Planing M&A-Transactions

Legal Aspects from a Buyer's Point of View

Christoph R. Ramstein

Planing and Due Diligence Phase

- ▪ **Who wants to acquire what?**

  Make sure you understand the proposed transaction

- ▪ **Are there particularities to the industry?**

  Make yourself familiar with the industry (practice, regulations, permits, risks etc.)

- ▪ **What jurisdictions are involved and have impact?**

  Analyse the business structure of, both, your client and the target

- ▪ **Legacy issues? Any risks from the history?**

  (e.g. FCPA-risks)

Planing and Due Diligence Phase

- Share or asset transaction
- Structure of companies
- Structure of manufacturing, supply, distribution
- Flows of materials, products, invoices, cash
- Applicable egulations to products, services, manufacturing, market access, employments etc.
- Essential IP-rights
- Allocation of rights and of risks in general

➢ **Mapping the transaction and identification of chances / risks**

Labor Protection

- Can buyer close production or terminate supply agreements?

  (e.g. establishment of social plan, liability of important
  buyer in sourcing)

- Board-level representation of employees

  (Germany: Employee representatives have a right to seats on the
  supervisory board of larger companies – one-third in companies with 500
  to 2,000 employees, half in companies with more than 2,000)

- Will employments follow an asst transaction?

  (Switzerland: Where the employer transfers a business or part thereof to a third
  party, the employment relationship and all attendant rights and obligations
  pass to the acquirer as of the day of the transfer, unless the employee refuses.)

Regulated Business

- **Financial Markets**
  - Change of controlling shareholder subject to approval
  - Access to market for distribution of product
- **Pharmaceutical / Chemical**
  - Validated production process
  - Change of notified body
  - Certified products   (e.g. for EU-market CE-label)
- **Health Care**
  - Qualification to practice
  - Work permit and language skills
- **Transportation**
- **Food Industry**
  - Product declaration/description
  - Nutrition safety

Customs

- Will the proposed new structure complicate materials soucing and market access?

- Any cost saving opportunities?
  - Chance to shop favourable FTAs (Free Trade Agreement networks)
  - Weigth based / value based customs
  - Opportunity of change in tariff-heading (origin)

State Subsidies

- Availability of public promotion to develop the economy?
    - Cash, land, education grants
    - Tax holidays

Taxes

«Basics»

Objective
- reduce taxable base in high taxed locations
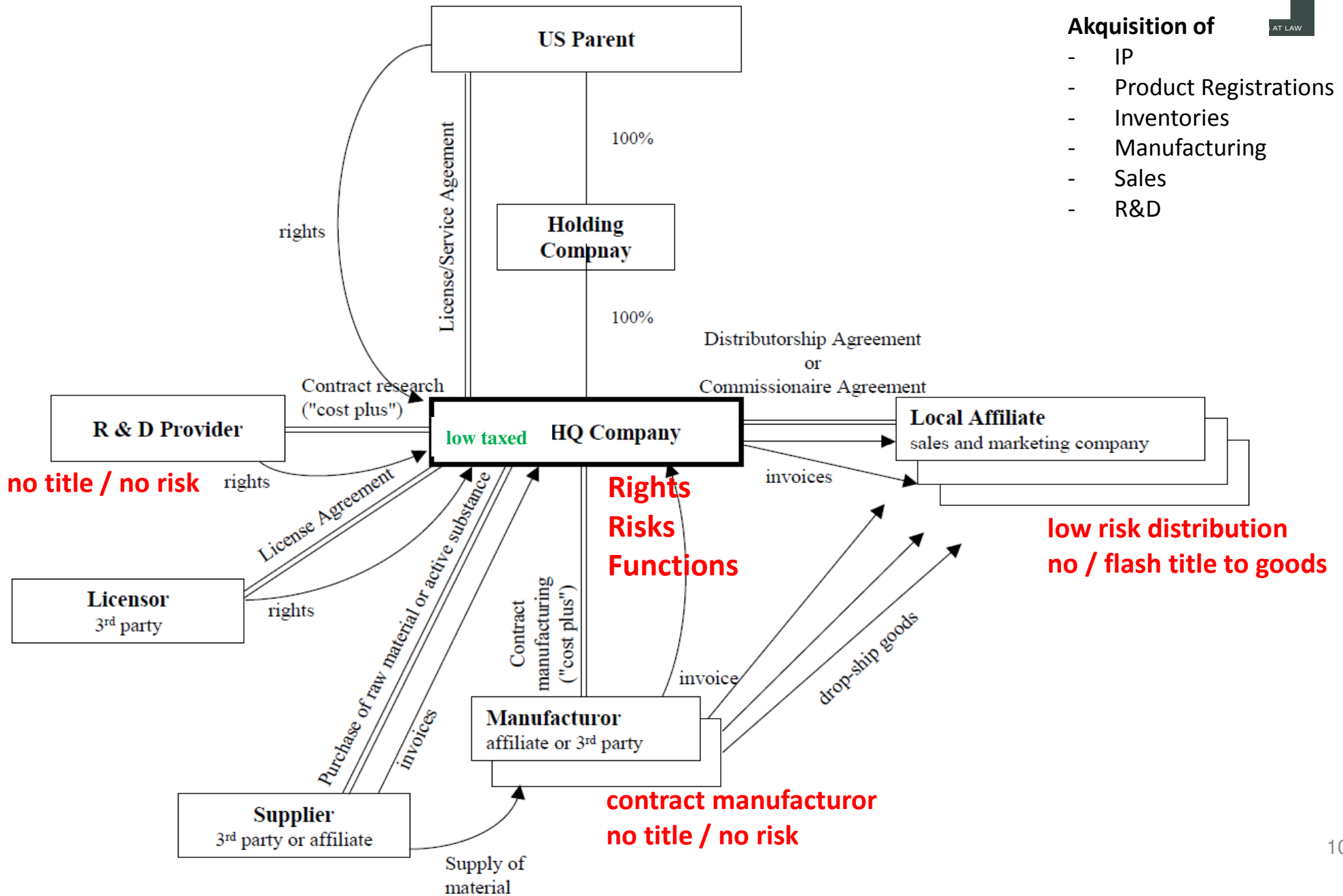- shift profit to low tax location

