24TH ANNUAL

U.S. AND EUROPE TAX PRACTICE TRENDS

HOTEL BAYERISCHER HOF
MUNICH, GERMANY

Inbound Investments into the United States

April 11, 2024

The Panel

Our Speakers

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Agenda

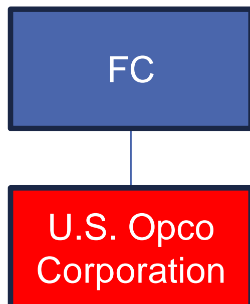
1. **Investing into the U.S. when hybrid entities are involved**
    - Tax Basics
    - LLC structure
    - Case studies

2. **Funding Arrangements**
    - Transfer pricing
    - U.S. anti-hybrid rules

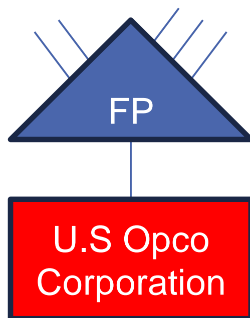
3. **Stock buyback excise tax**

Investing into the U.S. when hybrid entities are involved

Corporate Structure

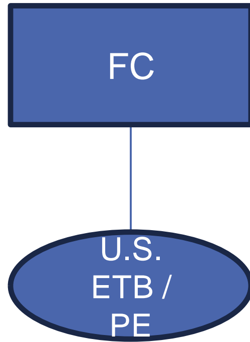


- U.S. Opco subject to corporate tax (21% federal) files federal state and local tax returns and form 5472 reporting certain transactions with FC
- FC does not, by virtue of ownership of U.S. Opco, pay U.S. tax or file U.S. tax returns
- Dividends paid by U.S. Opco to FC are subject to 30% withholding tax, unless reduced or eliminated by treaty. Tax imposed on FC



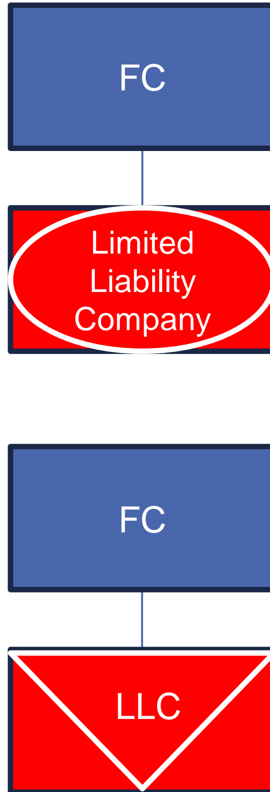
- If investor is a non-U.S. partnership for U.S. and non-U.S. purposes, same result for U.S. Opco
- FP does not, by virtue of its ownership of U.S. Opco file U.S. tax returns or pay U.S. taxes
- Dividends paid by U.S. Opco to FP subject to 30% withholding tax. Treaty may be claimed by partners to reduce rate. Tax imposed on partners

Engaged In Business / PE Structure



- FC is engaged in a trade or business (ETB) in the U.S. or has a PE if treaty applies
- FC is required to file U.S. tax returns reporting income / deductions attributable to U.S. operations (federal, state and local)
- FC pays corporate level tax (21% federal)
- FC is also subject to the branch profits tax on an annual basis, without regard to cash movements to FC. Based on a formula – 30% of after tax earnings and profits that is not reinvested in business assets. Can be reduced by treaty

LLC Structure



- It depends:
  - If LLC is wholly owned by FC and it has not made an election to be taxed as a corporation, the rules under ETB / PE apply because the LLC is treated as a disregarded entity; FC files U.S. returns and pays corporate tax and BPT
  - If the LLC elects to be treated as a corporation, the rules described in corporate structure apply
    - LLC is a reverse hybrid
    - LLC is subject to corporate tax. No BPT. Dividend withholding when dividends are paid, Dividend tax imposed on FC.

LLC Structure – New Dutch classification rules

- Enter into force 1 January 2025 – “Consent mechanism” abolished
- Draft Decree published 5 February 2024 (consultation)
- Dutch limited partnership (*commanditaire vennootschap*): per se tax transparent
- Dutch mutual fund (*fonds voor gemene rekening*): tax transparent unless
  - the FGR is a regulated under FMSA; and
  - the transfer of participations is possible, transfer only through redemption mechanism does not qualify

- **Non-Dutch entities:**
  - Compare with Dutch entity and follow classification
  - If non-comparable:
    - Dutch resident: opaque
    - Otherwise, same classification country of residence
  - Decree contains list with binding classifications
  - LLC is (still) company based on the draft list

LLC Structure – German classification rules (1)

- The classification depends on whether the overall pattern of the LLC's characteristics is more typical of a corporate entity or of a partnership
- The individual characteristics must be weighted for purposes of the evaluation.
- Decisive importance cannot be attributed to any single characteristic.
- Accordingly, the fact that an LLC has, for example, limited liability or perpetual duration will not in itself result in the LLC being characterized as a corporate entity.

Circular of the German Federal Ministry of Finance of March 19, 2004 on the classification of a U.S. LLC

LLC Structure – German classification rules (2)

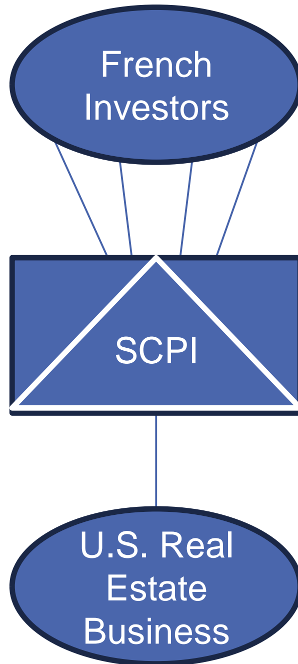
- In November 2020 the **Lower Tax Court of Munich** issued two separate decisions, both of which were published on January 28, 2021 regarding the classification of a U.S. LLC established under the laws of the state of Colorado in 2019.
- In the case at issue, the LLC's operating agreement did not contain any obligation for the single member to contribute equity to the LLC, and the applicable LLC law did not contain such an obligation, which the 2004 circular states is an indication that the LLC had the character of a flow-through.
- However, the court stated that the existence of an obligation to make capital contributions should no longer be relevant when analyzing a U.S. LLC for German tax purposes because it is now possible to establish a German corporate entity with only minimal capital. In so stating, the court cited the introduction of the entrepreneurial or small business company in Germany in 2008.
- Moreover, the decisions emphasized that an individual analysis based on the features of the operating agreement and the applicable LLC law is required in each case to determine the appropriate classification of a U.S. LLC for German tax purposes.
- **German Federal Tax Court (BFH**) agrees with Lower Tax Court of Munich (I B 75/20 and I B 76/20 both of May 18, 2021) re: classification as a corporation based on the particularly important characteristics; no need to make statement on whether the characteristic of raising capital following the introduction under national law of the entrepreneurial company without significant share capital is of limited significance.

