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International

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Does Intangible Ownership Move with the People That Perform the DEMPE Functions?

In the context of globalization and accelerated by the COVID-19 pandemic, recruitment pools are becoming global, remote team working becomes common, and employees performing significant value adding functions may be located in different jurisdictions, not always in the country of the head office or of the entity that owns the group's valuable intangibles. While the identification of significant people functions has been a critical point in transfer pricing analyses for more than 25 years, its precise significance in the OECD Guidelines has evolved in successive waves. The greater emphasis on people functions raises questions on the impact that workers' or functions' mobility can have on the allocation of intangible ownership and return.

1. Introduction

For many multinational enterprises, the recruitment pool is becoming global, especially in the areas that are deemed compatible with remote team working, and competences are hired where they are found. This trend was facilitated by globalization and accelerated by the COVID-19 pandemic and the new working habits that derived from it. As a consequence, employees performing significant value adding functions may be located in different jurisdictions, not always in the country of the head office or of the entity that owns the group's valuable intangibles. Further, these employees may be relocated over the years – internal mobility being a significant feature of many multinational enterprises' human resources management; or a function may be relocated upon the recruitment of a new employee in a country different from the one in which the predecessor was based. Situations where a multinational enterprise has its complete management team sitting in the same building are becoming exceptional.

This raises important questions in the area of transfer pricing as greater emphasis is put nowadays on the location of people functions. This article focuses on the evolution of this concept in OECD guidance over time, in an attempt to clarify the impact that workers' or functions' mobility can have on the allocation of intangible ownership and return.

2. Definition of Intangibles for Transfer Pricing Purposes and Their Significance

The definition of intangibles for transfer pricing purposes in the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* [hereinafter *OECD Guidelines*) is the following: "the word 'intangible' is intended to address something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances. Rather than focusing on accounting or legal definitions, the thrust of a transfer pricing analysis in a case involving intangibles should be the determination of the conditions that would be agreed upon between independent parties for a comparable transaction."[1]

On the one hand, this definition is relatively broad given it does not provide for an exhaustive list but rather uses a negative formulation, i.e. something which is not a physical or financial asset and not limited to the legal or accounting definitions. On the other hand, the OECD in this definition carefully narrowed and delineated the scope of intangibles for transfer pricing purposes, stating that intangibles are "capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances". In other words, not everything that is not a physical or financial asset consists in an intangible: in particular, location-specific advantages are not intangibles but comparability factors.

Intangibles do not all have the same impact on value creation and on the selection of the most appropriate transfer pricing method. Some are characterized as "routine", others as "unique and valuable intangibles". The latter encompass "intangibles (i) that are not comparable to intangibles used by or available to parties to potentially comparable transactions, and (ii) whose use in business operations (e.g. manufacturing, provision of services, marketing, sales or administration) is expected to yield greater future economic benefits than would

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1. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2022) para. 6.6., Primary Sources IBFD [hereinafter *OECD Guidelines*]

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be expected in the absence of the intangible."[2] For instance, it can be expected to be the norm in a given industry for distributors to have sufficient commercial know-how and clientele to perform their distribution activities (otherwise, they would not be hired as distributors in the first place); such commercial know-how and clientele would likely be regarded as routine, i.e. not unique, if they can reasonably be expected to be present in similarly situated independent parties. The identification of "unique and valuable intangibles" has consequences on the selection of the most appropriate transfer pricing method and determination of arm's length prices for transactions involving the use of intangibles alone or in connection with sales of goods or the performance of services.

3. Evolution of the OECD Thinking in Relation to People Functions: From "Functions (Taking into Account Assets Used and Risks Assumed)" to "Assets Used and Risks Assumed (Taking into Account Functions Performed)"?

While the identification of significant people functions has been a critical point in transfer pricing analyses for more than 25 years, its precise significance in OECD Guidelines has evolved in successive waves.

