IBA Finance and Capital Markets Tax Conference

Hybrid Instruments

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Hybrid Instruments

- European dividends to non-EU funds
- Anti-hybrid and pre-existing avoidance rules
- EU DEBRA proposed directive & interaction with anti-hybrid rules
- Recent changes to the UK’s anti-hybrid rules

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Distribution of dividends to Non-EU Funds

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Distribution of dividends to Non EU Funds

- COUNCIL DIRECTIVE (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries: it seeks to neutralize mismatches by obliging Member States to deny the deduction of payments by taxpayers or by requiring taxpayers to include a payment or a profit in their taxable income.

- Spanish Anti-hybrid rules. For the analysis and application of the coordination rules, the combination of 3 elements which constitute the premises of application must be taken into account:

  1. The existence of a cross-border double non-taxation result: either in the form of a deduction without inclusion (D/NI) or in the form of a double deduction (DD).

  2. Concurrence of a different (but not incorrect) classification of financial instruments, entities or permanent establishments, their related income or a different attribution of income (revenues and expenses) in two or more legal systems.

  3. The existence of a control situation or a structured mechanism as the scope of application.

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Distribution of dividends to Non EU Funds

- **Primary rules:** denial of a deductible expense for the Spanish entity in light of a potential cross-border double non-taxation result (provided that 2 and 3 above are met).

- **Secondary or defensive rules:** which would apply where another jurisdiction has not eliminated the double non-taxation result through primary rules, either because the latter have not been properly applied or because they are not recognized under the tax laws of those other jurisdictions.

- **Concepts of deduction/inclusion:** there is no definition in the articles. The concept of inclusion varies depending on the type of coordination rule and mismatch involved (non-inclusion: not only in the absence of income, but also if the recipient's income is (i) exempt, (ii) subject to a reduction of the tax rate, or (iii) subject to any deduction or tax refund other than a deduction for the avoidance of double taxation).

- **Impact of hybrid entities.** Check-the-box. Level of knowledge. Role of the Manager and the GPs.

Distribution of dividends to Non EU Funds

- **Situations of control:** Article 18. This concept would also include situations related to the so-called (and undefined) "*joint action*" and the poorly defined "*significant influence*".

  - What happens with funds that have minority percentages but are managed by the same fund manager? What happens with less common scenarios where there is a shared GP? What happens if we have several LPs participating in a partnership, with sufficient percentage and with one GP?

  - **Action 2 BEPS Project** (i) acting regularly in accordance with the interests of another person, (ii) the existence of an arrangement that has a substantial effect on the value or control of voting rights or interests in share capital, (iii) the management of ownership or control of voting rights or interests in share capital by the same person or groups of persons.

  - Perimeter of 25% vs. 50%

Distribution of dividends to Non EU Funds

Significant influence: "*significant influence is presumed to exist when one has the power to intervene in the financial and operating policy decisions of another entity but does not control or exercise joint control over that entity*".

- Can it be a concept that is covered by the accounting rules and the definition of group, multi-group and associated companies under the Spanish General Accounting Plan?

- Bond issues underwritten by a single bondholder?

Distribution of dividends to Non EU Funds

- **Structured mechanism:** the fiscal advantage of hybrid mismatches:
  - Is quantified or considered under its terms and conditions or consideration.
  - Was designed to produce the results of such mismatches, unless the taxpayer or a person or entity related to the taxpayer could not reasonably have known about them and did not otherwise benefit from the stated tax advantage.
- **Action 2 BEPS Project:** it would link that knowledge to a standard that could be expected from a prudent and reasonable person and that could be equally predictable from an objective and well-informed observer. Manager of the Funds? Level of knowledge?

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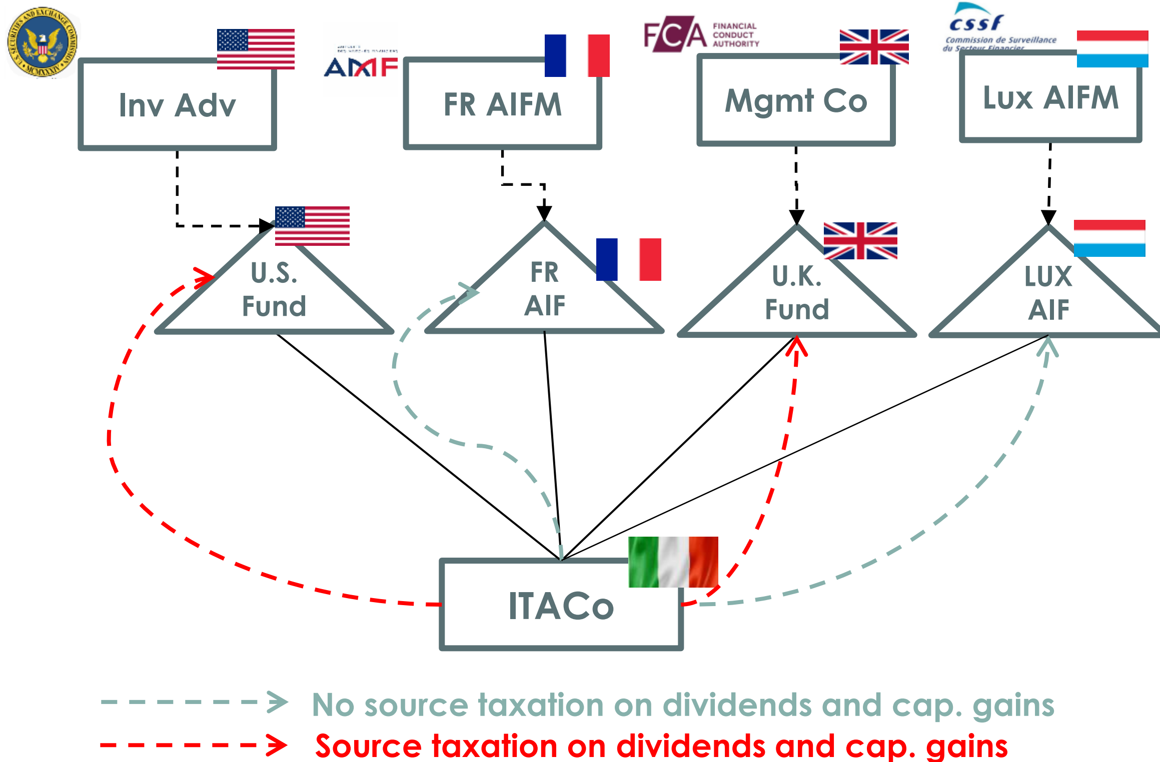
Dividends, Capital Gains for Non-EU Funds (Italy)

