IBA 14th Annual Finance and Capital Markets Conference

Cross border finance –
how to structure in view of increasingly complex rules

20 January 2025

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the legal profession®

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WHITE & CASE

Your Panel

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Anti-tax haven/black list regulations

Spain: List of Non-Cooperative Jurisdictions (NCJs)

- Spain has its own list of NCJs (24 countries, updated Feb 2023), which is different and prevails over the EU one (11 countries, updated Oct 24).

- The Spanish list includes territories like Gibraltar, the Channel Islands, BVI, Bermuda and Cayman, that are not in the EU list and that, in some cases (Bermuda, Cayman), have provided sufficient evidence of exchanging information according to OECD standards.

- Being on the list does not add effective taxation in case of a direct investment (same as non-DTT countries) but allow the STA to use specific provisions that disallow tax benefits for income obtained "through" NCJs and, above all, add a negative connotation ("smell test") that could influence the Courts in anti-abuse or beneficial ownership (BO) discussions.

- Other technical aspects:
  - It is possible to claim treaty benefits for a DTT resident operating through a branch in a NCJ.
  - The EU free movement of capital is applicable to NCJs, leading to a potential taxation at 1 % of Spanish-sourced income if the vehicle (fund) is comparable to certain Spanish collective investment vehicles. This also undermines potential tax reassessments based on the NCJ residence of the fund.

Spanish vs. EU list of NCJs

- Spanish list to be updated based on:
  - (i) Tax transparency criteria: effective exchange of information under specific agreements and/or international standards
  - (ii) Existence of offshore instruments or companies aimed at attracting profits that do not reflect real economic activity
  - (iii) Existence of low or zero taxation

  In addition, potential updates in line with the criteria of the EU Code of Conduct for Business Taxation or the OECD Forum on Harmful Tax Regimes.

EU list of non-cooperative jurisdictions for tax purposes (as of October 2024)

- American Samoa
- Anguilla
- Fiji
- Guam
- Palau
- Panama
- Russia
- Samoa
- Trinidad and Tobago
- US Virgin Islands
- Vanuatu

Spanish list of non-cooperative jurisdictions (since February 2023)

- Anguilla
- American Samoa
- Bahrain
- Barbados
- Bermuda
- British Virgin Islands
- Cayman Islands
- Dominica
- Falkland Islands
- Fiji
- Gibraltar
- Guam
- Guernsey
- Isle of Man
- Jersey
- Mariana Islands
- Palau
- Samoa, as regards the harmful tax regime (offshore business)
- Seychelles
- Solomon Islands
- Trinidad and Tobago
- Turks and Caicos Islands
- US Virgin Islands
- Vanuatu

The US: Incoming Trump Administration Likely to Retaliate Against DSTs

- Trump imposed tariffs against countries that imposed digital service taxes in his first term.

- Republicans have already called for action against Canada for its DST under Section 301 of US trade law.
  - Negotiations are continuing under the United States-Mexico-Canada free trade agreement.

- Italy has proposed expanding its DST so that it does not apply just to US tech companies.

- “Amount A” under Pillar One proposed by the OECD treaty would eliminate DSTs in exchange for a reallocation of taxing rights.

- To date, DSTs have not brought in significant revenue and the US tariff response could be disproportionate to the harm to its multi-nationals.

The Netherlands: Developments

- Updated 2025 NL blacklist for certain Dutch anti-abuse legislation, like conditional withholding tax provisions and CFC provisions.

- Dutch conditional withholding tax on intragroup interest and royalties extended to intra-group dividends as per January 2024.
  - Relevant to properly address in cross-border finance transactions.
  - In practice limited impact as in principle NL blacklisted jurisdiction needs to be involved.
  - Scope of NL blacklist limited and further reduced as per January 2025.

- Discussion points raised in practice.

The Netherlands: Updated 2025 NL blacklist

- Jurisdiction on NL blacklist, if:
  - (i) Statutory profit tax rate of less than 9%; or
  - (ii) Included in EU list of non-cooperative jurisdictions for tax purposes.

Dutch list of low tax/non-cooperative jurisdictions as determined for 2024

- American Samoa
- Antigua and Barbuda
- Anguilla
- Bahamas
- Bahrain
- Barbados
- Belize
- Bermuda
- British Virgin Islands
- Cayman Islands
- Fiji
- Guam
- Guernsey
- Isle of Man
- Jersey
- Panama
- Palau
- The Russian Federation
- Samoa
- Seychelles
- Trinidad and Tobago
- Turkmenistan
- Turks and Caicos Islands
- US Virgin Islands
- Vanuatu

Dutch list of low tax/non-cooperative jurisdictions as determined for 2025

- American Samoa
- ~~Antigua and Barbuda~~
- Anguilla
- Bahamas
- Bahrain
- Barbados
- ~~Belize~~
- Bermuda
- British Virgin Islands
- Cayman Islands
- Fiji
- Guam
- Guernsey
- Isle of Man
- Jersey
- Panama
- Palau
- The Russian Federation
- Samoa
- ~~Seychelles~~
- Trinidad and Tobago
- Turkmenistan
- Turks and Caicos Islands
- US Virgin Islands
- Vanuatu

The Netherlands: Scope CWT (1/2)

- Scope of Dutch conditional withholding tax (**CWT**) extended to intragroup dividends as per January 2024.

