



THE CORIT TRANSFER PRICING LECTURES 2025



Agenda

Control over risks and the transfer of functions

- Has something of value been transferred?

Louise Blichfeldt Fjord, Associate Partner, Ph.D., CORIT Advisory and Ass. Professor CBS

- Control over risk in German case law and in practice

Prof. Dr. Sven-Eric Bärsch, Partner, Flick Gocke Schaumburg

- Control over risk in Swedish case law and in practice

Petter Lohi, Director, Svalner

- Panel discussion

Jonathan Bernsen, Global Head of Transfer Pricing, A.P. Moller-Maersk

Dr. Sven-Eric Bärsch, Partner, Flick Gocke Schaumburg

Petter Lohi, Director, Svalner

Break

The Danish Accenture Supreme Court Case

Nikolaj Bjørnholm and Bodil Tolstrup, Bjørnholm Law

Preparing for a world of increased tariffs – Transfer pricing considerations

Jonathan Bernsen, Global Head of Transfer Pricing, A.P. Moller-Maersk

Katja Dyppel Weber, Partner, M.Sc., Ph.D., CORIT Advisory

Light refreshment upstairs

Has something of value been transferred?

Definition of a business restructuring

- TPG 9.1: *“the cross-border reorganisation of the commercial or financial relations between associated enterprises, including the termination or substantial renegotiation of existing arrangements. Relationships with third parties (e.g. suppliers, subcontractors, customers) may be a reason for the restructuring or be affected by it.”*

Accurately delineation of the transaction

- Contractual terms vs. actual conduct
 - TPG: Risk controlling functions determine the right to residual profit (or loss) of an asset...

VS.

- AOA: Significant people functions determine the “economic ownership” of an asset...
- ... provided that the risk-controlling party has access to sufficient funding

Who controls?

- Shareholders, BoD, CEO, C-suites, VPs, Committees...?
 - What if the “risk controller’s” physical location changes?
 - What if reporting line changes within the organization?
 - What if changes are a natural consequence of the group’s lifecycle?
 - What if an arrangement is terminated or substantially renegotiated?
 - What if a parent company has controlled and paid for the development of an asset and an SPV (without employees), profits from the use of this asset?
 - What if the SPV instead is allocated all direct costs associated with the asset?
 - What if the SPV instead pays for development services rendered by the parent?

“Something” for TP and tax purposes?

Does “something” qualify as an intangible asset?

Definition of intangible asset

- TPG 6.6: *“Something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.”*
 - Best practices, internal procedures, human capital, non-contractual relations to customers or suppliers, network effects, and DEMPE functions?

Does it constitute a transfer of the asset itself or a right to use the asset?

- SKM2003.586.HR
- Danish tax depreciation act sec. 40 includes intangible assets **such as** goodwill, know-how patent rights, copyrights and artist rights, as well as rights to designs or trademarks or the right under a yield, lease or rental agreement.
 - Best practices, internal procedures, human capital, non-contractual relations to customers or suppliers, network effects, and DEMPE functions?

If it is for the right to use the asset, is it subject to WHT?

- OECD Model Art. 12 (2) on royalties is broader than domestic definition in Danish source tax act sec. 65(4)



LOUISE BLICHFELDT FJORD

Associate Partner

Transfer of functions & control over risk

Some insights from Germany

February 27, 2025

Agenda

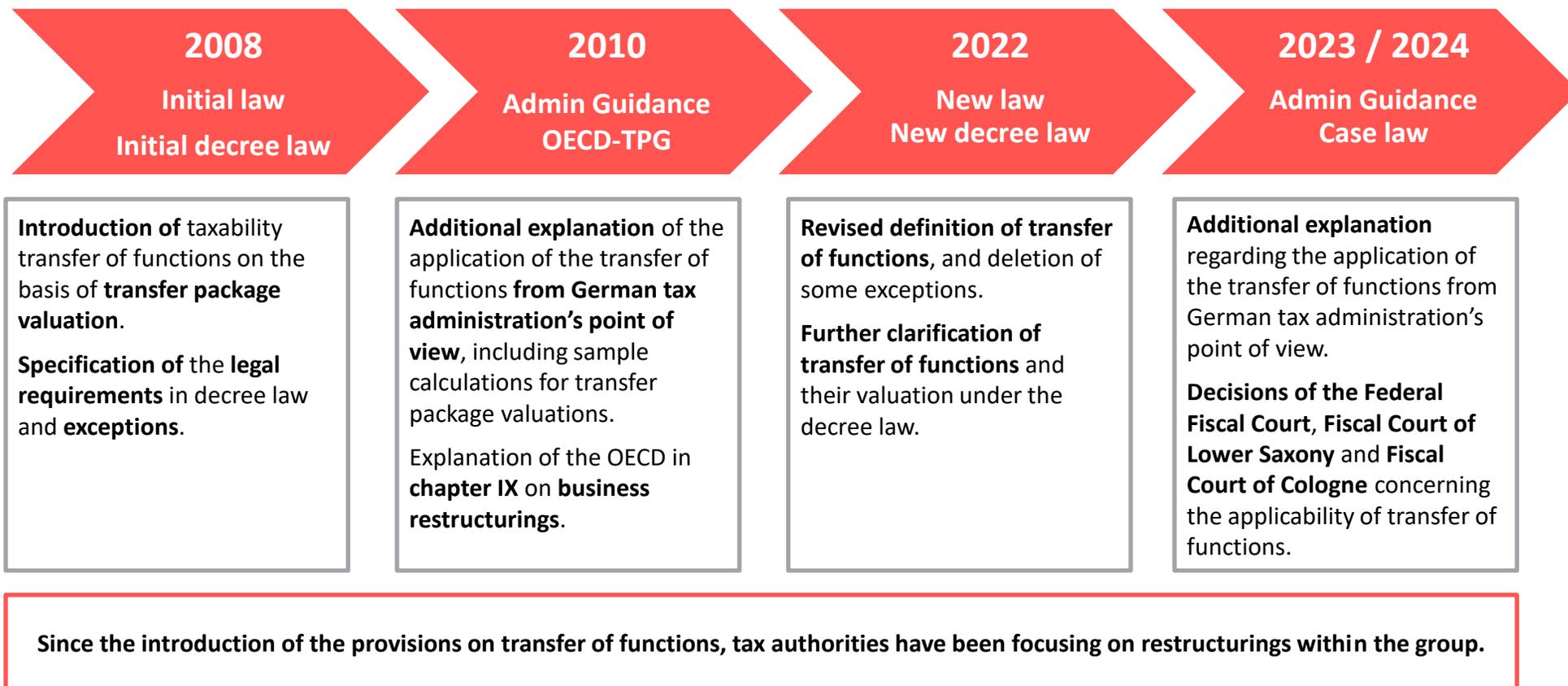
- 01** Business restructuring | German case law on the transfer of functions and more to come
- 02** Risk-control concept | Approaches applied by the German tax authorities
- 03** Tax certainty | Relevance of bilateral APAs in Germany

01

Business restructuring |
German case law on the
transfer of functions and
more to come



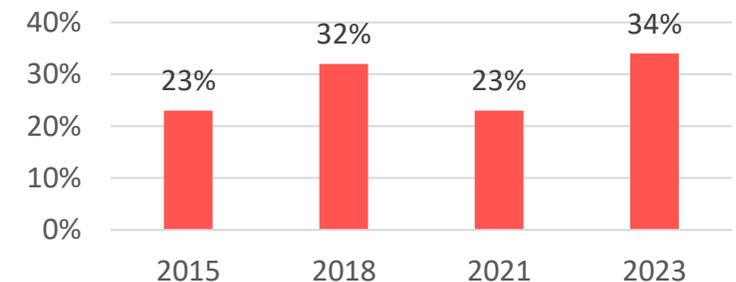
Transfer of functions | Evolution of legal background in Germany (1)



