BRUSSELS

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International Tax Strategies Related to Corporate Migration

Prepared for TIAG
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Reasons for Corporate Migration

- **Business continuity**
  - A migrating company may remain intact with unbroken corporate history
  - Shareholders do not need to crystallise gains and reinvest in assets
- **Streamlining corporate structure and operations**
- **Planning for changes in laws and tax treaties**
  - Protection of foreign investors
  - Corporate law regime
  - Tax law: CFC, WHT, participation exemption, thin capitalisation
  - Better treaty network and international agreements (including the EU Directives and ECJ case law)
- **Joining substance and the shell to gain treaty benefits**
- **Improving image** (e.g. in preparation for an IPO; anti-avoidance)
- **Personal reasons** (esp. owner-managed companies)

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Incorporation vs. Real Seat theory

- **The incorporation theory**
  - The UK, the US, Ireland, Switzerland, the Netherlands
  - A company is connected to the jurisdiction in which it has been incorporated
  - Mobile POEM
- **The real seat theory** (*siège social, siège réel*)
  - France, Germany, Luxembourg
  - A company is connected to the state in which it has its centre of administration
  - Change of POEM leads to dissolution of the company

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Associated Risks

- Deemed realisation of gains
- Exit taxes
- Potential VAT
- Real estate transfer taxation
- Cancellation of losses
- Loss of limited liability
- Substance requirement in the host jurisdiction

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Methods of Migration

- **Winding up and reincorporation**
  - Most tax inefficient
- **Transfer of legal domicile**
  - Not universally accepted
- **Transfer of place of effective management** (POEM)
  - Subject to substance requirements, but the least complicated and achievable under double tax treaties
- **Share for share exchange**
  - May constitute a taxable disposal
- **Merger migration under EU law**
  - Migration into the EU is regulated by national laws
- **Societas Europaea**

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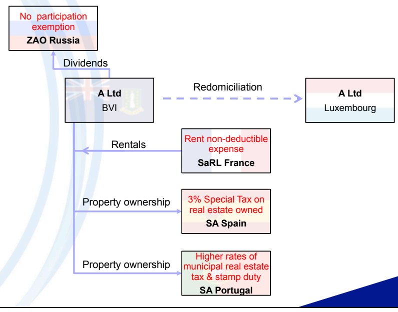
Tax Planning –
Transfer of Legal Domicile
(from BVI to Luxembourg)



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Tax Planning –
Transfer of Legal Domicile
(from BVI to Luxembourg)

- Problem
  A tax haven SPV may fall prey to the anti-avoidance rules in either (A) its parent's jurisdiction or (B) where the SPV has its interests:
  (A) Dividends paid from BVI to Russia cannot be taxed at 0% preferential rate (art. 284(3)(1) RTC)
  (B) (i) A French corporate tenant may not deduct rents paid to a landlord resident in BVI (art. 238 A of FTC)
  (ii) A BVI resident owner of Spanish real estate pays extra 3% Special Tax in respect of its cadastral value (Law 18/91)
  (iii) A BVI resident owner of Portuguese real estate pays higher rates of municipal real estate tax and stamp duty on transfer
- Solution
  Migrate the SPV by transfer of legal domicile e.g. to Luxembourg

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Tax Planning –
Transfer of Legal Domicile
(from BVI to Luxembourg)

- Redomiciliation Procedure (from BVI to Luxembourg):
  - A Ltd (BVI) notifies its "discontinuance" to the Registrar of Companies and is removed from the Register of Companies in the BVI
  - A Ltd (Lux) is established by a notarial deed, followed by a registration as a company in the 'Registre de Commerce et des Sociétés' and an attribution of a fiscal number
- Pros:
  - "On-shore" status and no anti-avoidance repercussions
  - Access to Luxembourg treaty network and the EU Directives
  - Possibility to migrate within the EU
  - Possibility to merge with the EU and non-EU companies
  - Company's existence continues, hence no taxable events associated with liquidation