The 1995 OECD Guidelines provided, as part of the functional analysis, that "compensation usually will reflect the *functions* that each enterprise performs (*taking into account* assets used and risks assumed). Therefore, in determining whether controlled and uncontrolled transactions or entities are comparable, comparison of the functions taken on by the parties is necessary. This comparison is based on a functional analysis, which seeks to identify and to compare the economically significant activities and responsibilities undertaken or to be undertaken by the independent and associated enterprises. For this purpose, particular attention should be paid to the structure and organization of the group. It will also be relevant to determine in what juridical capacity the taxpayer performs its functions". [Emphasis added][3] Thus, the identification of significant functions (taking into account assets used and risks assumed) already played a prominent role in the 1995 OECD Guidelines.

In 2008 and 2010, as part of its Authorised OECD Approach (AOA) for attributing profits to permanent establishments[4] (PE), the OECD introduced the notion of significant people functions in order to "[…] attribute to the PE those risks for which the significant functions relevant to the assumption and/or management (subsequent to the transfer) of risks are performed by people in the PE and also attributes to the PE economic ownership of assets for which the significant functions relevant to the economic ownership of assets are performed by people in the PE." The relevant significant people functions can "vary from business sector to business sector […] and from enterprise to enterprise within sectors".[5]

The rationale for this approach whereby risks and assets follow functions in an intra-entity setting was precisely the lack of legally binding agreements between two parts of the same legal entity, hence the impossibility to rely on contractual allocation of intangible rights and risks between a head office and its foreign permanent establishments:

> The factual, legal position in a PE context […] is that there is no single part of an enterprise which legally 'owns' the assets, assumes the risks, possesses the capital or contracts with separate enterprises. The legal position is thus unhelpful in a PE context, since Article 7(2) requires the PE to be treated as if it were a distinct and separate enterprise, performing its own functions, assuming its own risk and owning or using assets on its own. It is therefore necessary under the arm's length principle of Article 7 to develop a mechanism for attributing risks, economic ownership of assets and capital to the hypothetically distinct and separate PE, for associating with the hypothetically distinct and separate PE the rights and obligations arising out of transactions between separate enterprises and the enterprise of which the PE is a part and for recognising and determining the nature of the "dealings" (i.e., the intra-enterprise equivalents of separate enterprise transactions) between the hypothetically distinct and separate PE and other parts of the enterprise of which the PE is a part.[6]

It was expressly stated that this approach, developed to deal with the specific challenges of attributing profits to a PE in a single entity context under article 7 of the OECD Model Tax Convention, was not intended to apply under article 9 of the OECD Model Tax Convention for allocating profits between associated enterprises that are distinct legal entities where reliance on intragroup contracts is possible – subject of course to those contracts to reflect the economic substance of the transaction and to comply with the arm's length principle : "between unrelated enterprises, the determination of which enterprise owns assets and which bears risk is determined by legally binding contracts or other ascertainable legal arrangements. Similar considerations apply to associated enterprises *providing those contracts or legal arrangements reflect the underlying reality* and meet the criteria in Chapter I of the Guidelines. [...] Similarly, in a separate enterprise context no issues generally arise over determining which enterprise possesses the capital." [Emphasis added.][7]

In the 2010 OECD Guidelines (which apply to transfer pricing between legally distinct associated enterprises), a new chapter related to the transfer pricing aspects of business restructurings was introduced. In this chapter, noting the critical importance of intragroup allocations of risks and intangibles return in the context of business restructuring, the OECD aimed at strengthening its framework to determine whether a particular risk allocation or reallocation is arm's length. The OECD concluded that "Unlike in the AOA that was developed for

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2. *OECD Guidelines* (2022), para. 6.17.
3. *OECD Guidelines*(1995), para. 1.20.
4. For almost a century, the work of the OECD has oscillated between an assimilation or a differentiation of subsidiaries and permanent establishments.
5. Paras. 18 and 19 of the OECD (2008) and (2010), *OECD Report on the Attribution of Profits to Permanent Establishments*, Primary Sources IBFD.
6. Id., at para. 17.
7. Id.