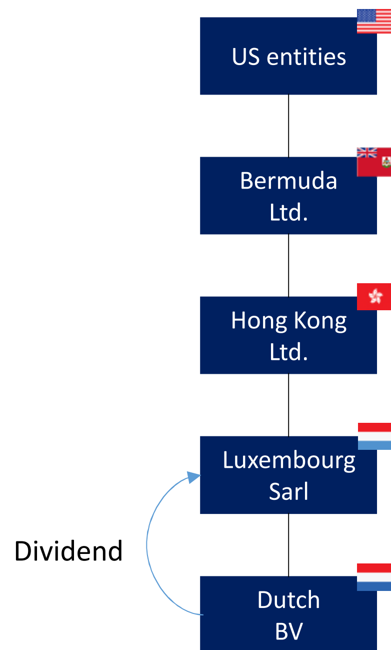
- CWT on interest/royalty payment made by body or PE situated in NL and on dividend distribution made by body situated in NL, if:
  (i) intragroup interest payment/dividend distribution, **and**
  (ii) a case of (deemed) abuse is present.

The Netherlands: Scope CWT (2/2)

Intragroup, if	(Deemed) abuse, if
(a) Qualifying interests are held (i.e., generally a shareholding representing more than 50 % of the voting rights); or (b) Collaborating group (‘*samenwerkende groep*’)/qualifying unity (‘*kwalificerende eenheid*’) is present.	(a) Interest payment/dividend distribution to entity or PE situated in jurisdiction on NL blacklist; (b) Interest payment/dividend distribution to certain hybrid entities (may apply without having NL blacklisted jurisdiction in the structure!); or (c) Interest payment/dividend distribution to abusively interposed entity (the interposed entity is not situated in a NL blacklisted jurisdiction, but elsewhere in the structure such NL blacklisted jurisdiction is present).

- Rate equal to headline Dutch corporate income tax rate (25.8 % in 2024 and 2025).

The Netherlands: CWT Case



Facts and circumstances

- The ownership structure of an US group is depicted on the left side.
- Bermuda Ltd. does not have any substance and no active business enterprise is present.
- Hong Kong Ltd. avails of some employees. Hong Kong Ltd. is remunerated based on payroll costs + 5%. Hong Kong Ltd. does not fulfil the relevant substance requirements.
- The direct shareholder of the Dutch BV (i.e. Luxembourg) does not meet the relevant substance requirements and does not perform business activities.

Question

- How strong is the position that no CWHT is due on distributions made by the Dutch BV?

The Netherlands: Discussion points

- Interpretation concept of interest for CWT purposes:
  - Dutch legislator adopts economic interpretation.
    - Main premise perspective of the debtor, perspective of creditor less relevant.
  - Accrued (implied) at arm's length interest falls within the scope of the CWT.

- Bond issuance:
  - Prospectus and tax opinions.
  - What info to obtain re bond holders to get comfortable that no CWT is due.

- Collaborating group ('*samenwerkende groep'*)/Qualifying unity ('*kwalificerende eenheid*'):
  - New collaborating group definition for CWT purposes effective as per January 1, 2025:
    - Qualifying unity ('*kwalificerende eenheid*').
    - Solely considers entities operating together for the primary purpose, or one of the primary purposes, to avoid CWT.
    - Aims to make the application of CWT rules better workable for Dutch based entities with diff shareholders.

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Tax aspects of direct lending funds

Typical Irish structures for Loan Origination

Section 110 company	Qualifying Investor Alternative Investment Fund ("QIAIF")	Combination
• Unregulated • Easy to establish – typically takes 3-5 business days to incorporate • Requires careful structuring to achieve a tax efficient outcome • Cost efficient to establish and maintain	• Regulated • Speed to market – 24 hour authorisation process; typically takes 8 – 12 weeks to establish, negotiate service provider contracts and complete KYC • Generally exempt from tax on their profits • Costs associated with establishment and maintenance • AIFMD marketing passport	• QIAIF may hold S.110 Company for treaty eligibility • If advantageous, may make sense for S.110 Company may hold QIAIF ICAV for US treaty purposes

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Irish S.110 Companies

Tax Benefits

- Wide treaty network to receive interest free of underlying withholding taxes.
- Variety of withholding tax exemptions available (EU / Treaty residents / listed notes).
- Interest on profit participating notes ("**PPNs**") is fully deductible (if appropriately structured), thus leaving nominal profits for tax. In general, three hurdles for interest deductibility:
  - PPNs (i) held by treaty residents subject to tax; or (ii) listed on a recognised stock exchange and not held by "specified person" (control test / 75% assets test);
  - deduction available under anti-hybrid rules;
  - deduction not restricted under interest limitation rules.
- No VAT on management services.
- Pillar 2 may need to be considered.

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Irish S.110 Companies - Key Tax Considerations

Anti-Hybrid Rules

- Deduction of interest on PPN denied if>
  - notes give rise to deduction without inclusion mismatch outcome (i.e. hybrid instrument); and
  - noteholder is an "associated enterprise" (if orphan SPV, consolidation / board representation); and
  - no inclusion at noteholder level
- Deduction also denied if "structured arrangement" (mismatch outcome priced in / arrangement designed to give rise to a mismatch outcome)

Interest Limitation Rules

- Restricts deductibility of net interest expense to 30% of EBITDA.
- Typical loan origination platform should only receive interest equivalent income such that no exceeding borrowing costs arise.
- If non interest equivalent income, equity escapes for "single company worldwide group" – conditions:
  - not a member of a consolidated group (for accounting purposes); and
  - no "associated enterprises" hold debt

Irish S.110 Companies: Profit Participating Notes

- The S.110 Company will **issue a profit participating loan / notes** (PPN) to the investors / aggregator.
- The structure **allows flexibility** to:
  - increase / decrease the level of investment from time to time;
  - bring in other external investors at the S.110 Company level.
- The PPN is structured as a "**variable funding note**" which will allow the S.110 Company to request multiple drawdowns from the investor / master fund on terms agreed e.g. up to a defined limit, within a prescribed period, etc.
- Interest on the notes equals the return on the credit assets less the S.110 Company's ongoing costs and a small amount of annual profit for the S.110 Company (e.g. €1,000).
- Noteholder protection - extensive suite of restrictive covenants.
- Depending on the tax status of the investor, a **listing** of the notes may be required.

