



Global Mobility Meets Transfer Pricing

What Happens when Functions,
Assets and Risks Follow?

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With guest speaker Paul Sutton, LCN Legal



Bios and Introduction



RBK

Sobhana Rao

Transfer Pricing Director



RBK

Richard McAufield

Tax Associate Partner



Paul Sutton

Co-Founder



RBK

Ronan McGivern

Head of Tax, Partner

Our Discussion Today



House keeping / Introductions



Global mobility / PE - Commentary to Article 5 update



TP/ Intra group services Chapter VII updates



Intragroup agreements and the legal fact pattern

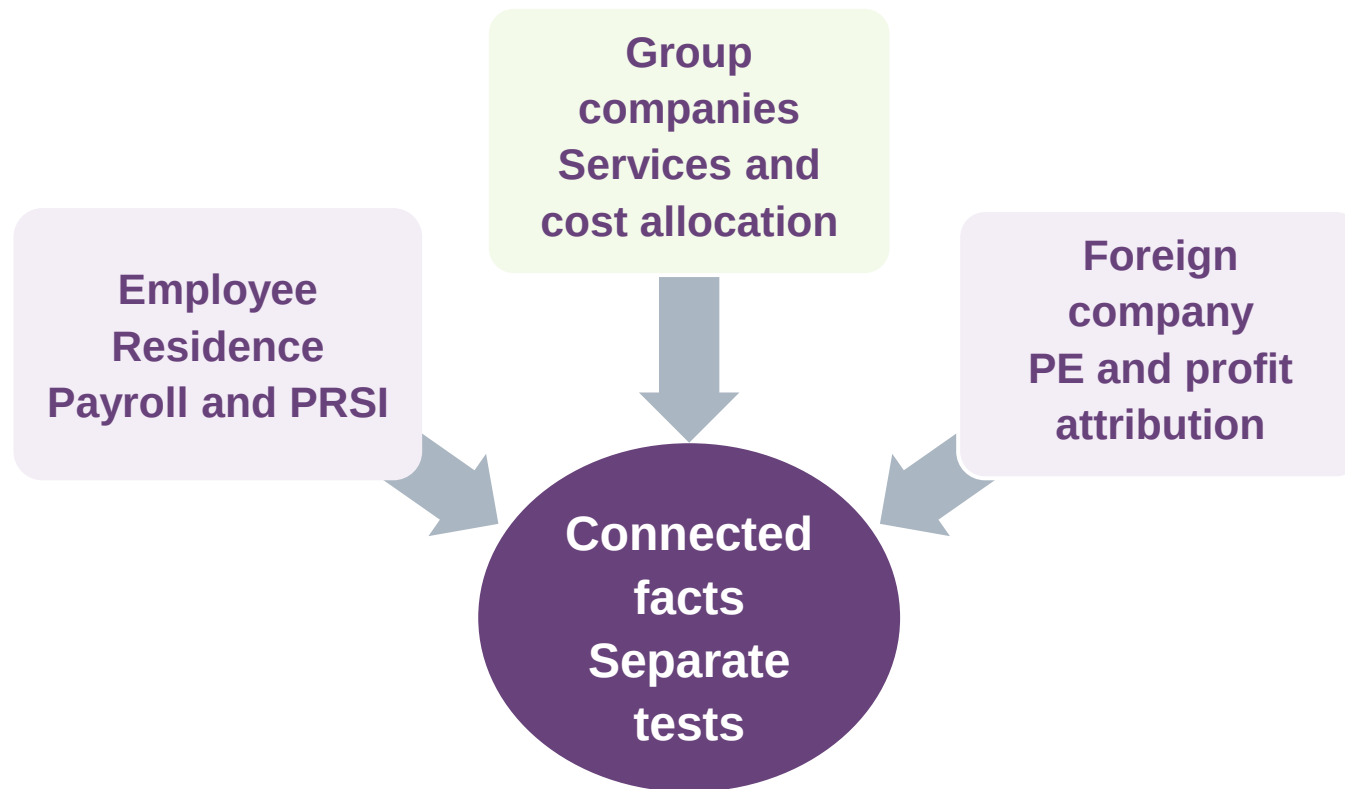


Panel discussion – Case studies



Wrap up

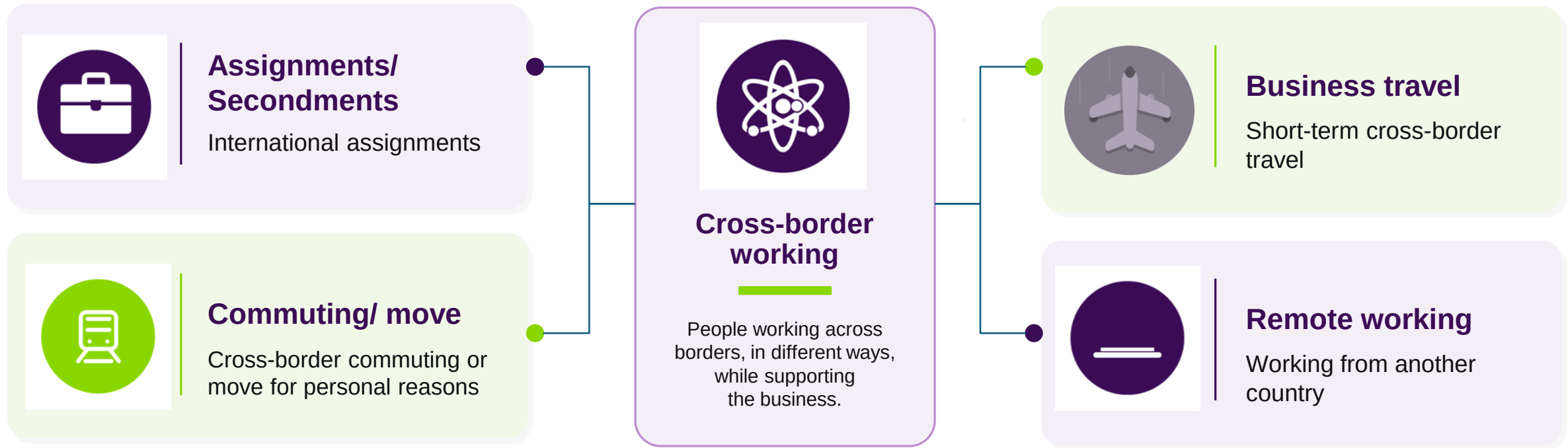
One move can affect several tax questions



Settling payroll does not settle the service charge or the company's PE position.

Work location alone does not establish a service to the Irish group company.

Why cross-border working matters to your business



A mobility issue can quickly become a payroll, PE and transfer pricing issue.

An Irish review needs more than a payroll check



Employee taxes

Irish PAYE can arise even where a foreign employer pays.



Social security`

PRSI should be tested separately; confirm the applicable system and any A1 coverage.



VAT

Nature of supply, place of supply, reverse charge and recovery



Corporation tax / PE

Review fixed-place, home-office and agency PE risk under domestic law and the relevant treaty.



Transfer pricing

Support the arm's length position and align agreements with the work actually performed. Legal Docs underpin.



Foreign payroll and a low PE risk do not by themselves remove Irish payroll obligations.

A coordinated review connects the individual position with the group's tax and transfer pricing position.

COMING TO A GROUP STRUCTURE NEAR YOU

PERMANENT ESTABLISHMENT



"Oh no. Additional costs."

PLOT TWIST

Sometimes it's the
CHEAPER answer

OTHER STATE EXEMPTS THE BRANCH PROFITS · IRELAND TAXES THE TRADE AT 12.5% · GROUP ETR FALLS

Subject to the other State's branch exemption conditions and, for in-scope groups, the Pillar Two minimum rate

Home working, agency and Irish PE checks

1. Fixed place of business

Definition (art. 5, §1):

- Fixed place of business
- Through which the business of an enterprise is wholly or partly exercised
- Key attention point is whether the fixed place of business is “at the disposal of” (e.g. access to building, able to inspect / provide maintenance to stock in warehouse, etc.)