Transfer of functions | Practical relevance in Germany

- In recent years German companies have undertaken restructurings projects, possibly also to obtain greater legal certainty. Research shows that **23% to 34% of surveyed German companies** have been **exposed to income adjustments** concerning business restructurings in tax audits over time.
- Several **tax court cases decided** in 2023 and 2024 on the transfer of functions:
 1. **Tax Court of Lower Saxony on March 16, 2023** on the **re-allocation of production capacity** decided *against* the assumption of a transfer of functions
 2. **Federal Tax Court on Aug. 9, 2023** on the **transfer of a single customer relationships** and the activities related therewith decided *against* the assumption of a transfer of functions
 3. **Tax Court of Lower Saxony on Aug. 3, 2023** on the change from a **licensed manufacturer-based remuneration to contract manufacturer/LRD-based remuneration** decided *against* the assumption of a transfer of functions → see next slides
 4. **Tax Court of Cologne on June 13, 2024**, whose decision has not yet been disclosed

Tax audit disputes concerning
business restructurings of
German companies

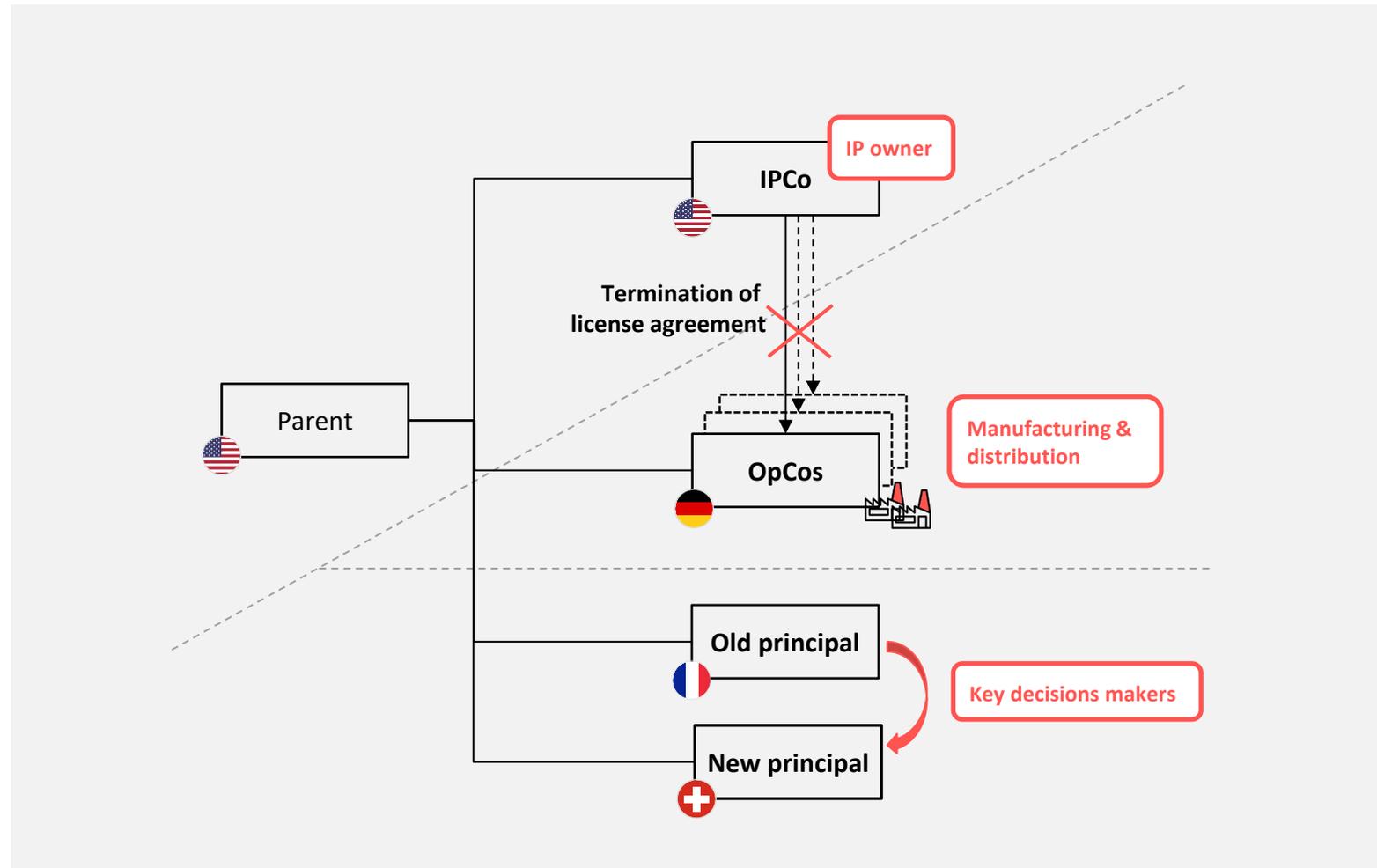


Shares of surveyed German companies that were confronted with income adjustments from business restructurings during tax audits (multiple listings were possible)

Transfer of functions | From licensed manufacturer to contract manufacturer/LRD (1)

Factual background

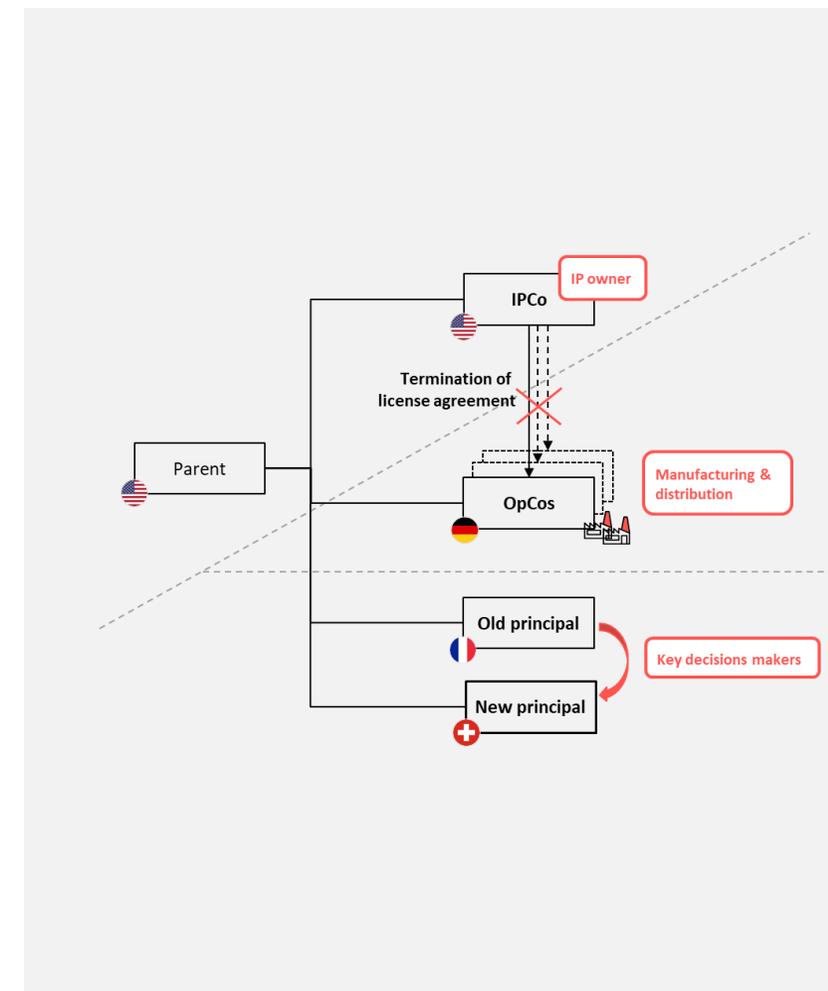
- **German OpCos** manufactured and distributed products for the German market
- All essential **intangible assets** were in-licensed from IPCo by way of a **non-exclusive license agreement**
- Key **strategic decisions** made by **principal**
- **In 2011, principal functions were transferred** from France to Switzerland, while the German OpCos continued their operations without any changes
- The **license agreement** with the German OpCos was **terminated**, and new license agreement with the new principal
- **German OpCos** received a **compensation** for the remaining licensing term and started receiving **C+/TNMM-based remuneration**
- **German tax authorities** assumed **transfer of functions**



Transfer of functions | From licensed manufacturer to contract manufacturer/LRD (2)

Decision taken by the Tax Court of Lower Saxony on Aug. 3, 2023

- The German OpCos have **not transferred any assets** to the principal:
 - The transfer of a business opportunity through the transfer of customer bases has been ruled out.
 - The premature termination of the license agreement was also sufficiently compensated.
- There is also **no transfer of functions**, because no tangible assets and no intangible assets, benefits or business opportunities were transferred from the German OpCos to the principal.
- The **lack of a causal relation** between the transfer of benefits and the ability to perform functions also led to the conclusion that no transfer of functions occurred.
- The **mere cost-plus remuneration of the French principal before the restructuring** was not commented by the court.
- The case is now pending at the Federal Tax Court.



