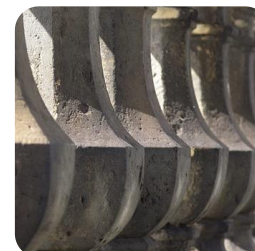




# Financiële Transacties

*29 januari 2019*



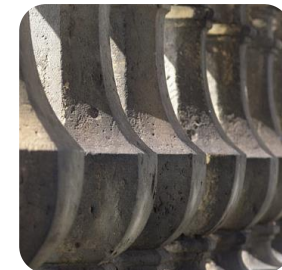
de Nederlandse Orde  
van Belastingadviseurs



# BEPS Discussion Draft inzake Financiële Transacties

Clive Jie-A-Joen, Simmons & Simmons Amsterdam

*29 januari 2019*

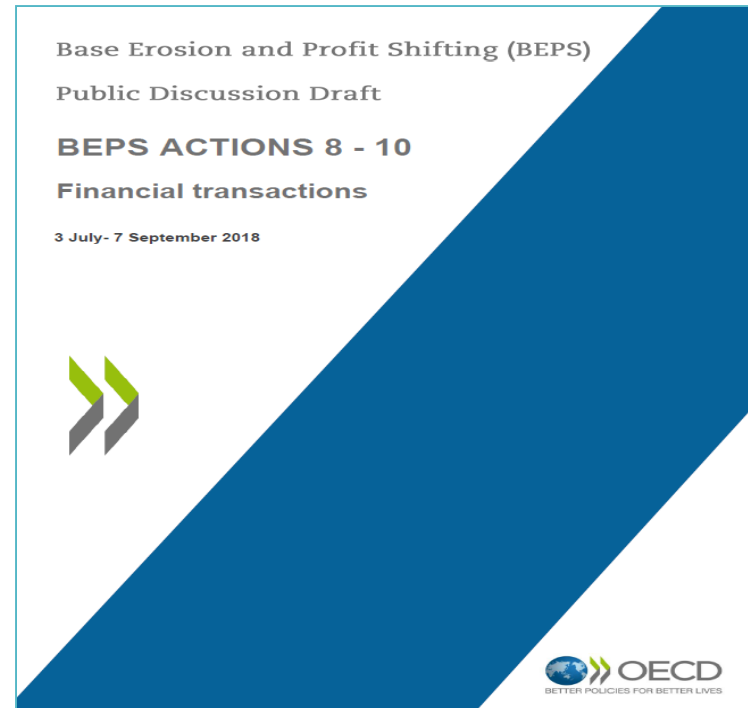


de Nederlandse Orde  
van Belastingadviseurs



## Agenda

- Nauwkeurige afbakening (“accurate delineation”) / karakterisering van transactie
- Intra-groep leningen
- Financiële garantstelling
- Cash pooling
- Captive insurance





## OESO Discussion Draft inzake Financiële Transacties - Algemeen

- Uitdgend OESO project: Géén consensus op fundamentele onderwerpen
  - ❖ Bijvoorbeeld inzake de rol van het arm's length principe in het evalueren van de kapitaalstructuur
- Non-consensus discussion draft (juli 2018):
  - ❖ Beoogt de toepassing van “accurate delineation” (afbakening) analyse op financiële transacties te verduidelijken
  - ❖ Gaat in op specifieke issues inzake het prijzen van financiële transacties, zoals leningen, cash pooling, financiële garanties en verzekeringscaptive
- Commentaar ontvangen van 78 organisaties (965 pagina's)
- OESO vergadering in november 2018: nog steeds geen consensus



## Accurate Delineation – Belangrijkste kernpunten

- Accurate delineation van de feitelijke transactie onder hoofdstuk I zal voorafgaan aan elke poging tot prijsstelling.
- Accurate delineation
  - ❖ Rol van het arm's length principe bij het evalueren van de kapitaalstructuur (debt - equity verhouding)?
  - ❖ Identificatie van economisch relevante factoren van een financiële transactie, inclusief functionele analyse.
- Rekening houden met “options realistically available”
- Risico vrij rendement wanneer de kredietgever de risico's niet kan beheersen of niet de financiële capaciteit heeft.



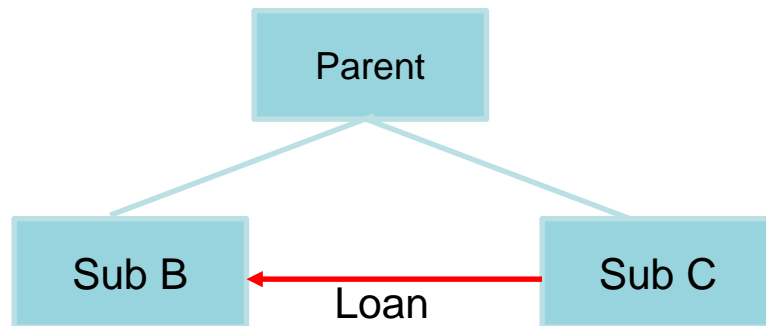
## Het gebruik van Accurate Delineation bij evaluatie van Kapitaalstructuur?

- Commentaar op Artikel 9(1) OESO-Modelverdrag staat toe dat het ALP ook een rol speelt bij het bepalen of een vermeende lening ook echt een lening is (“**kapitaalstructuur**” vraagstuk) naast het bepalen of de rente (“**terms and conditions**”) van een lening zakelijk is.
- Nationale regels kunnen toegepast worden.
- Accurate delineation om te bepalen of een lening ook gerespecteerd wordt als een lening - “middle of the road” benadering?
- ❖ Is er een terugbetalingsdatum, convenanten / zekerheden aanwezig, bron van rentebetalingen, status van uitlener t.o.v. andere schuldeisers, vermogen om lening te verkrijgen van ongelieerde kredietverschaffers, groepsbeleid (streven naar bepaalde debt-equity ratio), de tekortkoming van de vermeende schuldenaar om op de vervaldatum terug te betalen etc.



## Voorbeeld inzake relevantie van maximum leningsbedrag: alles-of-niets versus bifurcatie / splitsing ?

- Voorbeeld paragraaf 17: C advances a loan to B for a 10-year term, for which it is clear based on financial projections that B would be unable to service a loan of this amount.



**B.2. Comments are requested on this example regarding the relevance of the maximum amount that a lender would have been willing to lend and that a borrower would have been willing to borrow? Or should the entire instrument be requalified as equity?**



## Voorbeeld inzake uitlener die risico's van lening niet kan beheersen: risico vrij rendement?

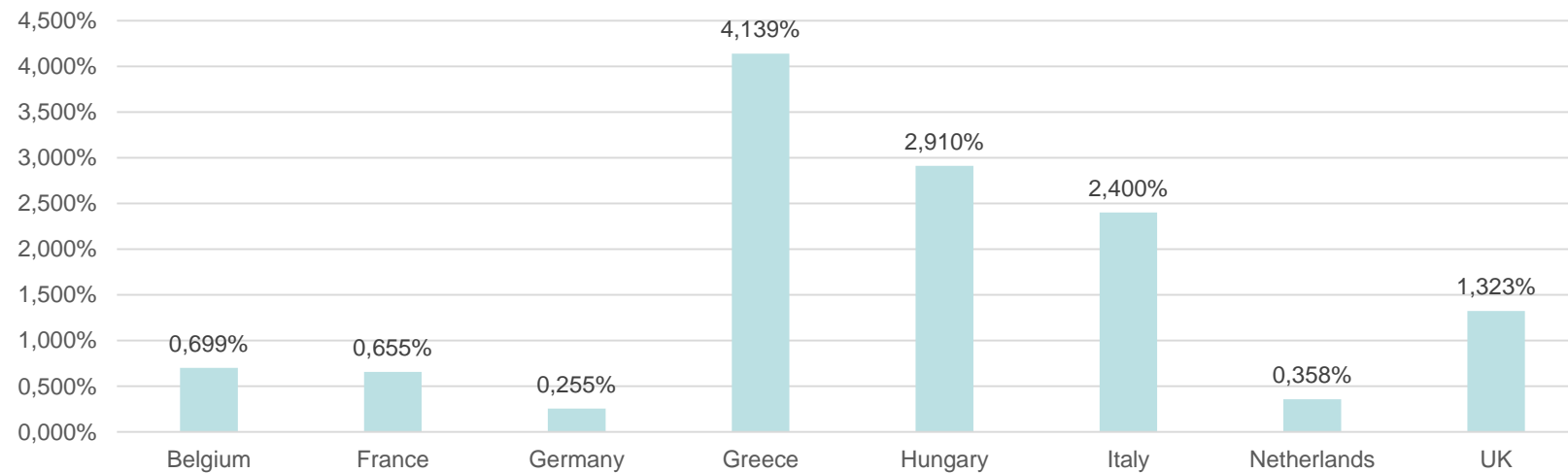
- Funder lacks capability to control the risk associated with investing in a financial asset, and is entitled to no more than a risk-free rate of return ('rfr').
  - The funded party, however, is still entitled to deduct an arm's length interest rate in respect of the funding.
  - The difference between the two rates ('Rr') is allocable to the party exercising control over the investment risk based on the accurate delineation.
1. Lijkt op toepassing raamwerk BEPS 8-10 inzake cash boxes op financiële transacties.
  2. Welke control functies moet funder precies verrichten?
  3. Rekening houden met materialiteit van transactie?





