



Owner Buyout Transactions in Switzerland: Myth or Reality?

Agenda



1. Owner Buyout
2. Transposition - Tax Considerations
3. Structuring Options
4. Shareholders' Agreement
5. Conclusion

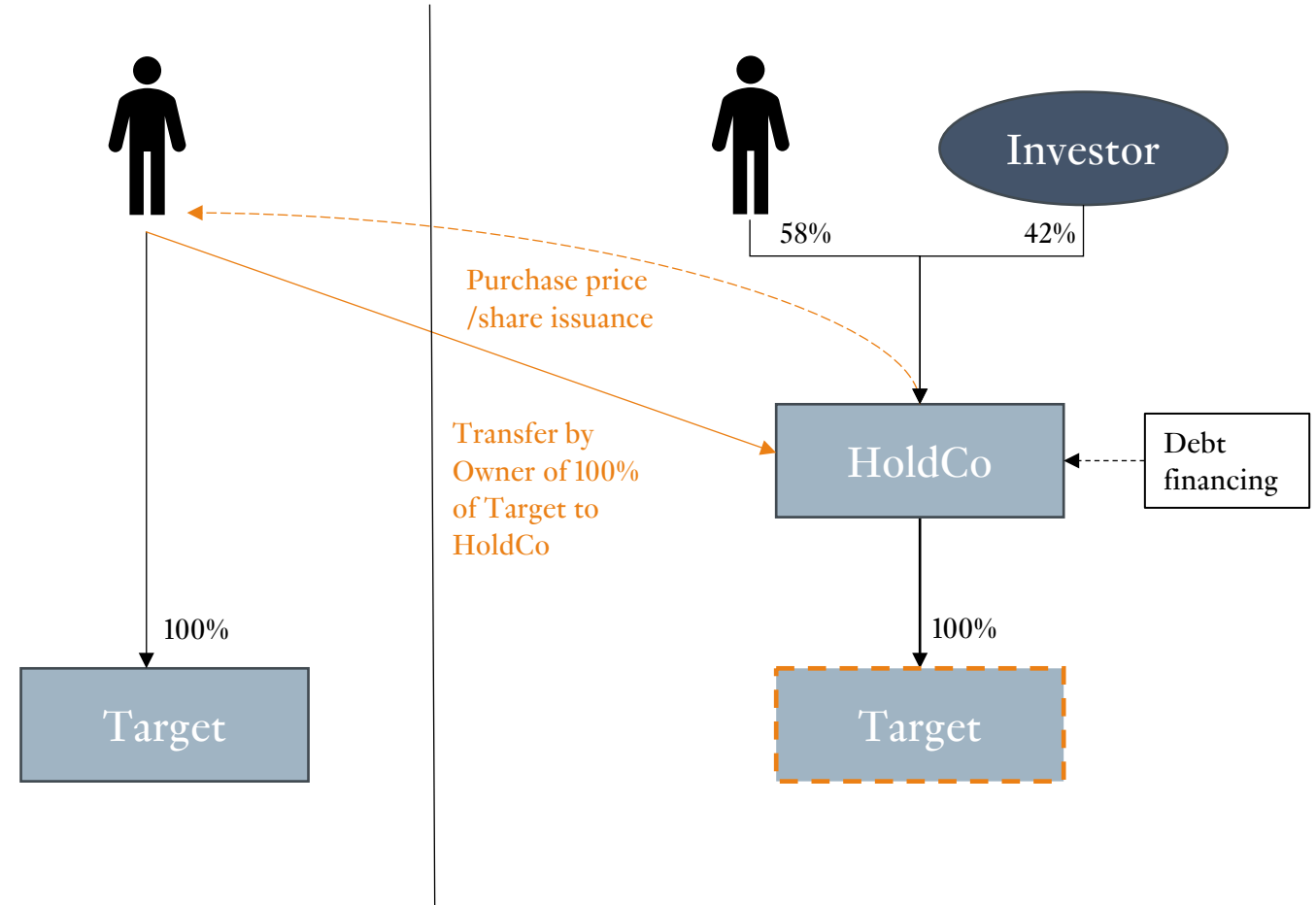


1. Owner Buyout

Owner Buyout - Definition



- Owner Buyout (or OBO) definition:
 - ❖ Financial transaction
 - ❖ Sale by an owner of a portion of his/her company
 - ❖ To a controlled holding company
- The OBO characteristics are:
 - ❖ Majority stake of the owner (economic & voting rights)
 - ❖ Equity investment by a third-party
 - ❖ Debt financing, if any
 - ❖ Partial cash-out of the owner
- Key features of an OBO might lead to a transposition





