



MASTER IN  
**Law &  
Management**

# **Lowering the Tax Burden of MNEs: Transfer Pricing for Intangible Assets**

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*“manifestations of "intangible" value become more pronounced, by essentially becoming in themselves the valuable "products" and "services," transmissible silently and invisibly behind the mask of apparently typical transfers.”*

J. Scott Wilkie, 2012

**ABSTRACT:**

This document explores the complexities of transfer pricing for intangible assets within MNEs. It highlights the role of intangible assets in tax planning, focusing on how these assets are often shifted to low-tax jurisdictions to minimize tax liabilities. The paper discusses the OECD's guidelines, emphasizing the arm's length principle as a measure to ensure fair taxation. Challenges in valuing intangible assets, due to their unique characteristics, and the implications for international tax regulation are also examined.

**KEYWORDS:** transfer pricing, intangible assets, arm's length principle, profit shifting, OECD Guidelines

**RESUMO:**

Este documento explora as complexidades da fixação de preços de transferência para ativos intangíveis em empresas multinacionais. Destaca o papel dos ativos intangíveis no planejamento fiscal, com foco em como este tipo de ativo é frequentemente transferido para países com taxas de imposto reduzidas para minimizar as obrigações fiscais. O documento discute as diretrizes da OCDE, focando-se no princípio de plena concorrência como medida para garantir uma tributação justa. São também explorados os desafios inerentes à avaliação de ativos intangíveis, devido às suas características únicas, e as implicações das regulações fiscal internacional.

**PALAVRAS CHAVE:** preços de transferência, ativos intangíveis, princípio da plena concorrência, transferência de lucros, diretrizes da OCDE

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## I. Introduction

“Intangible asset means non-monetary asset that cannot be seen, touched or physically measured.”<sup>1</sup>. According to IAS 38 there are three required characteristics to be considered an intangible asset: identifiability (being separable or arising from contractual or legal rights), control, and future economic benefits<sup>2</sup>. However, from a tax perspective, intangible assets as defined by the OECD have a broader range of elements beyond mere physical measurability or visibility<sup>3</sup>. The OECD emphasizes not just the identifiability, control, and potential for future economic benefits, but also aligning income attribution with economic activity and value creation, particularly through the development, enhancement, maintenance, protection, and exploitation (DEMPE) functions performed by entities within an MNE. The OECD Guidelines typically place a strong emphasis on *substance over form*, looking at the actual functions performed, assets used, and risks assumed by the parties involved in transactions related to intangible assets, aiming to ensure that profits are allocated in accordance with value creation, which may not always align with legal ownership.

Twenty-first-century companies’ income and productivity improvements are due to holding intangible assets<sup>4</sup> which are seen as one of the most important factors for companies to have a competitive advantage<sup>5</sup> due to digitalization<sup>6</sup>. In addition to financial considerations, this type of asset has become more and more important for tax and accounting purposes<sup>7</sup>.

The tax rate at which corporate income is taxed in Europe varies from country to country; therefore, MNEs have incentives to reallocate their income internationally to reduce their

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<sup>1</sup> METHA / MADHANI, 2008: 11

<sup>2</sup> IFRS, 2024

<sup>3</sup> OECD, 2022

<sup>4</sup> MARKHAM, 2005; DISCHINGER / RIEDEL, 2011; KARKINSKY / RIEDEL, 2012; ALI, 2022

<sup>5</sup> METHA / MADHANI, 2008; DISCHINGER / RIEDEL, 2011; CHIANG / DEL GAUDIO, 2013

<sup>6</sup> GREIL et al., 2023

<sup>7</sup> METHA / MADHANI, 2008

overall tax liabilities. MNEs have at their disposal several methods to transfer profits from high-tax to low-tax jurisdictions, one of them being the manipulation of transfer prices in international intra-firm transactions<sup>8</sup>. This technique is used by companies established in high-tax countries, transferring assets to low-tax jurisdictions – where they conduct little or no real business activity<sup>9</sup> – avoiding taxation, achieving an increase in profits (after tax) thought income flows<sup>10</sup>, and maintaining power, which are aspects that most companies intend to achieve by taking every opportunity available<sup>11</sup>.

These actions may be justified with the increasing tax pressure MNEs face, leading them to develop these tax minimization mechanisms, since there is a lack of clear tax regulation, such as tax and accounting policies for intra-firm transactions<sup>12</sup>.

Some authors<sup>13</sup> argue that tax avoidance arises due to divergent tax perspectives between governments and taxpayers. While not always illegal, tax avoidance involves ethically minimizing state revenues, making it a critical concern for tax authorities. This issue escalates into a tax problem when stakeholders observe multinational corporations exploiting transfer pricing to sidestep their tax obligations. Multinational corporations are permitted by law to utilize transfer pricing methodologies to distribute income among their subsidiaries and affiliated entities within the corporate structure. However, these companies can also engage in transfer pricing malpractice by manipulating their taxable income to decrease their overall tax liability. Transfer pricing assumes particular significance within multinational corporations operating across jurisdictions with disparate tax systems. It provides a mechanism for generating profits within the corporate group by directing income to countries with lower tax rates.

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<sup>8</sup> HUIZINGA / LAEVEN, 2008; DISCHINGER / RIEDEL, 2011; KARKINSKY / RIEDEL, 2012; LUCKHAUPT et al., 2021; CHIANG / DEL GAUDIO, 2013

<sup>9</sup> DURST, 2012

<sup>10</sup> BAERT, 2024

<sup>11</sup> EDEN, 2015; SEPTIANI et al., 2021

<sup>12</sup> GRIGOROI et al., 2023

<sup>13</sup> As SEPTIANI et al., 2021 defend

According to Ali<sup>14</sup>, holding intangibles is one of the main factors that influences MNEs to engage in profit shifting between subsidiaries from high to low tax jurisdictions. This author believes that intangible assets serve as a strategic tool for tax planning, enabling the shifting of revenue to offshore financial centers or tax havens to exploit tax differentials across jurisdictions. Under this strategy, intangible assets are transferred to a holding company located in low-tax jurisdictions, and royalties are imposed on operating subsidiaries situated in high-tax countries for the utilization of these assets. Royalties, recognized as tax-deductible expenses, enable multinational corporations to retain intangible assets in low-tax jurisdictions, where they can generate revenue from group companies through royalty payments or licensing agreements.

As 60% of world trade is intra-group<sup>15</sup> and MNEs hold more and more intangibles rather than tangible assets<sup>16</sup>, it becomes fundamental to analyze the challenges faced when valuating these assets with such unique characteristics for transfer prices purposes and whether the terms of these transactions respect the arm's length principle. Another important aspect to analyze is the ownership of the intangibles since MNEs may relocate these assets to subsidiaries established in low-tax jurisdictions and pay royalties to their use as a tax planning strategy and this practice has been growingly raising governments' concerns<sup>17</sup>. Finally, for the last few years, there has been the question of whether the price set between the related parties trading (intangible) assets is due to profit-shifting motives or just the price arising from two parties trading using their freedom of contract<sup>18</sup>.

To mitigate the manipulation of transfer prices, governments have established specific regulations, with the Organisation for Economic Co-operation and Development (OECD) recommending that internal transfer prices adhere to the arm's length principle (ALP)<sup>19</sup>, which is recommended as a guiding principle by the Article 9 of the OECD Model

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<sup>14</sup> ALI, 2022

<sup>15</sup> CHIANG / DEL GAUDIO, 2013; BEEBEEJAUN, 2019; SEPTIANI et al., 2021

<sup>16</sup> GRIFFITH et al., 2014

<sup>17</sup> DISCHINGER / RIEDEL, 2011

<sup>18</sup> ALI, 2022

<sup>19</sup> CHOI et al., 2020

Convention<sup>20</sup> and is widely accepted, being integrated into every bilateral tax treaty<sup>21</sup>. This principle, outlined in the OECD's transfer pricing guidelines first issued in 1995 and later updated several times, mandates that the transactions between a multinational enterprise's (MNE) headquarters and its affiliates be conducted as if they were between unrelated entities, ensuring that the prices for these internal transactions reflect those that would be found in the open market under similar conditions<sup>22</sup>.

Analyzing current regulations is fundamental for several reasons. Firstly, it helps in understanding the dynamic nature of global transfer pricing standards and their implications on the operations and tax liabilities of MNEs<sup>23</sup>. This understanding is important for analyzing the complex interplay between tax planning strategies and regulatory compliance, ensuring that MNEs can operate efficiently while adhering to international tax laws. Furthermore, an extensive analysis sheds light on the practical challenges associated with implementing the arm's length principle, a keystone of transfer pricing regulations<sup>24</sup>. These challenges include identifying comparable transactions, adjusting for economic and market differences, and ensuring that internal transfer prices reflect those that would be agreed upon by independent entities under similar circumstances.

Examining these regulations is useful to have a deeper understanding of the impact of regulatory differences across countries on international tax competition, encouraging a dialogue on harmonization and cooperation to prevent tax base erosion and profit shifting. Finally, understanding these regulations is fundamental to finding an equilibrium between preventing aggressive tax avoidance practices and allowing MNEs to leverage global efficiencies.

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<sup>20</sup> CHIANG / DEL GAUDIO, 2013; BÜTTNER / THIEMANN, 2017

<sup>21</sup> KAMDAR, 2020; LI, 2021

<sup>22</sup> OECD, 2017; OECD, 2022

<sup>23</sup> OECD, 2010

<sup>24</sup> Id.