## Risk free rate – which government bond?

EU Country 10 year Government Bonds Yields on Jan 21, 2019



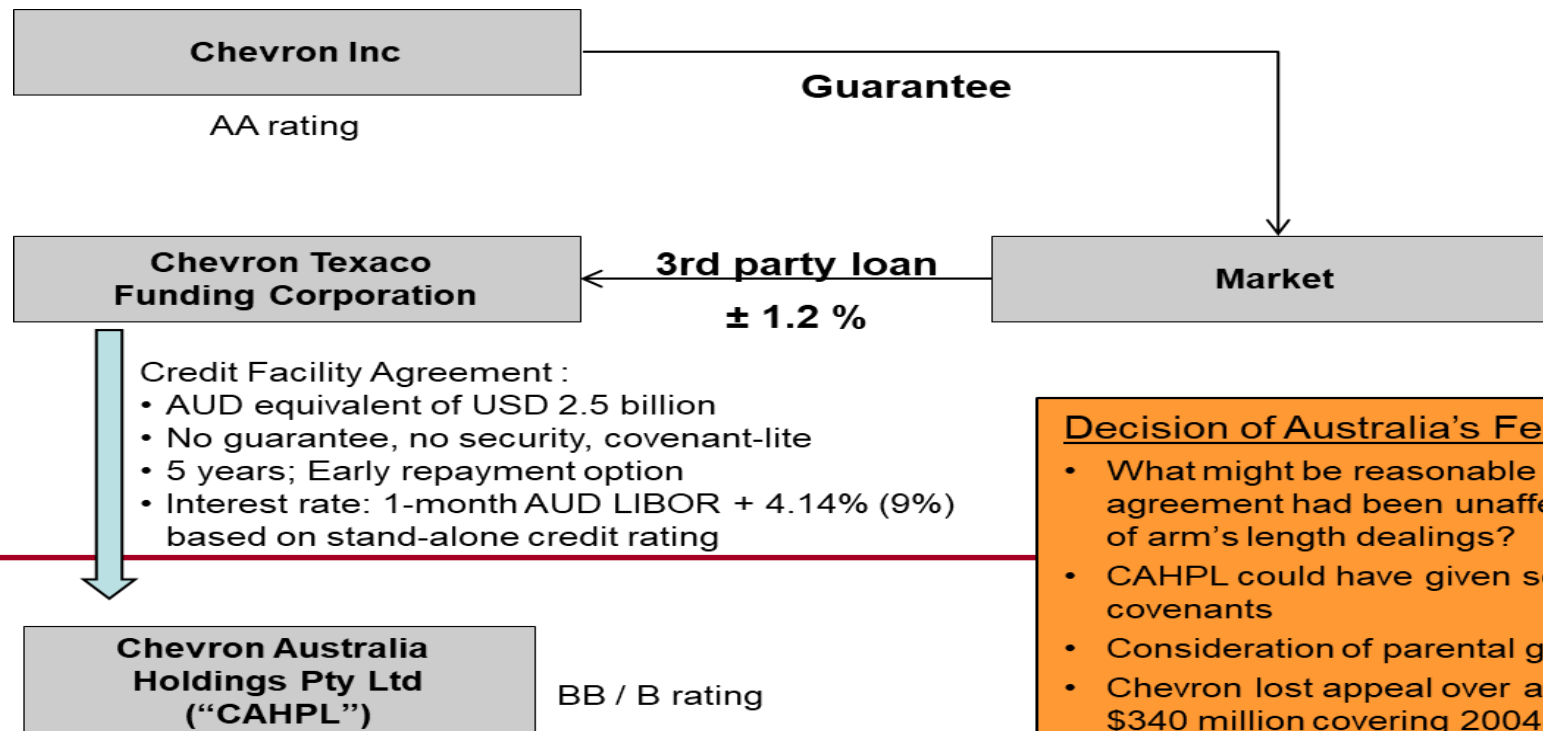


## Intra-groep leningen / Treasury functies - Belangrijkste kernpunten

- De **treasury functie** is meestal een ondersteunende dienst aan de belangrijkste waarde creërende operatie van een groep
- **Twee-zijdige analyse** vanuit lener's en geldschieter's perspectief
- **Credit ratings** kunnen een bruikbare maatstaf voor kredietwaardigheid zijn en dus helpen om potentiële comparables te identificeren
- Rekening houden met effect van “**Implicit support**”
- TP methode om arm's length rente te bepalen: **CUP methode** is toepasbaar, “cost of funds” benadering, geen “bank opinions”



## Chevron Australia vs. ATO: Pricing gebaseerd op werkelijke leningsvoorwaarden vs. Beoordelen zakelijkheid van leningsvoorwaarden?



Hoe analyseer je of Leningsvoorwaarden Zakelijk zijn?

**Decision of Australia's Federal Court:**

- What might be reasonable expected if actual agreement had been unaffected by the lack of arm's length dealings?
- CAHPL could have given security and covenants
- Consideration of parental guarantee
- Chevron lost appeal over a tax bill totalling \$340 million covering 2004-2008 period



## Leningtransacties – Credit ratings

- Bepalen van credit rating van inlener:
  - ❖ Wat is standalone credit rating van inlener (officiële credit rating versus commerciële tools)?
  - ❖ Effect van implicit support?
  - ❖ Wat is credit rating van lening?
- “Rebuttable presumption”: gebruik van Groep’s credit rating?

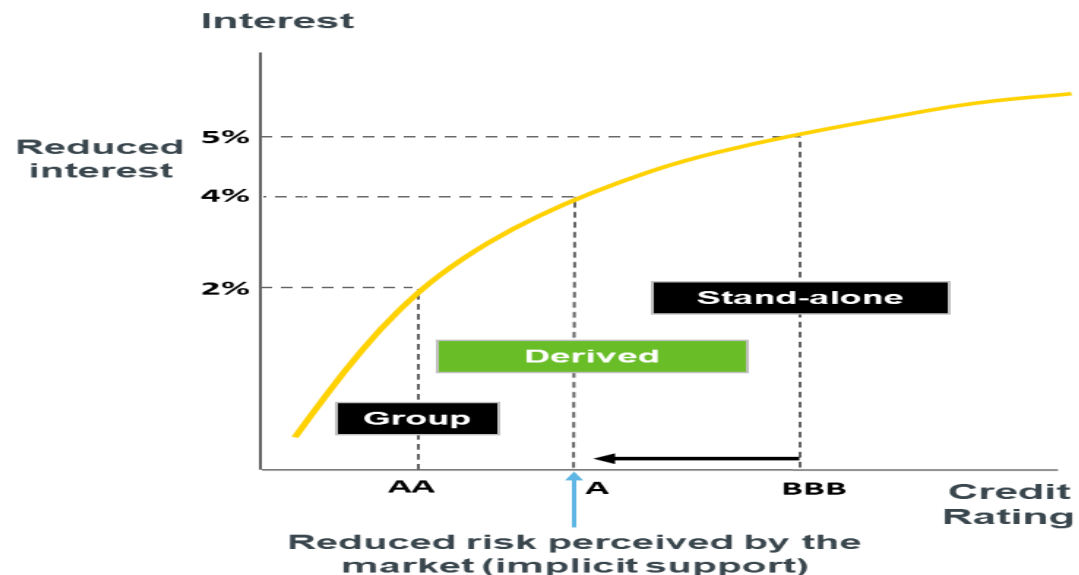
Investment Grade ↑

Moody's	Standard & Poor's
Aaa	AAA
Aa	AA
A	A
Baa	BBB
Ba	BB
B	B
Caa	CCC
Ca	CC
C	C

Declining Creditworthiness ↓



## Leningtransacties – Effect van implicit support?



- ▶ Implicit support is the benefit that may arise from passive association and generally does not require any payment.
- ▶ Expectation that parent will support subsidiary in case of financial distress or performance disruption.
- ▶ Relevant for many types of I/C financial transactions where analysis of credit rating is required
  - ▶ Loans
  - ▶ Guarantees
  - ▶ Cash pools



## Leningtransacties – Hoe corrigeren voor implicit support?

Group status	Definition	Potential Rating
<b>Core</b>	Integral to the group's current identity and future strategy. The rest of the group is likely to support these entities under any foreseeable circumstances.	Generally at group credit profile (GCP)
<b>Highly strategic</b>	Almost integral to the group's current identity and future strategy. The rest of the group is likely to support these subsidiaries under almost all foreseeable circumstances.	Generally one notch below GCP
<b>Strategically important</b>	Less integral to the group than highly strategic subsidiaries. The rest of the group is likely to provide additional liquidity, capital, or risk transfer in most foreseeable circumstances. However, some factors raise doubts about the extent of group support.	Generally three notches above standalone credit profile (SACP); but for the purpose of this analysis two notches below GCP
<b>Moderately strategic</b>	Not important enough to warrant additional liquidity, capital, or risk transfer support from the rest of the group in some foreseeable circumstances. Nevertheless, there is potential for some support from the group.	Generally one notch above SACP, but for the purpose of this analysis three notches below GCP
<b>Nonstrategic</b>	No strategic importance to the group. These subsidiaries could be sold in the near to medium term.	Generally at SACP; for the purpose of this analysis all entities assumed to be at least moderately strategic





## Gebruik van MNO Groep's Credit rating om Credit Rating van Inlener te bepalen – Weerlegbaar Vermoeden of “safe harbor”?

- *“a rebuttable presumption that an independently derived credit rating at the group level may be taken as the credit rating for each group member, for the purposes of pricing the interest rate, subject to the right of the taxpayer or the tax administration to establish a different credit rating for a particular member;”*

**Box C.2: Commentators’ views are invited on the use of an MNE group credit rating for the purpose of tax certainty and tax compliance to determine the credit rating of a borrowing MNE.**





## Leningtransacties – Interest rate benchmarking

- Externe CUP vaak in praktijk toegepast:
  - ❖ Beschikbare gegevens over leningen in databases
  - ❖ OESO vraagt of er realistische alternatieven zijn op intra-groep leningen?
- Interne CUP:
  - ❖ OESO DD vraagt om situaties te beschrijven waarbij de gemiddelde rente betaald op externe schuld door MNE groep als interne CUP beschouwd kan worden?





## Cash Pooling - Belangrijkste kernpunten

- Twee hoofdvormen van cash pooling structuren: fysieke cash pooling versus notionele cash pooling
- Accurate delineation:
  - ❖ Is er sprake van groepssynergie gecreëerd door doelbewust gecoördineerde groepsactie?
  - ❖ Cash pool voordelen in het algemeen gedeeld door cash pool leden (na passende beloning aan cash pool leider)
  - ❖ Toezicht op cash pool saldi – structureel lange termijn positie?
- Een cash pool leider verricht in het algemeen niet meer dan een coördinatie of agentschap functie
- Suggestie dat onderlinge garanties geen of weinig voordeel hoeft te verschaffen
- Drie benaderingen om cash pool voordelen te alloceren aan cash pool leden



## Cash Pooling – Rol van cash pool leader (“CPL”) ?

- Example 1: CPL performs a coordination/agency function and no credit risk: is expected to get a limited services-based return.
- Example 2: CPL also conducts other treasury activities; manages intra group loans; raises funding for the group through bond issuances or borrowing from banks; operates a cash pooling arrangement, sets intra group interest rates, decides on investing surplus funds or funding shortfall, bears credit risk, liquidity risk, currency risk and hedges such risk: through accurate delineation and a double sided analysis, CPL can earn a spread between borrowing and lending positions.

Box C.8: With respect to the operation of a physical cash pool, commentators’ views are invited on the situations in which a cash pool leader would be allocated risks with respect to lending within the MNE group rather than as providing services to cash pool participants coordinating loans within the group without assuming risks with respect to those loans.





