HOT OR NOT:
RECENT M&A TRENDS AND TRANSACTIONS

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Brief Overview

"Inversions" – or sometimes called "redomiciliations" – are hardly new and are not limited to the U.S.

Has historically been, and continues to be, a global, and not simply a U.S. topic:

U.S. tax authorities have rolled out several responses to inversions over the past 30+ years. The broad approach has been to make it difficult to leave – the Berlin Wall approach

Other countries have changed their tax rules so a redomiciliation has little impact on the tax yield – the free market approach

Recent U.S. regulatory reaction (or, perhaps over-reaction) has had a notable impact on the competitive M&A and operating landscape – influencing the size and shape of deals deemed commercially attractive and the competitive profile of many multinational corporations (both U.S. and non-U.S.)

Inversions typically involve not only tax considerations but many critical non-tax concerns too.

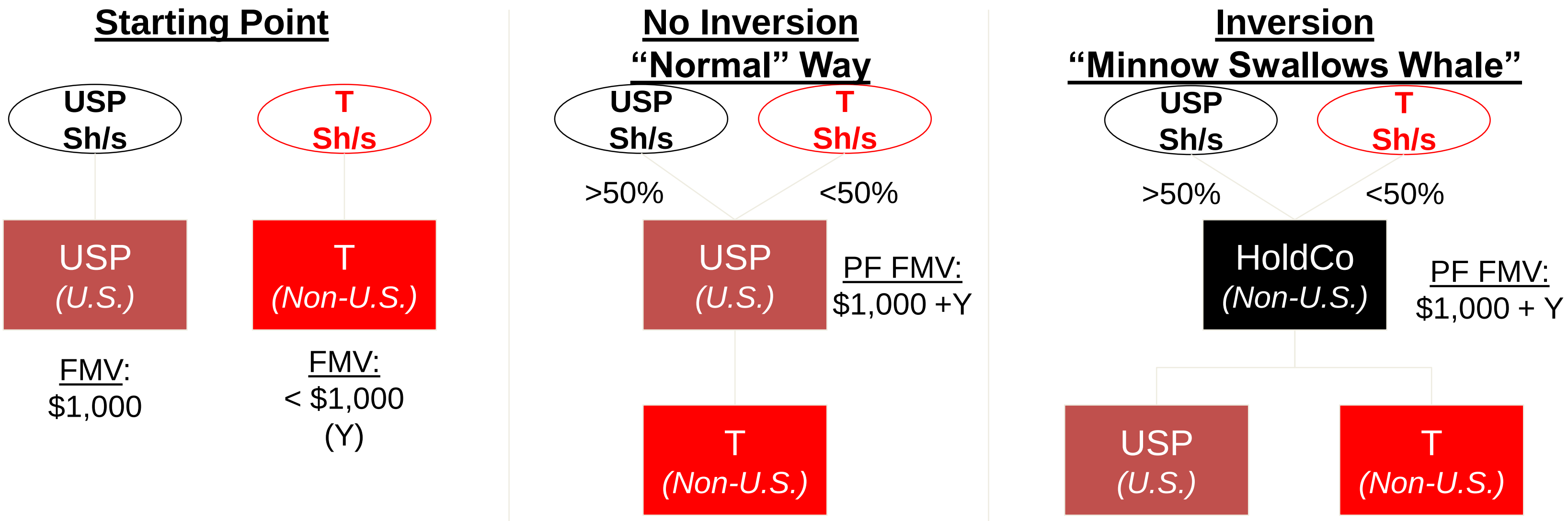
Topics to be covered

- Inversions – What is It?
- Why invert/redomicile?
- Practical Examples:
  - US
  - UK
  - Switzerland
  - Ireland
- Policy responses and policy constraints
- Primarily discuss public/listed companies

Inversions – What is It?

What is an "Inversion?"

- An "inversion" generally refers to a combination between a relatively *larger* U.S. company and a relatively *smaller* non-U.S. company under a non-U.S. parent company structure
- Non-tax term: a "reverse acquisition"

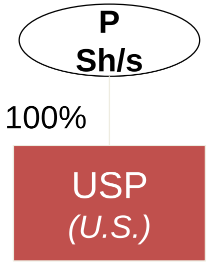


Inversions – Stand-Alone Version

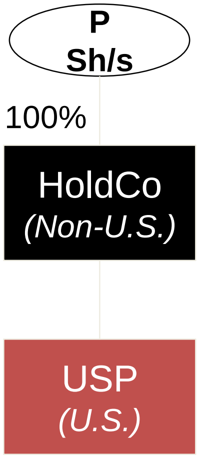
But, in some cases, an inversion can be done on a "stand-alone" basis whereby the existing corporation adopts a parent corporation structure in a different structure.

