Skatteverket – International Tax Planning

Agenda

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

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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 multifaced 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 agressive 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 Reccomendation of 6.12. 2012 on Agressive Tax Planning.*

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

International Tax Planning

- Nothing wrong in carrying out tax planning
  - Avoid double taxation
  - Direct opportunities in existing tax legislation (e.g. depriciations)
  - 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 form 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 lolocation 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

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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

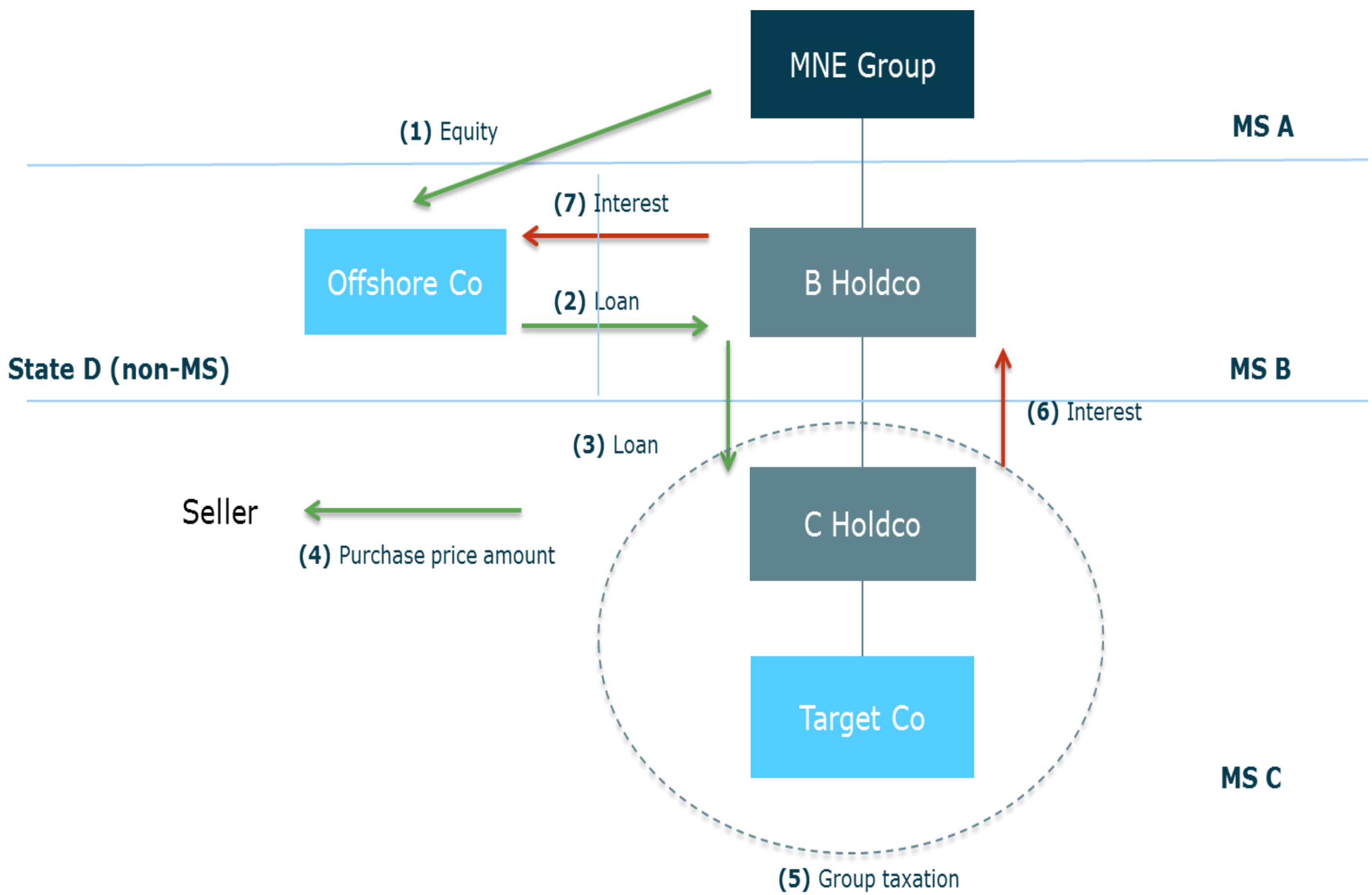
- Four additional ATP structures:
  1. An offshore loan structure
  2. A hybrid entity ATP structure
  3. An interest free loan
  4. A patent box ATP structure

