

ROYALTY DEDUCTIBILITY BARRIERS AND PROFIT SHIFTING THROUGH IP

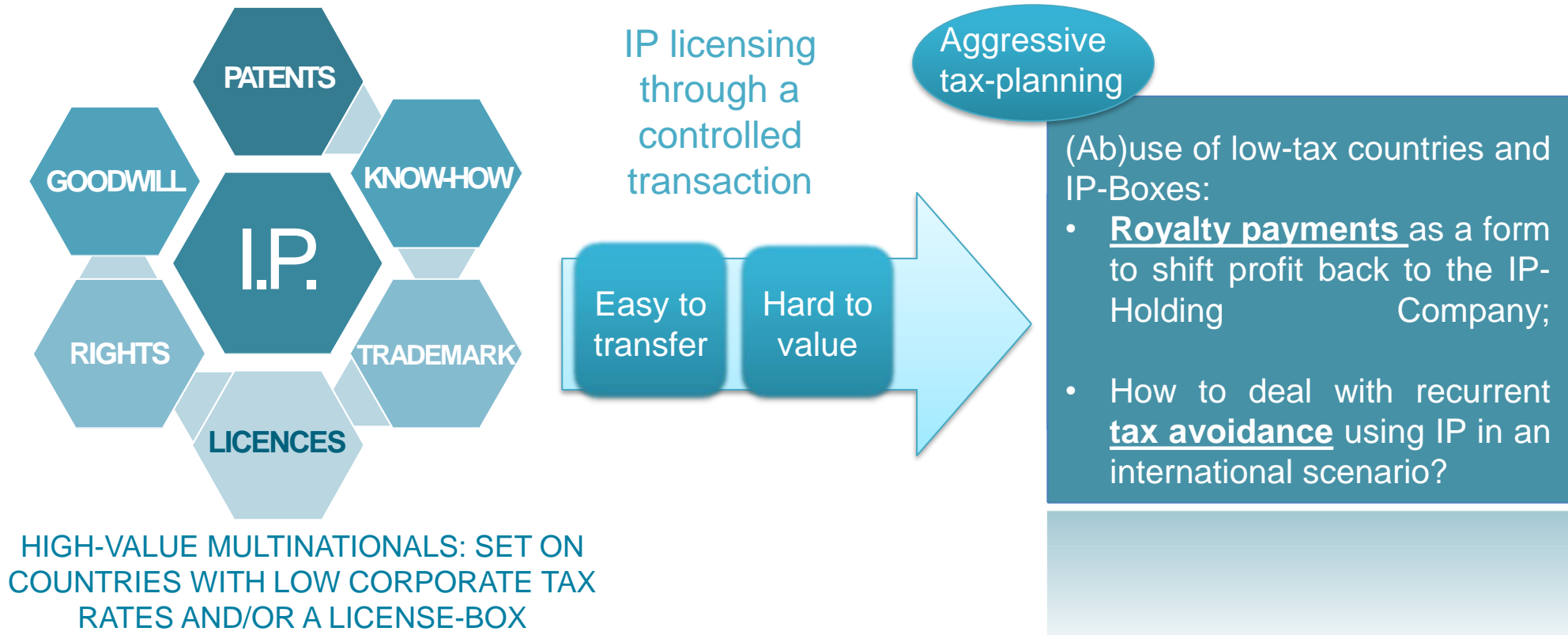
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MAX-PLANCK-GESELLSCHAFT

PROFIT SHIFTING AND INTELLECTUAL PROPERTY



ANTI-BEPS RULES ON ROYALTY PAYMENTS

General rules

Specific rules

Transfer Pricing Rules

Effectiveness of this system is jeopardized with the difficulty to value IP. Further issues with **HTVI**. Possibility of **retroactive price adjustment clauses**?

CFC-Rules

Restricted to specific cases and with **no consensus** on criteria for implementation and application. Coordination with other measures?

Withholding Taxes

Two pathways for WHT:

- **Broad-specter**, applicable to **all** transactions. Problems with EU law and foreign investments?
- Withholding tax as a **subject-to-tax clause**. How to determine effective **constraints**?

Royalty deductibility barriers

Unilateral application on some countries, restricting the deductibility of **royalty payments**. Determination of **criteria** to hamper deductions? Possible impacts on **foreign investments**?

GAARs

Mostly **backstop function** in treaty and EU law. **Last resort** in order to avoid treaty abuse and ensure a „fair“ taxation. Relevance to intangible assets?

The OECD Nexus-approach

Substantial activity requirement on **preferential regimes**. More damaging than beneficial, since tax havens are left out?

Inverted tax-credit system

Foreign tax-credits on **Lodin (2011)**. **Practical feasibility**?

GloBE proposal

International effective **minimum taxation** with an undertaxed payments rule, either as WHT or royalty barrier. Awaiting further **design proposals** by the OECD.

COMPATIBILITY WITH HIGHER-RANKING LAW

Constitutional law

Different restraints may arise from country's constitutional systems. Especially problematic are e.g. **royalty barriers**, that impede a **net taxation of income**.

European law

To the countries **part of the EU**, a huge obstacle is given e.g. through the **interest and royalties directive** when it comes to **withholding taxes**. Approval of reforms are not in sight.

Treaty law

Not only the **OECD-MC**, but also the **UN- and US-** ones are relevant to many anti-BEPS measures. Especially **Art. 12 and 24 OECD-MC** are relevant for the implementation of royalty barriers.

WTO law

This **often forgotten field of law** may also have direct impacts on measures aiming at preventing BEPS, notably with **BITs**, as well as **GATS** principles.

Evaluation of alternative norms *de lege lata*: effective, juridically and economically viable solutions.

The overarching goal of the aforementioned analysis will be to provide a two-fold answer to the topic of profit shifting through intangible assets, which is:

- Are royalty deductibility barriers a legally and economically viable method of curbing BEPS on intellectual property?
- If not, which of the other options is/are most suitable and likely to reach this goal, and what adaptations must realistically be made to the current taxation system for their successful implementation?