TAX IN M&A IN THE UK AND EUROPE

THIRD EDITION

AUGUST 2022

Contents

Introduction

This is the 2022 edition of the 'Tax in M&A in the UK and Europe' guide produced by Herbert Smith Freehills and other contributors (see the Contributors list for full details).

The 2021 edition of the 'Regulation of Public M&A in the UK and Europe' guide has also been published. The two are intended to give you a broad overview of the material tax and corporate issues to consider when contemplating cross border M&A transactions in key jurisdictions within the UK and Europe and are written by experienced practitioners from leading law firms.

The guides reflect the latest law and market practice in the jurisdictions covered. In all cases specific advice should be sought about the detailed application of the rules in each jurisdiction.

If you would like further information on any of the issues covered in this guide, or if you would like further copies, please ask your usual contact or any of the contributors.

Herbert Smith Freehills LLP
July 2022

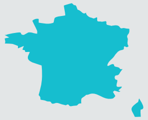
01 Tax position for Target shareholders on a cash offer

Corporate shareholders

United Kingdom

Corporate shareholders are generally exempt from capital gains tax arising on the disposal of Target shares by virtue of the so-called substantial shareholding exemption (SSE). The SSE is available to a corporate shareholder with a holding of at least 10% of ordinary share capital, which has been held for at least 12 months prior to disposal. The Target company must be a trading company or holding company of a trading group.

Where no relief is available, corporate shareholders will pay capital gains tax at 19% (the rate is scheduled to rise to 25% in April 2023).



France

Corporate shareholders are generally exempt from capital gains tax on up to 88% of the gains realised on the sale of Target shares by virtue of the participation exemption. The participation exemption is available to a corporate shareholder who disposes of 'investment shares' held for at least 2 years. The remaining 12% of the gross capital gain is taxed at the standard rate.

The participation exemption regime does not apply to capital gains on the disposal of shares in real estate companies. Disposals of shares in listed real estate companies held for more than 2 years are subject to 19% tax.

Corporate shareholders are otherwise liable to corporation tax at the effective rate of 25.83% (including the social contribution based on corporate income tax).

Germany

Corporate shareholders (other than certain financial institutions) are generally exempt from corporate and trade tax on 95% of the gains realised on the sale of Target shares by virtue of the participation exemption. The remaining 5% of the gains realised are taxed at the standard rate of 15%. There is no minimum participation requirement, nor any minimum holding period except for in certain restructuring situations (up to 7 years).

Ireland

Corporate shareholders are generally exempt from corporation tax on chargeable gains realised on the disposal of shares in certain subsidiary undertakings by virtue of the so-called participation exemption. The participation exemption is available on the disposal of shares in a subsidiary undertaking which is resident in any EU member state or a country with which Ireland has concluded a double tax treaty where the seller holds, or has held at least 5% of the ordinary share capital in the subsidiary undertaking for a continuous period of at least 12 months (a) in which the disposal takes place or (b) ending in the previous 24 months. Target must carry on a trade or be part of a trading group at the date of disposal of the shares.

Where no relief is available corporate shareholders generally pay corporation tax on chargeable gains at an effective rate of 33%.

Italy

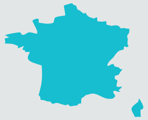
Corporate shareholders are generally exempt from capital gains tax on up to 95% of the gains realised on the sale of Target shares by virtue of the participation exemption. The participation exemption is available to a corporate shareholder which has held the shares in Target for at least 12 full months prior to disposal and the shares appear as a long term investment in the first accounts prepared during the holding period. The Target company must be a trading company in the 3 years prior to disposal and must be resident in a jurisdiction which is not a low tax jurisdiction. Certain limitations and other conditions also apply.

Corporate shareholders are otherwise liable to pay tax at 24% (or at an increased rate for certain companies).

Local/regional taxes may also apply under certain circumstances, at rates generally ranging between 3.9% and 4.82% (with higher rates applicable to financial institutions and insurance companies).

Tax position for Target shareholders on a cash offer

United Kingdom



France

Germany

Ireland

Italy

Individual shareholders

United Kingdom

Individual shareholders are generally exempt from capital gains tax on realised capital gains below the annual allowance (currently £12,300).

Where no relief is available, individual shareholders pay capital gains tax at 18% or 28%.

France

Individual shareholders are liable for income tax on gains arising on the disposal of shares in Target at the flat rate of 12.8%. Alternatively, upon express election, such gains may be subject to personal income tax at a progressive scale (top rate of 45% for income above €160,336) allowing for the tax deduction of a fraction of social contributions and, for shares acquired prior to 1 January 2018, the application of certain rebates to the taxable gains to account for the duration of ownership of the shares. An exceptional surtax on high income at a rate of 3% (resp. 4%) is also payable by taxpayers whose reference income exceeds €250,000 (resp. €500,000) in the year considered (double these thresholds for married couples).

Individuals are also subject to social contributions at the rate of 17.2%.

Germany

Resident individuals are generally exempt from income tax on 40% of the gains realised on the disposal of shares in Target provided the individual either holds or has held at least 1% of the share capital of Target in the last 5 years, or the shares are held as business property. Individuals pay tax up to 45-48% on the remaining 60% of the capital gain.

