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M&A In Turbulent Times – How To Get The Deal Done

Chair:

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Agenda

- Redomiciliations.
  - —US Basics
  - —UK Post Brexit Considerations
  - —Cross Border Conversions in Germany
  - —Cross Border Conversions in Ireland
  - —Ferrovial Transaction
- Spin-off and De-Mergers.
- Pillar 2
  - —Contract Clauses.
  - —Earnouts.
- Transfer Taxes
  - —RETT in Germany
  - —Stamp Tax Considerations
    - Who pays by law? Market
    - Consequences on non-payment
  - —Other global transfer taxes

Redomiciliations

Redomiciliations - Overview

What is a re-domiciliation? - Migration of an existing entity from one jurisdiction to another.

- Typically, the migrated company retains the same assets (e.g., assets, commercial contracts it enjoys, and liabilities) with no change to the running and maintaining of the company, other than being incorporated in the new country of choice.
- After migration, the company adheres to any different rules/laws, regulations or taxation, in the new jurisdiction.
- Occur by means of merger, share exchange, consolidation, or other transaction

Reasons for Redomiciliation: financial, strategic, tax, regulatory

Redomiciliations – Topics to be discussed

U.S. Basics

UK Post Brexit Considerations

Cross Border Conversions in Germany

Cross Border Conversions in Ireland

Ferrovial Transaction

Redomiciliations – US

<u>US Outbound Re-domiciliation</u> – When a U.S. company migrates outside the United States. Examples include: Burger King (US) and Tim Horton (Canadian) (2014); Budweiser (US) and Inbev (Brussels) (2008); Actavis/Allergan (US to Ireland) (2013)

The U.S. has two distinct sets of "anti-inversion" rules that may impact any transaction involving the introduction of a foreign owner

- Section 367 contains rules that may cause the stock-for-stock exchange to become taxable for the shareholders of U.S. Co
- Section 7874 may, depending on the collective ownership % of the ex-U.S. Co shareholders, cause the foreign acquisition corporation to be characterized as a U.S. corporation following the stock-for-stock exchange.

May also re-domicile into the US (inbound re-domiciliation) – often to take advantage of US markets. May also affect U.S. regulatory requirements. Broadcom moved from Singapore to the US to minimize CFIUS reporting. Tech companies move to the US for greater financing opportunities.

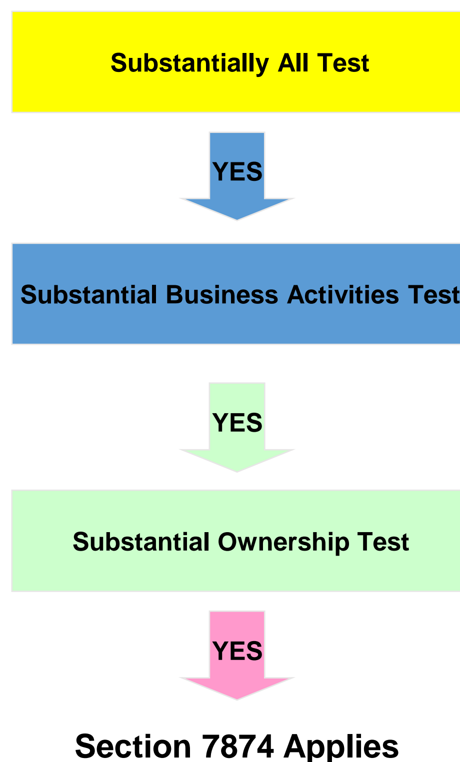
Redomiciliations – Section 7874

Anti-Inversion Tax Regime – Section 7874

- Enacted in 2004 in response to wave of US company inversion transactions in the preceding decade
- Primary policy reason - Congress was concerned primarily with inversion transactions that take place within a single corporate group, i.e., transactions in which U.S. corporations "reincorporate in foreign jurisdictions and thereby replace the U.S. parent corporation of a multinational corporate group with a foreign parent corporation."
- Focused transaction was - reverse subsidiary merger in which the U.S. corporation forms a foreign corporation with a U.S. merger subsidiary, and then merges into the latter, or to a simple merger of a U.S. corporation into a new foreign corporation. In both examples, the former shareholders of the U.S. corporation **own 100%** of the new foreign parent entity.
  - Transactions typically had no non-US tax effect or purpose + viewed as a means of avoiding US tax
- Outcome after nearly a decade – more often transaction involving combining or acquiring involving a US company and a 3rd party non-US company are caught in these rules.
  - Tension – regime applies far more broadly than anticipated by Congress

Section 7874 – Three Part Test

- Section 7874 – the key anti-inversion rule – applies only if each of the three tests described below are satisfied
- The primary U.S. tax consequences of triggering Section 7874 depend on the continuing ownership threshold for the shareholders of the U.S. corporation and are described on the next page



- Foreign corporation acquires (directly or indirectly) ***"substantially all"*** the properties of U.S. corporation (or U.S. partnership)
- Foreign corporation does not have ***"substantial business activities"*** in the country in which it is legally organized and tax resident when compared to the total business activities of its economic family – a "bright line" test applies
- ***Shareholders of U.S. Corporation own ≥ 60%*** (by vote or value) of Foreign Acquiror stock *by reason of* holding stock in the U.S. corporation

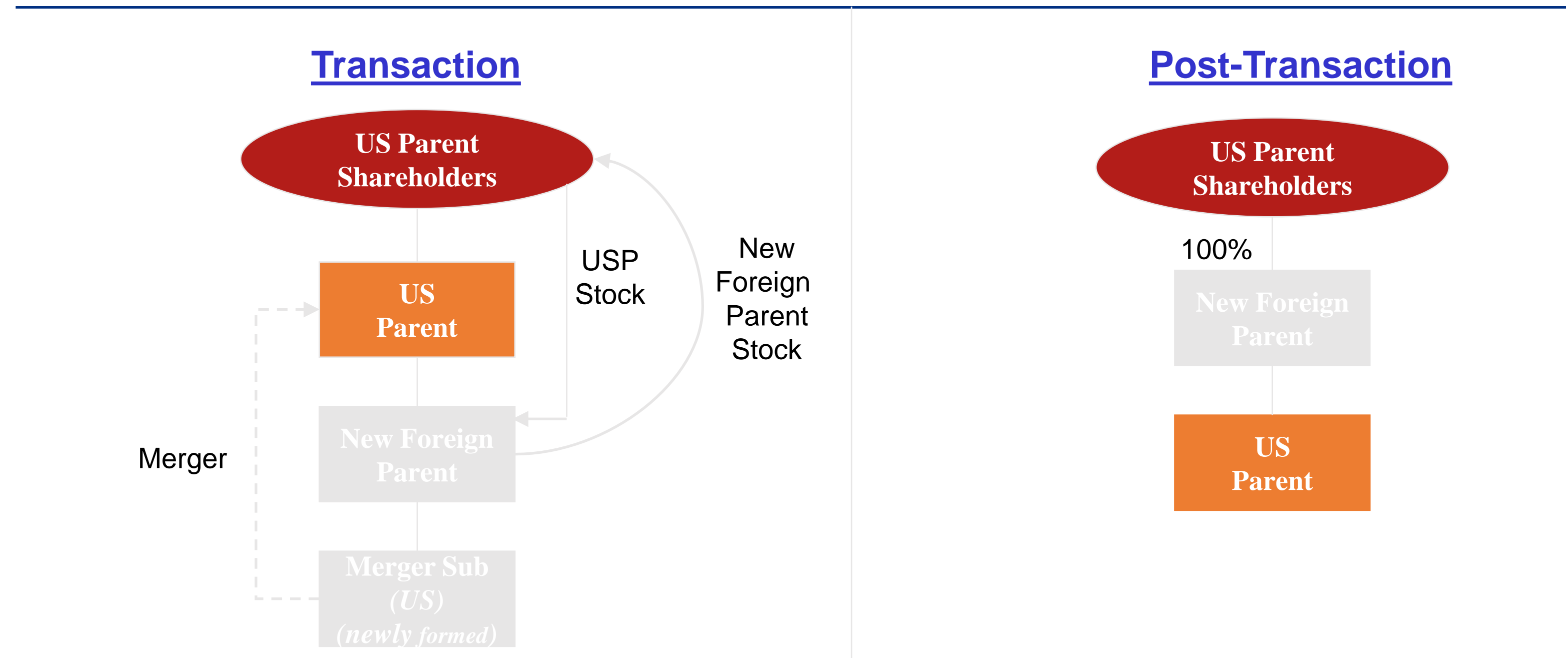
Section 7874 – Two Potential Outcomes if Rule is Triggered

