

**EUROPEAN HOLDING
COMPANIES INVESTING
IN GERMANY
- IN THE LIGHT OF NEW ANTI-
TREATY/DIRECTIVE SHOPPING
RULES -**

PRESENTATION BY

**Sven-Eric Bärsch
Oliver R. Hoor
Christoph Klein
Claire Lambert
Marcus Mick**

**18 March 2021
11:00 - 11:45 AM CET**

Your global tax partner



Claire Lambert
Managing Director
Alvarez & Marsal,
Taxand UK



Oliver R. Hoor
Partner
Atoz,
Taxand Luxembourg



Marcus Oliver Mick
Partner
Flick Gocke Schaumburg,
Taxand Germany
Frankfurt



Sven-Eric Bärsch
Partner
Flick Gocke Schaumburg,
Taxand Germany
Frankfurt



Christoph Klein
Associate
Flick Gocke Schaumburg,
Taxand Germany
Frankfurt

CONTENTS



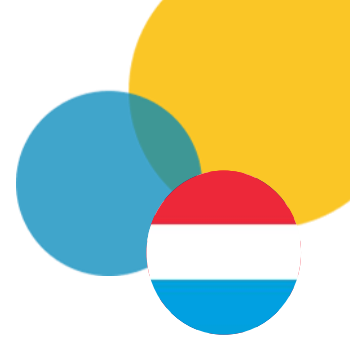
1. UK Holding Regime
2. Luxembourg investment platforms
3. The wholly artificial arrangement doctrine
4. German Anti-Treaty/Directive-Shopping Rule
5. Case 1: Personal Relief of Shareholders
6. Case 2-3: Material Relief (“Substance”)
7. New Principal Purpose Test
8. Conclusion

UK HOLDING REGIME



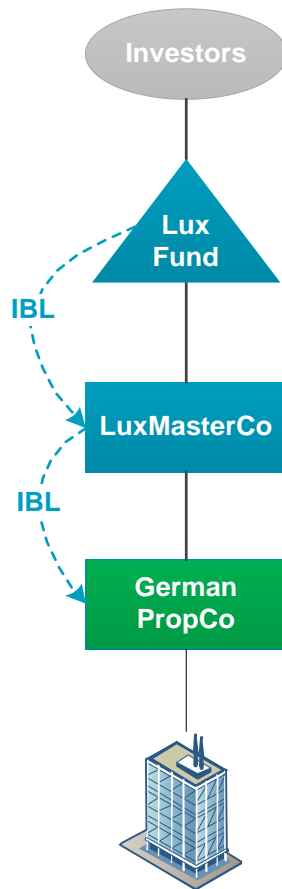
- ❖ Attractive tax regime, extensive treaty network
- ❖ Dividends generally exempt from tax
- ❖ Participation exemption on disposals of shares in trading subsidiaries
- ❖ No withholding tax on dividends
- ❖ No non resident CGT apart from in UK property rich companies
- ❖ Consultation on treatment of asset holding companies

LUXEMBOURG INVESTMENT PLATFORMS



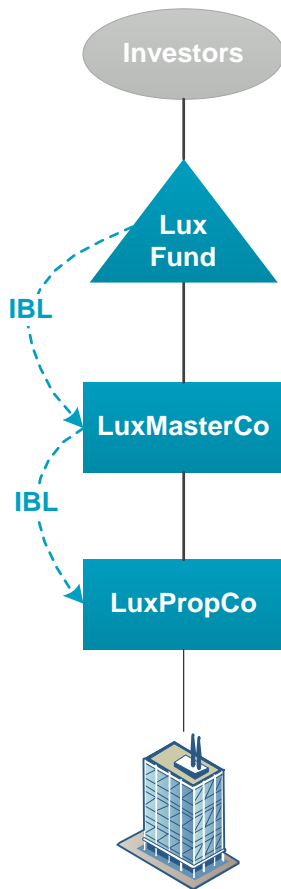
- ❖ International financial centre and a prime holding location
- ❖ Flexible and diverse legal, regulatory and tax framework
- ❖ Broad range of regulated, unregulated and semi-regulated vehicles
- ❖ Experienced and pro-business regulatory authority
- ❖ Compliance with all international tax standards
- ❖ AAA Rating

