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INDEPENDENT TAX CONSULTING



Skatteverket – International Tax Planning



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Agenda

- Introduction
- General remarks on International Tax Planning
- Analysis of International Tax Planning Models and Indicators
- International IP Tax Planning and the BEPS Perspective



Introduction

- CORIT Advisory
 - Ambition of being top quality boutique firm.
 - Emphasis on high-end, international and complex tax matters.
 - Fully credible and independent alternative to traditional service providers.
 - Tax advisory based on:
 - Academic ties
 - Business and framework understanding
 - True advisory approach (Not a cross disciplinary sales agenda)
 - Strict focus on quality and technical competences
 - International perspective
- Providing services to leading public and private organisations
- Our involvement in the topic

International Tax Planning

- What is international tax planning?
 - *"International tax planning is a multifaceted discipline and may be defined as the lawful structuring (through the legally acceptable use of domestic tax law and tax treaties) of cross-border investments or activities with the objective of optimizing the overall tax burden and maximizing net income."*
 - *See Hoor & Bock in Tax Notes International 2013, p. 913.*
- Includes optimization of effective tax rate (ETR) and mitigation of risks and uncertainty.
- What is aggressive international tax planning?
 - *"Taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability."*
 - *See Commission Recommendation of 6.12. 2012 on Aggressive Tax Planning.*



International Tax Planning

- Nothing wrong in carrying out tax planning
 - Avoid double taxation
 - Direct opportunities in existing tax legislation (e.g. depreciations)
 - Succession on business transactions
 - Effective Tax Rate in competition
- This presentation excludes tax evasion and illegal tax avoidance (this is not ATP)

International Tax Planning

- Which techniques are generally used internationally?
 - Guarding against different position from authority side:
 - Tax clauses in agreements, binding rulings, APAs etc.
 - General overview:
 - Corporate structures, holding companies etc.
 - Avoidance of withholding taxes
 - Double tax relief
 - Tax effective supply tax chain management
 - Placement of production, sales and services
 - Migration and relocation of companies, including head quarters
 - Transfer pricing
 - Financing structures and financing terms
 - Mobile income
 - Treaty shopping
 - Hybrid entities
 - Hybrid financial instruments
 - Loss utilization, including tax consolidation
 - Double dips
 - Leasing
 - IP tax planning

The Models - ATP Structures

- Model ATP structures serve as a means of identifying a set of ATP indicators against which the risk exposure of tax systems can be tested.
- OECD Models:
 - A hybrid financing structure
 - A one-tiered IP and cost contribution arrangement
 - A two-tiered IP structure with a cost contribution-arrangement
- Four additional ATP structures:
 1. An offshore loan structure
 2. A hybrid entity ATP structure
 3. An interest free loan
 4. A patent box ATP structure