- Foreign Acquiror treated as a U.S. corporation for all U.S. tax purposes if continuing ownership by U.S. Corp's shareholders (by reason of holding U.S. Corp stock) **is ≥ 80%**
- No current tax to the U.S. corporation or its shareholders, but effectively negates future tax planning opportunities
- Causes existing non-U.S. subsidiaries of the Foreign Acquiror to become subsidiaries of a U.S. corporation – i.e., "controlled foreign corporations" or "CFCs"

- Foreign Acquiror is treated as a foreign corporation for all U.S. tax purposes
- But, for at least 10 years, the U.S. Corp's taxable income cannot be less than gain recognized on its transfer of stock or assets plus certain royalty income from foreign affiliates
  - Tax attributes generally cannot be used to offset this income
- Generally subject to significant limits on post-deal tax planning opportunities for at least 10 years
- 20% excise tax on insiders' equity based compensation
- Special adverse rules (no QDI for individual U.S shareholders, COGS generally a base erosion payment for BEAT, lose 965 favored rate)
- Applies if the continuing ownership by U.S. Corp's shareholders (by reason of holding U.S. Corp stock) **is ≥ 60%, but < 80%**

US Redomiciliation – Single corporate group

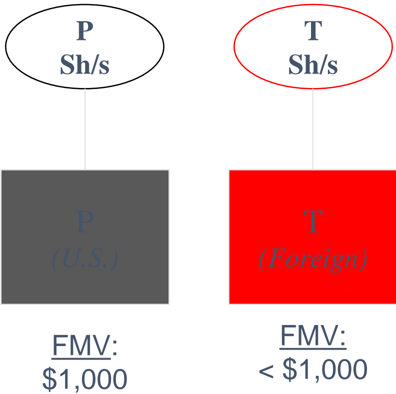
There are numerous ways for a US corporation to "invert." A stand-alone inversion occurring post-2004 will be respected only if it avoids triggering Section 7874.



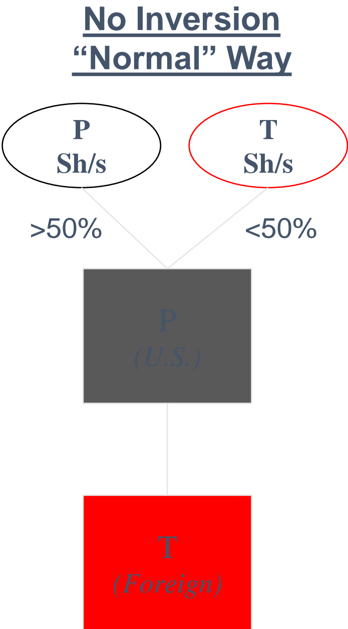
- Intended to qualify as a reorganization or Section 351 transaction
- US Parent shareholders continue to own 100% of their interest in the US Parent via their interest in New Foreign Parent shares
- New Foreign Parent typically engages in subsequent steps to restructure US Parent's operations and assets further to reduce future taxes, especially US taxes
- Recent Example Cardtronics re-domiciliation to U.K. (2016)

Inversions – 3rd Party Business Transactions

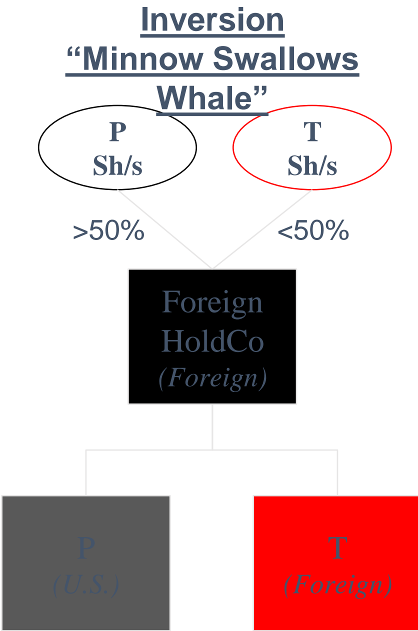
P and T intend to Merge Combined Group



No Inversion
"Normal" Way



Inversion
"Minnow Swallows Whale"



Section 367

- Section 367 – Generally, turns off tax-free provision for otherwise qualifying tax-free transactions (e.g., mergers, contributions)

- Sec. 367(a) – Apply in stock-for stock and asset transfers
- Stock for stock transfer - Generally, requires the U.S. shareholders to recognize gain (but not a loss) on the transfer as if the stock transferred was sold at its fair market value.
  - Exception may apply– gain recognition agreement
- Asset transfer - If the expatriating U.S. corporation transfers its assets to a foreign corporation, then the expatriating entity must recognize any built-in gains associated with the transfer under §367.