## **II. Methodology**

In crafting the methodology for a systematic literature review on the subject of transfer pricing and intangibles, the approach taken was methodical and strategic, designed to encapsulate the breadth and depth of the scholarly discourse in this domain. The aim was to ensure the research covered both a broad overview of the existing academic landscape and provided targeted insights into specific developments post-2017, especially those pertaining to the OECD guidelines.

The initial phase of research entailed a comprehensive search through the academic databases Scopus and Web of Science. The chosen search query, "(transfer AND pricing) AND (intangible\* AND assets)," was constructed to extract literature that addressed both transfer pricing and intangible assets in various capacities, with the asterisk serving to include multiple derivations of the term "intangible."

To refine the body of literature, criteria were set to consider articles published from 2017 onwards, aligning the research with the period post the latest revision of the OECD guidelines before their 2022 iteration. Additionally, the search was narrowed to include only open-access articles, ensuring that the review was built upon sources that were freely and fully available, thereby promoting transparency and replicability of the research.

As the research unfolded, Google Scholar was employed as a supplementary resource, utilizing the same keywords without the year filter. This platform's extensive repository of academic materials provided a rich supplement to the initial database findings, offering a more longitudinal perspective of the evolving discourse on transfer pricing and intangibles.

The research process organically evolved to incorporate more focused explorations as specific themes emerged as central to the thesis. Targeted search queries such as "(transfer AND pricing) AND (OECD AND guidelines)," "(transfer AND pricing) AND (intangible AND ownership)," "(OECD AND guidelines) AND (soft AND law)," "(OECD AND guidelines) AND (DEMPE AND functions)," and "(contract\* AND freedom) AND

(transfer AND pricing)" were deployed. These refined searches were instrumental in drilling down into nuanced areas of transfer pricing, from the intricacies of OECD guidelines to the conceptual analysis of DEMPE functions and the role of soft law in transfer pricing regulation.

In analyzing the collected literature, a thematic approach was adopted, dissecting the nuanced narratives, assessing methodological rigor, and identifying research gaps. The analysis was guided by qualitative synthesis methodologies, which emphasize the interpretation of emergent patterns and the articulation of connections within the scholarly works.

### **III. Challenges in Valuing and Transferring Intangible Assets**

#### **1. Challenges of Valuation**

##### *1.1. Arm's Length Principle*

According to the OECD and the UN, transfer prices must be calculated according to the arm's length principle<sup>25</sup>, which is a standard recognized internationally to guide transactions between two related parties<sup>26</sup>. This principle aims to avoid transfer pricing errors and has the purpose of ensuring conditions of intra-firm transactions are set as proportional to the ones in transactions between unrelated parties, ensuring tax fairness<sup>27</sup>.

Despite being enforced by transfer pricing regulations<sup>28</sup> and aiming to insert objectivity in the equation so that related parties would act as independent in the market and prices between them as set accordingly as such, this principle is a concept subject to

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<sup>25</sup> LUCKHAUPT et al., 2012; HEIDECHE, 2021; ALI, 2022

<sup>26</sup> MARKHAM, 2005; KAMDAR, 2018

<sup>27</sup> GRIFFITH et al., 2014; EDEN, 2015; KAMDAR, 2018; SEPTIANI et al., 2021

<sup>28</sup> GRIFFITH et al., 2014

interpretation rather than having a predetermined value<sup>29</sup>, requiring judgment from the taxpayer and the tax authority<sup>30</sup>.

The arm's length concept is used by comparing the terms of a controlled transaction with the terms that would have been applied had the parties been independent and executing the transaction under similar circumstances<sup>31</sup>. In other words, this standard simulates the negotiations an independent entity would engage in under similar circumstances, aiming to ensure fair tax practices<sup>32</sup>.

Applying this standard is extremely difficult when the asset being traded is intangible since these assets have special characteristics, which reduces the possibility of comparing the transaction with similar ones between unrelated parties<sup>33</sup>. These transactions don't usually have market counterparts, making it difficult to compare to others, therefore MNEs may set the prices as they wish to reduce their tax liability<sup>34</sup> since market prices for intra-firm transactions barely exist<sup>35</sup>. Furthermore, according to Heidecke<sup>36</sup>, the "comparable circumstances" have inherent to them a subjective element that plays an important role when examining if the price is set according to the standard. While it is simpler to perform this traditional comparative analysis with tangible goods, in the case of intangible it becomes harder, also because "under no circumstances is an MNE willing to risk allowing unrelated parties to exploit their intellectual property", since these play a major role in commercial success<sup>37</sup> and some are not traded in the market, making it impossible to do a direct comparison<sup>38</sup>. Thus, it would be necessary to perform a

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<sup>29</sup> MARKHAM, 2005; KLASSEN et al., 2016

<sup>30</sup> KAMDAR, 2018

<sup>31</sup> KAMDAR, 2018; HEIDECKE, 2021

<sup>32</sup> EDEN, 2015

<sup>33</sup> MARKHAM, 2005

<sup>34</sup> GRIFFITH et al., 2014

<sup>35</sup> LUCKHAUPT et al., 2012

<sup>36</sup> HEIDECKE, 2021

<sup>37</sup> ABDALLAH / MAGRABI, 2009: 116

<sup>38</sup> LUCKHAUPT et al., 2012; EDEN, 2015

functional analysis regarding the taxpayer and each transaction so that would be possible to identify a truly comparable market transaction, which demonstrates the difficulty in assessing it and determining a range of prices<sup>39</sup>.

In the case of firm-specific intangible assets, there are challenges in observing the arm's length price for intra-firm royalties<sup>40</sup>. These authors defend that this enables multinationals to manipulate transfer prices, facilitating profit shifting to jurisdictions with lower taxes, which is a practice particularly pronounced among MNEs possessing significant intellectual property and investing heavily in research and development, as empirical evidence suggests a correlation between these factors and heightened profit shifting activities<sup>41</sup>.

Implementing the ALP, especially when dealing with intangible assets that lack clear market comparables, introduces a significant degree of subjectivity into transfer pricing, complicating the efforts to achieve fair and equitable taxation<sup>42</sup>. Some difficulties result from the inability of the ALP to account for the unique synergies and economies of scale within MNEs, which are inherent to MNEs<sup>43</sup>, often leading to disputes between taxpayers and tax authorities<sup>44</sup>.

The essence of the ALP's difficulties lies in its foundational approach of comparing related party transactions to hypothetical transactions between independent parties, a

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<sup>39</sup> GREIL et al., 2023

<sup>40</sup> KARKINSKY / RIEDEL, 2012

<sup>41</sup> On this topic, however, MPOFU / WEALTH, 2022 argue that the real issue lies in the flawed income tax system design rather than the ALP itself, pointing out that tax incentives aimed at economic development are often exploited by MNEs for tax avoidance and evasion. Due to this, the authors believe developing countries need to improve their tax systems, close legal loopholes, and enhance regulatory oversight to curb aggressive tax planning strategies. They reject the perspective that replacing the arm's length principle with alternatives such as formulary apportionment could resolve the complexities faced in transfer pricing practices.

<sup>42</sup> MPOFU / WEALTH, 2022

<sup>43</sup> EDEN, 2015

<sup>44</sup> MARTINS et al., 2020; MPOFU / WEALTH, 2022

method increasingly scrutinized for its practicality given the complex, integrated nature of MNEs and the unique value of their intangible assets<sup>45</sup>.

The process of aligning transfer prices with those that would theoretically prevail among independent parties overlooks the intrinsic synergies that define the operational and financial structure of MNEs<sup>46</sup>. This compromises the relevance of market price comparisons and highlights the methodological shortcomings in capturing the firm-specific value contributions of MNEs' assets and services. This gap may justify the need for a paradigm shift in how synergies are accounted for within the ALP framework, suggesting a move towards methodologies that can more accurately reflect the complexities of global business operations of MNE transactions<sup>47</sup>. Despite these challenges, the ALP is recognized for its role in promoting international tax equity and fairness, treating related and unrelated entities consistently<sup>48</sup>. However, this recognition comes with an acknowledgment of the principle's limitations in capturing the economic realities of modern transactions, signaling a need for adaptive reforms<sup>49</sup>.

Contrarily, Melnychenko<sup>50</sup> defends that the arm's length principle reflects the economic realities of specific facts and circumstances for transactions of taxpayers under tax control, basing its norms on the regular functioning of markets as the fundamental value. According to them, this principle aims to approximate open market standards when goods, tangible or intangible assets, are transferred, or services are provided between related enterprises and has the purpose of establishing an appropriate tax base in each jurisdiction and preventing double taxation.

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<sup>45</sup> EDEN, 2015; GREIL et al., 2023

<sup>46</sup> GREIL et al., 2023

<sup>47</sup> EDEN, 2025; GREIL et al., 2023

<sup>48</sup> MPOFU / WEALTH, 2022

<sup>49</sup> EDEN, 2015; MPOFU / WEALTH, 2022; GREIL et al., 2023

<sup>50</sup> MELNYCHENKO et al., 2017

Some researchers<sup>51</sup>, argue that the arm's-length standard's reliance on "separate accounting" allows for potential manipulation, as it treats each affiliate of a multinational corporation as an independent entity for tax purposes. They believe the formulary apportionment approach offers a simpler, less manipulable method by allocating a multinational's global profits based on a specific formula. This "unitary" approach aims to accurately reflect a corporation's economic activity in each jurisdiction, potentially reducing incentives for income shifting and tax evasion, while aligning with global economic realities. However, they are aware of the challenges in creating a universally accepted apportionment formula to avoid issues like double taxation, emphasizing the need for international cooperation and recognizing its unlikelihood.