## Cash Pooling: Rewarding the cash pool members

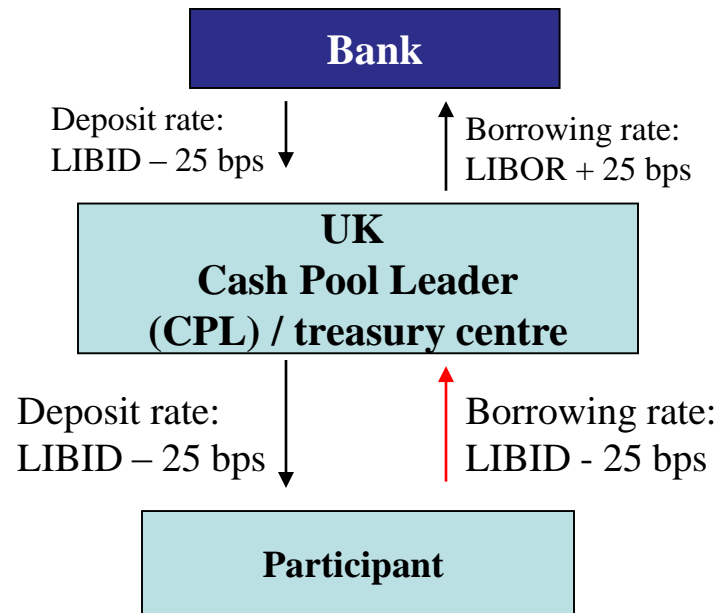
Drie benaderingen om cash pool voordelen toe te rekenen aan cash pool leden:

- 1) verbetering van rentevoet voor alle cash pool leden;
- 2) toepassen van dezelfde rentevoet voor alle leden (alle leden hebben hetzelfde kredietprofiel); en
- 3) cash pool voordelen toerekenen aan cashverstrekkers

- Is benadering 2) zakelijk?
- Vergoeding CPL
- Geen onderscheid tussen netting benefits en economies of scale voordelen
- Accurate delineation / functionele analyse nodig
- Implementatie issues (bijvoorbeeld berekening van netting benefits bij fluctuerende saldi)
- Karakterisering van netting benefits



## Cash pooling – Norway vs. ConocoPhillips, 2010



- Issue: whether the applicable deposit rate for the Norwegian participants under the multi-currency physical cash pool arrangement is arm's length?
- The participants were jointly and severally liable, but the parent company provided a guarantee to the bank for the cash pool liabilities.
- The two participating Norwegian companies were always in credit, so their surpluses were always transferred over to the CPL.
- Taxpayers argued that deposit rate received was higher than the closest comparable, which was to deposit funds with an independent bank. Cash pool benefit to be allocated to CPL.
- The Court agreed with the Norwegian tax authorities that LIBID -25 was too low. The pooling benefits should be split among the participants in light of contributions. Also, net depositors are in a better bargaining position.

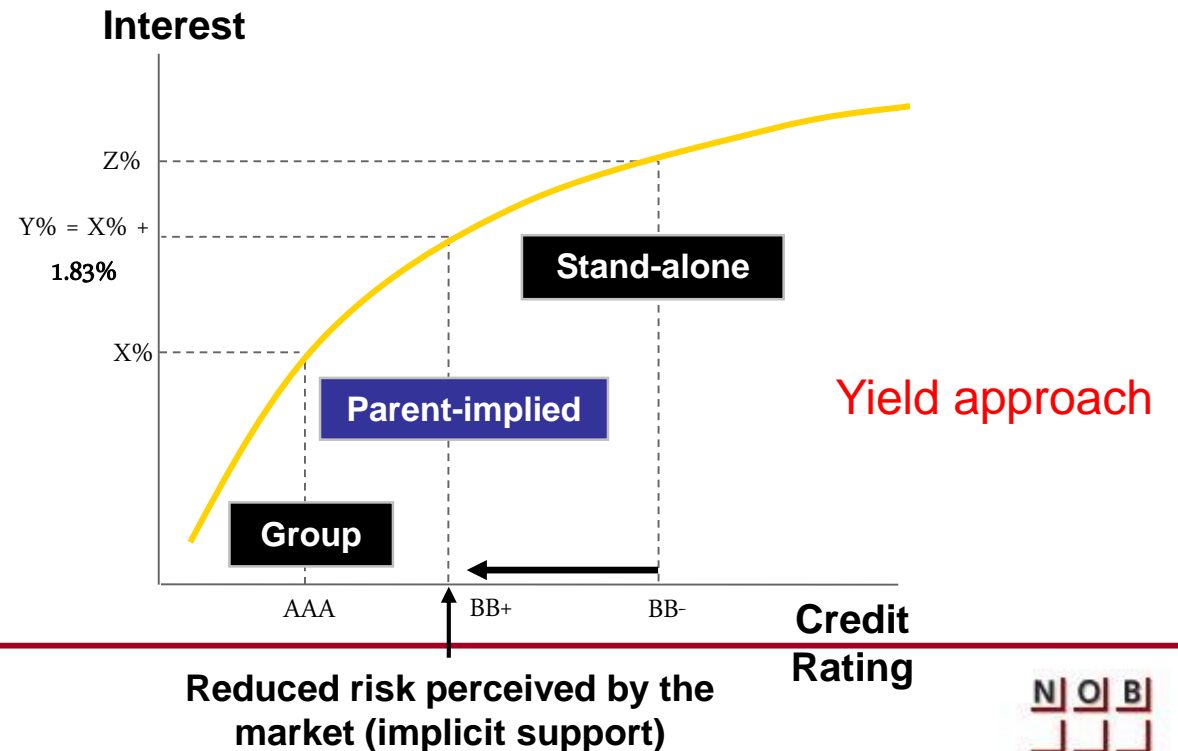
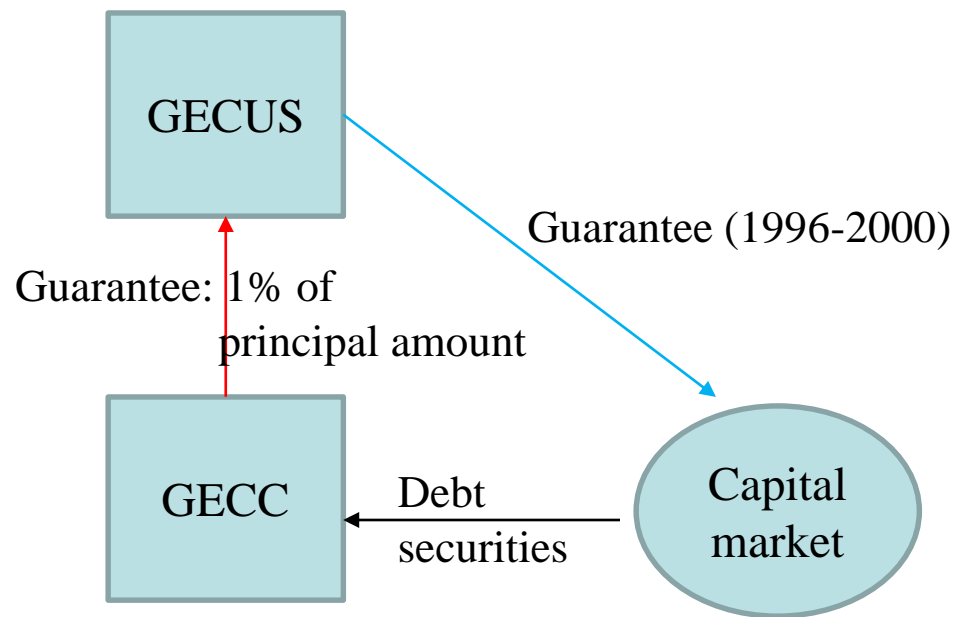


## Financiële garantstelling - Belangrijkste kernpunten

<b>Definitie</b>	A financial guarantee is “a legally binding commitment on the part of guarantor to assume a specified obligation of the guaranteed debtor if the debtor defaults”.
<b>Delineation</b>	Financiële garantstelling versus andere typen van verplichtingen (bijv. onderpand, ‘letter of comfort’)
<b>Doel van garantie?</b>	<ul style="list-style-type: none"><li>• Betalen voor een garantie of niet?<ul style="list-style-type: none"><li>❖ Zonder garantie → geen lening of een lening met lager bedrag</li><li>❖ garantie verbetert de credit rating → betere leningsvoorwaarden?</li></ul></li></ul>
<b>Implicit support</b>	Geen garantie fee
<b>Cross guarantee</b>	Praktische oplossing – suggestie dat het de kredietwaardigheid niet verbetert buiten niveau van passive association
<b>Pricing</b>	CUP methode, Yield approach, Cost approach, capital support method



## General Electric Capital Canada Inc. (2010) – Erkenning van implicit support





## Transfer pricing analyse van Financiële garantstelling

Box D.1: how a related party financial guarantee should be accurately delineated in accordance with the guidance in Chapter I of the TPG (considering also, for example, situations where it could be considered as a provision of a financial service, the sale of a financial asset or as a simple treasury service associated with a loan).



- A. Wat is doelstelling van financiële garantstelling? Wat gebeurt er als er geen garantie is? Beoordelen of garantie een compensabel voordeel heeft opgeleverd.
- B. Welke verrekenprijs methoden zijn er om de prijs voor een garantie te bepalen?
- C. Welke bandbreedte aan garantie fees?



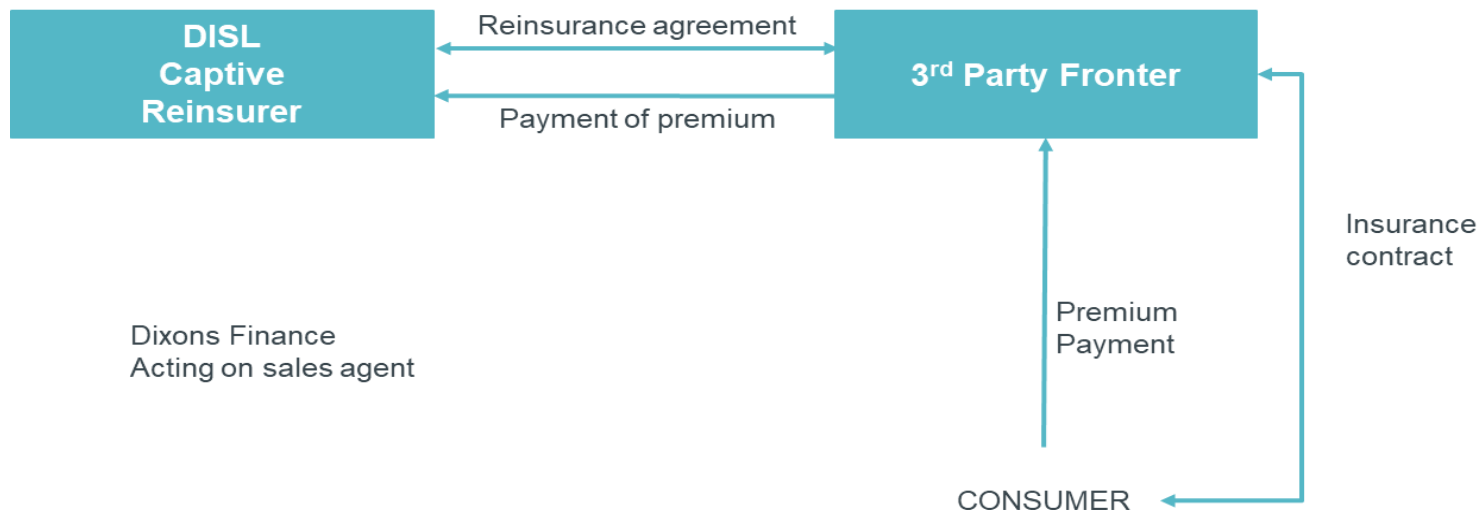
## Captive insurance - Belangrijkste kernpunten en uitdagingen