- 367(d) – Cross-border transfer of "intangible property" in exchange for stock of a foreign corporation gives rise to an annual deemed royalty for the transferor
- Royalty is characterized as ordinary income and is not limited to any ownership threshold
- Royalty continues until intangible property is subject to a disposition (directly or indirectly)

U.K. Post Brexit Considerations

- Merger Directive: access denied
- Redomiciliations consultation: where are we?
- Transactional and CMC shifts: generally unaffected
- Treaty LoB equivalent beneficiary provisions: not fully resolved
- Capital Duties Directive: some good news

Cross Border Conversions in Germany

	Case 1	Case 2	Case 3
Structure	Conversion and relocation of **GerCo into EUCo**	Conversion and relocation of **EUCo into GerCo**	Conversion of EUCo into another EUCo **without moving the place of effective management**
Rationale	• Main driver often **operational reasons** • Company to potentially benefit from **preferable tax regime** of member state of relocation		• Non-tax reasons prevail • E.g. co-determination, preferable corporate governance setup, listing location
Income Taxes	• German **exit tax** of approx. **30-32%** on hidden reserves unless relevant assets can be allocated to a German PE • Generally **no income tax consequences** at shareholder level if corporate law provides for a continuity of legal personality of converted company	• Exit tax in other member state to be assessed separately • Entry of assets in Germany at **fair market value** • Generally **no income tax consequences** at shareholder level if corporate law provides for a continuity of legal personality of converted company	• **No income tax consequences** at company and shareholder level if corporate law provides for a continuity of legal personality of converted company • EUCo will **remain** subject to **unlimited income taxation** in country of incorporation • Dividend distributions going forward to be further analyzed
Transfer Taxes	• None if applicable corporate law provides for a continuity of legal personality of converted company		

Cross Border Conversions in Ireland

	Case 1	Case 2	Case 3
Structure	Conversion and relocation of **IrCo into EUCo**	Conversion and relocation of **EUCo into IrCo**	Conversion of IrCo into another EUCo **without moving the place of effective management/tax residency**
Rationale	• Main driver often **operational reasons** e.g. continuity of contracts esp insurance undertakings • Company to potentially benefit from **preferable tax regime** of member state of relocation • Possible that move of corporate seat but tax residency remains same		• Non-tax reasons prevail • E.g. preferable corporate governance setup, listing location
Direct Taxes	• Irish **exit tax** on capital assets of 12.5% (or 33%) unless relevant assets can be allocated to an Irish PE • Generally **no tax consequences** at shareholder level if corporate law provides for a continuity of legal personality of IrCo. • Dividend distributions post conversion then in transferee state tax rules	• Potential Exit tax in other member state • Entry of assets in Ireland potentially at fmv if exit tax suffered • Generally **no tax consequences** at shareholder level if corporate law provides for a continuity of legal personality of IrCo • IrCo would then be within Irish dividend withholding regime	• **No tax consequences** at company and shareholder level if corporate law provides for a continuity of legal personality of company • EUCo would **remain** subject to **corporate income tax** in Ireland • Would remain within Irish DWT regime
Indirect Taxes	• None on assumption corporate law provides for a continuity of legal personality • NB – Transfers of shares in IrCo subject to 1% stamp duty, post conversion may be no foreign equivalent transfer tax?		

Cross Border Conversions in Ireland

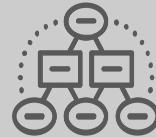
- To date 4 transactions effected under the Irish implementation of these Regulations
  - Three outbound – including Zurich Insurance plc converted into German stock corporation Zurich Insurance Europe AG, and 2 others Ireland to Germany
  - One inbound – Netherlands corporation Elavon European Holdings B.V. converted into Irish private company

- No specific Irish tax provisions dealing with taxation of such conversions
  - General ATAD compliant exit tax provisions likely to apply if as well as converting the company ceases to be Irish tax resident (not necessarily an automatic consequence). This triggers deemed disposal at market value with gains taxable at 12.5% in most cases
  - On an inward conversion where ATAD compliant exit tax suffered in exiting jurisdiction rebasing of relevant assets will be recognised in Ireland.
  - How are losses and other tax attributes to be dealt with?
  - Common questions around relevant accounts date and whether that can be followed for tax purposes.
  - Also administrative application in terms of tax registration/final returns etc

Introduction - Facts of the case

Ferrovial Group

A group of entities around the globe that develop and operate infrastructures such as highways, airports and energy plants



Corporate structure

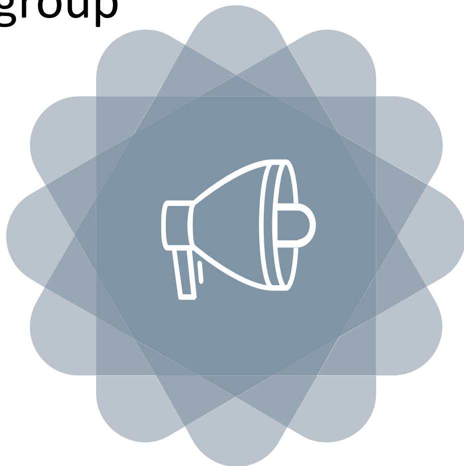
Ferrovial, S.A. (“**Ferrovial**”) was the ultimate parent company of the Ferrovial group and sole shareholder of Ferrovial International, SE (“**FISE**”)

Cross-border reverse merger

In June 2023, FISE (Dutch company) absorbed Ferrovial (Spanish company) through a cross-border reverse merger (the “**Merger**”)

Purpose of the Merger

To strengthen the **international profile** of the Ferrovial group



Financing

To improve the **financing conditions** as the Netherlands have favourable credit ratings