In all other cases: (i) if the Target shares were acquired before 1 January 2009, there is no tax liability arising on the disposal of those shares, or (ii) if the Target shares were acquired on or after 1 January 2009, tax (levied as withholding tax) is paid by individuals on disposal of the shares in Target at a rate of 26.4% on the realised gain.

Ireland

Individuals are generally exempt from capital gains tax arising on the sale of Target shares on the first €1,270 of net gains arising per annum otherwise individual shareholders pay capital gains tax at a rate of 33%.

Italy

Individual shareholders are generally taxed at a rate of 26% on gains realised on the disposal of a shareholding in Target.

Tax position for Target shareholders on a cash offer

Corporate shareholders

Luxembourg

Corporate shareholders who are resident and taxable in Luxembourg are generally exempt from profits tax on the disposal of shares in certain subsidiary undertakings by virtue of the participation exemption. The participation exemption is available to (i) a corporate shareholder with a holding of at least 10% of the share capital in Target or the Target shares are sold for a minimum disposal value of €6 million and (ii) the seller(s) has/have held or commit(s) to hold the qualifying shareholding for at least 12 months. The Target company must be tax resident and taxable in Luxembourg or otherwise resident in a jurisdiction with a tax comparable regime.

The Netherlands

Corporate shareholders are generally exempt from capital gains tax on the disposal of Target shares by virtue of the participation exemption. The participation exemption is available to a corporate shareholder with a holding of at least 5% of the nominal paid up share capital of Target and Target is not a non-qualifying passive investment company as defined for Dutch tax purposes.

Where the participation exemption is not available, corporate shareholders pay tax at a rate of 15% on the first €395,000 of taxable income and 25.8% on the taxable income exceeding €395,000.

Belgium

Corporate shareholders are generally exempt from capital gains tax on the sale of Target shares by virtue of the participation exemption. This exemption is available to a corporate shareholder with a participation of at least 10% or with an acquisition value of at least €2.5 million which has been held for an uninterrupted period of at least 1 year prior to the disposal, and the Target company must also be subject to Belgian CIT or a foreign tax of a similar nature and may not be tax resident in a jurisdiction where the ordinary law provisions on taxation are significantly more favourable than in Belgium or in a jurisdiction which is (at the end of the taxable period) mentioned on the EU list of non-cooperative jurisdictions.

Where the participation exemption does not apply, any capital gains realised on the disposal of Target shares will be subject to tax at the ordinary rate of 25% (or 20% on the first €100,000 for small and medium sized enterprises, subject to certain conditions).

Spain

Corporate shareholders are generally entitled to a 95% exemption from corporate income tax (CIT) arising on the disposal of a non-Spanish Target by virtue of the participation exemption. The exemption is available to a corporate shareholder with a holding of at least 5% of the ordinary share capital which has been held for at least 12 months prior to disposal and the Target company must also be subject to Spanish CIT or a similar regime, not be resident in a tax haven country and carry on business activities.

Where the participation exemption is not available, corporate shareholders are generally liable to tax at 25%.

Switzerland

Corporate shareholders are generally exempt from capital gains tax on the disposal of Target shares by virtue of the participation exemption. The participation exemption is available to a corporate shareholder with a holding of at least 10% of the nominal paid up share capital or the profit entitlement of Target that have been held for at least 1 year.

Where the participation exemption is not available, corporate shareholders pay tax at a rate ranging between 12% and 21% depending on the place of residence.

Tax position for Target shareholders on a cash offer

Individual shareholders

Luxembourg

Individual shareholders who are Luxembourg tax resident are generally subject to tax on any capital gains arising on the disposal of shares in a Target company if the disposal triggering the gain occurs within 6 months of acquisition at a progressive scale (top rate of 45.78% currently) or if the individual and connected persons hold or have held more than 10% of the capital at any time during the last 5 years preceding the sale, taxable at half of the ordinary progressive income tax rates with a top rate of 22.89% currently.

The Netherlands

Individuals are subject to tax on the disposal of Target shares at rates ranging from 26.9% to 49.5% depending on the size of the stake held and on the nature of the holding.

If an individual holds on aggregate less than 5% of the shares (and the individual will not be considered as an entrepreneur in this respect), it will (for now) not directly be taxed upon the disposal as it will be taxed on a deemed return. This deemed return is calculated by applying the applicable percentage(s) (rates for 2022 increase progressively from 1.82% to 5.53%) to the yield basis at the beginning of the calendar year insofar as this exceeds a statutory threshold. The deemed return will be taxed at a rate of 31% (rate for 2022). The Dutch Supreme Court recently ruled, in short, that the concept of deemed return can create conflict with the right of ownership and the prohibition of discrimination. The Supreme Court in this particular case ruled recently that the actual income was to be taxed. The overall impact of the Supreme Court ruling on Dutch personal income tax is still pending.

Belgium

Individual shareholders are generally exempt from capital gains tax on the sale of Target shares.

The exemption does not apply where (i) he (and certain of his relatives) has a 'substantial interest' (more than 25%) (or has had such 'substantial interest' during the last 5 years) in Target and the transfer is to a non-European Economic Area entity only if Target is a Belgian company), (ii) he holds the shares as business assets or (iii) the disposal constitutes a 'speculative or abnormal transaction' in his hands (ie the capital gains realised do not fall with the normal management of the private estate).