Case Study – Reverse Hybrids And The Branch Profits Tax

- In France a Societe Civile de Placement Inmobilier (SCPI) is a collective real estate investment vehicle, which is in the business of buying and managing properties on behalf of its owners. The SPCI is tax transparent and it does not pay French corporate tax. The income passes through to the holders of interests in the SCPI and is subject to tax at their level. The taxation of the passed through income is generally subject to a much more beneficial rate of tax as compared to dividend income.

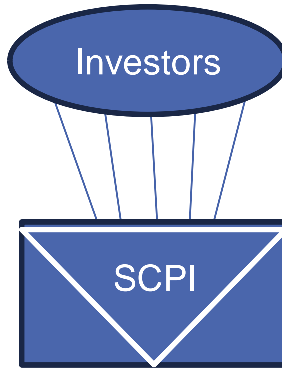
- The SCPI is investigating expanding into the U.S., buying and managing real estate. In order to maintain the tax benefits for the individual investors it must conduct the business directly, not through subsidiaries.

Direct Operations, No Elections



- Need to classify SCPI for U.S. tax purposes
- It is not a "per se" corporation because it is not an SA
- No investor has unlimited liability for the debts of the SCPI. As such, it defaults to partnership status for U.S. tax purposes
- The SCPI has a PE in the U.S. to which the business income is attributable. SCPI does not pay U.S. taxes – the income passes through to the investors
- SCPI files a U.S. partnership return and each investor is required to file their own U.S. tax return and pay U.S. tax on their allocable income. General federal rate 37%
- SCPI is responsible for pre-paying (quarterly) to the IRS estimated federal tax on income allocable to French investors

Blocking The Investors



- SCPI may elect to be taxed as a corporation for U.S. tax purposes. SCPI becomes a reverse hybrid entity (a partnership that elects to be treated as a corporation)
- SCPI is then a U.S. taxpayer, filing U.S. tax returns and paying corporate level tax
- Investors are shareholders in a corporation and do not file U.S. tax returns or pay U.S. taxes on the operating income of SCPI
- SCPI is not a U.S. corporation and thus dividends paid by SCPI to investors do not attract dividend withholding tax
- BUT – what about the branch profits tax?

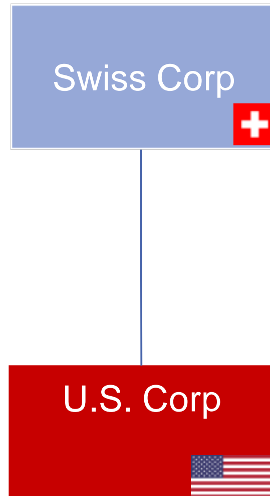
Possible Responses To The Question (1)

- SCPI is non-U.S. corporation subject to BPT and not treaty resident because it is not subject to tax on its income in France and therefore BPT is at 30% rate.
  - Official Bulletin of Public Finances – Tax. BOI – INT – CUB – USA – 10-20 – 12/09/2012 states French position that SCPI is qualified treaty resident
  - U.S. interpretation of resident would result in it not being a resident
  - U.S. interpretation controls

Possible Responses To The Question (2)

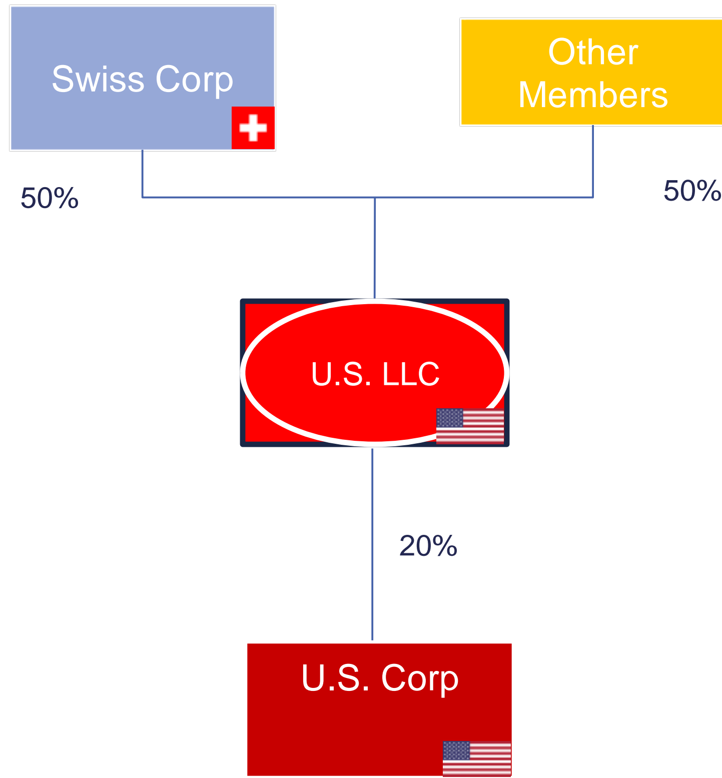
- BPT does not apply on these facts
- Non-discrimination approach; or
- Allow the members of the SCPI to claim treaty benefits because they are taxed on their income in France and thus “derive” the dividend equivalent amount
- What rate would apply/procedural issues in claiming benefit; or
- SCPI claims treaty benefit based on members residence status