Other researchers<sup>52</sup> note the absence of a guiding economic theory for intra-firm profit allocation as a main obstacle in accurately assessing transfer prices. This gap fundamentally complicates the equivalence of intra-firm and market transactions, making the quest for comparable data an almost impossible task.<sup>53</sup>

The shift towards internal transactions by MNEs, aimed at optimizing organizational efficiency and minimizing transaction costs, further blurs the lines of comparability, challenging the ALP's foundational premises<sup>54</sup>. Besides undermining the ALP's practical applicability, this movement away from market transactions also calls into question the method's ability to capture the unique value of MNEs' intangible assets and synergies. Some researchers<sup>55</sup> agree on the ALP's inadequacy in reflecting the nuanced economic

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<sup>51</sup> CHIANG / DEL GAUDIO, 2013

<sup>52</sup> LUCHAAPT et al., 2012

<sup>53</sup> GREIL et al. (2023) extend this critique, questioning the ALP's reliance on competitive market price formation as a benchmark for fairness in tax matters. They argue that such an economic perspective fails to capture the essence of fair profit distribution, given the theoretical void concerning value judgments and fairness in economic theory.

<sup>54</sup> GREIL et al., 2023

<sup>55</sup> LUCHAAPT et al., 2012; GREIL et al., 2023

realities of modern multinational operations, advocating for a reassessment of the principle's role and effectiveness in the contemporary tax landscape.

When conducting a valuation of intangibles for transfer pricing purposes, it is imperative to consider the appropriate valuation standard and method. If existing valuations are to be utilized or if the valuation of intangibles is performed based on standards other than the arm's length principle for transfer pricing purposes, it is essential to verify whether the applied valuation standard aligns with it.<sup>56</sup>

### *1.2. Valuation Methods*

In order to assist companies in establishing arm's length prices for transactions within the same group, tax authorities have developed various methods, which are either based on comparable prices or profits, and are designed to bring transparency and consistency to intra-group trade<sup>57</sup>. The OECD Transfer Pricing Guidelines offer a framework to identify comparable, observable prices that would have been agreed upon by independent entities in a transaction similar to that within a MNE, ensuring that the prices reflect the economic reality of such deals and comply with international tax regulations<sup>58</sup>. These guidelines require that the "best method" is selected by MNEs and tax authorities, considering the best method "the one that generates the most reliable measure of an arm's length result"<sup>59</sup>. This author argues that considering the economic rationale, applicable conditions, and crucial comparability aspects are essential factors for determining the "best method" in transfer pricing, with key considerations including comparability, data quality, and reliability of assumptions.

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<sup>56</sup> According to HEIDECKE, 2021 this aspect is emphasized by the OECD throughout its guidelines, as seen in paragraph 1.33 that states the comparability analysis is "at the heart of the application of the arm's length principle".

<sup>57</sup> ABDALLAH / MAGHRABI, 2009; SEPTIANI et al., 2021

<sup>58</sup> BÜTTNER / THIEMANN, 2017

<sup>59</sup> EDEN, 2015: 11

Firstly, there is the **Comparable Uncontrolled Price Method (CUP or CUT for intangibles)**, according to which the price of an intangible traded within the MNE is compared to the price charged for similar or comparable uncontrolled transactions in the open market<sup>60</sup>.

This strategy, which hinges on doing direct price comparisons, is only feasible in the scenario that the assets are offered for sale on the open market<sup>61</sup> and that the intangibles being compared have close profitability potential<sup>62</sup>.

Whenever possible, being the most basic and well-known method<sup>63</sup>, this is the one that should be chosen since it gives the most accurate arm's length price<sup>64</sup>.

Despite being the most direct method to apply the arm's length standard and the market approach<sup>65</sup> and being the preferred one according to the regulations, it has a high sensitivity to the availability, reliability, and completeness of the data required<sup>66</sup> making it difficult to apply in practice, especially regarding new products and intangibles<sup>67</sup>.

According to some authors<sup>68</sup>, when applied to intangibles, this method requires two types of adjustments. Firstly, it's fundamental to compare possible differences between the characteristics of the intangible being traded and the compared one in order to reach an arm's length range. Secondly, there is the need to adjust the values according to the circumstances of the sale to enhance the reliability of the price.

When adequate CUPs are unavailable or when a function-based approach provides a more accurate arm's length result, the resale price or cost-plus methods must be chosen. Known

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<sup>60</sup> ABDALLAH / MAGHRABI, 2009; EDEN, 2015

<sup>61</sup> SEPTIANI et al., 2021

<sup>62</sup> BRAUNER, 2008

<sup>63</sup> EDEN, 2015

<sup>64</sup> OECD, 2022

<sup>65</sup> EDEN, 2015; KAMDAR, 2018

<sup>66</sup> BRAUNER, 2008

<sup>67</sup> EDEN, 2015

<sup>68</sup> BRAUNER, 2008; ABDALLAH / MAGHRABI, 2009

as gross margin methods, they evaluate the gross margin or markup of a related entity against those of similar independent firms<sup>69</sup>.

Secondly, there is the **Resale Price Method (RPM)**, according to which the transfer price should be equal to the difference between the price of the intangible when resold to an independent enterprise and the price at which the intangible was sold between the related parties – the gross profit<sup>70</sup>.

This method, as the last one, has a limitation: the possible unavailability of the gross profit value of the transaction between comparable uncontrolled parties and the possible unreliability of the data relating to that value to be used as benchmark for the arm's length price<sup>71</sup>.

Another limitation of this method is that the intangible being transferred in the uncontrolled transaction between unrelated parties and the one being transferred within the MNE has to be the same and the transaction must occur under the same circumstances<sup>72</sup>.

According to the **Cost-Plus Method (CPM)**<sup>73</sup>, the price charged between related parties must be the cost of production (both direct and indirect) of the intangible asset, plus an appropriate gross profit margin (mark-up) that translates either the functions of it or considering comparative uncontrolled transactions<sup>74</sup>.

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<sup>69</sup> EDEN, 2015

<sup>70</sup> ABDALLAH / MAGHRABI, 2009; SEPTIANI et al., 2021

<sup>71</sup> ABDALLAH / MAGHRABI, 2009

<sup>72</sup> MARKHAM, 2005

<sup>73</sup> According to SEPTIANI et al., 2021 to manufacturing companies that resale goods (both tangible and intangible) is more beneficial to choose this method.

<sup>74</sup> ABDALLAH / MAGHRABI, 2009; SEPTIANI et al., 2021

This method requires that the functions performed and the risk assumed by the related parties are the same as the unrelated one, and that the accounting method used by the independent party is publicly known<sup>75</sup>.

These three methods, which are the market or traditional approach, have a major practical limitation: limited or non-existent comparable transactions and lack of data regarding the price of those transactions. Usually, intangibles aren't separately transferred in the market, it's more common that they are transferred through a whole business acquisition; furthermore, when they are separately transferred, their price is considered sensitive information and therefore is kept confidential, not being available to the public<sup>76</sup>. According to Kamdar<sup>77</sup>, the resale price method or the cost-plus method are the best methods to use in the scenario where taxpayers have internal comparables; however, most tax revenue authorities usually prefer the CUP method as it provides the most direct application of the arm's length principle.

Besides the traditional transaction methods, the Guidelines foresee two transactional profit methods: transactional profit split and transactional net margin methods (OECD, 2022).

The **Profit Split Method (PSM)** ensures that transactions between related parties are according to the arm's length principle, or at a fair market price, reflecting the revenue sharing between them<sup>78</sup>. According to the author, this method is commonly used when it's hard to understand each transaction separately; therefore, this method separates the profits that would have been earned by each party if the transaction had been made under the arm's length principle.

This method compares the operating profit or loss between the related parties and the allocation of profits between unrelated companies in similar circumstances to check if the

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<sup>75</sup> ABDALLAH / MAGHRABI, 2009

<sup>76</sup> BRAUNER, 2008

<sup>77</sup> KAMDAR, 2018

<sup>78</sup> SEPTIANI et al., 2021

allocation of combined earnings between related parties is made under the arm's length principle<sup>79</sup>.

Finally, the **Transactional Net Margin Method (TNMM)** and traditional transactional approaches share properties in their use of data from comparable arm's-length companies at a micro level for transfer pricing analysis. However, a fundamental distinction exists in the application of appropriate mark-ups – the first methods usually apply mark-ups exclusively to the cost of sales, while TNMM adopts a more encompassing approach by considering the application of mark-ups to total costs (which include components such as cost of goods sold, selling, and general administrative expenses)<sup>80</sup>.

This divergence introduces an important variance in terms of precision and directness. The TNMM method inherently exhibits a degree of indirectness compared to traditional transactional methods, due to its inclusion of operating costs, some of which may be assigned on an arbitrary basis. Additionally, it frequently operates on a macro level, often covering an entity's entire operations rather than scrutinizing each individual transaction, a practice mandated by the OECD<sup>81</sup>.

Despite its wider scope, TNMM has garnered favor among practitioners in the field of transfer pricing<sup>82</sup>, being considered as the best method. This method's attractiveness stems from its simplicity, efficiency, and cost-effectiveness, being characterized by its ability to streamline the transfer pricing analysis process, necessitating a reduced volume of detailed information. It effectively condenses the workload that would typically require numerous separate analyses, thereby expediting the production of a comprehensive transfer pricing report<sup>83</sup>.

