THE OECD INTANGIBLES PROJECT AND THE CONCEPT OF "INTANGIBLE RELATED RETURN"

Carlo Garbarino

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This contribution examines the recent work done by the OECD regarding the transfer pricing aspects of intangibles (hereinafter the "OECD Intangibles Project"). The contribution is organized in three separate sections. It initially offers a brief description of the Project as well as a concise summary of the activities undertaken by Working Party no. 6 up to March 2014. Secondly, it provides a description of the interim work performed by Working Party no. 6 in connection with all the topics related to the attribution of the Intangible Related Return to members of a multinational group. Lastly, it addresses in details the comments received by Working Party no. 6 from business commentators in connection with the Intangible Related Return topic as well as the implications and inferences of such topic with the OECD Project addressing Base Erosion and Profit Shifting (hereinafter "BEPS") and, more precisely, with the OECD BEPS action plan released in July 2013.

I. SUMMARY OF THE ACTIVITIES UNDERTAKEN BY WORKING PARTY NO. 6

Intangibles have always been considered as one of the most challenging topic in transfer pricing, an area of international taxation that is posing significant economic challenges to the international community[1]. The identification of a correct transfer price for intangibles relies on the assumption that there is an intrinsic market value of a given inter-company transaction and this highlights one of the logical weaknesses of the transfer pricing approach[2].

1 See in particular, in the immense literature on transfer pricing, the recent volume: Kai Konrad and Wolfgang Schon, "Fundamentals of international transfer pricing in law and economics", MPI Studies in Tax Law and Public Finance, Springer, 2012 (hereinafter "Fundamentals"), and in particular the following contributions to that volume: Michael C. Durst, "OECD Guidelines, Causes and Consequences", ibidem, 123-136. See also: Jens Wittendorff, "Transfer Pricing and the Arm's Length Principle in International Tax Law, Kluwer, 2010.

2 For a critical araisal of the transfer pricing policies see: Jinyan Li, "Soft Law, Hard Realities and Pragmatic Suggestions: Critiquing the Transfer Pricing OECD Guidelines, in "Fundamentals", cit. supra, note 1, 71-90; Hagen Luckhaupt, Michael Overesch and Ulrich Schreiber, "The OECD Approach to Transfer Pricing: A Critical Assessment and Proposal"?", ibidem, 91-122; Avi-Yonah in the Rise and Fall of Arm's Length. A Study in the Evolution of U.S. International Taxation, 15 Virginia Law Review 89(1995).

A debate among scholars and practitioner is under way about the aspects of transfer price where intangibles are involved both in respect to evaluation issues[3] and strategic considerations[4], but guidance in this area is available also in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[5] (hereinafter "OECD Guidelines"), precisely in Chapter VI (Intangibles), Chapter VIII (Cost contribution agreements) and, finally, in Chapter IX (Business Restructurings).

While the guidance included in Chapter IX was developed and finalized between 2008 and 2010, the guidance included in Chapter VI and VIII dates back to 1995[6]. Since new issues have emerged which were not foreseen or fully addressed when these Chapters were released, especially in relation to the definition, identification and valuation of intangibles, the OECD Committee on Fiscal Affairs decided to commence a new project examining the transfer pricing aspects of intangibles, to be carried out by Working Party No. 6[7].

The commencement of a project on the transfer pricing aspects of intangibles was announced by the OECD in 2010[8]. A scoping paper was published on the OECD website for public comment. In the interim, three public consultations have been held with interested commentators. As reported by the same OECD, at the business consultation held in November 2011, representatives of the business community suggested that it would be helpful if the OECD released interim drafts of its work as it progressed for further detailed public comment.

Accordingly, the first document issued by the OECD was a "Discussion draft on the transfer pricing aspects of the intangibles"[9] (hereinafter "Discussion Draft"). This document is an interim draft and, as represented by the same OECD, it contains two principal elements: (i) a proposed revision of the provisions of Chapter VI of the Transfer Pricing Guidelines; and (ii) a proposed revision of the Annex to Chapter VI containing examples illustrating the application of the provisions of the revised text of Chapter VI.