Swiss Corporations Investing in a U.S. Corporation



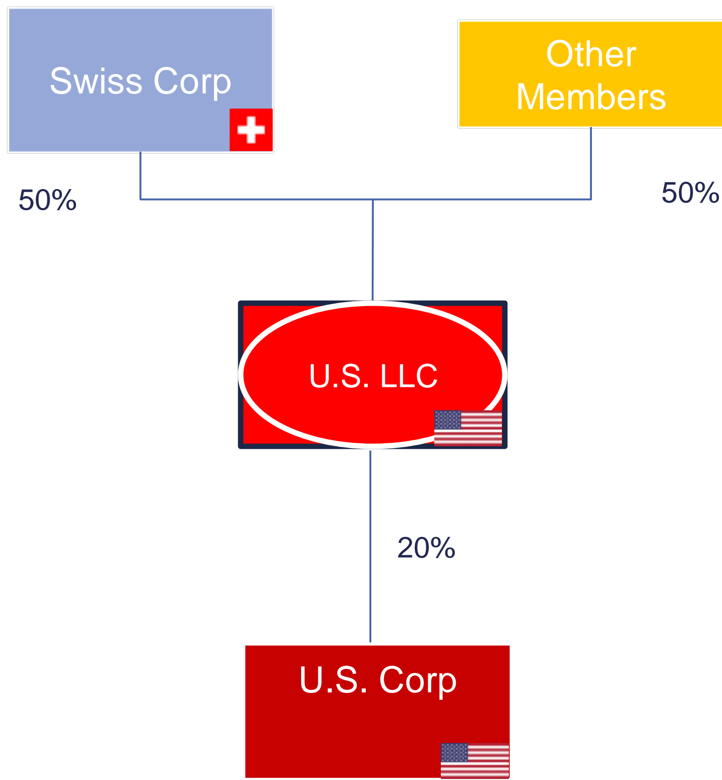
- Corporate income tax (CIT) is levied on profits earned by Swiss corporations, including dividends.
- Dividends from U.S. Corp would qualify for participation relief, which allows for a reduction of CIT equal to the proportion between net dividend income and total taxable income.
- Art. 10 of the U.S.-CH double tax treaty provides for 5% withholding tax rate on U.S. source dividends provided the Swiss corporation satisfies the LOB test.
- If participation relief applies, no foreign tax credit is granted in relation to U.S. residual tax at source.
- Sale of U.S. Corp would qualify for participation relief.
- No CFC rules exist in Switzerland.
- Switzerland does not apply the LOB test in the opposite situation.
- Treaty revision in advanced negotiations between competent Swiss and U.S. authorities to provide for a 0% rate similar to other key U.S. trading partners.

Swiss Corporations Investing in a U.S. LLC (1)



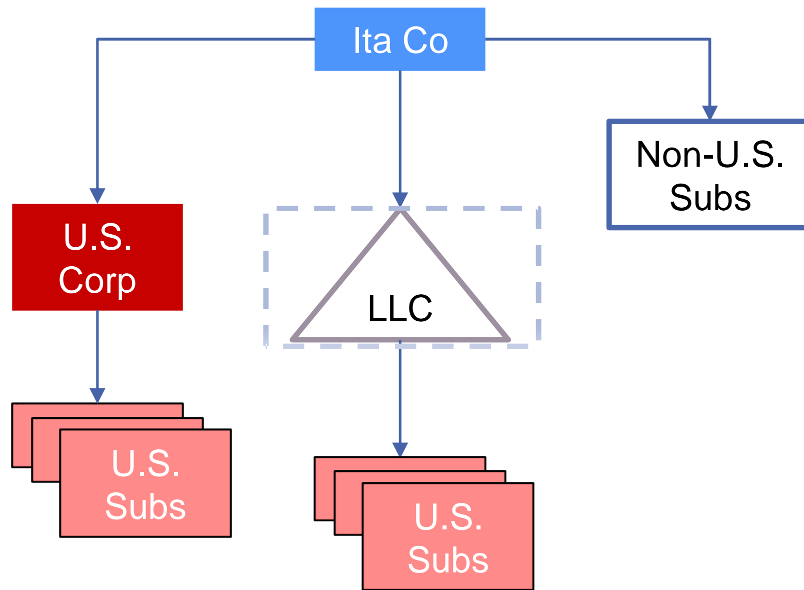
- Swiss tax treatment of LLCs controversial under Swiss tax law.
- Foreign subsidiaries assimilated to the most similar Swiss legal entity for tax purposes.
- Analysis to be made by reviewing U.S. civil law and the governing provisions of the LLC.
- LLC would generally be assimilated to GmbH and therefore opaque.
- Application of Swiss participation relief would then be similar than with a U.S. corporation.
- Supreme Court case law for individuals:
  - U.S. tax treatment is a decisive factor relevant for the Swiss tax treatment.
  - Switzerland must also take into account double taxation considerations so as to avoid double non-taxation due to income attribution conflicts.
  - Unclear whether this case also applies to corporations.

Swiss Corporations Investing in a U.S. LLC (2)



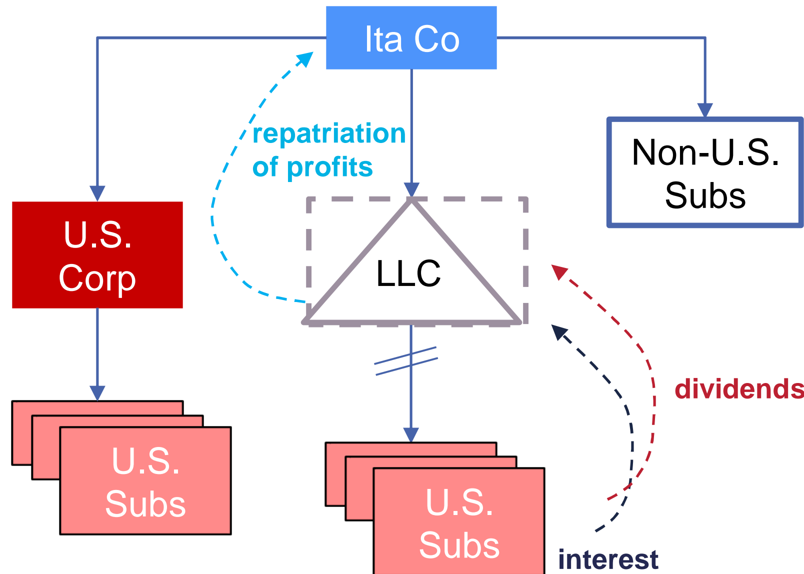
- As a result, LLC could also be transparent.
- Tax treatment can be confirmed in tax rulings.
- Proportional allocation of income and expenses to Swiss Corp in case of transparency of the LLC for Swiss tax purposes.
- Participation relief still possible in this example as threshold of 10% is met.
- Choice of accounting methodology by Swiss Corp:
  - Gross (or look-through):
    - Accounting of proportionate share of assets and liabilities
    - Accounting of proportionate share of underlying dividend and LLC expenses
  - Net:
    - Accounting of investment in LLC
    - Accounting of dividend from LLC
- Look-through accounting tends to increase participation relief.