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Article 7, the examination of risks in an Article 9 context starts from an examination of the contractual terms between the parties, as those generally define how risks are to be divided between the parties. Contractual arrangements are the starting point for determining which party to a transaction bears the risk associated with it. […] However, […] a tax administration is entitled to challenge the purported contractual allocation of risk between associated enterprises if it is not consistent with the economic substance of the transaction."[8]

Hence, in determining whether an allocation of risks is arm's length, the existence of comparables remains critical, in accordance with the overarching arm's length principle. The 2010 OECD Guidelines stated that "where data evidence a similar allocation of risk in comparable uncontrolled transactions, then the contractual risk allocation between the associated enterprises is regarded as arm's length. […]"[9] By contrast, "[…] where no comparables are found to support a contractual allocation of risk between associated enterprises, it becomes necessary to determine whether that allocation of risk is one that might be expected to have been agreed between independent parties in similar circumstances. […] In the absence of comparables evidencing the consistency with the arm's length principle of the risk allocation in a controlled transaction, the examination of which party has greater control over the risk can be a relevant factor to assist in the determination of whether a similar risk allocation would have been agreed between independent parties in comparable circumstances."[10]

Control "should be understood as the capacity to make decisions to take on the risk (decision to put the capital at risk) and decisions on whether and how to manage the risk, internally or using an external provider. This would require the company to have people – employees or directors – who have the authority to, and effectively do, perform these control functions." Importantly, subcontracting the performance of some functions does not lead to a reallocation of risks: "when one party bears a risk, the fact that it hires another party to administer and monitor the risk on a day-to-day basis is not sufficient to transfer the risk to that other party."[11]

The OECD again emphasized that "The reference to the notions of "control over risk" and of "financial capacity to assume the risk" is not intended to set a standard under Article 9 of the OECD Model Tax Convention whereby risks would always follow capital or people functions. The analytical framework under Article 9 is different from the AOA that was developed under Article 7 of the OECD Model Tax Convention."[12]

Thus, in the 2010 OECD Guidelines, the performance of risk control functions and the financial capacity to assume risk were relevant, although not determinative factors in assessing the compliance with the arm's length principle of risk allocations: they do not trigger an automatic (re-)allocation of risks, by contrast with the standard under the AOA (according to which, in an intra-entity set-up, risks follow functions).

8. *OECD Guidelines* (2010), paras. 9.11-9.12.
9. *OECD Guidelines* (2010), para. 9.18.
10. *OECD Guidelines* (2010), paras. 9.19-9.22.
11. *OECD Guidelines* (2010), para. 9.23.
12. *OECD Guidelines* (2010), para. 9.21. In the 2017 Guidelines, this language was revised, stating at para. 9.7 that "This chapter only covers transactions between associated enterprises in the context of Article 9 of the OECD Model Tax Convention and does not address the attribution of profits within a single enterprise on the basis of Article 7 of the OECD Model Tax Convention, as this is the subject of the Report on the Attribution of Profits to Permanent Establishments."