- MNE groepen kunnen ervoor kiezen om risico's te consolideren d.m.v. een interne verzekeraar.
- Is captive insurance transactie daadwerkelijk een insurance transactie? Bonafide commerciële insurance transactie?
- Is substance van captive insurer voldoende?
  - ❖ Welke control functies moet een interne verzekeraar verrichten?
  - ❖ Geen verwijzing naar Part IV Allocation of Profits to Permanent Establishments: insurance companies
- Het prijzen van verzekeringspremie's: CUP, actuariële analyse





## Captive insurance - DSG Retail Ltd vs Commissioners HRMC 2009: Verzekering als bijproduct / sales agent



- Een verkoopagent die verzekeringen voor consumptiegoederen aanbiedt bij verkooppunt ('point of sale'), profiteert van de mogelijkheid verzekeringen toe te voegen bovenop de verkoop van goederen.



## Concluderende opmerkingen

- A. Non-consensus document.
- B. Beoordeel huidige pricing model van onderneming tegenover kernpunten in OESO discussion draft.
- C. Omvang van TP analyses wordt significant groter bij toepassing van het ALP.
- D. Consensus?





**Dank U**

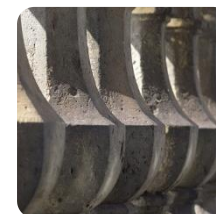
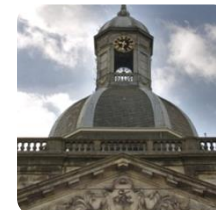




## Earnings stripping rules vs transfer pricing *How flexible can you be?*

Michel van der Breggen, PwC Amsterdam

*January 2019*



de Nederlandse Orde  
van Belastingadviseurs



## OECD BEPS project - Fifteen actions identified

<b>Action 1:</b> Address the challenges of the digital economy <sup>1</sup>	<b>Action 2:</b> Neutralise the effect of hybrid mismatch arrangements <sup>1</sup>	<b>Action 3:</b> Strengthen CFC rules <sup>2</sup>	<b>Action 4:</b> Limit base erosion via interest deductions and other financial payments <sup>2</sup>	<b>Action 5:</b> Counter harmful tax practices more effectively <sup>1/2</sup>
<b>Action 6:</b> Prevent treaty abuse <sup>1</sup>	<b>Action 7:</b> Prevent the artificial avoidance of PE status <sup>2</sup>	<b>Action 8:</b> Assuring that TP outcomes are in line with value creation: Intangibles <sup>1/2</sup>	<b>Action 9:</b> Assuring that TP outcomes are in line with value creation: Risks & Capital <sup>2</sup>	<b>Action 10:</b> Assuring that TP outcomes are in line with value creation: Other high-risk transactions <sup>2</sup>
<b>Action 11:</b> Establish methodologies to collect and analyse data on BEPS and the actions to address it <sup>2</sup>	<b>Action 12:</b> Require taxpayers to disclose their aggressive tax planning arrangements <sup>2</sup>	<b>Action 13:</b> Re-examine transfer pricing documentation <sup>1</sup>	<b>Action 14:</b> Make dispute resolution mechanisms more effective <sup>2</sup>	<b>Action 15:</b> Develop a multilateral instrument <sup>1</sup>

<sup>1</sup> 2014 Deliverables

<sup>2</sup> 2015 Deliverables



## Draft Financial transactions draft (OECD/BEPS Action 8-10)

### Accurate delineation of the transactions

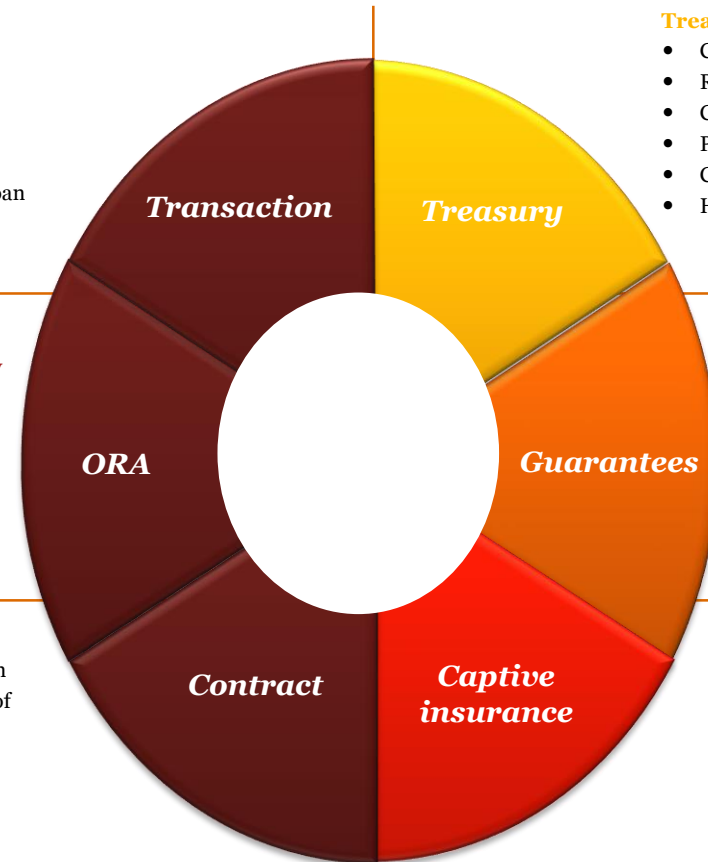
- Debt capacity of borrowers
- Terms and conditions applied
- Purpose of the loan
- Ability of the borrower to repay the loan
- Consistent functional profile

### Consideration of the options realistically available to each party

- Borrower (impact on credit rating, increase cost of capital etc)
- Lender (future cash flow, etc)

### Contractual terms

- Economic substance of the transaction
- Contract x actual behaviour/conduct of the parties



### Treasury functions

- Centralization of functions
- Return on risk (risk free, risk adjusted)
- Credit ratings (stand alone, parent support, group)
- Pricing for loans (CUP/cost of funds)
- Cash Pooling (characterization, guarantees)
- Hedging (service provider)

### Guarantees

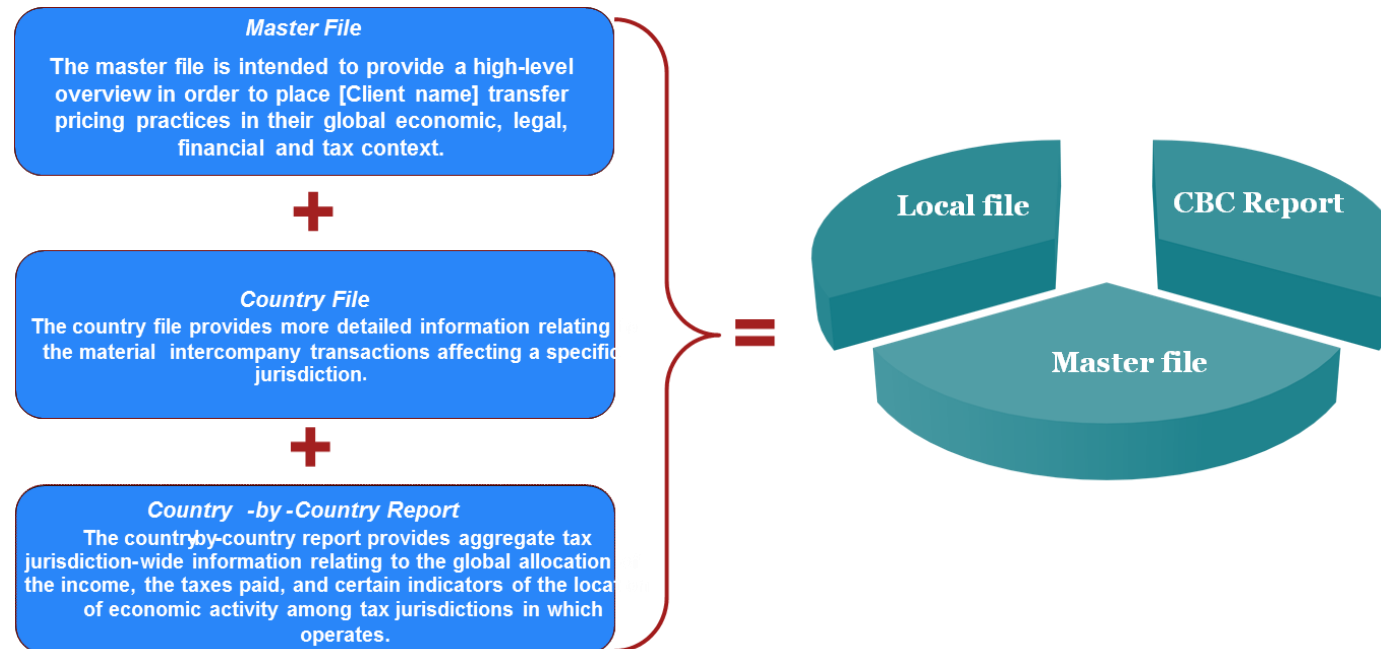
- Remuneration (benefit > implicit support)
- Pricing (CUP, Yield valuation etc)
- Impact on credit
- Implementation timing

### Captive insurance

- Characteristics of insurer
- Pricing (third party or actuarial approach)



## OECD BEPS Action Point 13 - Documentation requirements





## Statement

De fixed ratio rule uit OECD BEPS Actiepunt 4 en EU Atad I kan relatief makkelijk gemanaged worden door met de terms & condities van leningen te spelen







## OECD BEPS Action Point 4 – Fixed ratio rule

### *Objectives*

- Develop recommendations regarding best practices in the design of rules
- To prevent base erosion through the use of interest expense.

### *If adopted, the rules should apply to:*

- **All forms of debt**
- **Payments equivalent to interest**
- **Expenses related to financing**

### **Fixed ratio rule (10% - 30% cap)**

Allow a deduction for interest up to a specified proportion of an entity's earnings or assets.