The Models - ATP Structures

1 Offshore loan

2 Hybrid financing

3 Hybrid entity

4 Interest free loan

IP models

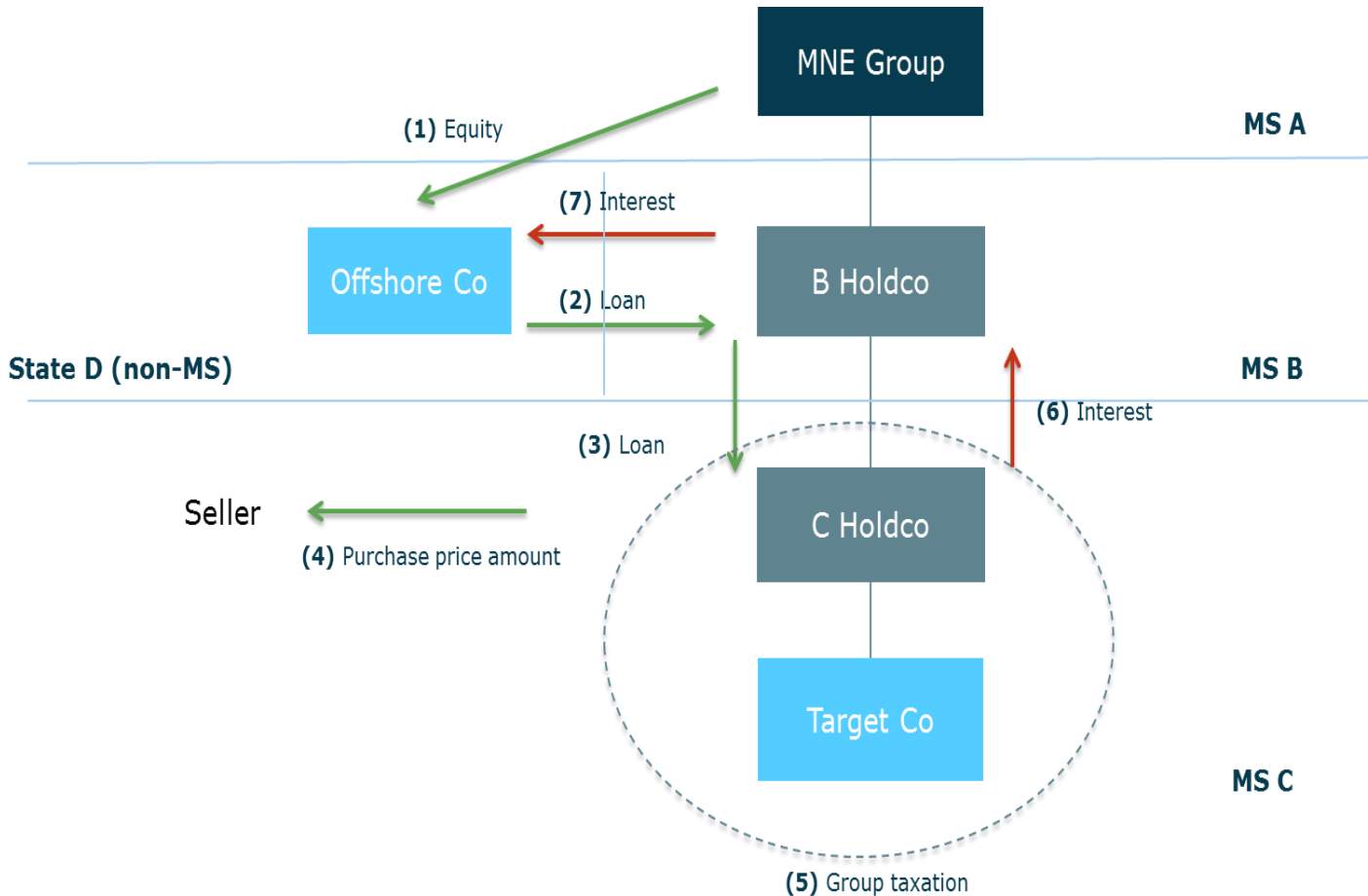
5 Patent box

6 Two-tiered IP

7 IP and CCA

- Model ATP-structures were selected from OECD BEPS reports, other tax literature and the authors' professional knowledge.