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<sup>79</sup> BRAUNER, 2008

<sup>80</sup> ABDALLAH / MAGHRABI, 2009

<sup>81</sup> Id.

<sup>82</sup> SEPTIANI et al., 2021

<sup>83</sup> ABDALLAH / MAGHRABI, 2009

This method focuses on assessing the net profit indicator, represented as the ratio of net income to a relevant baseline, which might include expenses, sales, or assets. This information is obtained from controlled transactions or transactions suitable for comparison. This method is proven to be particularly valuable in evaluating inter-party services, such as those related to product management and distribution costs, where traditional re-pricing methods may not offer a suitable means of assessment<sup>84</sup>.

As seen in paragraph 2.9 of the Guidelines, despite the five transfer pricing methods outlined in them, MNEs have the flexibility to opt for alternative methodologies if they are deemed more suitable. However, MNEs must furnish a comprehensive rationale for selecting such "other methods," elucidating why established OECD approaches were not deemed appropriate or workable for the given circumstances, and why the chosen alternative offers a better solution<sup>85</sup>.

One of these other methods is the **Comparable Profits Method (ComPrM)**, defined as “a profit-based transfer pricing method that compares the operating profits of a controlled entity with the operating profits of a set of uncontrolled entities performing similar functions and incurring similar risks.”<sup>86</sup>. According to the authors, there is a requirement that the arm’s length range is set within companies that have a similar level of comparability with the operating profits of the uncontrolled companies in order to be in accordance with the arm’s length principle.

This method aims to check if the transfer price, which must be based on “objective measures of profitability” is in accordance with similar market transactions, under comparable circumstances<sup>87</sup>. According to this author, instead of comparing the transaction to a singular similar transaction, the transfer price is compared to a similar range of transactions that generate similar levels of profits.

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<sup>84</sup> SEPTIANI et al., 2021

<sup>85</sup> OECD, 2022:

<sup>86</sup> ABDALLAH / MAGHRABI, 2009: 121

<sup>87</sup> BRAUNER, 2008

The selection of the appropriate transfer pricing method has a high significance, as its suitability must be diligently assessed and based on comprehensive analysis. An error in the method selection can lead to inaccurate results and therefore potentially lead to financial penalties and additional tax liabilities. Precision in method choice is fundamental to ensure compliance with tax regulations and to avoid unintended financial consequences. Therefore, in order to mitigate risks and ensure a solid foundation for transfer pricing practices, MNEs must have careful consideration and a high-level understanding of each method when selecting which one to apply<sup>88</sup>.

A table has been constructed to summarize the advantages and limitations of each method, facilitating a clearer understanding of their respective strengths and weaknesses.

## **2. Choice of Location and Ownership**

Subsidiaries of MNEs are legally separate entities established in different jurisdictions, therefore, they may use intangible property ownership to transfer profits between them by choosing low-tax jurisdictions to locate their intangibles' ownership rights, which include income rights, through written contracts and charging distorted royalty fees, with values outside the scope of the arm's length principle, to maximize the value of the MNEs' strategic assets and minimize the group tax burden<sup>89</sup>. These royalty fees distortions are possible due to the unavailability of arm's length price for these firm-specific payments by the tax authorities, enabling profit shifting between operating entities and the intangible owner<sup>90</sup>.

It has been estimated that aggressive cross-border tax planning schemes have a substantial impact on effective average tax rates. Research indicates that placing intellectual property in a country with a favorable intellectual property box results in a significant reduction in

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<sup>88</sup> GRIGOROI et al., 2023

<sup>89</sup> DISCHINGER / RIEDEL, 2011; KARKINSKY / RIEDEL, 2012; BEEBEEJAUN, 2019; MAGELSSSEN, 2019

<sup>90</sup> KARKINSKY / RIEDEL, 2012

the effective average tax rate, surpassing the impact of other tax planning structures<sup>91</sup>. These authors argue that the challenges arise from the difficulty in valuing intellectual property, as there are often no unrelated third-party transactions to determine an arm's length price. This complexity makes it easier to manipulate profits through transfer pricing techniques. Additionally, they defend that corporate taxation, particularly the preferential tax treatment of intellectual property, influences the geographic location of research activities, legal patent ownership, and the number of patent applications.

Dischinger & Riedel<sup>92</sup> find evidence that indeed the ownership rights are located in low-tax-based subsidiaries, concluding there is a negative relation between the subsidiaries' corporate tax rate in comparison to the other subsidiaries and the holding of intangible assets. These authors consider this practice attractive since a significant part of corporate return is due to intangibles while the manufacturing of the physical products generates low profits.

MNEs have an incentive to locate intangible assets at tax haven affiliates as this ensures that the accruing rents are taxed at a low rate, aligning with their profit-maximization objectives. This strategy reflects the MNE's incentive to transfer profits to tax haven affiliates, exploiting the enhanced importance of intellectual property in the production process to minimize overall tax liabilities<sup>93</sup>. According to these authors, allowing multinationals to shift profits to low-tax countries through intangible relocations (and other shifting strategies) reduces the tax burden on mobile tangible capital and may hence foster multinational real investment in high-tax countries. This means that countries that allow MNEs to relocate profits from their borders may be attractive locations for R&D units, production facilities, and other real investments despite a high statutory corporate tax burden.

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<sup>91</sup> HAK / ANDARLIC, 2021

<sup>92</sup> DISCHINGER / RIEDEL, 2011

<sup>93</sup> Id.

There are two types of ownership approaches companies can take regarding this subject: centralized and distributed intangible assets ownership<sup>94</sup>.

If the MNE chooses **centralized ownership**, the intangible assets are legally owned by the MNE, and its subsidiaries are able to use them by paying a royalty fee through a licensing agreement. This has the major advantage of achieving cost efficiency since the functions of the asset are centralized but serve subsidiaries in several countries. However, it's hard to determine the value of the royalty fee according to the arm's length principle for each asset.

On the other hand, if the MNE chooses the **distributed ownership** approach, the companies of the group enter into cost-sharing agreements, in which each agrees to pay a part of the development costs of the intangible according to the foreseen benefits of it. This approach serves as an alternative to licensing or selling intangible assets to related parties, given that the participants of the agreement jointly own the resulting technology. Several considerations arise when implementing this strategy, such as determining the jurisdiction for transferring ownership of the asset, the method of transfer, and how the asset will generate tax-advantaged income.

It's important to note that the fiscal regime of the countries and its possible changes (such as treaties' negotiation or supranational proposals for tax harmonization) are not the only factors to play an important role when choosing which approach to use. The MNE aims to achieve previously set strategic goals and therefore it's also important to consider a range of factors such as “the commercial characteristics of the location and its suitability as a location for intellectual property”<sup>95</sup>.

Markham<sup>96</sup> argues that there is not only one concept of ownership of intangibles, considering the difference between legal and economic ownership. The author argues that while legal ownership is just a matter of form predicated on the legal registration of

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<sup>94</sup> Suggested by ABDALLAH / MAGHRABI, 2009

<sup>95</sup> ABDALLAH / MAGHRABI, 2009: 118

<sup>96</sup> MARKHAM, 2005

intangibles, economic ownership relates to the substance of the relations between the companies since the party that bears the greatest costs, and therefore greater risk, and that receives the income flows from that intangible is deemed to be the owner. Economic ownership consequently links to economic reality, whereas adopting legal ownership may result in inconsistent treatment of intangibles because various MNEs and different jurisdictions have distinct intellectual rights policies<sup>97</sup>.

Companies have a vested interest in considering tax implications when making initial location decisions, as transferring ownership of intangible assets often incurs tax costs. To derive a tax benefit from selling or transferring an asset, it must be possible to do so at a value lower than its true market worth. However, the transfer of intellectual property is subject to transfer pricing regulations, which serve to limit the extent to which value can be shifted to low-tax jurisdictions. Additionally, many European countries impose exit taxes, which aim to tax the net present value of expected revenue streams from intangible assets when they are moved out of the country. Such tax provisions aim to mitigate, if not eliminate, any tax advantages associated with relocating to jurisdictions with lower tax rates<sup>98</sup>.

### **3. Freedom of Contract and Why It Needs to Be Limited**

Contractual autonomy includes two fundamental aspects: the freedom to negotiate terms within a contract and the freedom to select from various types of contracts<sup>99</sup>. This principle is considered a primary foundation for private legal relationships, since it

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<sup>97</sup> BRAUNER, 2008 agrees that under the transfer pricing rules, whoever receives the profits from the use or transfer of the intangible should be considered the owner, however, he acknowledges the complexity of determining the ownership of these types of assets. The author argues that intangibles have the nonrivalry characteristic, meaning several entities may economically benefit from them.

<sup>98</sup> GRIFFITH et al., 2014

<sup>99</sup> DAGAN / HELLER, 2013

provides the involved parties with the power to establish all contractual terms and conditions, including pricing, according to their own judgment and discretion<sup>100</sup>.

Despite this principle being fundamental in contract law, in the case of intra-group transactions, it can't be unlimited. By using transfer pricing methods, parties can misuse their freedom to set contract prices by intentionally inflating or deflating them, aiming to erode the tax base and avoid paying taxes<sup>101</sup>. These limitations on contractual autonomy in diverse legal frameworks can be justified to address several needs: they serve to protect public interests such as efficiency, morality, or equity<sup>102</sup>. According to the author, these interests may or may not align with those of the contracting parties and may extend to protect the interests of a particular party representing a socially protected group or the interests of third parties.