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3 See, among others: T. Baldenius, "Discussion on Divisional Performance Measurement and Transfer Pricing of Intangible Assets", Review of Accounting Studies 11, 367-376; M. Boos, "International Transfer Pricing: The Valuation of Intangible Assets", The Hague, 2003; Yariv Brauner, "The Eye of the Beholder: The Valuation of Intangibles for Transfer Pricing Purposes, 28 Va. Tax Review, 2008; Isabel Verlinden and Yoko Mondelaers in "Transfer Pricing Aspects of Intangibles at the Crossroads between Legal, Valuation and Transfer Pricing Issues", International Transfer Pricing Journal, January/February 2010;
4 H. Grubert, in "Intangible Income, Inter-company Transactions, Income Shifting and the Choice of Location, 56 Nat'l. Tax Journal, 221-242; J. Vidal, "The Achille's Heel of the Arm's Length Principle and the Canadian GlaxoSmithKline Case", Intertax 37, 512-528; Jens Wittendorff, "Valuation of Intangibles under Income-based Methods", Part I and II, International Transfer Pricing Journal, September/October and November/December 2010.
5 The OECD Transfer Pricing Guidelines, Committee of Fiscal Affairs, Paris, 2010, have been released originally in 1995 and then amended, updated and integrated in 2010.

6 See in this respect Toshio Miyatake in "Transfer Pricing and Intangibles", General Report, Cahiers de Droit Fiscal International, Volume 92a.
7 See, in this respect, OECD web pages for the meeting with business commentators on the scoping of its project on the transfer pricing aspects of intangibles are available at http://www.oecd.org/document/3/0,3746,en_2649_33753_46376835_1_1_1_1,00.html; Working Party No. 6 Special Session of the Transfer Pricing Aspect of Intangibles: meeting with Private Sector Representatives on the Valuation of Intangibles for Transfer Pricing Purposes", 21-23 March 2011 at the OECD Conference Centre In Paris.
8 See, in particular, comments of Wilkie made to the OECD as part of the OECD's public consultation in connection with its project on the "Transfer Pricing Aspects of Intangibles as well as the presentations most recently made in late March 2011 reported by the OECD in OECD meets with business commentators on the valuation of intangibles for transfer pricing purposes, http://www.oecd.org/documentprint/0,3455,en_2649_33753_47445940_1_1_1_1,00.html, documenting Working Party No. 6's Special Sesssion on the Transfer Pricing Aspects of the Intangibles.
9 OECD Working Party no. 6, "Discussion Draft. Revision of the special considerations for intangibles in Chapter VI of the OECD transfer Pricing Guidelines and related provisions", 6 June to 14 September 2012.

Numerous comments concerning the Discussion Draft were received by the OECD from the business community and a new public consultation was held in November 2012. On the basis of comments received, Working Party No. 6 has prepared a revised version of the Discussion Draft (hereinafter "Revised Discussion Draft") that incorporates many changes to the 6 June 2012 version[10].

II. ANALYSIS OF THE CONCEPT OF "INTANGIBLE RELATED RETURN"

The Discussion Draft and the Revised Discussion Draft are divided in four topics. The first topic addresses the identification and definition of the intangibles that are relevant for transfer pricing purposes. The second topic relates to the identification of the parties entitled to the so-called Intangible Related Return (hereinafter "IRR"). The third topic identifies and describes the inter-company transactions concerning intangibles and, finally, the four topic addresses the comparability analysis, the method selection and the economic analysis in the inter-company transactions regarding intangibles.

The present contribution focuses on Part B of the Discussion Draft and of the Revised Discussion Draft, i.e. the identification of the parties entitled to the IRR. This part is probably the most innovative of the work done by Working Party no. 6 and it solidly connects with the recent BEPS action plan of the OECD.

According to the arm's length principle and to its wide interpretation provided by the OECD Guidelines, the ownership of the group intangibles is a key factor in determining where profits should be allocated among the members of a multinational group. This holds particularly true in the cases where the business activities undertaken by a multinational group are significantly connected to the development and ownership of valuable intangibles. The pharmaceutical sector, as well as the software and web industries are probably the most typical businesses where the value of a company is strongly connected to the value of the intangibles owned.

In this respect, the goal of the OECD Intangibles Project is to establish common principles that multinational groups and tax administrations should adopt to effectively attribute the IRR to the members of a multinational group.

10 OECD Working Party no. 6, "Revised Discussion Draft on the transfer pricing aspects of intangibles", 30 July 2013.

2. a. Economic vs. legal ownership of intangibles

The first principle stated by the Revised Discussion Draft is that the IRR should not be automatically attributed to the legal owner of the intangibles. Other members of the multinational group may have performed functions, used or contributed assets, or assumed risks that are anticipated to contribute to the value of the intangible and for which they must be compensated under the arm's length principle[11]. The right of other members of the group to receive compensation for their functions performed, assets used or contributed, and risks assumed may be conceptually framed as an allocation to those other members of all or part of the return attributable to the intangible.