Model 1 – Offshore Loan

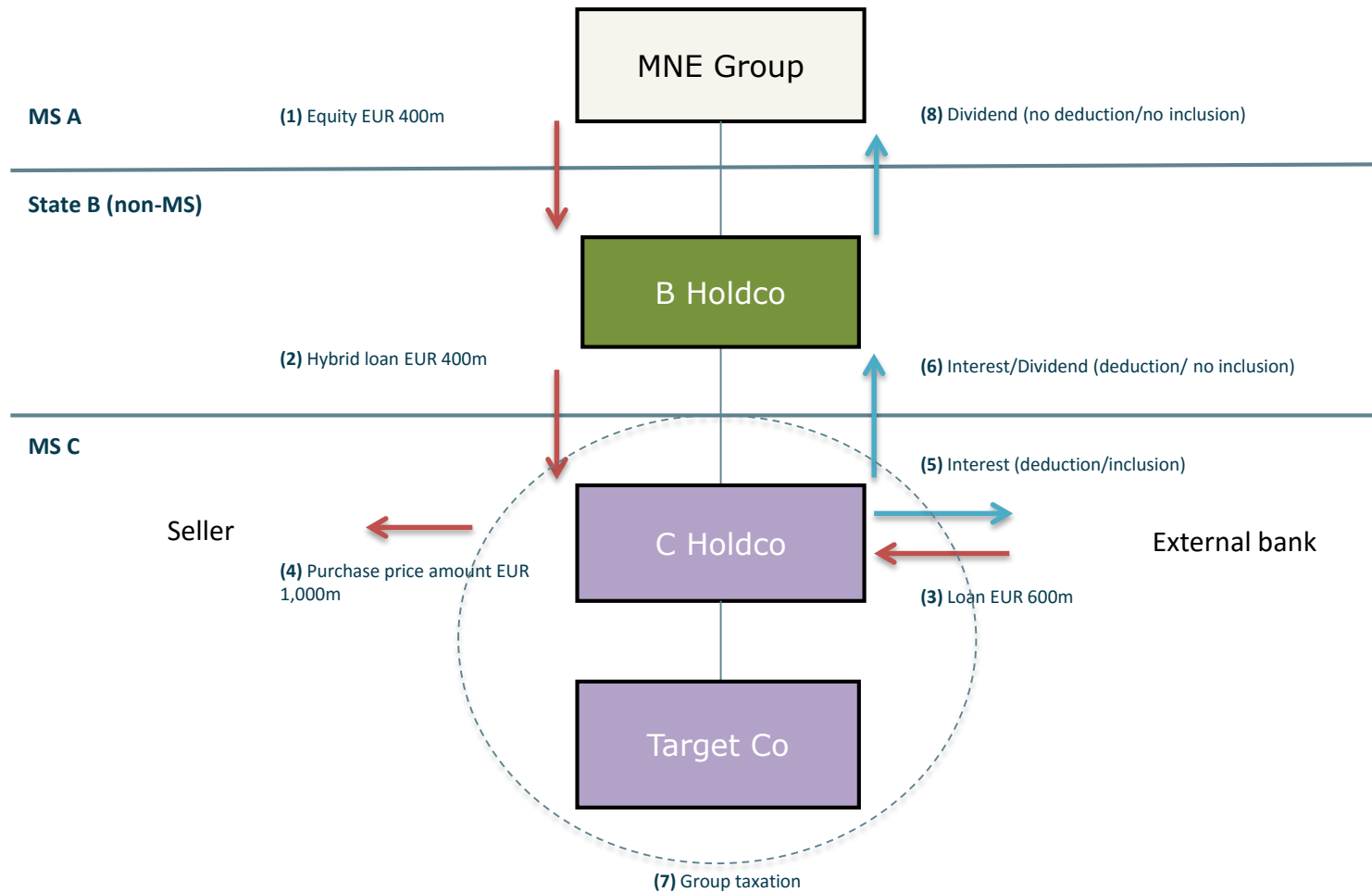




Model 1 - Indicators

MS A	MS B	MS C	State D
No taxation of dividends received.	Tax deduction for interest costs.	Tax deduction for interest costs.	No withholding tax on dividends paid.
No CFC Rules.	Tax deduction does not depend on the tax treatment in the creditor's state.	No thin cap/interest limitation-rules.	Absence of corporate income taxation.
	No thin cap/interest limitation-rules.	No withholding tax on interest payments.	
	No withholding tax on interest payments.	No beneficial owner-test for reduction of withholding tax.	
	Unilateral ruling on interest spread.	Group taxation with acquisition holding company allowed.	
	No general or specific anti-avoidance rules to counter the structure.	No general or specific anti-avoidance rules to counter the structure.	

