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BRING IT ON HOME – HOLDING COMPANIES & REPATRIATION STRATEGIES

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SESSION OVERVIEW

BRING IT ON HOME – HOLDING COMPANIES AND REPATRIATION STRATEGIES

James Stanley (USA), Romain Tiffon (Luxembourg), Marc Sanders (Netherlands), Albert Collado (Spain), Stephanie Eichenberger (Switzerland)

The US Tax Cuts Act as well as changes around the globe have introduced significant changes to the taxation of foreign subsidiaries and repatriation of foreign earnings. This panel uses case study examples to focus specifically on holding company structuring and repatriation strategies for both US and foreign MNEs with foreign operations.

PANEL INTRODUCTIONS

Panelists

James Stanley
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ATOZ, Taxand Luxembourg

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Taxand Netherlands

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Tax Partner, Taxand Switzerland

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OVERVIEW OF VARIOUS JURISDICTIONS & RELEVANT TAX CONSIDERATIONS

UNITED STATES (1/2)

- New reduced US corporate income tax rate for US multinational groups – **21%**
- New modified territorial tax system (elements of a world wide tax system remain)
- New participation exemption on distributions from CFCs to US corporate parent – **100%** DRD for foreign dividends
- New modified interest expense limitation – deduction for net interest of **30%** of ‘Adjusted Taxable Income’ (roughly EBITDA) for tax years 2018 through 2021
  - More restrictive limitation of **30%** of ‘Adjusted Taxable Income’ (roughly EBIT) for tax years starting in 2022

UNITED STATES (2/2)

- Expansive new category of CFC earnings (GILTI) taxed at a reduced effective rate
- Generally no entity substance requirements, but transactions must have ‘economic substance’
- Foreign derived intangible income (FDII) – US companies that earn income from selling or licensing property to foreign users, or from providing services to foreign persons, are provided with a **37.5%** deduction, leading to an ETR on such income of **13.125%**.

THE NETHERLANDS (1/2)

- Full participation exemption, no holding period
- Domestic exemption from dividend withholding tax
- Reduction of withholding tax to NL HoldCo through treaties or EU directives
- No capital tax or stamp duty
- No royalty or interest withholding tax
- APA/ATR practise

THE NETHERLANDS (2/2)

- Current vision Dutch government:
  - Attractive investment climate for ‘real investments’
  - Protect reputation and not be seen as a ‘tax haven’.
- EU ATAD directives and blacklist will become important
- Current and proposed dividend withholding tax rules

2018 – 2020	2020 –

- Impact of multilateral instrument
- Substance requirements.

SWITZERLAND (1/2)

- Participation exemption on qualifying dividends and capital gains
  - **Dividends** – at least **10%** capital quota or CHF 1m FMV of holding
  - **Capital gains** – at least **10%** capital quota and one-year holding period
- Holding company taxation (regime to be abolished by 12/31/19 or 12/31/20) with ETR of **7.83%** on interest and other income
- Low ordinary tax rate depending on location (ETR of **12%**)

SWITZERLAND (2/2)

- Tax credit for foreign withholding tax on dividends, interest and royalties
- Exemption of foreign PEs and foreign real estate
- Wide treaty network (>100 income tax treaties)
- No withholding tax on interest (thin capitalization rules) or royalties
- Withholding tax on dividends **35%** (relief based on tax treaty)
- Voluntary registration as VAT payer with input tax deduction on administration cost.

SPAIN (1/2)

- ETVE regime (‘Entidad de Tenencia de Valores Extranjeros’) created in 1996 and broadly used by MNEs (100 out of the top 500 MNEs)
- ETVE regime **main features**:
  - Participation exemption on dividends and capital gains for qualifying holdings:

At least **5%** holding or € 20 Mio acquisition value of the participation

One year holding period

Foreign subsidiaries subject to and not exempt from a CIT of identical or analogous nature of Spanish CIT [(1)]

  - No withholding tax on distribution of profits of non-Spanish subsidiaries to nonresident shareholders (not tax-resident in a black-listed country)

[(1)] Minimum nominal tax of 10% (deemed to be accomplished if resident in a DTT country)

SPAIN (2/2)

- ETVE formal (registered securities, corporate purpose, communication to tax authorities…) and substance requirements (administrative doctrine)
- Application of Parent-Subsidiary Directive.