Transfer of functions | Some key takeaways from German case law

1. **Lower profit potential** is not sufficient for the assumption of a transfer of functions
2. **Termination of an IC agreement** at arm's-length terms also does not constitute a transfer of functions
3. Less **granular approach** on the delineation of a **transferrable function**, but change in law in the meantime
4. **Customer base** has **not any value *per se***, and any exclusivity and group-wide access must be considered
5. **Valuation period** of 2 to 5 years was regarded appropriate, underlining the need to analyze facts, contractual clauses and intangibles
6. **Need** for detailed and accurate **documentation of facts**

➔ **It is worth going to German tax courts**

Transfer of functions meets control over risks



“The performance of **risk control functions** [...] constitute functions within the meaning of Sec. 1(3b) FTA [= transfer of functions].”

Administrative
Guidance on TP
2023/2024,
recital 3.89

02

Risk-control concept |
Approaches applied by the
German tax authorities



Control of risks | Administrative guidance for all (past) open years

Administrative
Guidance on
TP 2023/2024,
recital 3.5

*The core of the function and risk „analysis is formed by the **risk control approach**, according to which an **allocation of risks is based on (people) functions to control the risks** and depends on the financial resources available to take on risks. Control is defined as the ability to decide on whether to **take on risks and to manage risks**, and to actually exercise these decision-making functions (para. 1.65 OECD-TPG).“*

*„The general prerequisite is that **all decision-makers** have the **necessary experience and skills** and have access to a sufficient amount of information (recital 1.66 OECD-TPG).“*

Administrative Guidance on
TP 2023/2024, recital 3.6

*„If a FinCo, which **lacks the capability and authority to control or bear the risk** of this financing transaction, is interposed, it is **only entitled to a risk-free return** [...] if the granting of the loan and the **actual control of the associated functions or risks** are **separated**, there exists an **additional transaction** between the FinCo and the company that exercises actual control over the functions or risks associated with granting the loan.“*

Administrative
Guidance on
TP 2023/2024,
recital 3.147

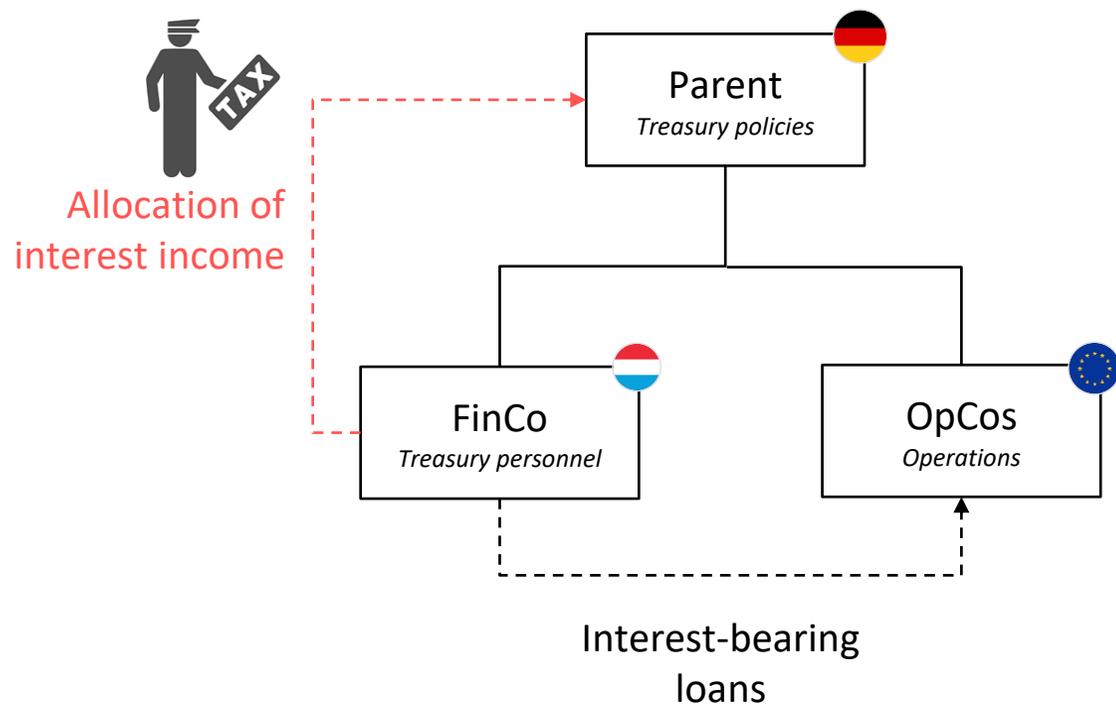
Administrative
Guidance on
TP 2023, recital 6.2

*“This guidance is
[...] **applicable for
all open cases.**“*

*“The **performance of risk control
functions** [...] constitute functions
within the meaning of” the **rules on
the transfer of functions.**“*

Administrative Guidance on
TP 2023/2024, recital 3.89

Control of risks | Current tax audit trend



- **FinCo** is fully **equity-financed** and employs **treasury personnel**
- Corporate **Treasury at Parent** prepares **group policies** on treasury
- **German tax auditors** conclude that the **control over risk** has been fully **with the Parent**. Hence, all **interest income** shall be **re-allocated** to the Parent, while FinCo is only entitled to X% on its OpEx
- Similar approaches in case of **loss-making German OpCos**