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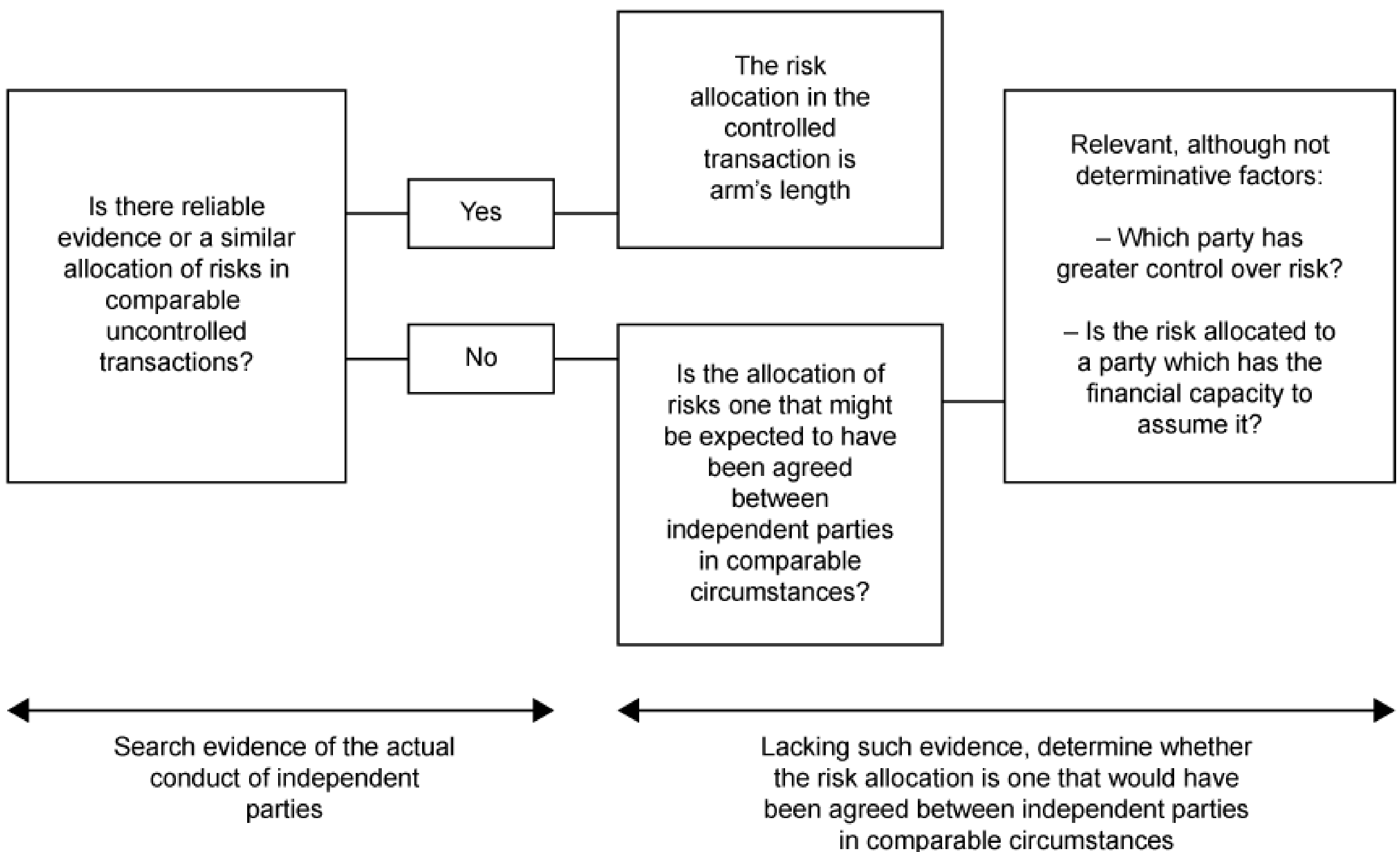
Further, these two factors remain subsidiary to the overarching arm's length principle: where comparables exist that evidence a similar risk allocation between independent parties, these tests are not needed or relevant. This whole reasoning was illustrated in the 2010 OECD Guidelines with the following diagram [13]

Figure 1 – Determining whether the allocation of risks in a controlled transaction is arm's length



In the case of intangibles, the type of functions that the owner would be expected to perform in order to be allocated the development risk and return was illustrated as follows:

> As [an] example, assume that a principal hires a contract researcher to perform research on its behalf. Assume the arrangement between the parties is that the principal bears the risk of failure of the research and will be the owner of the outcome of the research in case of success, while the contract researcher is allocated a guaranteed remuneration irrespective of whether the research is a success or a failure, and no right to ownership on the outcome of the research. Although the day-to-day research would be carried on by the scientific personnel of the contract researcher, the principal would be expected to make a number of relevant decisions in order to control its risk, such as: the decision to hire (or terminate the contract with) that particular contract researcher, the decision of the type of research that should be carried out and objectives assigned to it, and the decision of the budget allocated to the contract researcher. Moreover, the contract researcher would generally be required to report back to the principal on a regular basis, e.g. at predetermined milestones. The principal would be expected to be able to assess the outcome of the research activities. The contract researcher's own operational risk, e.g. the risk of losing a client or of suffering a penalty in case of negligence, is distinct from the failure risk borne by the principal.[14]

This notion was further elaborated in the 2017 Guidelines:

> When funding is provided to a party for the development of an intangible, the relevant decisions relating to taking on, laying off or declining a risk bearing opportunity and the decisions on whether and how to respond to the risks associated with the opportunity, are the decisions related to the provision of funding and the conditions of the transaction. […] The higher the development risk and the closer the financial risk is related to the development risk, the more the funder will need to have the capability to assess the

13. *OECD Guidelines* (2010), para. 9.33. This diagram was removed in the 2017 version of the OECD Guidelines.
14. *OECD Guidelines* (2010), para. 9.26.