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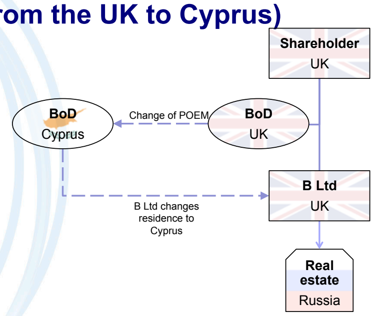
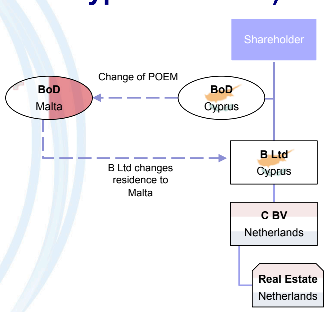
Tax Planning – Transfer of POEM (from the UK to Cyprus)



Tax Planning – Transfer of POEM (from the UK to Cyprus)

- Problem
  A UK resident that owns Russian real estate through a UK company pays Russian tax on disposal of shares in that company (Art. 13(2) of Russia-UK tax treaty)
- Solution
  - Under Russia-Cyprus DTT disposal of a company is not deemed to be disposal of the underlying real estate - move B Ltd (UK)'s residence to Cyprus by transferring the location from which its BoD effectively manages the company (POEM) (art. 4(3) of Cyprus-UK treaty)
    - *"transfer the place where key management and commercial decisions that are necessary for the conduct of the company's business as a whole are in substance made"*
  - Counter "exit charge" under the EU Freedom of Establishment rules
  - Only effective until 2016/17 depending on ratification of the Protocol, however exceptions exist
- Benefits
  - No Russian tax on disposal of Cyprus company with Russian property
  - No Cyprus tax
  - No WHT on dividends

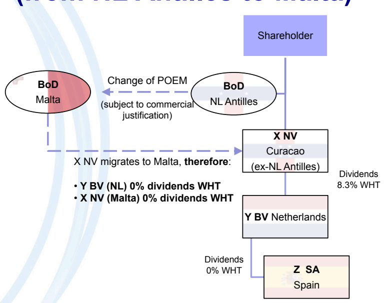
Tax Planning – Transfer of POEM (from Cyprus to Malta)



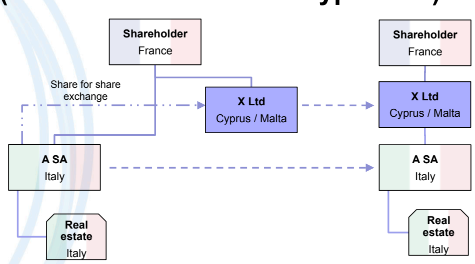
Tax Planning – Transfer of POEM (from Cyprus to Malta)

- Problem
  - B Ltd (Cyprus) owns C BV (Netherlands) with Dutch real estate
  - In the absence of Cyprus-NL tax treaty sale of C BV by B Ltd could be subject to Dutch taxation under Art. 17(3) VpB
- Solution
  - Malta-NL treaty does not deem disposal of a company to be disposal of underlying real estate – to change the company's residence transfer the BoD and POEM of B Ltd from Cyprus to Malta (art. 4(3) of Malta-NL DTT)
  - Preferable to accompany change of POEM with a valid commercial reason to avoid a claim by the Dutch tax authorities under *"fraus legis"*
- Benefits
  - No Dutch tax on disposal of a Dutch company with Dutch property by a Maltese company
  - If C BV is a "real estate" company, the transfer triggers 6% real estate transfer tax

Tax Planning – Transfer of POEM (from NL Antilles to Malta)



Tax Planning – Share for Share Exchange (introduction of Malta / Cyprus co)



Tax Planning – Share for Share Exchange (introduction of Malta / Cyprus co)

- Problem
  A French resident that owns Italian real estate through an Italian company will pay Italian tax on disposal of shares in that company (Art. 6 of France-Italy Treaty)
- Solution
  - The French shareholder of A SA (Italy) contributes its shares to X Ltd (Malta/Cyprus), which issues him a proportionate number of shares (share for share exchange)
  - Malta/Cyprus-Italy tax treaties do not deem disposal of a company to be disposal of underlying real estate, and the interposed X Ltd may dispose of its shares in A SA without adverse tax consequences
  - **NB:** beware of Italian anti-avoidance rules and ensure due business and economic justification for the transaction, including (i) substance of X Ltd and (ii) reasonable passage of time between the two operations.
- Benefits
  - No Italian CGT on disposal of A SA with Italian property
  - No Malta (subject to participation exemption) or Cyprus CT
  - No WHT on dividends

