



BEPS Action Report 8-10's impact on existing Dutch investment structures.

Effect on MNE's and possible solutions

22 February 2016 – Robert Jan van Lie Peters

BEPS Action 8 – 10 Action Plan – What is it about?



People functions



Capital

What is the problem of clients?

- Contents of OECD Reports 8-10 provides tax administrations with substantive tools to attack perceived “aggressive” tax structures
- Country-by-Country reporting and stricter TP documentation requirements create more transparency and potential incentive for tax administrations to (re)act
- This leads to more uncertainty for tax payers on their Effective Tax Rates and their existing structures

What are the most important contents (1/2)?

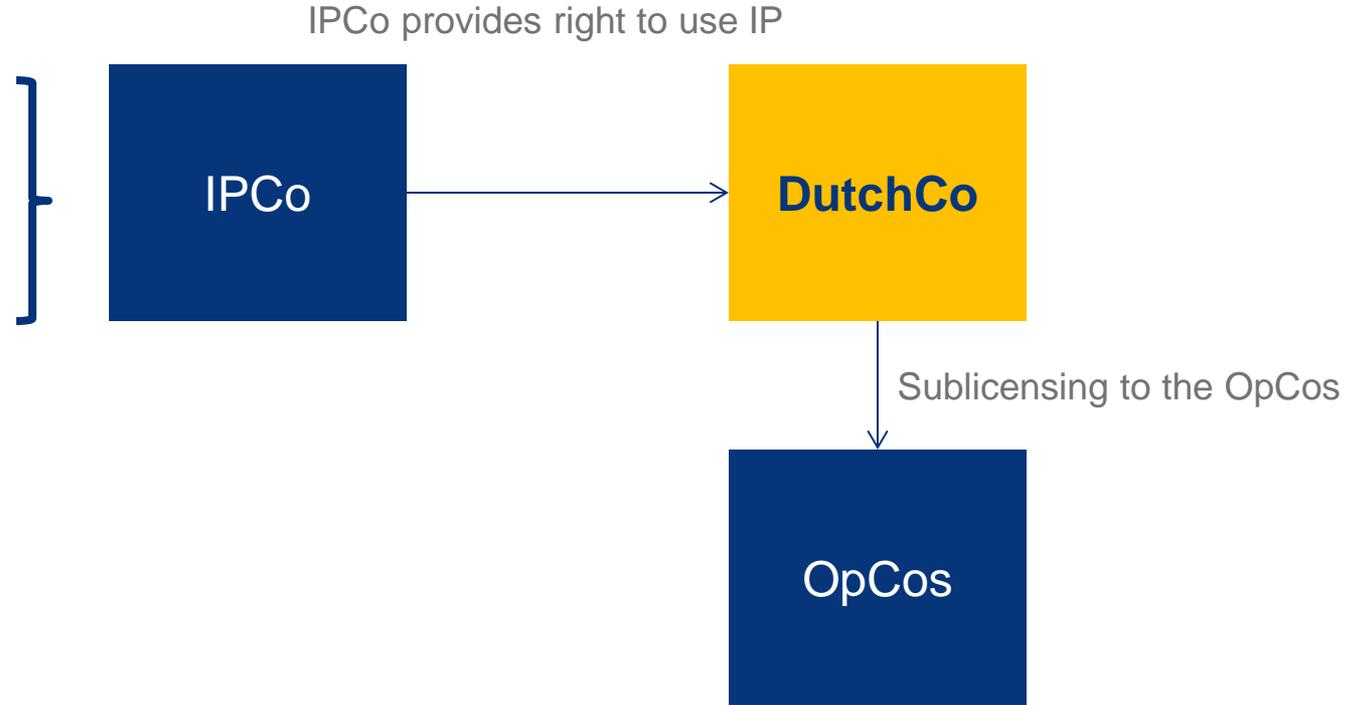
- Content of intercompany agreements remains starting position of TP analysis
- Intangibles related returns should be allocated to “DEMPE” function
- Price adjustment mechanism “Hard-to-Value” Intangibles
- “Risk related returns” should be allocated to “control” functions
- Synergies resulted from coordinated action should be allocated within the group

What are the most important contents (2/2)?