Freedom of contract can be subject to limitations based on two contrasting approaches: the paternalistic view and the social view. The social view, rooted in classical liberal thought, considers freedom of contract as essential for societal well-being and justice<sup>103</sup>. However, for the purpose of this discussion, we will focus on the paternalistic view.

According to the author<sup>104</sup>, the paternalistic view holds that the state can intervene in individuals' freedom of contract within narrow boundaries, justified by the moral authority of the law. This perspective emphasizes that contractual freedom can be limited if it poses a threat to the state's integrity, institutions, or fundamental rights of the parties involved. These limitations are primarily introduced to safeguard public interests related to efficiency, morality, or equity, as well as to protect the interests of parties indirectly affected by the contract.

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<sup>100</sup> MELNYCHENKO et al., 2017

<sup>101</sup> Id.

<sup>102</sup> MARELLA, 2015

<sup>103</sup> Id.

<sup>104</sup> Id

In the context of transfer pricing, the paternalistic view becomes particularly relevant as it underlines the need for state intervention to ensure fair pricing and prevent abuses that could undermine tax systems or distort market realities. This approach recognizes that unbridled contractual freedom may lead to practices that erode tax bases, hinder economic fairness, or perpetuate inequalities<sup>105</sup>.

The Paternalistic View advocates for limitations on freedom of contract in transfer pricing, primarily due to the substantial negative impact it can have on national economies<sup>106</sup>. Transfer pricing practices often lead to tax planning strategies that result in reduced tax payments to the state, leading to significant revenue losses for the government, which directly affects the state's budgetary capabilities, limiting its ability to fund essential public services and infrastructure<sup>107</sup>.

Thus, transfer pricing can undermine the transparency of taxpayers' real incomes, which further exacerbates the challenges in accurately assessing and collecting taxes owed<sup>108</sup>. According to the authors, this lack of transparency not only impacts the state's financial potential but also hampers its ability to ensure fair and equitable distribution of income and profits across different sectors of the economy. By allowing MNEs to shift profits to low-tax jurisdictions, the state faces the risk of receiving insufficient tax payments that are necessary for sustaining public services and promoting economic growth.

In conclusion, the paternalistic view argues that state regulation of transfer pricing is crucial to prevent tax base erosion, ensure accurate tax calculations, and safeguard the economic stability and well-being of the nation<sup>109</sup>.

According to some researcher<sup>110</sup>, transfer pricing practices significantly impact state revenue collection, often resulting in reduced tax payments that fail to fully contribute to

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<sup>105</sup> MARELLA, 2015

<sup>106</sup> MARELLA, 2015; MELNYCHENKO et al., 2017

<sup>107</sup> MELNYCHENKO et al., 2017

<sup>108</sup> Id.

<sup>109</sup> MARELLA, 2015; MELNYCHENKO et al., 2017

<sup>110</sup> MELNYCHENKO et al., 2017

the government's budget. These strategies not only lead to financial losses but also hinder the disclosure of taxpayers' actual incomes, undermining the national economy's financial potential. Transfer pricing, aimed at redistributing resources and optimizing taxation, profoundly affects income, profits, risks, and overall society's well-being. Pricing decisions in these transactions create substantial opportunities for profit distribution among affiliated organizations, prioritizing the holding entity's profitability over the state's tax revenues.

The primary objective of transfer pricing is to shift the tax base to affiliates in jurisdictions with more favorable tax regimes<sup>111</sup>, leading to insufficient tax payments to the state compared to market price applications<sup>112</sup>. These authors point out as consequences of the government experiencing lower-than-expected tax revenues, which results in budget shortfalls and potential losses due to MNEs breaching regulations. Thus, an accurate assessment and taxation of taxable income of MNEs – including independent legal entities and permanent establishments –, are crucial to ensuring tax obligations are met. The authors agree that transfer pricing regulations become imperative to minimize abuses, limit freedom of contract in setting prices, facilitate correct tax calculations, and safeguard society's well-being and justice.

#### **IV. Current Transfer Pricing Guidelines Analysis**

In the world of MNEs, transfer pricing emerges as a key strategy, deeply integrated into global tax planning<sup>113</sup>. This mechanism, meant to allocate profits within corporate entities across borders, is frequently stretched by MNEs or even crosses legal limits to reduce tax bills. According to Grigoroï et al.<sup>114</sup>, the appealing characteristic of transfer pricing is its ability to increase company profits, leading to the erosion of society's wealth through tax

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<sup>111</sup> KARKINSKY / RIEDEL, 2012; LUCKHAUPT et al., 2012; CHIANG / DEL GAUDIO, 2013; EDEN, 2015; SEPTIANI et al., 2021

<sup>112</sup> MELNYCHENKO et al., 2017

<sup>113</sup> GREIL et al., 2023

<sup>114</sup> GRIGOROÏ et al., 2023

base erosion thus, leading to a loss on society's welfare. The main reason companies use transfer pricing is to lessen tax costs, pushing them to find ways to lower their taxes, sometimes barely within the law.

Global efforts to contend with undesired tax planning have led to the introduction of new and tighter anti-avoidance regulations in tax law, as well as additional details in transfer pricing regulations<sup>115</sup>. However, despite advancing efforts by the OECD to establish common tax rules, achieving international consensus often involves compromises among involved countries, resulting in unclear assertions and vague formulations, which further contribute to complexity<sup>116</sup>. These complex tax rules may have adverse economic consequences, with effects on investments that are ambiguous, increasing the likelihood of disputes and double taxation, as well as administrative and compliance costs<sup>117</sup>. This ambiguity underscores the necessity, from both fiscal and economic perspectives, to reassess transfer pricing rules, reduce their complexity, and thereby enhance tax certainty<sup>118</sup>.

The current rules, which presume highly integrated enterprises to be separate entities, have enabled the shifting of income earned in high-tax jurisdictions to low-tax jurisdictions, such as through intra-group fees for the use of intangibles, resulting in under-taxation or even double non-taxation<sup>119</sup>. National and international regulatory bodies have thus been taking action, meticulously crafting guidelines that aim to reduce the possibility of tax evasion by transfer pricing. The sophistication of these guidelines reflects a deep understanding of the challenges inherent in valuing and transferring intangible assets across jurisdictions, a practice that has become a keystone of modern tax avoidance schemes<sup>120</sup>. The rise of digital businesses has made it even easier for companies to move profits to countries with lower tax rates, using the uncertain valuation

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<sup>115</sup> GREIL et al., 2023

<sup>116</sup> BÜTTNER / THIEMANN, 2017; GREIL et al., 2023

<sup>117</sup> GREIL et al., 2023

<sup>118</sup> Id.

<sup>119</sup> BÜTTNER / THIEMANN, 2017

<sup>120</sup> HAK / ANDRLI, 2021; SEPTIANI et al., 2023

of intangibles, especially using the hard-to-determine value of intangible assets to their advantage<sup>121</sup>.

The OECD has been at the forefront of these efforts, promoting the arm's-length principle as a tool against transfer pricing abuse and providing guidance to MNEs and tax administrations in its application<sup>122</sup>. This is based on the assumption that MNEs and tax authorities have good faith working with each other, ignoring the fact that MNEs shift part of their profits to low tax countries where they don't necessarily have a large economic activity volume<sup>123</sup>. The Guidelines offer practical guidance on conducting comparability analysis, applying transfer pricing methods, and resolving disputes, thereby functioning as a comprehensive "how-to" guidebook<sup>124</sup>.

The inherent challenge of establishing comparable market prices for intangibles has led to a nuanced hierarchy of valuation methods, emphasizing the complexity of enforcing these standards<sup>125</sup>. Additionally, the OECD's focus on commercial intangibles, dividing them into trade and marketing categories, attempts to cover all types of intangible assets, acknowledging the difficulty in defining terms such as 'know-how'<sup>126</sup>.

Büttner & Thiemann<sup>127</sup> highlight the OECD's fundamental role through its reformative actions since the 1950s. The organization's use of soft law (in the form of treaties and guidelines) has demonstrated great influence over the direction of international taxation. This soft law framework operates within a depoliticized context, which has been strategically advantageous, allowing the OECD to perform substantial changes with a low relative level of political resistance. The strength and efficacy of these soft law

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<sup>121</sup> YOO, 2020

<sup>122</sup> LI, 2012; CHIANG / DEL GAUDIO, 2013

<sup>123</sup> DURST, 2012; LI, 2012; CHIANG / DEL GAUDIO, 2013

<sup>124</sup> LI, 2012 defends that the main objective of the guidelines is to avoid double taxation by allocating correctly the tax base when comparable arm's length transactions exist; if not the key goal must be tax avoidance prevention.

<sup>125</sup> KLASSEN et al., 2016

<sup>126</sup> MARKHAM, 2005

<sup>127</sup> BÜTTNER / THIEMANN, 2017

instruments, more influential than any sources of hard law on transfer pricing<sup>128</sup>, shows the OECD's ability to shape tax policy at a global level, demonstrating a unique dynamic where non-binding agreements hold significant power in international taxation.

### 1. Soft Law Relevance on Transfer Pricing

“The term “soft law” has no universally accepted definition. In the context of international taxation, it can be used to describe a quasi-legal instrument which does not have any legally binding force but is intended to have a direct influence on the practice of states and taxpayers.”<sup>129</sup>. In the context of international taxation, the OECD's efforts primarily involve disseminating principles and policy solutions as “recommendations” to its State Members – a practice termed *governance through soft law* – rather than instituting strict, binding regulations that could restrict the sovereignty of member states<sup>130</sup>.

