

An aerial view of a city skyline at sunset. The sun is low on the horizon, casting a golden glow over the city and the water. The sky is filled with dramatic, dark clouds. The city lights are beginning to glow, and the water reflects the sunset. A large yellow text box is overlaid on the left side of the image.

# Cash Repatriation: Transfer Pricing, Tax Treaties and Debt Considerations

American Industrial Partners – Tax Director Meeting

*January 2025*



Building a better  
working world

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# 1

## Introduction

# Introduction

## *What hasn't changed?*

- *Access to free cash flow from operations is critical for investment and efficient capital structures.*

*Cash in King*

## *What has changed?*

- *Base Erosion Profit Shifting Actions*
- *OECD TP guidelines*
- *Local country laws and initiatives*
- *Anti-hybrid provisions.*
- *Anti-abuse treaty provisions*
- *Determination of beneficial ownership*

*Past circulation and repatriation tax strategies may no longer be as efficient.*

## General approaches

- Lending
- Distributions / contributions
- Equity redemptions
- Debt related payments
- Intercompany transactions (asset purchases, loans)
- Cash pool arrangements (short term)

## Specific approaches tailored to facts and circumstances

- Tax treaty benefits
- Controlled foreign corporation rules
- Foreign tax credits
- Legal entity substance
- Ancillary transaction (acquisition / divestiture)
- Indirect taxes / non-resident capital gain tax
- Local country regulatory requirements / exchange controls

Possibilities to  
circulate or  
repatriate cash  
within the group  
(‘cash mobilization’)

# Possibilities to circulate or repatriate cash within the group

## Equity transactions

- Dividend distributions
- Repayment of capital
- Share redemptions and share buy-backs
- Equity contributions (whether to facilitate subsequent transfer or to fund a group company)

## Debt transactions

- Upstream and other intercompany loans (to facilitate subsequent transfer)
- Accelerating interest (pre) payments and / or principal (pre) payments existing loans
- Expansion of cash pool participants

## Asset transactions

- Intercompany transfer of shares or other type of assets in return for cash

## Other

- Prepayment of obligations such as license fees, royalties, other
- Factoring

Different variations / combinations possible

Key tax and non-tax  
items to consider  
before 'pulling the  
trigger'

# Possibilities to circulate or repatriate cash within the group



# Key tax and non-tax items to consider before 'pulling the trigger'

*Detailed considerations listed on next slides*



# Key tax and non-tax items to consider before 'pulling the trigger'

## Non income taxes

*Are there any indirect taxes associated with setting up loan agreements, dividends distributions, equity contributions, etc. and if so, are there ways to manage this*

- ▶ Stamp duties
- ▶ Registration duties
- ▶ Capital taxes / net wealth taxes

## Withholding taxes

*Is there any withholding tax exposure when making interest or dividend payments?*

- ▶ Treaty and European Directive withholding tax exemptions (or reductions) under pressure due to various BEPS related measures, including enhanced substance and beneficial ownership requirements, Multilateral Instrument, etc. (and similar provisions outside of the EU).
  - ▶ *Recent developments*
    - ▶ Anti-hybrid provisions
    - ▶ Anti-triangulation provision in case of payments to low taxed branches
    - ▶ Treaty anti-abuse provisions either in the form of a Limitation on Benefits (LOB) clause or a general Principal Purpose Test (PPT)
    - ▶ EU case law (cf. 'Danish' cases)
    - ▶ Impact Brexit

## Taxation of dividend income / gains on the stock

*Can I claim participation exemption? Do I trigger any CFC issues at parent level when circulating cash amongst lower tier subsidiaries?*

- ▶ Participation exemption rules
  - ▶ Subject-to-tax requirements
  - ▶ Anti-hybrid rules
- ▶ Controlled Foreign Corporation rules
  - ▶ *Recent developments*
    - ▶ EU ATAD

## Taxation of interest income / gain on the loan

*What is the ETR on the financing income? Can I support beneficial ownership and residency status? Can I claim a foreign tax credit to avoid double taxation?*

- ▶ Corporate headline rate
  - ▶ Foreign exchange treatment
- ▶ Basket approach or possibility to shelter with non-finance expenses
- ▶ Ability to credit withholding taxes / availability of NOLs and tax attributes
- ▶ Tax efficient finance structures under pressure as a result of:
  - ▶ Anti-hybrid rules, preferential tax regimes, CFC impact at the level of shareholder, MLI (anti-triangulation rules. PPT / LOB provisions)
- ▶ Substantial activity requirements no / only nominal tax jurisdictions

# Key tax and non-tax items to consider before 'pulling the trigger'

## Transfer pricing

*Can I rely on unilateral safe harbor rates, what are the requirements for short-term lending, what is the impact on long term cash pool balances, etc.*

- ▶ Final OECD TP guidelines for intercompany financing transactions
- ▶ Use of unilateral safe-harbor rates

## Other considerations

*Consider optimal capital structure set-up, how do I manage my FX results, can I rationalize my intercompany balances, etc.*

- ▶ Potential requalification of upstream loans into deemed dividend distributions
- ▶ Optimal debt / equity ratio
  - ▶ Impact thin cap ratio after equity distribution or impact earning stripping rules after drop in EBITDA.
- ▶ Rationalization of intercompany balances
  - ▶ Any adverse tax consequences upon debt waiver?
- ▶ Mitigation FX positions
- ▶ Eliminate tax exposures
- ▶ Disclosure formalities such as e.g. EU Mandatory Disclosure Rules

## Non tax considerations

*Do I have capacity to distribute dividends, can I distribute interim dividends, is there a waiting period to consider, etc.*

- ▶ Legal and regulatory
  - ▶ Distribution capacity
  - ▶ Debt covenants
  - ▶ Contractual obligations
  - ▶ Exchange controls
- ▶ Timing
  - ▶ Approval and notice periods
  - ▶ Audit and valuation requirements

# 4

## US Specific Tax Considerations

# US Specific Tax Considerations

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## US Tax Profile

- GILTI
- Sub F
- Previously taxed E&P
- Participation exemption for distributions
- Hybrid dividend
- Extraordinary disposition account
- Foreign tax credit

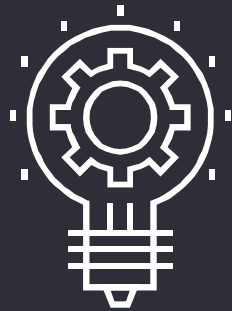
## Key Inputs

- Earnings and profits determinations
- Tax basis determinations

# 5 Approach and diagnostic

# Approach and diagnostic

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Assess best cash mobilization strategy, that is also feasible from a non-tax perspective (debt, equity or asset transaction)

Assess taxation of cash mobilization steps (e.g. withholding taxes etc.)

Assess post-circulation and post-repatriation impact on tax profile of company (e.g. debt to equity ratio)

Monitor and make changes if and where needed

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