This concept was somehow embryonic already in the 1995 version of the OECD Guidelines, in which the concept of legal ownership was already implicitly replaced by the concept of economic ownership for the purposes of attributing the IRR to a specific member of a multinational group[12].

The concept of economic ownership of intangibles is basic and comprehensible. In essence, the economic ownership of an intangible is attributed to the member of a multinational group that has developed the intangible at its own cost and at its own risk. Based on the OECD guidance, the economic owner does not need to have performed directly the research and development activity, but it is sufficient that it has requested other parties to perform these activities on a contract basis.

The economic ownership concept is pivotal within the transfer pricing guidelines, as it develops from the assumption that, within a multinational group, the legal ownership of an intangible may be attributed to a specific member without obstructions from the other members. For example, a multinational group may be interested in positioning the legal ownership of a certain intangible property in a country where legal protection may be facilitated. It would be incorrect in that case, that the IRR of the intangible will be taxed in the same country and not in the country of the member that has incurred the intangible development costs and borne the related risks.

2.b. The functional analysis and the so-called "important functions"

The second concept introduced by the Revised Discussion Draft is probably the most relevant and innovative. In brief, the Revised Discussion Draft goes beyond the original distinction between the legal owner and the economic owner and it merely focuses on the requirements for the legal owner of the intangibles to be entitled to the so-called IRR. In absence of these requirements, the tax administrations should be allowed to re-characterize the transactions and allocate a portion of the IRR to other members of the multinational group.

11 OECD Working Party no. 6, "Revised Discussion Draft on the transfer pricing aspects of intangibles". Par. 65.
12 OECD Transfer Pricing Guidelines, Par. 6.3.

According to the Revised Discussion Draft, the legal owner of intangibles is entitled to retain the IRR either if it performs the functions related to development, enhancement, maintenance and protection of the intangibles, or if it arranges to have such functions performed under its control by independent enterprises or by associated enterprises. Accordingly, as it was also evident in the old version of Chapter VI, it is not essential that the legal owner directly performs all of the functions related to the development, enhancement, maintenance, and protection of an intangible through its own employees in order to be entitled ultimately to retain IRR.

A member of a multinational group that is the legal owner of intangibles could similarly be expected to retain either independent enterprises or associated enterprises, transacting on an arm's length basis, to perform functions related to the development, enhancement, maintenance, and protection of intangibles. In such cases, however, the party performing the outsourced functions should operate under the control of the legal owner. In assessing which member of the multinational group in fact controls the performance of the relevant functions, principles analogous to those of paragraphs 9.23 through 9.28 of the OECD Guidelines apply[13].

Paragraph 76 of the Discussion Draft introduces a concept that was already adopted by the OECD Guidelines when commenting the Business Restructurings, i.e. the idea is that the legal owner of an intangible is permitted to outsource one or more relevant functions to related parties or independent parties. Nevertheless, where the legal owner outsources most or all of such important functions to other group members, the entitlement of the legal owner to retain any material portion of the IRR after compensating other group members for their functions is unsure. In essence, to be entitled to the IRR, the legal owner of the intangibles needs to perform at least a control activity on the outsourced functions[14].

The Revised Discussion Draft launches an approach that somehow originates from the Investor Model concept developed in the U.S. by the Internal Revenue Service in connection with the cost sharing Treasury Regulations. The Revised Discussion Draft makes a difference between a legal owner performing active control activities and a legal owner merely providing funding. According to the Revised Discussion draft, the legal owner should be entitled to the IRR, provided that it exercises an active control function. On the contrary, a party that merely provides funding, but does not control the risks or perform other functions associated with the funded activity, should generally be entitled to a risk-adjusted rate of anticipated return on its capital invested, but not more.

13 OECD Working Party no. 6, "Revised Discussion Draft on the transfer pricing aspects of intangibles". Par. 76.
14 OECD Transfer Pricing Guidelines, Par. 9.23. The paragraph states that "control" should be understood as the capacity to make decisions to take on the risk (decision to put the capital at risk) and decisions on whether and how to manage the risk, internally or using an external provider. This would require the company to have people – employees or directors – who have the authority to, and effectively do, perform these control functions.