Ireland: Loan Origination QIAIF (“LO-QIAIF”)

- QIAIF structure facilitating **direct lending / loan origination**.
- Lending can be structured as a bilateral loan, an investment in debt securities or as a participation in a syndicated lending arrangement.
- Regulatory requirements for LO-QIAIFS:
  - diversification: maximum exposure of **25% of NAV** per borrower group (can be achieved over a ramp-up period disclosed in PPM);
  - leverage: must not have gross assets of more than **200% of NAV**;
  - certain prohibited borrowers (e.g., other investment funds, financial institutions or related companies of these, persons intending to invest in equities / other traded investments / commodities).
- LO-QIAIFS to have a number of policies in place including in relation to risk management, diversification and credit monitoring.

Irish LO-QIAIFs

- LO-QIAIFs must limit their operations to:
  - issuing loans;
  - participating in loans;
  - investment in debt / credit instruments;
  - participating in lending,

  and operations relating thereto, including investing in debt and equity securities of entities or groups to which the LO-QIAIF lends or which are held for treasury, cash management or hedging purposes.
- **Changes to AIFMD**: The draft legislative proposals in respect of the amendments to AIFMD ("**AIFMD II**") include a proposal to introduce a harmonised framework for loan origination alternative investment funds across the EU. The current Irish loan origination fund regime requirements are similar to those proposed in the draft legislative proposals for AIFMD II so Irish LO-QIAIFS will be well positioned to comply with the EU regime. It is estimated that the updated AIFMD legislation will be adopted in **Q2/Q3 2024**.
- Pillar 2 – structure as an Excluded Entity

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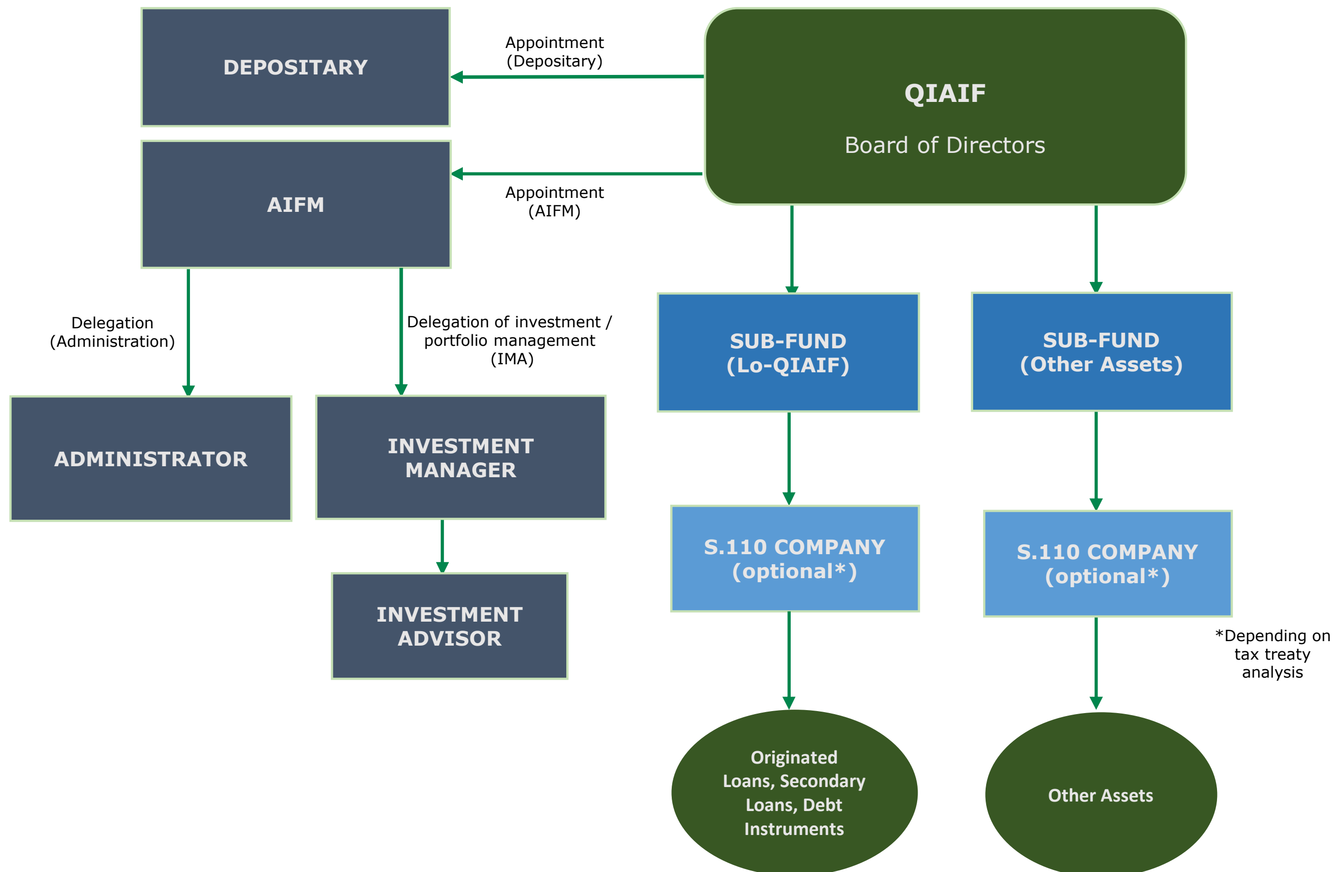
Typical Irish LO-QIAIF Structure (ICAV)