Italian Corporation Investing in the U.S. *via* a Tax Transparent LLC (1)



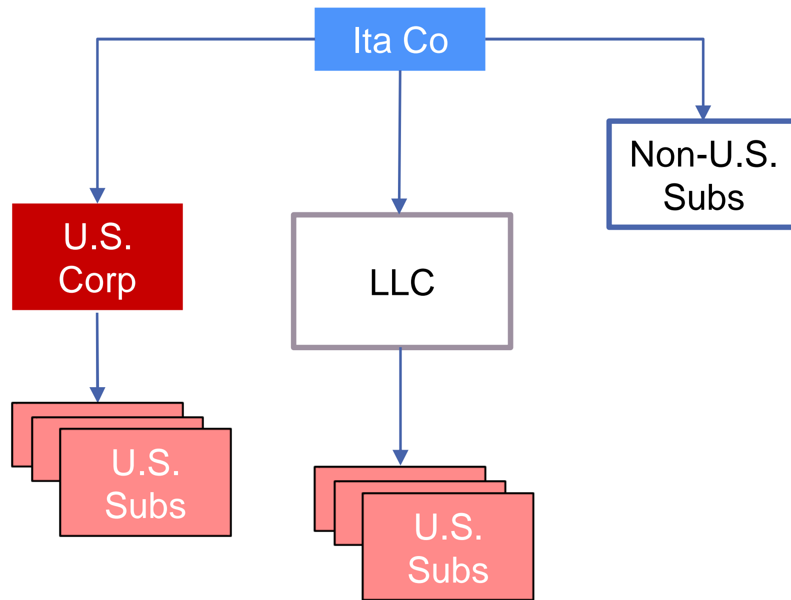
- ITA is an Italian tax resident corporation
- ITA has operations in the U.S. through U.S. entities
- LLC is considered as:
  - tax transparent in the U.S.
  - tax opaque in Italy
- LLC has participations in other tax opaque U.S. companies (the "**U.S. Subs**")
- LLC does not generate effectively connected income (ECI) in the U.S.
- LLC receives F.D.A.P. income from U.S. Subs
- U.S. Subs are not U.S.R.P.H.C.
- LLC receives dividend and interest from its U.S. Subs
- ITA has no financing agreements in place with LLC

Italian Corporation Investing in the U.S. *via* a Tax Transparent LLC (2)



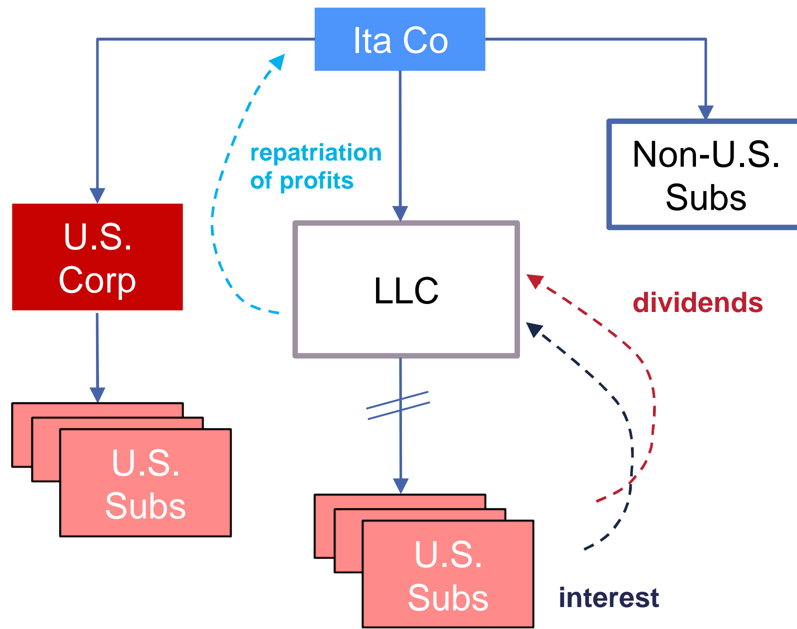
- LLC is a ***domestic hybrid entity*** for U.S. purposes (fiscally transparent for U.S. purposes but opaque for Italian purposes)
- Interest paid by U.S. Subs to LLC are not deductible, due to the U.S. anti-hybridity rules
- Interest received by LLC are subject to 30% U.S. tax (no treaty access)
- Dividends received by LLC are subject to 30% U.S. tax (no treaty access)
- Profits repatriated to Ita Co should be considered as dividends and taxed accordingly (no foreign tax credit available, taxation would occur on net income)
- Capital gains on disposal of U.S. Subs would generally be exempt
- Capital gains realized upon sale of participations in LLC generally exempt (provided certain compliance steps are taken)
- Italian CFC **tbc**

Italian Corporation Investing in the U.S. *via* a Tax Opaque LLC (1)



- ITA is an Italian tax resident corporation
- ITA has operations in the U.S. through U.S. entities
- LLC has made an election to be treated as a tax-opaque entity (check-the-box, or "**C.T.B.**")
- LLC is tax opaque in Italy
- LLC has participations in other tax opaque U.S. companies (the "**U.S. Subs**")
- LLC does not generate effectively connected income (ECI) in the U.S.
- LLC receives F.D.A.P. income from U.S. Subs
- Neither LLC nor the U.S. Subs are U.S.R.P.H.C.
- LLC receives dividend and interest from its U.S. Subs
- ITA has no financing agreements in place with LLC

Italian Corporation Investing in the U.S. *via* a Tax Opaque LLC (2)

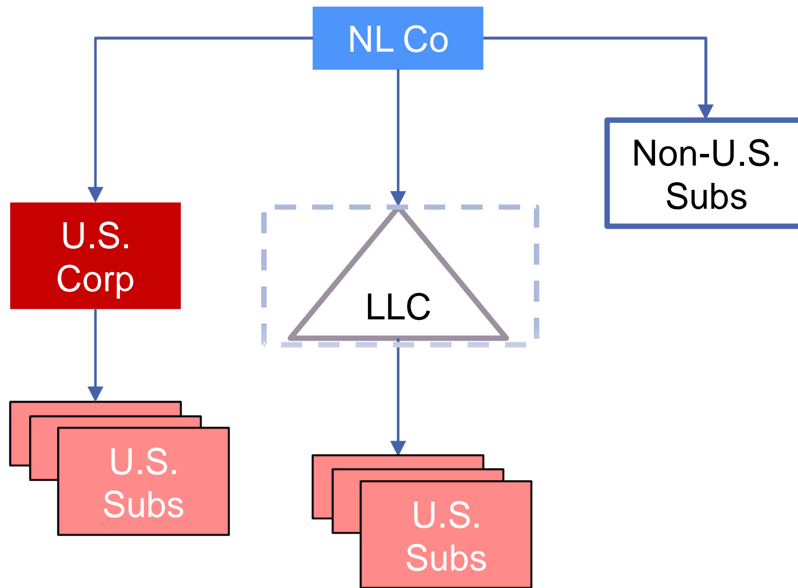


- LLC has elected for the C.T.B. → tax opaque
- Interest paid by U.S. Subs to LLC are generally deductible (subject to ordinary limitations - no hybridity issues)
- Interest received by LLC is ordinarily taxed in the hands of LLC (U.S. CIT - base rate is 21%)
- Dividends received by LLC are subject to CIT in the hands of LLC, but may benefit of a D.R.D. up to 100%
- Profits distributed to Ita Co are subject to outbound withholding tax, with treaty benefits (5% / 15% reduced tax rate) subject to LOB rules
- Foreign tax credit on dividend is available to Ita Co
- Capital gains realized on disposal of U.S. Subs to third parties would generally be taxable in the hands of LLC
- Subsequent distributions would be taxed as dividends (see above), although special rules for liquidating distributions
- Capital gain realized upon sale of participations in the LLC generally not taxable in the U.S.
- Application of Italian CFC rules **tbc**