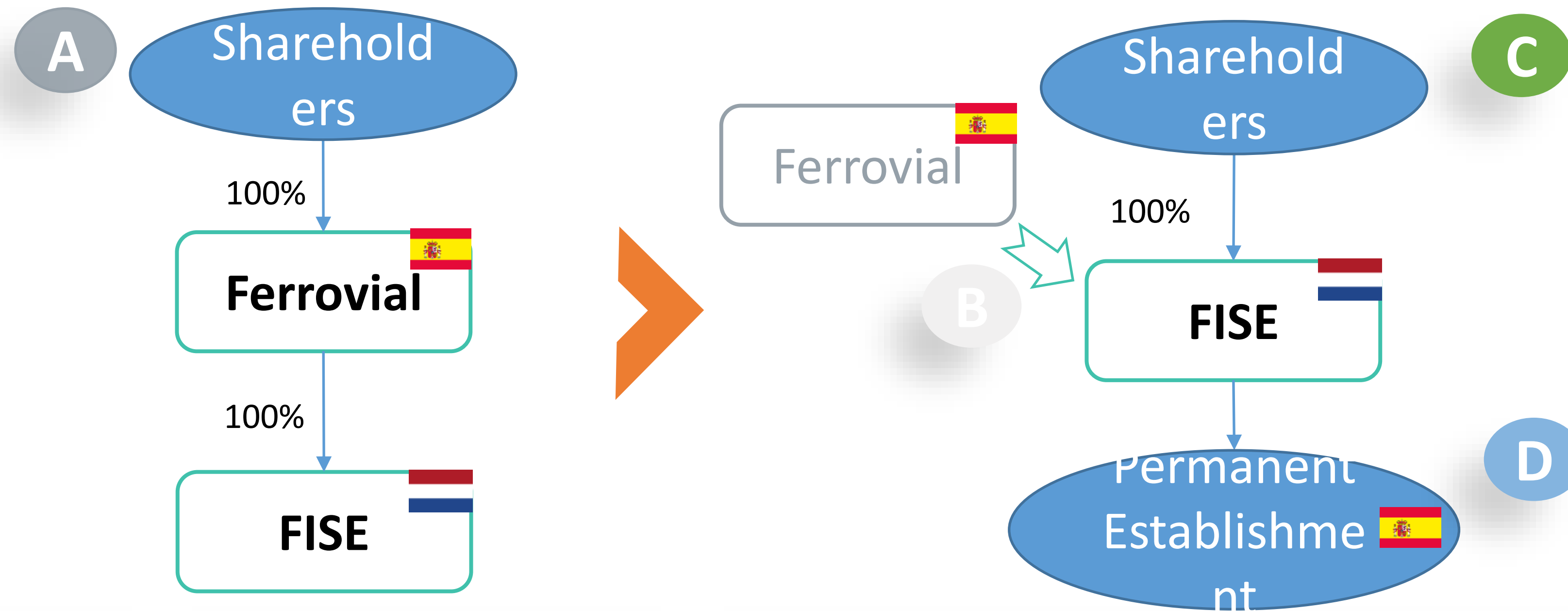
Awareness

To increase **awareness of the brand** in Europe and globally, considering the Netherlands is a location where various multinationals are domiciled

Stock Market

To be listed simultaneously on the **stock markets** in Spain, the Netherlands and the United States of America (and to be included in the US stock index)

Structure of the Merger



A. Initial structure

- Ferrovial had multiple types of **shareholders** from various tax residencies
- Ferrovial owned **100%** of the shares of FISE

B. Merger

- Ferrovial was **wound up** without going into liquidation
- Ferrovial transferred all its assets and liabilities to FISE (**universal succession**)

C. Ferrovial shareholders

- **No capital increase** of FISE
- The shares of Ferrovial were cancelled and its shareholders received **shares of FISE in exchange** in the same proportion

D. Spanish PE

- FISE created a branch in Spain considered as a **permanent establishment** (“**PE**”) for tax purposes, to which certain assets, liabilities and legal relations of Ferrovial were allocated

Spanish tax implications of the Merger

Direct taxation

- **Tax neutrality regime** instead of the general CIT regime
- Shareholders' taxation

Indirect taxation

- Value Added Tax
- Transfer Tax, Capital Duty and Stamp Duty
- Tax on financial transactions

Spanish tax implications of the Merger

Direct taxation

The Merger applied the **Spanish tax neutrality regime** (transposition of the EU Merger Directive)

OBJECTIVE

- The Merger qualifies as a corporate restructuring transaction for CIT purposes
  - ✓ In particular, a **reverse merger**, even when the absorbing company (FISE) does not execute a share capital increase (confirmed by several binding tax rulings)

SUBJECTIVE ("business purpose test")

- The Merger shall be carried out for **sound business reasons** and not mainly or exclusively with an aim to obtain a tax advantage (other than the tax deferral)
- Solid business rationale must be **evidenced** in a tax audit. Analysis on a case-by-case basis
- In principle, the purposes of the Merger (financing, awareness and listing) seem as valid business reasons

The Merger must be **communicated to the Spanish tax authorities** during a 3-month period as of the registration of the Merger with the Commercial Registry

Spanish tax implications of the Merger

Direct taxation

TAX NEUTRALITY REGIME

Capital gains realised by Ferrovial are **not included** in its **CIT** base to the extent that derive from assets located in Spain which are **allocated to the PE** in Spain of FISE

Embedded capital gains are inherited by the Spanish PE of FISE, deferring any taxation

On the contrary, the gains resulting from the transferred assets and liabilities which are **not allocated to the Spanish PE of FISE** would be subject to the **general CIT regime**

No Spanish taxation would be triggered on the **EU shareholders**. A roll-over regime should apply on the valuation and acquisition dates of the shares of Ferrovial

Tax credits (carry-forward losses, deductions) and liabilities would be **acquired by the FISE**, with certain limitations

Tax on the Increase in the Value of Urban Land ("**TIVUL**") on transferred immovable properties is **not accrued**, but FISE will inherit the embedded capital gain

GENERAL CIT REGIME

Capital gains obtained by Ferrovial are subject to CIT at a **25%** rate (1.25% for those derived from shares that could benefit from the Spanish Participation Exemption Regime)

Possibility to apply for the tax deferral of the **exit tax** until the assets are transferred to third parties

The assets and liabilities acquired by FISE would be **valued**, for tax purposes, according to the Dutch tax law

The **shareholders** of Ferrovial would be taxed as follows:

- **Spanish companies**: 25% / 1.25%
- **Non-Spanish residents**: 19% / Tax treaty reduced rate / 0% - ETVE regime

Tax credits and liabilities are **not transferred** to FISE

TIVUL would be accrued for Ferrovial (up to a 30% of the land cadastral value multiplied by a 0.08% to 0.45% percentage depending on the holding period)

Spanish tax implications of the Merger

Indirect taxation

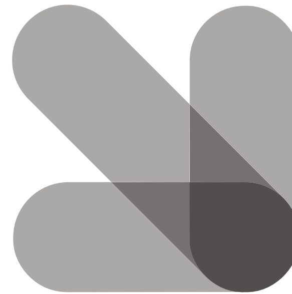
Going concern

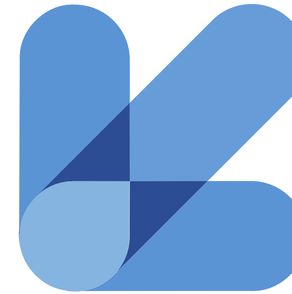
If the transfer of assets upon the Merger constitute a going concern (*i.e.*, autonomous economic or business unit), **not subject to VAT**

Real estate properties

Second and subsequent transfers of properties are subject to but **exempt** from VAT

Possibility to **waive** the VAT exemption if certain requirements are met (**reverse charge mechanism**)





Value Added Tax (“VAT”)

Transfer of shares

Generally subject to but **exempt** from VAT

Exception - Anti-abuse rule: if at least 50% of the assets of the transferred entity are real estate property not assigned to a business activity