2. Transposition – Tax Considerations

Transposition – Tax Considerations

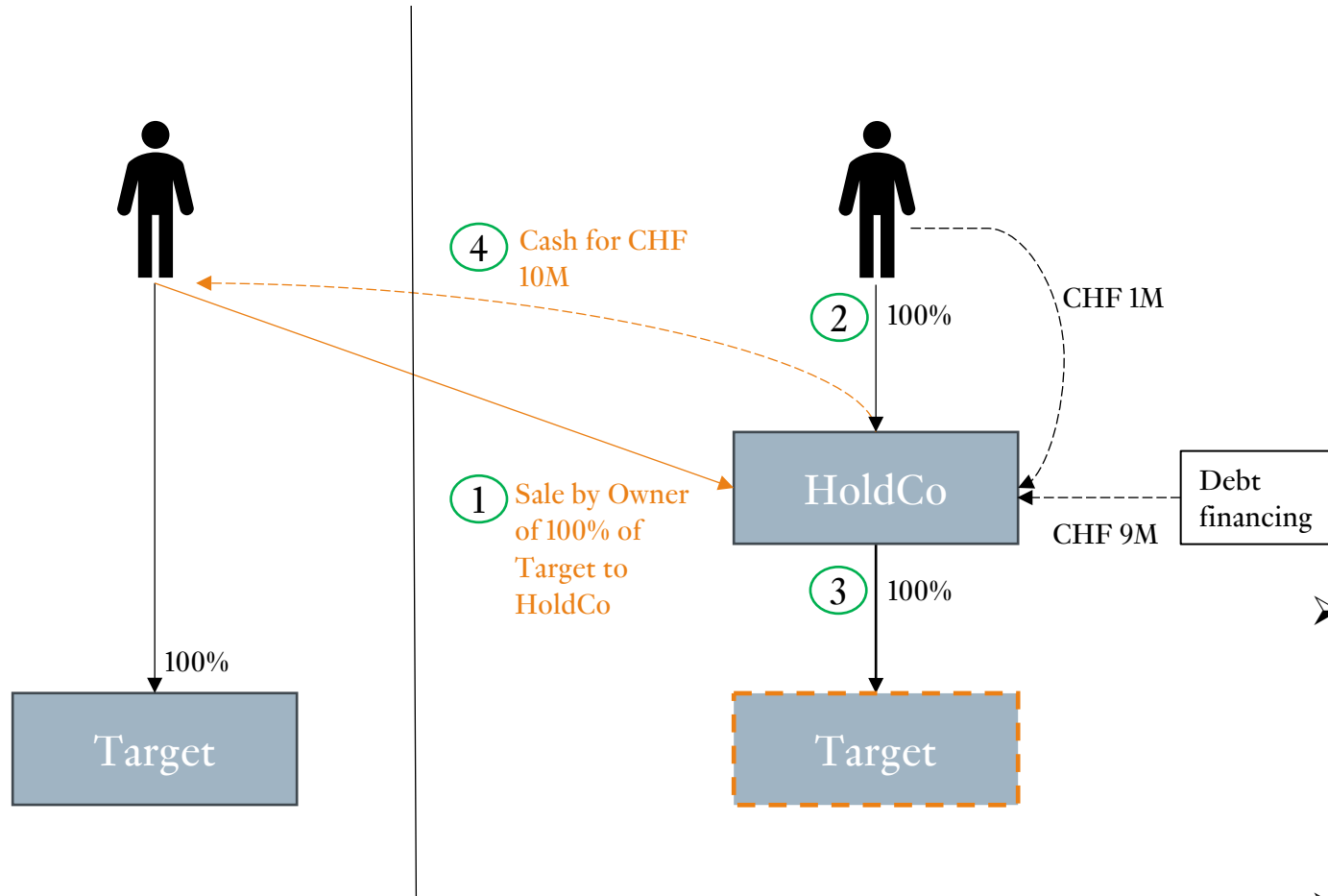


➤ Conditions of the transposition (art. 20a al. 1 lit. b LIFD):

Legal Conditions	Conditions in Practice
1. Sale/contribution in kind of shares by the owner	Most likely always met
2. Control of the owner over the company acquiring the sold/contributed shares	Controversy amongst cantons: absence of control if the owner retains 51% of the voting rights but has 49% of the economic rights of the acquiring company?
3. Transfer of the sold/contributed shares from the private wealth to the commercial wealth	No transposition if the selling party is a tax-blocker company
4. Consideration received by the owner exceeds the nominal value of the shares plus their <i>pro rata</i> of capital contributions reserves (the CCR Value)	<i>Agiolösung</i> : difference between the consideration received and the CCR Value is accounted as “other reserve” and not as capital reserve Undertaking of the owner to not change the accounting qualification in the future sometimes required by the tax authorities (9C_678/2019)

➤ Consequence of a transposition: the consideration received *minus* the CCR Value → Taxed as income instead of tax-free capital gain

Classic Transposition: Cash



➤ HoldCo Financing

HoldCo Balance Sheet

Assets (CHF)	Liabilities (CHF)
10M Target	Debt financing 9M
	Capital reserves 0.9M
	Nominal value 0.1M
	CCR

Target Balance Sheet

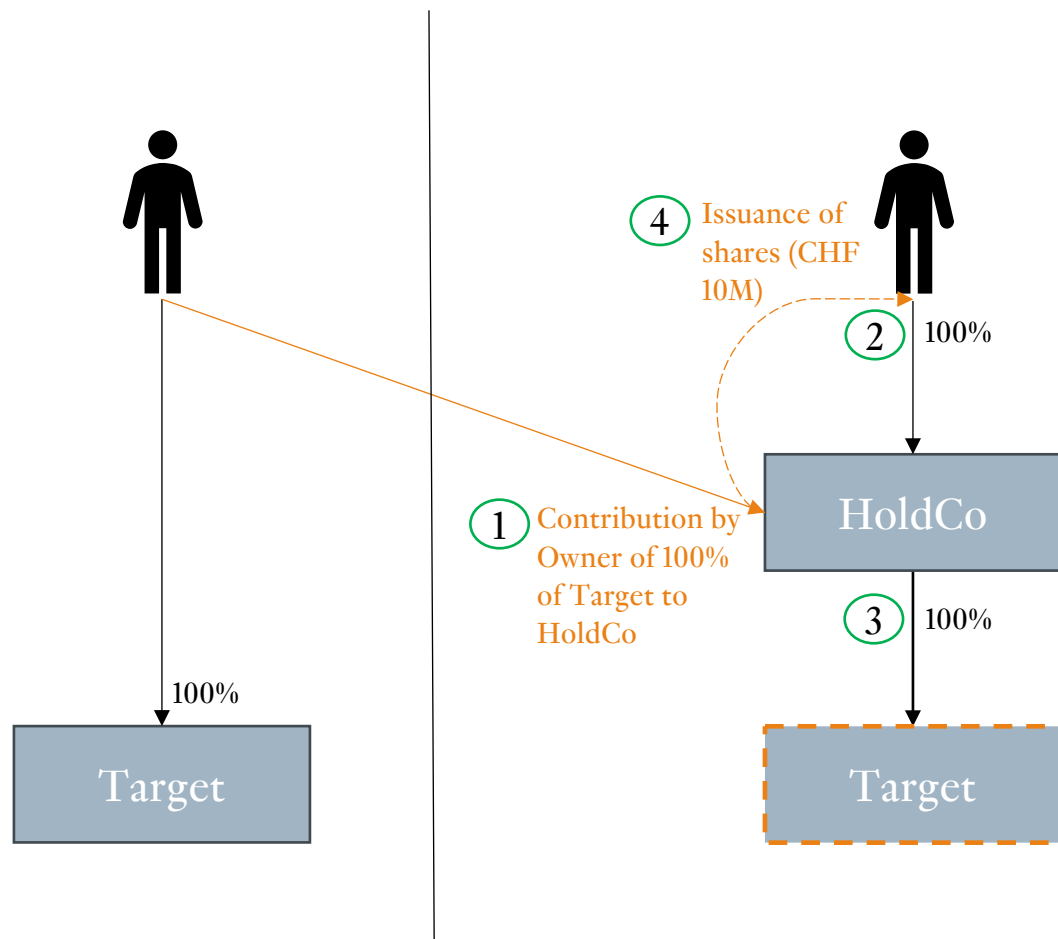
Assets (CHF)	Liabilities (CHF)
1M Cash	Capital reserves 0.9M
	Nominal value 0.1M
	CCR

➤ Conditions of transposition:

1. Sale/contribution of shares ✓
2. To a company controlled ✓
3. Transfer from private wealth to commercial wealth ✓
4. Consideration received > CCR Value ✓

➤ CHF 9M taxed as an income (CHF 10M > CCR Value of Target of CHF 1M)

Classic Transposition: Shares



➤ HoldCo Financing

HoldCo Balance Sheet

Assets (CHF)	Liabilities (CHF)
10M Target	Capital reserves 9.9M Nominal value 0.1M
	CCR

Target Balance Sheet

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➤ CHF 9M taxed as an income (CHF 10M > CCR Value of Target of CHF 1M)



3. Structuring Options

What we want to achieve



- Uses and sources for structuring options:

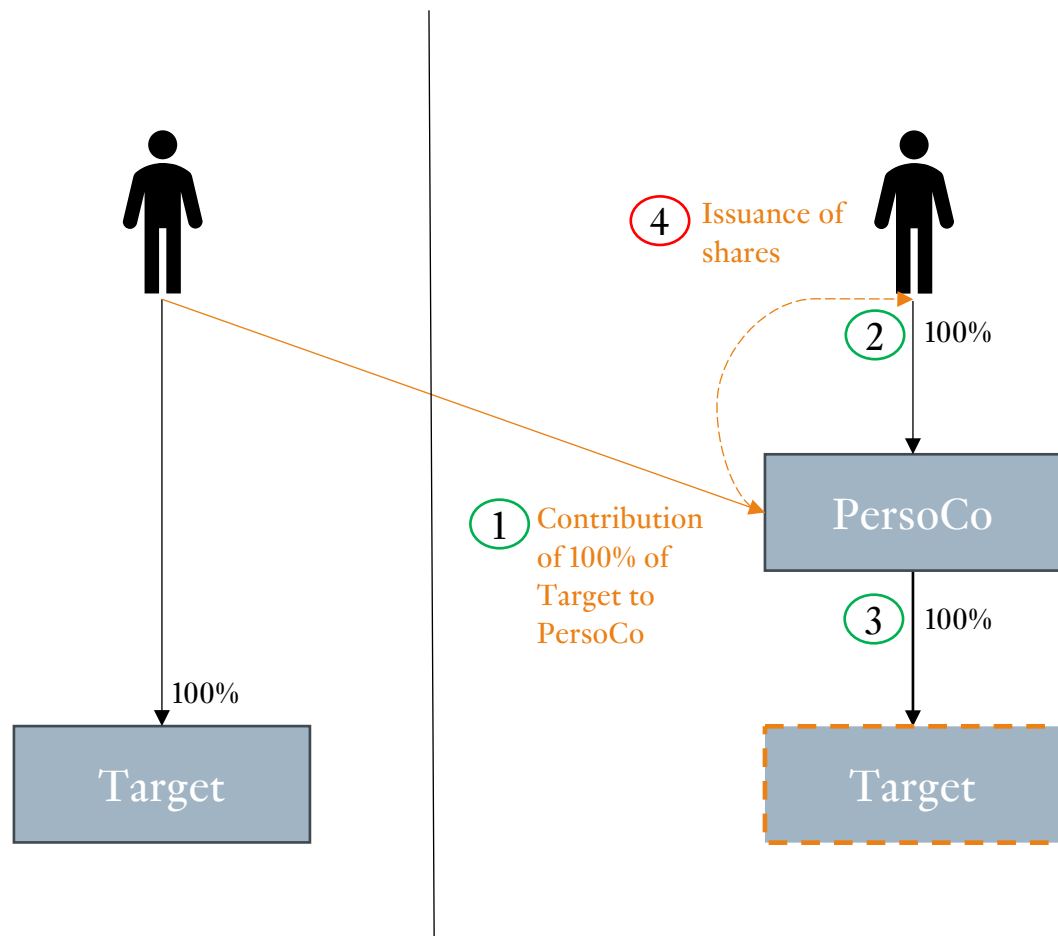
Uses – Acquisition of Target’s shares		Sources		
CHF	Item	CHF	Item	%
6.5M	Cash-out of Owner	4M	Debt financing	
		6M	Equity financing	100%
		2.5M	<i>Cash Investor</i>	42%
3.5M	Reinvestment of Owner	3.5M	<i>Reinvestment of Owner</i>	58%
10M	TOTAL	10M	TOTAL	

- No transposition and as little tax as possible



3.1 Structuring Option 1 – Creation of PersoCo

Step 1 – Creation of PersoCo



- Contribution of Target at market value

PersoCo Balance Sheet

Assets (CHF)	Liabilities (CHF)
10M Target	Other reserves 9M
	Capital reserves 0.9M } CCR
	Nominal value 0.1M
10M Total	Total 10M

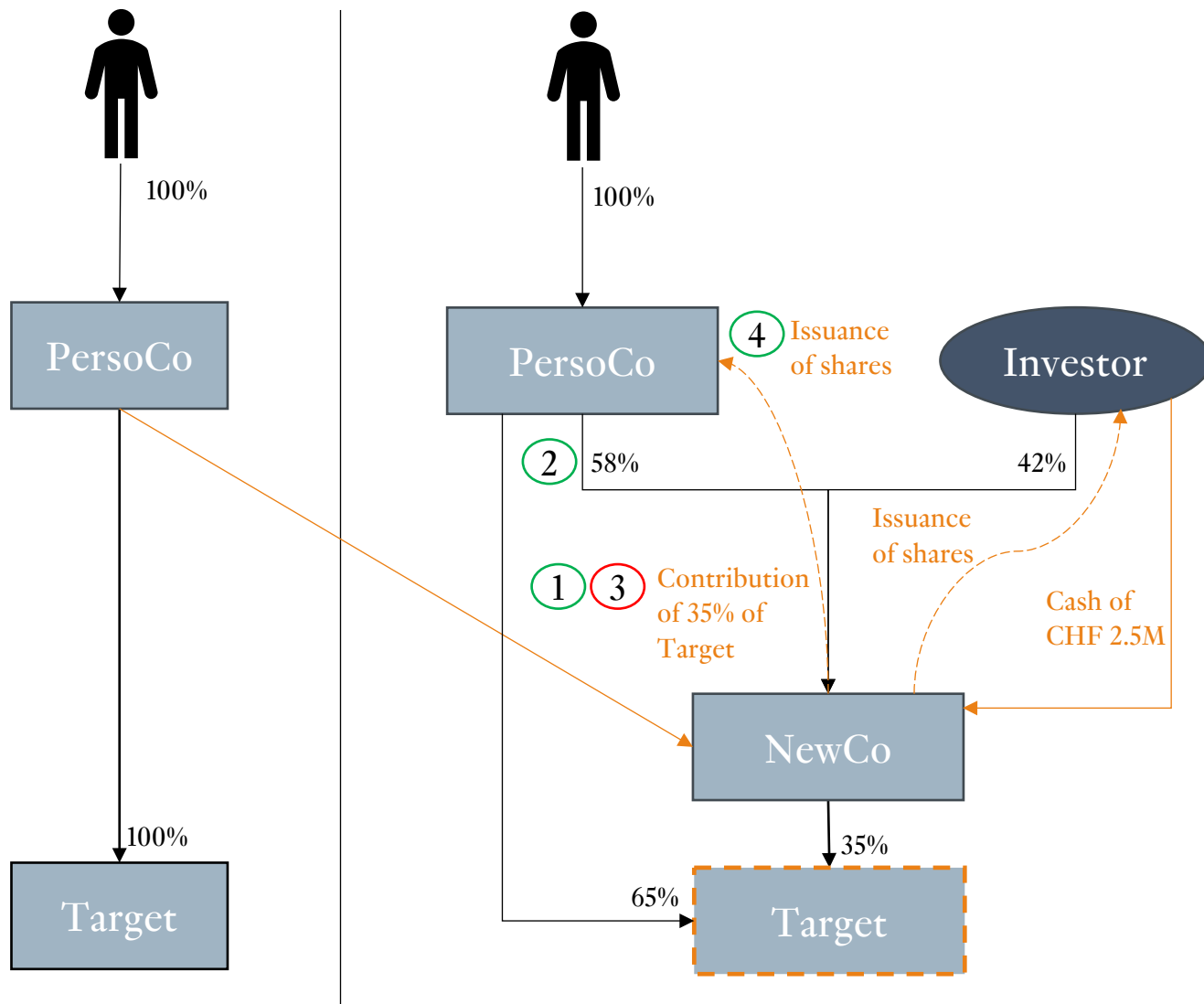
- Possibility to contribute Target at CCR Value