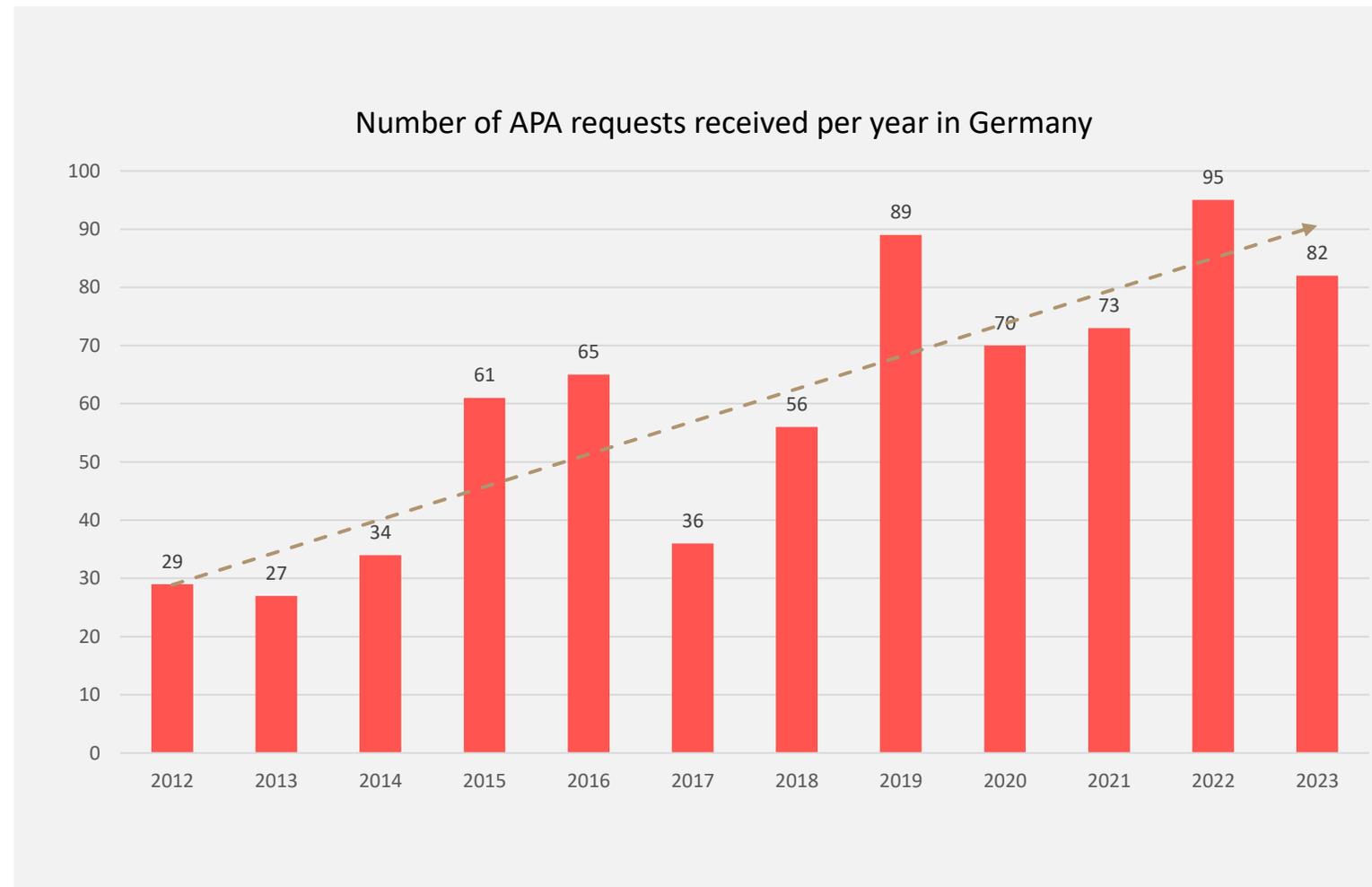
03

Tax certainty | Relevance of
bilateral APAs in Germany



Tax certainty | Statistics 2023 on Advance Pricing Agreement (APA) for Germany

- According to EU/OECD statistics, **Germany** has the **most bi-/multil. APAs among all EU member states** at the end of **2023** with an **inventory of 50 APAs**
- Significant increase in the **82 new request in 2023** was documented between 2013 and 2023 (+55)
- In 2023, **46 APAs were concluded**, of which 28 APAs with EU member states and 18 APAs with third countries
- Also in 2023, **6 applications were rejected** (e.g. due to preferential regimes) and **11 applications were withdrawn** by taxpayers



Any Questions?

Thank you for your attention!



27 February 2025

CORIT TP Lectures

Control over risk

wts global



Agenda

Control over risk

- Deep dive into a debated case – Datawatch
- General trends

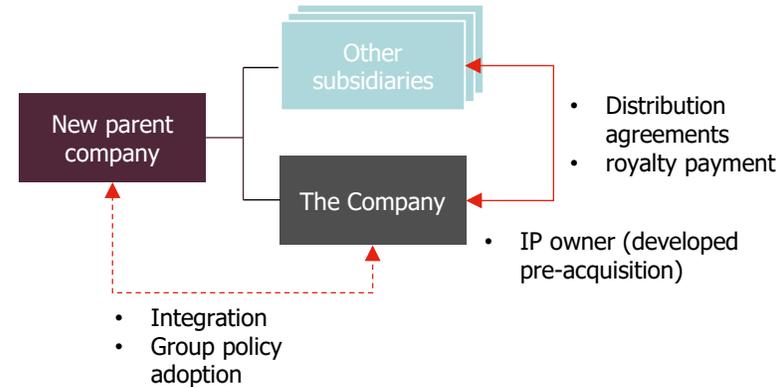


Case law

Datawatch

Background

- A US Multinational group acquired a Swedish company (the "Company"), which developed and sold a software
- Shortly after the acquisition, the sales function was restructured
- As a (natural) consequence of the acquisition and integration process, the formal HQ control of the business was transferred to the HQ in the US
- The Company remained the legal owner of the IP developed pre-acquisition
- The year after the acquisition, the Company entered into distribution agreements with other Group entities covering sales of the Company's products, under which the Company was remunerated by a royalty for the underlying IP

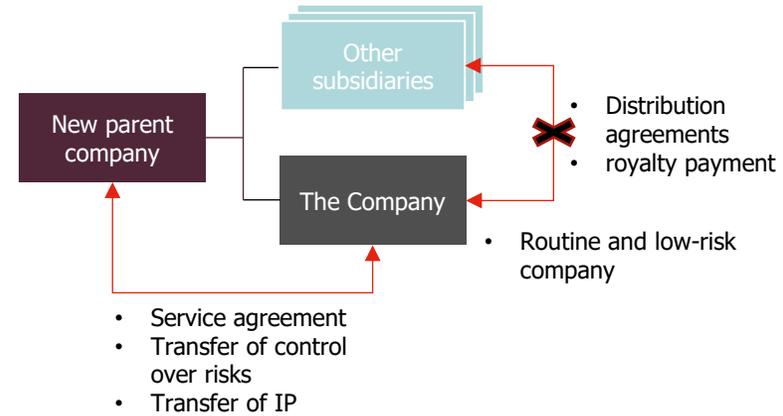


Case law

Datawatch

The STA's view

- According to the Swedish Tax Agency ("**STA**"), control over the most important risks were transferred to the US parent and consequently also the right to the returns in the IP owned by the Company
- The STA is not clear about how the shift in "control over risk" affects the right to returns in the intangible assets
- According to the STA, when the company is no longer entitled to the related returns, the "logical and obvious consequence" must be that rights have been transferred

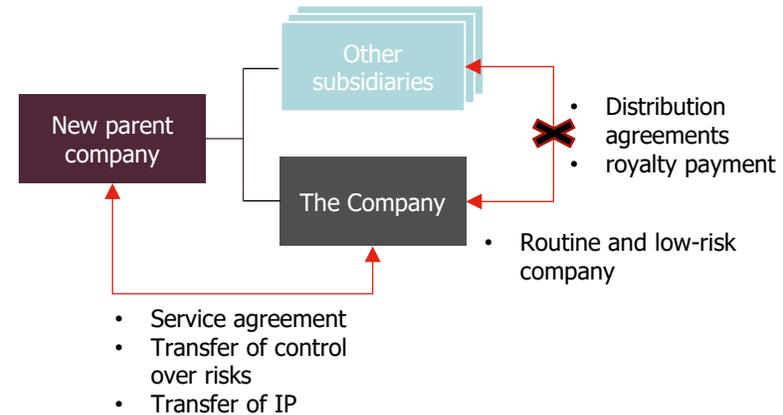


Case law

Datawatch

The STA's view

- The STA disregards the distribution agreements and concludes that the Company is entitled to:
 - A routine return for services provided to the parent company; and
 - A lump sum payment for the sale of IP
- The lump sum payment should be determined by reference to the price the parent company paid when acquiring the Company's shares