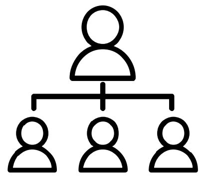
Cash and receivables

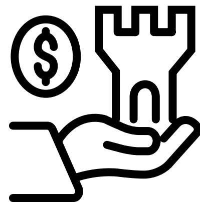
Exempt from VAT

Spanish tax implications of the Merger

Indirect taxation

No adverse tax implications from an indirect tax perspective





CAPITAL DUTY

Not subject, as the Merger falls under the scope of the Tax Neutrality Regime

TRANSFER TAX

Exempt, as the Merger falls under the scope of the Tax Neutrality Regime

STAMP DUTY

Exempt, as the Merger falls under the scope of the Tax Neutrality Regime

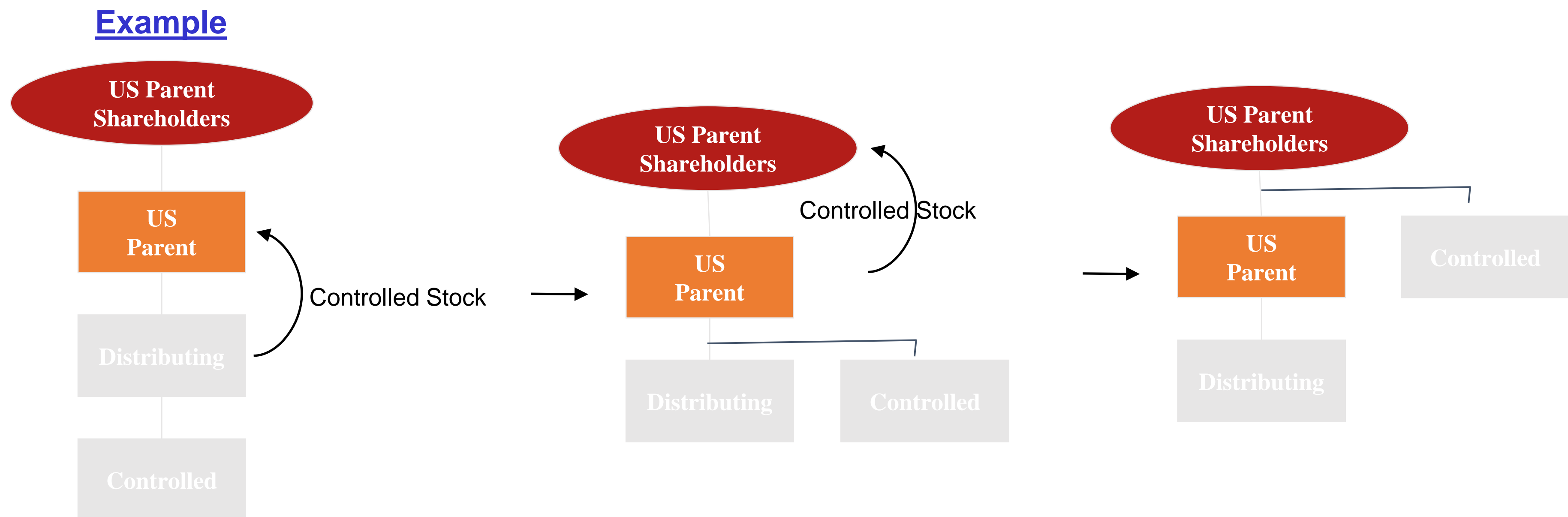
TAX ON FINANCIAL TRANSACTIONS

Exempt, regardless of whether the Merger applies the Tax Neutrality Regime

Spin off – US Issues

Spin-Off / Demerger - - US Issues

What is a Tax-Free Spin-Off? – Qualifying distribution to a shareholder of stock (at least 80%) of a corporation (so-called "Controlled") by another corporation (so-called "Distributing"). Demergers may qualify as a tax-free spin-off. Section 355 Transaction



Spin-Off / Demerger - - US Tax Concerns

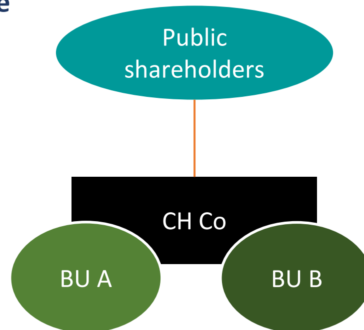
If Controlled is a non-US corporation or Controlled owns stock of non-US corporations ("CFC") may be US tax consequences

- De-Merger of asset sales to package up business to be spun-off may result in Subpart F or GILTI inclusions.
- Deemed dividend possible inclusions
  - —Internal spin of CFC by another CFC trigger basis reductions or "deemed dividend" inclusion (Section 1248 inclusion under Treas. Reg. §1.367(b)-5)?
  - —When CFC is transferred to another CFC or a US sub?: GRA Issues (outbound transfers only), Section 1248, Basis adjustments
  - —Internal spin of CFC by US sub to USP – Section 1248(f)

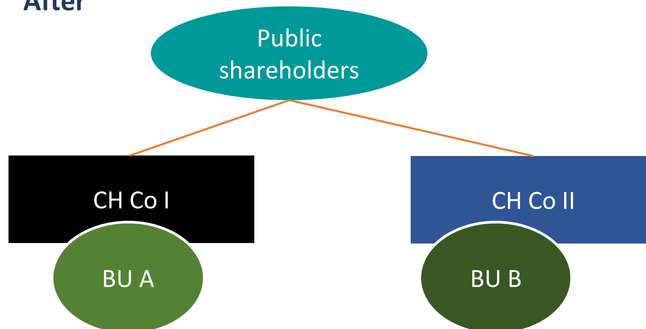
Tax sharing agreement, especially in post Spin combination.

Swiss spin-off transactions (1/3)

Before



After



Steps:
a) direct spin off under merger act or usually:
b) two step spin off
establishment of CH Co II as subsidiary of CH Co I, drop down of BU B via contribution, followed by distribution of shares in CH Co II to shareholders of CH Co I

- **Tax requirements for tax-neutral spin-off**
- A tax-neutral "spin-off" or "demerger" has the following requirements:

1. **Continuity of taxation** in Switzerland (i.e. transfer of business unit (BU) to Swiss resident company);
2. Transfer of BU at **existing tax book values** in transferor;
3. "**BU**" means that the transfer of a viable business / partial business, i.e.:
   a) The units render services in the market or to group companies;
   b) Each unit has at least one employee;
   c) Employee expenses are appropriate in relation to income. (*cf. next slide for requirements for holding spin-off*)
4. **Double business requirement**: Maintenance of BUs in transferor (here: CH Co I) and transferee (here: CH Co II)
5. Transfer against **equity**, e.g. contribution of assets > liabilities at BV, **no sale**;
6. The aggregate share capital and capital contribution reserves of CH Co I and CH Co II **after** the spin-off must **not** be greater than the share capital and capital contribution reserves of CH Co I **before** the spin-off (increase of nominal value is taxable: 35% WHT on company level, taxable income for Swiss individuals shareholders holding the shares as private assets);

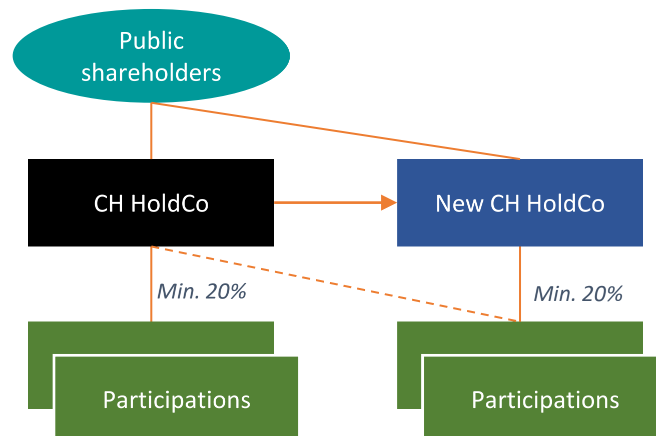
→Tax neutral transfer of BU for corporate income tax purposes, no blocking period