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Taxation of Irish LO-QIAIFs

Fund level:

No Irish tax on income or gains from its underlying investments (assuming no assets related to Irish land)

Fund level:

VAT exemptions for provision of services to Funds

Fund level:

Treaty access in many cases

Investor level:

No Irish WHT on payments by a Fund to non-Irish resident investors and exempt Irish resident investors (assuming no assets related to Irish land)

Investor level:

No Irish tax on income or gains made by non-Irish resident / ordinarily resident investor (assuming no assets related to Irish land)

Investor Level:

No stamp duty on the issue, transfer of units in a Fund (assuming no assets related to Irish land)

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Ireland: US Loan Origination – Treaty Relief

Irish Vehicle is lending to borrowers located in the US

- To avoid a US withholding tax on payment of interest to a non US person, the Irish vehicle must qualify for treaty benefits.
- To get treaty relief, Irish vehicle must:
  - Be a resident of Ireland:
    - Irish investment undertakings are specifically called out as Irish tax resident;
  - Be the beneficial owner of the interest:
    - assets often held via a US entity so that the borrower does not see a foreign payee. Ensure such entity is tax transparent;
  - Satisfy the limitation on benefits provisions of the US/Ireland Treaty (A.23):
    - ownership test – most usual is (i) ultimately 50% plus US persons; or (ii) owned by 7 or fewer EU or NAFTA residents (derivative benefits); and;
    - base erosion test – amounts paid or accrued to non US/ treaty qualified persons that are deductible for tax purposes do not exceed 50% of prior year gross income:
      - issue for S110Co;
      - note prior year gross income – year 1 impact; also impact on ramp-up fund;

The US: YA Global - Off-Shore Investor Structure

- YA Global had several non-US limited partners, but YA Offshore was the largest investor.
- YA Offshore was treated as a corporation for US tax purposes.
- YA Offshore was a typical offshore feeder into which the non-US investors invested their money.
- YA Offshore contributed the capital contributions that it received to YA Global.
- YA Offshore had substantial expenses ($12 million in 2007 & $22 million in 2008).

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The US: YA Global's Tax Reporting

- YA Global filed a US Internal Revenue Service Form 1065 in each year.
- YA Global did not treat any income it earned as effectively connected to a US trade or business (ECI).
- Income was treated as portfolio interest or non-taxable capital gains.
- YA Global used accrual accounting & did not designate any securities as held for investment.
- YA Global did not file IRS Forms 8804 because it took the position that it did not have ECI to allocate to non-US partners.

The US: Tax Court Addressed 7 Separate Tax Issues

- Should Yorkville's activities be imputed to YA Global?
- Did Yorkville's activities cause YA Global to be engaged in a USTB?
- Was YA Global a dealer in securities required to use mark-to-market accounting under Code § 475?
- What income should be considered to be effectively connected with YA Global's USTB?
- Should YA Global's liability for purposes of § 1446 be adjusted by partner-level expenses?
- What is the statute of limitations on assessment?
- Should YA Global be subject to penalties for failure to file Forms 8804?

The UK: Funds lending directly to or from the UK

- Non-UK fund lending to UK borrowers:
  - Managing withholding on payments of yearly interest:
    - Quoted Eurobond
    - Treaty access:
      - One-off applications;
      - Double Tax Treaty Passport;
      - Qualifying Private Placement.
  - Investing or trading?
    - Consider Investment Manager Exemption.

- UK fund:
  - Profits from loan relationships subject to corporation tax if fund is UK resident.
  - Withholding on payments from borrowers.
  - Withholding on payments to LPs?
  - Consider Qualifying Asset Holding Company (QAHC) regime.

Spain: Direct lending in Spain from Ireland

TO BE CONNECTED WITH AILISH TOPIC (TIMING PERMITTING)

- A legal and tax analysis of the features of the lending vehicle is required from Spanish tax purposes (i.e., to discard its consideration as a tax transparent entity).

- The Spanish WHT exemption on interest payments to EU lenders should in principle apply (the "extension" of the BO clause stemming from the Danish cases –see below- should not apply to non-Directive / unrelated parties' cases).

- As a general rule, as regards the most common vehicles:
  - Irish ICAVs and S110 vehicles are not treated as tax transparent entities for Spanish tax purposes. No experiences with tax transparent vehicles in Ireland.
  - Luxembourg SICAV-SIF SCA and RAIF SCA are not considered as tax transparent. Similar treatment to RAIF SCS but further doubts given the lack of legal personality.
  - Luxembourg SICAV-RAIF SCSp qualify as tax transparent.

