



Taxation of foreign passive income for group of companies

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Directives for the report

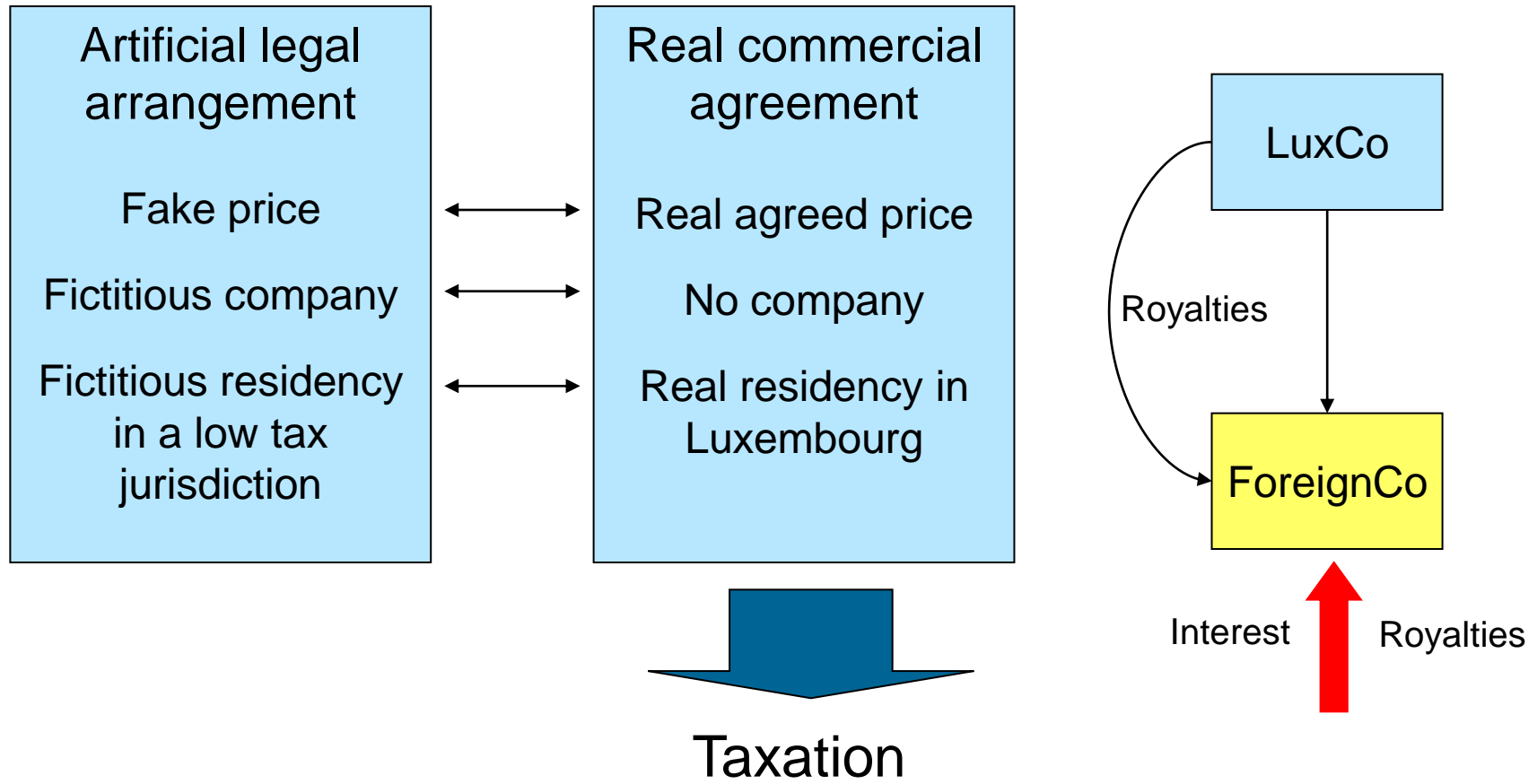
- The subject:
 - Taxation of foreign passive income for group of companies
- The directives:
 - Only the anti-abuse provisions