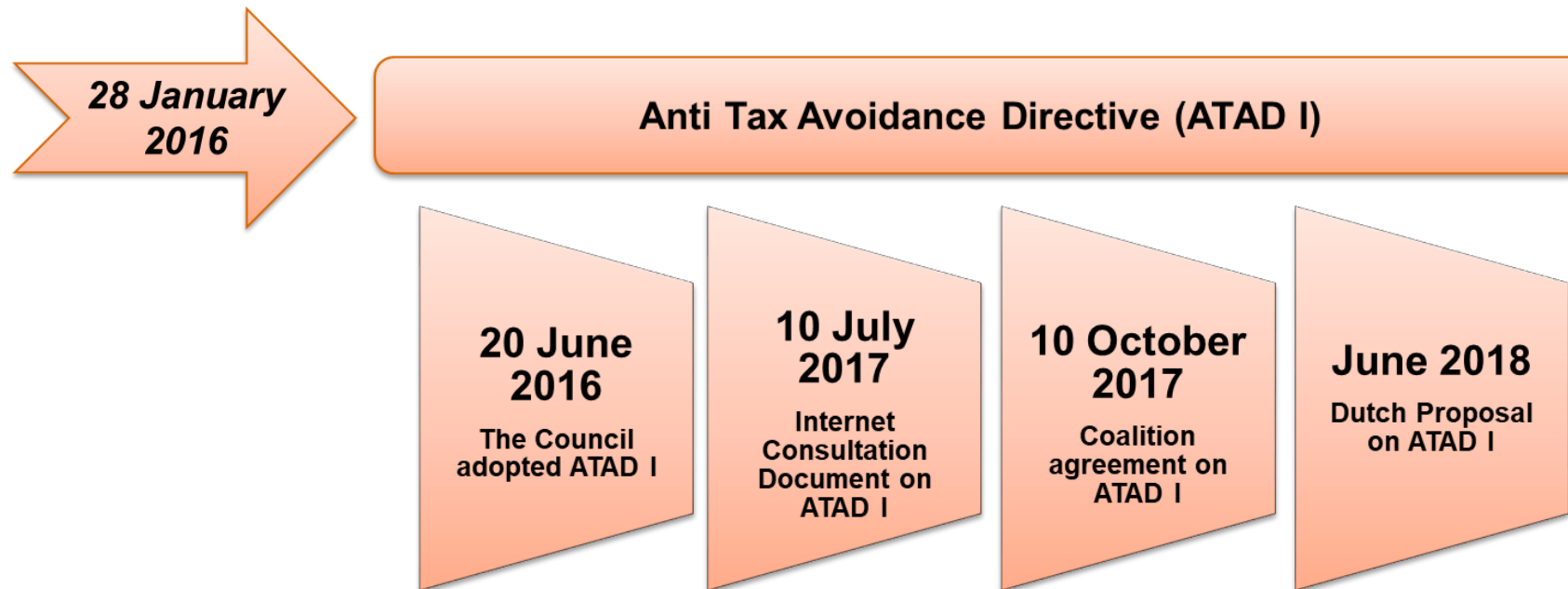
Some flexibility: cap at country level, de-minimis rule, etc)

+

### **Group ratio rule (optional carve-out)**

Allocation of the group's actual net 3rd party interest expense across jurisdictions based on a measure of economic activity (e.g. EBITDA)





**Implementation: 1 January 2019 ultimately!**





## ***ATAD I – Interest limitation rule***

### **Article 4**

- Interest limitation rule – builds upon **BEPS Action 4**
- **Aim:** discourage MNEs from reducing tax base through inflated group financing
  - *‘In an effort to reduce their global tax liability, groups of companies have increasingly engaged in BEPS, through excessive interest payments. The interest limitation rule is necessary to discourage such practices by limiting the deductibility of taxpayers’ exceeding borrowing costs.’*
- However, applies to **group** interest and **third party** interest
- **Germany** served as an example





## *ATAD I – Interest limitation rule (continued)*

### **Article 4**

- EBITDA rule is **minimum standard**; MS have option to go further
- Article 2(1): **‘borrowing costs’**
  - Broad concept of interest
  - *What about unwinding of a discount?*
- Applies to **‘exceeding borrowing costs’**
  - i.e. net interest paid
  - *‘the amount by which the deductible borrowing costs of a taxpayer exceed taxable interest revenues and other economically equivalent taxable revenues’*

## ATAD I – Implementation in the EU Member States\*

Country	EBITDA	Amount	Level	Carry forward	Carry back	Carry forward excess	Group escape
<i>Implemented</i>							
Spain	30%	1.000.000	Company	Indefinite	0	5	N/A
Portugal	30%	1.000.000	Company	5	0	5	N/A
Germany	30%	3.000.000	Company	5	0	5	Equity
UK	30%	2.000.000	Group	Indefinite	0	5	Earning based
<i>Announced / Draft</i>							
The Netherlands	30%	1.000.000	Company	Indefinite	0	0	N/A
Poland	30%	30.000	Company	Not defined	0	0	N/A
Sweden	35% (EBIT) 25% (EBITDA)	10.000	Group	6	0	0	N/A
Italy	30%	3.000.000	Company	5	0	5	N/A

**France, Greece, Slovakia, Slovenia and Spain will not introduce EBITDA rules before 2024 since their existing interest limitation rules are at least equally effective to the rules contained in ATAD I**

**\* Note that this table is not up to date.**





## *Earnings Stripping Rules - Quick Fixes?*

- Credit Facilities – Allowing for repayment of principal
- Use of short Term Loans
- Prepayment options – Repayment of principal (call premium?)
- Convertible option – Allowing for part of debt to be converted into equity
- Capitalization vs debt push downs
- EBITDA planning
- Other?





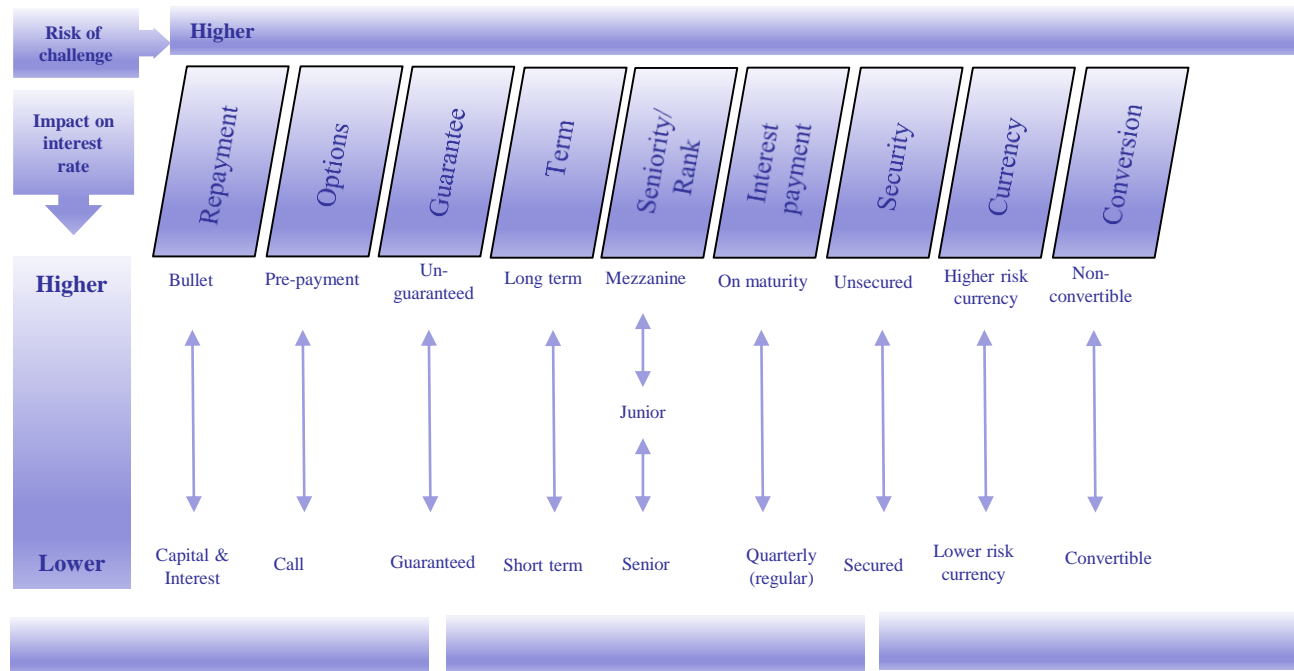
## *Options Realistically Available*

Did you consider the options?

- ▶ Independent enterprises, when evaluating the terms of a potential transaction, will compare the transaction to the other **options realistically available\*** to them
- ▶ Independent enterprises will generally take into account any **economically relevant differences** between the options realistically available to them (such as differences in the level of risk) when valuing those options
- ▶ Therefore, identifying the **economically relevant characteristics** of the transaction is essential in **accurately delineating** the controlled transaction and in revealing the range of characteristics taken into account by the parties to the transaction



# The impact of terms and conditions on interest





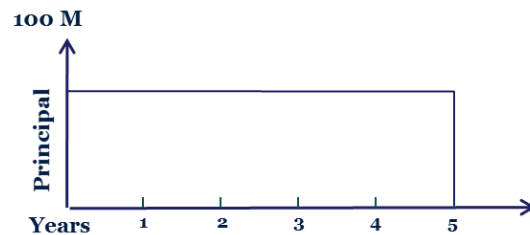


## Example often seen in practice

### *Envisaged loan*

- 5 years
- Bullet ↑
- Prepayment option included ↑

- High interest rate
- Due on the full principal
- How will excess cash be used?