LUXEMBOURG INVESTMENT PLATFORMS



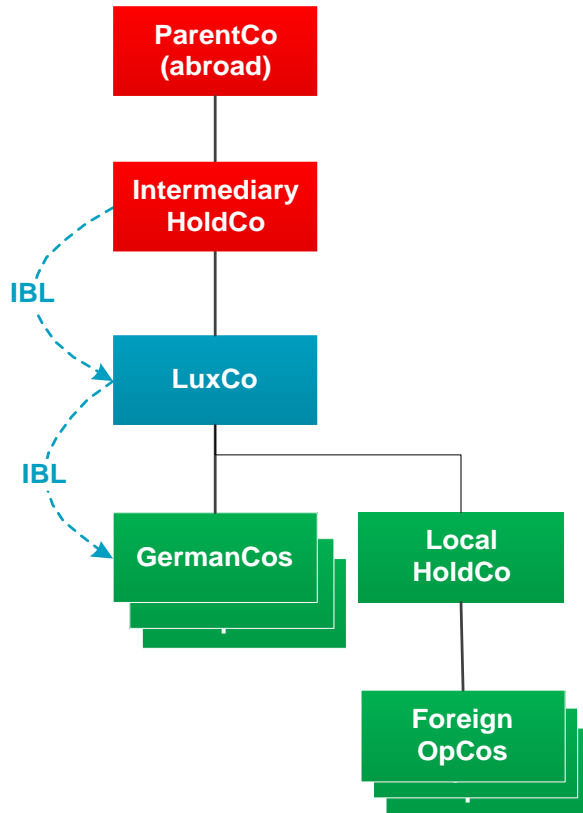
- ❖ Real estate investment structure
- ❖ German PropCo

LUXEMBOURG INVESTMENT PLATFORMS



- ❖ Real estate investment structure
- ❖ Luxembourg property company

LUXEMBOURG INVESTMENT PLATFORMS



- ❖ Luxembourg as a régional investment platform of a multinational group

THE WHOLLY ARTIFICIAL ARRANGEMENT DOCTRINE



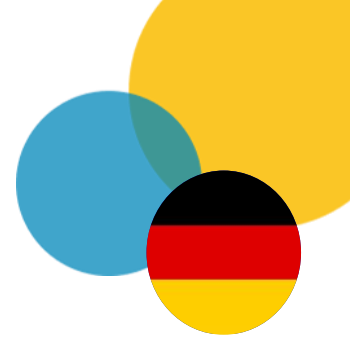
- ❖ In an EU context, anti-abuse legislation provided under domestic tax law and in tax treaties has to:
 - Focus on “**wholly artificial arrangements**” (e.g. letterbox companies)
 - Require an analysis of each **individual case** (rather than relying on formatted criteria)
 - Include a **substance test** (appropriate as opposed to excessive substance)
 - Consider the **substance of the entire group in a jurisdiction** (rather than focusing only on the substance of the direct parent company)
 - Consider **economic activity in a broad sense** (including asset management and generating exclusively foreign sourced income)

THE WHOLLY ARTIFICIAL ARRANGEMENT DOCTRINE



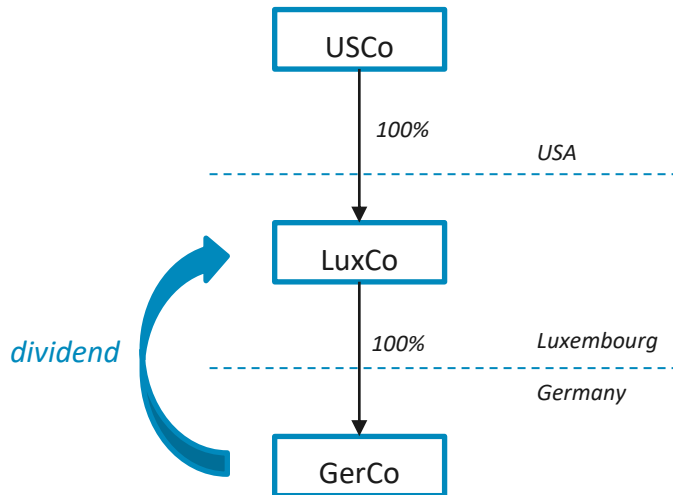
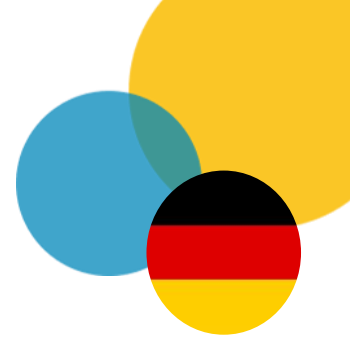
- ❖ In an EU context, anti-abuse legislation provided under domestic tax law and in tax treaties has to:
 - **Disregard the motives** of the taxpayer for the choice of the location of the holding company (tax jurisdiction shopping is legitimate)
 - Not exclude EU parent companies that are **directly or indirectly owned by shareholders resident in third states**
 - **Allow taxpayers to provide evidence** to demonstrate the appropriateness of the structure (there should **not** be an irrebutable presumption of abuse or fraud)