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

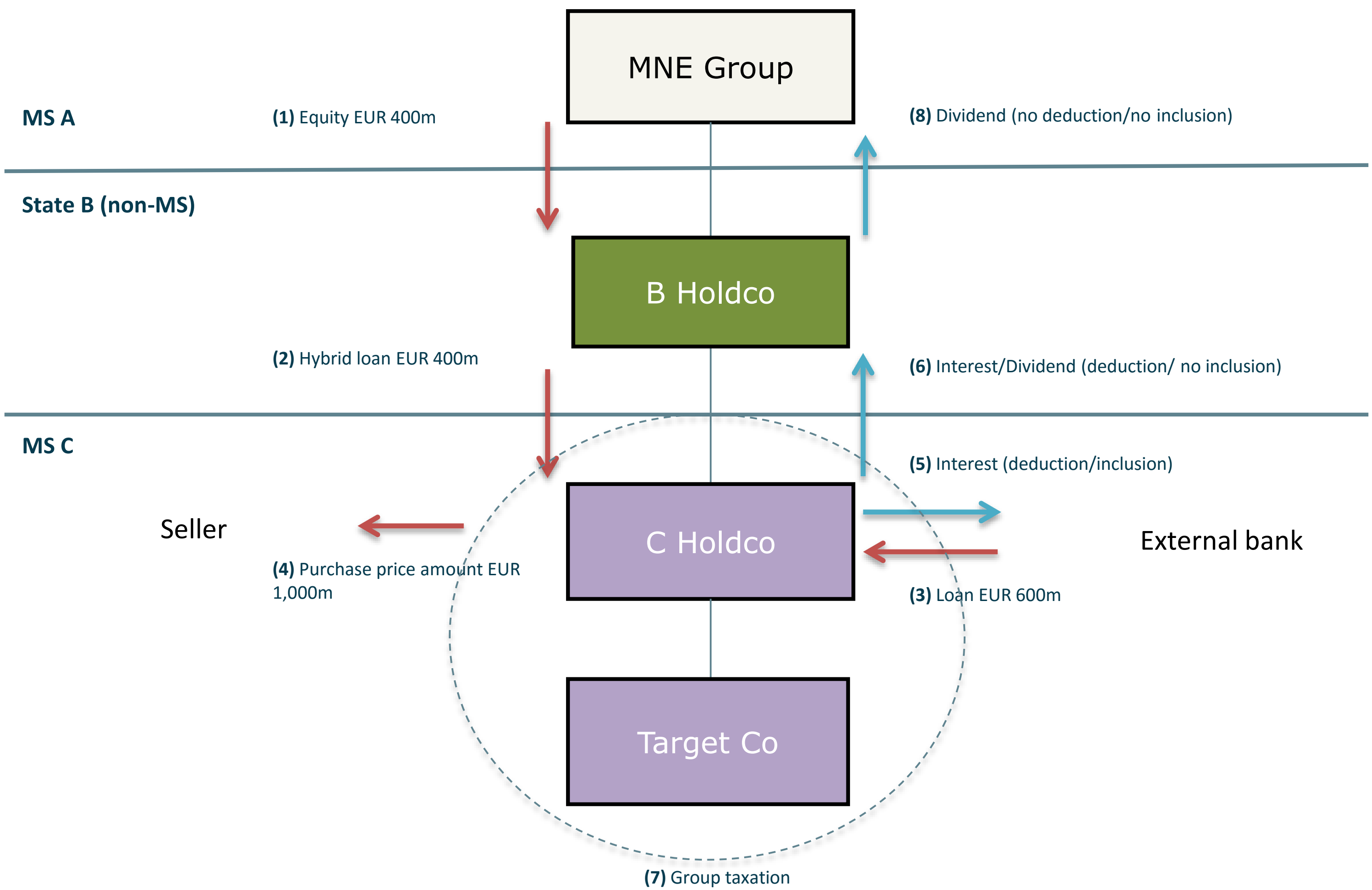


CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 1 - Indicators

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

Model 2 – Hybrid Financing