- Conditions of transposition:

1. Sale/contribution of shares ✓
2. To a company controlled ✓
3. Transfer from private wealth to commercial wealth ✓
4. Consideration received > CCR Value → *Agiolösung* ✗

- “Quasi-merger” exemption → No stamp duty

Step 2 – Constitution of NewCo



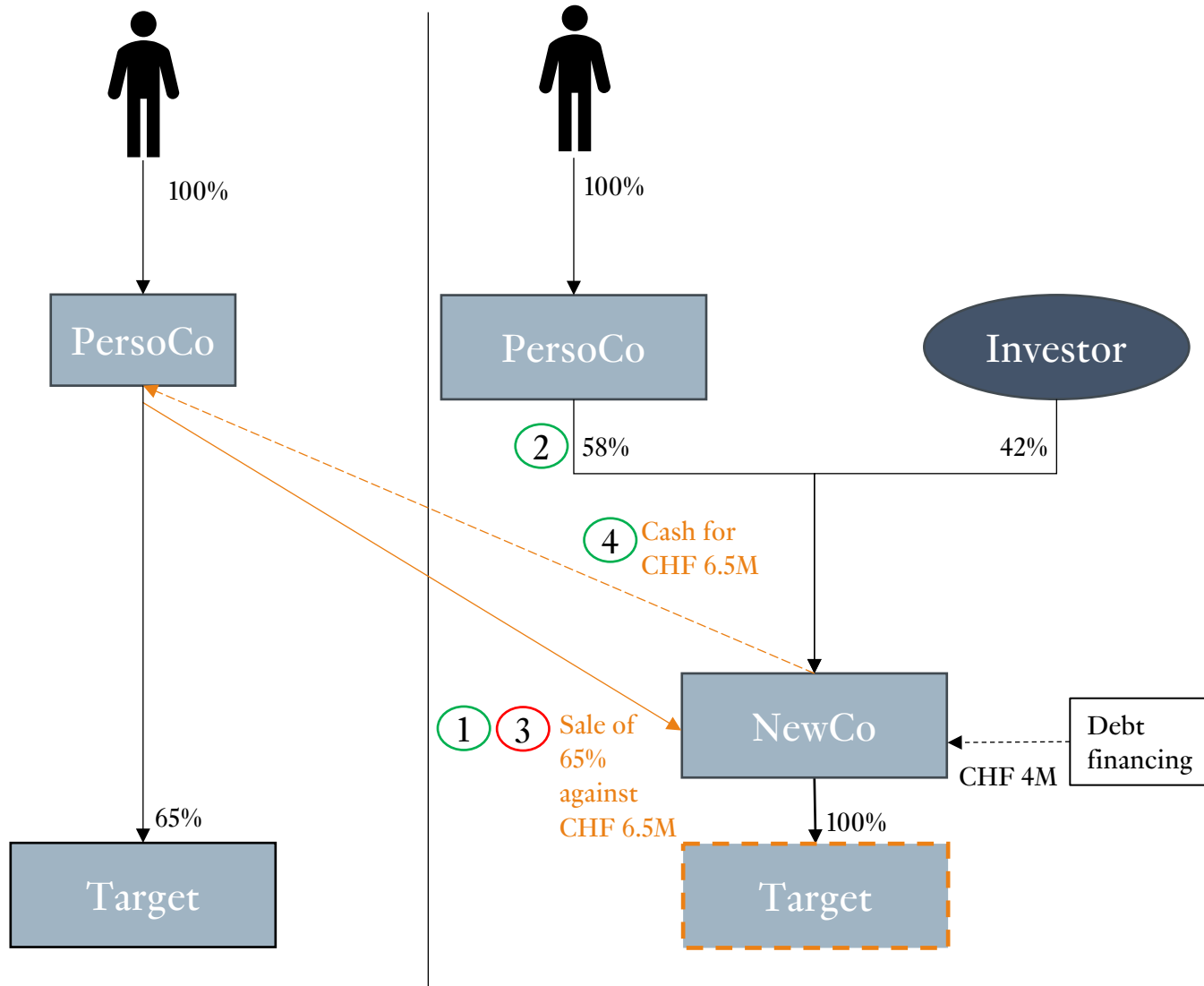
- If no gain on contribution by PersoCo of Target → No taxable event

NewCo Balance Sheet

Assets (CHF)	Liabilities	CHF	%
3,5M Target	Equity	6M	100
2,5M Cash	Capital reserves (cash Investor)	2.458	42
	Nominal value (cash Investor)	0.042	
	Capital reserves PersoCo	3.442	58
	Nominal value PersoCo	0.058	

- Conditions of transposition:
 1. Sale/contribution of shares ✓
 2. To a company controlled ✓
 3. Transfer from private wealth to commercial wealth ✗
 4. Consideration received > CCR Value → No Agiolösung ✓
- Stamp duty PersoCo → “Quasi-merger” exemption
- Stamp duty Investor → alternative transaction structure possible (same as slides 16-18)

Step 3 – Sale of 65%



- Drawdown of debt financing to finance sale
- Possible income tax of CHF 6.5M purchase price

NewCo Balance Sheet

Assets (CHF)	Liabilities (CHF)
10M Target	Debt financing 4M
	Equity Investor 2.5M
	Equity PersoCo 3.5M
10M Total	Total 10M

- Conditions of transposition:

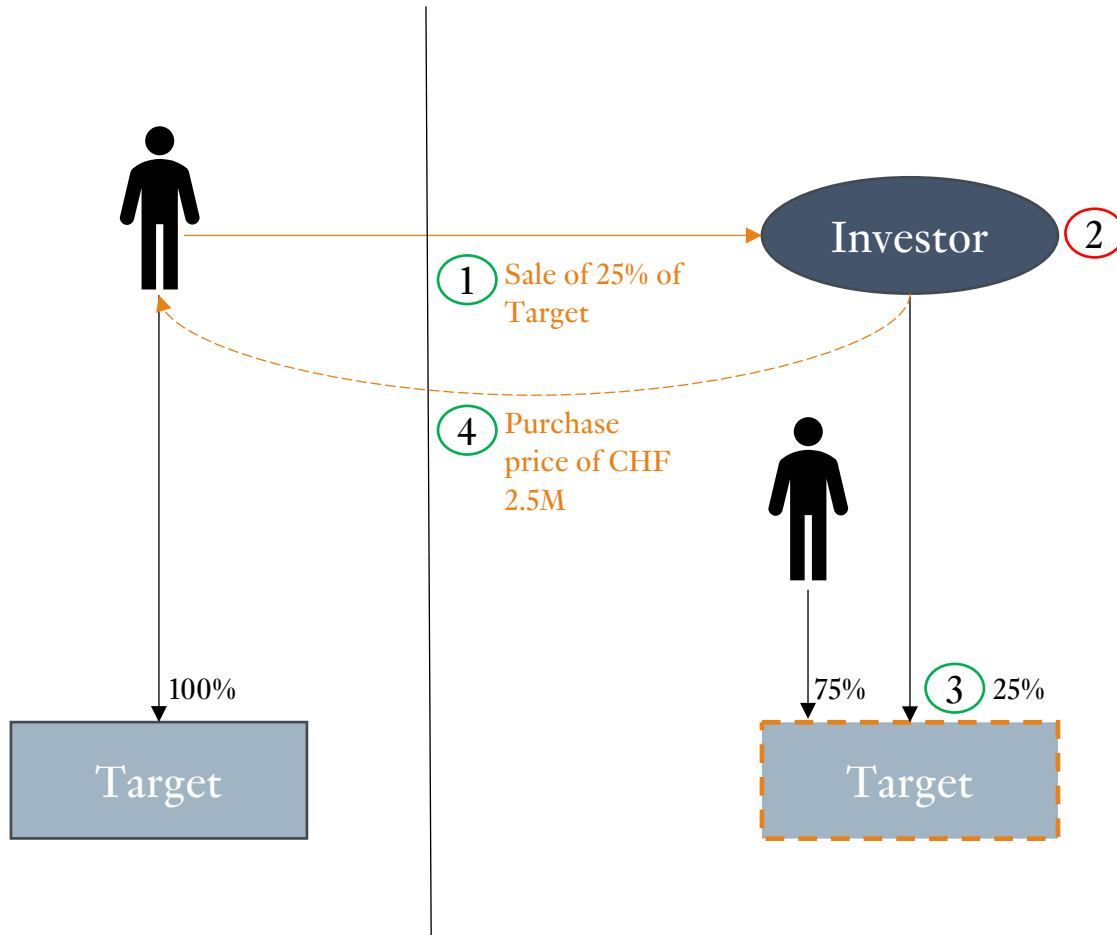
1. Sale/contribution of shares ✓
2. To a company controlled ✓
3. Transfer from private wealth to commercial wealth ✗
4. Consideration received > CCR Value → No Agiolösung ✓