Non-exhaustive list (art. 5, §2):

- Place of management, branch, office, factory, workshop, mine etc.
- **In practice: potentially home office**

Construction sites (art. 5, §3):

- Building site or construction or installation project constitutes PE if it lasts more than twelve months

Exception to the rule (art 5, §4):

- Activities which are considered as “auxiliary or preparatory”
- Use of facilities solely for the purpose of storage, display or delivery of goods or merchandise
- Maintenance of a stock of goods or merchandise solely for the purpose of (i) storage, display or delivery, and (ii) processing by another enterprise

2. Agency

Dependent agent (art. 5, §5) ('DAPE'):

- a person who is acting on behalf of an enterprise and has authority to conclude contracts in the name of the enterprise

Criteria (cumulative):

- Dependent: legal or economic interpretation
- Acting on behalf of
- Authority to conclude contracts
- Habitually exercises this right

“at disposal” Highly factual, case-by-case dependent interpretation

Impacted by the update to Commentary on Article 5 of the OECD
MTC

Update on Article 5 commentary regarding Home Office PE

Permanence first

Apply the normal fixed-place test. Short or intermittent use can fail before the home-working analysis becomes relevant.

Twelve-month period

Measure any 12-month period commencing or ending in the fiscal year concerned. Recurring use over several years can matter.

Denominator

Compare time at the home or other relevant place with the individual's total working time for that enterprise. Actual conduct controls.

Effect of the measure

Below 50% generally means no place of business. At least 50% leads to a facts-and-circumstances review, not an automatic PE.

This measure addresses fixed-place PE only. It does not determine payroll, residence or Dependent Agent PE.

Update on Article 5 commentary regarding Home Office PE

Commercial reason	The person's physical presence must facilitate the enterprise's business, such as sustained customer, supplier or group interaction.
Insufficient alone	Personal preference, staff retention and office-cost saving do not establish the link. Neither does the mere presence of customers or a group company.
Other PE route	Test whether the person habitually concludes contracts or plays the principal role leading to contracts routinely concluded without material change.
Irish treaty overlay	Apply the relevant treaty, protocol and MLI position. OECD Commentary assists interpretation but does not rewrite the treaty text.