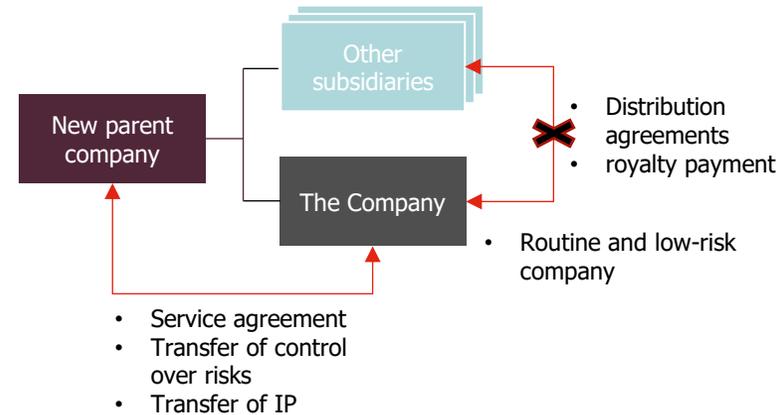


Case law

Datawatch

Outcome

- The Administrative Court of Appeal ruled in favor of the STA
- Accordingly, the following conclusions can be drawn:
 - A shift in control over risk leads to a shift in the right in returns (value created **both** before and after the shift); and
 - A shift in control over risk and changes in formal decision-making power could mean that there is evidence that intangible assets have been transferred

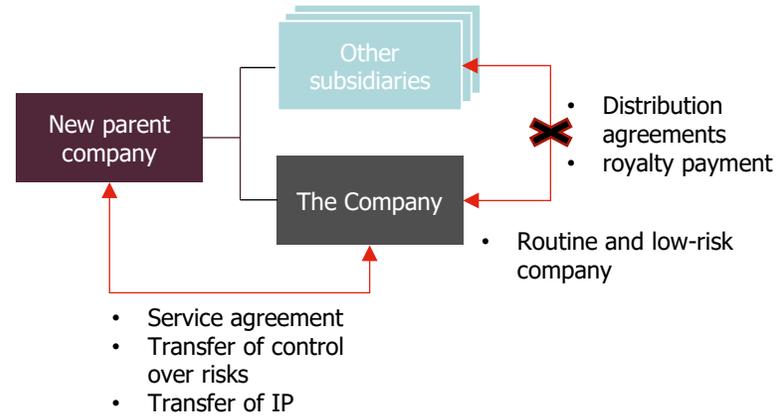


Case law

Datawatch

Comment

- Very common that formal control is transferred when a new subsidiary is acquired
- Possible to argue that IP from newly acquired subsidiary is always transferred to the parent company?
- Can be questioned if the outcome is aligned with OECD Guidance – especially relating to historical value created in the Company
- Illustrates how aggressive position the STA can take in complex matters
- The STA has been pursuing various similar cases – with a mixed success rate



General trends

Other observations

- Pandox-case
- We have seen the STA state in an audit that the EBIT margin needs to be positive when applying the CUP
- We have seen in case law that the STA states that the EBIT margin needs to be positive when applying the Resale Price Method (RPM)
- We have seen many cases where entities are loss-making, and the STA uses control over risk as an argument for adjustments



General trends

Summary and take-aways

- Probably the most debated concept in transfer pricing audits and court cases
- “Control over risk” used to disregard agreements and commercial relationships between group entities
- Transfer in control over risk = right in future returns has changed?
- Transfer in control over risk = existing rights (e.g., IP) has been transferred?
- Shift towards Transactional Net Margin Method and Profit Split Method?



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PANEL DEBATE

Break until 15:00

The Danish Accenture Supreme Court Case

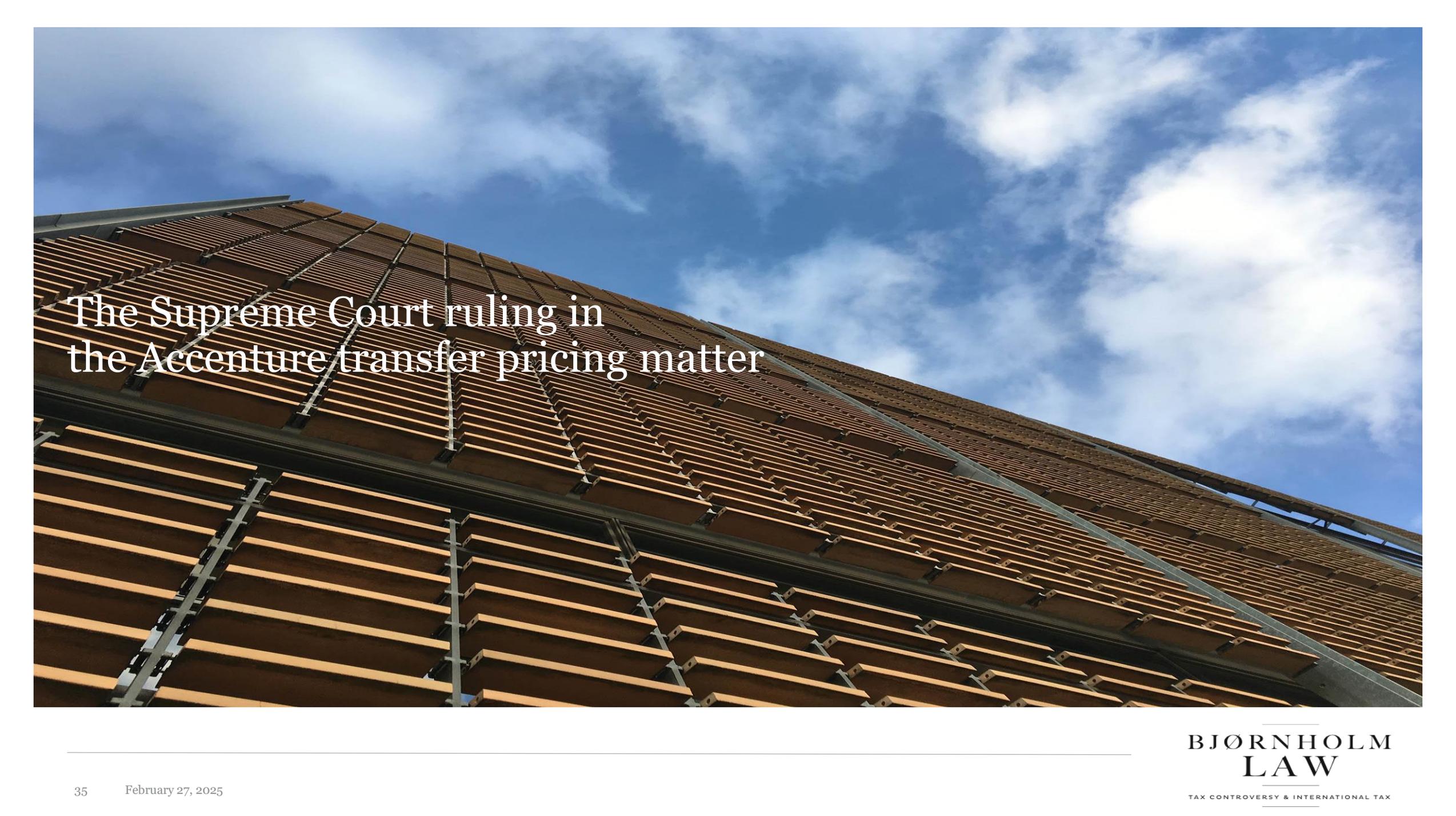
Nikolaj Bjørnholm and Bodil Tolstrup, Bjørnholm Law

Preparing for a world of increased tariffs – Transfer pricing considerations

Jonathan Bernsen, Global Head of Transfer Pricing, A.P. Moller-Maersk

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Light refreshment upstairs



The Supreme Court ruling in
the Accenture transfer pricing matter

The IAA transaction and its pricing

- International Assignment Agreement (IAA) – cross border temporary secondment of consultants
- FAR analysis of host and home country: Most functions and risks performed/assumed by host
- Pricing: Cost+ 30% (CUP not applicable – provision of consultants not consulting services)
- Cost base = cost of services
- Mark-up determined by benchmark study of consulting businesses (N = approx. 50)
- Adjustment made to reflect OPEX/revenue-ratio of 16 Accenture entities with benchmark resulting in median being reduced from 46% to 29%