Italian Tax Reform
Changes to Qualification of Foreign Transparent Entities

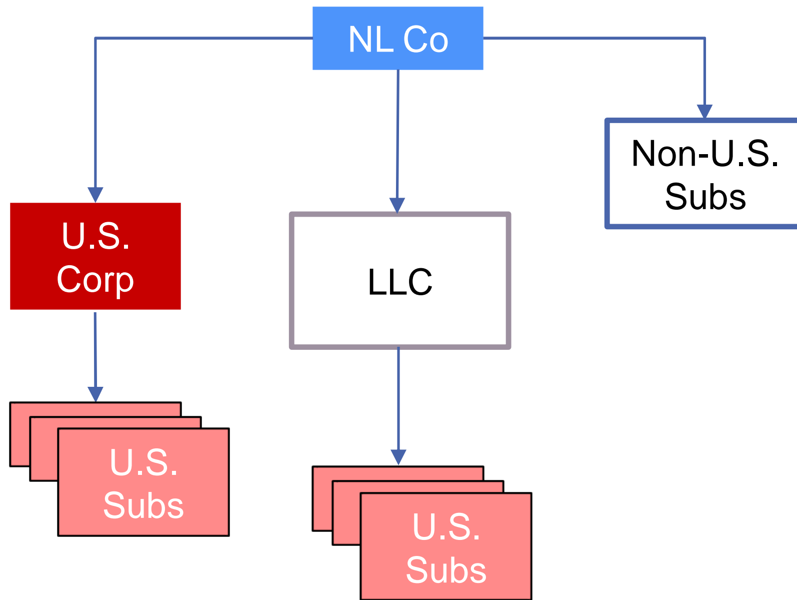
- Law 111/2023 – art. 6, 1 - h)
  - Review of the domestic tax qualification of foreign entities (opaque or transparent) in light of the actual tax qualification in the country of incorporation/residence.
- Implementing legislation to address a number of issues:
  - Qualification of the relevant items of income?
  - What will happen to income already accrued at the moment the reform enters into force? *ad hoc* legislation for interim period?
- What happens to Reverse Hybrid Entities?

Dutch Corporation Investing in the U.S. *via* a Tax Transparent LLC



- NL Co is a Dutch tax resident corporation
- NL Co has operations in the U.S. through U.S. entities
- LLC is considered as:
  - tax transparent in the U.S.
  - tax opaque in Netherlands
- LLC has participations in other tax opaque U.S. companies (the "**U.S. Subs**")
- LLC receives dividend and interest from its U.S. Subs
- Participation exemption possibly applies to LLC, but monitoring of hybrid mismatch rules

Dutch Corporation Investing in the U.S. *via* Tax Opaque LLC



- NL Co is a Dutch tax resident corporation
- NL Co has operations in the U.S. through U.S. entities
- LLC is considered as:
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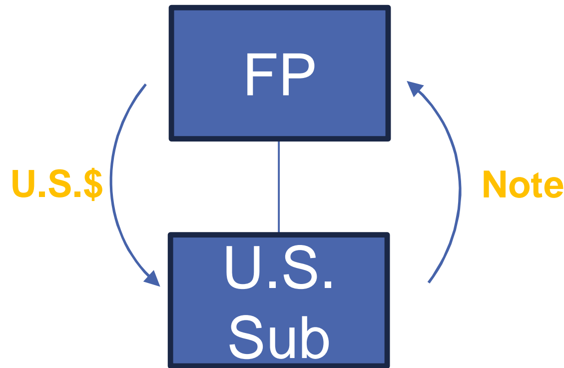
- LLC has participations in other tax opaque U.S. companies (the "**U.S. Subs**")
- LLC receives dividend and interest from its U.S. Subs
- Participation exemption possibly applies to LLC, no hybrid mismatch

Funding Arrangements

Financing the U.S. Investment – Transfer Pricing



- Assume bona fide debt
- Appropriate interest rate?
- It is a stand-alone rate?
  - What it would be taking into account only ability of U.S. Sub to repay?
- Or, should it take into account the implicit support of being part of the group?
- GLAM 2023-008
  - Took rate from 10% to 8%

Financing the U.S. Investment – Transfer Pricing

- GLAM 2023-008
  - Three reasons to justify the disallowance
  - Claims pricing approach is consistent with OECD guideline
  - The reasons
    1. An uncontrolled lender would take into account implicit support from affiliates to determine credit rating
    2. Could U.S. Sub borrow at a lower rate from a bank because of implicit support and is that a realistic alternative?
    3. Passive association benefits

Germany – Mandatory to Consider Group Rating Starting 2024

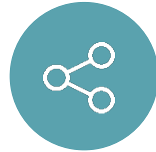
- Growth Opportunities Act passed on March 22, 2024
- Enacted on March 28, 2024
- New rules on cross-border i/c financing (new § 1 para. 3d AStG (Foreign Tax Act)) applying from FY 2024 onwards
- No grandfathering rules
- No interest ceiling rule introduced

In the case of financing relation-ships between related parties, additional hurdles are introduced for the deduction of interest

and

- Only the interest rate determined on the basis of the group rating is deemed to be at arm's length
- Whereby, evidence to the contrary can be provided if a rating derived from the group rating is at arm's length

- The taxpayer must credibly demon-strate the economic necessity of the financing **and** its use for the business purpose (**business purpose test**) **and**
- the probability of repayment from an ex-ante perspective (**cash flow test**)