- Before 2021 Italy generally ***(i)*** levied 26% WHT on dividends paid by Italian companies to foreign funds and ***(ii)*** taxed capital gains realized by foreign funds on substantial participations in Italian companies, unless tax treaties could apply (endorsement of OECD approach to fiscally transparent entities). Conversely, Italy did not tax Italian funds. **Discrimination and violation of free movement of capital (EU PILOT 8105/15/TAXU)**

- **Finance Act 2021 (effective as of January 1, 2021)**
  - ➢ Full source exemption for dividends received and capital gains realized by EU/EEA funds that are either ***(a)*** compliant with Directive 2009/65/EC (UCITS) or ***(b)*** AIF managed by AIFM subject to regulatory supervision pursuant to Directive 2011/61/EU
  - ➢ Revenue Agency (Private Letter Ruling 327/2021): Exemption applies also to dividends paid after January 1, 2021, but out of profits generated before 2021
  - ➢ New exemption should also apply to EU/EEA real estate funds

- **Shortcomings of the new rule**
  - ➢ Exemption available only to EU/EEA funds. But free movement of capital does not stop at the EU borders…
  - ➢ Violation of EU law remains for dividends and gains realized before 2021

Dividends, Capital Gains for Non-EU Funds (Italy)



- Under current legislation, non-EU/EEA funds still suffer source taxation on Italian dividends and capital gains
  - Only exception: capital gains on portfolio participations for "white list" non-EU/EEA funds. But Finance Act 2023 narrowed this exception carving out capital gains on portfolio participations in real estate companies
- Does Italian source taxation for non-EU/EEA funds violate Art. 63 TFUE (free movement of capital)?
  - Yes, for "white list" funds (plenty of CJEU case law; see e.g., *Santander*, *Emerging Markets, Deka*, *College Pension of British Columbia*, *AllianzGI-Fonds*). Italy cannot invoke the standstill clause
  - Confirmed indirectly by Supreme Court (Decisions No. 21454, 21475, 21479, 21480, 21481 and 21482 of July 6, 2022; No. 21598 of July 7, 2022; and No. 21882 of July 11, 2022) and directly by Tax Court of Pescara (Decision No. 49 of February 7, 2022)

Dividends, Capital Gains for Non-EU Funds (Italy)

- **Supreme Court's decisions on U.S. funds' cases (FY 2007-2010) and German funds' cases (FY 2003)**
  - The funds suffered 15% dividend WHT under Art. 10 of, respectively, the Italy-US DTC and the Italy-Germany DTC
  - In those years, dividends paid to foreign funds were subject to 27% WHT in Italy, which could be reduced if a DTC applied (e.g., 15%). Conversely, dividends paid to Italian funds were not subject to WHT in Italy and were only subject to a substitute tax of 12.5% at the fund level, which could be reduced to 5% or 0% in certain cases
  - Claiming an infringement of free movement of capital (Art. 63 TFUE), the funds sought refund from the Italian Revenue Agency. The Revenue Agency did not reply to the funds' refund applications, and litigation started
  - The Supreme Court acknowledged that Italian law represented an unjustified infringement of the free movement of capital under Art. 63 TFEU, and it therefore recognized the funds' entitlement to the refund
- **Supreme Court's decision No. 25963 of September 2, 2022**
  - U.S. pension fund suffered 15% dividend WHT under Art. 10 of the Italy-US DTC in 2008 and 2009
  - EU/EEA pension funds would have been subject to 11% WHT
  - Violation of EU free movement of capital because the U.S. fund was subject to a worse tax treatment than comparable EU/EEA funds