- These deals can be done in the U.S. only if the corporation has "substantial business activities" in the country in which the new parent corporation is legally organized and tax resident
- At least 25% of third party sales, tangible assets and employees must occur or be located in the destination jurisdiction – typically very difficult to satisfy

Starting Point



Stand-Alone Inversion



Inversions – Why Consider An Inversion?

Tax Factors

- Usually destination jurisdiction does not levy material tax on holding companies
- Tax on share transactions
- Capital gains of shareholders
- Dividend withholding tax
- CFC rules
- Transfer pricing
- Stability of tax system with rate certainty
- Efficiency and reliability of tax administration
- Ability to build substance - BEPS
- Tax treaty network
- Directors' taxation

Other Factors

- Corporate governance
- Director liability
- Share clearing and settlement issues
- Take-over regime
- Acquisitions for equity/debt/cash
- Infrastructure and access
- Accounting: availability of US GAAP; auditing standards
- Common law v. civil law jurisdiction
- Regulatory and administrative burden
- Ease of dealing with local bureaucracy
- Friendly time zone
- Worker's influence on the board

Inversions – Current U.S. Dynamic

Majority of inversions involving a U.S. corporation today are done via a combination with an unrelated non-U.S. corporation

“Less than 80%” deals technically work, but “less than 60%” deals generally are far better from a tax perspective and are the point of focus in today’s market

- **An inversion can be accomplished under U.S. tax law so long as the shareholders of the U.S. corporation receive less than 80% (by vote and value) of the shares of the combined company**
- **But due to numerous regulatory changes made in the past 2-4 years, the “sweet spot” is now a “less than 60%” deal – and those are the deals the market is generally focused on**

U.S. Co’s Sh/s Ownership Level – Highly Relevant*

< 60%	≥ 60 – 79.99%	≥ 80%
• Parent respected as non-U.S. corporation • Parent can be organized in any jurisdiction • Maximize post-deal tax planning opportunities	• Parent respected as non-U.S. corporation • But Parent must be in jurisdiction in which non-U.S. merger partner was already legally organized and tax resident • Severe limitations on post-deal tax planning	• Parent treated as a U.S. corporation for U.S. tax purposes

** Simplified chart with many assumptions, including the foreign acquiring corporation does not have substantial business activities in the country in which it is legally organized.*

Inversions – Current U.S. Dynamic *(Cont'd)*

Recent regulatory developments include:

"Third Country" Rule – changing an existing interpretation of law

"Anti-Serial Inverter" Rule – promulgating an altogether new rule to attack select transactions not otherwise covered

Generally no "grandfathering" for announced but not yet closed deals

Many deals modified or terminated / aborted

Threat of even more change chilling certain deal conversations

Inversions – EU Policy Issues and Policy Response

Most EU countries historically adopted participation exemptions so did not effectively tax income or gains of holding companies. As a result they were largely neutral on where the top listed company was based

Anti-redomicile policy was also constrained in preventing redomiciles within the EU due to freedom of establishment. In fact EU law structures exist specifically to permit companies to change domicile:

Cross border merger regulation

SocietasEuropaea: a EU created public company that can moves its domicile within the EU under EU regulations

From 2009 UK actively reformed its system to attract holding companies for the spin off benefits

As a result, the negative view of “inversions” from a policy perspective is largely a US perception

Inversions – Countries Have Responded Differently

United States	Ireland
• 1980s - 2004: Modest regulatory additions • 2004: Statutory change (§ 7874) • 2009-2014: Add to and modify existing regulations • 2014-present: Substantial additions and changes to regulations with no grandfathering for not-yet-closed deals • Still a timely and important boardroom topic	Ireland adopted a "neutral" but friendly policy to redomiciles and has not changed that policy • 2006-2010: UK listed companies stand alone redomiciles to Ireland using Jersey incorporated/Irish tax resident corporations • 2008-2012: US listed Bermuda/Cayman stand alone redomiciles to Ireland using Irish incorporated and tax resident corporations • 2012-2016: US companies doing M&A related redomiciles to Ireland • 2014/2015: US listed Swiss companies stand alone redomiciles to Ireland • 2015/2016: EU (Sweden/France) US IPO linked stand alone redomiciles

Inversions – Countries Have Responded Differently

Switzerland

- 2006-2009: Seen as "safe" destination for stand alone redomiciles of Bermuda/Cayman companies
- 2008-2010: Yet some of the formerly inverted corps that had redomiciled to Switzerland subsequently moved yet again to a different non-U.S. jurisdiction largely due to:
  - Minder referendum:
    - say on pay;
    - shareholders required to disclose their voting;
    - no leaving bonus for directors.
  - Referendum on limiting executing pay to 12x lowest paid employee (which did not pass).