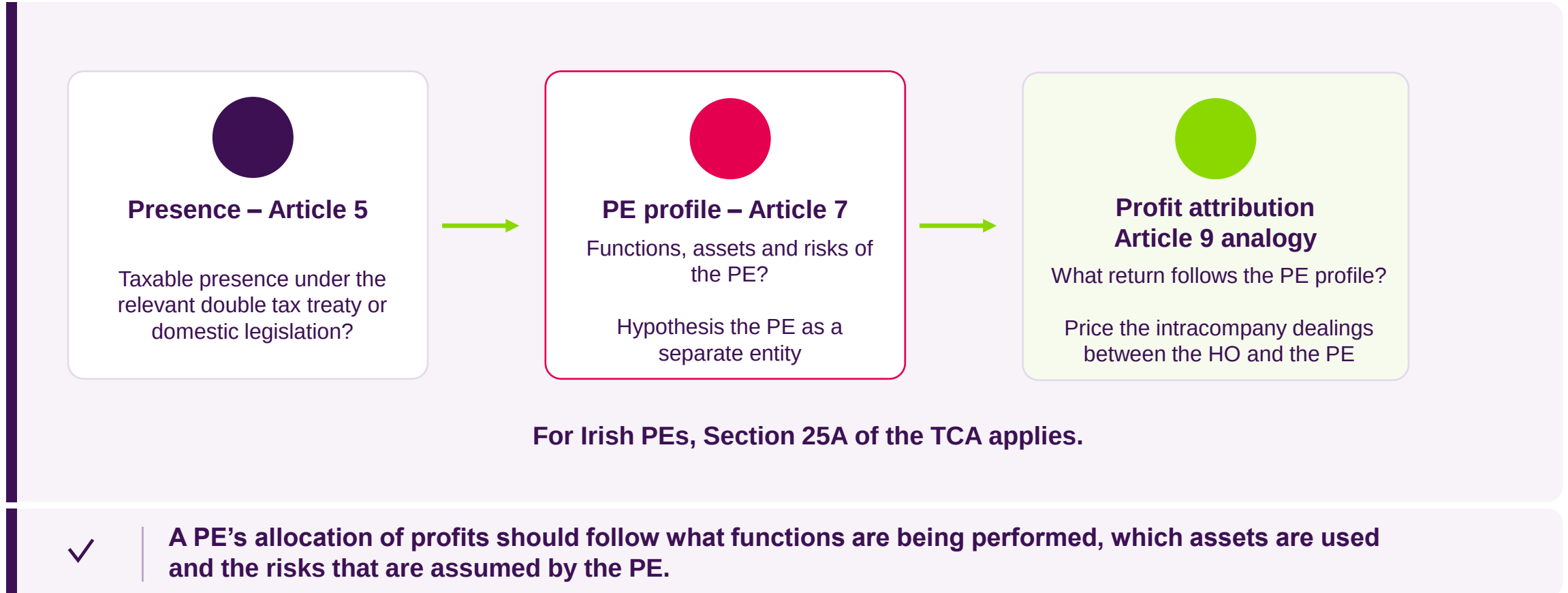
Irish domestic law and treaty protection require separate review. Section 25 TCA applies to a trade through an Irish branch or agency.

When home working creates a permanent establishment

	<u>WORKING PATTERN IN THE OTHER STATE</u>	<u>OUTCOME</u>	<u>WHY</u>
A	Three months of a 12-month period, one-off	No PE	Not fixed — lacks permanence
B	One or two days a week — 30% of time	No PE	Under 50% of working time
C	80% of time, plus regular client visits there	PE	Commercial reason — serving clients there
D	60%, all client contact remote (never in person); quarterly visit to client premises for a day to review performance vs. contract	No PE	No commercial reason (mere presence of er clients insufficient) — visits are incidental and short
E	Works from home; over 50%, no customers where individual based; in a location that allows individual to cover customers' time zones	PE	Commercial reason — real-time coverage, location facilitates provision of services

D and E are both near-full-time remote. The difference is whether the location itself delivers something.

A PE has been identified. What are the next steps?



Functions, Assets and Risks Analysis



Functions performed

Functions including the significant people functions performed by the Head Office (HO) and the PE to attribute profits to the PE.



Assets used

Tangible and intangible assets used and important to the intracompany dealings.
Economic ownership



Risks assumed

Economically significant risks and how the HO and the PE assume and manage these risks.

OECD's 2010 Authorised OECD Approach (AOA) provides the framework to attribute profits and free capital to PEs by treating them as functionally separate entities based on their functions, assets and risks.

Responsibility

Benefit

Risk Management

Evidence

What does the PE actually do?



Manufacturer/ Construction/ Extraction

Physical presence in the country

Factory/Construction over a certain period, exploration and extraction of natural resources onshore and offshore

Likely question

Routine return or more?



Distributor

Sells into a local market

Customer relationships, pricing, negotiation or sales contracts

Likely question

Routine risk margin or broader market return?



