



# FEDIL

*The Voice of Luxembourg's Industry*



**CONFERENCE**

**NEW BEPS-COMPLIANT  
INTELLECTUAL PROPERTY  
TAX REGIME IN  
LUXEMBOURG**

**7 MAY 2018**

# AGENDA

- **INTRODUCTION**

René Winkin, Director FEDIL

Bernard David, Partner, International Tax Leader Deloitte Luxembourg

- **LEGAL ASPECTS**

Pierre Kihn and Olivier Laidebeur, Patent and Trademark Attorneys at Office Freylinger

- **TAX ASPECTS**

Bernard David, Partner, International Tax Leader, Thierry Bovier, International Tax Partner, and Ralf Heussner, Transfer Pricing Partner at Deloitte Luxembourg

- **THEORETICAL SHOWCASE**

Roundtable Discussion between FEDIL, Office Freylinger and Deloitte Luxembourg

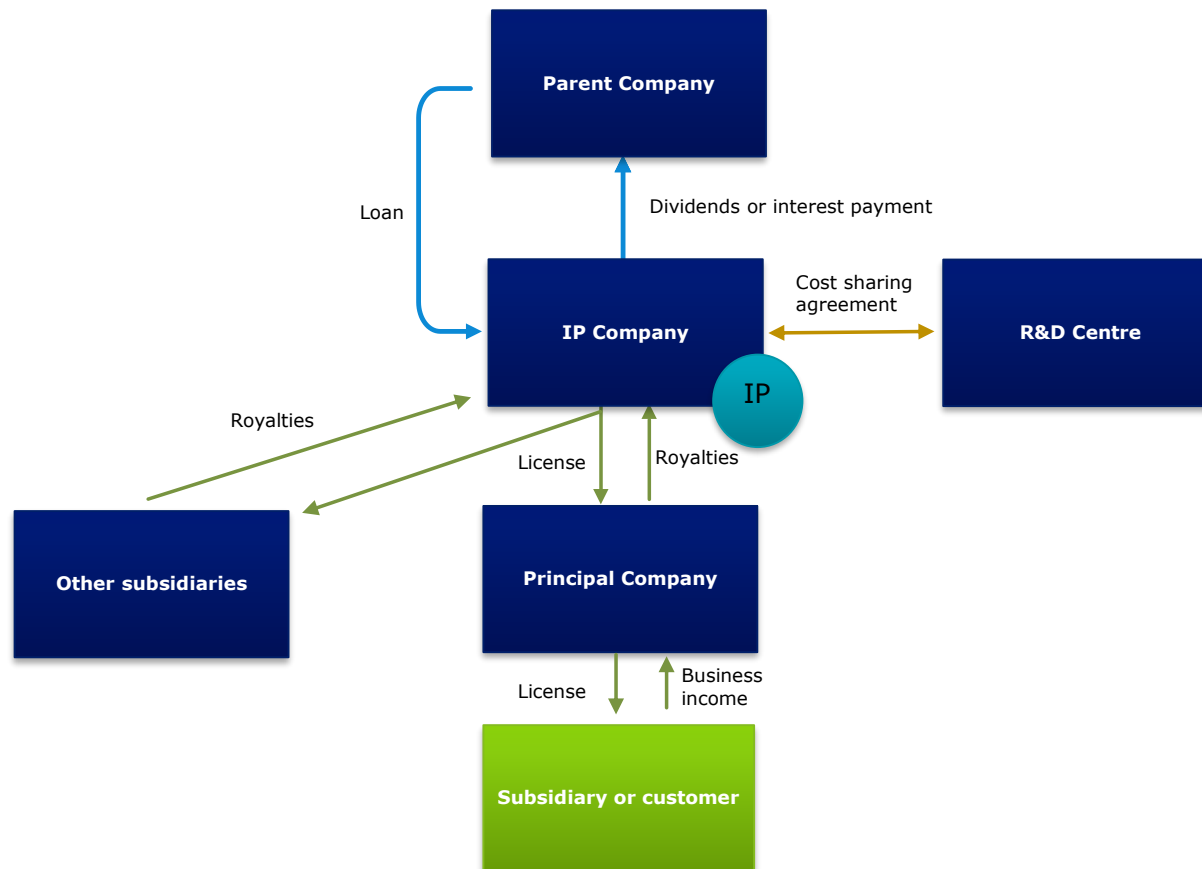
- **Q&A**

# INTRODUCTION

René Winkin  
Director FEDIL

# A changing environment

## Key tax considerations – a changing environment



### Global level change

An ever increasing amount of change is being driven globally, by organizations such as the OECD and the EU.

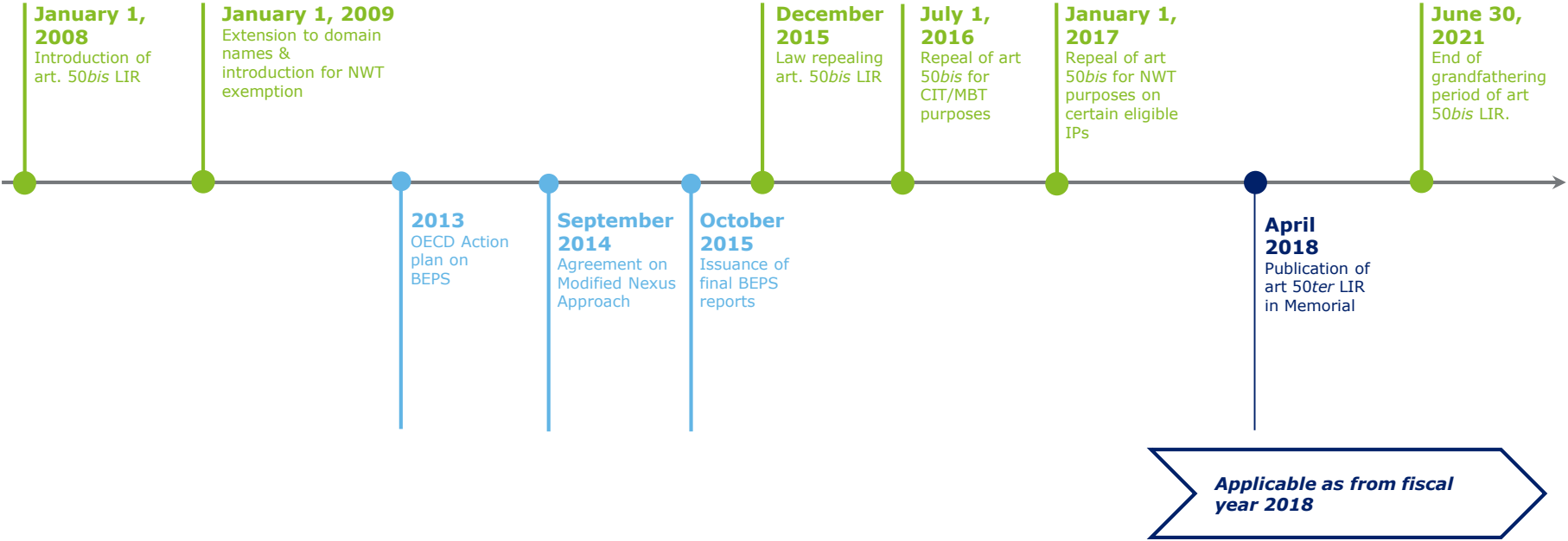
- BEPS Action 5
- Transfer pricing
- EU Anti Tax-Avoidance Directives
- Country by Country Reporting
- Disclosure requirements e.g. Masterfile and local file