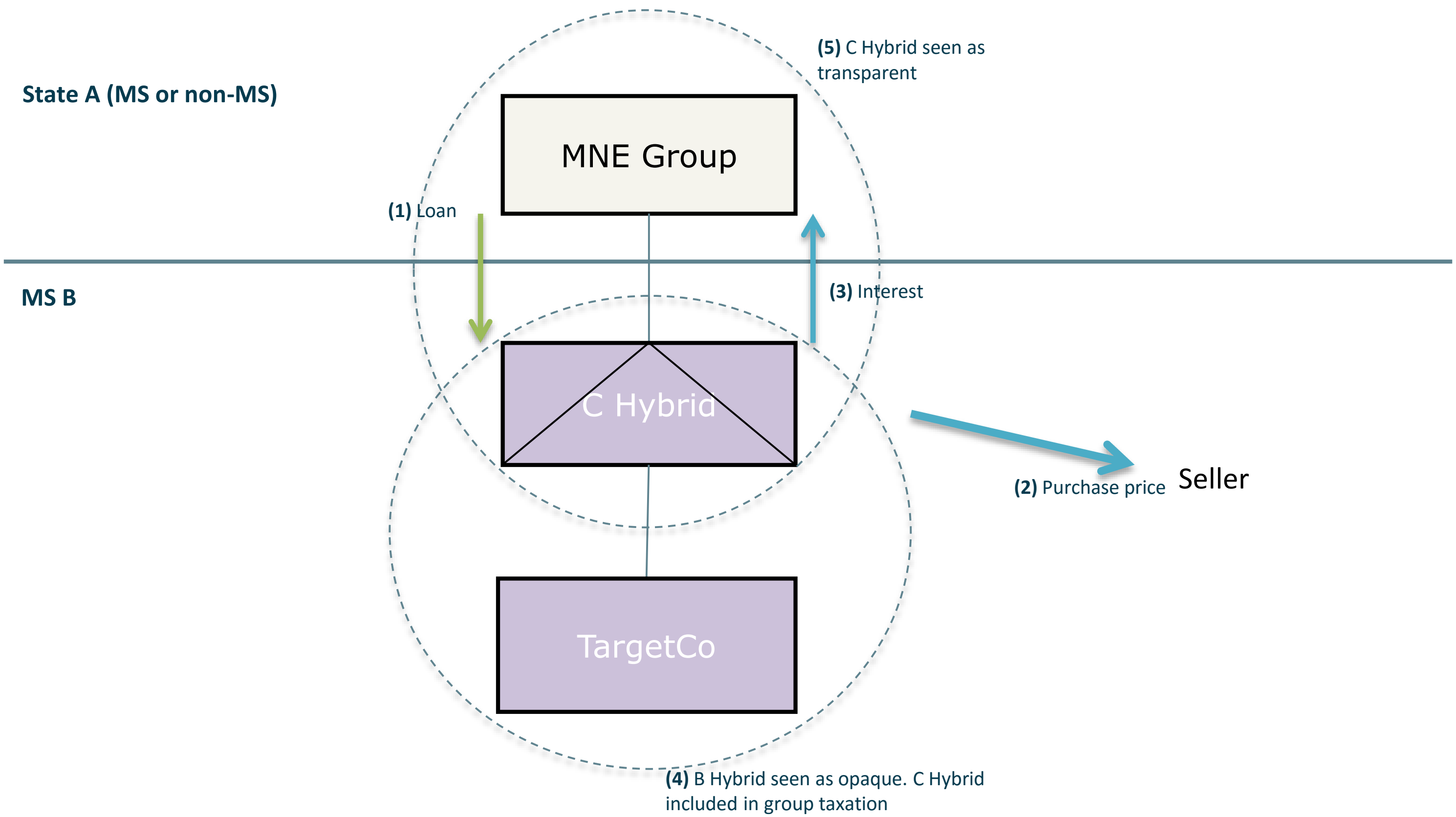


Model 2 –Indicators

State A	State B	State C
• No taxation of dividends received. • No CFC Rules.	• 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).	• 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.