Where individuals are taxed, rates range from 16.5% to 54%.

Spain

Resident individual shareholders are generally liable to tax at 19% on capital gains and other savings income lower than €6,000, 21% on any capital gains or other savings income between €6,000 and €50,000, 23% on any capital gains or other savings income between €50,000 and €200,000 and 26% on anything above €200,000.

Switzerland

Individual shareholders who hold the shares as private assets in general realise a tax free capital gain on the disposal of shares. The tax administration may reclassify all or a portion of the profit to taxable income if the Target has excess cash which is distributed within 5 years from the sale.

Individual shareholders holding their shares as business assets or who qualify as securities dealers for tax purposes are subject to tax on the disposal of Target shares at standard rates ranging between 22% and 45% depending on the place of residence plus social security contributions.

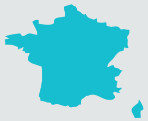
02 Tax position for Target shareholders on a share for share offer

United Kingdom

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg Target shareholders receive the disposal proceeds in the form of paper (shares or debentures) issued by the buyer), rollover treatment may be available. Where rollover applies, any tax charge on disposal is deferred until the consideration shares are sold.

Rollover may be used to defer and sometimes spread the gain over a number of years, for instance in order to provide access to the annual exempt amount (currently £12,300) over more than 1 tax year.



France

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg any cash component of the offer may not exceed 10% of the nominal value of the shares received in exchange), rollover treatment may be available. Where rollover applies any tax charge on disposal is deferred until the consideration shares are sold.

Germany

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg buyer is a company with EU/EEA residency and will hold the majority of voting rights in Target; Target shareholders receive new shares in buyer in exchange for Target shares; and, Germany's right to tax any gain on the sale of the consideration shares is unfettered), rollover treatment may be available for those shareholders subject to the German tax regime. Where rollover applies and holding periods are met, any tax charge on disposal is deferred until the consideration shares are sold.

A roll-over regime may also apply to individuals holding less than 1% of Target's capital.

Ireland

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg Target shareholders receive the disposal proceeds in the form of paper (shares or securities) issued by the buyer and the buyer obtains control of Target), rollover treatment may be available. Where rollover applies any tax charge on disposal is deferred until the consideration shares are sold.

Italy

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg Target shareholders receive shares in buyer in exchange for Target shares and buyer holds Target shares in its books at the same value previously held by the selling shareholder), rollover treatment may be available. Where rollover applies, any tax charge on disposal is deferred until the consideration shares are sold. Certain conditions apply.

Tax position for Target shareholders on a share for share offer

Luxembourg

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg Target's shareholders receive shares in qualifying EU resident company in exchange for Target shares), rollover treatment may be available. Where rollover applies, any tax charge on disposal is deferred until the consideration shares are sold.

The Netherlands

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg the share for share merger is not predominantly aimed at the avoidance or deferral of taxation, and any additional payment (eg in cash) does not exceed 10% of the nominal value of the shares issued), rollover treatment may be available. Where rollover applies, any tax charge on disposal is deferred until the consideration shares are sold.

Belgium

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions (eg Target shares constitute business assets), the tax exempt share for share exchange rules may apply.

Spain

In principle the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

Subject to certain conditions being met (eg buyer acquires at least 50% of voting rights in Target, buyer is EU resident and any additional (cash) payment does not exceed 10% of the nominal value of the shares issued), rollover treatment may be available. Where rollover applies, any tax charge on disposal is deferred until the consideration shares are sold.

Switzerland

In principle, the tax position of Target shareholders who receive consideration in the form of shares does not differ from the treatment on a cash offer.

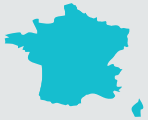
Subject to certain conditions being met (eg value of the cash component is not higher than the value of the share component and the buyer owns at least 50% of the shares of Target after the transaction), rollover treatment may be available. Where rollover applies any tax charge on disposal is deferred until the consideration shares are sold.

03 Key tax issues for employees and directors

United Kingdom

Shares acquired by or subscribed for by officers or employees by reason of an opportunity connected with their office or employment are subject to complex provisions which may operate to tax a proportion of the gain on their disposal as employment income.

Generally, options exercised by employees in connection with the acquisition (or otherwise) are subject to income tax on the difference between the market value of the acquired shares, and the exercise price.



France

Capital gains realised on the disposal of shares acquired by or subscribed for by officers or employees under preferential terms may, in certain circumstances, be treated as employment income where they are essentially derived from the exercise by the beneficiary of his position as employee or director.

In other cases, capital gains realised by officers or employees on the disposal of such shares will generally be subject to capital gains tax under the normal rules.

Stock options granted to officers or employees are subject to income tax at a progressive scale (top rate of 45% above €160,336, plus exceptional surtax on high income at 3% or 4% as the case may be), assuming that exercise of the options is immediately followed by the disposal of the newly-purchased shares.

Germany

Shares acquired by or subscribed for by officers, management or employees under preferential terms by reason of an opportunity connected with their employment is subject to wage tax at the time of the grant of the shares on the value of the benefit.

Any gain arising on a disposal of such shares is generally subject to income tax at a flat rate of 26.4% if the shareholding is – and has been for the last 5 years – below 1%.

Options granted to officers, management or employees will become subject to wage tax only when exercised or otherwise disposed of.