United Kingdom

- 2000s: Companies had been leaving in the early to mid 2000s
- 2009: But, then fundamental domestic tax reform:
  - No dividend withholding tax;
  - Participation exemption;
  - Restricted CFC, also

  0% withholding tax on interest and dividends from the U.S.
  - Exit trend generally ended
  - In fact, some companies have:
    - "returned"
    - Have moved to the UK as part of an inversion (US companies doing M&A related Inversions);
    - Split residence and incorporation (UK tax resident; Irish incorporated);
    - US listed Swiss companies stand alone inversions to UK;

Deductibility of interest expenses and carry forward of tax losses

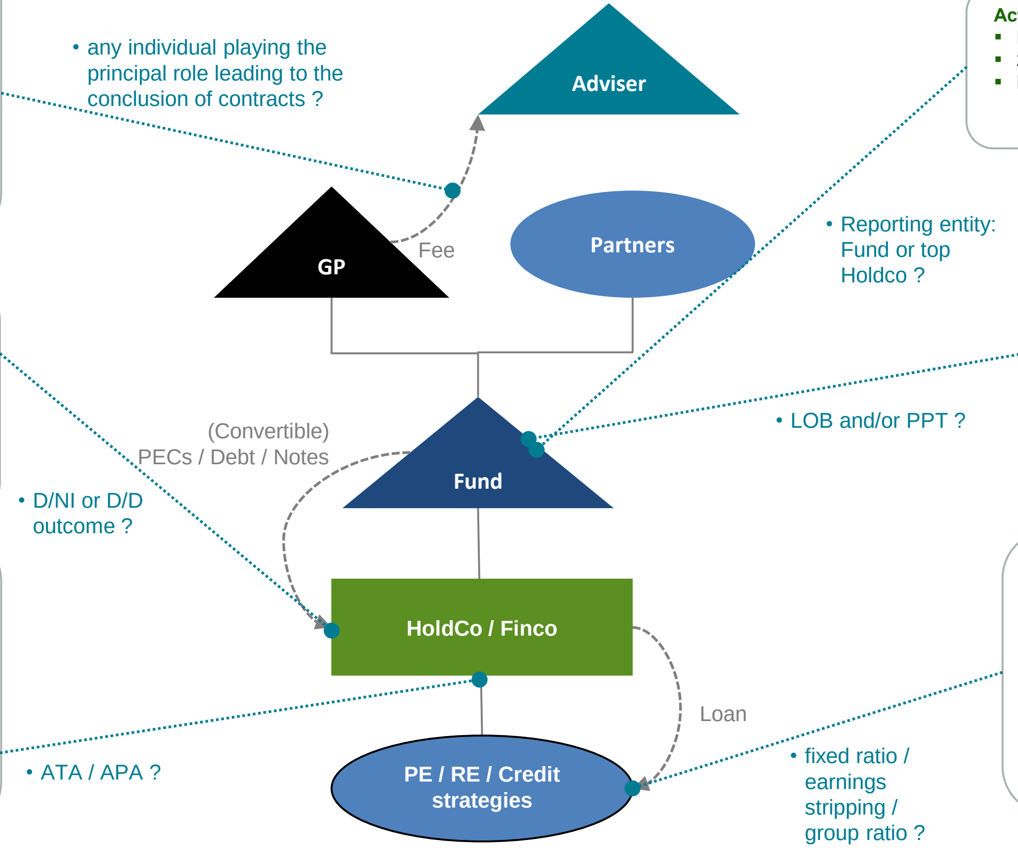
ANTI-AVOIDANCE PACKAGE UNDER THE OECD BEPS

Need to monitor implementation of BEPS

Action 7 (permanent establishment)
- **Report status: Final**
- **2016 work:**
  - ✓ **Reviewing the profit attribution rules**
- **Implementation method:**
  - ✓ **Tax treaty / Multilateral instrument**