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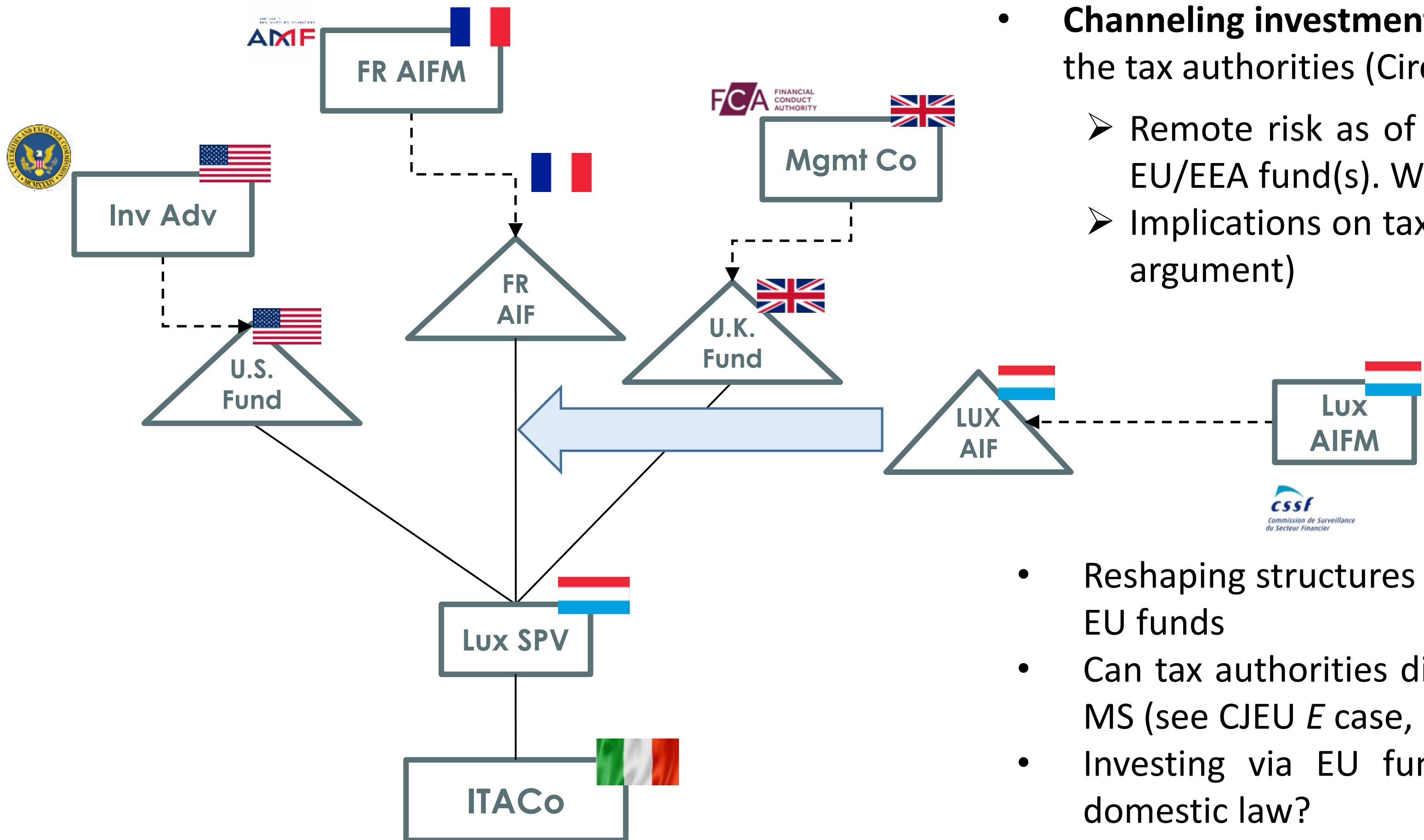
Dividends, Capital Gains for Non-EU Funds (Italy)



- **Channeling investments via an EU SPV**: risk of facing challenges from the tax authorities (Circ. Letter 6/2016; CJEU Danish cases)
  - ➢ Remote risk as of 2021 if EU SPV is exclusively held by genuine EU/EEA fund(s). What about EU SPV also held by non-EU funds?
  - ➢ Implications on tax audits for FYs until 2020 (additional defensive argument)

- Reshaping structures placing Italian investments under intermediate EU funds
- Can tax authorities disregard regulated fund structures in other EU MS (see CJEU *E* case, C-480/19)?
- Investing via EU funds as self-help remedy against illegitimate domestic law?

Anti Hybrid and Pre-Existing Avoidance Rules

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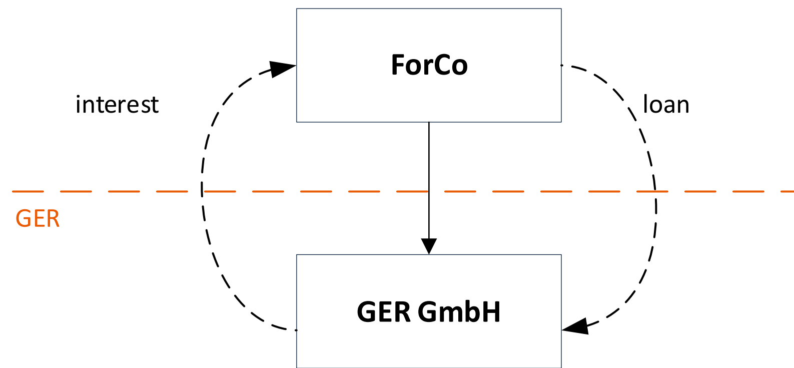
German anti-hybrid rule of Sec. 4k Income Tax Code (1)



- ForCo, a corporation tax resident in the foreign State A is sole shareholder of GER GmbH, a corporation being tax resident in Germany
- ForCo has granted an interest bearing loan to GER GmbH
- According to the tax law of State A, Ger GmbH is treated as tax transparent due to the provisions of its statutes
- From the perspective of foreign State A, no loan relationship exists
- Interest paid by GER GmbH are subsequently not taxed in State A; however, such interest is generally deductible in Germany
- Subsequently, German anti-hybrid rules deny interest deduction

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German anti-hybrid rule of Sec. 4k Income Tax Code (2)

The following situations are covered:

- Financing transactions with a **mismatch of** either **instrument qualification** or **asset attribution resulting** in income not subject to taxation or only to lower taxation at the recipient level (e.g., hybrid loans/equity instruments; certain stock lending- or REPO-transactions)
  - If the non-taxation or low taxation at the recipient level is just temporary and the transaction is structured at arm's length, the rule does not apply
- Any deduction/no inclusion scenarios with a mismatch in the qualification of the paying entity (e.g. disregarded transaction under United States entity classification principles)
  - Not limited to financing transactions but applies to any other payment which is deductible (immediately or over time, e.g. by way of amortization)
  - Also covers "dealings" between the headquarter and a permanent establishment
  - Exception if there is dual inclusion income at the level of the foreign recipient and, thus, the income is effectively taxed despite the mismatch

German anti-hybrid rule of Sec. 4k Income Tax Code (3)

The following situations are covered (cont'd)

- Any deduction/no inclusion scenario with a mismatch in the qualification of the recipient entity (reverse hybrids; transparent under local law, but non-transparent from owner's perspective) or branch income inclusion mismatch
- Any double deduction scenario, e.g. due to expenses incurred by a hybrid entity unless coupled with double inclusion of income
- Imported mismatch scenarios
  - ➢ Structures with no mismatch at the level of the direct recipient of the expenses but with a mismatch in income taxation at any level other than the direct recipient directly or indirectly resulting from the expense (e.g. due to a back-to-back structure)
- Expenses within the scope of a structured arrangement
  - ➢ Tax advantage that would have resulted without application of anti-hybrid rules was included in contractual arrangements or the terms of the contractual arrangements or underlying circumstances indicate that the parties to the arrangement could have expected the tax benefit