Services

People perform activities for the enterprise through its PE

Management, technical, commercial or support activities

Likely question

Cost recharge, cost plus, or high value service?

PE's functional profile determines the profit or loss to be attributed. A label alone cannot set the margin.



Characterisation drives whether the analysis points to a routine return, a service fee, or broader profit attribution.

Chapter VII starts with the service and its expected benefit

Identify

Accurate delineation

Expected benefit

Benefit test

Exclusions

Own costs
Shareholder costs

Cost allocation

Direct –indirect charge
(Allocation keys)

Mark-up

Low value 'vs' high value 'vs' passthrough costs

5% mark up is a safe harbour measure for low value adding services, but NOT automatic.

Corporate senior management would generally fall outside safe harbour.

Chapter VII: current guidance and proposed updates

Current framework	Direction of the proposed revisions
Identify the service and recipient	Closer integration with accurate delineation of the transaction
Establish economic or commercial benefit	More explicit analysis of the actual arrangement and the benefits being provided
Select an arm's-length price	Alignment with method selection and comparability
Retain supporting evidence	Further clarification and practical examples of modern work arrangements (e.g., post-COVID)

Chapter VII revisions remain proposals as on date

Examples

Distributor PE: who makes the sales and risk decisions?

The head office manufactures products and sends them to a PE that sells to customers. The OECD asks who actively decides inventory levels and whether to sell to a customer after assessing creditworthiness; those facts inform where inventory and credit risks sit. It then illustrates a notional purchase by the distributor PE from head office, priced using a comparable uncontrolled price where available, or potentially a resale price margin.

OECD AOA July 2010, Part I

Senior management: active decisions “vs” oversight

The OECD considers senior managers who set a bank’s overall risk limits while traders conduct the business at another location. Setting limits alone would generally not make the managers the people who assume and manage the trading risk. If they also intervene in active, ongoing risk management, they may share those significant functions with the traders. Paragraph 79 says this can affect capital and profit attribution and discusses including relevant senior management salary in a profit split factor.

OECD AOA July 2010, Part III para 76-79

An employee moves between group companies

A Co secondes a manufacturing specialist to **B Co** to assist with a factory start-up. The specialist remains on A Co’s payroll while working for B Co and has access to manufacturing know-how owned by A Co. The OECD says that, in many secondments, arm’s-length compensation for the employees’ services is the only payment needed. If they also make A Co’s manufacturing know-how available to B Co, that intangible element needs a separate analysis under Chapter VI.

OECD TPG 2022, paragraphs 1.174–1.175.

Documentation and Evidence

People and decisions

- Authority and approval matrix
- Decisions and approval emails.
- Meeting minutes.
- Relevant employee and intercompany agreements

Functional profile

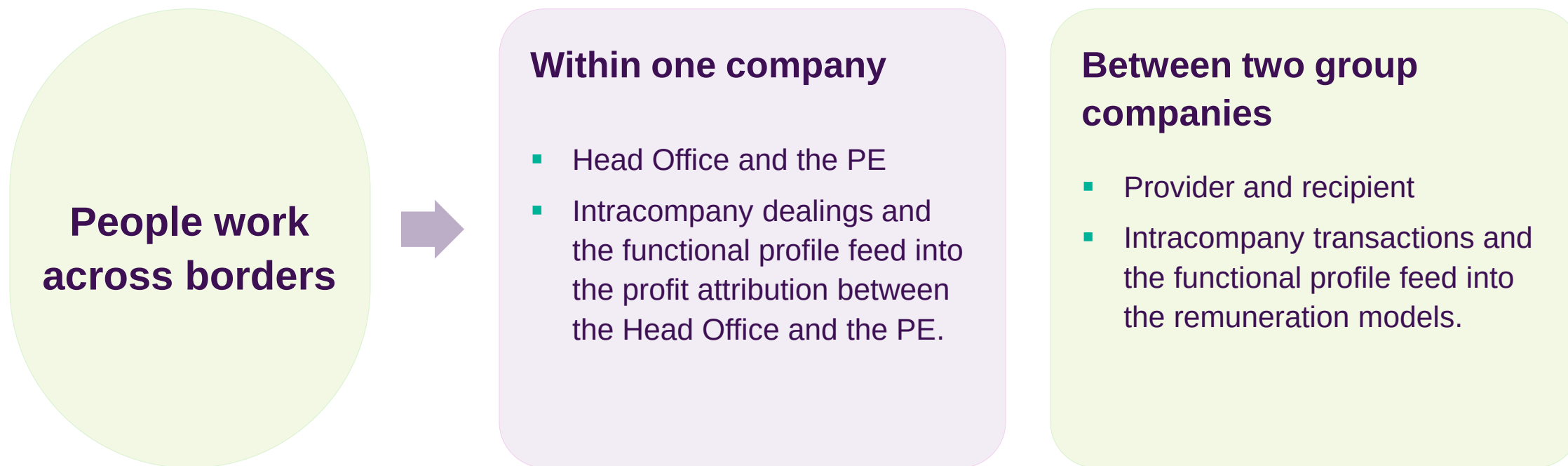
- Customer records and emails/correspondences
- Time sheets, project and asset-use records
- Relevant Branch records (PE) or TP documentation

Pricing

- Intercompany agreements
- Branch accounts and cost allocations
- Pricing method and comparables
- Annual reconciliation to the accounts

Actual conduct, financial records and written terms must tell the same story.