- Pros: no transposition, no income tax on CHF 6.5M
- Cons: cash sits at PersoCo level



3.2 Structuring Option 2 – Private Wealth and Partial Transposition

Step 1 – Sale of 25%

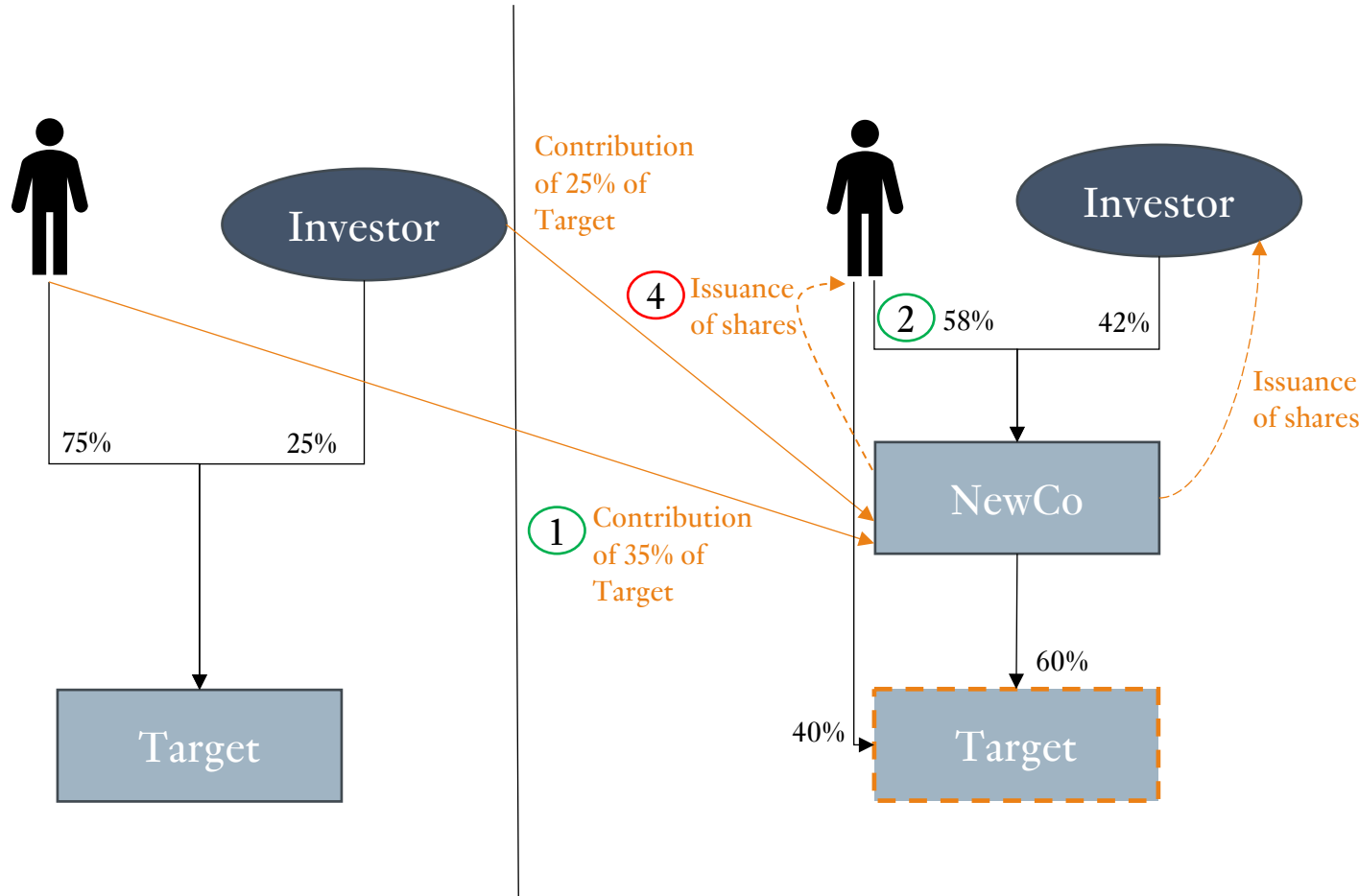


➤ Tax-exempted capital gain

➤ Conditions of transposition:

1. Sale/contribution of shares ✓
2. To a company controlled ✓
3. Transfer from private wealth to commercial wealth ✗
4. Consideration received > CCR Value → No *Agiolösung* ✓

Step 2 – Constitution of NewCo (contributing 60%)