LUXEMBOURG

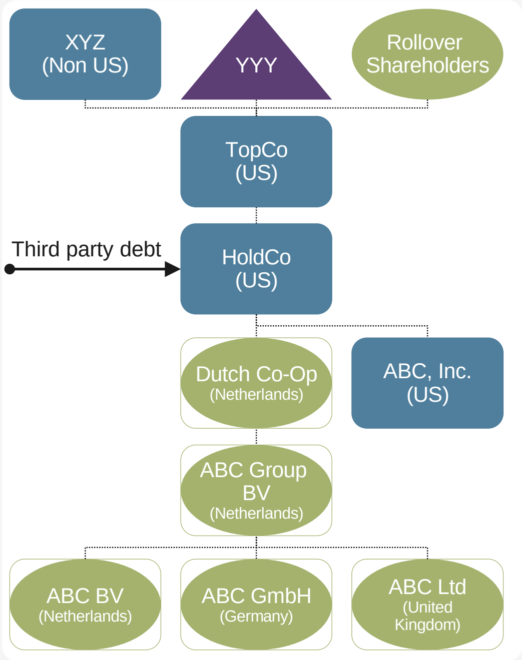
	INCOME		CAPITAL GAINS	
	Dividends	**Interest**	**Shares**	**Receivables**
General principle	Fully taxable	Fully taxable	Fully taxable	Fully taxable
Exemptions	50% exemption		Full exemption	
	Full exemption			
GAAR	Yes (specific)	Yes (general)	Yes (general)	Yes (general)

LUXEMBOURG TAXATION OF CASH REPATRIATION

	Dividends	Interest	Liquidation proceeds
Principle	15% Withholding tax	No withholding tax	No withholding tax
Exemptions	0% under domestic law	N/A	N/A
GAAR	Yes (specific)	Yes (general)	N/A
Points of attention	None	Withholding tax if (i) not arm’s length, (ii) debt-to-equity ratio not met or (iii) certain profit participating bonds	Partial liquidation proceeds debate

UNITED STATES

US HOLDCO STRUCTURE – EXAMPLE 1



- US consolidated group with CFCs electing to be transparent for US purposes – all income taxed at **21%** in US
- All IP located in US
- Increased interest expense limitation in the US by checking open CFCs – taking their EBITDA into account in the US
- Foreign taxes paid in foreign jurisdictions should result in FTCs available for use in the US, subject to applicable limitations
- If the foreign group is acquired in a deal, 338(g) election (deemed asset purchase) made with full step up in tax basis of assets – D&A in US providing tax shield
- No GILTI or subpart F income
- Remittance of cash to the US results in no US tax; DTTs among foreign entities should provide for efficient movement of cash to US
- Income derived from selling or licensing of property, or providing services from the US to foreign persons taxed at **13.125%**.