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Anti-hybrid rules - experience with administrative guidance

Italy: Anti-hybrid legislation

- Anti-hybrid rules implemented in Italy through Legislative Decree no. 142 of 2018 (ATAD Decree), transposing into the Italian tax system EU Directive 2016/1164 (ATAD 1), as amended by EU Directive 2017/952 (ATAD 2).
- OECD BEPS, Action 2 "*Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*" + "*Neutralising the Effects of Branch Mismatch Arrangements, Action 2 - Inclusive Framework on BEPS - 2017*".
- Deduction and non-inclusion mismatch (D/NI), double deduction (D/D) and double dip/foreign tax credit generator.
- Legislation targeted to avoid cross-border mismatches (i.e., no Italy/Italy relevance). Application to both EU Member States and Third Countries.
- **Italy**: CIT (IRES, 24 %). No relevance for regional tax (IRAP, generally 3.9 %); **Foreign States**: CIT as identified by DTTs or in any case the top-level taxation (e.g., federal level).

Italy: Administrative guidance

- **Circular letter no. 2 of 2022:** massive document (115 pages!) not simplifying the topic.
- Debt vs Equity? Is the typical case, but not the only one (potential relevance of repurchase agreements, stock lending, PEX regimes).
- Depreciations and amortizations are included in the definition of deduction (negative income).
- **Ruling no. 288 of 2023:** extension of anti-hybrid legislation to “Principal (Swiss) /Limited Risk Distributor (Italian)” structures benefitting of old tax privileges in Switzerland (namely, Principal Company Regime and Two-Rate Model).
- From hybrid financial instruments/payments to → hybrid structures.
- What happens with the implementation of the GloBE (Pillar Two)?

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Italy: New penalty protection regime

- On December 6, 2024, the Italian Ministry of Economy and Finance approved the Decree implementing the penalty protection regime for hybrid mismatches.

- Several formal and content requirements apply.

- **Similarity with TP documentation and related effects**.

- Is available to tax-resident taxpayers in Italy and Italian permanent establishments of foreign entities.

- The anti-hybrid documentation can be prepared for all fiscal years in which anti-hybrid rules is applicable in Italy (in other words, possibility to backdate the effects to previous fiscal years; *see next slide*).

- The anti-hybrid documentation can be prepared only for fiscal years where the ITA have not formally started inquiries, investigations or audit activities before December 29, 2023.

Italy: Timing

- For calendar-year taxpayers the Decree specifies the following deadlines for preparing anti-hybrid documentation:
  - for fiscal years ending on December 31, 2020-2022: the deadline is June 2025 (six months from the approval of the Decree);
  - for fiscal years ending on December 31, 2023-2024: the deadline is October 31, 2025 (the deadline for filing the tax return for fiscal year 2024);
  - from fiscal year 2025 onwards, the relevant documentation must be filed by the deadline for filing the tax return for the respective tax period.

- These deadlines may vary slightly for non-calendar year taxpayers.

The UK: Implementation Outline

- Changes to OECD guidance on transitional CbCR safe harbour also require legislation in the UK; no direct effect.

- UK legislative amendments published, to be effective from 14 March 2024 but not yet enacted.

- Countering certain D/NI, DD and duplicate tax expense arrangements.

- Exceptions:
  - Tier 1 capital (D/NI, DD only);
  - Imputation through domestically transparent vehicle (D/NI, DD only);
  - Dual inclusion income.

- Grandfathering limited to unchanged pre-16 December 2022 arrangements.

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The Netherlands: Issuance guidance HAAs for Pillar 2 purposes (1/2)

- Anti-abuse provision in article 3.2.7. of the GloBE Model Rules seeks to prevent taxpayers from entering into certain hybrid financing arrangements
  - Article 3.2.7 GloBE Model Rules implemented in the Netherlands as article 6.8 Minimum Taxation Act 2024.

- Transitional CbCR Safe Harbour initially did not contain a provision equivalent to article 3.2.7. of the GloBE Model Rules.

- However, in December 2023 OECD Administrative Guidance (**Dec Guidance**) introduced equivalent provision for the Transitional CbCR Safe Harbour targeting hybrid arbitrage arrangements (**HAAs**) entered into after December 15, 2022.

The Netherlands: Issuance guidance HAAs for Pillar 2 purposes (2/2)

- Dec Guidance specifies that it applies to HAAs entered into after December 18, 2023 (in lieu of December 15, 2022) if jurisdictional constitutional constraints are present due to retroactivity.

- Under the Dec Guidance, a HAA exists if there is:
  - a deduction/non-inclusion arrangement (D/NI arrangement);
  - a duplicate loss arrangement; or
  - a duplicate tax recognition arrangement.

- If an in-scope HAA is present, the Transitional CbCR Safe Harbour for the relevant tested jurisdiction should be adjusted by:
  - excluding any expense or loss from the D/NI arrangement or duplicate loss arrangement from the tested jurisdiction's profit before tax, and
  - excluding any income tax expense arising from a duplicate tax recognition arrangement from the tested jurisdiction's income tax expense.

INTERNATIONAL BAR ASSOCIATION

The Netherlands: Status of issued guidance on HAAs and application

- OECD Commentary or further regulations in the form of administrative guidance on the GloBE Model Rules, do **not** have direct effect in the Dutch legal order insofar such further guidance does not just provide clarifications but in fact provides new guidance focused on certain abusive situations.
  - On that basis the Dec Guidance does not have direct effect in the Netherlands and no retroactive effect.

- The Dutch government considers it important to incorporate OECD administrative guidance - if necessary - into Dutch tax law.