- Royalty deduction restriction
- Group synergies and allocation
- Multilateral instrument
- Exchange of information
- State aid concerns

- Permanent establishment changes
- Treaty shopping scrutiny
- Anti-conduit rules

# Intellectual Property Regime in Luxembourg

## Timeline



# Legal aspects





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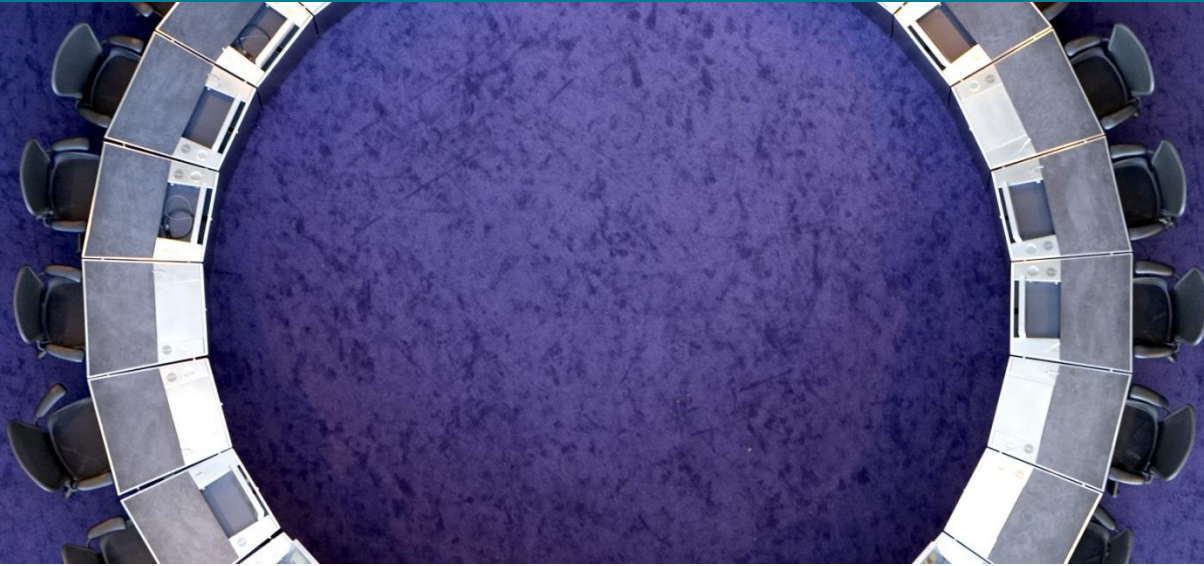
# INTELLECTUAL PROPERTY AND TAXES

**7 May 2018**





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# I. INTELLECTUAL PROPERTY AN ASSET FOR YOUR COMPANY



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**Intellectual Property = Family Jewels**



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# A Definition of Intellectual Property

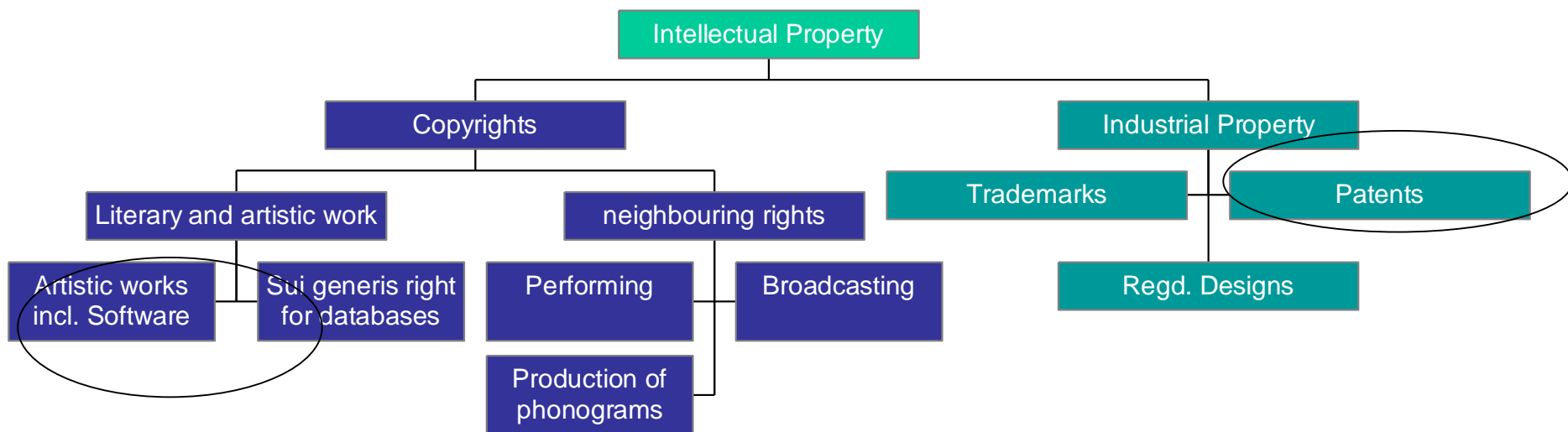
Legal field that protect the **creations of the mind**

IP rights confer **exclusive rights**  
(State guaranteed monopolies)

**Ideas cannot be protected** as such – only the expression of  
the idea can be protected



# Extent of IP





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# Most Valuable IP Assets

## Most Valuable IP Assets

Companies name the rights most crucial to their business.