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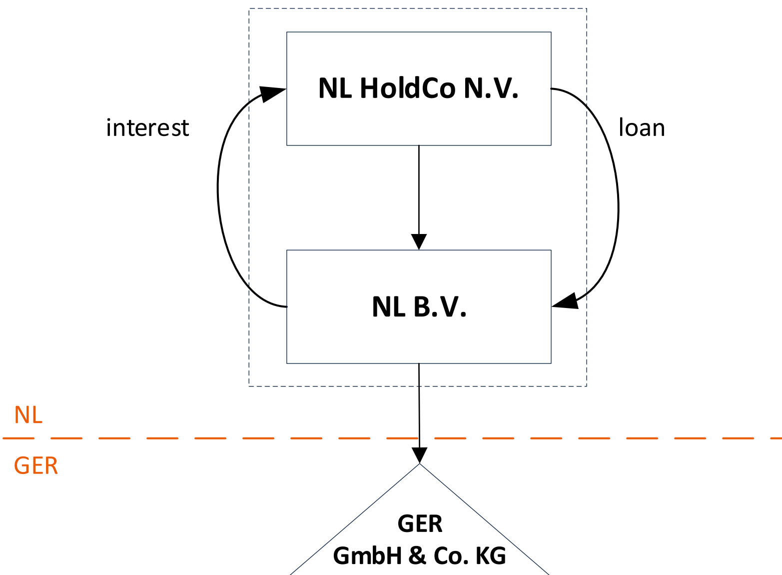
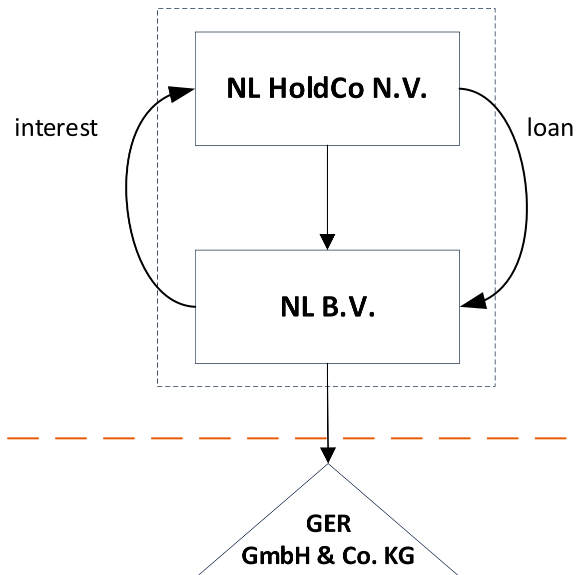
German anti-hybrid rule of Sec. 4k Income Tax Code (4)



- NL B.V. being tax resident in the Netherland holds 100% of the limited partner interest in a German limited partnership „GER GmbH & Co. KG"
- The general partner of GER GmbH & Co. KG (being a German corporation) does neither have a participation in the partnership's capital nor in the profits
- All shares in NL B.V. are held by NL HoldCo N.V.
- NL B.V. and NL HoldCo N.V. are in a tax group under Dutch tax law (*Fiscale Eeheid*)
- NL HoldCo N.V. grants a loan to NL B.V. which used the funds to acquire the limited partnership interest in GER GmbH & Co. KG
- The Netherlands treats GER GmbH & Co. KG as opaque, Germany as transparent

German anti-hybrid rule of Sec. 4k Income Tax Code (5)



- Tax treatment of interest without anti-hybrid rule
  - ➢ Netting of interest income and interest expenses within the tax group in the Netherland
  - ➢ Interest Expenses deductible in Germany as special business expenses (*Sonderbetriebsausgaben*)
  - ➢ Deduction/No inclusion or Double Deduction?

- As interest income is subject to tax in the Netherlands, no „Deduction/No inclusion"
- But Double Deduction scenario
  - ➢ interest expenses are deducted in Germany and in the Netherlands
- In addition Sec. 4i Income Tax Code should also be applicable
  - ➢ Rule covers partnership scenarios where interest expenses are deductible as special business expenses and can also be deducted in another jurisdiction

German anti-hybrid rule of Sec. 4k Income Tax Code (6)

Scope of application:

- Expenses between related parties within the meaning of Sec. 1 para 2 German CFC Rules
  - basically direct or indirect shareholding of at least 25% or right to at least 25% of the profits or liquidations proceeds (also parties acting in concert are covered)
- Expenses between a company and its foreign permanent establishment
- Expenses within the scope of a structured arrangement within the meaning of Sec. 4k para 6 sentence 3 ITC

Timing:

- Rules apply generally on expenses accruing after 31 December 2019

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Further (pre-existing) German anti-hybrid rules (1)

- Non-taxable contribution into corporations only if payments are not deductible in the jurisdiction of the shareholder

- Domestic participation exemption
  - Only applicable if "dividend" has not reduced the income of the distributing company
  - In case of attribution mismatches only applicable if no reduction of income at the level of the other person (e.g. in case of securities lending or Repo transactions)

- Partnership structures where expenses can be deducted in Germany and in a foreign jurisdiction (e.g. limited partner finances the acquisition of the limited partner interest)

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Further (pre-existing) German anti-hybrid rules (2)

- Reverse hybrid entities, i.e. income realized by a German transparent partnership if
  - ➢ such income is not taxed in the state of residence of the shareholder/partner due to the qualification of the partnership as opaque,
  - ➢ the income is not already subject to limited tax liability in Germany, and
  - ➢ the income is not taxed in any other jurisdiction.
  - ➢ applies only if the non-tax resident partner holds (alone or together with related persons also not being tax resident in Germany) more than 50% of the voting rights or capital in the partnership

- Exemption method for income from a foreign permanent establishment under a tax treaty is denied if such income in not taxed in the treaty state where the permanent establishment is located due to an attribution to a permanent establishment in another jurisdiction or the permanent establishment’s income is reduced/not increased due to an assumed “dealing” mismatch