GERMAN ANTI-TREATY/DIRECTIVE-SHOPPING RULE



- ❖ Generally **26.375%** WHT on German dividends are levied regardless of an applicable DTT or PSD (on royalties: **15.825%** WHT)
- ❖ Sec. 50d (3) Income Tax Act (ITA): WHT relief under a DTT or PSD is only granted to a foreign company if
 - (a) the foreign company's shareholders would be entitled to the same WHT relief if they directly earned the German income ("*personal relief*"), or
 - (b) certain **substance requirements** are met at the level of the foreign company (*eg gross earnings of the foreign company result from its own business activity*)
- ❖ **Draft bill** of 20 January 2021 shall revise Sec. 50d (3) ITA
 - WHT relief is denied if personal relief (see above) is not met and
 - Income has no substantial connection with the company's economic activity, or
 - Income is passed on (pass-through entity), or
 - Company/foundation has no appropriately established business
- ❖ **Escape** possible for stock exchange listed companies or if PPT is fulfilled

CASE 1: PERSONAL RELIEF OF SHAREHOLDERS



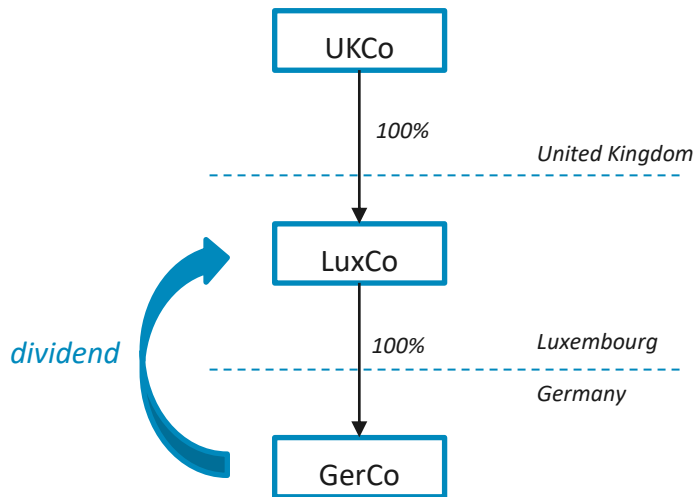
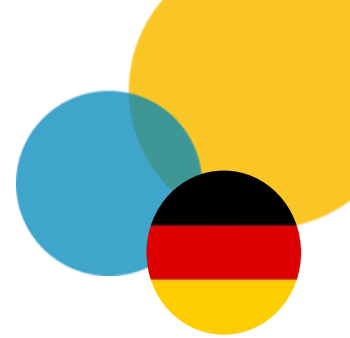
- ❖ GerCo pays dividend to LuxCo
 - ❖ (gross amount EUR 10m → WHT: **EUR 2.6m**)
- ❖ LuxCo is generally entitled to
 - a) WHT reduction to **5%** (Art. 10 (2) a) DTT-Lux) **and**
 - b) WHT reduction to **0%** (PSD)

Assumptions:

- ❖ USCo is **entitled to** WHT reduction to **0%** (Art. 10 (3) DTT-US)
- ❖ LuxCo **does not fulfil** substance requirements

