Corporate reorganisations: how US tax reform drives cash repatriation programmes

In a series of papers Robin Johnson, Christian Mense and Nicola Evans of Eversheds Sutherland will consider corporate reorganisations. The first focuses on cash repatriations

Change is the new norm and each month, companies are contemplating how to transform their current business set-up to create efficiencies, maximise use of invested capital and simplify corporate structures. Other motives for corporate reorganisations are very often the improvement of fiscal compliance and tax efficiency. The Trump administration’s tax reforms have created a recent trend: the increase of cash repatriation programmes.

Background
Before the Trump administration’s tax reform, it was very often advantageous for US-headquartered multinationals to maintain profits at the level of their non-US subsidiaries. This was the result of relatively high US corporate tax rates combined with lower rates of taxation in other jurisdictions. Cash was therefore used for local needs, capex, investments, funding and acquisitions. Cash pooling remained geographically focused. One of the intentions of the Trump administration’s tax reform was to create a tax environment that would make it beneficial for multinationals to move money sitting at the level of their non-US subsidiaries to their US parent company thus facilitating cash to be recycled to meet the administration’s ‘America First’ policy.

Cash repatriation considerations
While before the Trump administration’s tax reform profits were still transferred to the US parent company, this involved relatively complicated foreign tax credit planning through offshore jurisdictions. Given the new regime, there are certain considerations that make cash repatriation to the US parent company more interesting for multinational businesses, eg:

- The current taxation of most non-US earnings in the US provides much greater flexibility to repatriate without an incremental cost.
- Withholding taxes will now often be non-creditable following the tax reform, so repatriation planning should focus on ways to reduce such withholding taxes where possible, simplifying offshore structures.
- Because holding company structures are no longer required for foreign tax credit planning or deferral purposes and withholding taxes may not be creditable in the US, historical group structures may need to be revisited.

Set-up of cash repatriation programs
While foreign tax credit planning is one of the core functions of the in-house tax teams of multinational companies, cash repatriation programmes are very often set up together with external accounting firms and tax lawyers. This brings in external expertise and also gives access to expertise and best practice from similar projects for different companies and from different sectors. From the start of the project, it is essential to combine tax advice with corporate law advice as the cash repatriation will ultimately have to be implemented by corporate law measures. In addition, from a corporate law perspective, an analysis of which local requirements and limitations may apply to the transfer of cash by local subsidiaries – eg minimum capital requirements or foreign exchange transfer clearances – must take place.

Practical implementation of cash repatriation programmes
Every cash repatriation program starts with the overall structuring of the project. This is then followed by planning of the microsteps
that are required in order to achieve the overall goals. In practice, the respective microstep plans are usually very voluminous documents with input from tax and corporate legal advisers.

Cash repatriation programmes are by their very nature multinational projects, as they will involve several jurisdictions. Therefore, it is key from the beginning to involve local experts from all jurisdictions involved in order to avoid any surprises later down the road.

Like other corporate reorganisations, cash repatriations also have to follow a defined sequence of events. After drafting and finalising the documents for the microsteps, it is then important to have all signatories lined up for signing as and when necessary and to make arrangements for notarisations of documents that are required. Given that multinational groups usually have a larger number of local directors who will need to be involved in the execution of the huge amount of documents to effect all microsteps, it is vital to have the local directors on board early and plan for their availability – which can be quite challenging, eg during different holiday seasons in different jurisdictions and on different continents. It can be worth considering setting up an e-signing facility.

Some of the microsteps required in order to implement cash repatriation programmes from a legal perspective may include:

- Cash dividends.
- Dividends in specie.
- Reduction or cancellation of shares or capital reserves.
- Intra-group transfers of companies.
- Transfers of existing inter-company debt.
- Creation of new inter-company debt.
- Variation of cash pooling arrangements.
- Thin capitalisation rules.
- Setting up of optimised subsidiaries and sub-holding structure.
- Board resolutions at the level of various subsidiaries.
- Shareholder resolutions at the level of various subsidiaries.

Treat cash repatriation programmes like other important company transactions

Cash repatriation programmes will usually have a significant effect on the financials of the respective company group. It is therefore important to treat cash repatriation programmes like other important company transactions, eg M&A projects. Hence, active project management should play an important role from the start of the project. It will also be necessary to ensure that all stakeholders within the respective group and their external advisers are apprised of all recent developments, if necessary, even by way of daily ‘all-hands’ update calls.

Top five tips to implement cash repatriation programmes

1) Have one central point of contact and a dedicated project management team.
2) Start detailed planning early (microsteps) based on the macro plan.
3) Use technology (eg SharePoint) where possible to facilitate the work. This can free up space in email inboxes and will enable people in different jurisdictions and in different time zones to work on the documents most efficiently.
4) Early team building and regular communication is key. Closely align the tax teams and the corporate law teams.
5) Plan for resources and availability way ahead.