EU DEBRA Proposed Directive & Interaction with Anti-Hybrid Rules

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DEBRA

- Debt-Equity Bias Reduction Allowance
- EU commission initiative (together with BEFIT) to provide better business tax system in EU
- DEBRA addresses mismatch treatment of debt and equity financing by providing deduction to inserted equity and profits
- Directive proposal 11 May 2022
- To be in force as of 2024

DEBRA

- Allowance is deducted from net taxable income
- Allowance = Equity Base * Notional Interest Rate
- Equity Base = Annual Increase in Equity
- Notional Interest Rate = Risk Free Rate + Risk Premium
- Risk Free Rate = Ten Year Maturity, Currency of Taxpayer
- Risk Premium = 1% (1.5% for SMEs)
- Maximum allowance 30% of taxpayer's EBITDA
- Anti-avoidance rules to prevent cascading of allowance within group

ATAD Anti-Hybrid Rules

- ATAD deals with certain mismatch situations in connection of hybrid instruments or entities:
    - ➢ In case of tax deduction of payment without inclusion in taxable income of recipient -> deduction is denied in payer jurisdiction
        - ➢ In case payer is not in EU payment is taxed in payee (EU) jurisdiction
- Anti-hybrid rules applied since 2020

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ATAD vs. DEBRA

- Equity financing costs (distributions) are non-deductible for companies
- Distributions may be tax exempt for shareholders
  - ➢ Hybrid mismatch?
- Tax deduction provided under DEBRA pertains to equity increase in company
- Equity increase enables dividend or capital reduction
  - ➢ Do anti-hybrid rules prevent deduction under DEBRA?

ATAD vs. DEBRA

- Applicability of ATAD anti-hybrid rules' deduction denial to DEBRA allowance:
  - Is there link between allowance and distribution?
  - Direct link is only to equity increase
  - Equity increase as such does not obligate company to make dividend payments or capital reduction payments
    - Such dividend payments or capital reduction payments decrease allowance base and are also subject to recapture
  - DEBRA allowance is only notional deduction and there is no corresponding "payment" as referred in BEPS action report 2
  - Grounds to argue that DEBRA allowance should not be subject to ATAD anti-hybrid deductibility restrictions?

NID and Anti-Hybrid Rules: Italy’s Viewpoint

- **Italy has a notional interest deduction regime (ACE) in its legislation since 2011**
  - Italy’s regime shares many features of DEBRA proposal, but there are also considerable differences
  - If DEBRA is approved, Italy could elect for the transitional rule in Art. 11(2) of the proposed Directive
- **Italy also implemented ATAD II anti-hybrid rules effective as of January 1, 2020 (2022 for reverse hybrids)**
  - Italy’s implementing rules state that deductions under the domestic NID regime cannot give rise to hybrid mismatches
  - According to the Government’s explanatory memorandum and the Revenue Agency, this holds true also for foreign NID regimes. As a result, NID regimes should also be outside the scope of the imported mismatch rule
  - Italy’s position is mainly based on the absence of a “payment” linked to the NID (see BEPS Action 2, par. 11)
- **Pitfalls for Italian groups operating in the U.S. (a potential EU-wide problem because of DEBRA)**
  - §267A IRC: Italian NID may be seen as a hybrid deduction triggering an imported mismatch. Same fate for DEBRA?
- **Other traps?** CFC, Pillar II, future U.S. tax treaties with EU MS that mirror Art. 11(2)(e) U.S. Model 2016

U.S. Anti-Hybrid Legislation

- IRC § 267A denies interest or royalty deductions for payments by specified parties to related parties in hybrid transactions and hybrid entities.
  - The regulations deny a deduction for hybrid arrangements, or similar arrangements involving branches, that produce D/NI (deduction/ no inclusion) outcomes or indirect D/NI outcomes.
  - "Specified parties" means any of (i) a tax resident of the United States, (ii) a CFC for which there is one or more United States shareholders that own (within the meaning of Code section 958(a)) at least ten percent of the stock of the CFC, and (iii) a US taxable branch (which includes a US permanent establishment of a tax treaty resident).

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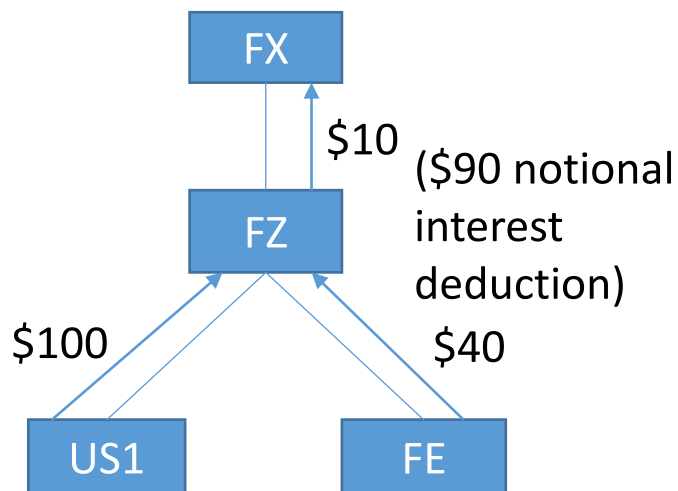
U.S. Anti-Hybrid Legislation

- The deduction for specified payments is disallowed to the extent it is:
  - A disqualified hybrid amount (hybrid and branch arrangements);
  - A disqualified imported mismatch amount (payments offset by a hybrid deduction); or
  - A specified payment subject to anti-avoidance rules.
- A hybrid deduction includes
  - A deduction allowed to a non-U.S. resident or branch that would be disallowed under IRC § 267A or
  - A deduction allowed to a non-U.S. resident or branch with respect to equity, such as a notional interest deduction.