Mobile people can affect the existing transaction flows



A move may change an existing service, introduce a new transaction, or require review of the wider TP model.

INTERCOMPANY TRANSACTION BASICS: STAKEHOLDERS

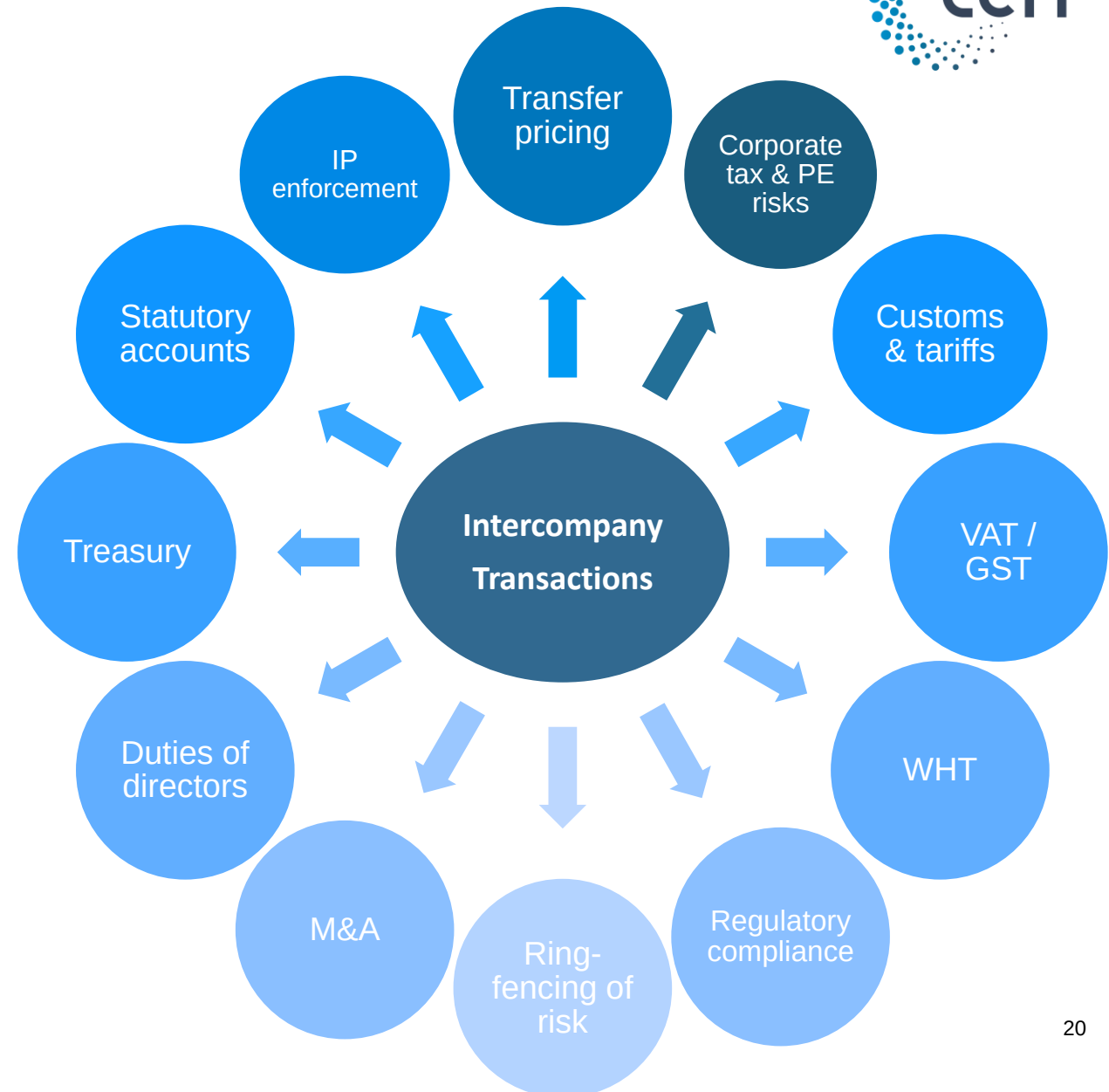


Intercompany agreements

= the group's opportunity to define the commercial terms of each transaction for multiple stakeholders

Transaction types

- **One-off transactions**
e.g. asset transfers, share transfers, distributions in kind
- **Ongoing transactions**
e.g. IP licences
- **Financial transactions**
e.g. loans, guarantees and cash pools