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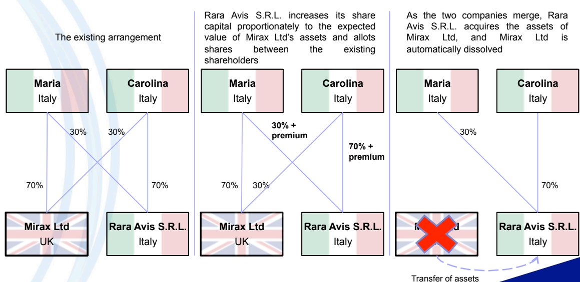
Migration through merger – the Method



Goal: **Maria and Carolina want to achieve a better control and involvement in the running of the core business in Italy through migrating Mirax Ltd and its assets to Italy**

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Migration through merger – EU legal framework

- Directive 2005/56/EC of the European Parliament and of the Council of October 26, 2005 on cross-border mergers of limited liability companies
  - Provides a single set of rules to regulate mergers between the EU based companies
  - Does not regulate SE or SCE
  - Subject to domestic anti-abuse rules
- Council Directive 2009/133/EC of 19 October 2009 ("*Merger Directive*")
  - Allows cross-border reorganisation of the EU companies in a tax-neutral manner
  - Applies to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different MSs and to the transfer of the registered office of an SE or SCE between MSs
  - Generous regime but subject to two-tier anti-abuse rules

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Migration through merger – domestic legislation

- Directive 2005/56/EC is subject to domestic implementation
  - The Companies (Cross-Border Mergers) Regulations 2007 (UK)
  - Leg. Decree no. 108 of 30 May 2008 (Italy)
- Domestic anti-abuse rules apply
  - "Economically justified and not for the avoidance of tax"
    - UK: [merger must be executed] "*for bona fide commercial reasons and [must] not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.*
  - **Necessitates an existing company in the target jurisdiction with business history, not a mere SPV**

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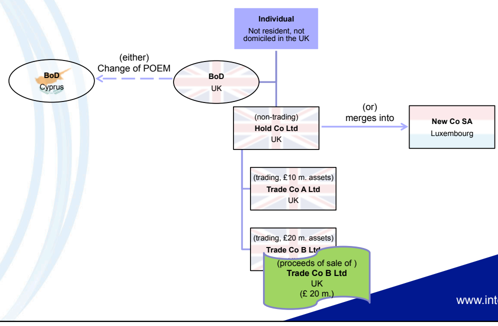
Migration through merger – Tax planning (capital gains and inheritance tax)



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Migration through merger – Tax planning (capital gains and inheritance tax)

- Current taxation of capital gains
  - Capital gain on disposal of Trade Co B Ltd is tax-exempt under substantial shareholding exemption (SSE)
  - In the absence of the qualifying "trading group" to which the Trade Co A Ltd and Hold Co Ltd should belong, on future disposal of Trade Co A Ltd SSE will not apply, and the resulting gain in the hands of Hold Co Ltd will not be exempt from corporation tax
- Current inheritance tax liability
  - If the individual shareholder of Hold Co Ltd gifts his shares he will incur inheritance tax if he dies within seven years
  - On death of the individual shareholder of Hold Co Ltd its shares will form part of his estate and will be subject to the UK inheritance tax. Business property relief will be unavailable even though Hold Co Ltd's sole business remains holding securities in Trade Co A Ltd since the £20M sale proceeds are now in Investment Assets
- **Remove Hold Co Ltd from the UK and avoid liability to capital gains and inheritance taxes**

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Migration through merger – Tax planning (capital gains and inheritance tax)

(A) Migrate Hold Co Ltd from the UK to Cyprus

- Transfer the BoD and POEM from the UK to Cyprus (art. 4(3) of Cyprus-UK DTT)
- Gains from alienation of shares are taxable in Cyprus (art. 23,) which does not tax foreign capital gains.
- **If Hold Co Ltd leaves the UK it will incur "exit tax" on capital tax incurred on deemed disposal and reacquisition of its assets (s 185 TCGA 1992), but this is subject to *Lasteyrie du Saillant* ECJ case (not yet tested in court)**