Ireland

Shares acquired (including those pursuant to an option) by officers and employees under preferential terms by reason of an opportunity connected with their employment may be liable to an income tax charge at the time of the grant or exercise in certain circumstances of the shares on the difference between the price paid and the market value of the acquired shares. Gains arising on the disposal of such shares may be taxable depending on the circumstances.

Where outstanding employee share options in a Target company are exchanged or otherwise replaced with options over shares in the buyer, the employee option holders may be entitled to rollover relief with no adverse tax consequences.

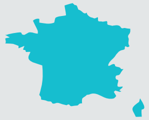
Italy

Shares acquired or subscribed for by officers and employees under preferential terms by reason of an opportunity connected with their employment are generally subject to tax on the value of the benefit in the same manner as other employment income. Certain exemptions apply.

Gains from the sale of such shares may be subject to a 26% substitute tax in the case of both the sale of non-qualified and qualified interests.

Key tax issues for employees and directors

United Kingdom



France

Gains from stock options are also subject to social contributions at a global rate of 9.7% (of which 6.8% is deductible from taxable income) and a specific employee contribution at a rate of 10%.

Germany

Ireland

Shares acquired by or subscribed for by officers or employees by reason of an opportunity connected with their office or employment are subject to complex provisions which may operate to tax all or a proportion of the gain on their disposal (or certain other events such as the removal of restrictions or a conversion of shares) as employment income.

Generally, options acquired in connection with the office or employment are subject to income tax, universal social charge and social security contributions on the gain arising on exercise, cancellation or assignment of the option.

Italy

Key tax issues for employees and directors

Luxembourg

Since 1 January 2021, employees (irrespective of their status) may benefit from a participation in corporate profits, the so-called "profit-sharing bonus". The discretionary bonus benefits from a 50% tax exemption subject to certain conditions and qualifies as employment income for employees.

Shares or stock options acquired at a discount or on preferential terms by employees of Luxembourg companies by reason of an opportunity connected with their employment may be liable to wage tax on the value of the discount or preferential term (eg in relation to the financing of shares).

Any gain arising on a disposal of such shares is generally not subject to tax provided that the shareholding is 10% or less and has been held for more than 6 months.

Non-tradable options granted to employees will become subject to wage tax only when exercised.

The Netherlands

Shares acquired on preferential terms by officers, management or key employees by reason of an opportunity connected with their employment are subject to wage tax on the value of the preferential term (including any discount and benefit in financing share acquisition).

Options granted to officers, management or key employees by reason of an opportunity connected with their employment are currently subject to wage tax when exercised or disposed of.

A return which is derived (in addition to a salary) by certain employees and managers who hold a 'lucrative' security which is directly or indirectly linked to performance may be taxed as personal income at a maximum rate of 49.5%.

Belgium

Shares acquired or subscribed for by officers or employees under preferential terms (eg at a discount of up to 20%) by reason of an opportunity connected with their office or employment may, under certain conditions, benefit from tax exemption.

There are generally no tax or social security implications when such shares are sold.

Qualifying stock options are taxable at grant, generally on a lump sum value, and any gain realised on exercise or the subsequent disposal of the shares is in principle exempt (provided the gains are realised within the normal management of the private estate).

Option holders who exercise options on an accelerated basis in connection with the acquisition may be taxed on the associated additional benefit.

Spain

Shares acquired at a discount or on preferential terms by officers, management or key employees by reason of an opportunity connected with their employment may be regarded as labour income and become subject to Spanish income taxes on the value of the benefit in the same way as any ordinary labour income (though certain tax benefits may be applicable).

The right to dispose of shares on an accelerated basis and options granted to officers, management or key employees by reason of an opportunity connected with employment may result in employees losing certain tax benefits and may trigger adverse tax consequences.

Switzerland

Capital gains realised on the disposal of shares acquired by or subscribed for by officers or employees at fair market value may be treated as tax free capital gains.

Capital gains realised on the disposal of shares acquired by or subscribed for by officers or employees under preferential terms may, in certain circumstances, be treated as employment income. If Target has agreed with the tax administration a certain valuation method and if the officers or employees sell the shares within 5 years, they realise a tax free capital gain to the extent of the value of the shares at the time of the disposal applying the same valuation method. Any excess sale proceeds are treated as employment income.

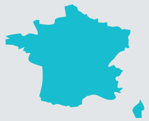
Options granted to officers, management or key employees by reason of an opportunity connected with their employment will generally be subject to wage tax only when exercised or disposed of.

04 Transfer taxes on the takeover

United Kingdom

Stamp duty is payable at 0.5% on value of the consideration paid for shares on any transaction involving a sale of shares of a company incorporated in the UK.

Stamp duty will not arise where the seller's shares are cancelled and new shares are issued in their place to the buyer (eg a cancellation scheme), because no sale is involved. Note however that cancellation schemes are no longer allowed to be used in the context of most takeovers of UK companies.



France

For non-listed companies, stamp duty is due at a rate of 0.1% for joint stock companies and 3% for partnerships (ie,SARL).

Certain exemptions exist (eg intra group transactions).

Where the Target is a real estate company, a 5% stamp duty charge applies.

No transfer taxes are levied on a purchase of shares in a French listed company, unless a deed of acquisition is concluded, in which case a 0.1% stamp duty charge arises.