Action 2 (anti-hybrids)
- **Report status: final**
- **2016 work: None**
- **Implementation method:**
  - ✓ **Domestic law**
  - ✓ **Tax treaty / Multilateral instrument**

Action 5 (harmful tax practices)
- **Report status: Final**
- **2016 work:**
  - ✓ **Expanding participation of non-OECD countries**
- **Implementation method:**
  - ✓ **Domestic law**



Action 13 (country by country reporting)
- **Report status: Final**
- **2016 work: None**
- **Implementation method:**
  - ✓ **Domestic law**

Action 6 (treaty abuse)
- **Report status: Final**
- **2016 work:**
  - ✓ **Reviewing the treaty entitlement of non-CIVs**
  - ✓ **Work on the LOB provision**
- **Implementation method:**
  - ✓ **Tax treaty / Multilateral instrument**

Action 4 (interest deductibility)
- **Report status: Final**
- **2016 work:**
  - ✓ **Designing of group carve-out ratio**
  - ✓ **Developing specific rules for the banking and insurance industry**
- **Implementation method:**
  - ✓ **domestic law**

RECENT BEPS DEVELOPMENTS WITHIN THE OECD AND EU

G20

- G20/G8, parliaments, NGOs and press.

OECD

- BEPS Action Plan: root out inappropriate tax avoidance through 15 actions.
- Continuous and unprecedented stream of reports. Deliverables: fall 2015.
- Global exchange of information system: “Common Reporting Standard.”

EU

- State aid scrutiny into tax rulings for multinationals in Belgium, Ireland, Luxembourg and the Netherlands.
- Anti-abuse and anti-hybrid provision in the PS-D.
- Transparency initiatives: UBO-register, CRS, exchange of information on tax rulings.
- Last but not least: more anti-abuse provisions by harmonizing the corporate tax base: Common Consolidated Corporate Tax Base (“CCCTB”).
- Nexus on IP regimes

ANTI-AVOIDANCE PACKAGE

- Measures included in the Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, of January 28, 2016 (“Draft Anti-BEPS Directive”):
  - Interest limitation rule
  - Exit taxation
  - Switch-over clause
  - General anti-abuse rule
  - CFC rules
  - Hybrid mismatches
- To be adopted by Member States by December 31, 2018.

- Aims to achieve a certain degree of uniformity in implementing the BEPS outputs across the EU.

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INTEREST LIMITATION RULE

- Interest expenses, exceeding any interest income, may only be deducted up to an amount of 30% of the taxable EBITDA. However, the rule has been substantially amended compared to the initial proposal ATAD, to allow for flexibility and exemptions upon transposition (*de minimis* thresholds, consolidated groups, standalone companies, etc.).

- Unused EBITDA / non-deductible interest may be carried forward.

- Interest limitation rule may not be applicable to financial undertakings.

- A 5 year transition period (until 2024) is introduced for Member States wishing to keep their targeted domestic rules which are equally effective to the interest limitation rule (e.g. thin capitalization rules).

ANTI-AVOIDANCE PACKAGE

EXIT TAXATION

- Transfer of asset, residence or permanent establishment to another country shall be subject to exit taxation (based on fair market valuation).
- Deferral of tax payment possible within EU / EAA (5 installments over 5 years) with interest accrual.
- “Acquiring” Member State shall allow for recording of the fair market value as determined by “transferring” Member State.

ANTI-AVOIDANCE PACKAGE

GENERAL ANTI-ABUSE RULE

- Non-genuine arrangements or a series thereof shall be ignored for tax purposes.
- Corresponds to business purpose test / substance-over-form approach.

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CFC RULES

- Member States shall include the non-distributed income of foreign entity (enterprise or permanent establishment) where:
  - Taxpayer, alone or together with associated enterprises, holds direct or indirectly more than 50% of the voting rights, owns more than 50% of the capital, or is entitled to receive more than 50% of the entity's profits.
  - CIT paid in foreign country is lower than the difference of the tax that would have been payable in the Member State and the actual paid tax.
- Rule also applicable to entities resident within EU / EEA, unless they satisfy a substance test (which may apply also for non-EU/non EEA CFCs).

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HYBRID MISMATCHES

- If the mismatch results in a double deduction, the deduction is only given in the Member State where the payment has it source.
- If the mismatch results in a deduction without inclusion, the Member State of the payer shall deny the deduction of such payment.