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 3 – Hybrid Entity



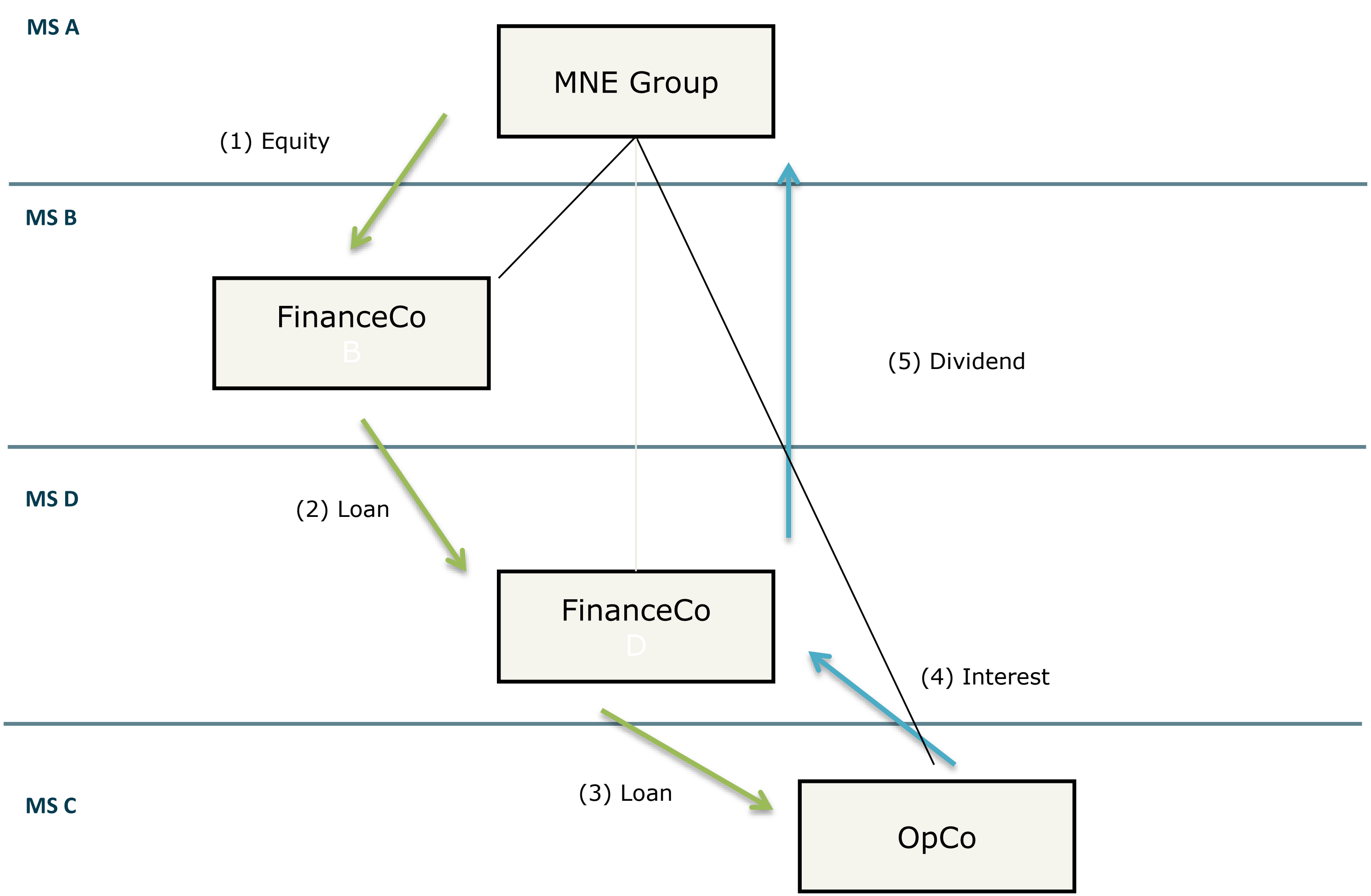
CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 3 –Indicators

	State A	State B
	• No rule to counter a qualification mismatch of entities. • No general or specific anti-avoidance rules to counter the model ATP structures.	• 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.

ORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 4 – Interest-free Loan



CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 4 –Indicators

State A	State B	State C	State D
• No taxation of dividends received. • No CFC-rules. • No general or specific anti-avoidance rules to counter the model ATP structures.	• No deemed income from interest-free loan (non-arm's length-transactions.	• 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.	• 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.