Source: Intellectual property survey of U.K. companies, PricewaterhouseCoopers, March 2002.



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## “Actifs éligibles”

**An invention** protected by  
**a patent / utility model**  
**an SPC**  
**a pediatric extension**  
**an Orphan drug status**  
**a Plant certificate**

**A Computer program** protected by **copyrights**



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# Rights are not eligible anymore (art 50 Bis LIR)

Trademarks

Designs

Domain names



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# On The Menu Today

## Patents

*inventions*

## Software protection

*Multiple protections, including*

- *Source code (copyrights)*
- *Design*
- *Trademark*
- *Patent*
- *Contract*





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# Intellectual Property is everywhere





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## II. WHAT IS A PATENT OF INVENTION ?



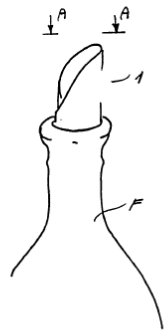
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# Patents

**PCT** WORLD INTELLECTUAL PROPERTY ORGANIZATION  
International Bureau

INTERNATIONAL APPLICATION PUBLISHED UNDER THE PATENT COOPERATION TREATY (PCT)

(51) International Patent Classification <sup>5</sup> : <b>B65D 23/06</b>	<b>AI</b>	(11) International Publication Number: <b>WO 92/05080</b> (43) International Publication Date: 2 April 1992 (02.04.92)
(21) International Application Number: PCT/DK91/00275 (22) International Filing Date: 17 September 1991 (17.09.91) (30) Priority data: 2297/90 24 September 1990 (24.09.90) DK (71) Applicant (for all designated States except US): MIDAN APS [DK/DK]; Livøvej 25, DK-8800 Viborg (DK). (72) Inventor; and (75) Inventor/Applicant (for US only): JENSEN, Brian, Yang [DK/DK]; Smelevvej 18, Nr. Vovrup, DK-7700 Thisted (DK). (74) Agent: MAGNUS JENSEN'S SUCCESSORS; P.O. Box 207, DK-3520 Farum (DK).	(81) Designated States: AT, AT (European patent), AU, BB, BE (European patent), BF (OAPI patent), BG, BJ (OAPI patent), BR, CA, CF (OAPI patent), CG (OAPI patent), CH, CH (European patent), CI (OAPI patent), CM (OAPI patent), DE, DE (Utility model), DE (European patent), DK, DK (European patent), ES, ES (European patent), FI, FR (European patent), GA (OAPI patent), GB, GB (European patent), GN (OAPI patent), GR (European patent), HU, IT (European patent), JP, KP, KR, LK, LU, LU (European patent), MC, MG, ML (OAPI patent), MR (OAPI patent), MW, NL, NL (European patent), NO, PL, RO, SD, SE, SE (European patent), SN (OAPI patent), SU*, TD (OAPI patent), TG (OAPI patent), US.	
Published With international search report.		
(54) Title: DRIP-CATCHER		
(57) Abstract The invention relates to a drip-catcher for, for instance, a bottle and intended for preventing dripping and drops seeping from the bottle orifice during pouring. The drip-catcher of the invention simply consists of a piece (1) of flexible and elastic foil material, preferably plastic material foil having the thickness of 1-2 mm. The diameter of the piece of material may be 60-80 mm. When used as a drip-catcher the piece of material is rolled into an oblong cylindrical form and inserted in the orifice of the bottle. Due to its elasticity the piece of material will positively engage the orifice and constitute a tube-formed outlet spout. Due to the small thickness of the foil material and its liquid-repellent nature this spout cuts off the jet very efficiently and is also a very efficient drip-catcher. The drip-catcher of the invention is extremely simple and cheap. Its use is uncomplicated and it is universally applicable because the piece of material adjusts itself to the bottle orifice irrespective of its size. The effect of the drip-catcher is remarkable due to the small thickness and liquid-repellent surface of the material.		



**Europäisches Patentamt**  
European Patent Office  
Office européen des brevets

Publication number: **0 659 375 A1**

**EUROPEAN PATENT APPLICATION**

Application number: **94108936.9**  
Date of filing: **10.06.94**  
Priority: **21.12.93 GB 9326106**  
Date of publication of application: **28.06.95 Bulletin 95/26**  
Designated Contracting States: **CH DE FR IT LI NL**

Int. Cl.<sup>8</sup> **A47G 23/02, A47B 73/00**

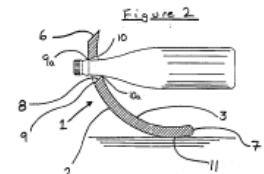
Applicant: **RUBY TOWER COMPANY LIMITED**  
22nd Floor,  
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Representative: **Meddle, Alan Leonard**  
**FORRESTER & BOEHMERT**  
Franz-Joseph-Strasse 38  
D-80601 München (DE)

**A bottle support.**

A free-standing bottle support (1) for supporting a bottle in a substantially horizontal attitude above a horizontal support surface upon which the support (1) is stood, which support (1) has a head portion (6) rigidly connected to a base portion (7), the head portion (6) comprising means (8,9,10) for receiving and retaining a neck of the bottle, which bottle support (1) is characterised in that the base portion (7) has a curved contact face (11) for resting on the support surface when the support is stood on the support surface, the arrangement being such that the head portion (6) supports the bottle in a balanced condition with the centre of gravity of the assembly of support and bottle above the curved contact face (11) for a range of positions of the neck of the bottle relative to the receiving and retaining means (8,9,10) of the head portion.