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THE SWITCH-OVER CLAUSE

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Member State	Hybrid mismatch rule	CFC	Switch-over
Spain	Yes. Payments not deductible if taxed below 10% due to mismatch	Yes	Yes. Exemption denied if foreign entity subject to tax <10% and not resident in a tax treaty country.
France	Yes (tax test at recipient level)	Yes	No
Germany	Partial*	Yes	Partial (for some items exempt through DTCs)
Netherlands	Partial*	No	No
UK	Partial*. Further rules expected in 2016	Yes	No
Luxembourg	Partial*	No	No. “Comparable tax” test for dividend exemption.
Italy	Partial*	Yes	Yes

**Hybrid mismatch rule introduced by the Parent-Subsidiary Directive. Exemption is denied for dividends that have been deductible for the paying subsidiary.*

ANTI-AVOIDANCE PACKAGE

Member State	Exit taxation*	EBITDA interest limitation rules	GAAR
Spain	Yes	Yes	Yes
France	Yes	Yes	Yes
Germany	Yes	Yes	Yes
Netherlands	Yes	No	Yes
UK	Yes	Expected after 2017	Yes
Luxembourg	Yes	No (in some cases 15/85 debt/equity ratio applied)	Yes (civil 'simulation' doctrine)
Italy	Yes	Yes	Yes

** In most cases, the scope of the existing exit taxation provisions is narrower than that foreseen in the ATA Directive.*

PAST ACQUISITION STRUCTURES THAT ARE NO LONGER FEASIBLE

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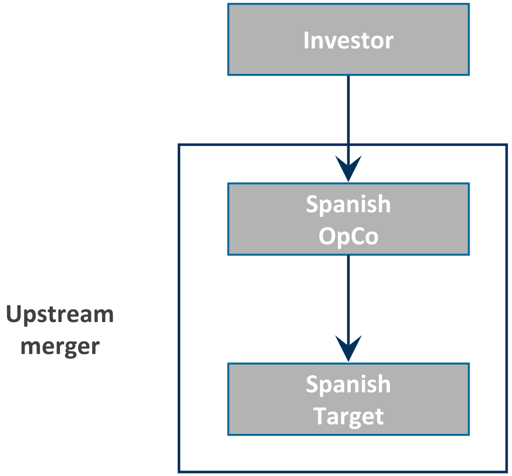
Acquisition followed by upstream merger + goodwill depreciation

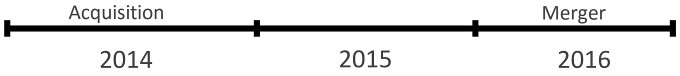


BEFORE*:

- Spanish OpCo acquired Spanish Target, which was subsequently merged into Spanish OpCo (upstream merger) under the Spanish corporate income tax neutrality regime.
- The tax neutrality regime applied if the merger was carried out for valid business reasons, such as the restructuring or rationalization of the activities of the companies involved, and not with the sole objective of achieving a tax advantage.
- Goodwill recognized in the merger was depreciated for tax purposes under certain conditions.

NOW:

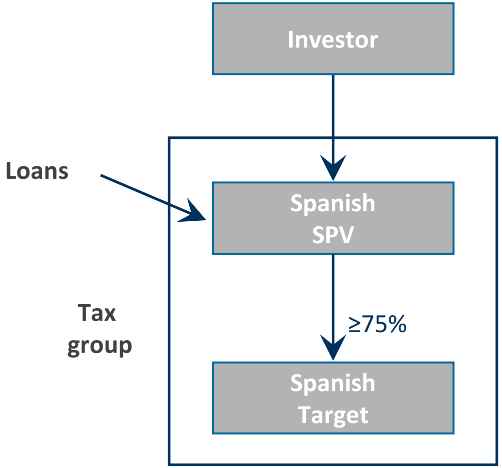
- Goodwill arising after a merger is no longer depreciated for tax purposes.
- Goodwill arising in a merger carried out before January 2015 can be tax depreciated in the following tax years (1% in 2015; 5% in 2016).
- Goodwill arising in a merger carried out after January 2015, but referring to a stake acquired before January 2015, can be tax depreciated if the requirements in force in tax periods previous to 2015 are fulfilled.



*BEFORE refers to tax periods previous to 2015.