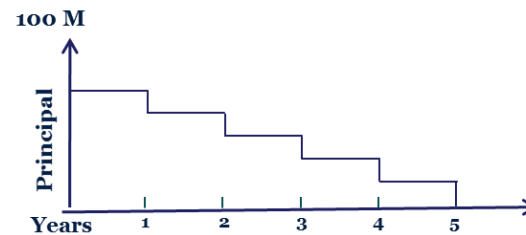


### *Alternative loan*

- 5 years
- Term loan
- Fixed instalments, no prepayment option

- Lower interest rate
- Due on a decreasing principal

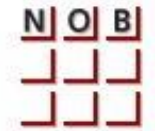
**Overall interest burden significantly lower in this scenario**





## Australia's "Game of Zones"

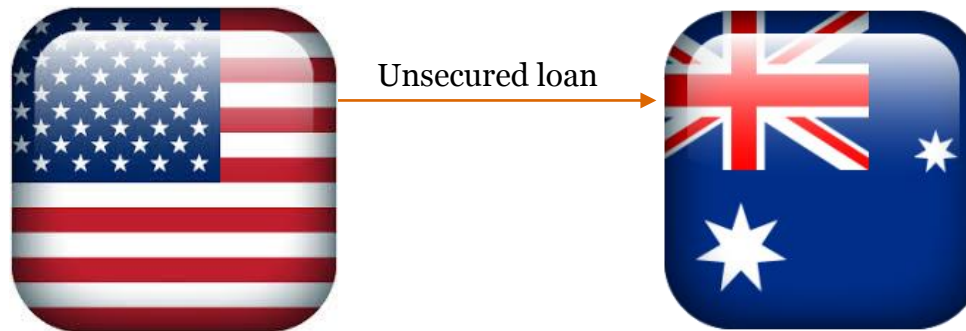
Score	Outbound			Outbound & Inbound	Inbound			
	10	3	1	0	1	3	10	15
Price relative to: - global group cost of debt - traceable third party debt - relevant third party debt of borrowing tax entity	No interest charged	Less than the cost of referable debt		Inbound: 50 bps over cost of referable debt (or less) Outbound: Cost of referable debt or higher	51 to 100 bps over cost of referable debt	101 to 150 bps over cost of referable debt	150 to 200 bps over cost of referable debt	More than 201 bps over cost of referable debt
Leverage of borrower				Consistent with global consolidated leverage	Greater than global leverage but less than 60% leverage		More than 60% leverage	
Interest coverage ratio				Consistent with global consolidated group	Lower than global consolidated group ratio but equal to or greater than 10	3.3 to 9.9	Below 3.3	
Appropriate collateral				Yes		No		
Subordinated or mezzanine debt				No		Yes		
Headline tax rate of lender entity jurisdiction				Over 30%, or lender entity is global parent	21% to 29%	16% to 20%	1% to 15%	0%
Currency of debt is different to operating currency	Yes			No			Yes	
Involves an arrangement covered by a taxpayer alert	Yes			No			Yes	
At least one party is a hybrid entity	Yes			No				Yes
Presence of exotic features on loan				No			Yes	
Sovereign risk of borrower entity	B, CCC	BB	A, BBB	AAA, AA				
<b>Base risk</b>								
Green	0 to 4							
Blue	5 to 10							
Yellow	11 to 18							
Amber	19 to 24							
Red	25 or more							





## Chevron – high profile Australian court case

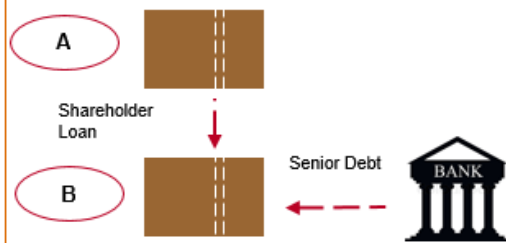
- On 21 April 2017 the Full Federal Court handed down its decision on the Chevron case, with all three judges dismissing the taxpayer appeal (taxpayer is likely to file a secondary appeal).
- The actual rates charged under the five year, unsecured Credit Facility from a related party was AUD LIBOR plus 4.14% reflecting a standalone or “orphan” credit quality of the Australian group.
- The Court held that the absence of “security” by the borrower was not part of the acquired “property” but rather a function of what terms would have been offered by form of consideration – which in turn would have resulted in a lower interest rate.
- The standalone rating approach was also rejected on the basis that in an arm’s length scenario, the borrower would be provided security and covenants (evidenced through behaviour of its subsidiary amongst other factors) and the relationship with the parent cannot simply be ignored (albeit not formally paid for)



# Debt/Equity – a real time Dutch case

## Arm's Length Structuring of Loan

### Facts



- ▶ Acquisition related SHL issued in 2010 with 10 year maturity
- ▶ SHL is subordinated to senior bank loan, carries 12% interest and has payment in kind feature.
- ▶ Credit Rating established for the Group: CCC+
- ▶ 5 page Loan Agreement in Place
- ▶ Transfer Pricing Study supports interest rate applied (ext. CUP: Loanconnector) and loan volume (DSC)

### Audit experience

- ▶ The Tax Inspector disqualified external CUPs:
  - ▶ Two-sided-analysis: Party A only has one loan and is not comparable to syndicate of Banks: no risk diversification (no CCC credit risk)
  - ▶ Benchmark identified junior and mezzanine debt, not comparable to SHL (PIK) and terms and conditions applied in SHL not comparable to those in junior and mezzanine debt (e.g. no financial covenants applied and no conversion option.). **Benchmark results for interest rate therefore not relevant, and no comparable transaction identified between third parties: thus Capital**
- ▶ Disqualified loan volume – reassessed financial ratios used in DSC with actuals of Party B from 2011 – 2014, outside of benchmarked ranges. Combined with CCC+ rating: **led to conclusion that third party creditor would not lend funds to Party B: thus Capital**



## *Earnings Stripping Rules - so again, quick fixes?*

- Credit Facilities – Allowing for repayment of principal
- Use of short Term Loans
- Prepayment options – Repayment of principal (call premium?)
- Convertible option – Allowing for part of debt to be converted into equity
- Capitalization vs debt push downs
- EBITDA planning
- Other?



**Thank You**



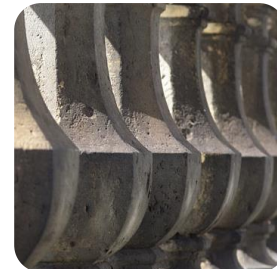
de Nederlandse Orde  
van Belastingadviseurs



# Financiële Transacties

Daan Siero

*29 januari 2019*



de Nederlandse Orde  
van Belastingadviseurs

**Profit and Loss (P&L) Statement**  
[USD \$ millions]

Revenue stream 1  
Returns, Refunds, Discounts

FX on receivables

Factoring

**Total Net Revenue**

Cost of Goods Sold

Commodity hedges

**Gross Profit**

**Expenses**

Advertising & Promotion  
Depreciation & Amortization  
Insurance  
Maintenance  
Office Supplies  
Rent  
Salaries, Benefits & Wages  
Telecommunication  
Travel  
Utilities  
Other Expense 1  
Other Expense 2

Captives

Embedded derivatives

Equity swaps

Energy forwards

**Total Expenses**

**Earnings Before Interest & Taxes**

Interest Expense

Loans

Interest rate swaps

**Earnings Before Taxes**

FX forwards

Cross-currency  
interest rate swaps

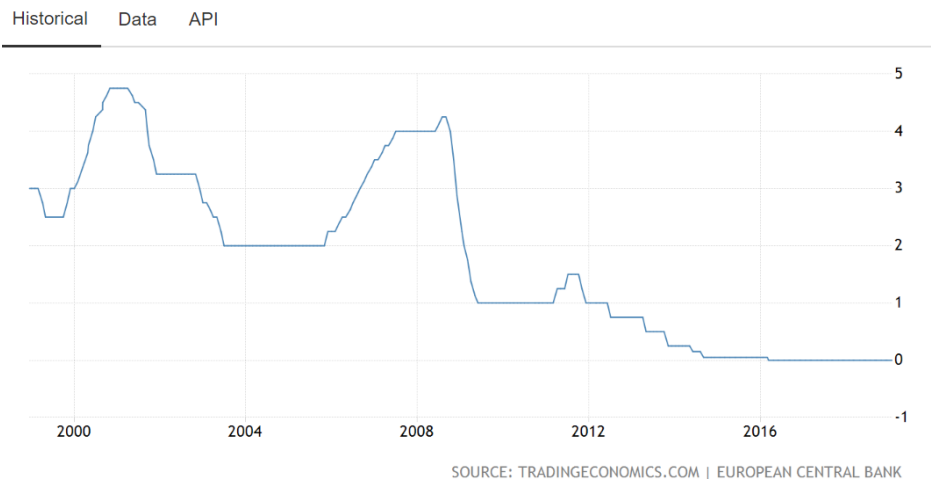
Income Taxes

**Net Earnings**



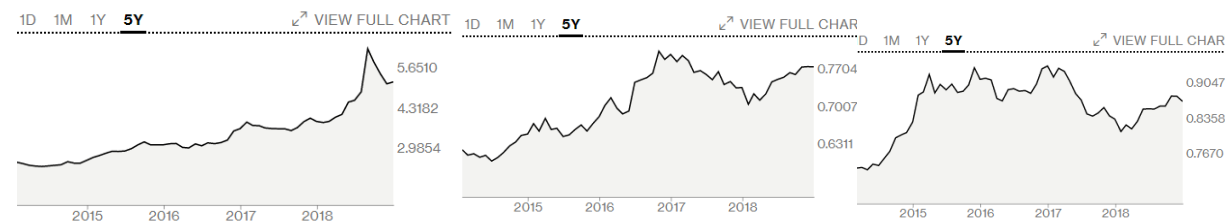
## Waarom nu?

- Earning stripping rules (Action 4)
- Anti hybrid (Action 2)
- Dalende interest rates



## Daarom nu!

- Zeer volatiele wisselkoersen  
USDTRY USDGBP



- Voorkomen van onvoorspelbare tax resultaten (FX vs interest)
- Treasury functie ontwikkelt zich snel en is footloose
- OECD discussion draft
- Toegenomen focus van belastingdiensten



## Treasury functie

- People org chart in combinatie met legal org chart
- Soort financiële transacties
  - Per entiteit (operational vs financial)
- Treasury policies (tax policy)
- Welke systemen
  - ERP vs treasury systemen
  - Hoe te gebruiken voor tax
- Financiering van groep vs onderdelen
- KPI's treasury functie
  - Externe kosten/FX exposure/forecast accuracy (aligned met tax functie?)