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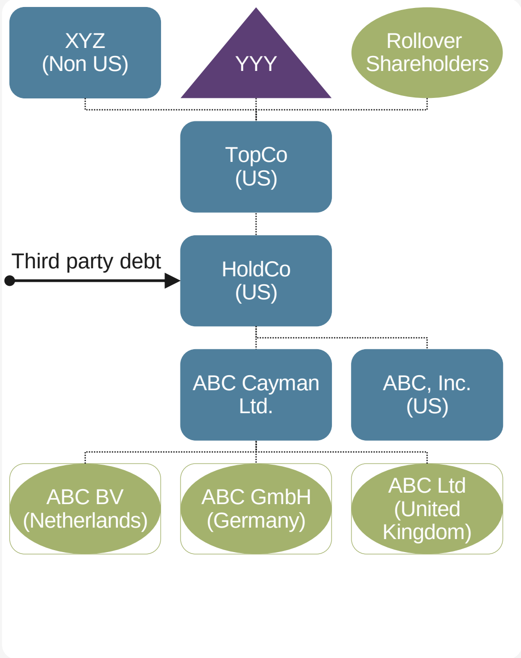
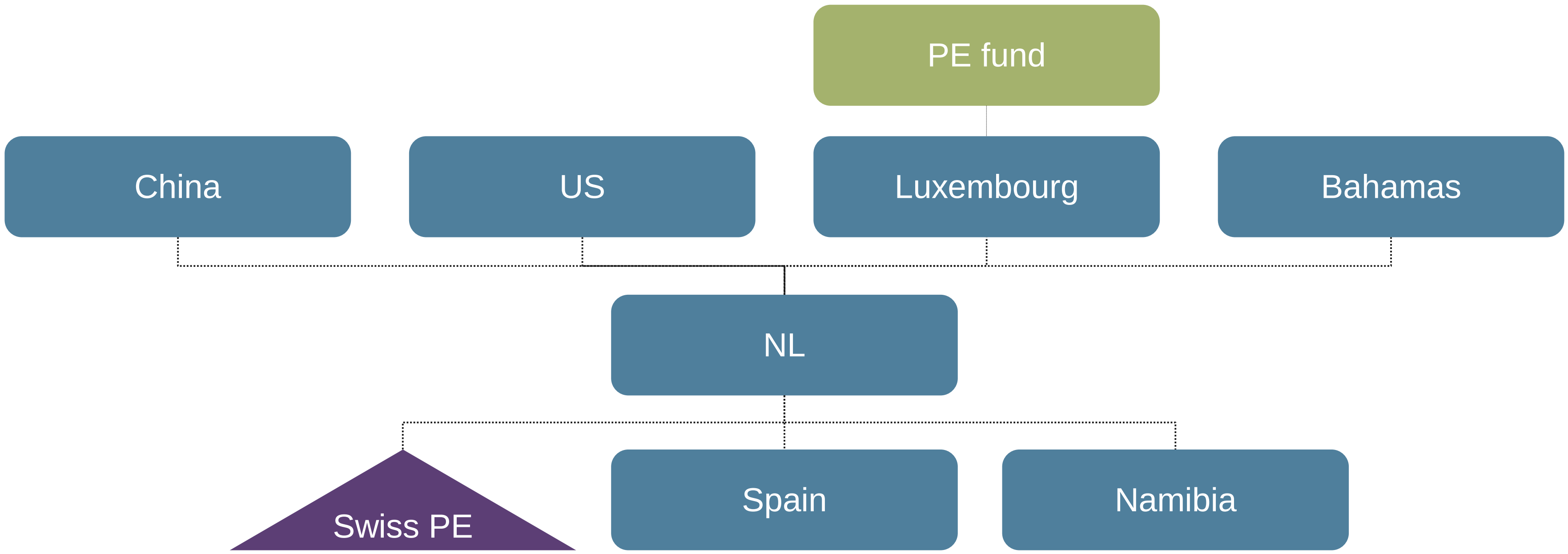
US HOLDCO STRUCTURE – EXAMPLE 2



- US consolidated group with CFCs checked open into the Cayman – Cayman acting as principal
- RoW and perhaps North American IP residing in Cayman
- Netherlands, Germany, and UK compensated on cost plus arrangement
- Interest expense limitation in US driven off of US consolidated group Adjusted Taxable Income (but including GILTI)
- CFC taxes creditable against subpart F or GILTI
- If acquisition of the foreign group under Cayman, 338(g) election (deemed asset purchase) made with full step up in tax basis of assets – D&A to reduce E&P of foreign entities; step-up reduces GILTI
- GILTI on foreign earnings net of **10%** return on tangible assets – **10.5%**
- Participation exemption on distribution of foreign earnings back to US
- Subpart F exposure needs to be managed.