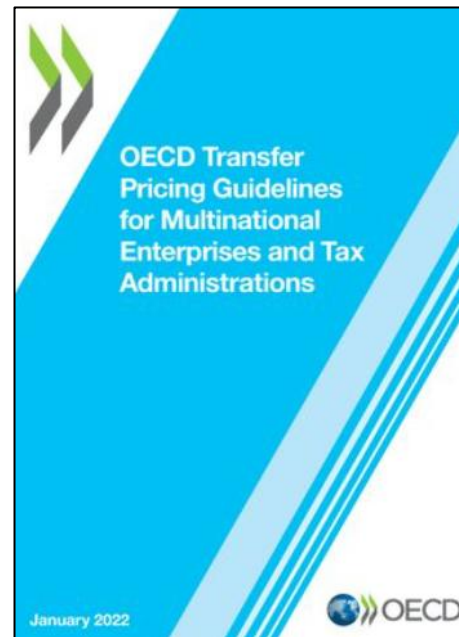


THE ROLE OF LEGAL IN TP



Legal is an **input**
into TP analysis:

- Existing agreements
- Regulatory environment
- Contracting model
- HR model
- Legal rights in IP
- Chain of title to goods
- Minority share rights
- M&A history
- Litigation history
- External debt



Legal is an **output**
from TP analysis:

- New / updated agreements
- Business restructurings
- Corporate approvals
- Third party consents
- Legal filings

IMPACT OF GAPS AND DEFECTS IN INTERCOMPANY AGREEMENTS



Typical consequences of gaps and defects in agreements:

- Wasted TP costs
- Fines and penalties for non-compliance with formal TP requirements
- Unsupportable TP, WHT, VAT positions
- Unnecessary exposure to TP / WHT / VAT risks
- Unnecessary exposure to tax investigations and disputes
- Denial of corporation tax deductions
- Directors exposed to personal liability risks for breach of fiduciary obligations
- Exposure to risks of investor litigation
- Adverse impact on proposed corporate transactions

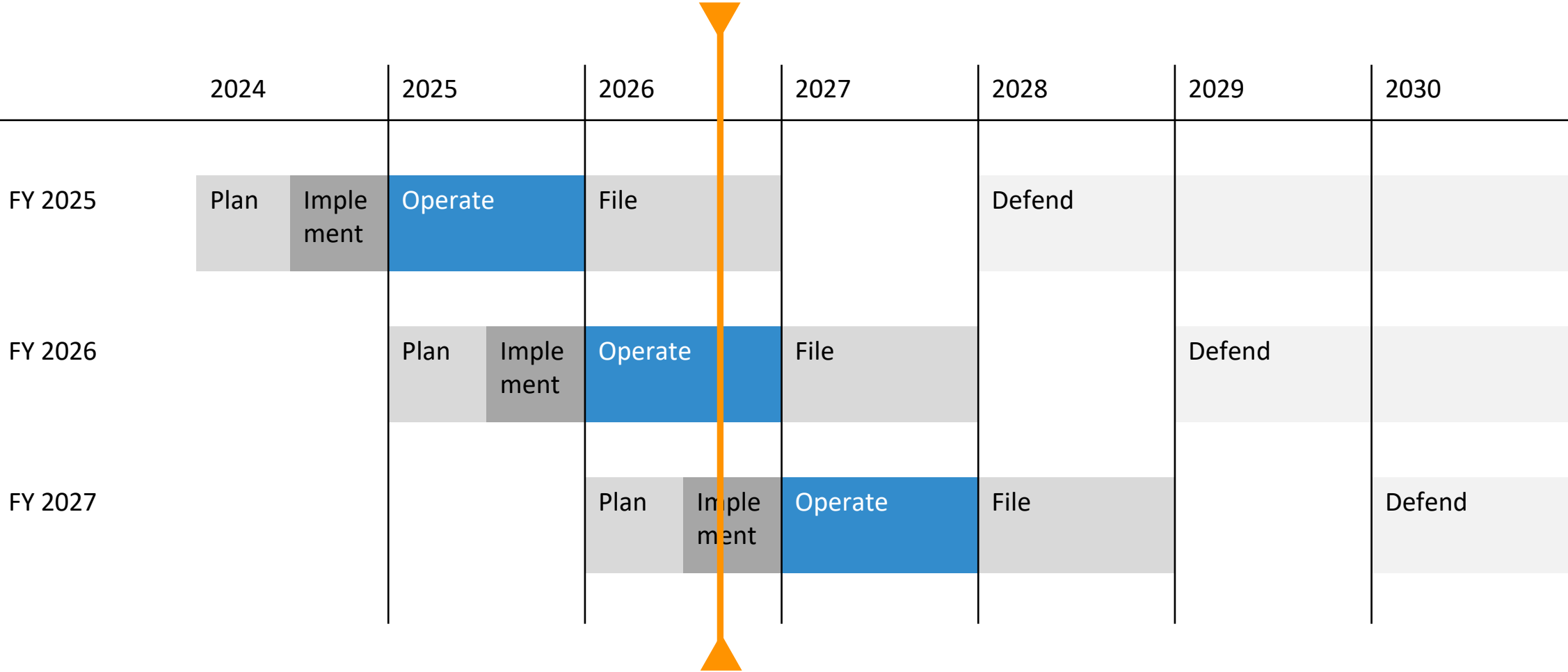


Assess the business case as regards:

- **What** legal action or input is needed
- **Why** it is needed
- **When** it is needed (or why now)

This is the role of the in-house tax and finance function, with guidance from external advisers

INTERCOMPANY TRANSACTIONS LIFECYCLE



You are
here



Case Studies

Case 1 - Maya: who directs the finance work?