U.S. Anti-Hybrid Legislation



- FX holds all the interests of FZ, and FZ holds all the interests of each of US1 and FE. The tax law of Country E contains hybrid mismatch rules. FX holds an instrument issued by FZ that is treated as equity for Country X tax purposes and indebtedness for Country Z tax purposes (the FX-FZ instrument). In accounting period 1, FZ pays $10x to FX pursuant to the FX-FZ instrument. The amount is treated as an excludible dividend for Country X tax purposes (by reason of the Country X participation exemption) and as interest for Country Z tax purposes. Also in accounting period 1, FZ is allowed a $90x **notional interest** deduction with respect to its equity under Country Z tax law. In addition, in accounting period 1, US1 pays $100x to FZ pursuant to an instrument (the FZ-US1 instrument); the amount is treated as interest for U.S. tax purposes and Country Z tax purposes, and is included in FZ's income. Further, in accounting period 1, FE pays $40x to FZ pursuant to an instrument (the FZ-FE instrument); the amount is treated as interest for Country E and Country Z tax purposes, is included in FZ's income, and is subject to disallowance under a provision of Country E hybrid mismatch rules substantially similar to §1.267A-4. Lastly, neither the FZ-US1 instrument nor the FZ-FE instrument was entered into pursuant to a plan or series of related transactions that includes the transaction pursuant to which the FX-FZ instrument was entered into.

U.S. Anti-Hybrid Legislation

- Analysis. US1 is a specified party and thus a deduction for its $100x specified payment is subject to disallowance under section **267A**. As described in paragraphs (c)(12)(ii)(A) through (D) of this section, $92x of US1's payment is a disqualified imported mismatch amount for which a deduction is disallowed under §1.267A-1(b)(2).
- (A) The entire $100x of US1's specified payment is an imported mismatch payment. See §1.267A-4(a)(2)(v). US1 is an imported mismatch payer and FZ (a foreign tax resident that includes the imported mismatch payment in income) is an imported mismatch payee. See §1.267A-4(a)(2).
- (B) FZ has $100x of hybrid deductions (the $10x deduction for the payment pursuant to the FX-FZ instrument plus the $90x **notional interest** deduction). See §1.267A-4(b). Pursuant to §1.267A-4(f)(1), §1.267A-4 is first applied by taking into account only the $90x hybrid deduction consisting of the **notional interest** deduction; in addition, for purposes of applying §1.267A-4 in this manner, FE's $40x payment is not treated as an imported mismatch payment. Thus, the $90x hybrid deduction offsets the income attributable to US1's imported mismatch payment, an imported mismatch payment that directly funds the hybrid deduction. See §1.267A-4(c)(2)(ii). Moreover, $90x of US1's imported mismatch payment directly funds the hybrid deduction because FZ (the imported mismatch payee) incurs at least that amount of the hybrid deduction. See §1.267A-4(c)(3)(i).

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U.S. Anti-Hybrid Legislation

- (C) Section §1.267A-4 is next applied by taking into account only the $10x hybrid deduction consisting of the deduction for the payment pursuant to the FX-FZ instrument. See §1.267A-4(f)(2). When applying §1.267A-4 in this manner, and for purposes of determining the extent to which the income attributable to an imported mismatch payment is directly or indirectly offset by a hybrid deduction, FE's $40x payment is treated as an imported mismatch payment. See §1.267A-4(f)(2). In addition, US1's imported mismatch payment is reduced from $100x to $10x. See §1.267A-4(c)(4). But for FE's imported mismatch payment, the entire $10x of US1's imported mismatch payment would directly fund the $10x hybrid deduction because FZ incurred at least that amount of the hybrid deduction. See §1.267A-4(c)(3)(i). Similarly, but for US1's imported mismatch payment, the entire $40x of FE's imported mismatch payment would directly fund the $10x hybrid deduction because FZ incurred at least that amount of the hybrid deduction. See §1.267A-4(c)(3)(i). However, because the sum of US1's and FE's imported mismatch payments to FZ ($50x) exceeds the hybrid deduction incurred by FZ ($10x), pro rata adjustments must be made. See §1.267A-4(e). Thus, $2x of US1's imported mismatch payment is considered to directly fund the hybrid deduction, calculated as $10x (the amount of the hybrid deduction) multiplied by 20% ($10x, the amount of US1's imported mismatch payment to FZ, divided by $50x, the sum of the imported mismatch payments that US1 and FE make to FZ). Similarly, $8x of FE's imported mismatch payment is considered to directly fund the hybrid deduction, calculated as $10x (the amount of the hybrid deduction) multiplied by 80% ($40x, the amount of FE's imported mismatch payment to FZ, divided by $50x, the sum of the imported mismatch payments that US1 and FE make to FZ). Accordingly, $2x of FZ's $10x hybrid deduction offsets income attributable to US1's $10x imported mismatch payment, and $8x of the hybrid deduction offsets income attributable to FE's $40x imported mismatch payment.

U.S. Anti-Hybrid Legislation

- (D) Therefore, $92x of US1's imported mismatch payment is a disqualified imported mismatch amount, calculated as $90x (the amount that is a disqualified imported mismatch amount determined by applying §1.267A-4 in the manner set forth in §1.267A-4(f)(1)) plus $2x (the amount that is a disqualified imported mismatch amount determined by applying §1.267A-4 in the manner set forth in §1.267A-4(f)(2)). See §1.267A-4(a)(1) and (f).

Finland – Taxation of Hybrid Financial Instruments and other anti-hybrid rules

- Traditionally Finland has had liberal practice towards interest deductibility
  - ➢ Domestic GAAR applicable in theory to hybrid situations, but never applied in practice
  - ➢ E.g. interest on perpetual and profit participation loans generally deductible
- Implementation of ATAD since 2019 has restricted deductibility accordingly
  - ➢ Only limited case law – a pending case re. reverse hybrid entity
- Finnish implementation of Directive 2014/86/EU imposes tax since 2016 on dividends received by parent as far as subsidiary has made corresponding deduction

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Recent Changes to the UK’s Anti-Hybrid Rules

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Overview

- UK’s anti-hybrid rules known for:
  - overreach when compared with (e.g.) OECD Action 2 recommendations; and
  - numerous legislative changes since introduction in 2017.
- FA 2021 and 2022 have most recently amended UK’s anti-hybrid rules - generally, to address their perceived overreach.
- Following slides will only consider application of changes to hybrid financial instruments (“HFI”), not other types of hybridity.