PAST ACQUISITION STRUCTURES THAT ARE NO LONGER FEASIBLE

Debt pushdown + tax consolidation



0% interest WHT to EU lenders

BEFORE:

- Spanish SPV raised debt to fund the leveraged purchase of Spanish Target (share deal).
- Spanish SPV acquired at least 75% of the share capital of Spanish Target (70% if the Spanish Target was a listed company).
- Spanish SPV became head of a tax consolidated group together with Spanish Target.
- Interest accrued at the level of Spanish SPV were offset against operating profits made by Spanish Target without limitations before 2012.

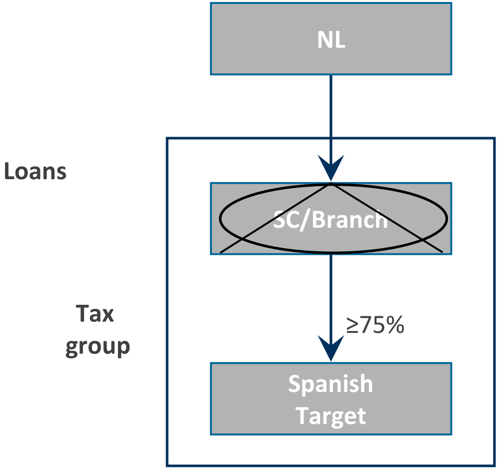
NOW:

- Subject to additional LBO limitation:

✓ Cases where the acquiring entity that took the leverage merges with the acquired entity within the following four years (outside the scope of the tax neutrality regime), or chooses the consolidated tax regime. Limitation of 30% deductibility of the acquiring entity's operating profits applies. This additional limitation does not apply if the leverage is less than 70% of the purchase price and is reduced to 30% within eight years (see slides 8 to 10).

PAST ACQUISITION STRUCTURES THAT ARE NO LONGER FEASIBLE

Acquisition through Spanish partnership/branch



0% interest WHT to EU lenders

BEFORE:

<u>Spanish partnership as head of Spanish tax group</u>

- Sociedad Colectiva ("SC") is considered transparent for NL tax purposes.
- Non-recognition of interest income at NL level.
- Interest expense in SC was offset against Spanish target income within tax unit (≥75% participation).

<u>Spanish branch as head of Spanish tax group</u>

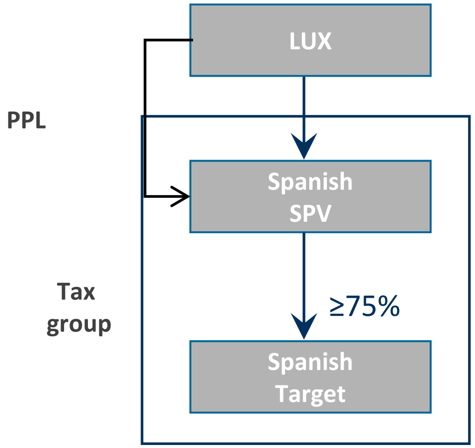
- Participation exemption in NL on Spanish branch profits.
- Interest expense in SC was offset against Spanish target income within tax unit (≥75% participation).

NOW:

- Since January 2015, no recognition of the interest expense in Spain.
- Before January 2015, these structures were sometimes reassessed by the Spanish tax authorities under the general anti-abuse rules. Unless there are valid economic reasons.

PAST ACQUISITION STRUCTURES THAT ARE NO LONGER FEASIBLE

Hybrid financing schemes



BEFORE:

- Interest income qualified as dividends eligible for the participation exemption in Luxembourg.
- Interest expense in SPV was offset against Spanish target income within the tax unit (≥75% participation).

NOW:

- Since January 2015, no recognition of the interest expense in Spain.
- General rule establishing the non-deductibility of the interest expenses of participative loans between group entities, granted after June 2014.

PAST ACQUISITION STRUCTURES THAT ARE NO LONGER FEASIBLE

Hybrid financing schemes - previous case law

- **Profit sharing loans (High Court, February 2, 2011)**
  - Characteristics: (i) no repayment term; (ii) 100% profit-linked interest; (iii) loan convertible into shares at any time; (iv) *stapled to shares.*
  - Court decision: interest non-deductible.

- **Australian preferred shares (High Court, April 18, 2013)**
  - Characteristics: (i) non-redeemable and non-cumulative shares; (ii) revenues were considered dividends for corporate purposes and interest for tax purposes.
  - Court decision: Classified as interest and not exempt dividends.

- **Brazilian Juros (High Court, March 16, 2016)**
  - Characteristics: (i) dividends for Brazilian commercial purposes; (ii) interest for Brazilian tax purposes; (iii) requires the existence of distributable profit.
  - Court Decision: *Juros* should be considered as dividends for Spanish tax purposes and, therefore, are entitled to the corresponding exemption.