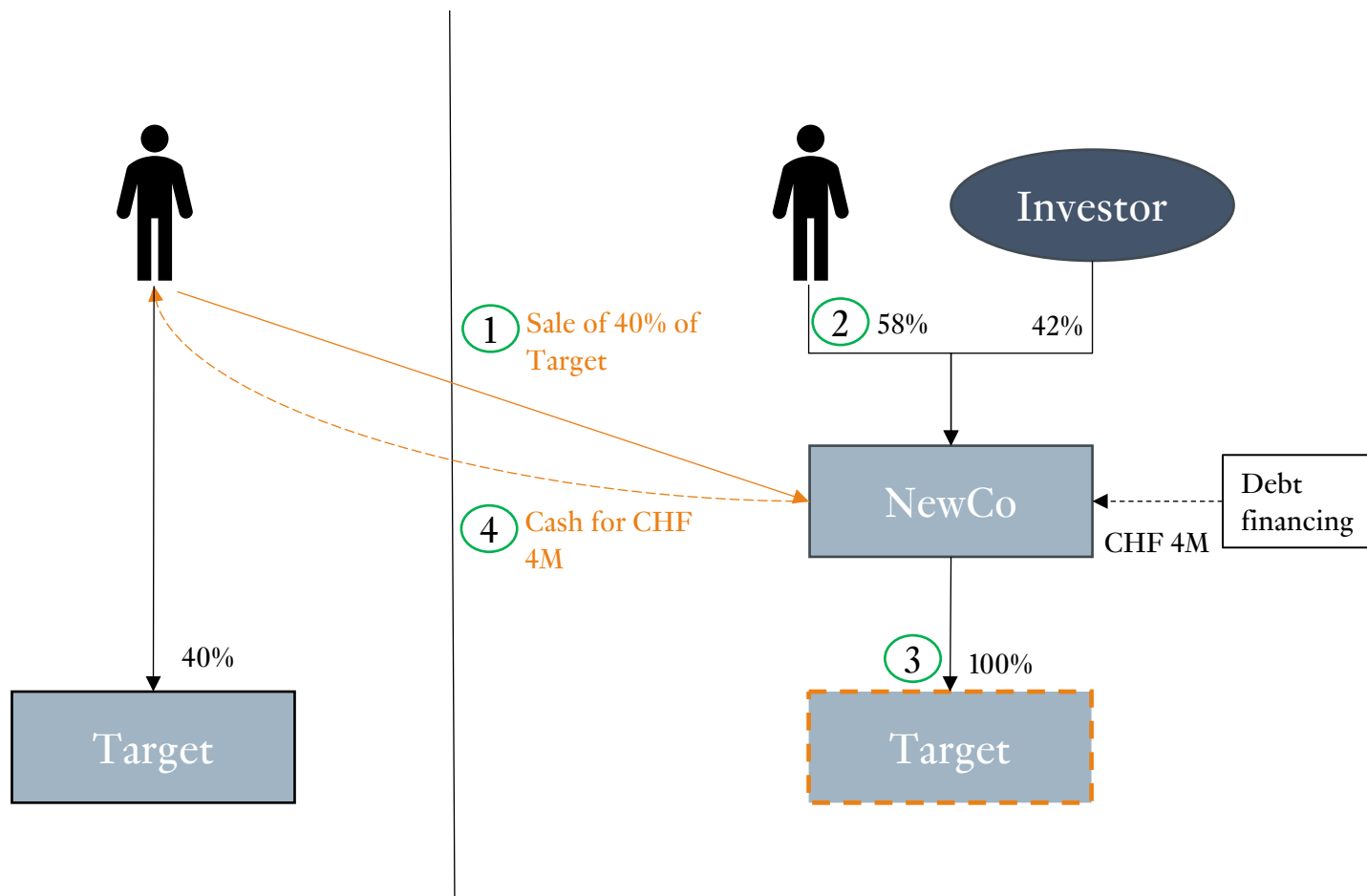
- No stamp duty based on “quasi-merger” exemption

NewCo Balance Sheet

Assets (CHF)	Liabilities	CHF
6M Target	Equity	6M
	<i>Capital reserves Investor</i>	2.458
	<i>Nominal value Investor</i>	0.042
	<i>Other reserves Owner</i>	3.442
	<i>Nominal value Owner</i>	0.058
6M Total	Total	6M

- Conditions of transposition:
 1. Sale/contribution of shares ✓
 2. To a company controlled ✓
 3. Transfer from private wealth to commercial wealth ✓
 4. Consideration received > CCR Value → Agiolösung ✗

Step 3 – Sale of 40%



NewCo Balance Sheet

Assets (CHF)	Liabilities (CHF)
10M Target	Debt financing 4M
	Equity Investor 2.5M
	Equity Owner 3.5M
10M Total	Total 10M

➤ Conditions of transposition:

1. Sale/contribution of shares ✓
2. To a company controlled ✓
3. Transfer from private wealth to commercial wealth ✓
4. Consideration received > CCR Value ✓

➤ Transposition triggering income tax on purchase price of CHF 4M *minus* CCR Value (i.e. CHF 400,000) → issue on portion of the debt financing

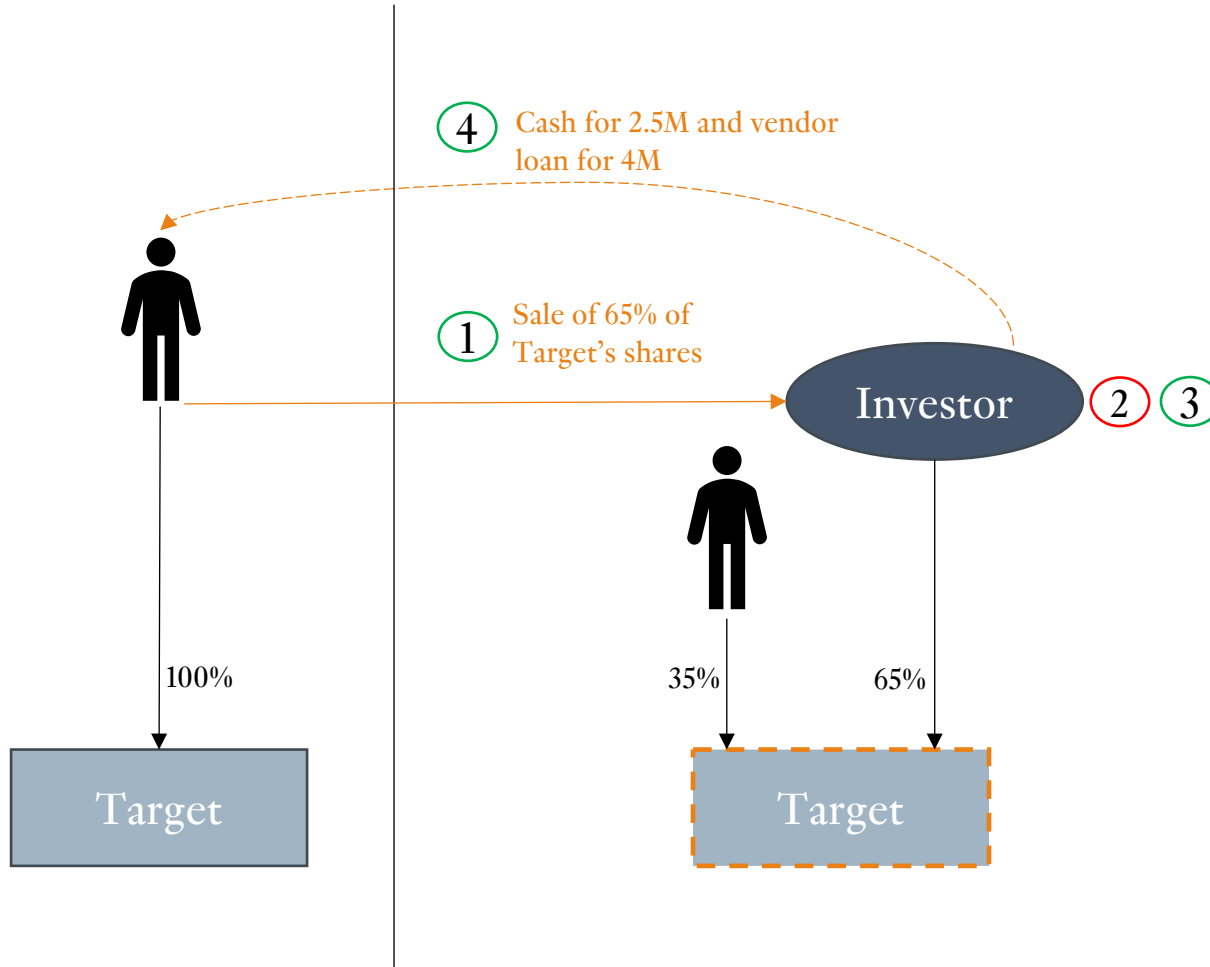
➤ Pros: no stamp duty and partial tax-free capital gain