Model 2 – Hybrid Financing

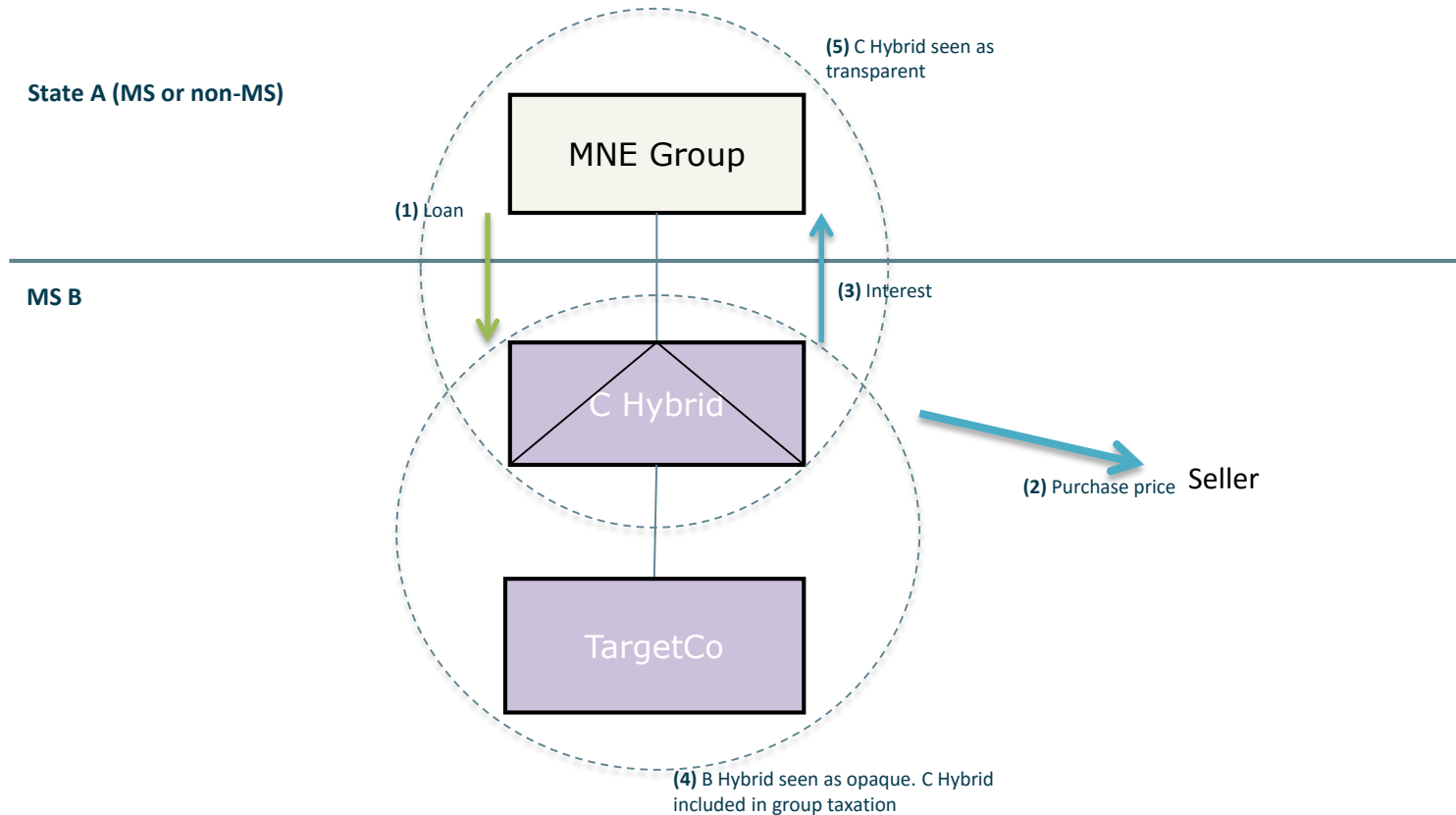




Model 2 – Indicators

State A	State B	State C
<ul style="list-style-type: none">• No taxation of dividends received.• No CFC Rules.	<ul style="list-style-type: none">• No withholding tax on dividends paid.• Income from certain hybrid instruments can be treated as tax free dividend or similar.• No taxation of dividends received regardless of deduction by the distributing company (hybrid loan).	<ul style="list-style-type: none">• Tax deduction for interest costs.• Tax deduction does not depend on the tax treatment in the creditor's state.• No interest limitation-rules.• No withholding tax on interest payments.• No effective beneficial owner-test for reduction of withholding tax.• Group taxation with acquisition holding company allowed.• No general or specific anti-avoidance rules to counter the model ATP structures.