The IAA assessments / positions of the DTA/MoT

- Discretionary assessment warranted as TP documentation was materially deficient:
- The parties agree that IAA does not constitute provision of consulting services and hence CUP cannot be applied. Accordingly wrong to benchmark against consulting businesses
- Cost + wrong as mark-up covers overheads (sales and marketing costs) which do not apply to IAA
- Cost of services not adequately defined
- Only 2 of +50 companies in benchmark study approved. Rejections due to independence, outside EU, use of consolidated accounting data

- TNMM benchmark of temping agencies performed by the Danish Tax Agency: 4,1% (2005-2006) and 7,27% (2007-2011). N = 18 respectively 9 (only EU)
- 4,1%/7,27% applied to cost of services

The IAA rulings – Cost+ and TNMM mark ups

Gross and net mark-ups (2005-2006)		
	Consulting businesses	Temping agencies
<u>Cost +</u>		
UQ	41 %	30 %
Median	29 %	20 %
LQ	25 %	17 %
<u>TNMM</u>		
UQ	7 %	8 %
Median	4 %	4 %
LQ	2 %	2 %

The IAA rulings – profit element warranted?

- Employees idle and in the affirmative bearing on pricing?
- TP documentation and subsequent evidence

- IAA agreement deemed cooperation agreement.
- CCA argument invoked by MoT (cost = AL)
- Accenture – all agreements yield benefits to the parties, no reciprocity embedded (Denmark net importer of employees)

Royalty – facts

- Group IP held by a company in Switzerland.

- Established in 2001 (Andersen Consulting transformed from partnership to listed corporate)
 - Partnership (I/S) IP transferred in 2001 against declining royalty over 4 years (~ earn-out)
 - Full detail of (local) transformation requested but not disclosed

- IP investments rate to increase in future; factual USD 2.4 billion 2001-2007

- 10 employees with mainly administrative functions
 - Board members and advisory boards were key IP employees / management within the group
 - R&D performed by employees of operating entities, including cross border groups dedicated to IP, e.g. Tech Labs; Marketing; Legal IP
 - R&D / Board costs paid by IP company under Service agreement; full cost +8% (TNMM)

- License agreement with royalty of 7% of Client Billings
 - Reduction of royalty (not guaranteed return) if operating profits below 4,45% after royalty

Royalty – Accenture’s positions on IP company (1)

Main issue 1: MoT argued that IP structure was fictitious and should be disregarded

- Argue for ‘sufficient’ IP company substance
 - Legal ownership, i.e. registrations; third parties (purchase; court cases); payments
 - Board of directors and advisory boards with key individuals; minutes from meetings showing decision making within legal set-up
 - R&D and Boards spread across many and changing jurisdictions depending on IP type ect., i.e. no clear geographical location
 - TPG allows for outsourcing (owner may end up with zero profit but not zero revenue)

- Accept weakness
 - E.g. Switzerland; administrative employees

Royalty – Accenture’s positions on IP company (2)

➤ Counter arguments

- Must be difficult to set-aside legal owner and all transactions
- If DEMPE decisive then clearly not DK
- MoT must provide realistic alternative – legal and financial. Provided: Joint ownership for operating entities and RPSM model incl. 2 ‘best guess’ estimates

➤ Take away

- No deep dive into control discussions cf. TPG
- Key issue may have been truly diverse geography on R&D / management so no clear alternative
- Not to be repeated. Better prepared MoT => different result?

Royalty – Accenture positions on royalty rate (1)

Main issue 2: MoT argued that the License agreement was RSPM because RSPM as test method for royalty rate

- Testing (determination) of royalty rate using RSPM
 - Benchmarking: net margins of IT / consulting businesses: listed; turnover of +mUSD 100
 - RSPM: Accenture Group operating profits (3 year average) divided: routine (operating entities) and residual (IP). Turnover on IP calculated and converted to % of total turnover on group basis.
 - Result (2007):

	Lower quartile	Median	<i>Applied</i>	Upper quartile
Base (routine) profit	3,83 %	6,05 %	7,68 %	9,53 %
Royalty rate	10,85 %	8,63 %	7,00 %	5,15 %

- MoT / DTA: The License Agreement to be understood as two steps: 1) allocation of minimum return to DK (EBIT of 4,45 %); 2) rest is residual of which some – potentially all – are allocated to IP company
 - The minimum return is in lower quartile, i.e. not in line with skilled DK employees
 - The test allots all residual to IP company – some residual must be local for local IP

Royalty – Accenture’s positions on royalty rate (2)

➤ Arguments

- License agreement is usual; Client Billings (third party trades) are usual basis
- Uncertain issues is the rate (7%)
- The reduction mechanism (EBIT 4.45%) cannot be requalified as a minimum return
- Testing is sound and does include local IP as benchmark companies hold the same IP (cf. TPG)
- Testing the royalty rate on RSPM is not converting license agreement into an RSPM, i.e. not wrongly executed
- IP company “gets all residual” is not even true when MoT / DTA own understanding is applied (full acceptance of royalty for 2013-2018)

➤ Take away

- MoT “spin” where license agreement is fully ignored did not work. Different if they had “owned” the narrative?
- Words and calculation models seems to have played to big a role for the MoT. Better today?