- Legislative amendment for Dutch Transitional CbCR Safe Harbour:
  - Implementation Dec Guidance related to HAAs for Dutch Transitional CbCR Safe Harbour purposes in provision 8.8a Minimum Taxation Act 2024.
  - It applies to reporting years starting on or after December 31, 2024.
  - It applies to HAAs entered into after December 15, 2022.

The Netherlands: Discussion points

- Parliamentary history states that retroactive effect is only justified to the extent that no negative consequences occur for taxpayers:
  - Consequently, the implemented Dec Guidance related to HAAs for Dutch Transitional CbCR Safe Harbour purposes does not apply with retroactive effect but only as of December 31, 2024!
  - How does this interact with other countries?

- What does the cut off date mean in practice?
  - December 15, 2022, as cut off date for existing HAAs.
  - Dividing line between existing HAAs / new HAAs under circumstances potentially difficult to determine.

- Impact on Dutch consolidation regime for tax purposes.

- Interaction with EU ATAD 2 legislation.

- Interaction with notional interest deduction regimes.

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The US: Tax Code § 894(c) Overrides US Tax Treaties

- Treaty benefits are denied for "reverse hybrid payments".

- Prerequisites for application:
  - Payments are received through an entity that is fiscally transparent for US purposes.
  - Treaty does not address income earned through a partnership.
  - Foreign country does not impose tax on distribution from hybrid entity to the beneficial owner.

- Broad authority is given to the IRS to deny treaty benefits with respect to items of income derived by an entity that is fiscally transparent for US purposes but is treated as the owner of the item under the law of the treaty partner.

- US LLCs pose these problems because they are fiscally transparent in the US but are treated as corporations for most non-US jurisdictions.

The US: Anti-Conduit Rules Also Preclude Treaty Benefits

- "Financing arrangement" means a series of transactions by which
  - (1) one person (the financing entity) advances money or other property, or grants rights to use property, and
  - (2) another person (the financed entity) receives money or other property, or rights to use property
  - (3) if the advance and receipt are effected through one or more other persons (intermediate entities) and
  - (4) there are financing transactions linking the financing entity, each of the intermediate entities, and the financed entity.

- An intermediate entity is a "conduit entity" with respect to a financing arrangement if
  - (1) the participation of the intermediate entity in the financing arrangement reduces the tax liability of foreign persons;
  - (2) the participation of the intermediate entity in the financing arrangement is pursuant to a tax avoidance plan; and
  - (3) either
    - (a) the intermediate entity is related to the financing entity or the financed entity; or
    - (b) the intermediate entity would not have participated in the financing arrangement on substantially the same terms but for the fact that the financing entity engaged in the financing transaction with the intermediate entity.

Beneficial ownership in equities transactions

Spain: The BO case (equity and debt) (1/2)

- The Spanish WHT exemptions on interest payments (domestic and not restricted to related parties) and dividends (coming from the Parent-Sub EU Directive) do not foresee a BO clause. However, the STA apply it based on the criteria set forth in the Danish Cases.
- Special focus on PE structures, where intermediary EU, non-transparent entities (blockers) are ignored, so the LPs incorporated in NCJs are –under the STA's views- the BOs. Clearly controversial given the pooling function and transparent nature of the LPs (i.e., an analysis of the residence of the investors should in principle be made).
- What if the LPs had invested directly in Spain? Some are doing it already. EU Law analysis.
- No substantial changes on the STA approach after the Supreme Court judgments issued in 2023 (the burden of proof of the abuse is in the STA, but the Court was inconclusive in the BO analysis).

INTERNATIONAL BAR ASSOCIATION

Spain: The BO case (equity and debt) (2/2)

- First judgment issued by the National Appellate Court (October 2024) on interest payments. The Court endorses (in a very “bad” case involving The Netherlands, Curaçao and Andorra) that the BO clause is implicit in the Spanish domestic WHT exemption on interest payments to the EU. Also to non-related parties not in the scope of the Directive?

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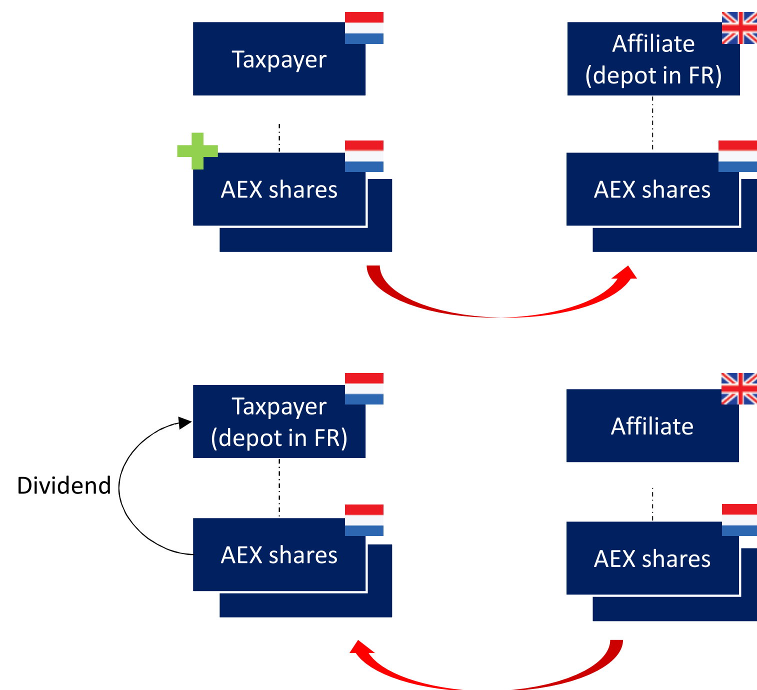
Beneficial ownership in equities transactions: the Netherlands
Recent Supreme Court judgment: ECLI:NL:HR:2024:49, Jan 19, 2024