SHARE DEAL VS ASSET DEAL

SHARE DEAL

- No step-up in basis. No financial goodwill tax depreciation.
- No taxation for corporate seller (if participation exemption applies).
- Assumption of tax contingencies by the acquiring company.
- No transfer tax. Indirect taxation may arise for purchaser on purchase of real estate companies (>50% asset is real estate located in Spain), unless real estate effectively relates to a business activity.
- Limitation on financial expenses incurred by Spanish SPV on acquisition of target – additional LBO limitations.
- Special restriction on debt pushdown strategies.

ASSET DEAL

- Step-up in basis resulting in:
  - higher tax depreciation for the purchaser;
  - depreciation of goodwill (max. 5% p.a.).
- Taxation of corporate seller.
- No assumption of tax contingencies if certain formal aspects are fulfilled.
- No VAT applicable on acquisition of a “going concern.” Transfer tax may apply in case of transfer of real estate assets.
- No additional LBO limitation on financial expenses applicable, other than the general limitation on EBIDTA.

HOW TO DEAL WITH PAST STRUCTURES

DIRECTORS' LIABILITIES

Tax Liability Insurance in M&A Transactions – when, where and how to use it

WHAT IS A TRANSACTIONAL LIABILITY INSURANCE?

- Insurance to protect from or mitigate two types of risk typically arising from M&A transactions:

Unknown and Unforeseen Loss

Warranty & Indemnity

Insurance

Identified and Known Risks

Tax insurance

Environmental

Litigation Buyout

WARRANTY & INDEMNITY INSURANCE – WHAT DOES IT COVER?

- W&I Insurance protects against liabilities arising from:
  - a breach of the reps and warranties, incl. tax reps and warranties
  - referring to a fact or circumstance existing prior to closing; and
  - resulting from unknown events at closing.

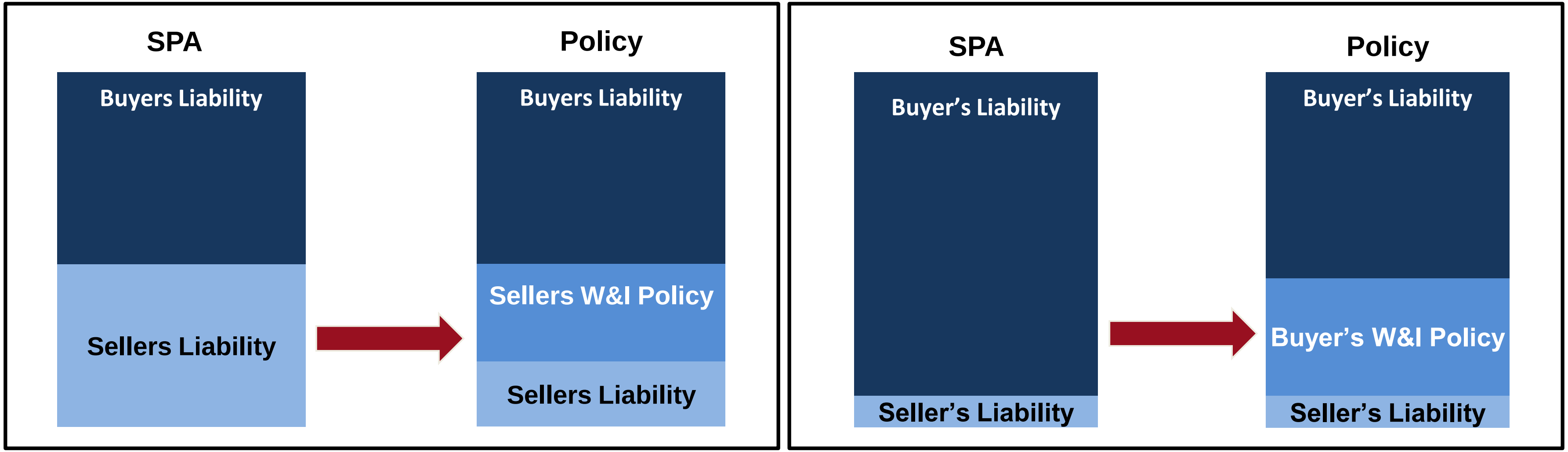
- W&I insurance does not cover
  - known issues (identified in due diligence (fair disclosure)
  - future events (e.g., profits)
  - broken deal, fulfillment of CPs, leakage
  - Specific tax issues such as:
    - transfer pricing
    - secondary tax liability
    - availability of NOLs