However, a financial transaction tax at a rate of 0.3% is levied on a purchase of shares in a French listed company with market capitalisation exceeding €1 billion (subject to specific exemptions).

Germany

No transfer taxes are generally levied on the transfer of shares.

A direct or indirect transfer of 90% or more of the shares to one new shareholder or multiple new shareholders in a company that owns real estate in Germany may trigger real estate transfer tax (*Grunderwerbsteuer*) at rates between 3.5% and 6.5% (with the exact rate depending on the federal state in which the real estate is located).

Ireland

Stamp duty is generally payable on the acquisition of shares in an Irish incorporated company at a rate of 1% of the consideration paid or the market value of the shares (whichever is higher). A statutory provision imposes stamp duty on cancellation schemes of arrangement as if the scheme involved a transfer of the shares to which it relates. This provision was held to be inconsistent with EU law by the Tax Appeals Commission, but that ruling is technically not authoritative. Transfers of US or Canadian listed shares held through DTC are not usually stampable. Certain exemptions exist where companies are effecting a bona-fide reconstruction or amalgamation.

Italy

No *ad valorem* stamp duty is due on the transfer of shares. A fixed registration charge of €200 is payable in certain cases.

Transfers of ownership of shares and participating financial instruments issued by certain Italian companies (excluding limited liability companies) are subject to a financial transfer tax (FTT) at the rate of 0.2% on the value of the transaction.

Transfers taking place in regulated markets are subject to FTT at a reduced rate of 0.1%.

Some broad exemptions and exclusions from the FTT apply.

Transfer taxes on the takeover

Luxembourg

No transfer taxes are levied on the transfer of shares. If registered on a voluntary basis, the legal documentation reflecting the transfer of shares (eg share purchase agreement) will be subject to a fixed registration duty (*droit d'enregistrement*) of €12.

A direct or indirect transfer of shares in a joint stock company or a private limited liability company (as opposed to a *société civile immobilière* or a Luxembourg tax transparent entity) that owns real estate in Luxembourg will not trigger Luxembourg real estate transfer tax, except for cases where abuse of law is proved.

The Netherlands

No transfer taxes are levied on the transfer of shares, unless the shares relate to a company that is considered as a real estate company.

Real estate transfer tax (*overdrachtsbelasting*) at a rate of 8% (9% as from 2023) is levied on the acquisition of shares or similar rights in real estate companies if the buyer obtains, directly or indirectly, an interest of at least a third in the company (including shares and rights already in possession). A real estate company is a resident or non-resident company of which assets consist of more than 50% of real estate and at the same time, consist of more than 30% of real estate assets situated in the Netherlands. Exceptions apply in case the real estate is used within the business of the company.

Belgium

No transfer taxes are levied on a transfer of shares (unless the transfer involves a financial markets professional intermediary in which case a 0.35% stock exchange tax may apply).

Property transfer tax is levied on a transfer of real estate at a rate of either 12% or 12.5%. Anti-avoidance legislation may operate to charge tax on share sales where real estate assets are contributed to Target prior to sale.

Spain

No transfer taxes are levied on the transfer of shares although a transfer tax may apply to shares in certain real estate companies if the transaction has been structured as a share deal instead of an asset deal in order to avoid payment of the taxes that would have been due on the transfer of the underlying real estate properties.

Transfer tax (of between 6% and 11%) is levied on the acquisition of shares in certain 'real estate companies' where buyer obtains, directly or indirectly, a controlling interest in Target (ie more than 50% of share capital). It is also due in some other circumstances.

'Real estate companies' are resident or non-resident companies the assets of which consist (50% or more) of real estate situated in Spain which is not used in connection with business activities. The tax is assessed on the market value of the underlying assets (determined under special rules).

No transfer tax should be due if the shares of Target are listed on an official stock exchange.

Switzerland

Stamp duty is payable at 0.15% on value of the consideration paid for shares on any transaction involving a sale of shares of a company incorporated in Switzerland and at 0.3% on shares of a company incorporated outside Switzerland if a Swiss bank or other securities dealer is a party or an intermediary to the transaction. A Swiss securities dealer for stamp duty purposes includes any Swiss resident company which holds shares with a book value of at least CHF 10 million.

Certain exemptions exist (eg intra group transactions, exempt shareholders such as foreign resident listed companies).

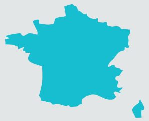
05 Need for any advance tax clearances

United Kingdom

There is no general need for advance tax clearances.

However, statutory clearances are available in relation to certain matters affecting the rollover treatment on a share for share exchange. Such clearances are only required in relation to over 5% shareholders, but are customarily applied for in most public transactions. Other statutory clearances, to confirm that certain anti-avoidance rules do not apply, are also commonly applied for.

There is at present no general statutory clearance facility. A non-statutory clearance service is however operated by HMRC, and this is being used increasingly by businesses in the context of more complex transactions.



France

There is no general clearance procedure.

However, specific transactions may require a ruling from the Tax Authorities (eg in relation to rollover in some cases, and the transfer of tax losses in the case of mergers). Where a ruling is required, subsequent rulings may also be necessary in respect of future transactions concerning the same shares or other assets.