THE NETHERLANDS

DUTCH HOLDCO STRUCTURE



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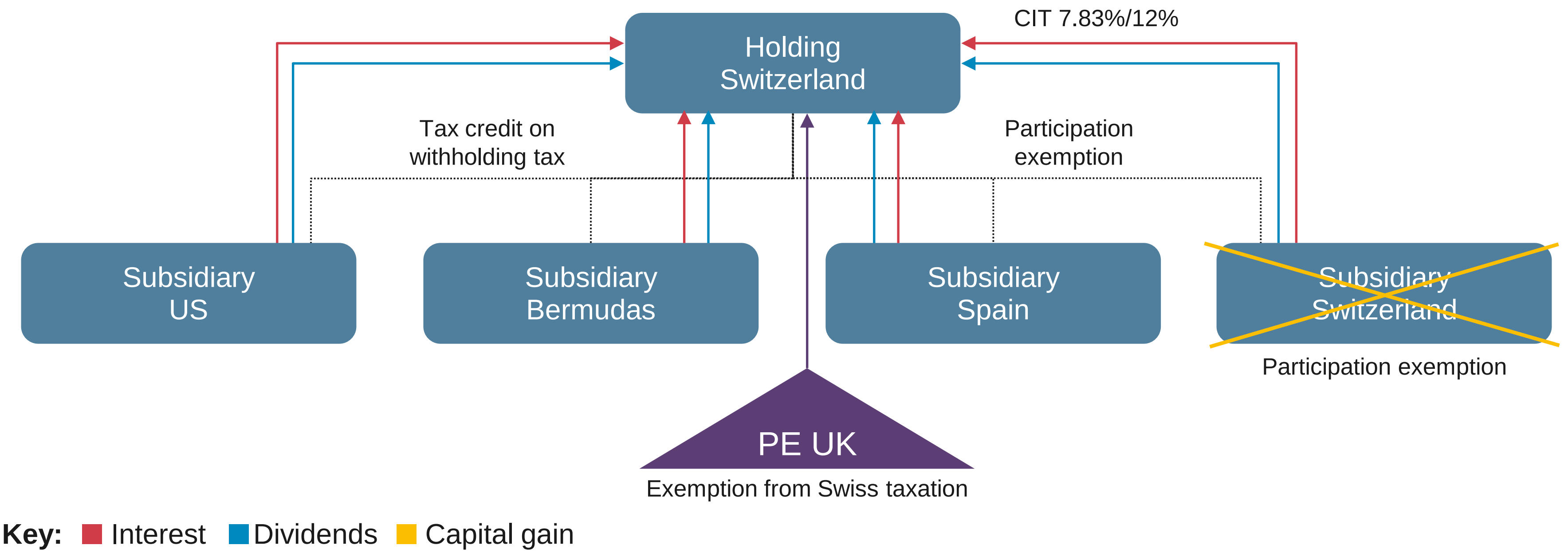
SWITZERLAND