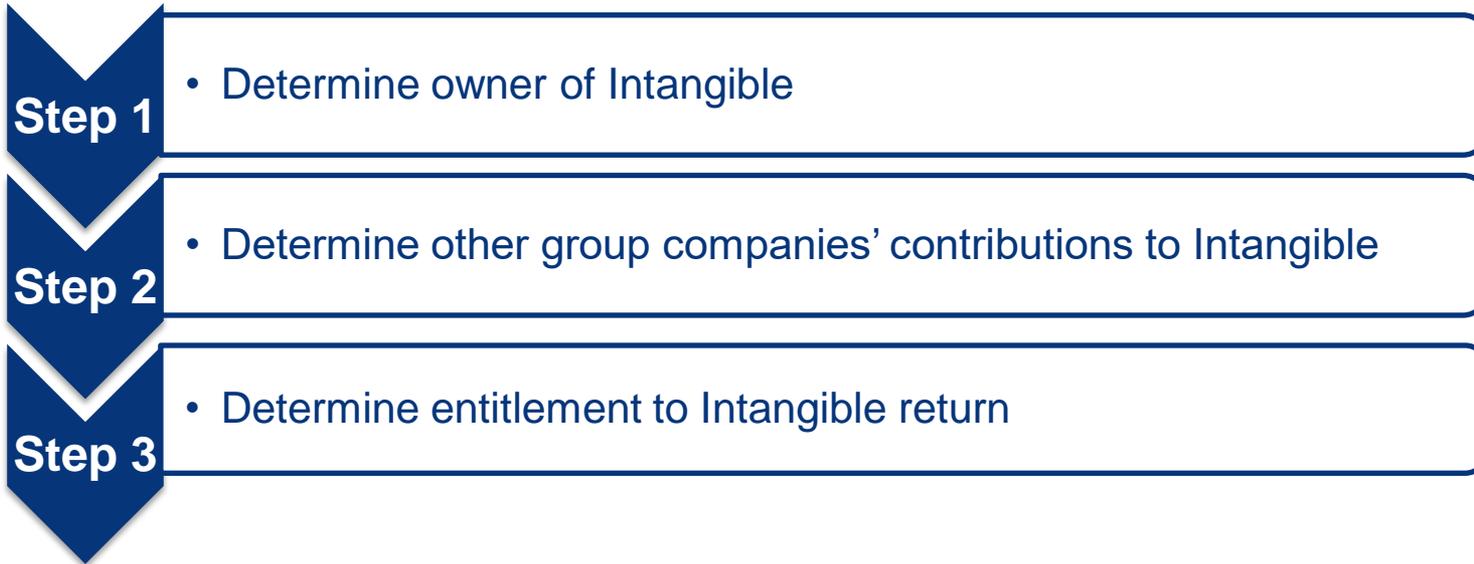
- Capital-rich member of MNE group with limited functionality: **Risk Free Return**
- Additional guidance on cost contribution agreements, commodity transactions and low value added services
- New projects:
 - Profit Split Method
 - Financial transactions

Recap: why are Dutch investment structures relevant here?

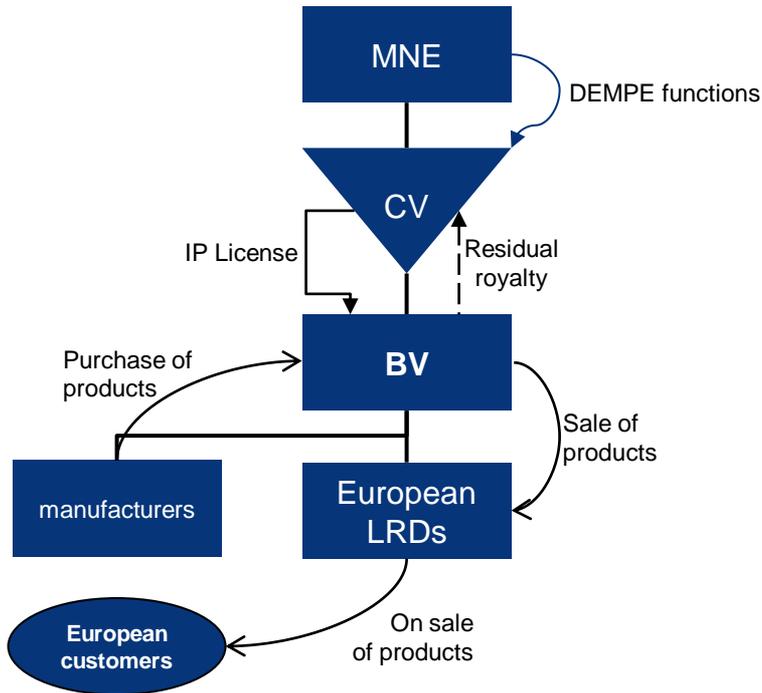
- Starbucks
- Uber
- Ikea
- Google



What does the Intangible framework look like?