EP 0 659 375 A1



# Contract between Two Parties

The proprietor of the invention and the State

## The proprietor of the invention:

discloses his invention to the State & **authorises** the State **to publish** the invention after a certain time

## The State:

grants to the proprietor of the invention a **monopoly** on his invention (normally for a period of 20 years); provided that the invention is patentable



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DISCLOSURE OF THE INVENTION  
*against a*  
MONOPOLY  
**THAT 'S THE DEAL**



# Principles

On the one hand

- give the inventor moral recognition for his feat
- give the proprietor of the invention the chance to make profit



**monopoly of exploitation** limited in time

- make technical knowledge easily tradable

On the other hand

- promotion of the disclosure of technical knowledge
- documentation of technical knowledge
- promotion of innovation & investments in R&D promotion of technology exchange



## However beware

I.

If the inventor does not sufficiently disclose his invention



the State will not be prepared to grant him the monopoly.

II.

If the inventor has already published his invention



the State has no reason to grant him the monopoly.

Why should the State pay for something, that is already available to the public?



# The requirements for patentability

No State will grant an inventor a monopoly - a patent - if the invention does not fulfill certain **requirements for patentability**.





Article 52(1) of the  
EUROPEAN PATENT CONVENTION (EPC)

“European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.”



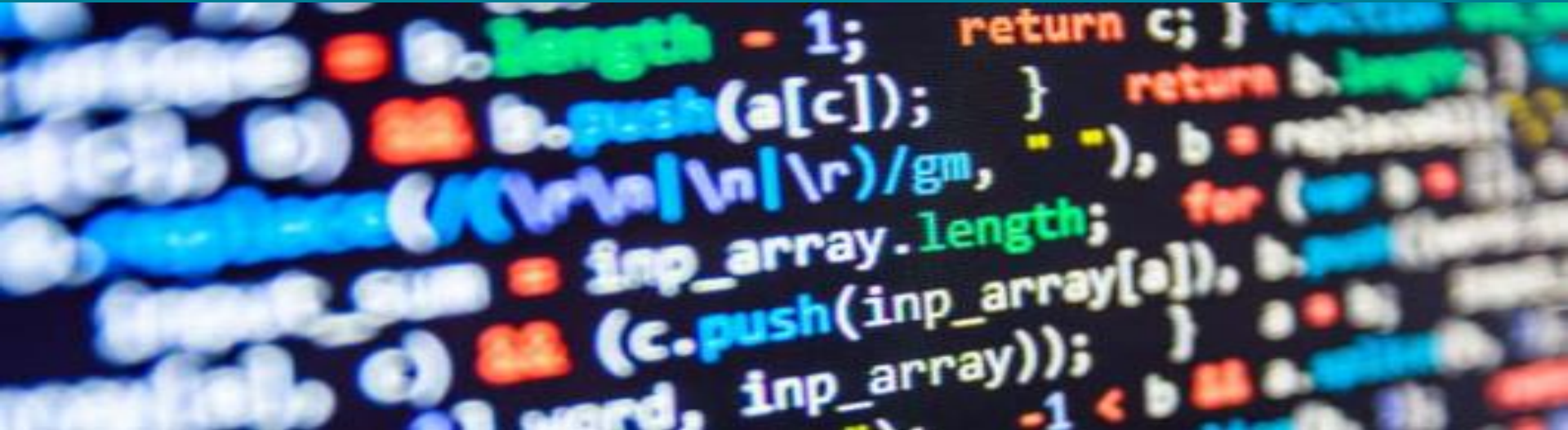
## Requirements:

- Industrial application
- Novelty
- Inventive step

**All three requirements must be fulfilled  
to obtain a patent**



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### III.

## Software protection



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# Software protection = Napoleon pastry

## Recipe :

- **IP rights**
- **.... Know how**
- **... and contracts!**





# MULTIPLICITY OF IP RIGHTS

No specific protection

**But** various existing IP rights, cohabiting:

- **Copyrights** – for source code
- **Trademarks** – for names and icons, logos
- **Designs** – for look and feel, appearance
- **Patents** – for technical inventions embedded in software



# Requirements for a computer program to be protected by copyrights

Copyright is automatic (no registration required)

As soon as it is created

Originality - determined by the Courts *in fine*

*NB: Two authors may own copyrights if the duplication was coincidental, and neither was copied from the other.*



# Copyrights on software

Several elements:

- Financial elements - 70 years, transferable
  - Distribution / Reproduction / adaptation
  - Public performance
- Moral elements – perpetuals, non transferable
  - Right to be named
  - Integrity of the work



Usually the  
**AUTHOR**  
owns the copyright in his work





## Persons hired to produce copyright work

Owner of the copyright is not necessarily the person or company who commissioned the work

Necessity for a company to ensure that it is the owner of the copyright

→ ***a written assignment of the copyright***



## Software and open source

- Magic / easy to use open source
- IP rights (copyrights, trademarks, patent) based system
- Dangerous for clients
  - No rights
  - No IP tax exemption?



# Contracts

Required to ensure security and tax certainty:

- With **employees**
  - No only transfer of rights on source code, but other elements
  - Confidentiality, etc.
- With **external providers / developers**
  - Transfer of rights
  - Open source questions : Interfacing vs Integrating