Considered questions

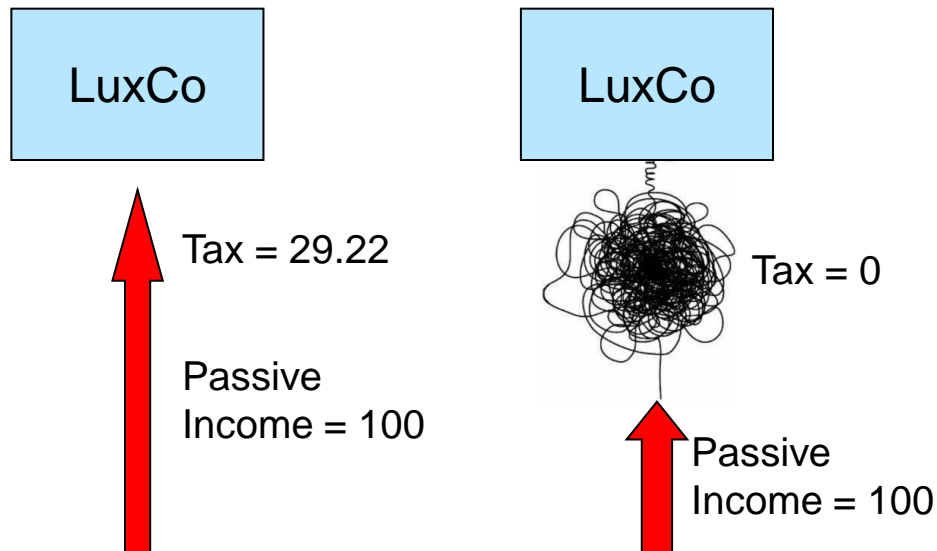
- Specific questions:
 - A. General anti-abuse provisions
 - B. Specific anti-abuse provisions
 - C. CFC provisions
 - D. Anti-abuse provisions and double tax treaties
 - E. Anti-abuse provisions and EU Law
- Scope:
 - Only taxation of foreign passive income
 - Question of the definition of passive income

A. General Anti-Abuse provisions: simulation



A. General anti-abuse provisions: Abuse of Law

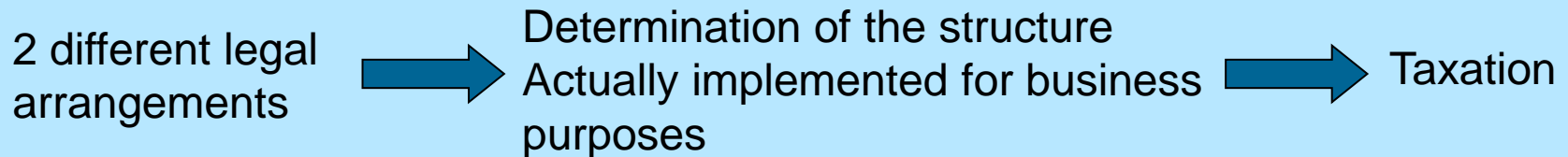
- Abuse of the forms and structuring possibilities of private law in order to avoid tax resulting in the use of an inappropriate structure



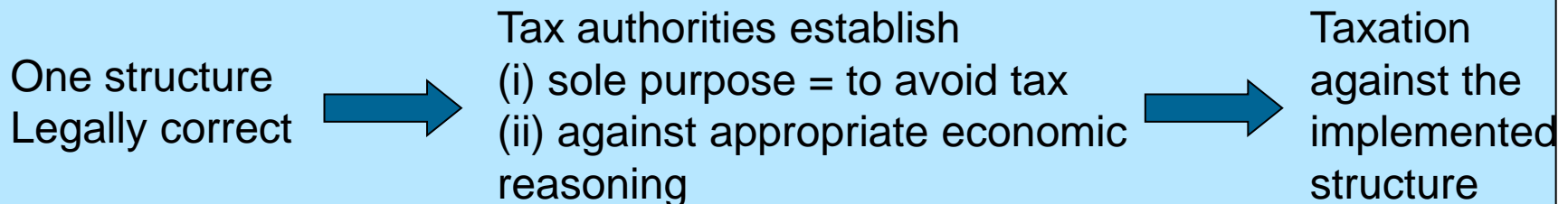
- Tax treatment
 - Taxation as if the structure did not exist based on the proper economic structure
- Limits:
 - Structure for sole tax purpose
 - Tax authorities must prove the abuse
 - Risk of double taxation