ABC Group: A Co (Country A) owns the software platform and employs Maya, its finance manager. B Co (Country B) provides group support.

Specific facts

- Maya remains on A Co's payroll.
- For six months she works two days a week at B Co. B Co's finance head allocates her tasks and reviews her output.
- There is no recharge or secondment agreement.

Questions in speaking order

A. Could A Co have a PE through Maya's work at B Co? What employment tax and social security checks follow

B. Does B Co receive a seconded employee or a finance service from A Co? What should the recharge cover?

C. What should the assignment and recharge terms record?

Case 1 - Maya: CT, TP and agreement implications

B Co's supervision points towards a secondment analysis. The parties' actual conduct, economic analysis and legal position determines the tax and charging position.

A CT / PE

- Check whether A Co carries on its own business through space available at B Co. Maya's presence alone does not establish a PE.
- Review payroll withholding and the applicable social security system separately. Check VAT on any cross-border supply.

B Transfer pricing

- B Co directs Maya's tasks and reviews the output. Identify attributable salary and other assignment costs.
- Test whether A Co supplies any further finance or administration function before deciding whether cost reimbursement or a service margin fits.
- Support the recharge with time and cost records.

C Contracts and IC agreements

- Ensure that the transaction is commercially rational
- Record Maya's reporting line, supervision, duration and allocation of employment costs.
- State who bears responsibility for the finance output and errors.
- Specify pricing, IP ownership, payroll, confidentiality and termination duties.

Case 2 - Leo: one regional role, different activities

ABC Group: A Co owns the software platform and employs Leo, its sales director. B Co provides support. C Co distributes in Country C, Country D and nearby markets.

Specific facts

- **Country B:** Leo meets customers and passes leads to A Co. A Co negotiates and contracts.
- **Country C:** Leo helps negotiate C Co contracts within delegated limits; C Co's local team reviews and approves.
- **Country D:** on repeated visits Leo settles key terms for C Co. C Co signs in Country C, usually unchanged.

Questions in speaking order

A. Which enterprise could have a PE in each country? Does signing in Country C settle the Country D position?

B. Which entity benefits from Leo's leads and negotiation work? Who should charge whom, and for what? How should the agreements be structured?

C. What territorial mandate, authority limits and approvals should be put in place?

Case 2 - Leo: CT, TP and agreement implications

The analysis follows the customer activity and the enterprise whose contracts Leo advances.

A CT / PE

- **Country B:** a genuine lead handover is generally less likely to meet an agency PE test.
- **Country D:** repeated settlement of key terms may create agency PE exposure for C Co under the relevant treaty, even if C Co signs in Country C. Assess fixed-place PE separately.
- Set Leo's mandate by entity, country and activity.

B Transfer pricing

- Design the matrix of transactions to fit the legal fact pattern
- Separate A Co's lead generation from work Leo performs for C Co.
- Identify the beneficiary and price the actual sales and negotiation contribution.
- A support fee does not answer whether a PE exists. Coordinate any PE profit attribution with intercompany returns.

C Contracts and IC agreements

- Ensure risk allocation, treatment of IP and intercompany pricing aligns with economic analysis
- Define pricing limits and who approves material terms.
- Keep CRM, negotiation and approval records consistent with actual practice.
- Review recharge terms when his role changes; a signature clause alone has little weight.

Case 3 - Niamh: where should the product team sit?

ABC Group: A Co (Country A) owns the software platform and employs Niamh, its product director. The group has no branch or subsidiary in Country B.

Specific facts

Niamh plans to move to Country B. She may hire and lead a local software development team, while A Co's board retains approval over key product decisions.

The group has not chosen whether A Co will operate there directly, register a branch or form B Co.

Niamh has no sales or contracting role. The group seeks a structure for her move.

Questions in speaking order

A Choosing between a branch or subsidiary? What changes if a local team is hired?

B Would the new team provide development services to A Co, or make contributions that could support Profit Split Method?

C What employment, service or development terms are needed under each structure, including IP and risk control?

Case 3 - Niamh: the structure follows the planned work

The client's first decision is who will employ the team, direct its work and bear development risk in Country B.

A CT / PE

- A Co's direct work in B may create a PE before any branch registration.
- A registered branch remains part of A Co. A new B Co is separately taxed, but A Co could still have a PE through its own activity there.
- Assess payroll and social security, then any transfer of functions or rights.