Model 3 – Hybrid Entity

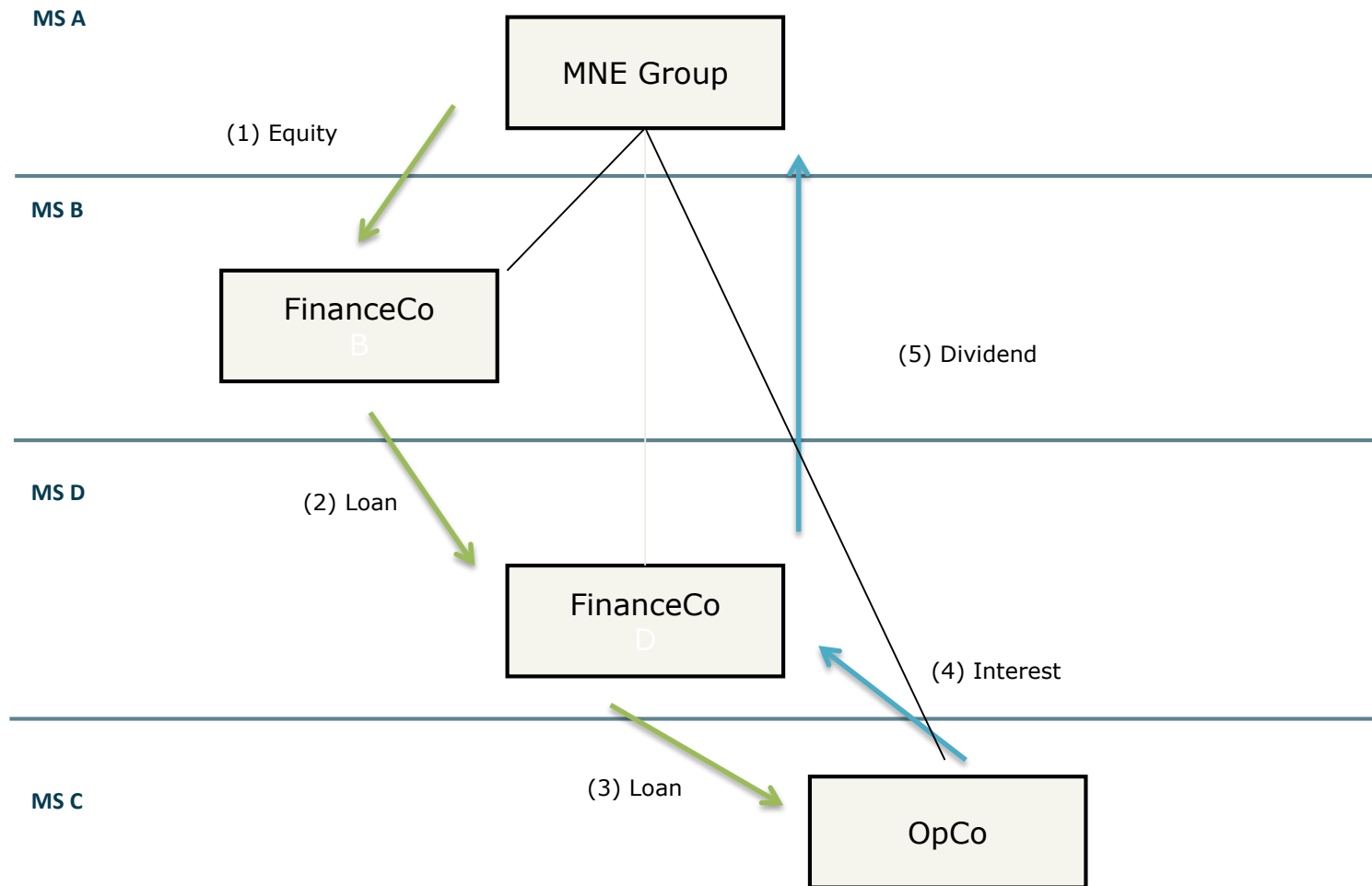




Model 3 – Indicators

State A	State B
<ul style="list-style-type: none">• No rule to counter a qualification mismatch of entities.• No general or specific anti-avoidance rules to counter the model ATP structures.	<ul style="list-style-type: none">• Tax deduction for interest costs.• Tax deduction does not depend on the tax treatment in the creditor's state.• No interest limitation-rules.• No withholding tax on interest payments.• Group taxation with acquisition holding company allowed.• Tax qualification of foreign partnership does not follow that of the foreign state.• No rule to counter a qualification mismatch of entities.• No general or specific anti-avoidance rules to counter the model ATP structures.

Model 4 – Interest-free Loan



Model 4 – Indicators

State A	State B	State C	State D
<ul style="list-style-type: none"> • No taxation of dividends received. • No CFC-rules. • No general or specific anti-avoidance rules to counter the model ATP structures. 	<ul style="list-style-type: none"> • No deemed income from interest-free loan (non-arm's length-transactions). 	<ul style="list-style-type: none"> • No withholding tax on dividends paid. • Tax deduction for interest costs. • Interest deduction allowed for deemed interest costs on interest-free debt. • No taxation of benefit from interest-free debt. • No interest limitation-rules. • No withholding tax on interest payments. • No general or specific anti-avoidance rules to counter the model ATP structures. 	<ul style="list-style-type: none"> • No withholding tax on dividends paid. • Tax deduction for interest costs. • No interest limitation-rules. • No withholding tax on interest payments. • No effective beneficial owner-test for reduction of withholding tax. • No general or specific anti-avoidance rules to counter the model ATP structures.

International IP Tax Planning

- What is IP
 - The notion of intangibles
 - The notion of royalties
- IP Tax Planning in its simplest form
 - Timing:
 - In the start up phase
 - Development of IP
 - Migration of existing IP rights
 - Long term assets v. direct costing
 - Tax and other incentives
 - A tax-friendly structure (model)
 - Low taxation of income (Patent boxes)
 - CFC and other parent-issues?