Rule
Allocate in the low tax location
- Rights
- Risks
- Functions

Taxes

«Practical Aspects»

- Management/Trading Company («principal») in low tax environment to manage supply chain, develop strategies, absorb financing/risk of R&D, hold and exploint IP; and use of contract manufacturing («cost- plus») and low-risk distributon («flash-title»)

  ➢ OECD + G20 efforts:

    BEPS (fighting tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax)
    CbCR (enhancing transparency regarding MNEs for tax administrations)

  ➢ Substance: «rights, risks, warm boddies»

Example in a «nut-shell»

Akquisition of
- IP
- Product Registrations
- Inventories
- Manufacturing
- Sales
- R&D

US Parent

Holding Compnay

100%

100%

License/Service Ageement

rights

Contract research ("cost plus")

R & D Provider

no title / no risk

rights

License Agreement

Licensor
3rd party

rights

Purchase of raw material or active substance

invoices

low taxed HQ Company

Rights Risks Functions

Distributorship Agreement
or
Commissionaire Agreement

invoices

Local Affiliate
sales and marketing company

**low risk distribution
no / flash title to goods**

Contract manufacturing ("cost plus")

invoice

drop-ship goods

Manufacturor
affiliate or 3rd party

**contract manufacturor
no title / no risk**

Supplier
3rd party or affiliate

Supply of material

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Financial Crisis / Souvereign Debt:
G-20, OECD and EU fight