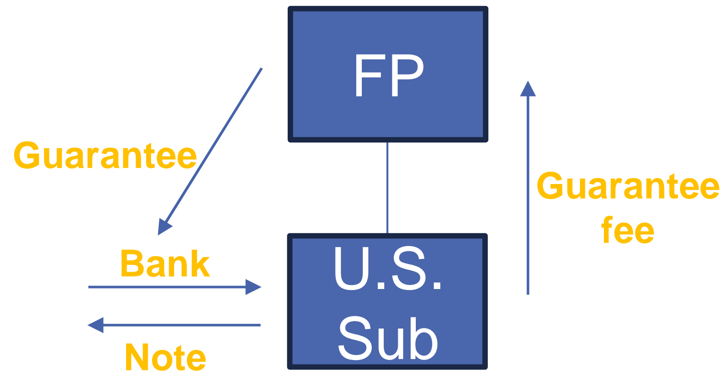


- I/c financing / treasury services are regarded as low-function and low-risk services for transfer pricing purposes
- Meaning that the cost-plus method (but without including financing costs) must be applied to these relationships
- New § 1 para. 3e AStG

Financing the US Investment – Transfer Pricing – Italy

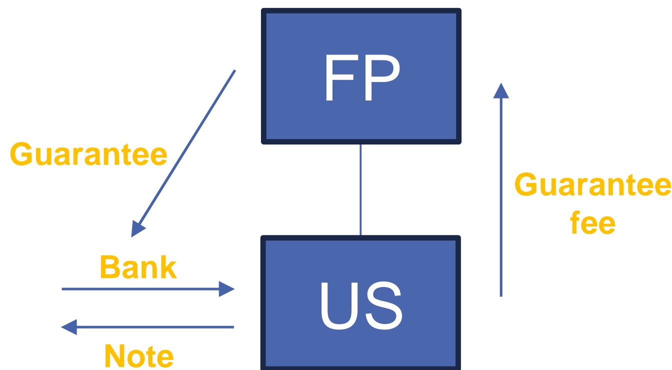
- Italian transfer pricing regulations is aligned with OECD principles
  - Implicit support is recognized in rating analysis of the borrower with recourse to best practice for determining the relevant adjustments (S&P's and Moody's guidance)
  - Other terms may be relevant:
    - Interest-free loans?
    - Breakage costs clause in case of prepayments;
    - Maturity (to reconcile with repayment capacity) and recurrent extensions (risk of redetermination of the original maturity);
    - In case of outstanding (senior) debt with unrelated parties, subordination may be factored in the pricing;
  - Potential re-characterization of purported loans under debt-equity principles
  - Re-characterization of long-standing positive or negative balances of a cash pooling participant into loan transaction

Financing the U.S. Investment – Transfer Pricing



- How to price the guarantee fee
- Implicit support?

Financing the US Investment – Transfer Pricing – Italy



- OECD principles are applicable also on guarantees
  - Explicit guarantees require fee
  - Pricing methodologies from practice:
    - CUP: difficulties in retrieving reliable data on comparable transactions
    - Yield approach: generally applied; implicit support factored in the borrower rating to determine its resulting benefit
    - Cost approach: generally applied
    - Other methods: not common (some specific recourse to CDS)

Germany – Guarantee Fee

- The assumption of a guarantee constitutes an obligations and is therefore to be remunerated in accordance with the arm's length principle of § 1 para. AStG.
- The new Administrative Principles deal with i/c guarantees under the heading "*Remuneration for increased creditworthiness*" in recitals 3.96 and 3.97 VWG VP of July 14, 2021.
- The prerequisite for an arm's length guarantee is that the guarantor assumes an actual risk position. This could result in an advantage for the guarantee holder if one or more associated guarantors undertake to fulfill the payment obligations of the guarantee holder vis-à-vis third parties.
- In principle, the tax authorities assume that the economic advantage resulting for the guarantee holder is **limited to the "difference between the conditions"** for the group as a whole and the **"conditions"** for the guarantor. The administrative principles do not specify what is meant by "conditions". It could be inferred from the facts that in the case of guaranteed loans it is interest or in the case of deliveries it is payment terms, discounts, etc.

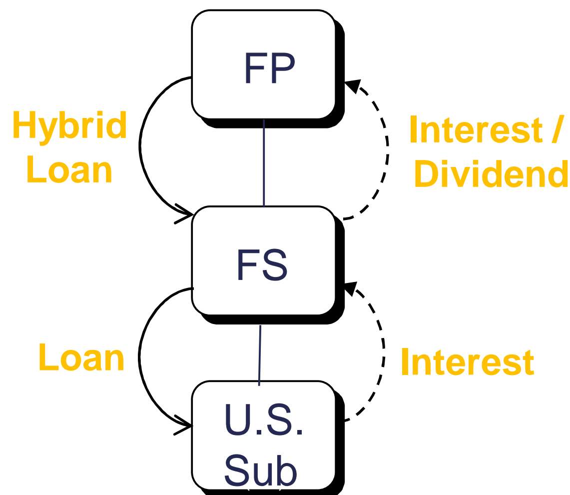
U.S. Anti-Hybrid Rules – Deduction Disallowance

- Deduction disallowance applies to "specified party":
  - U.S. tax resident
  - CFC with at least one direct or indirect U.S. shareholder
  - U.S. taxable branch
- Deduction disallowed for any interest or royalty paid or accrued by a specified party to the extent such payment is:
  - a disqualified hybrid amount
  - a disqualified imported mismatch amount, or
  - subject to the broad anti-avoidance rule of §1.267A-5(b)(6)

U.S. Anti-Hybrid Rules –
Disqualified Imported Mismatch Amounts

“Disqualified Imported Mismatch Amount” is a U.S.-source, non-hybrid interest or royalty payment to the extent the income attributable to such payment is *directly or indirectly* offset by a “hybrid deduction” taken by a foreign affiliate (or branch) of the specified party.