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# **Tax & TP aspects**



# Main differences between the two IP tax regimes

	Art. 50bis LIR	Art. 50ter LIR
Qualifying taxpayers	<ul style="list-style-type: none"> <li>Individuals (resident/non-resident) carrying out a commercial activity in Lux;</li> <li>Resident corporate entities;</li> <li>Luxembourg permanent establishment of non-resident corporate entities.</li> </ul>	<ul style="list-style-type: none"> <li>Individuals (resident/non-resident) carrying out a commercial activity in Lux;</li> <li>Resident corporate entities;</li> <li>Luxembourg permanent establishment of non-resident corporate entities.</li> </ul>
Eligible IPs	<ul style="list-style-type: none"> <li>i. Patents, including: <ul style="list-style-type: none"> <li>• Utility models,</li> <li>• Supplementary protection certificates</li> </ul> </li> <li>ii. Copyrights on software;</li> <li>iii. Trademarks;</li> <li>iv. Domain names;</li> <li>v. Designs;</li> <li>vi. Models</li> </ul>	<ul style="list-style-type: none"> <li>i. Patents, including: <ul style="list-style-type: none"> <li>• Utility models,</li> <li>• Supplementary protection certificates,</li> <li>• Plant breeders' rights,</li> <li>• Orphan drug designations;</li> </ul> </li> <li>ii. Copyrights on software;</li> </ul>
Eligible income	<ul style="list-style-type: none"> <li>Royalty income;</li> <li>Gain realized upon sale of the qualifying IP rights;</li> <li>Embedded IP income on a <u>patented IP</u>; and</li> <li>Income derived within the framework of a trial or arbitration proceedings.</li> </ul>	<ul style="list-style-type: none"> <li>Royalty income;</li> <li>Gain realized upon sale of the qualifying IP rights;</li> <li>Embedded IP income on an <u>eligible IP</u>; and</li> <li>Income derived within the framework of a trial or arbitration proceedings.</li> </ul>

Removed

Added

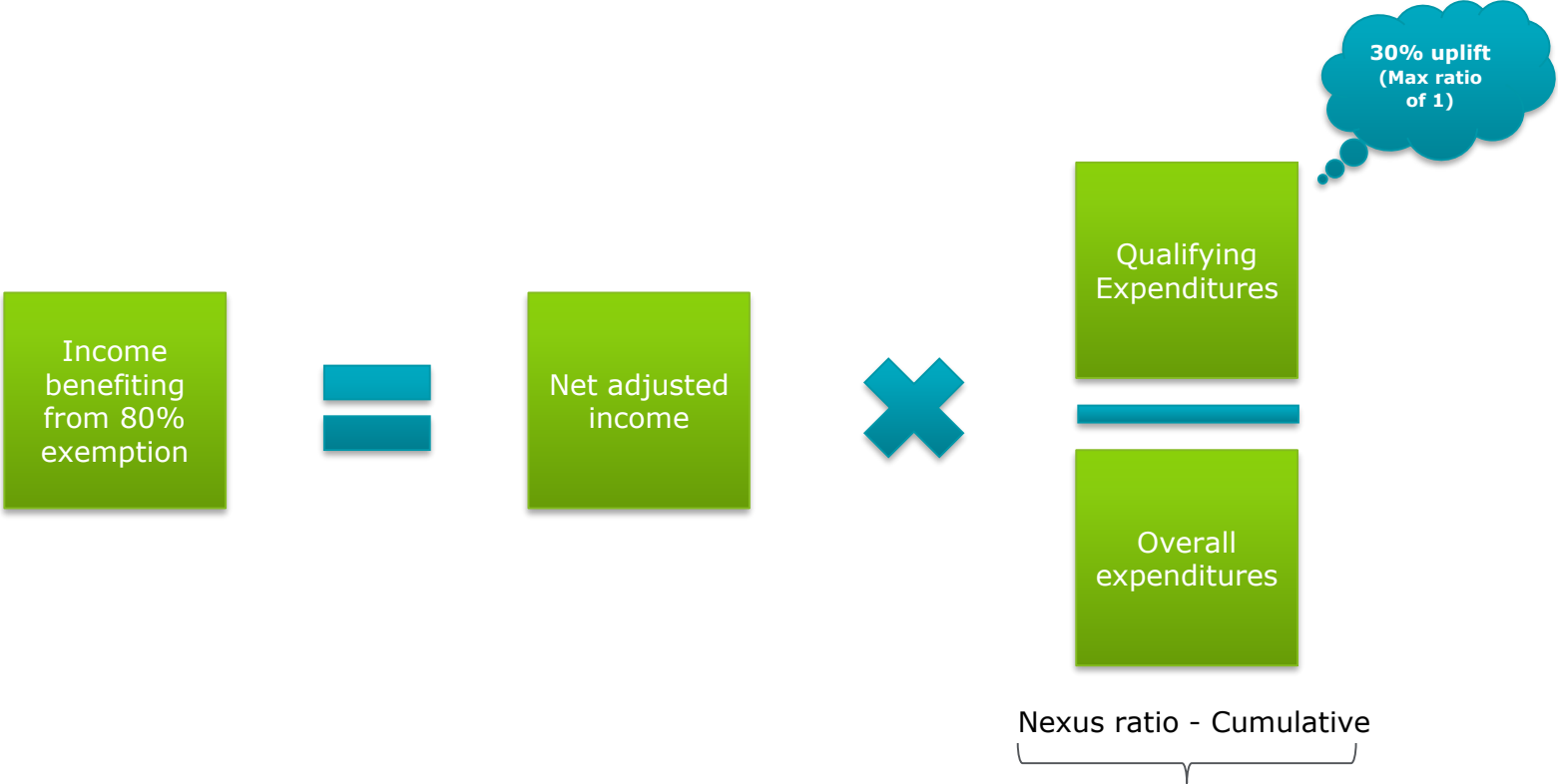
# Main differences between the two IP tax regimes

	Art. 50bis LIR	Art. 50ter LIR
<b>Computation of net IP income</b>	<p>Gross eligible income - Current year operating expenses in direct economic relation with the IP.</p> <p>Upon sale of the IP, recapture of 80% of net losses linked with the IP.</p>	<p>Adjusted income - Current year total expenditures (nexus) and operating expenses indirectly linked with the IP</p> <p>Prior year net losses linked with the IP and not yet absorbed by a net positive income (current recapture)</p>
<b>Tracking and tracing</b>	Per IP for the purpose of: (i) Net IP income.	Per IP or product/service deriving from a group of IPs for the purpose of: (i) Nexus ratio (eligible and total expenditures) (ii) Net IP income
<b>Nexus requirement</b>	No	Yes (benefit proportional to nexus ratio)
<b>CIT/MBT exemption</b>	80% of net IP income	80% of net IP income * nexus ratio
<b>NWT exemption</b>	100% of qualifying IPs	100% of qualifying IPs