Besides the transfer pricing guidelines, we can note the OECD efforts on international taxation through other instruments such as the model convention for preventing double taxation, the standards for effective exchange of information on tax matters and so on: the OECD work on international taxation through the use of soft law is of notable relevance<sup>131</sup>. This source of law is fundamental, specifically in the case of transfer pricing due to the changing dynamics of economic globalization, where MNEs operate across national borders while nation-states maintain their sovereignty in tax policy and enforcement<sup>132</sup>. Soft law plays a fundamental role by offering a flexible framework for cooperation among nations on tax matters without requiring them to give up their tax sovereignty or establish supranational tax bodies<sup>133</sup>, even though, being non-legally binding, these guidelines are meant to have a direct influence on the national legal

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<sup>128</sup> LI, 2012

<sup>129</sup> LI, 2012: 78

<sup>130</sup> VEGA, 2012; BAERT, 2014

<sup>131</sup> LI, 2012; VEGA, 2012

<sup>132</sup> LI, 2012

<sup>133</sup> Id.

systems of several countries, besides influencing the international taxation system<sup>134</sup>. This is relevant because nation-states are unlikely to agree to cede their tax sovereignty or enter into multinational tax treaties, even though many bilateral tax agreements are based on the OECD Model, reflecting the enduring influence of sovereign control in tax law<sup>135</sup>. Thus, soft law enables states to reach agreements and eases the coexistence of different legal cultures, perspectives, and values, being the foundation for international cooperation<sup>136</sup>.

Lasiński-Sulecki<sup>137</sup> argues that both MNEs and tax authorities would benefit if the Guidelines were binding, being transposed to domestic law since it would reduce tax controversies. However, the author notes that, despite not being legally binding, MNEs benefit by adhering to them<sup>138</sup>.

However, the voluntary nature of the Guidelines does not diminish their moral influence on MNEs and states<sup>139</sup>. Despite being non-legally enforceable, the Guidelines represent a strong expectation of MNEs behavior and contribute to shaping international tax standards. The author<sup>140</sup> states that while MNEs are expected to comply with the Guidelines, in cases where these conflict with domestic law, MNEs are obligated to still comply with the requirements of the respective domestic legal framework. This notes the importance of respecting both international guidelines and national legislation, ensuring compliance with legal standards across jurisdictions.

Besides the lower costs in terms of states' sovereignty, which becomes even more clear in the case that an international organisation holds the authority powers preventing states

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<sup>134</sup> VEGA, 2012

<sup>135</sup> LI, 2012

<sup>136</sup> LI, 2012; VEGA, 2012; CHAISSE / JI, 2018

<sup>137</sup> LASINSKI-SULECKI, 2014

<sup>138</sup> This aligns with VAN'T FOORT, 2017 theory that transforming the Guidelines into legally binding rules could further enhance their effectiveness in limiting tax controversies, highlighting their significance as the first intergovernmental voluntary code of conduct involving developed countries.

<sup>139</sup> VAN'T FOORT, 2017

<sup>140</sup> Id.

to have the capacity of regulating and make decisions in some areas independently<sup>141</sup>, soft law has the advantage of also having lower economic costs when comparing the negotiation process required to reach legally binding agreements, especially when the issues are complex<sup>142</sup>.

Besides these advantages, Chaisse & Li<sup>143</sup> (2018) point out that soft law provides a greater level of flexibility, simplicity, and speed since it allows the renegotiation of agreements as circumstances change, accommodating diverse legal systems and better management uncertainties due to its adaptable nature. This flexibility is particularly beneficial in a world characterized by a rapid change of circumstances, where unforeseen conditions can be effectively addressed through soft law to facilitate agreements. According to these authors, soft law effectively accommodates different cultural and economic structures and interests, since it may be difficult or impossible to reach legally binding agreements when disparities in wealth and power exist. Its use of subjective language, such as "appropriate measures," "best efforts," "as far as possible," and "with a view toward achieving progressively," allows for flexible application and negotiation, catering to the diverse needs and capabilities of various countries.

On the negative side, soft law instruments may not fulfill the requirements for the creation of hard law (such as being transparent, democratic legitimate and the public debate) but paradoxically end up becoming more rigid and “hardening” over time<sup>144</sup>. A significant disadvantage of soft law is its lack of credibility compared to hard law, since hard law norms can enhance the credibility of promises made by countries, as violations can cause serious reputational costs. Additionally, because hard law often requires national implementation, it further enhances the credibility and reliability of international commitments, ensuring that agreements are more rigorously adhered to and enforced<sup>145</sup>.

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<sup>141</sup> LI, 2012; VEGA, 2012; CHAISSE / JI, 2018

<sup>142</sup> VEGA, 2012; CHAISSE / JI, 2018

<sup>143</sup> CHAISSE / JI, 2018

<sup>144</sup> VEGA, 2012

<sup>145</sup> CHAISSE / JI, 2018

## **2. DEMPE Functions: ownership's *substance over form***

Disputes over the allocation of taxable profit, particularly in transfer pricing, are intensifying, as evidenced by the constantly evolving OECD Guidelines for Multinational Enterprises and Tax Administrations<sup>146</sup>. MNEs have historically exploited regulatory frameworks to separate income from the economic activities generating that income, therefore the OECD's guidelines aim to recalibrate transfer pricing outcomes to reflect the actual value creation<sup>147</sup>. This consists of a significant shift towards recognizing the economic substance of transactions over their contractual or formalistic legal aspects, particularly in the valuation of intangibles. By broadening the definition of intangibles and emphasizing the 'functions performed, assets used, and risks assumed', “often cited are sales, marketing, distribution, manufacturing, or ownership of intangible property.”<sup>148</sup> in their development, enhancement, maintenance, protection, and exploitation, the guidelines seek to discourage the artificial transfer of intangibles to tax havens. This approach besides aiming to restrict profit shifting, also reduces the previously overstated importance of legal rights in determining transfer prices, which is a fundamental step towards aligning tax obligations with the locus of economic value generation.

### *2.1. The Role Played by the DEMPE Functions*

The DEMPE concept acts as a proxy for functional analysis in the realm of intangibles, focusing on development, enhancement, maintenance, protection, and exploitation functions<sup>149</sup>. According to the OECD guidelines, two dimensions are critical in DEMPE analysis: the entitlement to profits and the eligibility for cost allocation purposes,

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<sup>146</sup> GREIL et al., 2023

<sup>147</sup> BÜTTNER / THIEMANN, 2017

<sup>148</sup> KAMDAR, 2018: 20

<sup>149</sup> PAUMIER, 2020

including associated risks<sup>150</sup>. Specifically, sub-section 6.32 of the OECD guidelines notes that, besides the legal owner, "other members of the legal owner's MNE group may have performed functions, used assets, or assumed risks that are expected to contribute to the value of the intangible"<sup>151</sup>, which highlights the integration and complexity of DEMPE functions within MNEs, often surpassing what is observed between independent enterprises<sup>152</sup>.

To be relevant from both economic and transfer pricing standpoints, the focus of DEMPE analysis should be on activities related to firm-specific assets (FSAs), which significantly impact the mid to long-term performance of the company<sup>153</sup>. Once the accurate level of contributors is defined, including the functions they perform within the company, it is necessary to address the risks and assets aspect to provide a comprehensive picture of the control over the risk landscape concerning firm-specific assets<sup>154</sup>. Tam<sup>155</sup> underscores that intangible returns should be allocated to entities performing intangible activities, namely the DEMPE functions, and managing and controlling the associated risks and financing activities. This perspective aligns with the heart of the OECD's approach, which emphasizes understanding an MNE's value chain and identifying critical functions performed by various entities in the creation and exploitation of intangible assets<sup>156</sup>.

A functional analysis is essential to determine which members perform and control the DEMPE functions, provide funding and other assets, and assume the various risks associated with the intangible<sup>157</sup>. According to the OECD, rights to economic returns from an intangible asset depend on which entity performs and controls the DEMPE

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<sup>150</sup> Id.

<sup>151</sup> OECD, 2022:

<sup>152</sup> PAUMIER, 2020

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> TAM, 2017

<sup>156</sup> TAM, 2017

<sup>157</sup> Id.

functions<sup>158</sup>. Therefore, an MNE needs to identify and categorize all its intangible assets, considering the new definition of marketing intangibles adopted by the OECD. Management must have a comprehensive understanding of all the MNE's intangible assets and its operational value chain. This involves exploring and understanding the functions performed to transform inputs into outputs, identifying critical success factors, and recognizing the use of intangible assets to determine the drivers of the MNE's profits<sup>159</sup>. Once management identifies the important DEMPE functions within each business unit of the MNE's value chain, a road map can be created to summarize which entity performs which DEMPE functions that drive profitability along the value chain<sup>160</sup>. The process of allocating returns from exploiting intangible assets relative to contributions made by group members may then be executed. Some non-critical DEMPE functions can be outsourced, provided the principal controls these functions – in risk management, "control" is defined as the capability to make decisions to take on the risk associated with outsourced functions and decisions on whether and how to respond to, mitigate, and manage these risks; therefore, the entity controlling the risks must have people with the authority and ability to perform these functions effectively, including assessing the performance of outsourced functions<sup>161</sup>.

The OECD's broader definition of intangible assets and its approach to allocating profits from the creation and exploitation of these assets between the legal owner and other value-providing entities within the group will lead to increased scrutiny by tax authorities regarding which entities are entitled to profits from such assets and activities, meaning MNEs must assess the DEMPE functions and identify which entity is carrying which to ensure a proper allocation of profits<sup>162</sup>.