<u>Facts and circumstances</u>

- Taxpayer buys AEX shares and sells listed futures contracts relating to these shares
- Taxpayer lends AEX shares to an affiliated company in the United Kingdom
- Shortly before the dividend payments, the share loans are repaid and the respective AEX shares are returned to a deposit account of the taxpayer held at a bank in France
- Question arose whether the taxpayer may offset the Dutch dividend tax withheld from the dividend received on the AEX shares in its Dutch corporate income tax returns



Beneficial ownership in equities transactions: the Netherlands
Recent Supreme Court judgment: ECLI:NL:HR:2024:49, Jan 19, 2024

Judgment Supreme Court

- To qualify for dividend tax relief, recipient must (i) be entitled to proceeds from the underlying shares and (ii) be the beneficial owner of dividends
  i. Recipient entitled to the proceeds is beneficial owner unless:
     - recipient cannot freely dispose of the dividends (i.e. fiduciary or agent); or
     - the specific Dutch anti-dividend stripping legislation applies
- The specific Dutch anti-dividend stripping legislation entails that the recipient of a dividend will not be considered the beneficial owner if the recipient has paid a consideration as part of a series of transactions in respect of which it is likely that:
  i. The dividends have accumulated to a person / entity that is to a lesser extent entitled to DWT relief compared to the recipient of the dividends; and
  ii. Such person / entity has retained or acquired an interest in the shares comparable to the interest it had in such shares prior to the series of transactions
- Helpful that Supreme Court held that scope of the anti-dividend stripping legislation is limited to situations covered by the wording of the provision
- Case at hand referred to another Court of Appeal to re-examine whether taxpayer was entitled to proceeds from a civil law perspective

Prior holdings

- Lower Court held that taxpayer did qualify as beneficial owner and Court of Appeal held that taxpayer did not qualify as beneficial owner

Beneficial ownership in equities transactions: the Netherlands
Recent legislative amendments

- As per January 1, 2024, legislative amendments relevant for beneficial ownership concept following tax audit discussions for inter alia banks.
  - Adjustment burden of proof for purposes of obtaining a credit, exemption, reduction or a refund of Dutch dividend withholding tax
  - ‘Series of transactions’ for purposes of specific Dutch anti-dividend stripping legislation further defined
  - Codification of ‘record date’ for purposes of specific Dutch anti-dividend stripping legislation

- Questions raised (among others by the Dutch bar of tax advisors (NOB)) regarding legislative amendments. However, raised questions remain unanswered till this day.

The UK: Burlington Loan Management DAC

- Purchase of debt-claim in Lehman administration by Irish resident: was Article 12(5) of the UK-Ireland treaty engaged?
- First Tier Tribunal decision [2022] UKFTT 290 TC.
- Points arising from Upper Tribunal judgment [2024] UKUT 00152 (TCC).

Italy: Supreme Court – Decisions no. 23628 and 26640 of 2024

- Decisions no. 23628 of September 2024 (dividends) and no. 26640 of October 2024 (royalties).

- Implementation in Italy of Danish “beneficial owner” principles.

- Three cascade tests:
  - **Substantive business activity test**, to verify that the company carries out a true economic activity and that it is not an artificial arrangement;
  - **Dominion test**, assessing the company's suitability to freely dispose of the income received, without any obligation to remit the income flow to a third party;
  - **Business purpose test**, verifying the economic reasons for the interposition of the percipient company in the income flow.

- These three indicators are immanent principles in the system, suitable to scrutinize the “substance” of the recipient of cross-border payments, for both the purpose of DTT cases (decision no. 23628) and EU Directives (decision no. 26640).

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Italy: Supreme Court – Decisions no. 510 and 521 of 2024

- **Twin decisions**: restrictive interpretations of beneficial owner in case of WHT on interest and royalty payments.
- Denial of reimbursement based on lack of material evidence (in addition to tax residence certification) of beneficiary.
- **Also in these decisions**: substantive business activity test, dominion test and business purpose test.
- **Proof requested by the ITA**: copy of loan agreement, stock purchase agreement, bank documentation, accounting records, etc.
- In any case, possibility of "look-through" approach.

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Italy: Standard of Practice no. 225 of July 2024 (1/2)

- Regulations published by the Italian Association of Chartered Accountants (*AIDC*) i.e., no official legislation or administrative guidance **although** it is, anyway, a strong reliable tool for interpretation.

- **Domestic WHT applicable to interest payments**: 26 % (to be reduced under applicable DTTs or eliminated in case of exemptions, e.g., Interest/Royalty Directive).

- **Topic (elimination of discriminations)**: taxable base of WHT in case of interest paid by Italian companies to companies/entities (beneficial owners) resident in other EU Member States.

- WHT shall be applied on the amount of interest reduced by all direct charges related to (and incurred by recipients for) the loan, including fees for legal and tax consultancy services, travel expenses, bank commissions, etc.

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Italy: Standard of Practice no. 225 of July 2024 (2/2)

- Supporting documentation shall be required by the Italian WHT agent.