Example 1 – U.S. Anti-Hybrid Rules

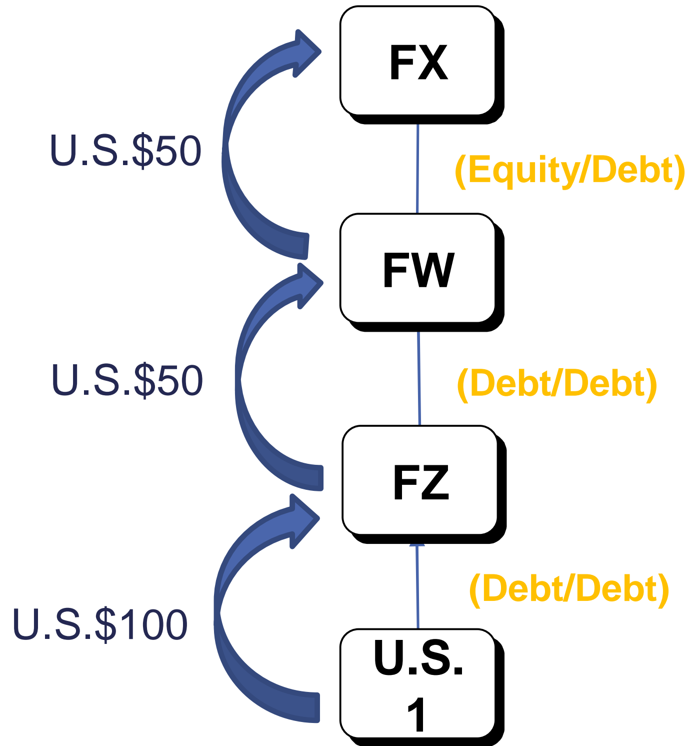


- No hybridity in US loan, but FS-FP loan is a hybrid instrument
- FP excludes the (hybrid) dividend from income under a participation exemption

Result:

- Interest payment by U.S. Sub is non-deductible “disqualified imported mismatch amount” to the extent the interest income is offset by a “hybrid deduction” taken by FS
- A “hybrid deduction” arises here because FS is allowed a deduction under its tax law that would be a Disqualified Hybrid Amount under § 1.267A-2 (if its country had rules similar to the U.S. anti-hybrid rules)

Example 2 – U.S. Anti-Hybrid Rules



- U.S.1 borrows from FZ and FZ borrows from FW. Both are treated as debt in all relevant countries
- However, FW borrowed from FX with a hybrid debt-equity instrument
- *The instruments are factually unrelated*

Result:

U.S.$50 is a disqualified imported mismatch amount and U.S.$50 of U.S.1's interest deduction is disallowed

1% Stock Buyback Excise Tax and Intergroup Financing

Stock Buyback Excise Tax

- Enacted by "Inflation Reduction Act" of 2022, new section 4501 imposes a 1% excise tax on buybacks of stock by publicly traded U.S. corporations and certain publicly traded foreign corporations over $1 million de minimis amount
- Generally, subject to certain adjustments and exceptions, section 4501 imposes a non-deductible excise tax equal to 1% of the fair market value of any stock of the corporation that is "repurchased" by the corporation or an affiliate of the corporation

Stock Buyback Excise Tax (2)

- Perceived (or alleged) abuses:
  - Cash “trapped” in foreign subsidiaries of U.S. multinationals that was repatriated to the U.S. at a reduced tax rates as a consequence of the 2017 Tax Act (TCJA) was not reinvested in U.S. productive assets but was returned to shareholders by means of share repurchases.
  - Stock repurchases disproportionately benefit non-U.S. shareholders who are not taxed on capital gain basis and avoid U.S. withholding tax consequences of an actual dividend (under U.S. tax principles)
  - Non-participating shareholders benefit from appreciation in shares without current tax liability
- Since enactment of section 4501, large stock repurchases are reported to be continuing regardless of the Excise Tax in the US
- Current U.S. administration has expressed the intention of increasing the rate of the Excise Tax to 4%

Stock Buyback Excise Tax – Funding Rule

- IRS Notice 2023-2 expanded the scope of the Excise Tax to share repurchases by non-US listed multinationals if a US affiliate "funds" the repurchase
- If Excise Tax is triggered it is imposed on the U.S. affiliate providing the funding
- Notice 2023-2 applied the Excise Tax to a repurchase of a publicly traded foreign corporation's stock, or the purchase of such stock by an affiliate of the foreign corporation, where
  - a U.S. affiliate funds the repurchase "by any means," including distributions, debt and capital contributions, and
  - such funding is undertaken for "a principal purpose" of avoiding the Excise Tax.
- However, the Notice contained a "per se" rule.

Stock Buyback Excise Tax – Funding Rule

Under Notice 2023-2, the “per se” rule deemed that a principal purpose of avoiding the Excise Tax was generally met in all cases in which the foreign corporation acquires or repurchases stock within two years of receiving funding from the U.S. affiliate

- Would have applied to all loans to the foreign parent as well as participation in “normal” international financing structures (e.g., cross-border cash pooling arrangements)
- Issues:
  - application to reorganizations/restructurings of the foreign parent involving a share-for-share exchange
  - Need to review share repurchases under equity plans
  - Current accounting consequences of the Excise Tax for a publicly traded corporation: It has been suggested that the Excise Tax should be capitalized and added to the cost of the repurchased shares.

Stock Buyback Excise Tax – Funding Rule

Proposed regulations released April 9 (published April 12)

- replace the strict per se rule with a rebuttable presumption that applies only to narrower set of “downstream” fundings occurring within two years
- presumption would apply where a US affiliate directly or indirectly funds a foreign “downstream relevant entity” within two years of a stock repurchase by that entity ($\geq$25% ownership threshold)
- presumption can be rebutted with facts and circumstances that establish avoiding the excise tax wasn’t **a** principal purpose of the funding
- Broad per se rule appears to still apply to fundings occurring on or before April 12