SWITZERLAND HOLDCO STRUCTURE



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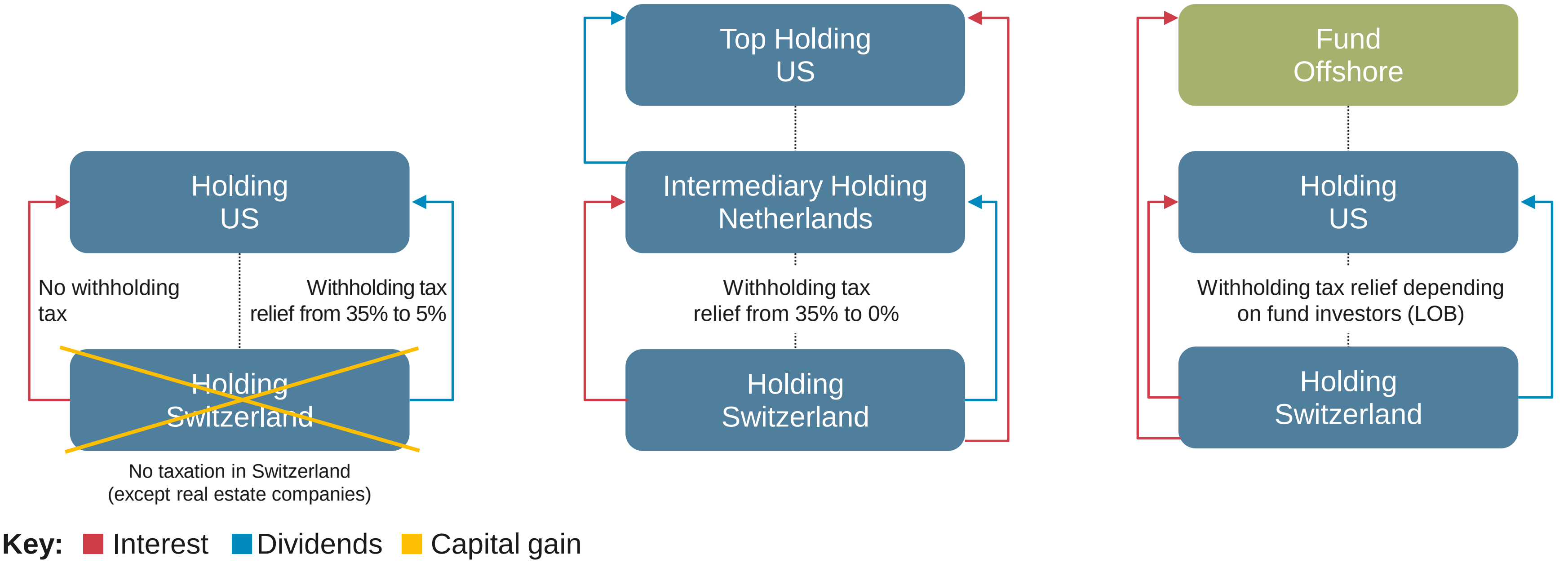
SWITZERLAND – DISTRIBUTION BY HOLDING