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> progress of the development of the intangible and the consequences of this progress for achieving its expected funding return, and the more closely the funder may link the continued provision of funding to key operational developments that may impact its financial risk. The funder will need to have the capability to make the assessments regarding the continued provision of funding, and will need to actually make such assessments, which will then need to be taken into account by the funder in actually making the relevant decisions on the provision of funding.[15]

4. Recharacterization of Transactions or Delineation of Actual Transactions

Importantly, in its 1995 Guidelines, the OECD stated that disregarding or recharacterizing a transaction should remain exceptional: "A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises *as it has been structured by them*, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapters II and III. *In other than exceptional cases*, the tax administration should not disregard the actual transactions or substitute other transactions for them. *Restructuring of legitimate business transactions* would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured."[16] [Emphasis added.]

This guidance, far from giving a blank check for taxpayers to organize transactions that lacked economic substance, already provided for a substance over form and a commercial rationale test. It was, however, expected that cases of recharacterization would remain exceptional; the OECD affirmed that for legitimate business arrangements, taxpayers had the freedom to organize their affairs as they deemed appropriate. However, when developing the 2010 OECD Guidelines, some OECD countries considered that this guidance was too restrictive in practice, especially since there was no clear consensus concerning what kind of situations would be concerned with the lack of commercial rationale test. The 2010 OECD Guidelines therefore included several examples of business restructurings to illustrate the above reasoning and its relationship with recharacterization, especially in the case of restructurings involving a transfer of intangible rights.[17]

The post-BEPS 2017 OECD Guidelines reflect a notable evolution in this respect. With the introduction of the concept of "accurate delineation of the *actual* transaction" in Chapter I of the Guidelines, as an essential component of the comparability analysis, the OECD suggests that tax authorities may recharacterize transactions (or reallocate risks or intangible returns in a given transaction) without having recourse to the exceptional circumstances criteria (substance over form and commercial rationale tests discussed above), by reallocating risks in cases where the entity to which risk is contractually allocated does not perform the risk control functions and does not have the financial capacity to assume risk.

The 2017-2022 OECD guidance on intangibles and DEMPE functions

A similar notion was introduced in Chapter VI of the 2017 OECD Guidelines with tax administrations being allowed to reallocate intangible return in cases where the legal intangible owner does not perform *any* of the so-called "DEMPE" functions (Development, Enhancement, Maintenance, Protection, Exploitation). However, the drafting of the OECD Guidelines in this respect remains carefully crafted:

> The legal owner will be considered to be the owner of the intangible for transfer pricing purposes. *If no legal owner of the intangible is identified under applicable law or governing contracts*, then the member of the MNE group that, based on the facts and circumstances, controls decisions concerning the exploitation of the intangible and has the practical capacity to restrict others from using the intangible will be considered the legal owner of the intangible for transfer pricing purposes. [Emphasis added.][18]

But, while legal ownership is to be respected, identifying the legal owner is not the final step in a transfer pricing analysis:

> For transfer pricing purposes, legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by the MNE group from exploiting the intangible, even though such returns may initially accrue to the legal owner as a result of its legal or contractual right to exploit the intangible. The return ultimately retained by or attributed to the legal owner depends upon the functions it performs, the assets it uses, and the risks it assumes, and upon the contributions made by other MNE group members through their functions performed, assets used, and risks assumed. [19]

"If the legal owner of an intangible in substance:

- performs and controls *all of the functions* […] related to the development, enhancement, maintenance, protection and exploitation of the intangible;
- provides *all assets*, including funding, necessary to the development, enhancement, maintenance, protection, and exploitation of the intangibles; and
- assumes *all of the risks* related to the development, enhancement, maintenance, protection, and exploitation of the intangible,

15. *OECD Guidelines* (2017), para. 6.64.
16. *OECD Guidelines* (1995), para. 1.36.
17. *OECD Guidelines* (2010), para. 9.190-9.194.
18. *OECD Guidelines* (2017), para. 6.40.
19. *OECD Guidelines* (2017), para. 6.42.

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then it will be entitled to *all of the anticipated, ex ante, returns* derived from the MNE group's exploitation of the intangible." [Emphasis added.]