→Tax neutral for Swiss resident shareholders (in case of roll over of book value: roll over of holding period), no blocking period

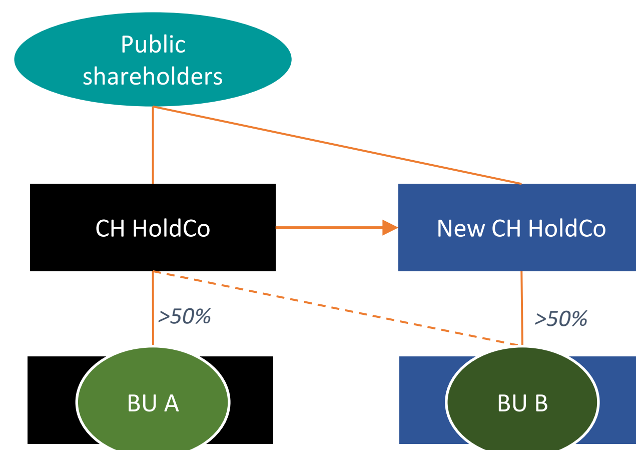
→Tax neutral for stamp duty and securities transfer tax

Swiss spin-off transactions (2/3)

Holding spin-off



Business spin-off (new)

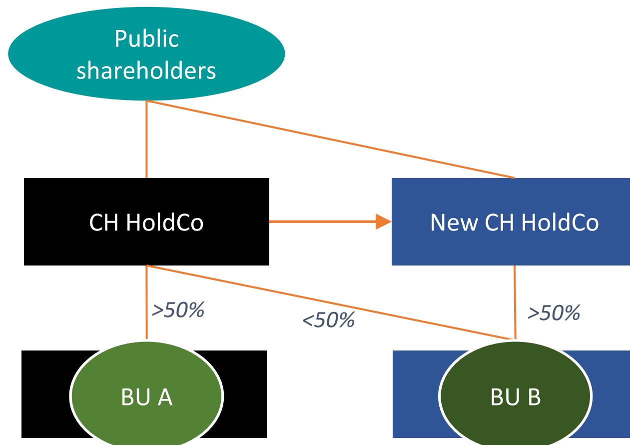


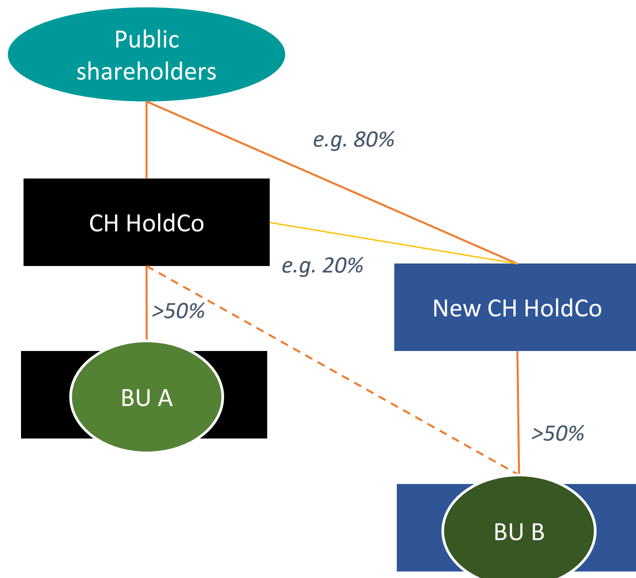
Tax requirements for tax-neutral holding spin-off

- **BU** requirements:
  1. Transfer of at least **two directly owned, operating (Swiss or foreign) participations** (min. 20% shareholding) to New HoldCo;
  2. Continuation of business: i.e. **holding function** of New HoldCo (strategic management, coordination of subsidiaries' business) with own **personnel** employed / engaged by New HoldCo in Switzerland for holding activities (min. one full time employee).

- **Tax requirements for tax-neutral business spin-off in subsidiary (new since court case 2019, accepted by Swiss tax administration)**
- Transparency approach: CH HoldCo with two operating directly or indirectly controlled subsidiaries can perform tax neutral spin offm based on **transparency view**:
  - BU can also be performed by a **direct / indirect (Swiss or foreign!)** subsidiary of New HoldCo, **control (>50% voting rights) required** to apply transparency view
  - Both HoldCo and New HoldCo need to have an own business activity or at least one participation (>50%) each of which performs an operating business; **New HoldCo must remain in place** for a certain period in time (no immediate merger of sub BU B into New CH HoldCo, otherwise treatment as taxable dividend)
  - Transfer must be done to New CH HoldCo, **direct distribution** of subsidiary (here: sub with BU B to shareholders of CH HoldCo) would be taxable dividend (subject to WHT / Swiss income tax)

Swiss spin-off transactions (3/3)





Partial Spin options

- Generally, full spin-off required (transfer of all shares in New CH HoldCo)
- Recent examples
  - Novartis – Spin-off Alcon
  - Sulzer – Spin-off Medmix
  - Novartis – Spin-off Sandoz

Possibilities for partial spin

- CH HoldCo keeps up to 49.99% in Sub B, New CH HoldCo receives more than 50% in Sub B
  - Example: Implenia – Spin-off Ina Invest
- Full spin-off, but CH HoldCo has convertible loan in New CH HoldCo; upon conversion CH HoldCo holds e.g. 20% in New CH HoldCo
  - Example: Actelion – Spin-off of Idorsia (after take-over by J&J)
- Distribution of all shares pre-capital increase, i.e. shares due to capital increase (before spin) remain with CH HoldCo
  - Example: Spin-off of V-Zug by Metall Zug (distribution of all existing shares, following a 30% capital increase in V-Zug by Metall Zug)
- Distribution of only e.g. 80%, CH HoldCo keeps 20%
  - Untested in (public) deal (ruling confirmation had been obtained, but not implemented)

Pillar 2 contract clauses

Pillar 2 Contract Clauses

Certain Customary Provisions Affected in a US Transaction Agreement

Tax Indemnity - Allocate risks between the parties and to cover the various implications of the top-up taxes.

- From a buyer's perspective: cover any (secondary) liability for taxes imposed based on IIR and UTPR.