➤ Cons: income tax on CHF 3.6M



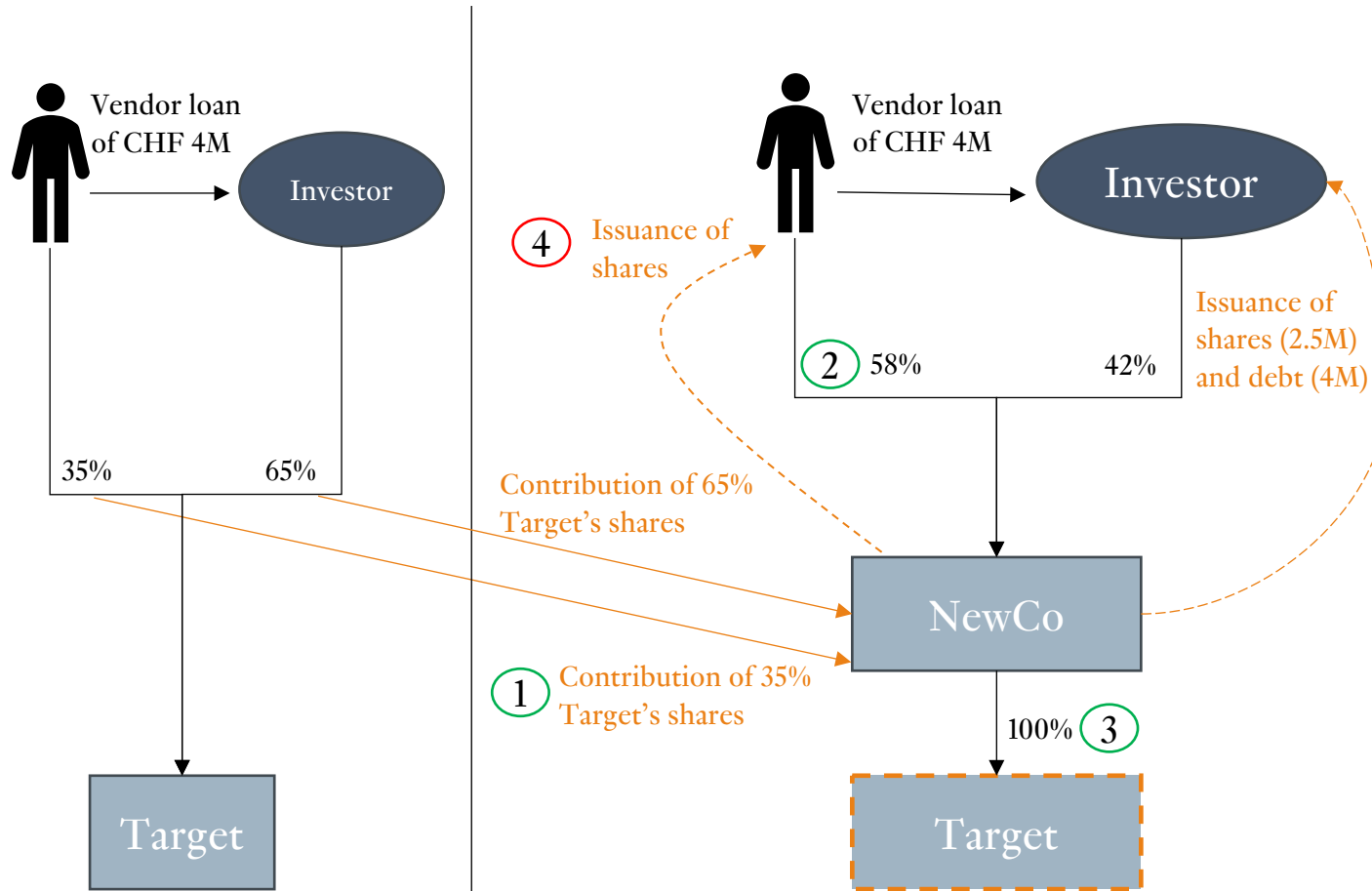
3.3 Structuring Option 3 – Private Wealth and No Transposition

Step 1 – Sale of 65%



- Sale of 65% of Target shares to Investor for CHF 2.5M cash and CHF 4M vendor loan
- Conditions of transposition:
 1. Sale/contribution of shares ✓
 2. To a company controlled ✗
 3. Transfer from private wealth to commercial wealth ✓
 4. Consideration received > Nominal Value → *Agiolösung* ✓
- Tax exempted capital gain for the owner on CHF 2.5M and question mark on CHF 4M?