Removed

Added

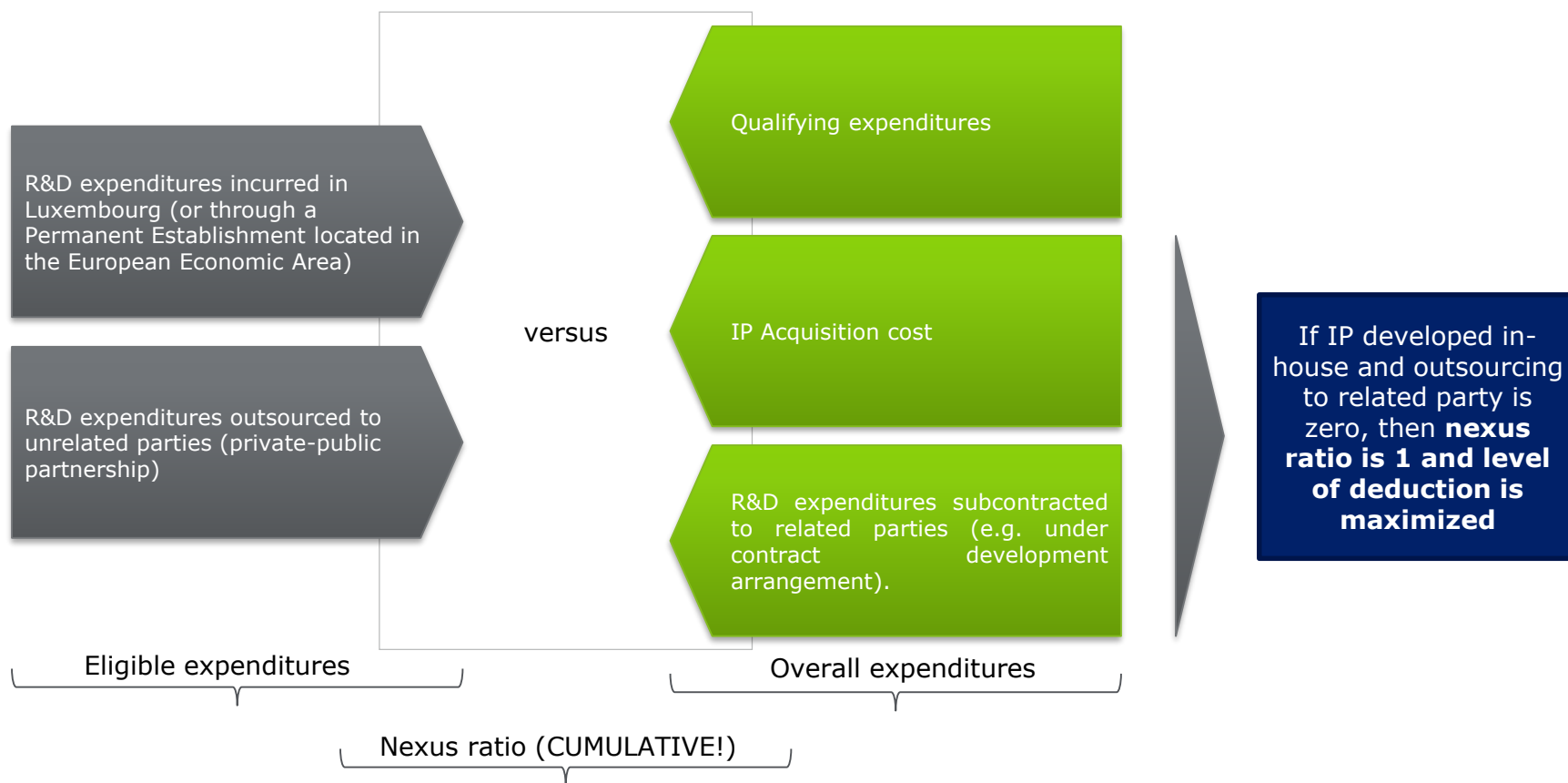
# One formula – the nexus ratio





# Eligible expenditures vs overall expenditures

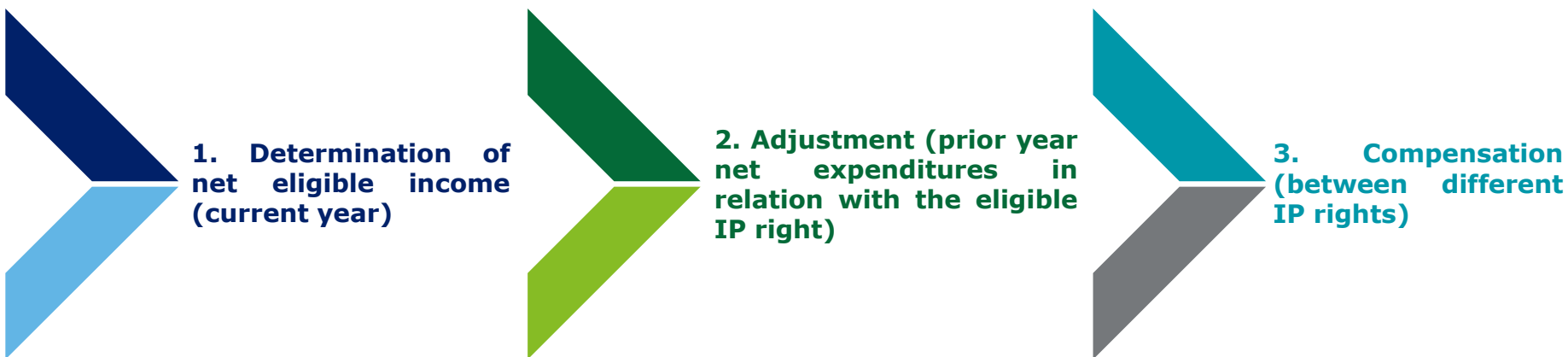
## The nexus ratio



# Determination of the adjusted and compensated net eligible IP income

## Concept

- **Exemption** only granted when the **net eligible IP income is positive** (on an adjusted and compensated basis)
- **Objective:** prevent net IP losses to offset other income taxed at full rates on a permanent basis
- **Three steps approach:**



- **Net positive adjusted and compensated eligible IP income qualifies for the exemption (proportional to nexus ratio)**