Tax Representations - Drafted in such a way as to fulfill disclosure function with respect to the impact of the GloBE Rules (e.g., regarding being in scope for Pillar II or complying with reporting obligations)

Tax Covenants – Responsibility for additional tax filings requirements and paying top-up taxes (secondarily liable), is there such a thing as interim "closing of the books" for allocation, others as this area developes

Pillar 2 Contract Clauses

Certain Customary Provisions Affected in a US Transaction Agreement

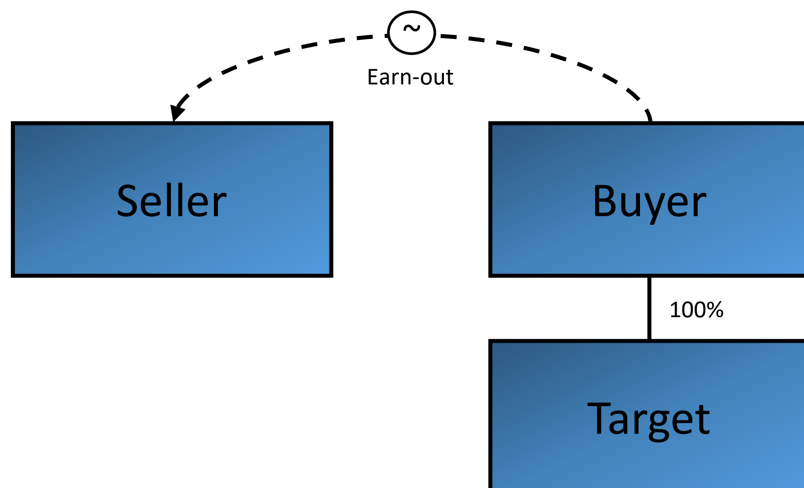
Definitions

- Taxes – Is definition of Taxes and/or Pre-Closing Taxes broad enough to cover top up tax? Specifically include in definitions
- Transfer Taxes – Should Taxes resulting from Pillar 2 legislation incurred as a result of the transaction be a Transfer Tax? Often Transfer Taxes are indirect such as stamp duty, recording fees, sales/use – often split 50/50.

Purchase Price Calculation – How should these Taxes (current or deferred) be taken into account.

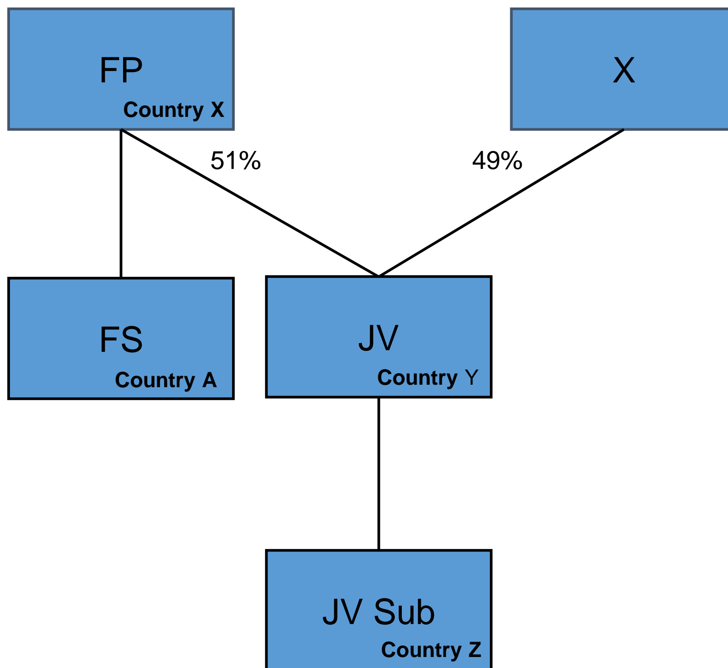
E.g., Pillar II specific rules certain DTLs are subject to a recapture mechanism (i.e., deduction from Covered Taxes) if they do not become an actual liability within five years. Often DTLs and DTAs are not taken into account as a purchase price adjustment

Example: Earn-out Arrangement



- Example
  - Seller sells Target to Buyer with a capital gain of EUR 100 which is an Excluded Equity Gain for Seller
  - Seller will receive an earn-out from Buyer calculated over 24 months after closing; the earn-out right is valued by Seller at EUR 20 and accounted for as receivable
  - After 24 months, Seller receives EUR 30; the excess of EUR 10 is exempt from corporate income tax at Seller level
- Attention points
  - In some jurisdictions (*e.g.*, the Netherlands), earn-outs are tax exempt by virtue of the participation exemption
  - Depending on the qualification of earn-out as receivable or income from shares, the gain on the earn-out of EUR 10 will be either:
    - Included in the GloBE Income as gain on receivable → decreasing the ETR since no corresponding Covered Tax
    - Qualify as Excluded Equity Gain or Loss → neutral for Pillar Two
  - High book valuation of earn-out at the moment of sale beneficial

Allocation of Top-up Tax to Consolidated Owner



Facts

- FP and X own 51% and 49%, respectively, of JV, a holding company. FP also owns 100% of FS. FS, JV, and JV Sub are included in the consolidated financials of FP
- Situation 1: Country A (FS) adopts the GloBE rules. Countries X (FP), Y (JV), and Z (JV Sub) do not. Country Z's tax rate is below 15%.
- Situation 2: Countries A (FS) and X (FP) do not adopt the GloBE rules, while Countries Y (JV) and Z (JV Sub) do. Country A's tax rate is below 15%

GloBE Implications

- In both cases, JV is not a "joint venture" within the meaning of the GloBE rules because it is consolidated by the FP group.
- Situation 1: Because Countries X, Y, and Z do not have QDMTT or IIR rules, the UTPR rules apply and 100% of the Top-Up Tax is allocated to Country A. FP gets 100% of the cost and only 51% of the related tax savings.
- Situation 2: Because Countries X and A do not have GloBE rules, Top-Up Tax of FS will be allocated to JV in Country Y. FP gets 100% of the related tax savings but only 51% of the cost.

Transfer Taxes

US 1% excise tax on Stock Buy Backs

2021 – US enacted section 4501 that assesses 1% excise tax on the repurchase (directly or indirectly) by a US corporation of stock of a publicly traded corporation

- Stock acquired can be of a US or non-US corporation – publicly traded (broad definition and actual stock acquired does not have to be the stock publicly traded – e.g., Corp C common stock is traded on the NYSE. Corp C redeemed preferred stock it issues – this transaction is subject to the 1% excise tax

- Acquisition in which a US entity cash is actually or deemed to be used to acquire stock of a publicly traded corporation, a 1% excise tax could be assessed

- Is this a Transfer Tax? Reduction to Purchase Price?