Transfer Pricing and Tariffs

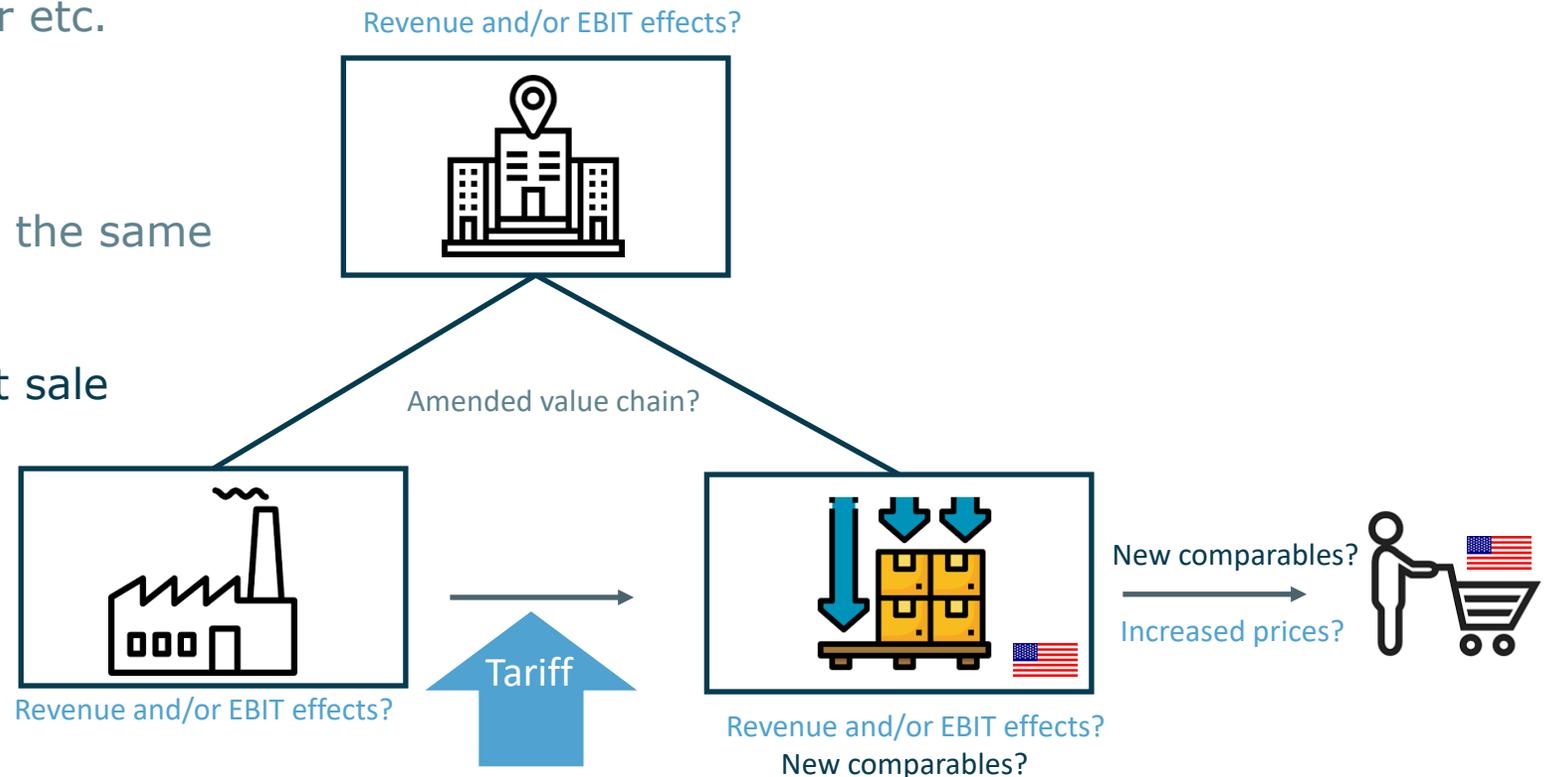
INCREASED TARIFFS & TP CONSIDERATIONS

Short term effects

- Stockpile inventory (temporary)
 - Control of risk
 - Bargaining power and options realistically available
- Increased prices (COGS)
 - Control of risk, bargaining power etc.
- Impact on comparables
 - Normally rely on historic data
 - Tariffs may impact companies in the same industry/sector differently

Long(er) term effects "Accelerated" first sale

- Changed operational footprint
 - Country of origin
 - Increased production in the US
 - Use of new export states



International Trade & Transfer Pricing

February 2025

Jonathan Bernsen



Maersk



State of Play

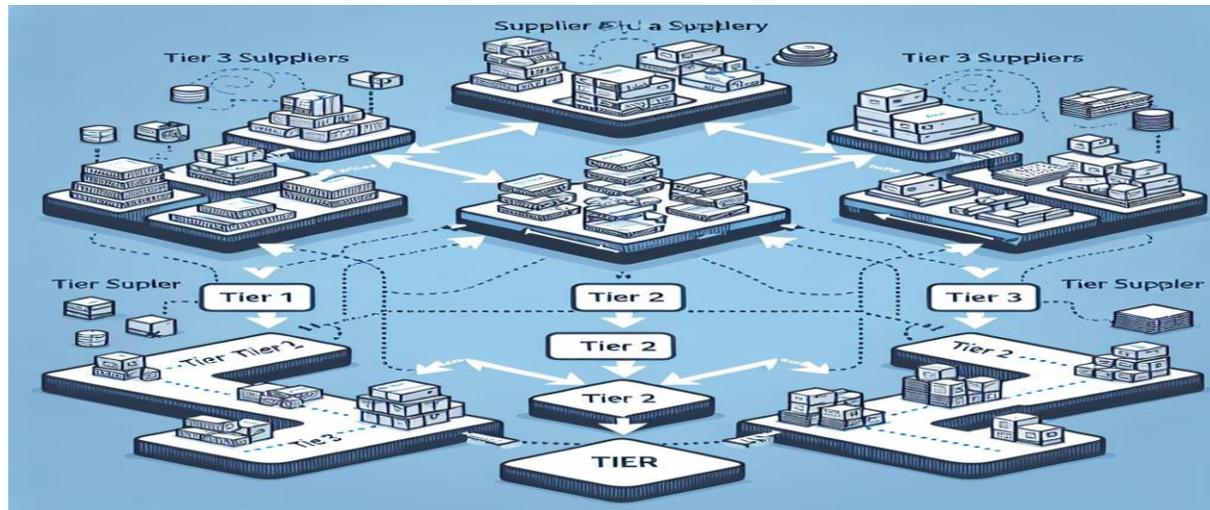


Last 30 years



Last 30 days

Global Supply Chains



Solutions: CAPEX and Supply Chains

CAPEX:

- CAPEX deployment has been shifting since 2016 (Nearshoring; “China+1” sourcing strategy, etc.)
- CAPEX decisions typically subject to robust processes including Tax Function involvement

Supply Chain Planning in 2025 according to Big4:

- Resilience.....
- Use of technology and AI.....
- Risk assessment and mitigation.....
- Balanced approach of Customs, transfer pricing and Tax.....

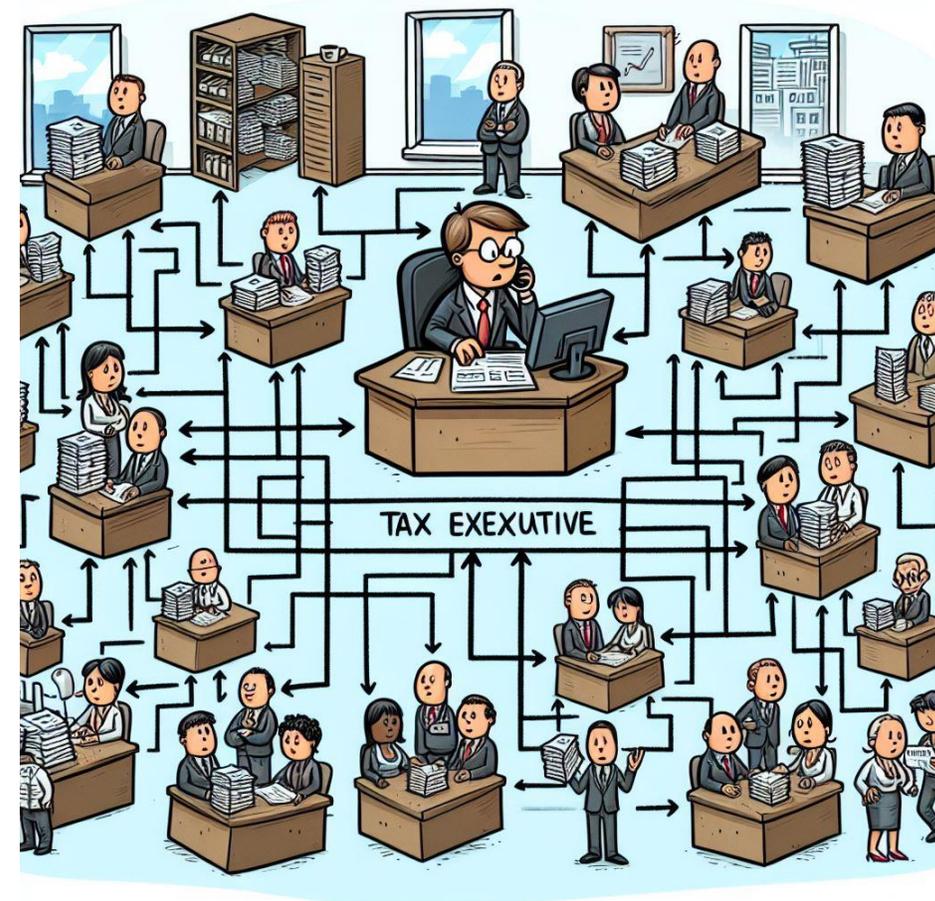
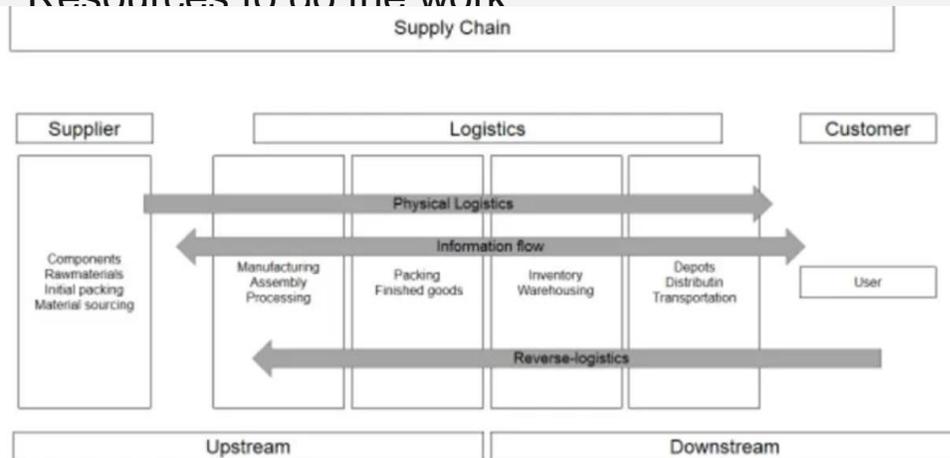
Average Monthly Manufacturing worker salary (2024):

- **United States:** \$5,120 - \$5,440
- **Vietnam:** \$320 - \$370
- **China:** \$1,200 - \$1,400
- **Mexico:** \$672 - \$896

What can actually be done?