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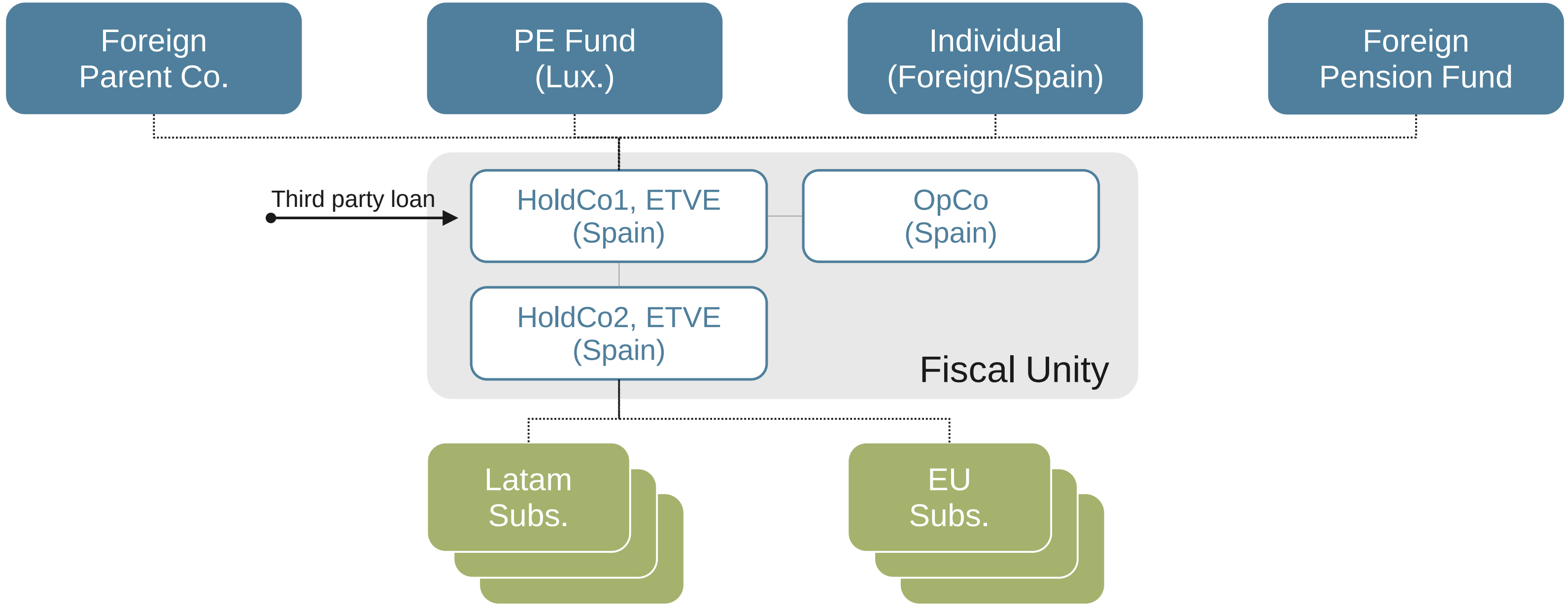
SPAIN

SPANISH HOLDCO STRUCTURE
(ETVE – SAMPLE CASE)



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STRUCTURING INVESTMENTS THROUGH A SPANISH HOLDING STRUCTURE

(ETVE – SAMPLE CASE – CRITICAL ISSUES)

- Tax treatment of profit distributions to different types of shareholders – the non residence test
- Type of activity performed in connection with Foreign Subs. and substance requirements of the ETVE
- Financing acquisitions of Foreign Subs. via external debt. Impact of interest expense in ETVE structures:

Attribution of the debt to specific/general assets	Anti-abuse provisions related to the use of debt to acquire participations to related parties (targeted)	General limitations on the deduction of interest expense (30% EBITDA)

STRUCTURING INVESTMENTS THROUGH A SPANISH HOLDING STRUCTURE

(ETVE – SAMPLE CASE – CRITICAL ISSUES)

Distribution of profits from foreign/Spanish source:

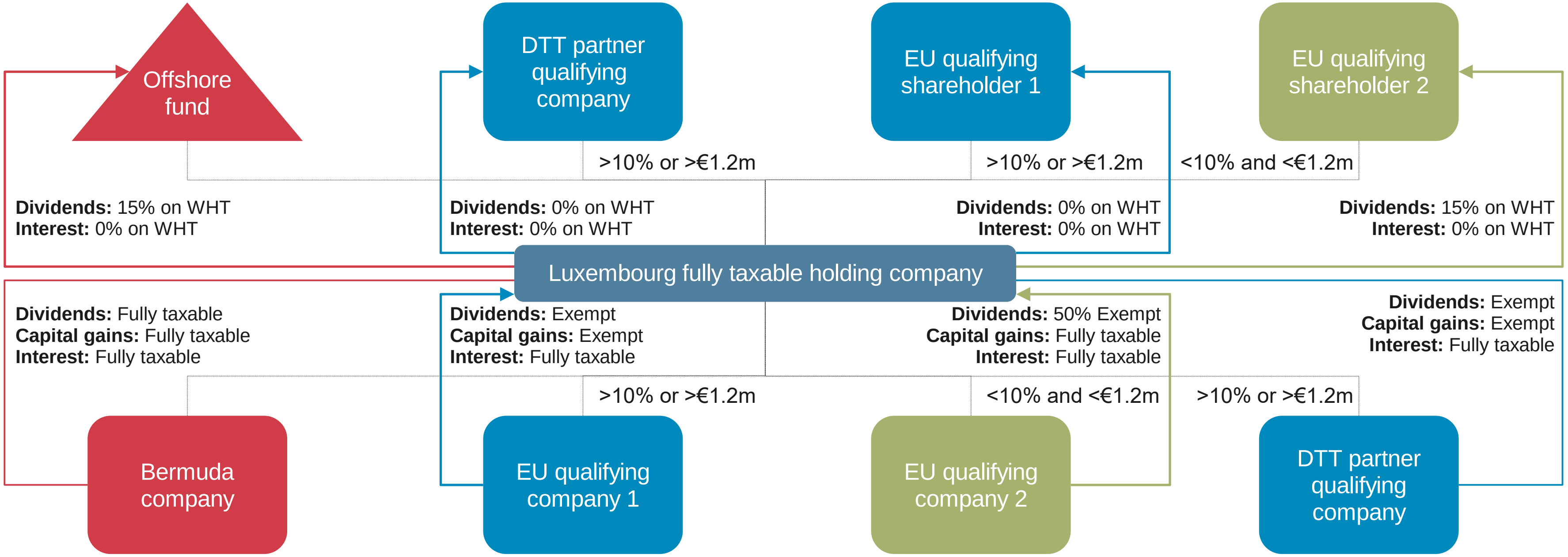
- The use of double ETVE structures
- Special rule – first distributed profit comes from exempt income from foreign participations

Some practical considerations about the use of ETVE:

- ETVE vs. General regime vs. Holding regime basque country
- ETVE regime vs. PS directive
- ETVE and Spanish listed companies

LUXEMBOURG

LUXEMBOURG HOLDING AND FINANCING IN PRACTICE



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SPEAKER PROFILES

SPEAKER PROFILE

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James Stanley is a Managing Director with Alvarez & Marsal Taxand, LLC, in San Francisco. With more than 20 years of experience, James has transactional experience in structuring all aspects of domestic and cross-border acquisitions, joint ventures, divestitures and reorganisations across a wide range of industries, including technology, financial services, life sciences, energy, industrial products, business services and entertainment.

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Marc Sanders is a member of the Taxand Board, and a partner of Taxand Netherlands. He specialises in M&A transactions and international taxation. Marc has advised corporates and financial institutions with respect to a wide variety of M&A transactions. Marc has also advised many prominent Dutch and private equity firms with respect to leveraged buyout transactions. Marc is recognised in rankings by Chambers, Legal 500 and International Tax Review.

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Romain Tiffon is a Partner and Head of the International and Corporate Tax department at ATOZ Tax Advisers, which is Taxand Luxembourg. Romain has 13 years of experience in structuring Pan-European investments and coordinating tax implementation for a wide range of institutional investors in the Private Equity and Real Estate sectors. He also has extensive experience in structured finance, corporate restructuring, and family offices.

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Albert Collado is based in Barcelona where he is a partner of Garrigues, Taxand Spain. He specialises in international tax planning and taxation of mergers, acquisitions and reorganisations, where he has advised both listed and privately owned multinational groups and funds. Albert acts as a regular speaker at international conferences dealing with international tax, and has been featured as a recognised tax lawyer in Spain by Chambers, Best Lawyers International and Who's Who: Corporate Tax.

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Stephanie Eichenberger is a partner of Tax partner, Taxand Switzerland. She is experienced on tax issues including M&A, reorganisations and other elements of domestic and international tax. She advises multinational and Swiss companies across a wide range of sectors including real estate, construction, trading, logistics, wholesale, consumer goods, media, travel, IT, consulting and finance. Stephanie is an attorney and a certified tax expert. She regularly lectures on various tax issues.

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