- Possibility to file refund requests to the ITA claiming back the difference between (a) WHT applied on the gross amount of the interest, and (b) WHT calculated on interest reduced by directly related charges.

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The US: Rules on Dividend Equivalents Are Overbroad

- Original rules (over 14 years ago) would have applied only to dividend uplift transactions (owner sells, gains exposure via swap over dividend record date, then terminates swap and repurchases equities).

- IRS proposed regulations would reach structured products, even when payments under the structured product are only loosely correlated to dividend payments on the referenced equities.

- Regulations will be incredibly disruptive to structured product markets.

- Rules keep getting “kicked down the road.” Latest postponement comes from IRS Notice 2024-44. Only delta one instruments are affected through 2026.

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Florian leads the German tax practice at A&O Shearman. He has 25 years of experience in providing tax advice to large international companies and financial investors on M&A transactions, reorganizations, financings, structured finance products and fund investments. His expertise in the area of capital markets tax law is also particularly noteworthy.

In recent years, he has increasingly participated in internal investigations in the financial sector. He represents leading national and international banks in tax and civil law matters related to current and past equity transactions.

Career Development

- Studied Law in Munich
- Admitted to bar in 1998
- Since 2005 Partner at Magic Circle Firms
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Mark is a tax partner in the New York office of the law firm of Mayer Brown.

Mark's professional practice focuses on the tax consequences of a variety of capital markets products and strategies, including over-the-counter derivative transactions, swaps, tax-exempt derivatives and working with credit funds, offshore insurance companies and hedge funds. Prior to joining Mayer Brown, Mark was a partner at another International law firm, served as a Managing Director at Deutsche Bank, general counsel of a credit derivative company and, prior to that, Mark was a partner at Deloitte, where he led the Capital Markets Tax Practice. Mark began his legal practice at Skadden Arps and then worked at Weil Gotshal.

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Rafael joined Garrigues in 1998 and is partner since 2011.

He has pursued his career in the area of international taxation, advising both listed companies and Spanish multinationals, as well as nonresident investors in their transactions in Spain. Rafael specializes in EU tax law and has led relevant litigation proceedings before the Spanish and EU Courts on State Aid and EU Law infringement cases.

He is a member of the Madrid Bar, a Director at IFA's Spanish Branch and a regular lecturer on International and EU Tax Law in several Spanish universities and business schools.

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Federico is a partner and serves as co-chair of Lipani's tax department in Milan and Rome. He previously acted as partner in the tax department of Macchi di Cellere Gangemi (now Lipani).

Member of the Rome Bar since 2011 and admitted to practice before the highest courts.

He advises large corporations and multinational clients (Fortune 500) on corporate taxation and mergers and acquisitions, international taxation and transfer pricing, structural and transactional tax planning and global tax projects.

He also offers private clients sophisticated tax counsel in complex crossborder transactions and disputes.

Federico has structured and negotiated a lot of APAs concerning the transfer pricing methodology in Italy across and different industries, and the world's largest high-tech and digital enterprises.

He is knowledgeable in the U.S. international tax system. Statutory auditor for multinational group companies.

Lecturer in tax law. Author of more than 50 publications in the field of domestic and international tax law.

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Margriet is a tax partner with Loyens & Loeff in Amsterdam. Margriet advises multinationals, financial institutions and sovereign wealth funds on Dutch corporate tax and dividend tax aspects and accompanying international tax aspects. Her expertise includes international structuring/restructuring taking into account the OECD and EU developments on BEPS. Margriet has been listed in the International Tax Review and Chambers. Margriet has also been ranked in The Legal 500 as Leading Individual.

Margriet is an active member of the Dutch Association of Tax Advisers (NOB). In addition, she is an active member of the International Bar Association (IBA), since she won the 2010 IBA Taxation Scholarship. Margriet was an officer of the IBA Taxes Committee from 2013 – 2019 and she took up the role of co-chair of the IBA Taxes Committee for 2019 and 2020. Since June 2021, Margriet is a Board Member of the Dutch Association of Tax Advisers (NOB).

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Alex's practice covers a broad range of U.K. and cross-border tax matters, with a particular focus on the tax aspects of corporate acquisitions, financings and restructurings, group structure planning, corporate relocations, and asset management structures, and resolution of disputes on related matters.

He is recommended as a leading practitioner in *ITR World Tax*, *Chambers Global, Chambers Europe* and *Chambers UK.* Alex previously served as chair of the British branch of the International Fiscal Association (IFA). He was the branch's secretary from 2016-19, as well as U.K. branch reporter and an organising committee member for the IFA's 2013 and 2019 global congresses, respectively. He also is a member of the Law Society of England and Wales' Tax Law Committee and chair of its Income Tax Subcommittee, in addition to serving as a member of the Steering Committee of the Forum on International Tax & Disputes and previously as a member of Working Group 2 within the HM Revenue and Customs' modernisation project on the taxation of corporate debt and derivative contracts.

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Arnaud is an Associate within the White & Case Global Tax Practice, based in Luxembourg.

His practice predominantly encompasses international and Luxembourg taxation, particularly in relation to cross-border mergers and acquisitions, private equity, structuring of both regulated and unregulated alternative investment fund platforms, and corporate reorganisations. Additionally, he advises on the tax implications of financings, securitisations, and capital markets transactions.

Arnaud's practice also includes advising on the exchange of information in tax matters, including DAC6, FATCA, CRS, and exchange of information upon request.

Arnaud is an active member of the International Bar Association (IBA) and International Fiscal Association (IFA).

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