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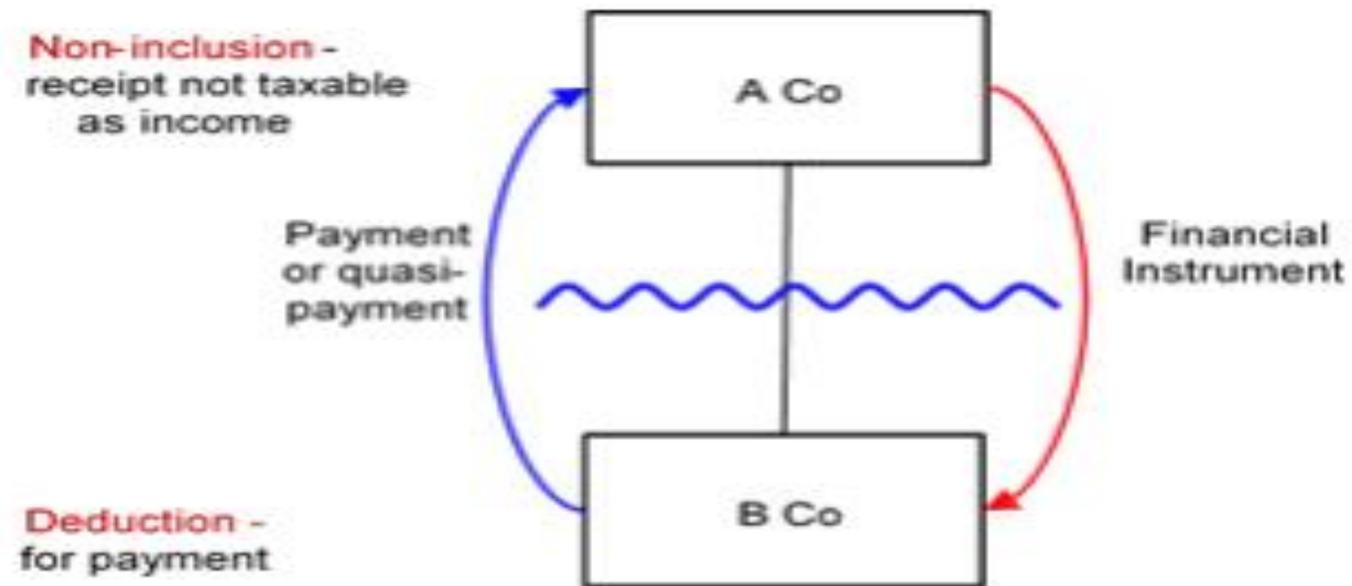
Hybrid financial instrument



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UK's hybrid financial instrument rules

- HFI rules within UK regime only generally apply (absent “structured arrangement”) if:
  - lender/holder and issuer/borrower under HFI are “related”; and
  - “impermissible [D/NI] mismatch” arises.
- However, otherwise unconnected lenders/holders may be treated as related with issuer/borrower under broad “acting together” rules.
- Plus, mismatch may arise under rules even if lender/holder wouldn’t have been taxed on receipt anyway (e.g. as tax exempt investor).

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FA 2021/22 changes

- To narrow scope of UK's anti-hybrid regime, FA 2021:
  - generally excludes ordinary lenders from acting together rules if their "relevant investment" in borrower is 5% or less; and
  - provides potential carve-out for underlying investor lending through "transparent [investment] fund" if it has less than 10% interest in fund.
- Rules also modified favourably for UK investment trusts, "qualifying asset holding companies" and "qualifying institutional investors" (e.g. certain pension schemes, SWFs, charities and investment funds).
- In addition, HMRC's guidance now makes clear that lender's rights *qua* lender won't usually make it "related" to borrower.

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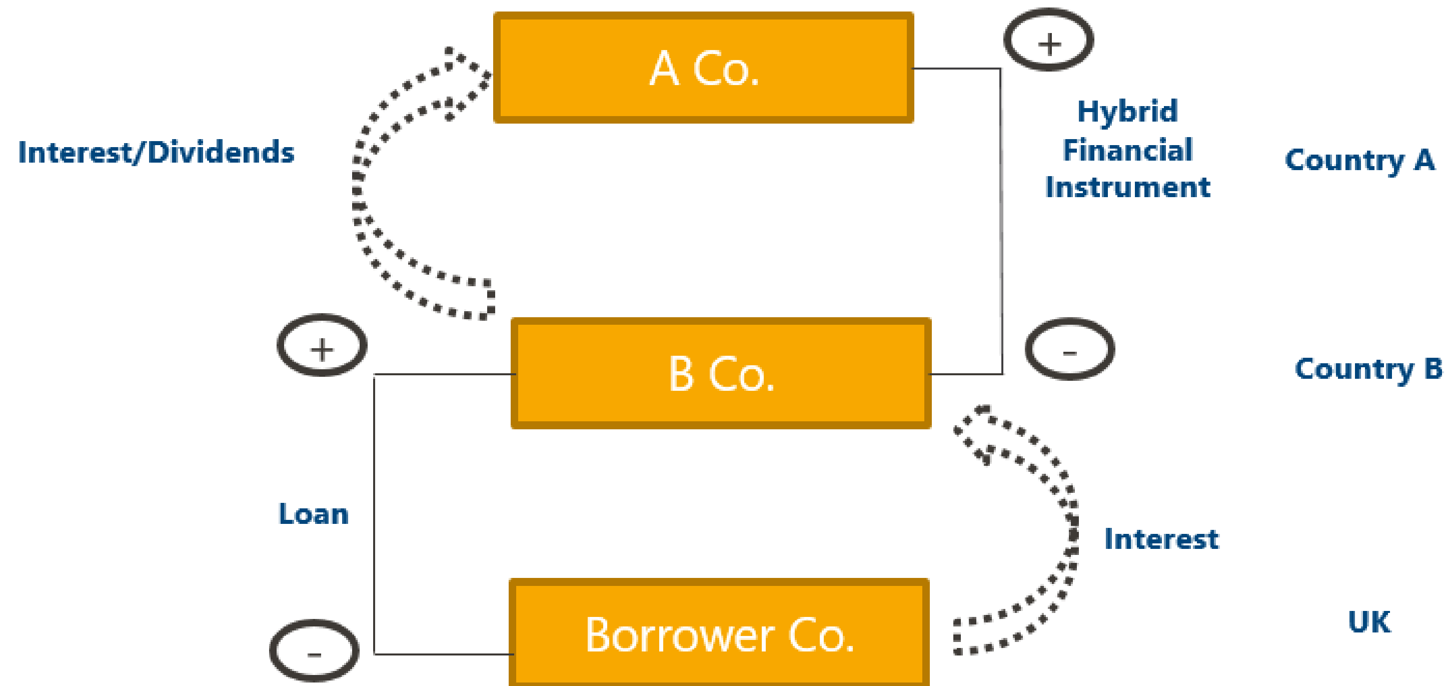
Imported mismatch arrangement