(B) Merge Hold Co Ltd with New Co SA (Luxembourg)

- Gains from alienation of shares are taxable in Luxembourg (art. XIII of UK-Lux tax treaty,) which can be further avoided if participation exemption conditions are met
- **Merger is subject to the UK court's discretion and UK anti-avoidance rules (s 137 TCGA 1992) – New Co SA must be an existing company with proven business history, not an SPV**

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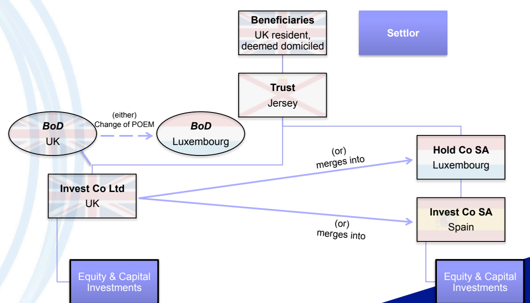
Migration through merger – Tax planning (inheritance tax)



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Migration through merger – Tax planning (inheritance tax)

- Current inheritance tax liability
  - If a beneficiary of the Jersey trust is absolutely entitled to the trust assets, on his death the trust assets located in the UK (i.e. excluding Hold Co SA) will form part of his estate and will be subject to the UK inheritance tax.
  - Business property relief will be unavailable as long as Invest Co Ltd's sole business will be holding investments
- Remove Invest Co Ltd from the UK:
  - Transfer the BoD and POEM from the UK to Luxembourg (subject to the UK anti-avoidance considerations and adherence to Luxembourg laws)
  - Merge with Hold Co SA or Invest Co SA
    - The owner remains the same, and no revaluation issues should arise
    - See also anti-avoidance considerations on the previous slide

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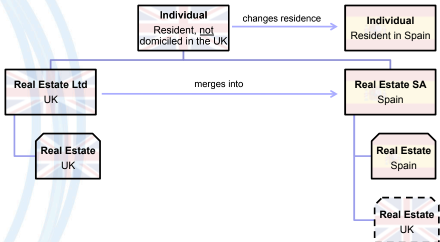
Migration through merger – Tax planning (capital gains tax)



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Migration through merger – Tax planning (capital gains tax)

- Problem
  - The owner of the real estate may want to sell his UK assets or consolidate their ownership with a foreign company (prior to leaving the UK), however on its disposal Real Estate Ltd will incur UK corporation tax on chargeable gains
- Solution
  - The UK resident owner moves his permanent home or his centre of vital interests to Spain and becomes resident there under the UK-Spain tax treaty
  - Real Estate Ltd with the UK real estate migrates to Spain by merging into Real Estate SA (Spain), provided the latter is an active company with substance and there is a valid economic reason for the merger
  - Real Estate SA acquires ownership of the UK real estate at its current market value; no deemed disposal occurs under UK law
  - [Real Estate SA can further dispose of the UK real estate without incurring the UK or Spanish corporation tax on chargeable gains]

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EU Law – Migration of Societas Europaea

Legal Framework

- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
- Council Directive 2009/133/EC of 19 October 2009 ("*Merger Directive*")
  - Allows cross-border reorganisation of the EU companies in a tax-neutral manner
  - Applies to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different MSs and to the transfer of the registered office of an SE or SCE between MSs
  - Generous regime but subject to two-tier anti-abuse rules

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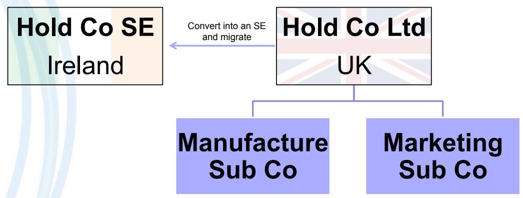
EU Law – Migration of Societas Europaea



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EU Law – Migration of Societas Europaea

- General principle:
  - A public company that converts into an SE or is formed as such may transfer its registered office without having to wind up or change its legal personality.
  - The registered office of the SE must be located in the EU in the same member state as its head office, subject to the domestic legislation that may require that both the registered and the head offices are located in the same place.
- An MNE with a registered office in a high-tax jurisdiction may transfer to Ireland

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