- **legal but «agressive»** tax planing and
- **harmful tax competition**
- resulting in an **erosion of the tax base and the shifting of profits**
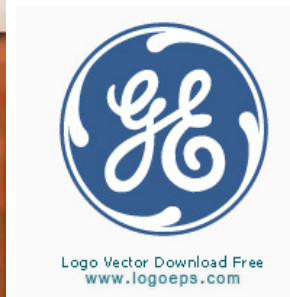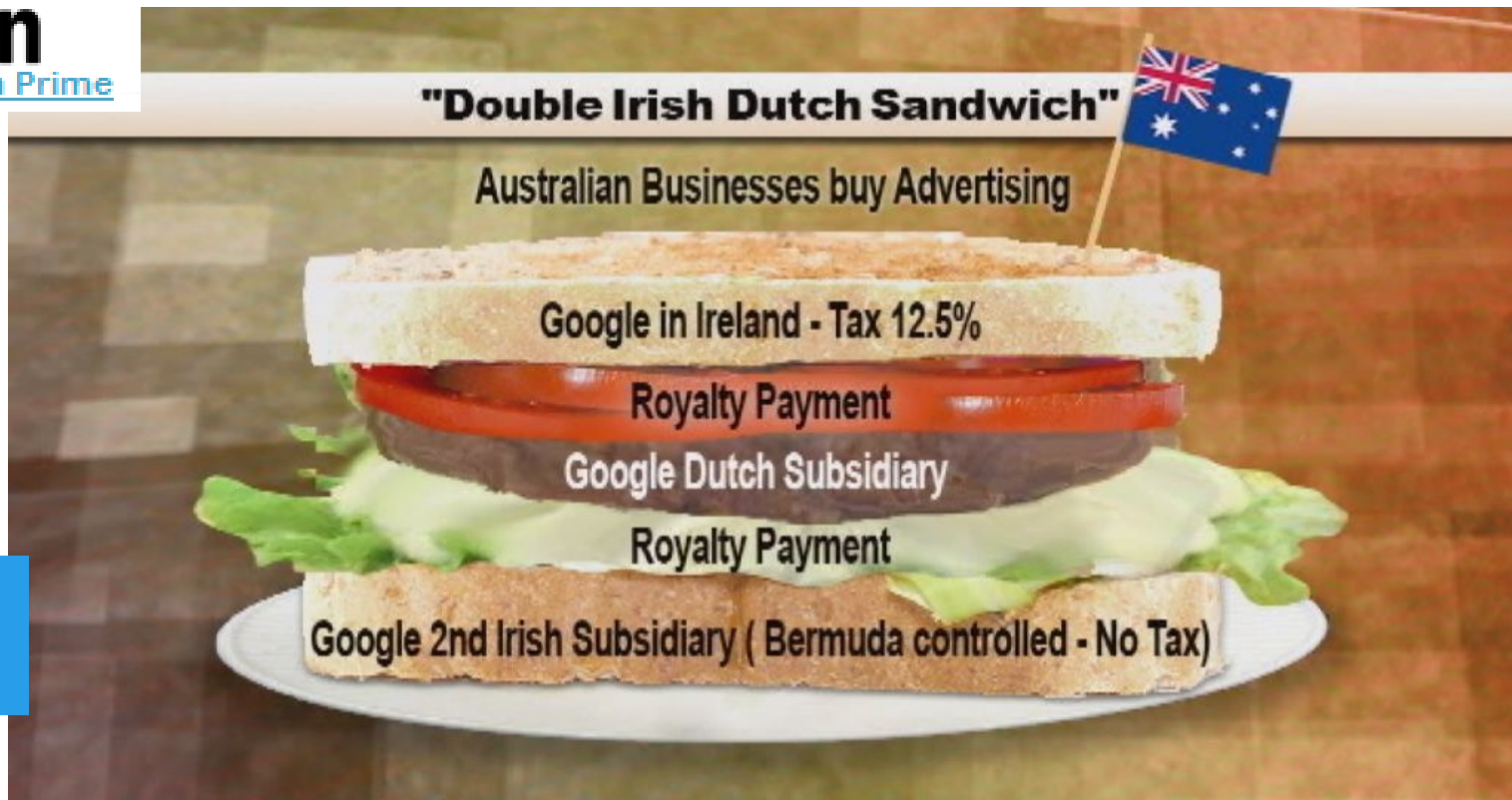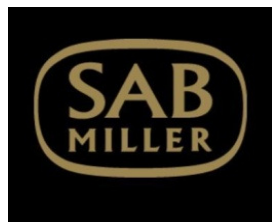
BEPS - The OECD reasoning

In an increasingly interconnected world, **national tax laws have not always kept pace with global corporations**, fluid movement of capital, and the rise of the digital economy, leaving **gaps and mismatches** that can be exploited to generate **double non-taxation**. This undermines the fairness and integrity of tax systems.

Base Erosion and Profit Shifting (BEPS) refers to tax planning strategies that exploit these **gaps and mismatches in tax rules** to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.

BEPS is a global problem which requires global solutions. For the first time ever in tax matters, OECD and G20 countries worked together on an **equal footing**.

Transparency and **international exchange of information** should facilitate working together, help enforcement and build confidence.

For the OECD Reports and further details see: http://www.oecd.org/ctp/beps-2015-final-reports.htm

OCED proposes **15 actions** to equip governments with the **domestic and international instruments** needed to tackle BEPS.

Action 1: Addressing the Tax Challenges of the **Digital Economy**

Action 2: Neutralising the Effects of **Hybrid Mismatch Arrangements**

Action 3: Designing Effective **Controlled Foreign Company Rules**

Action 4: Limiting Base Erosion Involving **Interest Deductions** and Other Financial Payments

Action 5: Countering **Harmful Tax Practices** More Effectively, Taking into Account Transparency and Substance

Action 6: Preventing the Granting of **Treaty Benefits** in Inappropriate Circumstances

Action 7: Preventing the Artificial Avoidance of **Permanent Establishment** Status

Actions 8-10: Aligning **Transfer Pricing** Outcomes with Value Creation

Action 11: **Measuring** and Monitoring BEPS

Action 12: Mandatory **Disclosure Rules**

Action 13: Guidance on **Transfer Pricing Documentation** and Country-by-Country Reporting

Action 14: Making **Dispute Resolution** Mechanisms More Effective

Action 15: Developing a **Multilateral Instrument** to Modify Bilateral Tax Treaties

Thank you!

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