# Simplified application example

## For illustrative purposes

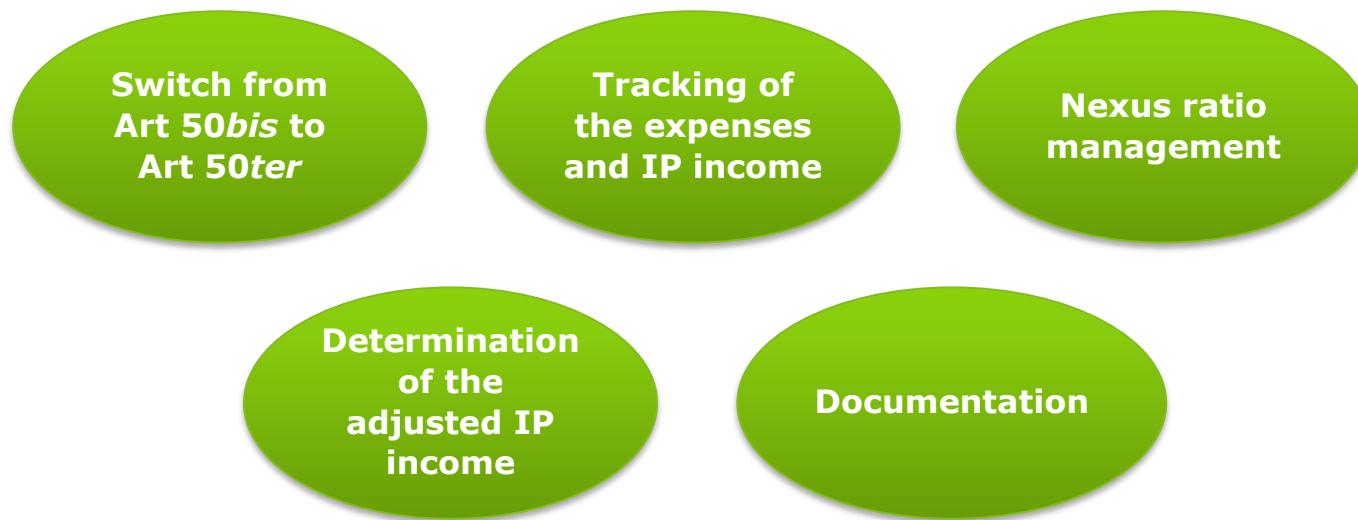
A Luxembourg taxpayer develops a software and incurs R&D costs of EUR 50,000 and EUR 20,000 in years N and N+1. These costs include sub-contracting of some R&D functions to a related entity which are recharged to the Luxembourg taxpayer for an amount of respectively EUR 15,000 and EUR 6,000.

As from year N+2, the software is licensed to a customer for a gross annual royalty of EUR 40,000. during that same year, the Lux taxpayer incurs costs related to the improvement of the software for EUR 10,000.

	N	N+1	N+2	N+3	N+4
<b>Gross income</b>	0	0	40,000	40,000	40,000
<b>Eligible expenditures</b>	35,000	14,000	10,000	0	0
<b>Total expenditures</b>	50,000	20,000	10,000	0	0
<b>Commercial result</b>	(50,000)	(20,000)	30,000	40,000	40,000
<b>1. Determination of Nexus ratio (cumulative)</b>					
<b>Eligible expenditures</b>	35,000	49,000	59,000	59,000	59,000
<b>Total expenditures</b>	50,000	70,000	80,000	80,000	80,000
<b>30% uplift</b>	45,500	63,700	76,700	76,700	76,700
<b>Nexus Ratio (rounded)</b>	91%	91%	95%	95%	95%
<b>2. Determination of net eligible income</b>					
<b>Current year net eligible income</b>	(50,000)	(20,000)	30,000	40,000	40,000
<b>Adjustment (prior years net negative income)</b>	/	/	(70,000)	(40,000)	/
<b>Net eligible income</b>	0	0	(40,000)	0	40,000
<b>3. Determination of taxable basis</b>					
<b>Exemption (1) * (2) * 80%</b>	0	0	0	0	(30,400)
<b>Taxable basis</b>					9,600
<b>Tax (26%)</b>					2,496