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<sup>158</sup> TAM, 2017; OECD, 2022

<sup>159</sup> TAM, 2017

<sup>160</sup> Id.

<sup>161</sup> TAM, 2017

<sup>162</sup> Id.

## 2.2. *Aligning Income with Value Creation*

The introduction of the DEMPE functions as outlined by the OECD represents a more detailed approach to gathering information and assessing the value creation and return attributed to each participant<sup>163</sup>. It demands a finer examination of how intangible assets are developed, enhanced, maintained, protected, and exploited across different jurisdictions within an MNE<sup>164</sup>. This approach challenges firms to demonstrate the actual economic contribution of their activities to value creation, potentially leading to more equitable profit allocations and tax contributions.

Aligning income with value creation is a core objective of the BEPS transfer pricing reports. The goal is to ensure that income reported for tax purposes corresponds to where value is created, addressing the disparities between tax jurisdictions<sup>165</sup>. This involves assessing the functions and risks assumed in transactions and the relevant circumstances in each jurisdiction.

In transactions between associated enterprises, a member of an MNE group assuming risk can expect a return proportional to the level of risk assumed, unless adverse outcomes reduce or eliminate the anticipated return. While the correlation between risk and reward is a well-established transfer pricing principle, pre-BEPS OECD Guidelines offered limited guidance on determining which entities in an MNE group bear specific risks<sup>166</sup>. Determining which entities bear risk involves investigating which party controls the risk and which party has the financial capacity to assume the risk. The Final BEPS Transfer Pricing Report outlines three critical elements for managing risks: making decisions to take on, lay off, or decline a risk-bearing opportunity; deciding how to respond to risks; and mitigating risks through actions affecting risk outcomes<sup>167</sup>.

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<sup>163</sup> KAMDAR, 2018; PAUMIER, 2020

<sup>164</sup> TAM, 2017

<sup>165</sup> ANDRUS / OOSTEHUIS, 2017; HEIDECKE, 2021

<sup>166</sup> ANDRUS / OOSTEHUIS, 2017

<sup>167</sup> Id.

Historically, tax planning strategies allocated risk to low-tax environments to claim significant income as compensation for bearing the risk. Previously, some believed these risk allocations could be achieved merely through contractual agreements. Post-BEPS, the critical question revolves around the decision-making capacity required in a particular entity to support contractual risk allocation and establish control over its risks<sup>168</sup>. Assigning risk to a tax-advantaged jurisdiction requires some decision-making in that jurisdiction, though not all risk control decisions must reside with the entity contractually assigned the risk. Other entities may assist in controlling risk by performing important control functions. These parties must be compensated for any control functions they undertake, potentially earning a share of the risk-related profits of the enterprise<sup>169</sup>.

Two significant questions arise concerning this treatment of risk: whether the control requirement will effectively encourage the alignment of income and value creation, and whether it will be enforceable. The new rules assume that parties only assume risks if they control them, though business commentators argue that independent enterprises commonly assume risks they do not fully control<sup>170</sup>.

The BEPS project also aimed to update existing guidance to prevent below-value transfers of intangibles that result in separating intangible value from the economic activities creating that value<sup>171</sup>. The new chapter on intangibles addresses definitions to fill gaps in some countries' laws, ensuring items cannot be transferred with little or no compensation under transfer pricing rules while generating significant income for the transferee. The intangibles rules also clarify the treatment of business synergies and local market features in transfer pricing analyses and approve common valuation techniques to provide solutions when identifying reliable comparables is impossible. The most contentious aspect of the new intangibles' guidance relates to intangible ownership and the entitlement of various group members to returns from exploiting intangibles. The OECD

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<sup>168</sup> ANDRUS / OOSTEHUIS, 2017; HEIDECKE, 2021

<sup>169</sup> ANDRUS / OOSTEHUIS, 2017

<sup>170</sup> ANDRUS / OOSTEHUIS, 2017

<sup>171</sup> Id.

seeks to align intangible returns with the contributions of various group members to intangible value. Transfer pricing analysis where intangibles are present should begin with relevant contracts and agreements, but contractual or legal ownership of the intangible is not the main determinant of how intangible-related income should be allocated<sup>172</sup>. Contributions to intangible value can come from performing functions, providing assets (including funding for intangible development), or assuming risks. This approach reverses the perception that the owner of a key intangible can claim all residual profit after rewarding low-risk or routine functions. Instead, parties performing critical functions related to the development and exploitation of intangibles may be entitled to substantial rewards for their contributions<sup>173</sup>.

The new rules will impact structures adopted by taxpayers for intangible development and ownership. An associated enterprise that legally owns an intangible, has the financial capability to develop and exploit it, provides relevant funding, bears and controls the risks, and has employees performing the DEMPE functions, is entitled to the returns from exploiting the intangible. Conversely, an enterprise that owns an intangible and provides funding but does not control the risks or perform DEMPE functions will likely only earn a risk-free rate of return on its funding<sup>174</sup>.

### *2.3. Challenges in Applying the Arm's Length Principle*

The arm's length principle has been more and more developed to ensure a fair and reasonable allocation of MNEs' profits. However, this evolution has also introduced complexity and challenges. One of the major concerns with this principle is the inaccurate meaning of applicable rules, which means a detailed functional analysis for each taxpayer and transaction is needed to identify comparable market transactions<sup>175</sup>. This requirement makes it extremely difficult to find comparable transactions, especially for firm-specific

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<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> ANDRUS / OOSTEHUIS, 2017; PAUMIER, 2020

<sup>175</sup> GREIL et al., 2023

intangible assets that are typically not traded in markets and whose characteristics are usually not disclosed by the MNEs holding them.

The OECD operationalizes value creation based on three criteria: economic functions performed, assets used, and risks assumed. These criteria mainly focus on supply-side factors in value creation, overlooking the activities of companies' customers and users in influencing the value creation. Thus, this approach may fail to allocate significant profits to jurisdictions where MNEs perform sales or where internet service users are established, even if these jurisdictions have a taxable presence. This shows the market jurisdictions limited access to the profit tax revenue generated by MNEs under the current OECD regulations<sup>176</sup>. Additionally, MNEs and governments must search for evidence of similar transactions conducted by unrelated firms under comparable facts and circumstances: these transactions can be either external or internal comparables, depending if they were executed on open market or between an MNE with a third party. Transfer pricing rules require MNEs to prepare extensive documentation of their search for comparable transactions and justify the preference for one transfer pricing method over another. Finding comparables is challenging, even with financial databases, and is particularly difficult for high-value intangibles, which are not usually traded between unrelated parties<sup>177</sup>.

In practice, the application of ALP involves significant challenges due to the complexity of transactions within MNEs. To be able to rely on comparable transactions extensive documentation and justification would be needed, adding to the administrative burden on MNEs. The supply-side focus of the OECD's criteria for value creation can result in an inequitable allocation of profit tax revenue, disadvantaging market jurisdictions where significant economic activities, such as sales and user interactions, occur<sup>178</sup>.

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<sup>176</sup> Id.

<sup>177</sup> EDEN, 2015

<sup>178</sup> EDEN, 2015; GREIL et al., 2023

#### 2.4. *Legal Ownership vs. Economic Activity*

The notion of ownership of an intangible asset is crucial in transfer pricing analysis, significantly influencing the characterization of the group company and the selection of an appropriate transfer pricing method. Legal ownership previously played a key role in assigning residual profits from intangible assets. However, the OECD Transfer Pricing Guidelines (2017) shifted the focus from legal to functional ownership<sup>179</sup>. This change emphasizes that profits from intangible assets are allocated to the functional owner based on the development, enhancement, maintenance, protection, and exploitation (DEMPE) functions performed<sup>180, 181, 182</sup>. Governments increasingly mandate clear reporting on which entities within an MNE hold economic ownership of intangible assets, aiming to secure rightful tax revenues from these strategic assets<sup>183</sup>.

Legal ownership no longer confers the right to retain returns from exploiting an intangible asset. Instead, contractual arrangements within a group are largely irrelevant for the arm's length allocation of residual profits. The DEMPE approach now defines functional ownership and determines which company is entitled to residual profits from the intangible asset. For instance, companies performing critical functions such as research design, strategic decisions, and quality control are considered functional owners and are entitled to significant returns<sup>184</sup>.

The Guidelines introduced an approach emphasizing the importance of compensating MNE group members for their contributions to the value of intangibles, regardless of

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<sup>179</sup> OECD, 2017

<sup>180</sup> KARNATH, 2021

<sup>181</sup> MARKHAM, 2005 illuminated the ambiguity within the OECD Guidelines regarding the preference for a legal or economic ownership test concerning intangible assets for transfer pricing purposes. This ambiguity led to divergent interpretations concerning the appropriate ownership test endorsed by the guidelines.

<sup>182</sup> MAGELSSSEN, 2019 notes a shift towards a more transparent delineation of economic ownership rights within MNEs.

<sup>183</sup> OECD, 2017

<sup>184</sup> KARNATH, 2021

legal ownership. This is accomplished by rewarding functions performed, assets utilized, and risks assumed in the development, enhancement, maintenance, protection, and exploitation of intangibles<sup>185</sup>. The OECD's DEMPE approach necessitates a detailed analysis of all activities related to intangible assets within a multinational group. This includes the use of assets and assumption of risks associated with these functions. Funding, by itself, does not entitle a company to residual returns unless it also performs DEMPE functions and controls significant risks. The return for purely funding activities is typically based on the cost of capital or a realistic alternative investment<sup>186</sup>.