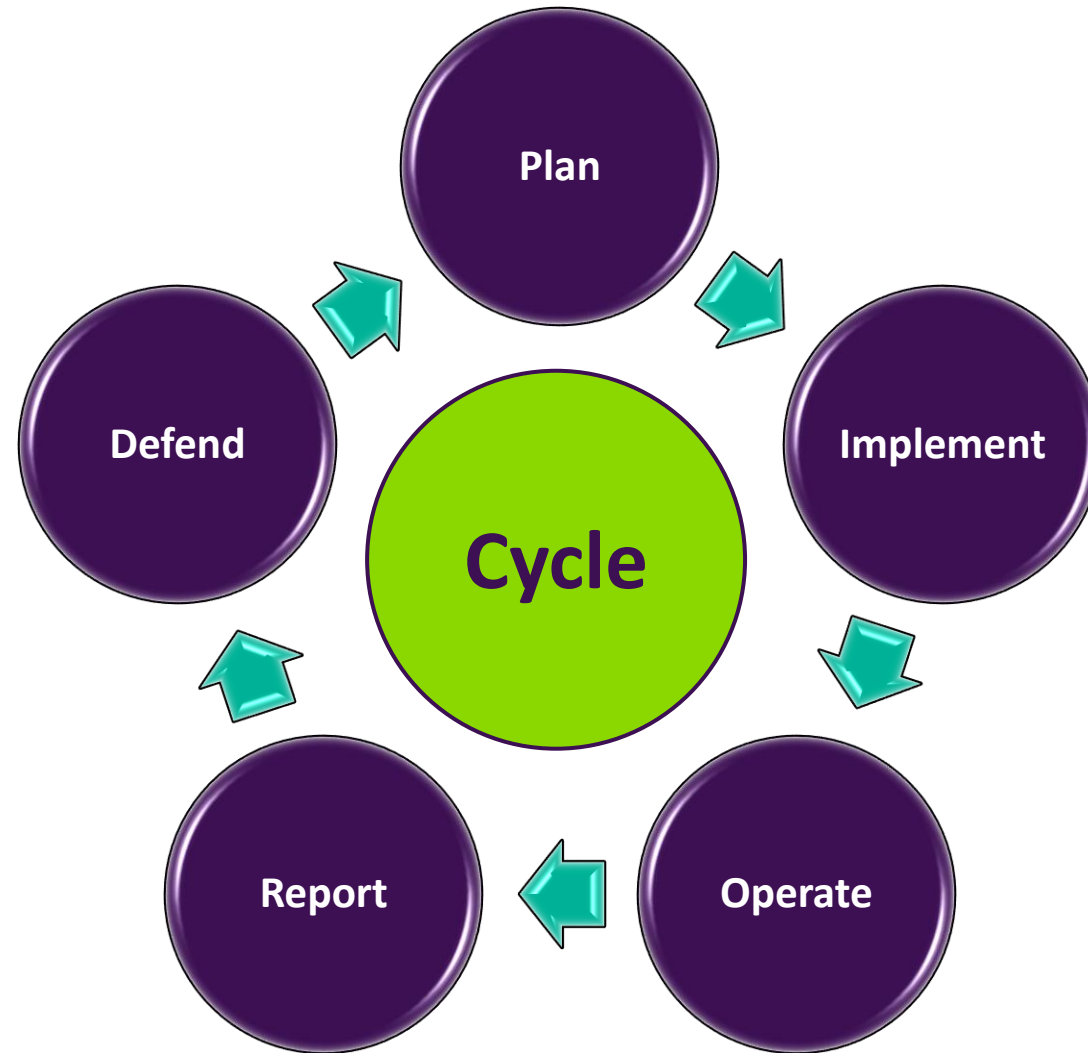
B Transfer pricing

- If a B Co team works under A Co's direction, price the development service under Chapter VII.
- If A Co and B Co each make unique contributions and share important risks, assess PSM for the defined product activity.
- Choose the profit pool and loss rules from the actual arrangement.
- For a branch, record internal governance and PE profit attribution.

C Contracts and IC agreements

- Intercompany agreements must align with economic analysis
- Employment agreement to lay out specific relevant clauses
- For B Co, document employment and service or joint development terms, A Co board approvals, IP output, risk funding and pricing.
- Add people factors and losses only if PSM fits.

Action Points



Checklist – Items to consider with a cross-jurisdictional move

Internal policies and records
Mobility policy and guide
Awareness and training on internal policies
Approval matrix
Tax implications and decisions
Employee tax and payroll
Social Security
Corporation Taxes
Decide - Branch vs Subsidiary
Transfer Pricing
VAT/Customs
Check - Business Restructuring?

Legal
Employee Contracts
Intercompany agreements
Other legal documents and evidences
Accounts and books of records
Periodic review for changes – Annual or move-based
Other regulatory compliance requirements



Thank You

Sobhana Rao
Transfer Pricing Director, RBK
T: +353 1 6440100
E: srao@rbk.ie

Richard McAufield
Tax Associate Partner, RBK
T: +353 1 6440100
E: rmcaufield@rbk.ie

Paul Sutton
Co-Founder, LCN Legal
T: +44 20 3286 8868
E: paul.sutton@lcnlegal.com

Ronan McGivern
Head of Tax, Partner, RBK
T: +353 1 6440100
E: rmcgivern@rbk.ie

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