## Reporting

- Accounting treatment
  - Geconsolideerd op groepsniveau
    - Boekingen in equity
    - IFRS/US GAAP
  - Statutair
    - Effective hedge vs Financial lines (tax impact financial speculation)
- Management accounting



## Lenings Documentatie

Acquisition  
loan

- Transactie specifieke documentatie

Structural  
funding

- Consistente pricing

Day to day  
funding

- Cash pool policy

- Pricing policy essentieel voor solide tax positie
- Source
  - External bonds
    - Zo recent mogelijk (31)
    - Correcties (Country & currency risk)
  - Credit rating
- Consistente methode over de jaren
- Interne lening is geen externe lening (24)
  - Aansluiten bij bestaande rapportages
  - Geen geforceerde 3e partij bepalingen
  - Garanties (verrekenprijbesluit, 140 e.v.)
- Documentatie
  - Policy
  - Pricing (externe bond issuances/credit ratings)
  - Contracten
- Systemen voor analyse per lening en entiteit (labeling)
- Treasury functie is in de lead met guidance van tax

## Valuta risico's

- Vorderingen/schulden
- Dividend receivables
- Cashpool posities
- FX exposure op inkoop (forecast)
- M & A

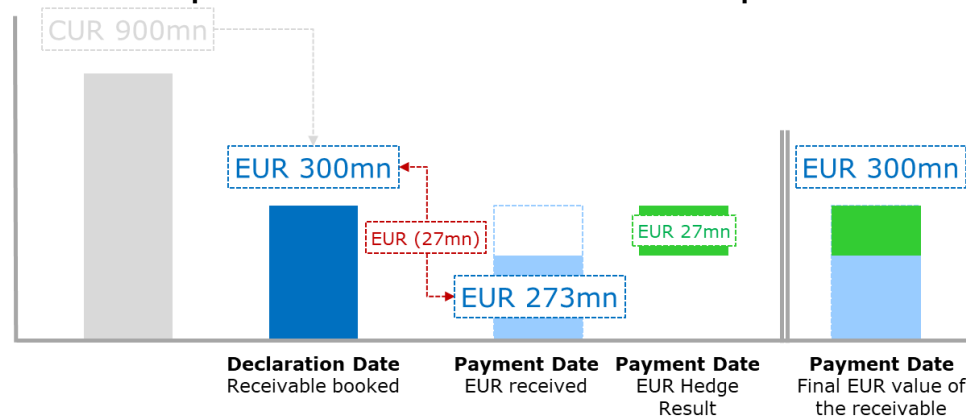
## Afdekkings instrumenten

- Inzicht in cash movements
  - Hedge contracten
    - Net payment op bepaald moment
  - Swaps
    - Wederzijdse betaling van vooraf vastgestelde bedragen in verschillende valuta
  - Tegengestelde cashpool posities
  - Loan swap
- Looptijd afdekkingsinstrument gelijk aan exposure
  - Effect van voortijdige terugbetaling
    - Interest rate swap
    - FX contract (MTM effect van oprollen )
- Simuleer samen met treasury scenario's (zit risico in zelfde entiteit als hedge (136))

# Dividend receivable

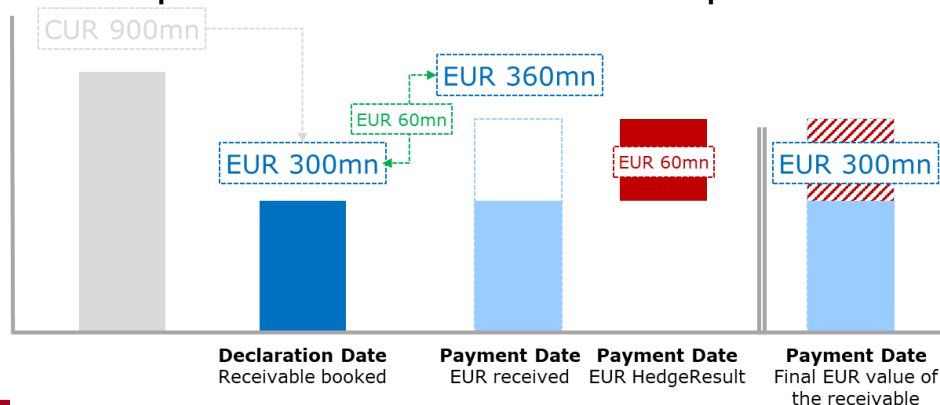
- Waarom hedgen?
  - Resultaat op receivable is belast na declaratie datum
  - FX resultaat is onvoorspelbaar en mogelijk zeer materieel
- Waarom toch nog “FX” resultaat?

CUR depreciates from 3.00 to 3.30 per EUR



Under this scenario, Company would book  
 (i) an **FX loss** on the receivable of **EUR 27mn**  
 (ii) a **positive FX hedge result** of **EUR 27mn**

CUR depreciates from 3.00 to 3.30 per EUR



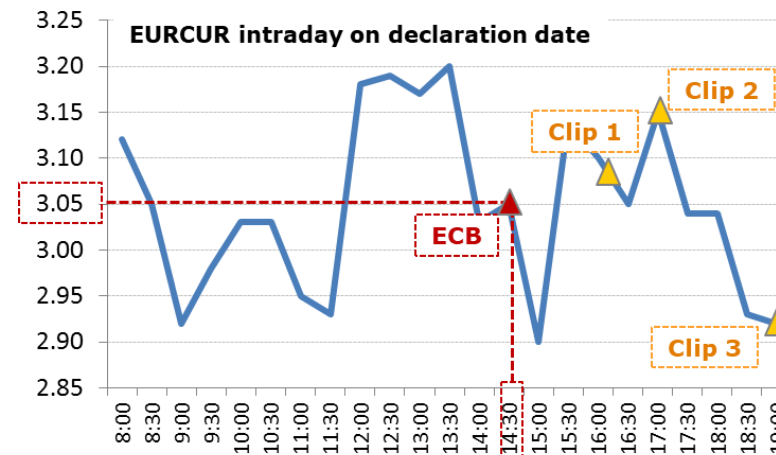
Under this scenario, Company would book  
 (i) an **FX gain** on the receivable of **EUR 60mn**  
 (ii) a **negative FX hedge result** of **EUR 60mn**



# Dividend receivable

- Timing
  - Declaratie datum
  - Aangegeven betaaldatum
  - Daadwerkelijke ontvangst (payment restrictions)
- Amount (bank costs/WHT)
- FX rate
  - Accounting rate
    - Monthly average rate
    - Closing rate
    - ECB rate
  - Transaction rate
    - Local central bank (different timing fixing)
    - External Bank rate (spot on transaction)
    - Internal bank rate (treasury system)
- Materialiteit

- Vordering opgeboekt tegen ECB rate (spot rate at 14.30)
- Hedge uitgevoerd in 3 clips

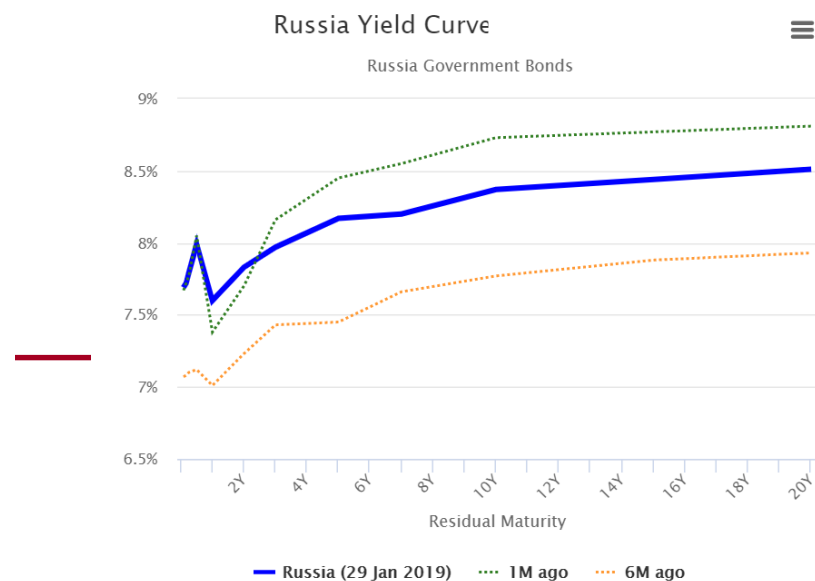
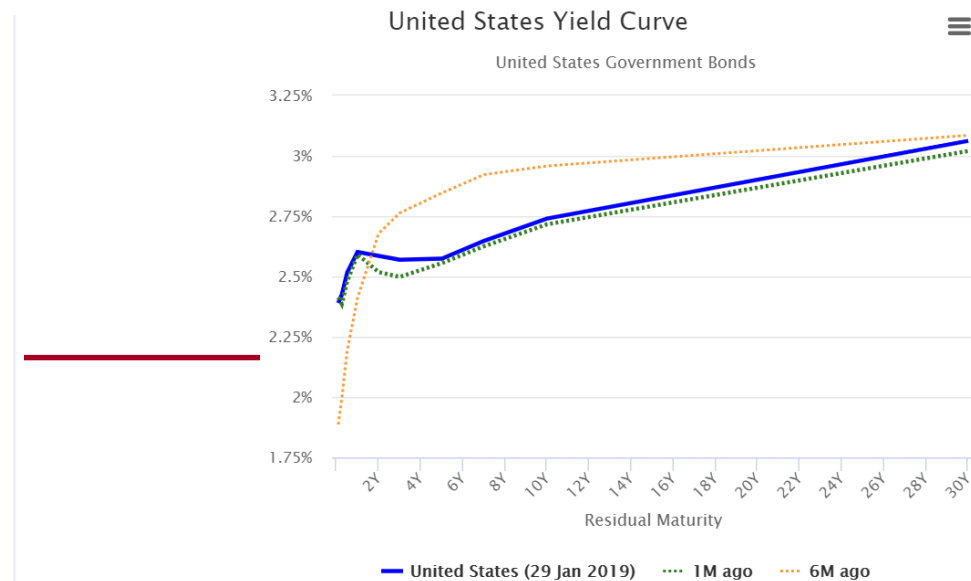
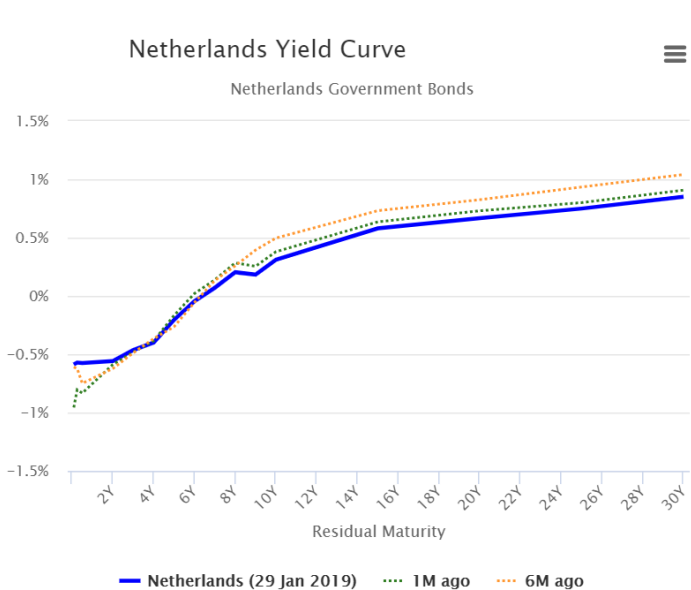


## Voorbeeld

- The CUR 900mn invoice would be booked @ 3.05
  - The hedge execution would be split in 3 clips:
    - CUR 300mn @ 3.06
    - CUR 300mn @ 3.12
    - CUR 300mn @ 2.90
- Average hedge rate of 3.02 (delta EUR 3mn)