The Model ATP Structure

1 Offshore loan

2 Hybrid financing

3 Hybrid entity

4 Interest free loan

IP models

5 Patent box

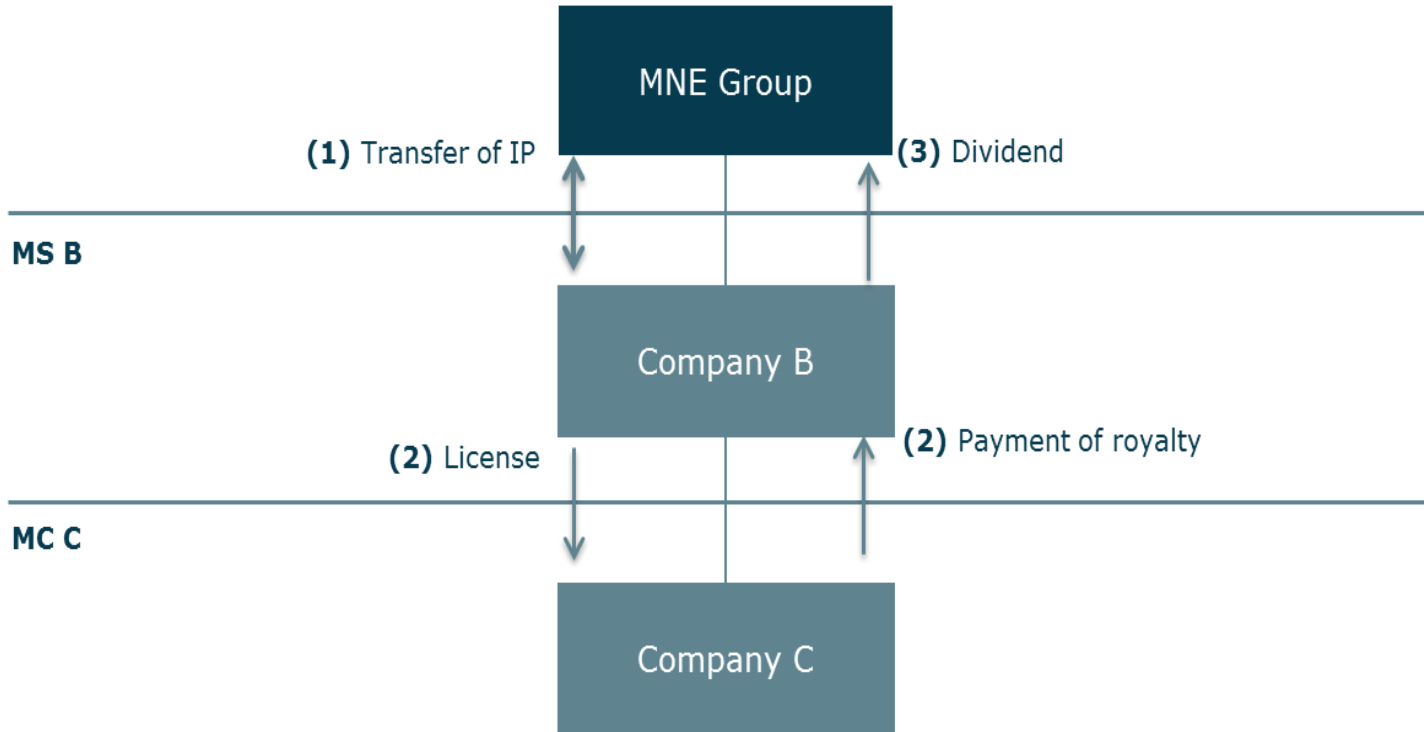
6 Two-tiered IP

7 IP and CCA

- Model ATP-structures were selected from OECD BEPS reports, other tax literature and the authors' professional knowledge.