Real Estate Transfer Tax (RETT) in Germany

- RETT is to be calculated by applying a tax rate of between **3.5** and **6.5%** on the tax value (close to fair market value) of German situs real estate in case of a transfer of shares in PropCo owning such real estate
- A unification, directly or indirectly, of 90% or more of the shares in PropCo triggers RETT at the level of the acquiring entity (or group of acquiring entities) ("**first rule**")
- In addition, transfers of 90% or more of the shares in PropCo within a time period of 10 years trigger RETT at the level of PropCo ("**second rule**")
- Intra-group transfers are generally not tax exempt (only very limited exceptions apply); transfers over the stock exchange would not count as a harmful transfer for the purpose of the second rule
- **Signing and Closing of a share deal** trigger RETT under the first rule (upon Signing) and under the second rule (upon Closing). In principle, a **double RETT charge can be avoided, but only subject to meeting very strict compliance obligations**:
  - The second rule takes precedence over the first rule in case of a standard deal where 90% or more of the shares in PropCo are sold and transferred to a third party purchaser
  - However, the RETT charge under the first rule will only be eliminated if both upon Signing and upon Closing a proper and complete RETT filing will have been submitted in time
- Latest guidelines from German tax authorities foresee **double attribution of one and the same piece of land** (to different entities within a group of entities)
- Complete revision of German RETT law currently discussed; outcome uncertain

Securities transfer tax (STT) in Switzerland (1/3)

- STT is applicable on the transfer of **Swiss or foreign securities** (shares (listed or non listed), bonds (as defined under Swiss law), fund units etc.) against consideration with a Swiss (or FL) securities dealer acting **as party or intermediary**
- **STT of 0.075% per party** (= 0.15% in total) on the consideration for **Swiss securities**
- **STT of 0.15% per party** (= 0.3% in total) on the consideration for **foreign securities**
- **Various exemptions for transaction in case of restructurings**
- **Exempt party,** e.g. Swiss or foreign (generally regulated) fund, non-Swiss subsidiary of non-Swiss entity which is listed on the stock exchange
- Swiss securities dealer, e.g.
  - — Swiss bank,
  - — Swiss bank branch of foreign entity,
  - — Swiss incorporated entity holding more than CHF 10m book value in securities (in the last balance sheet, thus NewCo / AcquiCo only qualifies 6 months after such last balance sheet date),
  - — Swiss resident individuals / Swiss entities as securities dealer (trading with securities for third parties) or asset manager / advisor as broker (intermediary)
- Party = buyer or seller
- Intermediary in a transaction: person who is involved as broker (having a relevant role to convince the other party to buy /sell) or as evidence broker (showing an opportunity) → rather broad term

Securities transfer tax (STT) in Switzerland (2/3)

Examples

- US sub of Swiss listed holding entity (i.e. Swiss securities dealer) acquires US group from Lux seller
  - No Swiss securities dealer as party
  - Swiss listed group as intermediary? Depending on role, e.g. as broker during the transaction
    - Pure financing of the transaction, guarantor role or approval of the transaction as ultimate shareholder is generally not critical
    - Involvement of Swiss holding, e.g. M&A team / CFO etc. in the negotiations could be critical resulting in 0.3% STT on the purchase price!
    - Obligation is with Swiss securities dealer; recharge / sharing of costs can be contractually agreed
- Swiss M&A advisor initiates / supports in the sale of a US subgroup of a Swiss family owned business to a US buyer; seller is NL subholding
  - No Swiss securities dealer as party
  - No Swiss group company as securities dealer involved
  - Swiss M&A advisor may qualify as Swiss securities dealer (intermediary, asset manager ("Anlageberater") and be obliged to pay 0.3% STT on the purchase price! See recent Federal administrative court case BVGer A-5038/2020 dated 30 Nov 2021)
- Swiss management company (with M&A/ BD department) of a Swiss multinational supports in international M&A transactions, Swiss holdings (securities dealers) are not involved in such transactions
  - Swiss management company may qualify as Swiss securities dealer (intermediary, see above) being subject to STT on all international transactions

Securities transfer tax (STT) in Switzerland (3/3)

Key considerations / points to note

- STT applies on Swiss and foreign security transfers
- Check whether Swiss securities dealer (e.g. Swiss holding) is involved as party
- Check whether Swiss securities dealer is involved as intermediary
  - Swiss bank
  - Swiss group company
  - Swiss M&A advisor
- Consider structuring possibilities / mitigate involvement of Swiss securities dealer (and document it)
- Check engagement letters with banks / advisors re recharge of potential STT on client
- Check SPA re allocation of taxes (including transfer taxes) → sharing of taxes may result in STT recharge due to involvement of Swiss securities dealer (without this fact being known to a party)
- Check possible exemptions for involved parties (and agree on evidence, e.g. qualification as foreign fund, ideally in SPA)
- Formal requirements in case several securities dealers are involved (so-called "blue card" must be exchanged within three days to ensure that only own half STT must be paid)

U.K. stamp duty / SDRT

- Capital Duties Directive caselaw
- Exemption from 1.5% charge broadly preserved
- More general reform possible
- Remember the domestic exemptions

Irish Stamp duty – background and relevance to M&A transactions

- **Documentary tax** – historically a tax on documents and could be avoided by transacting without creating a document – since extended to apply to deemed documents created where electronic share transfers
- **Mandatory tax** – again historically it had an optional element in that if documents executed outside Ireland and retained outside Ireland duty was not payable, but relevant documents could not be relied on in legal proceedings if not properly stamped. It is now a mandatory tax.
- **Territoriality** – Irish assets and documents executed in Ireland and which relate to Irish assets or things to be done in Ireland
- **Tax payable by the transferee** – contractually can share etc, but strictly for purchaser to pay
- **Charged on both share and asset transfers** at rates of 1% and 7.5% generally. So potential saving if acquire company rather than underlying assets, although anti-avoidance provisions for real estate rich companies.
- **Reliefs for certain corporate transactions** 90% corporate group transfers, and for share for share exchanges and share for undertaking transactions subject to conditions – also clawback provsions to watch out for where connection broken
- **Exemptions for number of financial services related transfers** – loan capital, debt factoring, securitization company bonds
- **Charged on both listed and unlisted share transfers** – no duty on issuance (contrary to Capital Duty Directive).
- **Share transfer duty collected in Euroclear** (previously in CREST) and requires raising of relevant “flags” in the settlement process to indicate transaction status
- **Specific exempt treatment for ADRs and Irish company shares listed in North America and cleared in US** - certain practices/requirements of DTC before agreeing to deal with Irish shares.

Irish Stamp duty – background and relevance to M&A transactions

- **Considerations in M&A transactions**
  - **Can stamp duty costs be mitigated through a share transaction rather than an asset transaction?**
    - Rate differential – but anti-avoidance where Irish real estate derived
    - Would some of assets be SD exempt – eg IP
    - SD on share acquisition is on purchase price so if company indebted may be reduced (but anti-avoidance rules
    - If assets can be transferred by delivery rather than document further mitigation?
  - **Specific anti-avoidance provision on cancellation schemes of arrangement** – in conflict with Capital Duty Directive?
  - **Tax DD exercise**
    - Are documents of title etc properly stamped so enforceable etc
    - Any intra-group transactions subject to a clawback that could be triggered by sale/post sale
  - **Can transaction be effected in a manner so as to avail of reconstruction relief?**
    - Share for share
    - Share for undertaking?
  - **Manage risk of bringing transfer of non-Irish assets into SD charge by ensuring documents not executed in Ireland and/or split out completion transfers between Irish and non Irish asssets.**
  - **Where ADR or US listed shares exemption being availed of ensure conditions etc continue to be satisfied**
  - **Administration requirements to be able to pay and file within 30 days** – obtaining tax numbers for all parties