Germany

There is no general need for any advance tax clearances.

However, it is common practice in more complex cases to apply for a binding ruling to ensure that the proposed structure has no negative tax implications.

Ireland

There is generally no need to obtain advance tax clearances.

However, in certain circumstances (eg where unquoted shares being disposed of derive the greater part of their value from Irish land), it may be necessary for the transferor to seek a clearance certificate from Irish Revenue confirming that the transferee is not required to withhold tax from the purchase price.

Italy

There is no general mandatory need for any advance tax clearances.

However, in certain circumstances it might be advisable to apply for a binding ruling to ensure that the envisaged structure has no negative tax implications.

Need for any advance tax clearances

Luxembourg

There is no general need for advance tax clearances.

However, it is common practice in complex cases to apply for a binding ruling to ensure that the proposed structure has no negative tax implications.

Rulings have a legally binding effect for a maximum period of 5 tax years, unless (i) the situation or operations described in the application were incomplete or inaccurate, (ii) the situation or operations eventually realised differ from those described in the application or (iii) the advance tax confirmation is no longer compliant with domestic, EU or international law.

The issuance of the advance tax confirmation (including for advance pricing agreement) is subject to an administrative fee (ranging from €3,000 to €10,000), the amount of which is determined by the tax authorities upon receipt of the application.

Advance tax confirmations and pricing agreements may further be exchanged with the tax authorities of the relevant EU Member State or OECD member country.

The Netherlands

For certain tax structures it can be advisable to apply for a ruling to confirm the Dutch tax treatment. Under the current ruling practice (applicable from 1 July 2019), an international tax ruling can in principle only be obtained by companies that have sufficient 'economic nexus' with the Netherlands.

Belgium

There is no general need for any advance tax clearances.

However, in certain circumstances it might be advisable to apply for a binding ruling to ensure that the proposed structure has no negative tax implications.

Spain

There is no general need for advance tax clearances.

However, it is possible to apply for binding tax rulings from the Spanish Tax Authorities before completing transactions.

Certain tax matters require notification to the Spanish Tax Authorities (eg application for the rollover tax regime).

Switzerland

It is standard practice to apply for an advance tax ruling to confirm the Swiss tax treatment.

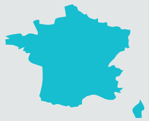
06 Debt financing the takeover offer

United Kingdom

As a general rule, finance costs associated with UK corporate debt are generally deductible.

This is subject to anti-avoidance rules, including transfer pricing rules (the UK transfer pricing rules now also contain the thin capitalisation rules) which restrict deductibility for debt with equity-like features and where the debt has tax avoidance as a main purpose (unlikely in the context of an acquisition). In addition, in broad terms, the corporate interest restriction rules limit deductible interest to 30% of tax EBITDA. Restrictions on deductibility may also arise under the UK anti-hybrid rules.

While no tax consolidation as such exists, tax deductible amounts in the acquisition vehicle can be used, subject to certain restrictions, to shelter taxable receipts of Target using so-called 'group relief'.



France

As a general rule, interest expense which is associated with the acquisition is deductible for corporation tax purposes.

This general rule is subject to certain restrictions applicable to related party loans pursuant to which the interest must not exceed a statutory rate determined by averaging market rated loans over a given period, unless it can be demonstrated that such interest corresponds to a market rate (note: such safeguard does not apply in respect of loans extended by direct shareholders).

"ATAD 2" anti-hybrid provisions also prevent cross-border interest payments from being tax deductible in France where the corresponding profit is not effectively subject to tax at the recipient's level.

In addition, net financial expenses in a given financial year may only be deducted up to a maximum amount equal to €3 million or 30% of the company's taxable EBITDA if higher. Specific provisions apply to companies which are (i) members of a consolidated group, and/or (ii) deemed to be thin capitalised (ie where related-party debt exceeds 1.5 times the amount of the company's net equity). Interest that is not deductible in respect of a given financial year can generally be carried forward.

Germany

As a general rule, interest expense which is associated with the acquisition is deductible for (corporate) income tax purposes provided that it does not exceed 30% of the taxable EBITDA.

Non-deductible interest may be carried forward.

This interest barrier applies irrespective of the legal form of the financed business and does not distinguish between debt financing by shareholders or third parties. There are some exceptions to the interest barrier for small and medium sized companies, companies not belonging to a consolidated group and companies whose equity ratio equals or exceeds the average equity ratio of the group to which they belong.

25% of interest expense that is deductible for (corporate) income tax purposes must be added back to the tax base for trade tax purposes.

Germany also has transfer pricing rules, rules to prevent erosion of the German tax base and has implemented the anti-hybrid mismatch rules of the EU Anti-Tax Avoidance Directive (ATAD).

Ireland

As a general rule, interest expense incurred to fund the acquisition of any part of the ordinary share capital of a trading company, a company whose income consists mainly of rental income or a holding company of such a trading or rental company is deductible (provided that certain conditions are met).

Ireland has implemented ATAD compliant anti-hybrid rules, interest limitation rules and transfer pricing rules which can operate to limit the ability to deduct interest on all debt.

Italy

As a general rule, interest expense which is associated with the acquisition is deductible for tax purposes provided that it does not exceed 30% of the taxable EBITDA for income and trade tax purposes.