Model 5 – Patent Box Structure

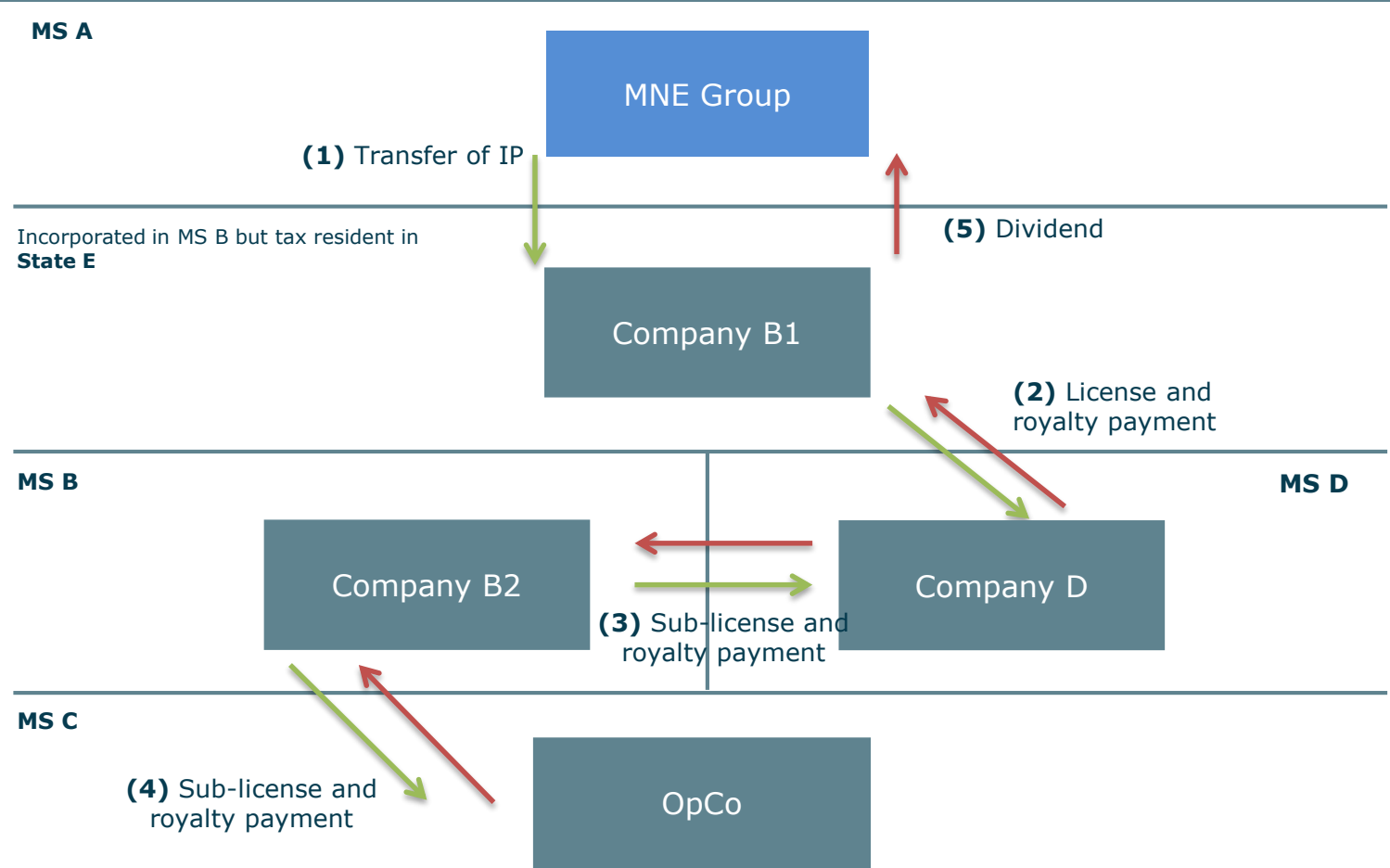
MS A



Model 5 – Indicators

State A	State B	State C
<ul style="list-style-type: none"> • No taxation of dividends received. • No or low taxation of capital gain (fair market value) upon disposal of IP. • No CFC-Rules. 	<ul style="list-style-type: none"> • No withholding tax on dividends paid. • Patent box or other preferential tax treatment of income from IP. 	<ul style="list-style-type: none"> • Tax deduction for royalty costs. • No withholding tax on royalty payments. • No effective beneficial owner-test for reduction of withholding tax. • No general or specific anti-avoidance rules to counter the model ATP structures.