W&I INSURANCE: SELL-SIDE / BUY-SIDE POLICY

- Insured = Seller
- Buyer → Seller → Insurance

- Insured = Buyer
- Buyer → Seller/Insurer
- Seller flip-over buyer policy

Sell-side **Buy-side**



Approx. 80% of EMEA policies were Buy-side policies; 60% introduced by the Seller

W&I INSURANCE: UNDERWRITING PROCESS

- Duration: 14 to 21 days (including process to select insurer, policy issued shortly before signing); policy can be also concluded after the closing
- No due diligence review by insurance
- Required information:
  - All drafts of acquisition agreement
  - All drafts of disclosure letter
  - Accounts of the target
  - Vendor due diligence (if available)
  - Information memorandum/management presentation (if available)
  - Access to online data room and
  - Buyers due diligence reports (legal, tax and financial) prepared by professional third party advisers

W&I INSURANCE: WHAT DOES IT COST?

- Pricing in EMEA is between 1-2% of limit purchased (reduction of 50% in the last three years); real estate transactions 0.8 to 1.5%
- Minimum of EUR 50k to 100k (transaction value of approx. EUR 40m)
- Policy Excess (paid by insured party) is usually 1% of transaction value
- Criteria
  - Identity of seller, buyer, advisors
  - Sector/region
  - Quality of sale process, due diligence, disclosure
  - Transaction value
  - Limited/extensive warranties
  - Reason for insurance
  - Knowlege of parties of insurance
- Single payment at start of policy

TAX LIABILITY INSURANCE – WHAT DOES IT COVER?

- Tax liability insurance can help a company
  - to reduce or eliminate a contingent tax exposure arising from tax treatment of a transaction, investment or other tax position, where
  - the underlying legal conclusions may be subject to future challenge by the applicable tax authorities
- What is covered
  - Losses arising from the failure to achieve the expected tax treatment
  - Losses may include tax, contest costs, interest, penalties and gross up
- Examples of covered exposures
  - Protection of tax-free status of corporate spin-offs, split-ups or split offs
  - Tax consequences resulting from a change in ownership
  - Availability / existence of NOLs / base cost

TAX LIABILITY INSURANCE: WHAT RISKS CAN BE INSURED?

- Low probability but high quantum risks
- Stemming from a historic or proposed transaction where the law is not black and white
- No interest in insuring aggressive tax avoidance / contrived structures
- There must be a sound legal basis for the tax position being taken – cannot insure on the basis that a "mistake" will not be spotted
- Using tax liability insurance as a risk-management tool
  - Groups constantly adapt their structure:
    - > due to M&A
    - > entering into joint ventures
    - > to align with commercial strategy
    - > for tax efficiency
  - on the basis of sound tax and legal analysis, possibly tax liability insurance available to transfer the risk that tax authorities take a different view

TAX LIABILITY INSURANCE: TYPES OF RISKS INSURED

- PE and residency issues, trading risk
- Withholding tax on interest / royalties / dividends
- Tax free reorganizations / demergers
- Participation exemption / substantial shareholding exemption / entrepreneur's relief
- De-grouping charges
- Debt for equity swaps
- Entity classification
- Tax treatment of earn out payments
- Availability / existence of NOLs / base cost
- Validity of tax grouping / fiscal unity
- Thin capitalization / certain transfer pricing issues
- Applicability of transfer taxes

TAX LIABILITY INSURANCE: WHAT DOES IT COST?

- Highly bespoke product
- Pricing varies from risk to risk (premium typically 2.5 – 7% of the limit of the coverage)
- Key factors:
  - strength of technical position
  - discovery risk
  - jurisdiction
  - quality of broking
- Secondary factors:
  - market conditions
  - size of risk
  - timeframe

TAX LIABILITY INSURANCE: UNDERWRITING PROCESS

- Detailed submission generally accompanied by insured's adviser's own analysis
- Insurer considers and produces "non binding indication" with headline terms (premium, key assumptions, policy representations)
  - Ideally insurer gets preliminary external feedback at this point (or uses in house tax expertise)
- Insurer gets expense agreement to cover external advisory costs. Varies deal to deal but in EUR 20k – 75k range
- Insurer begins underwriting
  - 2/3 week process
  - Underwriting calls and / or written Q&A with management as preferred