"It is not essential that the legal owner physically performs all of the functions related to the development, enhancement, maintenance, protection and exploitation of an intangible through its own personnel in order to be entitled ultimately to retain or be attributed a portion of the return derived by the MNE group from exploitation of the intangibles. In transactions between independent enterprises, certain functions are sometimes outsourced to other entities. A member of an MNE group that is the legal owner of intangibles could similarly outsource functions related to the development, enhancement, maintenance, protection or exploitation of intangibles to either independent enterprises or associated enterprises."

"To the extent that one or more members of the MNE group other than the legal owner performs functions, uses assets, or assumes risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible, such associated enterprises must be compensated on an arm's length basis for their contributions. This compensation may, depending on the facts and circumstances, constitute all or a substantial part of the return anticipated to be derived from the exploitation of the intangible." Similarly, "Where associated enterprises other than the legal owner perform relevant functions that are anticipated to contribute to the value of the intangibles, they should be compensated on an arm's length basis for the functions they perform under the principles set out in Chapters I - III. The determination of arm's length compensation for functional contributions should consider the availability of comparable uncontrolled transactions, the importance of the functions performed to the creation of intangible value, and the realistically available options of the parties."[20]

Thus, the 2022 OECD Guidelines do not provide for a systematic proportional allocation of intangibles economic ownership based on the mere allocation of DEMPE functions, nor for a systematic profit split based on a value chain analysis. Rather, they (re)affirm that a legal owner must compensate at arm's length the functions performed by other group entities that contribute to the value of the intangibles. This can be for instance contract R&D entities or marketing entities, as the case may be.

Further, the OECD guidance indicates that where the legal owner neither performs nor controls any of the DEMPE functions, it would not be entitled to the ongoing return associated with the performance of those functions that it does not perform (as arm's length compensation for those functions should be allocated to the entity(ies) that perform(s) them); it does not exclude a remuneration for the mere ownership of assets, but only to the extent that the intangible owner "actually" uses them and/or actually bears the associated risks (*see* comments under item 4 above on the delineation of the "actual" transaction):

In extreme cases, "if the legal owner *neither controls nor performs the functions* related to the development, enhancement, maintenance, protection or exploitation of the intangible, the legal owner would not be entitled to any ongoing benefit attributable to the outsourced functions. Depending on the facts, the arm's length compensation required to be provided by the legal owner to other associated enterprises performing or controlling functions related to the development, enhancement, maintenance, protection, or exploitation of intangibles may comprise any share of the total return derived from exploitation of the intangibles. A legal owner not performing any relevant function relating to the development, enhancement, maintenance, protection or exploitation of the intangible will therefore not be entitled to any portion of such returns related to the performance or control of functions relating to the development, enhancement, maintenance, protection or exploitation of the intangible. *It is entitled to an arm's length compensation for any functions it actually performs, any assets it actually uses and risks it actually assumes.*"[21] [Emphasis added.]

Guidance on the relationship between the performance of risk control functions and the allocation of risks, including guidance on how to determine a risk-free rate of return and a risk-adjusted rate of return in those situations where an associated enterprise is only entitled to any of those returns, is found in Chapter I of the 2022 OECD Guidelines.[22]

Finally, and very importantly, while the above guidance possibly restricts the ongoing return that an intangible owner would receive where it does not perform some of the DEMPE functions, it does not suggest a reallocation of sales proceeds in the event where the legal owner would dispose of the intangible. A long-established principle, confirmed in the most recent OECD guidance, is that in a transfer pricing analysis the options realistically available to each of the parties to the transaction should be considered. This is true also for transactions involving intangibles. In the view of many tax courts, whether a party has the legal option available to dispose of an asset is critical in the analysis.[23]

5. Conclusion

Identifying the significant people functions in a transaction has always been an important part of transfer pricing analyses since the 1995 OECD Guidelines. More recently, greater emphasis has been placed on people functions, first in the AOA for the attribution of profits to permanent establishments, as an alternative test in the absence of binding contracts within a single entity; then with the elaboration of the notions of control functions in relation to risks and of DEMPE functions in relation to intangibles, in the 2010, 2017 and 2022 OECD Guidelines.