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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

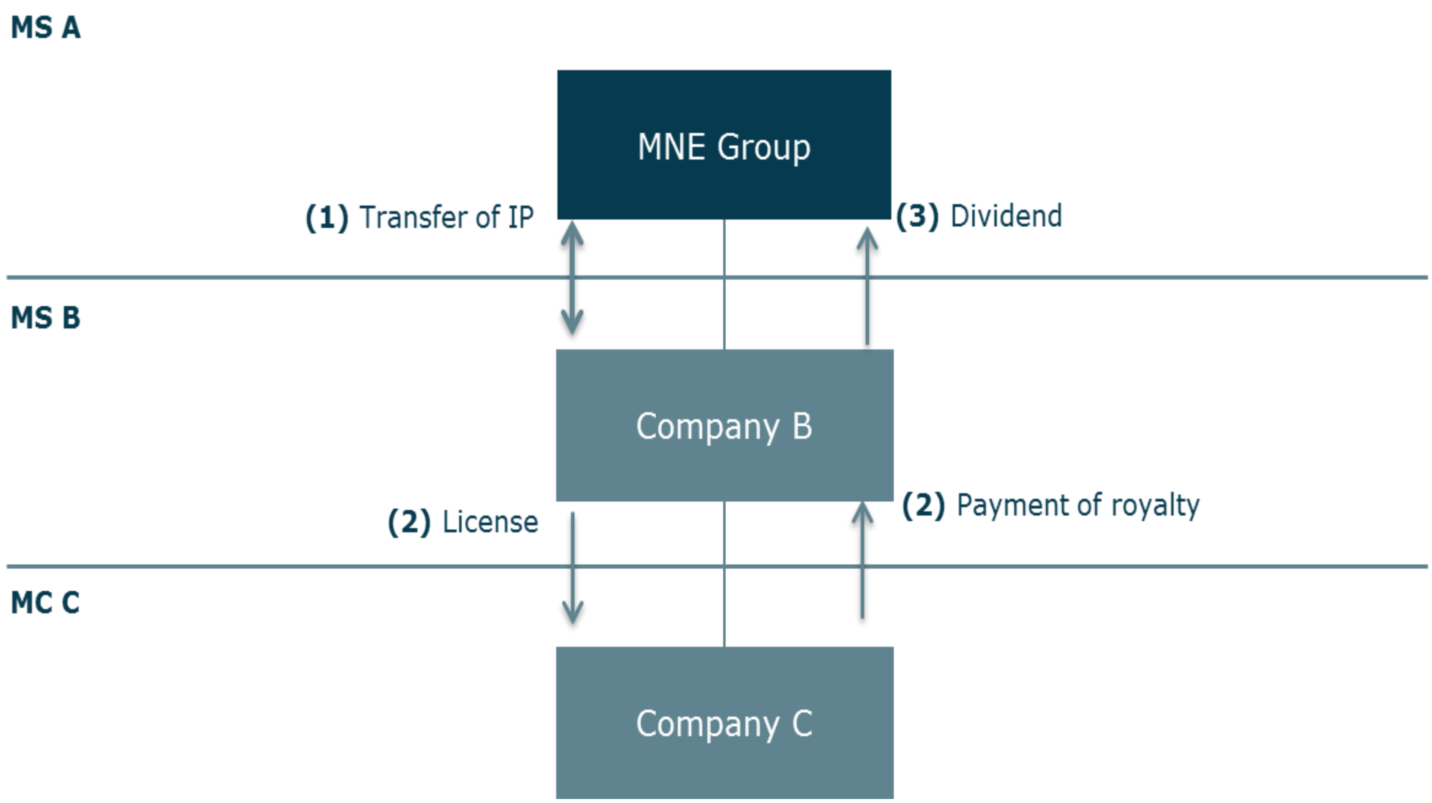
5 Patent box

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.