# Dividend receivable

- Hedging moet gezien worden als verzekering en heeft een bijbehorende “cost of hedging” (“forward points” of “interest differential”).
- Hoger naarmate interest rate hoger is en currency markt minder frictionless
  - EUR USD vs EUR RUB
- Geen rente op dividend vordering, maar wel embedded interest in instrument



# Dividend receivable (documentation)

- Contract/formalisatie (incl. POA)
- Tweezijdige instemming
- Accounting entries
- Treasury pricing method/source
- Policy
- Payments

Global Journal of Finance and Management  
 ISSN 0975 - 4477 Volume 3, Number 1 (2011), pp. 77-89  
 © Research India Publications  
<http://www.rjpublication.com/gjfm.htm>

**Hedging Effectiveness of Index Futures Contract: The Case of S & P CNX Nifty**

Ash Narayan Sah and Krishan K. Pandey\*  
 University of Petroleum & Energy Studies,  
 Bahadur, Via Poonamgar, Dehradun (Uttarakhand) 248007, India  
 \*Corresponding Author E-mail: [krishan.pandey@gmail.com](mailto:krishan.pandey@gmail.com)

**Abstract**  
 Futures market performs an important function which is to provide effective hedging besides price discovery at distant future date to the market participants. The hedging effectiveness of the futures contract shows its ability in reducing the amount of risk. We estimated the effective hedge ratio and its hedging effectiveness for the S&P CNX Nifty futures using daily data from 12 June 2000 to 24 December 2008 by three models. The study found that Nifty futures contract provides effective hedging to the market players for hedging purpose.

**Keywords:** Error correction models (ECMs), Minimum variance hedge ratio (MVHR), GARCH, GELS hedge.

**Introduction**  
 One of the important functions of the futures market is to provide hedging facilities to the market participants. The dictionary meaning of 'hedge' is to protect oneself financially by buying or selling futures contract as a protection against loss due to price fluctuations. The rationale behind futures trading is to provide hedging facilities to the economic agents by reducing or eliminating risks that cannot be insured or diversified away.  
 Hedging is done by taking opposite positions in the futures market. The significance of hedging in a volatile price environment is not difficult to imagine. To see the demise of an otherwise efficient firm or farmer as a consequence of adverse price fluctuations over which it had no control is really pitiable. This high degree of volatility in prices is often seen in the case of agricultural commodities where a good crop causes harvest prices to fall below a farmer's cost of production. In fact, it was

Electronic copy available at <http://ssrn.com/abstract=1874526>

6. FOLLOWING ARE THE JOURNAL ENTRIES THAT DEMONSTRATES THE PROPER ACCOUNTING FOR A CASH FLOW HEDGE.  
 2 FOR EACH ENTRY: 1. EXPLAIN THE JOURNAL ENTRY, 2. DISCUSS HOW THE DOLLAR NUMBERS WERE DETERMINED AND 3. EXPLAIN THE RATIONALE  
 3 FOR THE ENTRY, AS AN ILLUSTRATION I COMPLETED THE FIRST ENTRY

CASH MARKET				FORWARD MARKET			
7	SELLS GOODS FOR 1 MILLION EUROS			7	SELLS 1 MILLION MAR EURO @90.5		
8	SPOT RATE = .92	920000		8			905000
9	EURO SPOT RATE = .93	10000		9	MAR EURO = .916		-16783
11				11	DELIVER EURO @ .90		15783
12	PYMT REC'D: EURO SPOT RATE = .90	-300000		12			910000
13		900000					
14				14	BALANCE SH		
15				15	DR CR		DR CR
16	ACCOUNTS RECEIVABLE		920000	16			
17	SALES			17			920000
18				18			
19				19			
20				20			
21				21			
22	ACCOUNTS RECEIVABLE		10000	22			
23	FOREIGN EXCHANGE GAIN			23			10000
24				24			
25				25			
26				26			
27				27			
28	ACCUM OTHER COMP INCOME		510,783	28			
29	FORWARD CONTRACT			29			16783
30				30			
31				31			
32				32			
33				33			
34	LOSS ON FORWARD CONTRACT			34			10000
35	ACCUM OTHER COMP INCOME		10000	35			
36				36			
37				37			
38				38			
39				39			
40				40			
41	DISCOUNT EXPENSE			41			5000
42	ACCUM OTHER COMP INC		5000	42			
43				43			15000
44				44			930000
45				45			
46				46			

1. THIS ENTRY RECORDS THE SALE OF 1,000,000 GOODS TO A FOREIGN ENTITY  
 2. THE DOLLAR AMOUNT IS THE 1,000,000 IN EURO CONVERTED TO US DOLLARS (1,000,000 \* .92)  
 3. GAAP REQUIRES INTERNATIONAL SALES TO BE RECORDED IN US DOLLARS

FX Forward Calculator

18 Forwards 19 Cross-Rates Calculator 20 Par Forwards 21 Predelivery/HRR

Cur: EUR CUR: CUR NDF: via Pricing Date: 04/20/15 Auto Refresh:   
 Trading Mode:  Direct Input:   
 Fwd Source: BGN CMPN Show True Decimal:

T	Dates	Points Bid/Ask	Forwards Bid/Ask
0N	04/22/15		
TN	04/23/15		
SP	04/23/15	3.2771 3.2813	3.2771 3.2813
SN	04/24/15	0.001036 0.001193	3.278136 3.282493
1W	04/30/15	0.007250 0.008350	3.284350 3.289650
2W	05/07/15	0.014584 0.015514	3.291684 3.296814
3W	05/14/15	0.021918 0.022678	3.299018 3.303978
1M	05/26/15	0.034490 0.034960	3.311590 3.316260
IM	06/01/15	0.041009 0.041485	3.318109 3.322785
2M	06/23/15	0.064910 0.065410	3.342010 3.346710
3M	07/23/15	0.099840 0.100830	3.376940 3.382130
4M	08/24/15	0.135906 0.137199	3.413006 3.418499
IM	09/01/15	0.144923 0.146291	3.422023 3.427591
5M	09/23/15	0.169718 0.171294	3.446818 3.452594
6M	10/23/15	0.203530 0.205390	3.480630 3.486690
IM	12/01/15	0.244443 0.246995	3.521543 3.528296
9M	01/25/16	0.302140 0.305670	3.570240 3.586970
IM	03/01/16	0.337736 0.342299	3.614836 3.623599
1Y	04/25/16	0.392120 0.398260	3.669220 3.679560

Legend: Australia 61 2 9777 8600 Brazil 5511 2395 9000 Europe 44 20 7300 7500 Germany 49 69 9204 1210 Hong Kong 852 2977 6000 Japan 81 3 3201 8900 Singapore 65 6212 1000 U.S. 1 212 318 2000 Copy Right 2015 Bloomberg Finance L.P. SN 212449 H213-1619-0 20-Apr-15 18:12:55 CEST GMT+2:00



# Cashpool

- Cashpool management
  - Wordt de policy nageleefd
    - Maximale posities
  - Feitelijk lange termijn lening (106/107)
- Verschillende cash pools binnen zelfde groep (leidt dit tot nadeel participant?) (96)
- FX op cashpool posities vs cashpool om FX te managen
- Maandelijks review mechanisme als onderdeel van treasury policy
- Extra focus op holding/dormant/SPV's (minder relevant voor rest van Company)



# Cashpool

- Cashpool leader routine beloning en voordeel naar participanten
- In de praktijk?
  - Vanuit participant
    - Geen interest marge tussen debet & credit positie'
  - Vanuit leader
    - FX resultaten?
    - Verschillende interest rate afhankelijk van valuta
    - Totale posities positief
      - Verstrekken langlopende leningen
        - Vaste rente
        - FX risico
        - Risico profiel
- Geïsoleerde cashpool enige optie of toch bredere financiële functie met functies en risico's?





## Garanties

- Nagaan of het is voor betere condities of grotere capaciteit (140 e.v.), echter
  - Standaard opgenomen in bankcontract
- Letter of comfort heeft geen effect (142)
- Garanties voor SPV's en specifieke financiële transacties





## M&A – post-closing actions

- Externe bank lening wordt afgelost en vervangen door interne lening
  - CUP
  - Zelfde interest?
  - Implicit parent guarantee (68)
    - Group status op moment van aankoop vs na 2 jaar
- Externe faciliteit wordt vervangen door cashpool
- Additionale funding voor uitbreidingen
  - Due diligence? (62)
- Check en bewaar M&A business case





**Bedankt!**



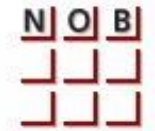
de Nederlandse Orde  
van Belastingadviseurs



## Q&A

Michel van der Breggen  
Hans van Egdome  
Adriaan van der Heijden  
Clive Jie-A-Joen  
Peter Klaver  
Daan Siero

*29 januari 2019*



de Nederlandse Orde  
van Belastingadviseurs



## Question 1

- Co A is a newly established entity in NL and part of a group
- Receives a loan from the bank in order to invest in different properties (real estate)
- Parent company (non-Dutch entity) provides a financial guarantee
- Group rating is BBB
- Co A is not rated separately as it is a start-up and doesn't have previous financial statements

Question: Provide a quantitative example where a maximum guarantee fee is calculated.



## Question 2

- Dutch Coop is an intermediary financial services provider
- Receives intercompany funds and on-lends to other related entities for investments in different projects
- Some of the loans are provided in a different currency

Question: What is the practical way to deal with this FX exposure, and if the solution is to calculate additional margin on those loans what is the practical way of such calculation?







## Question 3

- A loan is provided to a newly established Dutch distributor
- Purpose of the loan: working capital
- No financial data of the borrower exists (yet)

Question: How would you benchmark the interest rate on such a loan taking into consideration that it is difficult to establish the credit rating of the borrower?



## Question 4

- Dutch BV receives a 1M euro loan from a foreign related party
- Interest was benchmarked and set at 4%
- Question arises if a bank / unrelated party would have provided a similar loan or maybe only 300K

Question: How do you practically establish the maximum amount of a loan that can be provided between related entities (quantitative example)?





## Question 5

- Same company as in question 4
- Dutch BV is to invest in real estate properties

Question: Give any specific guidance on how to establish Loan to Value for an entity in the real estate industry.

How is the maximum of the Loan linked to the value of the properties and where to get information to benchmark the max amount of the loan?





## Statement

Er is behoefte aan een meer pragmatische invulling van de steeds complexer wordende guidance.



## Statement

Het gebruik mogen maken van de groepsrating voor het vaststellen van een arm's length rente op lokaal niveau, is een wenselijke en verdedigbare versimpeling.





## **Einde bijeenkomst**