20. *OECD Guidelines* (2017), paras. 6.51-6.52 and 6.71.
21. *OECD Guidelines* (2017), para. 6.54.
22. *OECD Guidelines* (2022), paras. 1.107-1.126.
23. *See* for instance the decision by the French Supreme Court, Conseil d'Etat n° 369814 of 7 December 2016, in the case of eBay France which held the legal registration on the ebay.fr domain name.

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However, while the AOA provides that risks and assets follow functions within a single entity, the OECD Guidelines do not provide for the same between legally distinct associated enterprises. Despite some convergence, a clear distinction remains between the AOA under article 7 on the one hand, and the OECD Guidelines under article 9 of the OECD Guidelines on the other hand.

The key takeaways from the 2022 OECD Guidelines in relation to significant people functions and intangibles can be summarized as follows:

- There has been a subtle and progressive transition between the 1995 and 2002 OECD Guidelines from "functions (taking into account assets used and risks assumed)" to "assets used and risks assumed (taking into account functions performed)";
- Further detailed guidance is provided as to what those important people functions are (the so-called DEMPE functions in relation to intangibles);
- A legal intangible owner is not required to perform all the DEMPE functions itself: it can use service providers (for instance contract R&D or marketing services providers) to the extent that it controls the risks associated with those subcontracted functions;
- DEMPE functions must be compensated at arm's length, including in the case where these are performed for the benefit of a legal intangible owner which is a different associated enterprise;
- If the legal owner of an intangible neither controls nor performs the DEMPE functions related to the intangible it owns, then the OECD considers that it would not be entitled to any ongoing benefit attributable to the outsourced functions.

Thus, the OECD Guidelines do not suggest that the mere transfer of people functions, whether because of people performing these functions being relocating, or because the positions being filled by new personnel in a different country, would lead to economic ownership of the intangible also being relocated. Risks and assets do not follow functions in the case of separate legal entities. Rather, the OECD Guidelines clarify that the new entity hosting the functions should be compensated at arm's length for the performance of the functions to the benefit of the intangible owner. Such remuneration may be a small or a large portion of the intangible return, as the selection of the most appropriate transfer pricing method and determination of the remuneration for these functions will depend on a factual analysis and in particular on the significance of those functions in value creation and the level of autonomy in decision-making of the functions transferred.

A different question is whether a relocation of functions may entail a transfer of workforce in place, which might be characterized as a transfer of "something of value" within the meaning of Chapter IX of the OECD Guidelines, and might (or not) attract profit potential. This "something of value" would, however, be distinct from the intangibles in relation to which the functions transferred are being performed. Similarly, depending on the circumstances of the case, the relocation of functions could lead to a termination or substantial renegotiation of certain intra-group contractual arrangements, that might warrant (or not) indemnification in accordance with guidance in Chapter IX of the OECD Guidelines.

One interesting development is the new emphasis put by the OECD, in the Pillar One proposal, on market jurisdictions, irrespective of the location of people functions : "Pillar One is focused on new nexus and profit allocation rules to ensure that, in an increasingly digital age, the allocation of taxing rights with respect to business profits is no longer exclusively circumscribed by reference to physical presence."[24]For the OECD, "The existing international tax rules generally attach a taxing right to profits deriving from a physical presence in a jurisdiction. However, given globalisation and the digitalisation of the economy, businesses can, *with or without the benefit of local physical operations*, participate in an active and sustained manner in the economic life of a market jurisdiction, through engagement extending beyond the mere conclusion of sales, in order to increase the value of their products, their sales and thus their profits. Such participation is attributable to the nature of what is being supplied, how it is being supplied and the active interaction or engagement with market jurisdictions. This means that the allocation of taxing rights and taxable profits can no longer be exclusively circumscribed by reference to physical presence". [Emphasis added.][25]

It is amazing that this new market-based paradigm is being developed so shortly after the greater emphasis on people functions resulting from the BEPS Project. In allocating groups' profits among jurisdictions, taxpayers and tax administrations may have to navigate between legal reality / contractual terms which many tax courts will consider as essential; location of people functions performed in an increasingly mobile environment, and, if Pillar One is implemented, location of customers. In June 2022, the OECD indicated that it is planning to review tax issues related to mobile work in a number of areas including tax treaties and transfer pricing rules in 2023 and beyond. Stay tuned!

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24. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, para. 3 (OECD 2020).
25. Id., at para. 22.

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