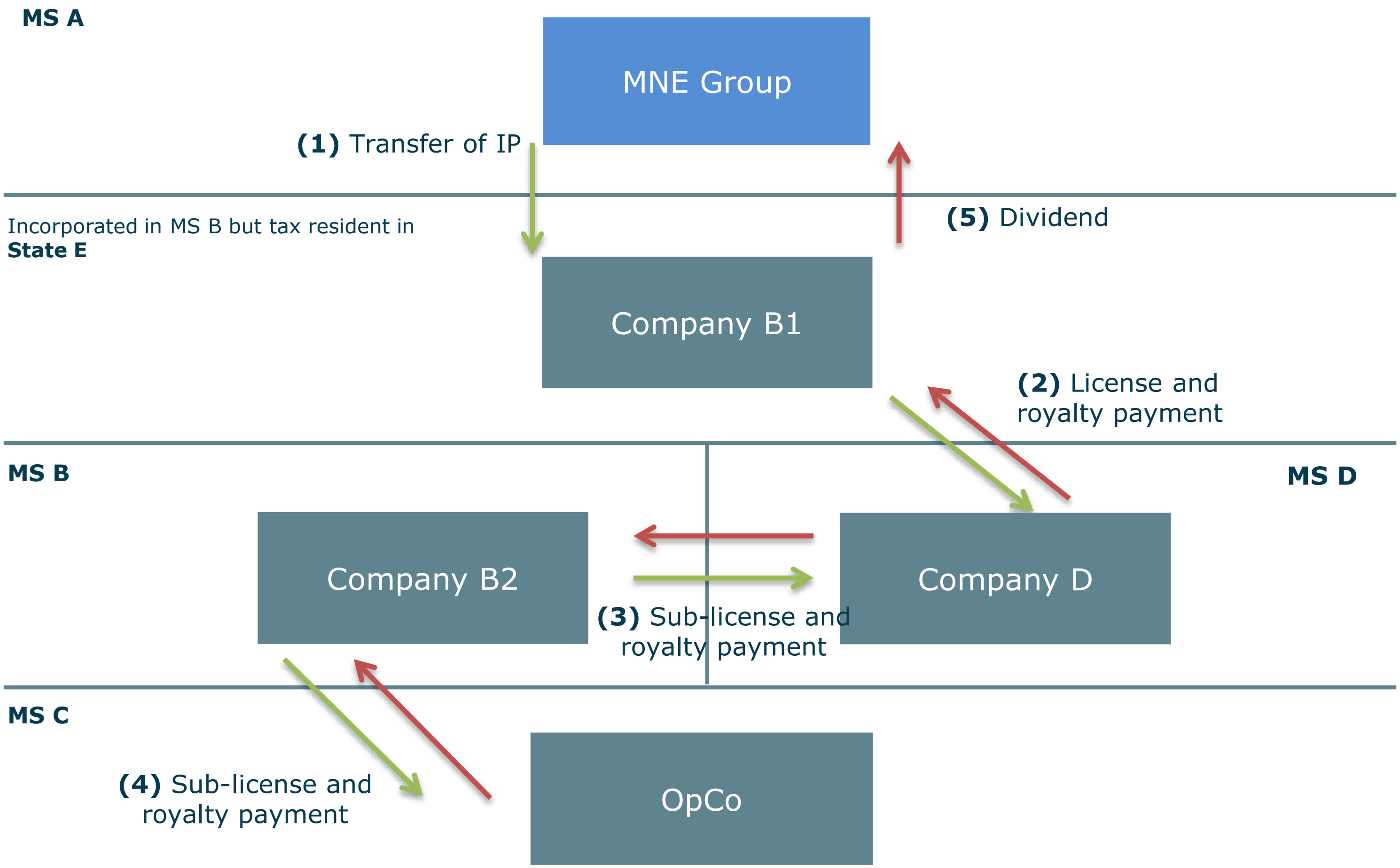
Model 5 – Patent Box Structure



Model 5 – Indicators

State A	State B	State C
• No taxation of dividends received. • No or low taxation of capital gain (fair market value) upon disposal of IP. • No CFC-Rules.	• No withholding tax on dividends paid. • Patent box or other preferential tax treatment of income from IP.	• 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