Step 2 – Constitution of NewCo



➤ Contribution in kind by Investor and Owner

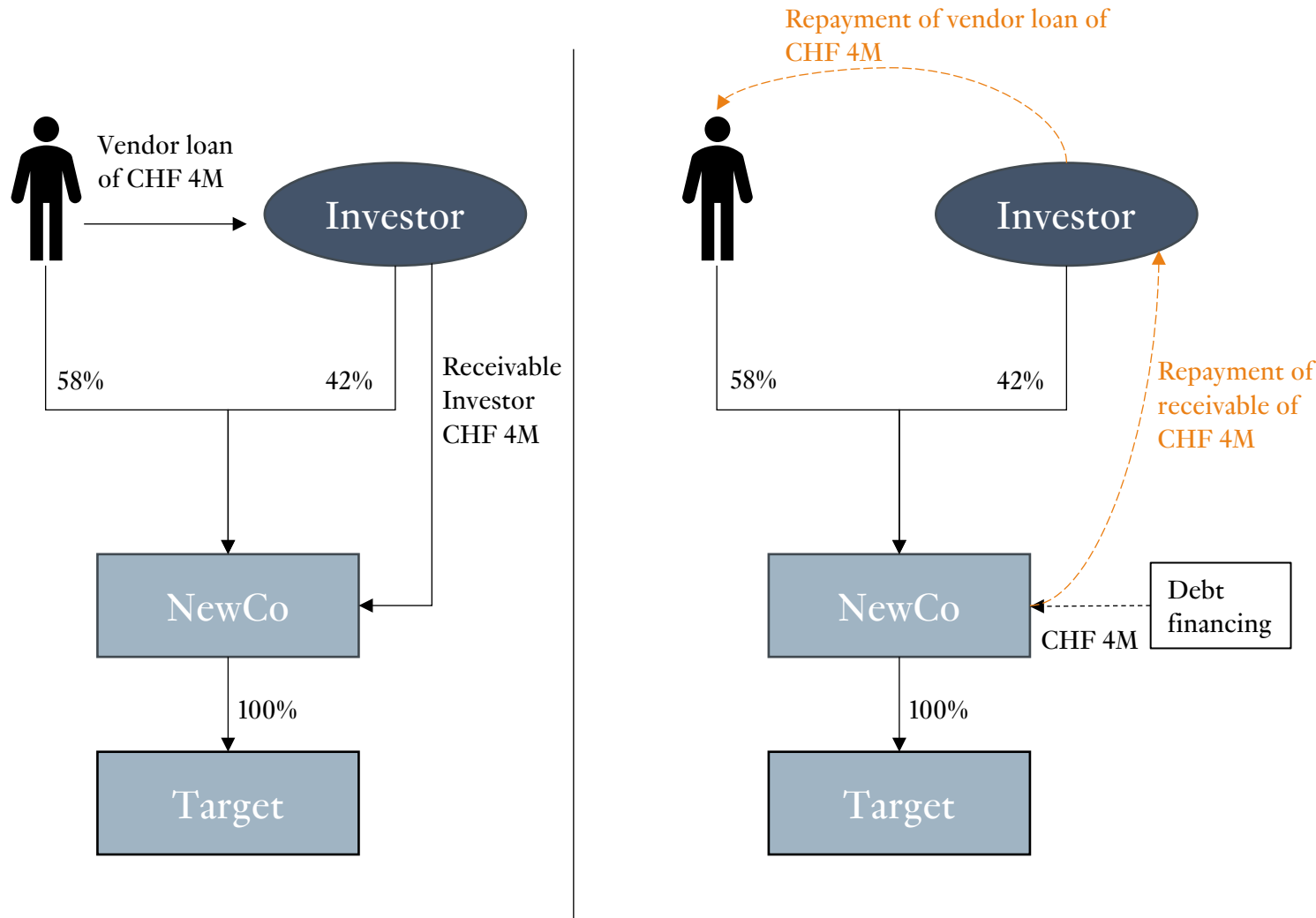
NewCo Balance Sheet

Assets (CHF)	Liabilities	CHF
10M Target	Debt to Investor	4M
	Equity	6M
	<i>Capital reserves Investor</i>	2.458
	<i>Nominal value Investor</i>	0.042
	<i>Other reserves Owner</i>	3.442
	<i>Nominal value Owner</i>	0.058
10M Total	Total	10M

➤ Conditions of transposition:

1. Sale/contribution of shares ✓
2. To a company controlled ✓
3. Transfer from private wealth to commercial wealth ✓
4. Consideration received > Nominal Value → *Agiolösung* ✗

Step 3 – Repayments



- Drawdown of the debt financing
- Repayment of Investor's receivable
- Repayment of the Owners' vendor loan
- Tax ruling necessary

NewCo Balance Sheet

Assets (CHF)	Liabilities (CHF)
10M Target	Debt Investor 4M
4M Cash	Debt financing 4M
	Equity Investor 2.5M
	Equity Owner 3.5M
10M Total	Total 10M

- Pros: no tax
- Cons: deal uncertainty



4. Shareholders' Agreement

Shareholders' Agreement



The main points of attention for the owner and the investor are:

- The exit process
 - ❖ Who can trigger it?
 - ❖ At what valuation?
 - ❖ What is the process?
- The process in case of a disagreement between the owner and the investor
 - ❖ Breach of the SHA
 - ❖ Deadlock situation

Shareholders' Agreement – Exit Process



Tensions/Interests of the Parties			
Topics	Owner's tensions/interests	Investor's tensions/interests	How to bridge the gap
Triggering persons	<ul style="list-style-type: none"> Retain control No forced exit 	<ul style="list-style-type: none"> Investment period Liquidity 	<ul style="list-style-type: none"> Owner triggers: <ul style="list-style-type: none"> Partial/full drag-along/tag-along Sale process Investor triggers: <ul style="list-style-type: none"> Drag-along Right of first refusal/right of first offer of owner Sale process
Timing	<ul style="list-style-type: none"> Longer horizon 	<ul style="list-style-type: none"> Investment period 	<ul style="list-style-type: none"> Blocking period Obligation to give a mandate to an investment bank after a certain time
Valuation	<ul style="list-style-type: none"> Low entry price 	<ul style="list-style-type: none"> High entry price Return on investment wanted 	<ul style="list-style-type: none"> Minimum purchase price (limited in time?) Third-party valuation
Process	<ul style="list-style-type: none"> Retain control 	<ul style="list-style-type: none"> Protection on timing and valuation 	<ul style="list-style-type: none"> Obligation to give a mandate to an investment bank after a certain time Minimum purchase price
Put/Call	<ul style="list-style-type: none"> Potential financing issue Price Retain control 	<ul style="list-style-type: none"> Price Does not want control over company 	<ul style="list-style-type: none"> Appropriate formula (LTM 24 months, floating multiple within a range determined by expert) → no market price Careful valuation → real estate, build up, minority participation Timing → possibility to postpone exercise Financing

Shareholders' Agreement - Breach



- Investor most likely cannot terminate the owner
- SHA might include a loyalty obligation, serving as proxy for a breach of the owner's employment agreement, whose breach would give rights to the investor
- Remedy of the parties in case of a breach of the SHA:
 - ❖ Call option of the owner/investor
 - ❖ Put option of the owner/investor
- Same tensions/interests as in case of exit process

Shareholders' Agreement – Deadlock Situation



Possible Right under the SHA	Owner's perspective	Investor's perspective
Shotgun clause	<ul style="list-style-type: none">Owner has a risk to lose his/her shares in the company where he/she probably wants to retain controlOwner can be able to buy-out the investorOutcome of a shotgun clause is unpredictable → incentive to find a solution to a deadlock situation	<ul style="list-style-type: none">Investor has a risk to have to buy the shares of the owner which is not consistent with a minority investment.Investor may be able to exit its investmentOutcome of a shotgun clause is unpredictable → incentive to find a solution to a deadlock situation
Mandate given to an investment bank	<ul style="list-style-type: none">Same as a mandate given in relation to an exit	<ul style="list-style-type: none">Same as a mandate given in relation to an exit

Shareholders' Agreement – Others



The following standard rights and/or obligations shall also be included in the shareholders' agreement:

- Composition of the board of directors
- Veto rights of the investor
- Information rights of the investor
- Transfer restrictions
 - ❖ Lock-up period
 - ❖ Permitted transfers
 - ❖ Right of first refusal/offer
 - ❖ Drag-along right
 - ❖ Tag-along right



5. Conclusion



Conclusion

- The transposition provisions, and to a lesser extent the other potential tax issues, are problematic in relation to the structuring of an OBO in Switzerland and can prevent such transactions.
- However, some structures enable the implementation of an OBO even if it complicates the deal and render it more costly.
 - ❖ An OBO through the creation of a PersoCo (option 1) is a decent structuring option but not tax efficient in the sense that the owner cannot achieve a tax-free cash-out.
 - ❖ Option 3 is certainly the best option but is subject to a tax ruling.
- The shareholders' agreement plays a central role for the investor in an OBO and the negotiations of protective provisions prove to be tough given the somewhat opposite interests of the parties.



Thank you for your attention

Jacquemoud Stanislas
29, rue de la Coulouvrenière
Case postale
1211 Genève 8, Suisse

Jslegal.ch

Téléphone +41 22 716 96 96
Fax +41 22 346 89 64
info@jslegal.ch