459 of 3 January 2009, Ruling No. 800.371 of 16 December 2008, Ruling No. 800.304 of 28 October 2008 and Ruling No. 500.111 of 7 July 2005. However, there are no rules under Belgian law that deny intra-group finance companies access to an advance ruling procedure.

Luxembourg

The Luxembourg tax law does not provide for a formal tax ruling procedure. However, taxpayers are allowed to request the tax authorities' opinion on particularly complicated matters and in case the relevant law provisions are not clear.

In case a financing company applies for an Advance Pricing Agreement (APA) procedure, however, specific substance requirements must be met. The financing company must be adequately capitalized to face the functions performed and the risks assumed in connection to its financing activities. As a rule, a minimum equity at risk of 1% of the amounts lent (capped at EUR 2 million) is required.

Additionally, it is specified that the APA procedure will only be available for companies mainly engaged in intra-group financing activities which have sufficient substance in Luxembourg. Thus, in addition to the requirements mentioned above, a company will be considered as having sufficient substance in Luxembourg if:

- the majority of its directors/managers are Luxembourg residents and have the capacity to take binding decisions for the company;
- the directors/managers need to have the required professional knowledge to fulfil their duties;
- the key decisions regarding the financing company are taken in Luxembourg, and at least one shareholders meeting per year takes place there;
- the financing company has a bank account in Luxembourg;
- it is not considered as tax-resident in another country (dual residence);
- its equity is sufficient for the functions it performs, the assets used and the risks it assumes; and

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- it fulfilled its obligations regarding the filing of tax returns when the request for the APA is filed.