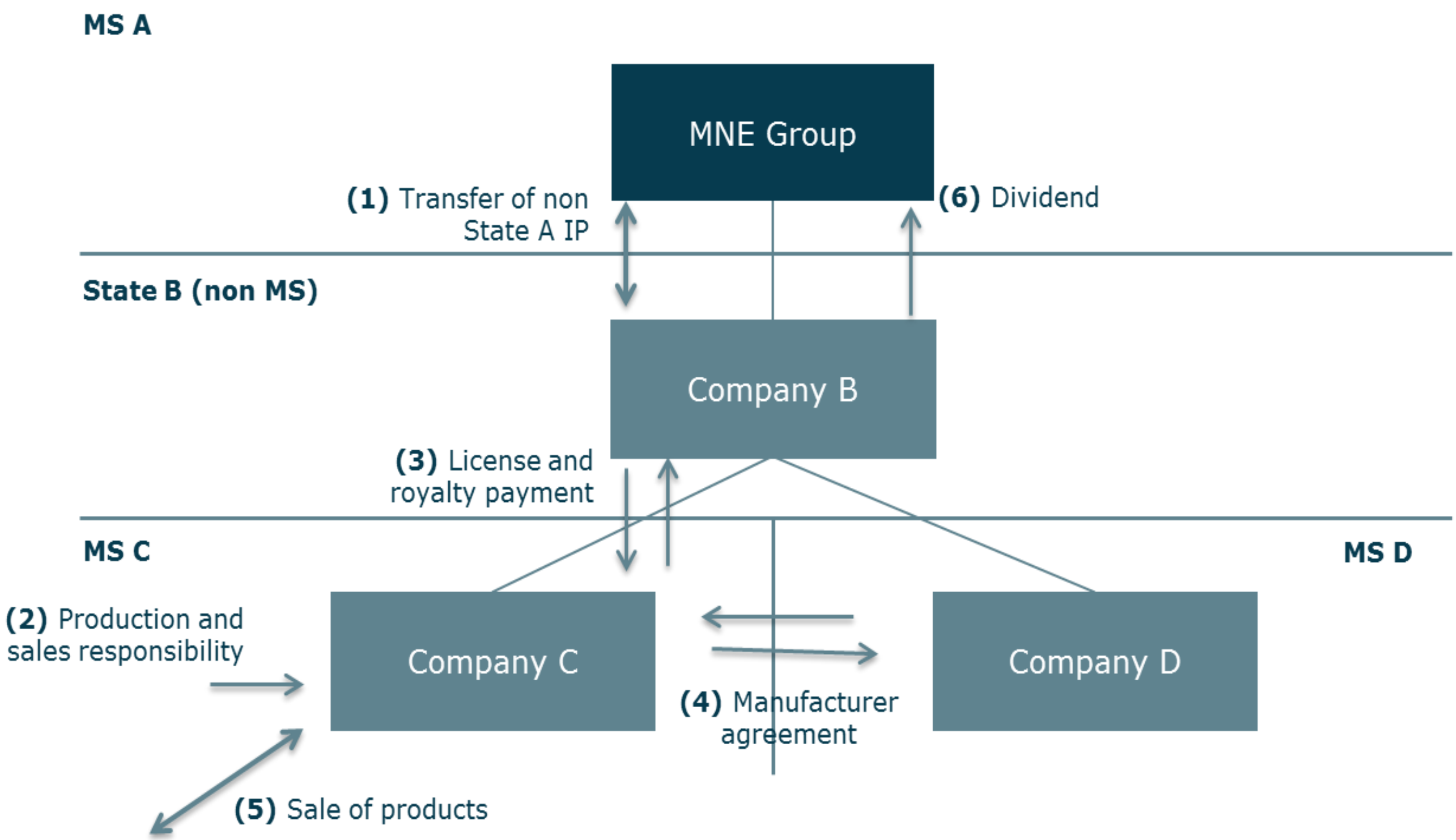


ORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 6 –Indicators

State A	State B	State C	State D	State E
• No taxation of dividends received. • No or low taxation of capital gain (fair market value) upon disposal of IP. • No CFC-Rules.	• 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).	• 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.	• Tax deduction for royalty costs. • No withholding tax on royalty payments. • Excess profits are tax exempt (ruling can be obtained).	• No taxation of dividends received.

Model 7 – IP and Cost Contribution Agreement



CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

Model 7 –Indicators

State A	State B	State C
• 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.	• 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.	• Tax deduction for royalty costs. • No withholding tax on royalty payments. • No general or specific anti-avoidance rules to counter the model ATP structures.

ORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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

ORIT ADVISORY©
INDEPENDENT TAX CONSULTING

BEPS Perspective

Re 1) Identifying intangibles

- Broad, independent definition of intangibles under art. 9:
  1. Not a physical or financial asset,
  2. Cable 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.

CORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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.

ORIT ADVISORY©
INDEPENDENT TAX CONSULTING

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

JAKOB BUNDGAARD
MANAGING DIRECTOR
HONORARY PROFESSOR, M.SC., PH.D.

MICHAEL TELL
TECHNICAL ADVISOR
ASSOCIATE PROFESSOR, M.SC., PH.D.

CORIT ADVISORY P/S
LYNGBY HOVEDGADE 17, 2. SAL
2800 KONGENS LYNGBY
DENMARK

WWW.CORIT-ADVISORY.COM

P: +45 40 42 22 84
E: JB@CORIT.DK