Model 6 – Two-Tiered Structure

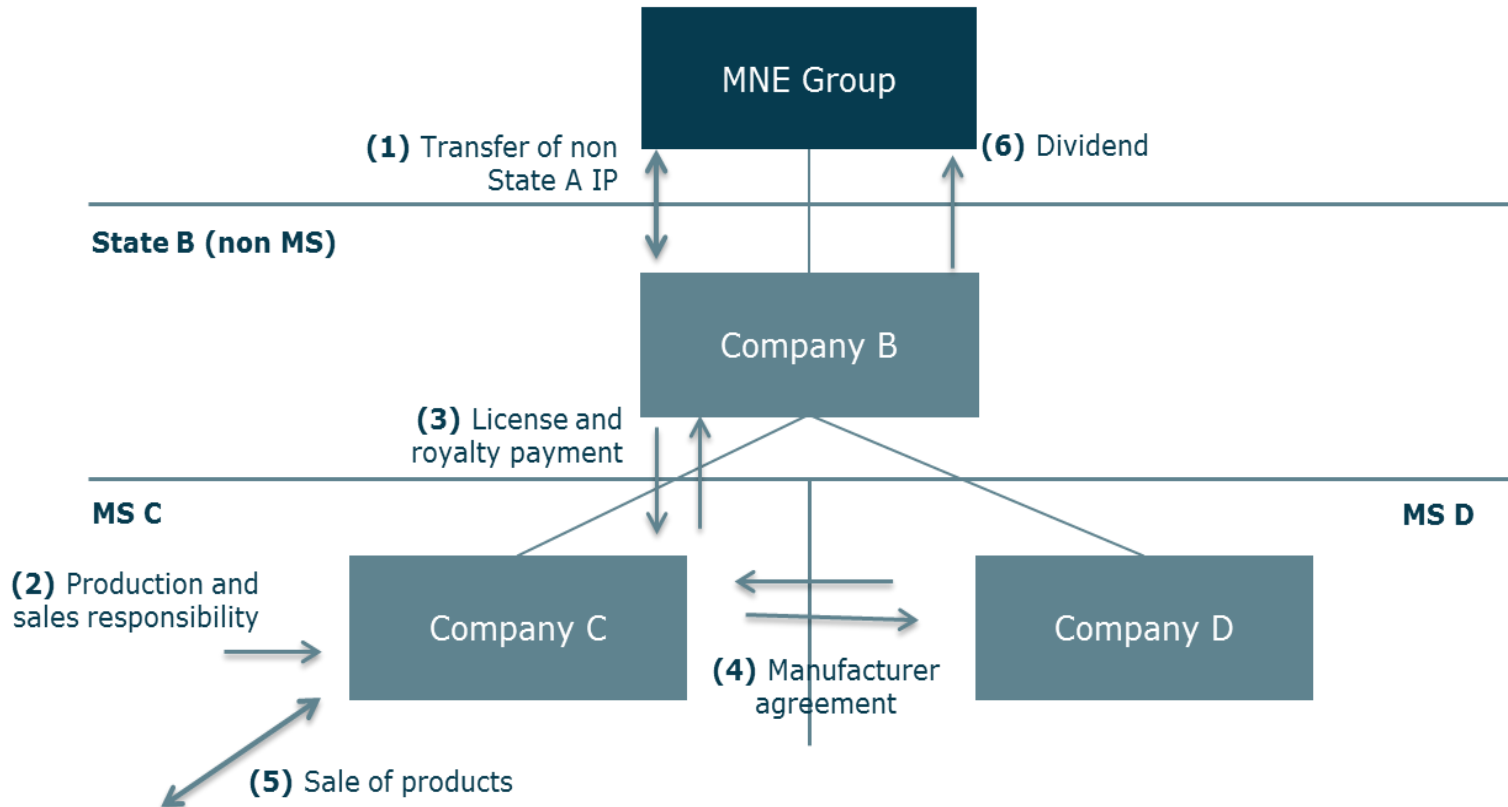


Model 6 – Indicators

State A	State B	State C	State D	State E
<ul style="list-style-type: none"> • No taxation of dividends received. • No or low taxation of capital gain (fair market value) upon disposal of IP. • No CFC-Rules. 	<ul style="list-style-type: none"> • No withholding tax on dividends paid. • Tax deduction for royalty costs. • No withholding tax on royalty payments. • No effective beneficial owner-test for reduction of withholding tax. • Locally incorporated company not tax resident if management/control is situated in another state. • Excess profits are tax exempt (ruling can be obtained). 	<ul style="list-style-type: none"> • Tax deduction for royalty costs. • No withholding tax on royalty payments. • No effective beneficial owner-test for reduction of withholding tax. • No general or specific anti-avoidance rules to counter the model ATP structures. 	<ul style="list-style-type: none"> • Tax deduction for royalty costs. • No withholding tax on royalty payments. • Excess profits are tax exempt (ruling can be obtained). 	<ul style="list-style-type: none"> • No taxation of dividends received.

Model 7 – IP and Cost Contribution Agreement

MS A



Model 7 –Indicators

State A	State B	State C
<ul style="list-style-type: none"> • No taxation of dividends received. • No or low taxation of capital gain (fair market value) upon disposal of IP. • R&D tax incentive obtainable also for costs that are reimbursed. • No CFC-Rules. 	<ul style="list-style-type: none"> • No withholding tax on dividends paid. • Patent box or other preferential tax treatment of income from IP. • Absence of corporate income taxation or very low corporate tax rate. 	<ul style="list-style-type: none"> • Tax deduction for royalty costs. • No withholding tax on royalty payments. • No general or specific anti-avoidance rules to counter the model ATP structures.



EU Anti Tax Avoidance Package

- On 28 January 2016 the European Commission presented its Anti Tax Avoidance Package
- Includes a proposal for directive on BEPS, which includes the following provisions:
 - Interest deduction
 - Exit tax
 - GAAR
 - Switch over clause
 - CFC rules
 - Hybrid mismatches
- Impact?



BEPS Perspective

- BEPS action 8 on intangibles
 - Align transfer pricing outcomes and value creation
 - “Vulnerable to manipulation”
- Four issues are analyzed
 1. Identifying intangibles
 2. Ownership of intangibles
 3. Transfer of intangibles
 4. Arm’s length test of intangibles

BEPS Perspective

Re 1) Identifying intangibles

- Broad, independent definition of intangibles under art. 9:
 1. Not a physical or financial asset,
 2. Capable of being owned or controlled,
 3. Used in commercial activities, and
 4. Use or transfer would be compensated in a transaction between independent parties.
- No legal basis in art. 9 to qualify income – income qualification follows domestic law – arm's length principle only supplements material tax law.
- IP does not include market conditions, group synergies, assembled workforce and location savings etc.

BEPS Perspective

Re 2) Ownership of intangibles

- Two separate issues: 1) ownership of intangibles and 2) joint development of intangibles
- Identification of group members that are entitled to returns from the exploitation of intangibles:
 - A) legal owner test and B) arm's length principle.
- A) Legal owner test:
 - OECD now acknowledges that the legal owner is the owner of intangibles according to art. 9.
 - Thus, in principle all returns derived from the exploitation of the intangibles may initially accrue to the legal owner.

BEPS Perspective

Re 2) Ownership of intangibles (continued)

- B) Arm's length test:
 - Group members must be compensated for functions performed, assets used and risk assumed on an arm's length basis.
 - More focus on significant people functions than on risk and capital.
 - Regular functions
 - Important functions (significant functions)
 - To receive total return on intangibles the legal owner must:
 - Perform and control all functions, including important functions,
 - Provide all assets, including funding, and
 - Bear and control all risks
- Legal owner → economic owner → significant people functions
 - AOA developed for art. 7 will in fact be introduced in art. 9.



BEPS Perspective

Re 3) Transfer and use of intangibles

- Transfer
 - The labels applied to transactions do not control the TP analysis.
 - Written contractual terms vs. actual conduct of the parties.
 - Transfer of combination of intangibles may be subject to a combined TP analysis.
 - Some intangibles are so intertwined that it is not possible to transfer one intangible without transferring the other.
 - E.g. trademarks under a license agreement and goodwill.
 - Transactions including the use of intangibles in combination with performance of services may be subject to a combined TP analysis.



BEPS Perspective

Re 3) Transfer and use of intangibles (continued)

- Use:
 - All intangibles used by group members must be identified for the purpose of:
 1. Comparability analysis,
 2. Choice of best method *and*
 3. Choice of tested party.

BEPS Perspective

Re 4) Arm's length test

- Intangibles vs. other resources
- **Residual income** should not **automatically** be allocated to the legal owner
- **Other factors** have to be considered e.g.: i) risks, ii) market characteristics, iii) location, iv) business strategies and v) group synergies.
- The profit split method
 - The preferred OECD method
- TNMM
 - Not a preferred method



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