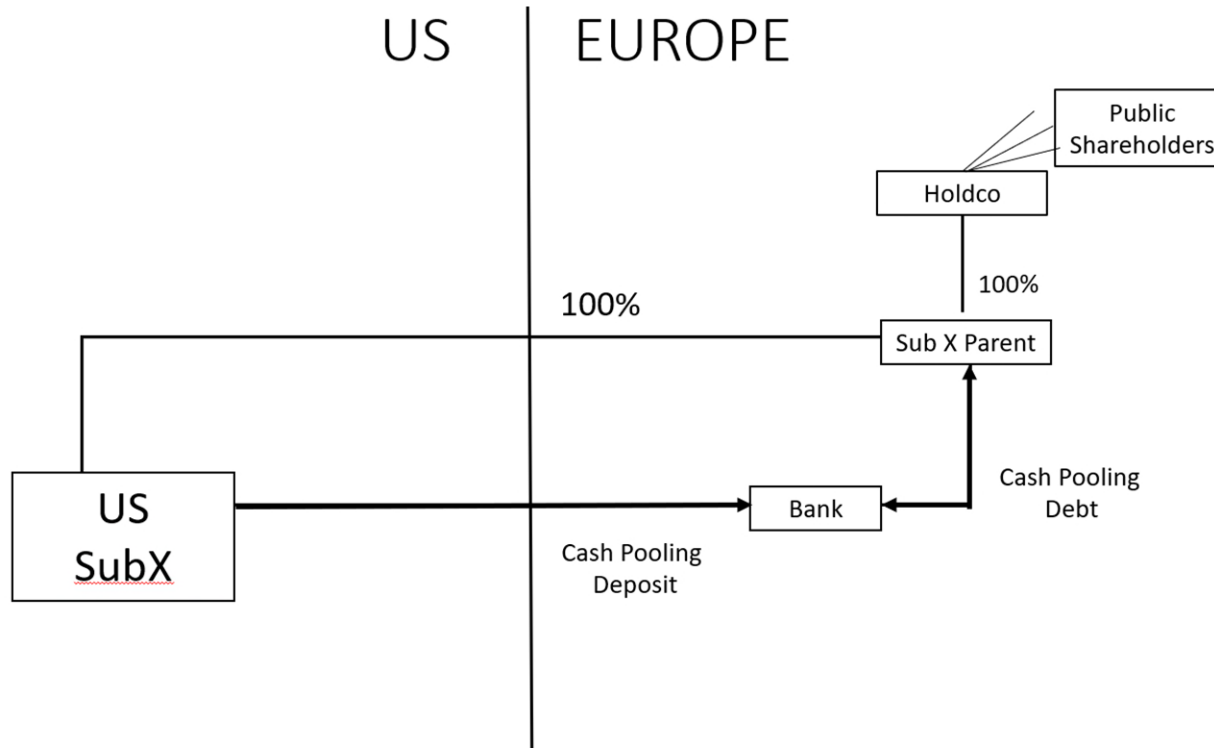
Stock Buyback Excise Tax – Funding Rule

- Proposed regulations otherwise strongly reaffirm "funding" rule; illustrating concept with example of payment of dividend by US affiliate having "a principal purpose of avoiding the excise tax."
- Having a principal purpose of funding stock repurchases by a foreign affiliate is equated to having a principal purpose to avoid the excise tax.
- But where is the intent found? At the US subsidiary? At the non-US parent/headquarters?
- Many multinationals continuously make stock repurchases

Stock Buyback Excise Tax – Funding Rule

- Requests to exclude normal intergroup financing transactions from scope of excise tax not adopted by IRS in proposed regulations.
- IRS rejected many other taxpayer requests for change and clarification (including treaty-based arguments)
- Depending on enforcement the excise tax may thus remain a real issue for non-US multinationals having a US affiliate

Stock Buyback Excise Tax – Example (Funding Rule)

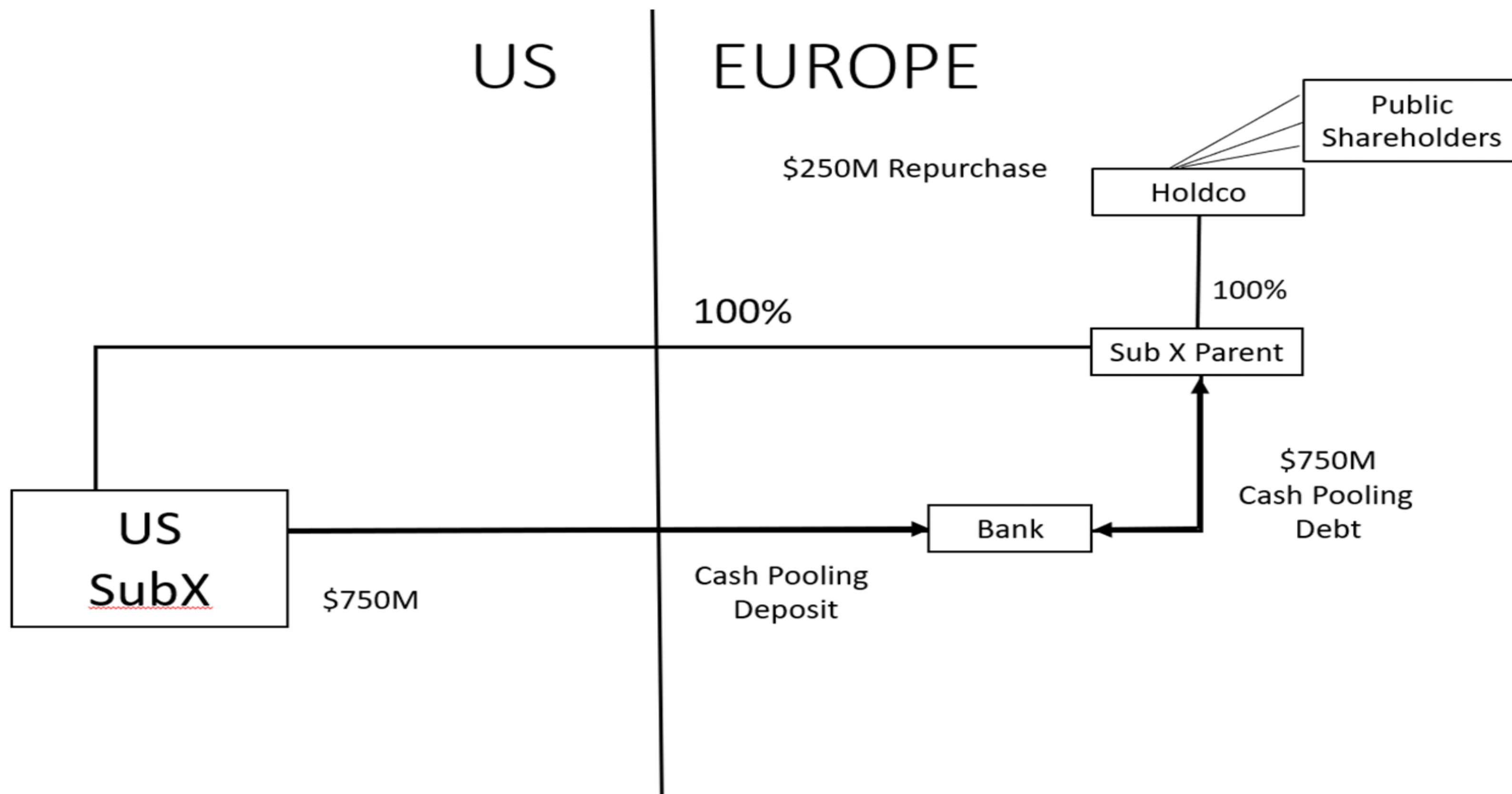


Sub X and Sub X parent participate in a cross-border cash pooling arrangement

Stock Buyback Excise Tax – Example (Funding Rule)

- Sub X has $750m on deposit in the arrangement
- Sub X Parent has borrowing of $750m from the cash pooling arrangement
- In 2024 Holdco repurchases $250m of its outstanding shares

Stock Buyback Excise Tax – Example (Funding Rule)



Questions?

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