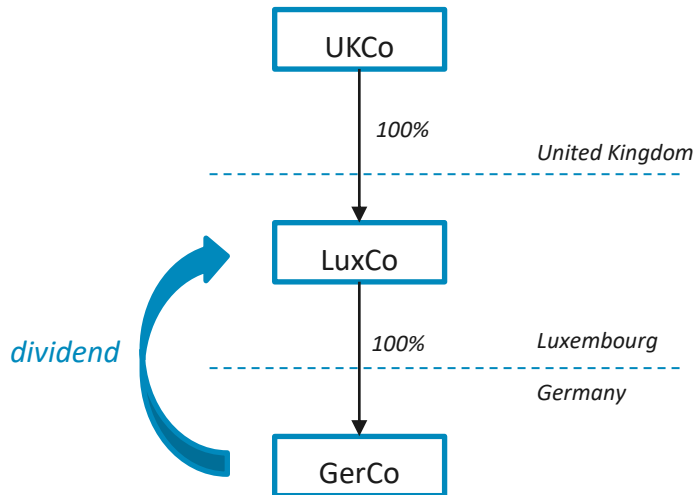
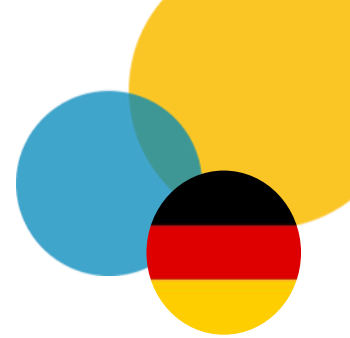
➔ Is “personal relief” of USCo under DTT-US sufficient for refund of German WHT?

CASE 1A: PERSONAL RELIEF OF SHAREHOLDERS



- ❖ GerCo pays dividend to LuxCo (EUR 10m)
 - ❖ WHT: **EUR 2.6m**
 - ❖ UKCo is **entitled to** WHT reduction to **5%** (Art. 10 (2) lit. a DTT-UK)
 - ❖ LuxCo **does not fulfil** substance requirements
- ➔ Is refund of EUR 1.1m (= difference to reduced tax rate) available?

CASE 2: MATERIAL RELIEF (“SUBSTANCE”)



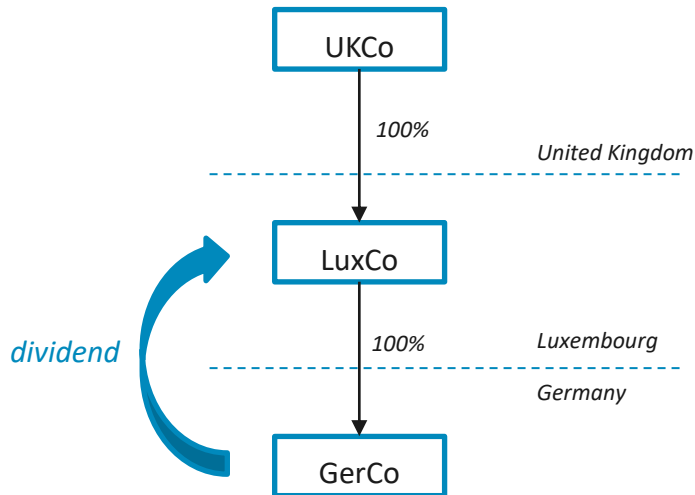
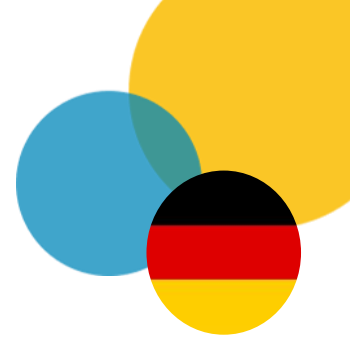
- ❖ GerCo pays dividend to LuxCo (EUR 10m)
 - WHT: **EUR 2.6m**
- ❖ UKCo is entitled to WHT reduction to **5%** (Art. 10 (2) lit. a DTT-UK), LuxCo would be entitled to **0% under PSD**
- ❖ LuxCo is a **mere (passive) holding company**
 - No operational business, but LuxCo exercises its rights as shareholder
 - LuxCo employs qualified personnel capable of managing day-to-day activities
 - LuxCo rents business premises, technical means of communication, etc.

Alt. 1: LuxCo reinvests the dividend

Alt. 2: LuxCo immediately forwards the dividend to UKCo

➔ Is refund of German WHT possible?

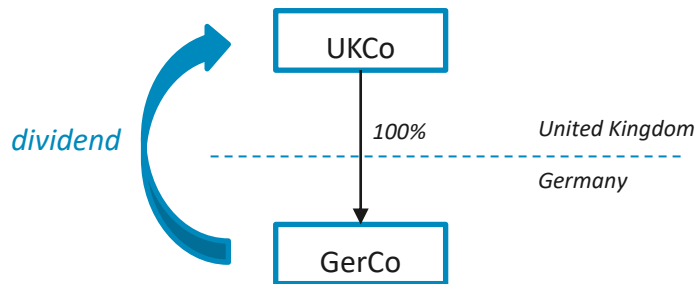
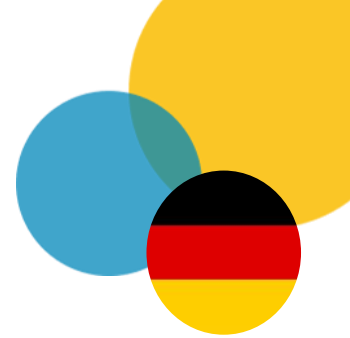
CASE 2A: MATERIAL RELIEF ("SUBSTANCE")