What are you looking for as an in-house tax function:

- Quality Data & Insights
- Stakeholders that understand/sympathize
- Functions with aligned objectives/interests
- Resources to do the work

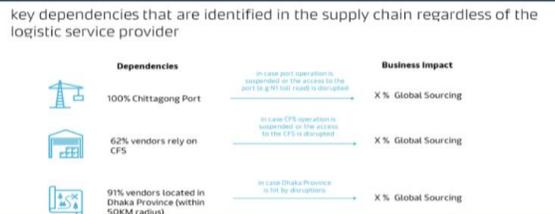
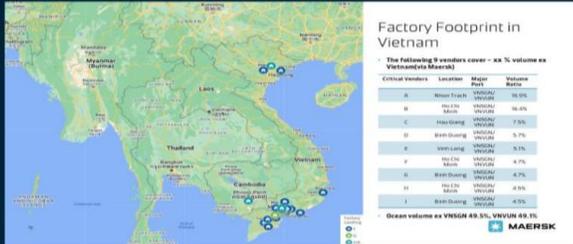


Supply Chain Resilience: Case studies

Supply Chain/ Vendor Mapping

To better understand the flow of supply chain and further identify the key dependencies.

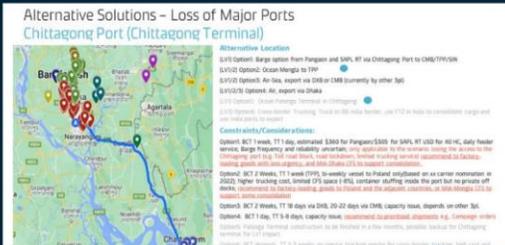
see examples >>>



Contingency Planning

To get "Plan B's" in place and prepare for the potential impacts to supply chain

see examples >>>



Some Questions for Self-check:

- Do you know who are your critical vendors? And where are they located? Which ports/airports are they using?
- What are the key dependencies in your supply chain?
- In case losing the key dependency, how much will this impact your business and potentially sales/manufacturing?



Questions for Self-check:

- In case of a disruptive event, such as a major port closes, or a warehouse fire, what alternative solutions do you have? And how fast can you activate them?
- Do you know have scenario plans in case losing your key dependencies?



Supply Chain Resilience Model(SCRM) successful pilot with Marks & Spencer in Bangladesh



”

John Frost, Group Head of Business Continuity, Marks & Spencer

“Maersk have played a key role in supporting Marks & Spencer with its strategic Supply Chain Resilience Assessment & Business Recovery

”

Johanna Hainz, Global Head of Retail Vertical

“I think this is definitely super valuable to offer to customers, especially in the current context where continuously new disruptions and challenges in different origins or destinations occur and require the customers to act. Resilience is the word of the day and will remain like that for the foreseeable future, I

Real-Life Resilience: Navigating the Red Sea Crisis with SCRM Solutions

- Identify key dependencies in your supply chain
- Our SCRM service delivers unparalleled risk monitoring and foresight intelligence, enabling the customer to proactively stay ahead of emerging threats.

Beyond conventional alerts, we offer comprehensive daily risk monitoring and targeted alerts, ensuring timely awareness and response.

Recognizing the fluid dynamics of global conflicts, like the Israel-Gaza situation, we provide bespoke weekly consultation calls or updates. These are complemented by customized impact assessments and strategic recommendations for risk mitigation.

Examples of alternative solutions



Example: the impacted port corridors by the Red Sea

Port Corridors	% of affected containers	Variation TT (subject to change)
CNSGH-DKAAR	10.28%	6
INENN-USHOU	10.17%	4
CNHSK-DKAAR	8.54%	4 (skip calls)

Example: The impact overview by the Panama Canal and the Red Sea issues

Canal	Containers	Routes	% of affected containers
Panama Canal Impact	55	15	1%
Red Sea Crisis	2646	136	61%
Total	4368	310	44%

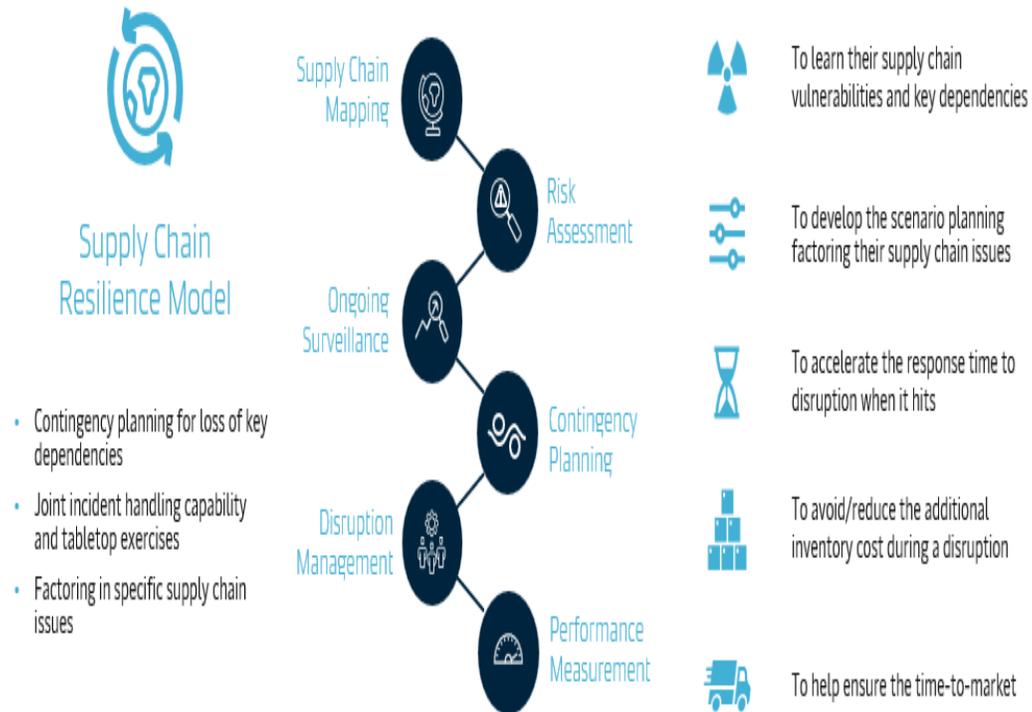


Teaming up with Supply Chain/Logistics

In your Supply Chain Function, you may find all 3.....

SCRM is a resilience planning and monitoring service, enabling customers to optimize SC risks

...and improve relevant customer outcomes



Supply Chain/Logistics Functions have been rapidly transforming over the last 5-10 years

- Geopolitical issues
- Red Sea disruption
- Alternative CAPEX and sourcing strategies
- Applying technology to large data sets, often in partnership with their logistics/supply chain service provider

Tax and Supply Chain/Logistics teaming up will leverage data, resources and insights and drive better outcomes!





CORIT TRANSFER PRICING LECTURES 2025