A. General anti-abuse rules: comparative approach

Simulation

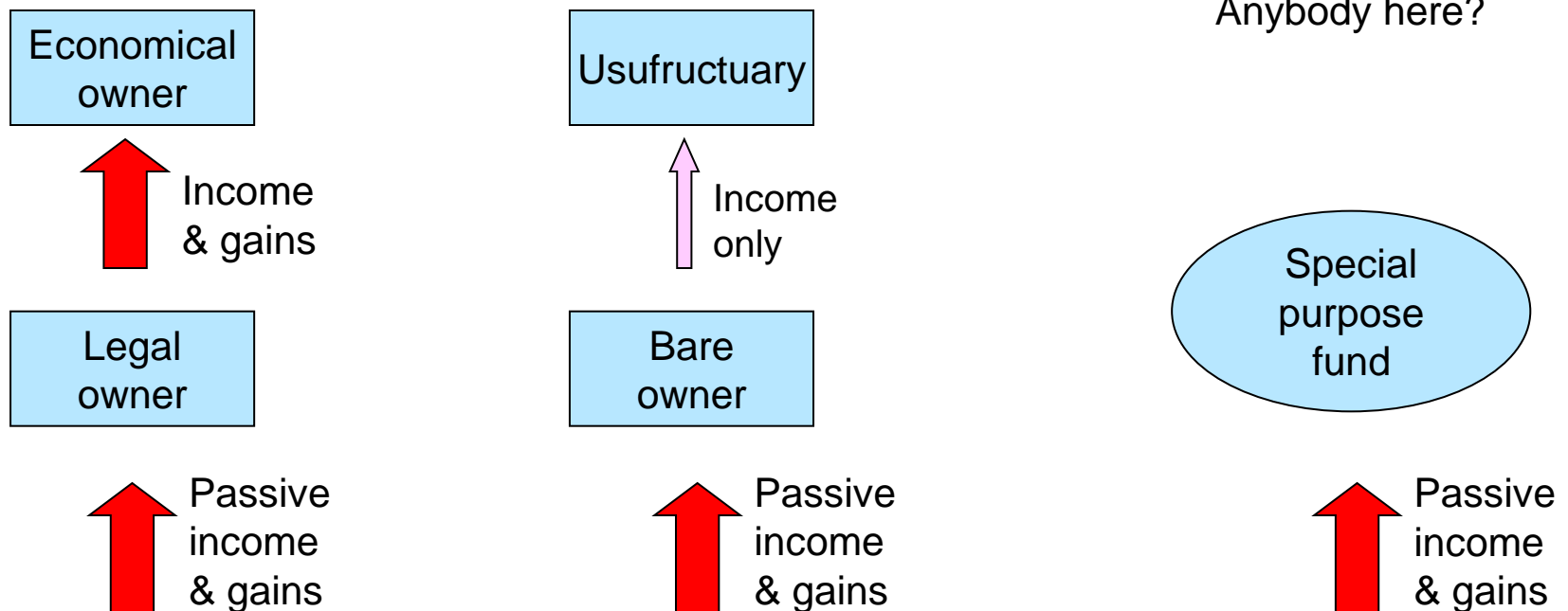


Abuse of law



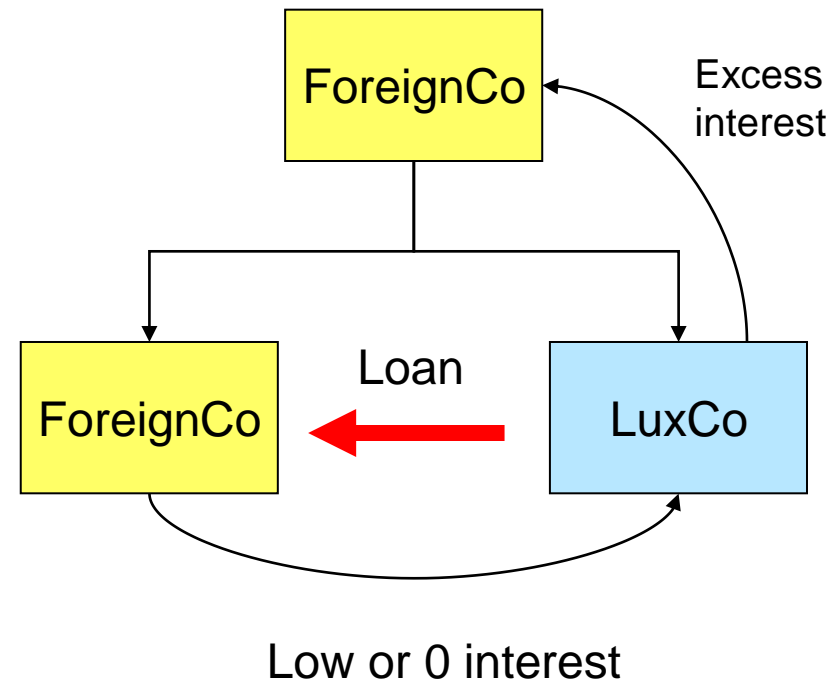
B. Specific anti abuse rules

- Economical vs. legal ownership
 - Not an anti-abuse but normal taxation rule



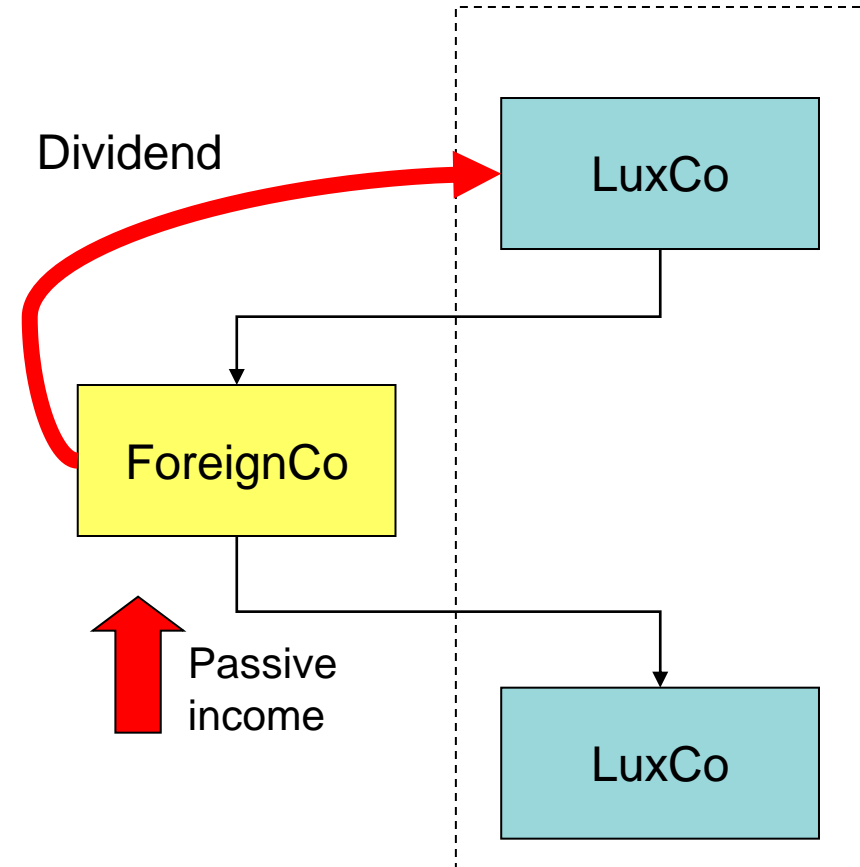
B. Specific anti-abuse rules: Section 164-3 LIR: the Swiss army knife

1. Hidden/deemed distributions
 - ✓ Specific application of the abuse of law
 - ✓ Also an income application
2. Thin capitalization rules
3. Tax authorities use it also for transfer pricing
 - ✓ Reasoning: there is a specific transfer pricing provision



B. Subject to tax requirement

- Concept:
 - Condition for regimes which aim at avoiding economic double taxation: there must be one taxation
 - Not an anti-abuse provision
- Scope
 - Participation exemption
 - Tax credit imputation
 - Dividend taxation
 - Group consolidated taxation



D. Anti-abuse rules in Luxembourg DTT

- Applicable principles in the case of anti-abuse provisions in a double tax treaty (“DTT”) context
 - ✓ Supremacy of DTT over Luxembourg domestic law → impact on Luxembourg domestic anti-abuse provisions?
 - ✓ Can the OECD Commentary be relied on to interpret the DTT in this context?
- Commentary to the OECD Model Tax Convention: no conflict of DTT with domestic anti-abuse provisions
- Luxembourg contrary position

D. Anti-abuse rules in Luxembourg DTT

- Application of anti-abuse provisions in case of a DTT with no specific anti-abuse provisions:
 - ✓ Mutual agreement procedure
 - ✓ In case of reference to domestic law in the DTT
 - ✓ Practical case with the Luxembourg – Ireland DTT

D. Anti-abuse rules in Luxembourg DTT

- Application in case of DTT which provides for specific anti-abuse provisions:
 - ✓ Heterogenous provisions of the DTTs
 - ✓ “Subject to tax” clause for dividend exemption may be more favourable than under domestic law
 - ✓ Practical case with the Luxembourg – Belgium DTT: arguable ground of the Luxembourg tax authorities

E. Luxembourg anti-abuse rules in light of EU regulations

- EU law supersedes Luxembourg domestic law
- Parent-Subsidiary and Interest and Royalties directives allow EU Member States to use domestic anti-abuse provisions
- ECJ case law allows EU Member States to take measures to prevent “wholly artificial arrangements”
- Compliance of articles 5 and 6 StAnpG with EU case law
- Subject to tax provision in Luxembourg domestic law in breach with the free movement of capital?