- ❖ GerCo pays dividend to LuxCo (EUR 10m)
 - WHT: **EUR 2.6m**
- ❖ UKCo is entitled to WHT reduction to **5%** (Art. 10 (2) lit. a DTT-UK), LuxCo would be entitled to **0% under PSD**
- ❖ LuxCo is an **active holding company**
 - LuxCo has controlling effect on the business of its subsidiaries
 - LuxCo provides group services to its subsidiaries, e.g. management activities
 - LuxCo employs qualified personnel capable of managing day-to-day activities, rents business premises, technical means of communication, etc.

➔ Is refund of German WHT possible?

CASE 3: MATERIAL RELIEF ("SUBSTANCE")

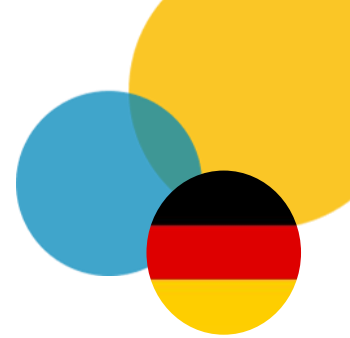


- ❖ GerCo pays dividend to UKCo (EUR 10m)
 - WHT: **EUR 2.6m**
- ❖ UKCo is entitled to WHT reduction to **5%** (Art. 10 (2) lit. a DTT-UK)
- ❖ UKCo has an operational business

Alt. 1: GerCo sells goods produced by UKCo (or vice versa) → supply/service relationships
Alt. 2: The business areas of UKCo and GerCo are fundamentally different

➔ Is partial refund of German WHT possible?

NEW PRINCIPAL PURPOSE TEST



❖ Sec. 50d (3) ITA shall not apply to the extent that the ForeignCo proves that **none of the main purposes** of its involvement is to obtain a **tax advantage**.

- Proof of reasons for ForeignCo's interposition
- All tax and non-tax reasons are taken into account, including those arising from group structures
- Appreciation of "all circumstances of the individual case"
- What were "main purposes"? Foreign or German tax advantages?

CONCLUSION



- ❖ Draft law apparently adapts EU case law (counter-evidence possible)
- ❖ Many uncertainties – even more than before!
- ❖ Adaption of ECJ's wholly artificial arrangement doctrine depends on the application of the new law by German tax authorities



QUESTIONS & ANSWERS

SPEAKERS – UK AND LUXEMBURG



Claire Lambert
Managing Director
Alvarez & Marsal,
Taxand UK

T: +44 207 072 3285

E: clambert@alvarezandmarsal.com



Oliver R. Hoor
Partner
Atoz,
Taxand Luxembourg

T: +35 22 69 401

E: oliver.hoor@atoz.lu

SPEAKERS – GERMANY



Marcus Oliver Mick
Partner
Flick Gocke Schaumburg,
Taxand Germany
Frankfurt
T: +49 69 717 03-0
E: marcus.mick@fgs.de



Sven-Eric Bärsch
Partner
Flick Gocke Schaumburg,
Taxand Germany
Frankfurt
T: +49 69 717 03-0
E: sven-eric.baersch@fgs.de



Christoph Klein
Associate
Flick Gocke Schaumburg,
Taxand Germany
Frankfurt
T: +49 69 717 03-0
E: christoph.klein@fgs.de

ABOUT TAXAND

Taxand is the world's largest independent tax organisation with more than 550 tax partners and over 2,500 tax advisors in 50 countries. Taxand focuses on delivering high quality, integrated tax advice, free from conflict creating audit work. Taxand advisors work together to deliver global tax services for clients.

www.taxand.com

Taxand is a global organisation of tax advisory firms. Each firm in each country is a separate and independent legal entity responsible for delivering client services.

© Copyright Taxand Economic Interest Grouping 2021
Registered office: 1B Heienhaff, L-1736 Senningerberg
– RCS Luxembourg C68