Imported mismatch rules

- UK’s imported mismatch rules only previously disapplied if imported mismatch subject to “equivalent” rules in overseas jurisdiction.
- Now, under FA 2021 changes, test is, broadly, whether overseas jurisdiction is “OECD mismatch compliant” -
  - i.e. has it implemented 2015 BEPS Action 2 recommendations?
- Other helpful changes also made to UK’s imported mismatch rules, e.g. as regards interaction with UK’s transfer pricing regime.

Debt releases

- HMRC consider (cf. OECD Action 2 recommendations) that UK HFI rules are capable of applying to intragroup debt releases.
  - I.e. if lender obtains tax relief for release and no taxable profit for borrower.
- Exclusion previously available but only if debt release mismatch arose due to “relevant debt relief provision”.
- FA 2021 has now broadened exclusion (retrospectively to UK regime’s 2017 start date) to encompass “relevant debt relief *circumstances*”.

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GILTI

- Based on FA 2021 changes/HMRC guidance, GILTI is neither a “foreign tax” nor “foreign CFC charge” under UK’s anti-hybrid rules.
- Which means that D/NI mismatch can arise and be counteracted under rules *despite* income being brought into account under GILTI.
- Cf. HMRC’s “expectation” that tax paid in US under GILTI should be Pillar 2 “covered tax” that is generally eligible for pushdown to relevant CFCs under Art 4.3.2(c)/UK equivalent.

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Michaela Engel specializes in the tax structuring of (cross-border) real estate and corporate M&A transactions. She also provides tax advice on corporate reorganizations as well as advice on international tax law. Furthermore, she advises on group tax law and financing transactions, including securitizations.

Competences

- Real estate tax
- International and EU tax law
- Reorganization tax law
- Mergers & Acquisitions
- Structured and hybrid financing
- Group tax law

Career Development

- Studied business management and received doctorate degree at the Otto-Friedrichs-University of Bamberg
- Lectured in-house at a major German bank
- With Noerr since 2002
- Admitted to the Munich Chamber of Tax Advisors

Languages

- German
- English

Antti Lehtimaja advises clients on various corporate and international tax matters, such as transactions, disputes and general advice. He is also known for his expertise in crypto asset taxation. He has over 25 years' working experience in international taxation as an attorney in a law firm and as a specialist at the Tax Administration.

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Rankings

- ITR World 2022 (Tax): "WT - Highly Regarded", "EG Tax Leading Advisor“
- Chambers Europe 2022 (Tax): A client comments: "Antti is extremely responsive, always calm and insightful.“
- Chambers Europe 2021 (Tax): According to a client, Antti is a "very knowledgeable guy."

References

- Defended Ashoka in its tax dispute in the Supreme Administrative Court
- Advised Consolis on the acquisition of Finnish and Latvian operations of TMB Group
- Advised Evolver Equity on the formation of Evolver Fund I
- Advised European Energy Exchange on the acquisition Grexel Systems
- Advised One Equity Partners on the acquisition of Walki Group
- Advised AXA Investment Managers - Real Assets on the acquisition of the Kluuvi retail and office asset in the centre of Helsinki

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Cesare Silvani is a partner with Maisto e Associati in Milan (Italy). His practice mainly focuses on taxation of M&A and corporate reorganizations, private equity funds, financial instruments, real estate deals, and international taxation. He joined the Firm in 2014, after working five years for a U.S. law firm.

He is admitted to the Milan Bar and the New York State Bar. He worked as IFA Research Associate in Amsterdam in 2013 and 2014 and obtained an LL.M. (with honors) in Taxation from the New York University in 2013.

He is author of several publications on international and corporate taxation, including most recently *Italy's Corporate Taxation Country Analysis* for IBFD and *Departures from Article 11 of the OECD Model Convention* (in G. Maisto (Ed.), *Taxation of Interest under Domestic Law, EU Law and Tax Treaties*).

Matthew Mortimer is a partner in Mayer Brown's international tax practice. He concentrates predominantly on the tax aspects of acquisition and structured finance, M&A transactions, intragroup reorganisations and debt restructurings.

He also advises in relation to international tax planning, private equity investments and fund formation.

Matthew is admitted to practise in England and Wales and is a Member of the Law Society's Corporation Tax Sub-Committee. He joined Mayer Brown in 2019.

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Rebeca Rodríguez is an expert in securitization, having participated in many debt instrument issues and derivative transactions, and has advised on many corporate and high-yield bond issues. She advises on tax matters in relation to syndicated and bilateral loans (business financing, project financing, leasing, leveraged transactions and structured acquisitions). In recent years, she has advised on bad debt acquisitions and transactions with secured non-performing loans (NPLs), involving shares, corporate loan portfolios and REOs, as well as on secured debt restructuring transactions.

She is also an expert in insurance company taxation and in social welfare, as well as in tax planning for all kinds of restructuring transactions, financing, financial agreements, investment structures and transactions implemented by foreign funds.

She is a member of the Madrid Bar Association. She lectures in the Master in Tax Consultancy at IE Business School and speaks regularly at conferences and talks.

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