Any interest not so deductible can be carried forward and will be deductible in future years, subject to the same 30% test. Where EBITDA for the year is higher than excess interest, the excess EBITDA can, subject to certain conditions, be aggregated with the EBITDA of the following financial years and the 30% test is then applied in the subsequent financial years by reference to the aggregated EBITDA figure. All excess interest expense can be carried forward indefinitely, while 30% of unused EBITDA can be carried forward for up to 5 years.

Other specific provisions apply to banks and other financial institutions, as well as insurance companies, which are allowed to deduct 96% of interest expenses.

Debt financing the takeover offer

Luxembourg

As a general rule, finance costs associated with Luxembourg corporate debt is generally deductible and not subject to Luxembourg withholding tax provided that anti-avoidance rules do not apply and the transfer pricing rules are not breached.

Interest paid or accrued in connection with the financing of a share qualifying for the participation exemption is deductible in so far as it exceeds the tax exempt income of the year but subject to a number of claw back rules.

Tax losses resulting from interest expenses which exceed exempt dividend income and gains are available for carry forward for a maximum of 17 years. A carry back of tax losses is not permitted.

The Netherlands

As a general rule, interest expense which is associated with the acquisition is generally deductible for corporation tax purposes provided it is at arm's length and the balance of interest payable and receivable does not exceed 20% of the company's EBITDA. In case the company is included in a Dutch CIT fiscal unity, the fiscal unity's EBITDA is leading.

This general rule is subject to anti-base erosion rules. Interest deduction may be fully denied if loans are (deemed to be) obtained from related parties and used for the financing of participations. Certain exceptions apply if the double business motive or the subject to tax test is met.

Belgium

As a general rule, interest expenses and other financing costs that are incurred with a view to financing a share acquisition should be deductible.

This general rule is subject to certain specific limitations, such as certain at arm's length limitations and thin capitalisation rules (a 5:1 debt equity ratio applies for financing provided by beneficially taxed entities, other than banks, and a 1:1 debt equity ratio for loans granted by shareholders, individuals or individuals/entities appointed as eg director). Moreover, the tax deductibility of interest charges and economically equivalent costs is subject to a 30% EBITDA interest limitation rule (with a de minimis deduction at group level of up to €3 million). Finally, specific reporting obligations apply for payments to certain tax havens whereby the sanctions for non-reporting include the loss of tax deductibility.

Spain

As a general rule, finance costs recorded in the profit and loss account associated with the acquisition are generally deductible if they (i) do not exceed 30% of the EBITDA (or €1 million if higher) and (ii) do not breach transfer pricing rules in respect of loans received from related parties.

That said, in the case of debt financing the acquisition of shares, a special rule applies (the so-called LBO rule) whereby tax deduction of interest will require compliance with additional requirements.

Interest on intra-group leveraged reorganisations or hybrid instruments may not be tax-deductible.

Switzerland

As a general rule, interest expense which is associated with third party financing of the acquisition is deductible for corporation tax purposes at the level of a Swiss acquisition company. However, since there is no tax consolidation for corporate income tax purposes and any dividend income is not taxed at the level of the acquisition company, this tax deduction is not tax efficient without any debt push-down. If the acquisition company merges with the Target, the tax administrations usually deny the tax deduction of the interest from the Target profit based on a general anti-abuse rule.

Interest expense associated with related party financing of the acquisition is deductible for corporation tax purposes of a Swiss acquisition company subject to the arm's length rules for interest expenses and the thin capitalization rules.

Switzerland has not introduced any limitations of the deduction of interest on third party debt (ie no 30% EBITDA limitation).

Debt financing the takeover offer

Luxembourg

The Netherlands

Belgium

No general tax consolidation regime is available (except for (i) a special group contribution rule which entered into force as from assessment year 2020 for taxable periods starting not earlier than on 1 January 2019, subject to certain conditions (eg a direct minimum participation of 90% between qualifying group companies for an uninterrupted period of 5 years), and (ii) a special ad hoc 'tax consolidation' regime with respect to the 30% EBITDA interest limitation rule as a result of which, subject to certain conditions, the interest deduction capacity and the minimum deduction of €3 million should be established on a group level, and a transfer of unused deduction capacity can be made between qualifying group companies).

In the absence of a tax consolidation regime, a debt push down may be required, and is under increasing scrutiny, especially where the debt push down is organized in the form of a "leveraged distribution".

Spain

Switzerland

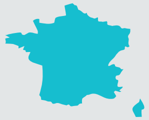
07 Change of control issues

United Kingdom

The change in the ownership/control of Target may result in restrictions on the use of Target's tax losses post-acquisition.

Some losses (eg capital losses pre-acquisition) can be used by Target only, to set against pre-acquisition assets only. Others (certain revenue losses) may be lost altogether following the acquisition if there is a change in the nature, scope or conduct of Target’s business.

Target’s undischarged tax liabilities in respect of pre-acquisition years may be demanded from certain shareholders of Target post-acquisition.



France

The change in the ownership/control of Target has, in principle, no impact on Target's tax losses and its ability to carry them forward, or on any other tax matters.

Germany

The change in the ownership/control of Target may result in restrictions on the use of Target's tax losses and interest carried forward post-acquisition.