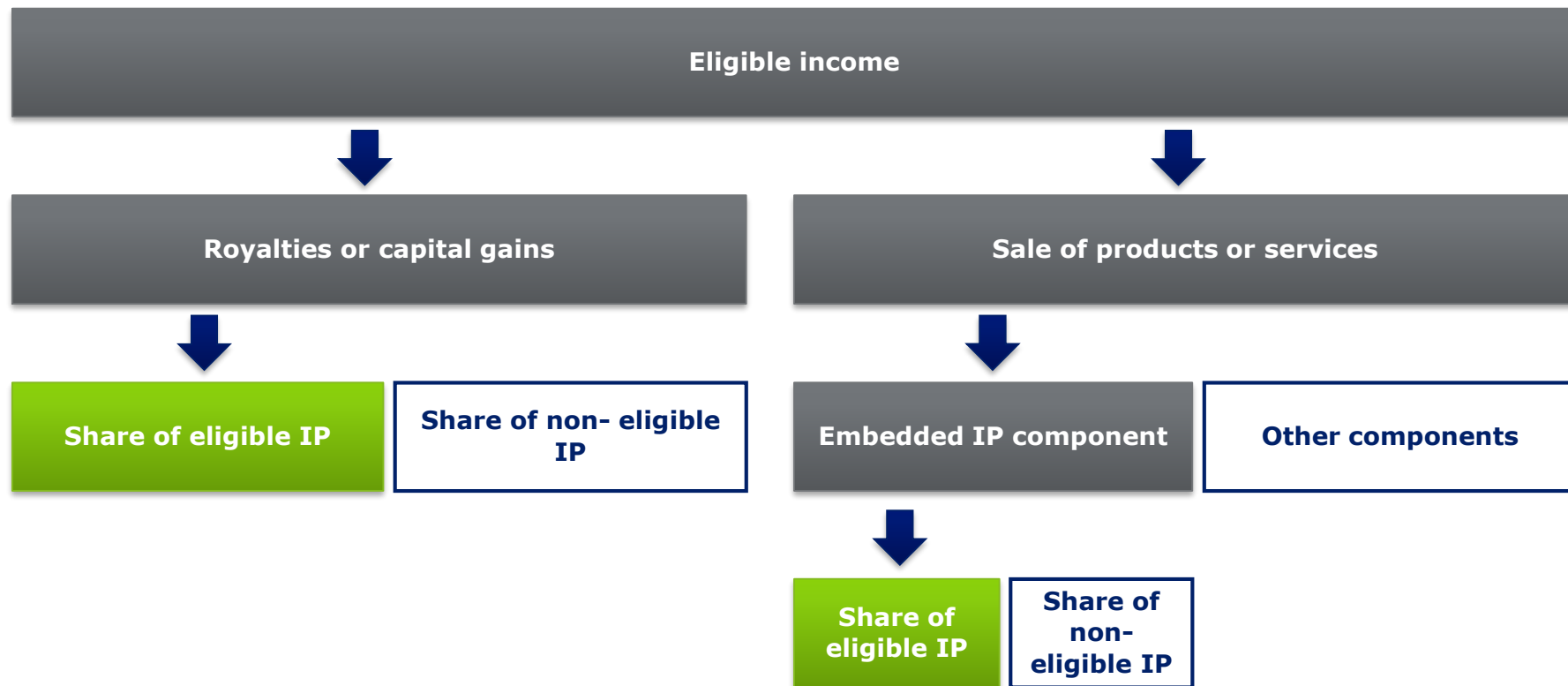
# New Luxembourg IP box

## Key points to consider



# New Luxembourg IP box

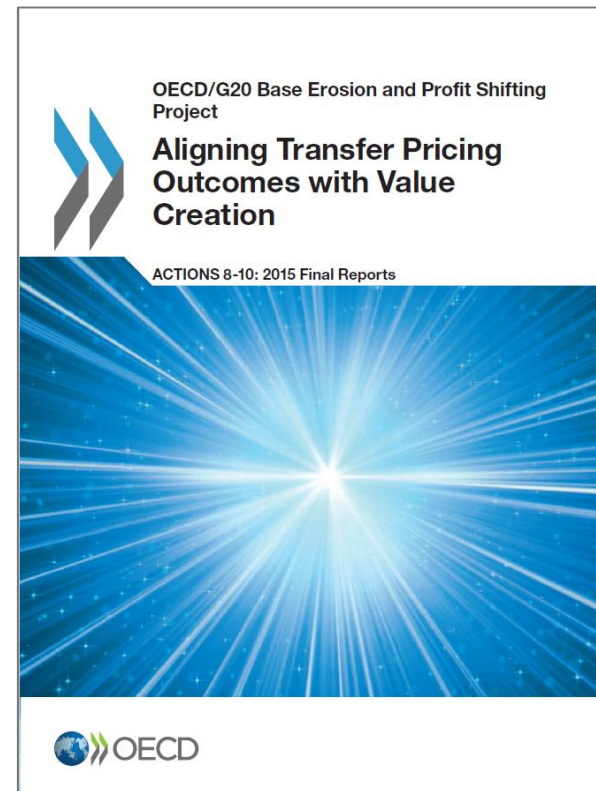
## Transfer pricing aspects



# New Luxembourg IP box

## Transfer pricing aspects

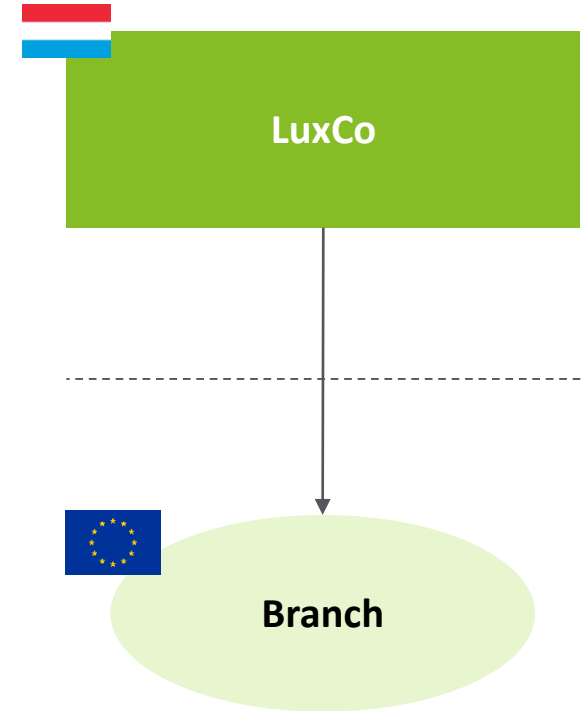
- 2015 Final Report on BEPS Action 8 on intangibles introduces concept of **DEMPE** functions (**d**evelopment, **e**nhancement, **m**aintenance, **p**rotection and **e**xploitation) and control over risk
- Differentiation between legal and economic ownership of IP for tax purposes
- Economic ownership to IP requires i) control over risk/substance (material economic activity) and ii) financial capacity to bear risk
- OECD defines control over risk as “[...] i) *capability to make decisions to take on, lay off, or decline a risk-bearing opportunity and* ii) *capability to make decisions on whether and how to respond to the risks associated with the opportunity (together with the actual performance of that decision-making function)*”
- Financial capacity to assume risk defined as “[...] access to funding to take on risk or to lay off risk, to pay for risk mitigation functions and to bear the consequences of the risk if the risk materializes”
- Examples of control over risk include:
  - Setting of R&D agenda, instructions and monitoring of activities;
  - Management and control of budgets; or
  - Important decisions on changes to R&D strategy and protection of IP.



# New Luxembourg IP box

## Transfer pricing aspects

- Branch can be set up as service provider if properly aligned from transfer pricing perspective
- Profit attribution between head office and branch(es) based on 2010 OECD guidance on attribution of profits to permanent establishments
- Attribution of IP ownership follows substance and control over risk
- If LuxCo performs sufficient control over risk with respect to activities performed at level of branch, then IP related profits should also be attributed to head office in Luxembourg
- Based on functional profile as service provider, branch would earn routine return (typically cost plus based compensation)
- Dealings between head office and branch(es) are within one legal entity leading effectively to higher threshold for recognition of dealings and transfer pricing documentation requirements to support functions performed



# **Podium Discussions**





# Q&A





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