The allocation of risk is another critical factor in transfer pricing analysis. Initially, risks were allocated based on contractual arrangements. However, the Guidelines version of 2010<sup>187</sup> introduced the requirement that a company must control the risk and have the financial capacity to bear it. This principle was initially applied to business restructurings but has since been extended to all intercompany transactions in the Guidelines version of 2017<sup>188</sup>. Now, the allocation of risk depends on a company's capability to make and implement decisions regarding risk-bearing opportunities and responses to associated risks<sup>189</sup>.

The OECD's guidelines aim to reduce tax planning opportunities for MNEs by suggesting criteria beyond market prices, which are rarely observed for internal transactions. These rules allocate an MNE's total profit based on performed economic functions. Despite the theoretical challenges, the OECD's approach is widely accepted internationally and provides a guiding framework for fair allocation of profits based on economic activities<sup>190</sup>.

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<sup>185</sup> OECD, 2022

<sup>186</sup> KARNATH, 2021

<sup>187</sup> OECD, 2010

<sup>188</sup> OECD, 2017

<sup>189</sup> KARNATH, 2021

<sup>190</sup> LUCKHAUPT et al., 2012

### 2.5. *Phases of Comparability Analysis*

The DEMPE functions are crucial in transfer pricing analysis, ensuring arm's length compensation for functions performed related to intangibles within an MNE group. The legal owner doesn't need to physically perform all functions but must contribute assets and assume risks to retain returns from intangible exploitation. Associated enterprises performing relevant functions should be compensated based on comparability, importance to intangible value creation, and available options. The analysis involves identifying parties controlling functions, assets, and risks, confirming consistency with contractual terms, delineating controlled transactions, and determining arm's length prices based on contributions<sup>191</sup>.

Some authors<sup>192</sup> emphasize that functional analysis involves a detailed examination of the roles played by various entities within an MNE, including the risks they assume and the assets they use, particularly intangible ones. This analysis is not just about identifying functions but understanding how these functions contribute to value creation within the firm, determining the selection of appropriate transfer pricing methods, and moving beyond mere comparability to consider the underlying economic essence of transactions.

Comparability analysis is a multi-phase process aimed at ensuring that each associated member of an MNE group is treated as if it operates as a separate entity rather than an indivisible unit of a single business entity. This approach is crucial for determining the arm's length nature of transactions between associated enterprises<sup>193</sup>.

The first phase involves the identification of commercial or financial relations and the determination of business products between associated enterprises and the conditions and circumstances governing the controlled transaction. This requires an understanding of the sector, its business strategies, markets, products, supply chain, assets used, and risks assumed<sup>194</sup>. This information is typically documented in the master files maintained by

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<sup>191</sup> OECD, 2022: 262

<sup>192</sup> KAMDAR, 2018; REILLY, 2020

<sup>193</sup> Id.

<sup>194</sup> KAMDAR, 2018

the parent company and shared with relevant revenue authorities. It is also crucial to understand the characteristics of the controlled transactions, including their costing and pricing structures, functions performed, assets used, risks assumed by the associated enterprises, and the nature of the products or services transferred. This detailed characterization ensures that each transaction is viewed in its specific economic context<sup>195</sup>. The third component of this phase involves analyzing the economically relevant circumstances of comparable transactions between independent parties to establish a basis for comparison. This comparability of terms and conditions directly impacts the determination of taxable income<sup>196</sup>.

The second phase, functional analysis, requires a meticulous identification of each associated enterprise's functions, risks, and ownership and use of intangible assets. Functions typically cited include sales, marketing, distribution, manufacturing, and ownership of intangible property. After identifying the primary activities of each associated enterprise, the MNE gathers information on the value and return attributed to each participant<sup>197</sup>.

This functional analysis is fundamental for finding the appropriate pricing method. This process involves understanding how the functions performed, assets used, and risks assumed contribute to value creation within the firm. The analysis also helps in aligning taxable income with the economic activities that generated the income, which is more reliable than just comparability to consider the economic essence of the transactions<sup>198</sup>.

The DEMPE approach, central to the OECD's BEPS project, has both positive and negative consequences in the realm of international taxation.

It has intensified tax competition among states, attracting mobile factors such as skilled staff and capital, by reducing corporate tax rates or offering preferential tax regimes

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<sup>195</sup> REILLY, 2020

<sup>196</sup> KAMDAR, 2018

<sup>197</sup> Id.

<sup>198</sup> REILLY, 2020

designed to stimulate innovation and investment<sup>199</sup>. This competitive environment can lead to increased economic activity and innovation, as businesses seek out jurisdictions with favorable tax policies, thereby potentially boosting local economies and fostering a more dynamic global business environment.

Despite its benefits, the DEMPE approach also presents several significant challenges. It doesn't effectively prevent genuine profit shifting, since MNEs can exploit the approach's focus on "people functions" by relocating key decision-making staff to low-tax jurisdictions, facilitating profit shifting without necessitating the legal transfer of intangibles<sup>200</sup>. This practice allows MNEs to shift intangible profits to low-tax countries, bypassing exit taxes in some instances. Additionally, by centralizing decision-making over R&D and financing in low-tax jurisdictions, companies can move substantial profits while maintaining ownership of intangibles elsewhere. This loophole enables profit shifting and undermines the intended effectiveness of the DEMPE approach in preventing tax avoidance strategies<sup>201</sup>.

## V. Conclusions

The world of international taxation and transfer pricing has been strongly shaped by the treatment of intangible assets within MNEs. This dissertation has explored the intricate dynamics of the arm's length principle, the delineation of economic versus legal ownership, and the challenges in applying comparability analyses to intangibles. Through these explorations, several critical insights and implications emerge, underscoring the complexity and evolving nature of global tax policy.

The arm's length principle, the most notable of international tax law, is increasingly under scrutiny. Its application to intangible assets, whose value often derives from unique, non-market factors such as intellectual property and brand strength, reveals inherent

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<sup>199</sup> CHAND / LEMBO, 2020

<sup>200</sup> CHAND / LEMBO, 2020

<sup>201</sup> Id.

limitations. The principle takes the assumption that comparable market transactions exist; however, when they exist are usually inadequate<sup>202</sup>. This gap leads to subjective interpretations and inconsistent applications, potentially resulting in tax base erosion and profit shifting.

The principle's reliance on comparability analysis has practical limitations: the diverse nature of intangibles and the lack of transparent market data makes the establishment of appropriate benchmarks a hard task. This issue is particularly noted in the digital economy, where the value is increasingly tied to data, elements that are difficult to quantify and locate within traditional tax frameworks<sup>203</sup>.

The DEMPE functions framework introduced in the 2017 OECD Guidelines attempts to address these inconsistencies by focusing on the economic substance of the transaction<sup>204</sup>. However, this shift has created several challenges. The requirement for detailed documentation and functional analysis places a substantial burden on MNEs, especially smaller entities without extensive tax planning resources<sup>205</sup>. The subjective nature of assessing functions, assets, and risks can lead to disputes between tax authorities and MNEs, further complicating compliance and enforcement. These challenges highlight a broader issue: the need for a more coordinated and consistent global tax framework that can adapt to the unique characteristics of intangible assets.

The move towards emphasizing economic over legal ownership represents a significant shift in international tax policy, reflecting a growing trend of ensuring profits are taxed where economic activities and value is created. This approach, while aligning with the goals of fairness and preventing base erosion and profit shifting, has practical challenges. It requires a higher understanding of business models, intra-group synergies, and the

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<sup>202</sup> MARKHAM, 2005; LUCKHAUPT et al., 2012; GRIFFITH et al., 2014

<sup>203</sup> YOO, 2020

<sup>204</sup> OECD, 2017; MAGELSSSEN, 2019; KARNATH, 2021

<sup>205</sup> EDEN, 2015

strategic importance of intangibles, which are often unique and not easily comparable across different firms or industries or even disclosed by MNEs.

Policymakers and tax authorities are increasingly focusing on enhancing transparency and compliance. The requirement for detailed functional analyses and comprehensive documentation aims to minimize aggressive tax planning strategies that usually exploit ambiguities in the interpretation of transfer pricing rules. However, the burden on businesses, especially those operating across multiple jurisdictions, has increased, showing a need for more sophisticated tax compliance strategies.

The evolution of transfer pricing rules and, specifically, the treatment of intangibles is likely to continue. However, for the last years, global economic activities have shown a trend to depend less and less on the physical existence or presence, challenging these existing regulations. The OECD's ongoing works, such as the BEPS Plan, are fundamental to address these issues, but the pace of regulatory adaptation often has a lag compared to the quick evolution of business models, leaving significant regulatory gaps.

A universal approach for every intangible may not be appropriate, given the diversity of business models and the rapid pace of technological innovation affecting intangibles' valuation and exploitation. One of the most pressing issues is the ambiguity and potential grey areas within the guidelines themselves. While the shift towards economic substance and the DEMPE functions framework aims to align profit allocation with value creation<sup>206</sup>, the lack of clear definitions and standards can lead to divergent interpretations and implementation by different jurisdictions. This not only complicates compliance for MNEs but also creates opportunities for tax avoidance through strategic exploitation of these ambiguities. A more adaptable approach to international tax policy is required. This includes not only refining existing guidelines and closing loopholes but also improving international cooperation to harmonize tax standards and practices – ensuring consistency in application, reducing compliance burdens, and adapting to the rapidly changing business landscape, reducing litigation and conflicts.

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<sup>206</sup> ANDRUS / OOSTEHUIS, 2017; TAM, 2017; KAMDAR, 2018; PAUMIER, 2020

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