Case 1 (IP transaction)



- BV is a 'super distributor' / local HQ
- It purchases from toll manufacturers and sells to European LRDs
- BV performs marketing and sales using IP
- CV is legal owner of IP
- BV pays residual royalty to CV for use of IP
- CV has limited functionality
- MNE provides all 'DEMPE' functions to CV and is compensated for it by CV under CCA

Case 1 (IP transaction)

- **Step 1** - Determining owner of Intangible
 - CV is the legal owner of the IP
 - Financial statements indicate that conduct of parties is in line with contractual agreement
 - CV is also owner of IP for TP purposes
 - Legal owner is not necessarily entitled to all Intangible return
 - Legal owner's entitlement to Intangible return depends on other group companies' contributions to Intangible

Case 1 (IP transaction)

- **Step 2** - Determining other group member's contribution to Intangible
 - 'DEMPE functions'
 - DEMPE functions are outsourced to MNE
 - CV does **not** have 'control over' outsourced DEMPE functions because:
 - It does **not** have the capability to make decisions regarding performance of DEMPE functions 😈
 - 'DEMPE funding'
 - CV funds DEMPE functions performed by MNE under CCA
 - CV does **not** have 'control over' (i) financial risk and (ii) underlying risk because it lacks the capability to take these decisions relating to these risks

Case 1 (IP transaction)

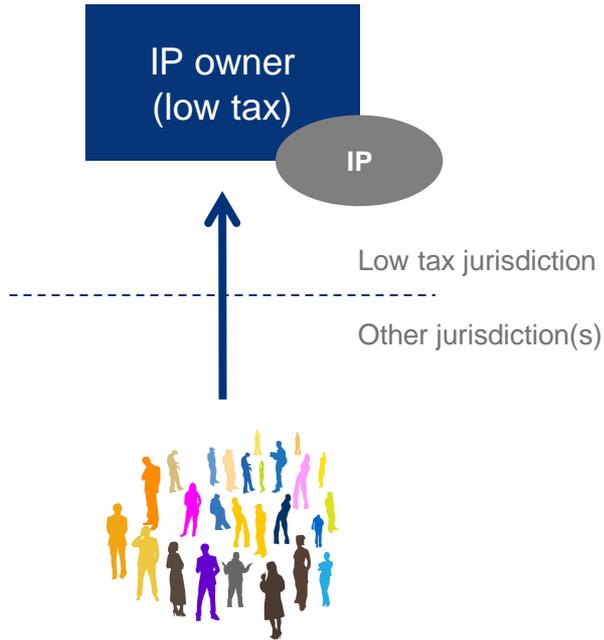
- Step 2 - Determining other group member's contribution to Intangible
 - 'DEMPE risk'
 - CV does not assume DEMPE risk because:
 - it is only involved with formalizing risk decision-making outcomes; and
 - It does not have the capacity and  s not actually involved in the decision making function relating to risk

Case 1 (IP transaction)

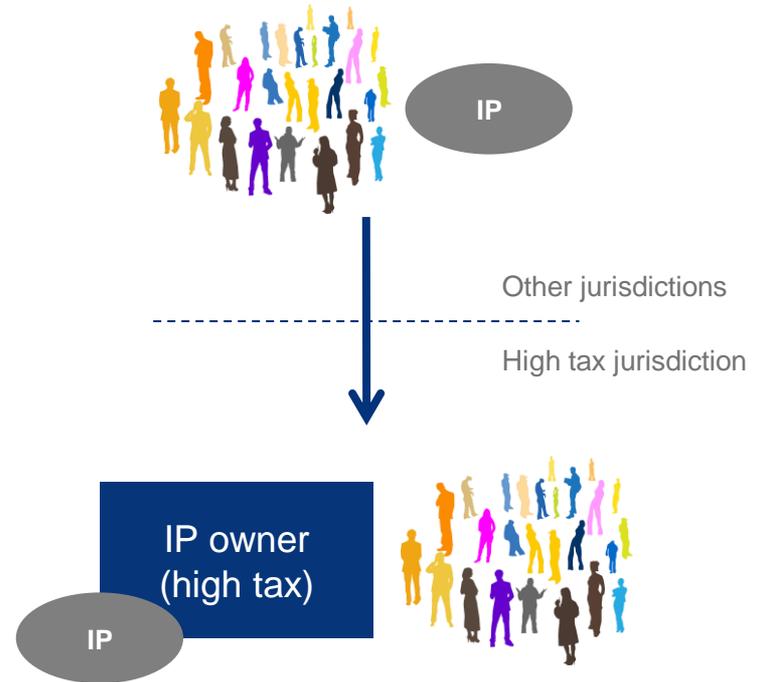
- Step 3 - Determining entitlement to group's exploitation of Intangible
 - In Step 2 it was determined that CV:
 - performs no DEMPE functions
 - provides no DEMPE funding; and
 - assumes no DEMPE risks
 - CV will therefore not be entitled to any Intangible return other than arm's length compensation for holding title

Solutions (1): aligning control and DEMPE functions

Offshoring functions



Onshoring functions and legal ownership IP



Solutions (2)

- (Financial) modelling of potential outcomes of transfer pricing methodology
- Rephrasing and restating intercompany contracts to align functions, risks and funding.

Vision

- Contents of intercompany agreements and other corporate documents will become more important
 - Alignment of control functions and corresponding returns reduces risks
 - “On-shoring” seems to fit best in business structures and can tackle other anti-BEPS measures
 - Increased focus on application profit split method
 - Substantiation of risk allocation by financial modeling will become more important
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