Ireland

The change in the ownership/control of Target may result in Target's carry forward trading losses and certain capital allowances being disallowed where, in association with a change in the ownership of Target, there is also a major change in the nature or conduct of the trade or where, at the time of the change in the ownership of Target, the scale of the activities carried on by Target has become small or negligible.

Italy

The change in the ownership/control of Target may result in restrictions on the use of Target's carried forward tax losses post-acquisition (and in case of mergers).

The sale of Target out of a group has implications in the context of group tax consolidation.

Change of control issues

Luxembourg

The change in the ownership/control of Target has, in principle, no impact on Target's tax losses and its ability to carry them forward provided that Target continues its economic activities post-acquisition.

Tax losses carried forward in Target may be restricted post-acquisition in specific cases such as: (i) where there is a change or cessation of Target's pre-acquisition activity to which the losses relate; (ii) where there are no assets having a real economic value; and (iii) where Target was in substance acquired only to obtain the benefit of the losses.

The Netherlands

The substantial (ie 30% or more) change of ultimate interest of Target in combination with a decrease in the company's activities may result in restrictions on the use of Target's tax losses and interest carried forward post-acquisition.

Belgium

The change in ownership/control of Target has in principle no impact on Target's carried forward losses and other reliefs provided that the acquisition was effected for *bona fide* commercial reasons. In all other cases, such losses and reliefs are restricted post a change of control.

Spain

The change in the ownership/control of Target may result in restrictions on the use of Target's carried forward tax losses post-acquisition where certain anti-avoidance rules are applied.

The change of control of Target may, in some cases, affect tax consolidation.

Switzerland

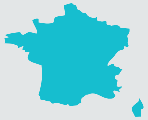
The change in the ownership/control of Target has, in principle, no impact on Target's tax losses and its ability to carry them forward, or on any other tax matters.

08 Potential tax issues on selling Target assets post-takeover

United Kingdom

Disposals by Target post-acquisition will be taxed in the usual manner (corporation tax on chargeable gains, subject to relief).

In addition, exit charges may apply. In essence, intra-group transfers are tax free, but if the transferee (here assumed to be Target) leaves the group within 3 years (in the case of stamp duty charges) or 6 years (in the case of capital gains tax) the tax relief may be recouped.



France

Disposals by Target post-acquisition will be taxed in the usual manner (corporate income tax on gains, subject to reliefs).

Where Target is a member of a tax consolidated group, the disposal of its assets may trigger certain de-grouping charges.

Germany

Disposals by Target post-acquisition will be taxed in the usual manner (corporate, income and trade tax on gains, subject to reliefs).

Ireland

Disposals by Target post-acquisition will be taxed in the usual manner (capital gains tax on gains, subject to relief).

In addition, where a transfer has taken place intra-group and relief from capital gains tax or stamp duty has been claimed, the transferee must remain within the group for a period of 10 years (for capital gains tax) or 2 years (for stamp duty) otherwise there will be a claw back of the tax relief.

Italy

Disposals by Target post-acquisition will be taxed in the usual manner (capital gains tax on gains, subject to reliefs).

Potential tax issues on selling Target assets post-takeover

Luxembourg

Disposals of assets by Target post-acquisition will be taxed in the usual manner (corporate income tax and municipal business tax on gains, subject to reliefs).

The Netherlands

Disposals post-acquisition will be generally taxed in the usual manner (corporate income tax on gains, subject to relief).

Claw-back provisions may apply if assets containing 'hidden reserves' are transferred within a fiscal unity and the fiscal unity between the transferring company and the acquiring company is terminated within 6 years.

Belgium

Disposals by Target post-acquisition will be taxed in the usual manner (capital gains tax on gains, subject to reliefs).

Belgium does not have a tax consolidation regime, so no break up charge arises when sales are made out of the group.

Spain

Disposals by Target post-acquisition will be taxed in the usual manner (capital gains tax on gains, subject to reliefs).

Switzerland

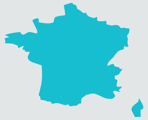
Disposals post-acquisition will be generally taxed in the usual manner (corporate income tax on gains, subject to relief).

Contributors

United Kingdom

Herbert Smith Freehills

Isaac Zailer (Partner, Tax)



France

Herbert Smith Freehills

Bruno Knadjian (Partner, Tax)

Sylvain Piémont (Avocat, Tax)

Germany

Herbert Smith Freehills

Steffen Hoerner (Partner, Tax)

Ireland

Arthur Cox

Fintan Clancy (Partner, Tax)

Italy

Herbert Smith Freehills

Francesca Morra (Partner, Corporate)

Simone Egidi (Of Counsel, Corporate)

Luxembourg

Arendt & Medernach

Thierry Lesage (Partner, Tax)

Marie Demmerlé (Senior Associate, Tax)

The Netherlands

Stibbe

Michael Molenaars (Partner, Tax)

Reinout de Boer (Partner, Tax)

Stephanie Kleefstra (Senior Associate, Tax)

Belgium

Stibbe

Giovanni Smet (Counsel, Tax)

Spain

Herbert Smith Freehills

Nicolas Martin (Partner, Corporate/Tax)

Marta Esteban (Of Counsel, Tax)

Switzerland

Homburger

Reto Heuberger (Partner, Tax)

For a full list of our global offices visit **HERBERTSMITHFREEHILLS.COM**