The Discussion Draft is very precise in describing the functions to be performed and the risk to be borne by the legal owner of the intangible in order to avoid to be characterized as a mere funding entity and, therefore, to be entitled to the IRR. According to paragraph 79 of the Discussion Draft, depending on the facts and circumstances of the specific case, the legal owner should be involved in functions like, among others, design and control of research and marketing programmes, management and control of budgets, control over strategic decisions regarding intangible development programmes, important decisions regarding defence and protection of intangibles, and ongoing quality control over functions performed by independent or associated enterprises that may have a material effect on the value of the intangible.

In terms of risks, paragraph 84 of the Discussion Draft lists specific questions that should be answered in order to entitle to the IRR the legal owner of the intangibles. The key questions in each case are: (i) what is the financial risk assumed by the funding entity, (ii) whether the funding entity has the financial capacity to bear the risk, (iii) how and by whom is that financial risk controlled, (iv) what are the financing options realistically available to the parties; and (v) what is the arm's length anticipated compensation for assuming the financial risk in question. In assessing the allocation of risks related to intangibles among members of a multinational group, the principles of paragraphs 9.10 through 9.46 of the OECD Guidelines apply[15].

The Discussion Draft concludes that the legal owner of an intangible is entitled to all IRRs attributable to that intangible only if it (i) performs and controls all of the important functions related to the development, enhancement, maintenance and protection of the intangibles, (ii) controls other functions outsourced to independent enterprises or associated enterprises and compensates those functions on an arm's length basis, (iii) provides all assets necessary to the development, enhancement, maintenance, and protection of the intangibles, and (iv) bears and controls all of the risks and costs related to the development, enhancement, maintenance and protection of the intangible.

2.c. Practical implications of the new OECD Approach

The conclusions reached by the Revised Discussion Draft are likely to have an impact on two typical inter-company frameworks: the contract research agreements and the cost sharing agreements.

Contract research agreements are contracts where one party (generally named Principal) appoints another party (generally named Service Provider) to perform research and development activities on a contract basis. Under this contract, the Principal retains all the rights related to the intangible property developed and it bears all risks associated to the accomplishment or non-accomplishment of the research activities.

Cost sharing agreements, on the other hand, are agreements where two or more parties (generally named participants) share resources, costs and risks of developing, producing or obtaining assets and agree to share the ownership of said assets based on their respective contributions.

15 Chapter IX of the OECD Transfer Pricing Guidelines provides guidance to determine whether the allocation of risks between parties member of a multinational group is consistent with the arm's length principle. In essence, a risk allocation should be respected when the risk is allocated to the party that has greater control over it and that has the financial capacity to bear it.

These contracts are frequently used by multinational groups to allocate the ownership of the group intangibles and, accordingly, the entitlement of a group member to the IRR. Nevertheless, tax administrations may claim that these agreements are used and, in some cases, abused by multinational groups to artificially shift the ownership of certain intangibles among the members of the group, only with the intent of attributing the IRR to entities located in low tax jurisdictions.

In the view of these tax administrations, the approach reported in the Revised Discussion Draft, if finally approved and incorporated in the new version of the OECD Guidelines, should restrain the possibilities for a multinational group to attribute the IRR of certain intangibles to a member entity that lacks of the necessary organization and capabilities to control the generation, development and maintenance of the same intangibles.

III. COMMENTS TO THE DISCUSSION DRAFT

The OECD has received comments from business representatives. These comments have been made both to the Discussion Draft and to the Revised Discussion Draft and they are publicly available on the OECD website[16]. In summary, as far as the IRR topic is concerned, commentators have represented a number of criticalities.

In general terms, the Revised Discussion Draft is focused on the cases where a so-called “cash box” company provides the funding for the development of intangible property, but has little or no ability to control the course of the intangible property development. According to most of the commentators, the “cash box” cases are not the norm, but they are just residual transactions that should be addressed by anti-avoidance regulations. On the contrary, Chapter VI of the OECD Guidelines should be devoted to regulate common situations in a simple and consistent manner.

3. a. Criticalities related to the definition of the control function

Most of the commentators are of the idea that the approach undertaken in the Revised Discussion Draft may lead to an overemphasis on the functions performed in the related party transactions connected to the generation of the intangibles, while the legal ownership of the intangibles and the contractual assumptions of risk appear to be excessively disregarded. In essence, the introduction of this new IRR approach may affect those multinational groups of companies, where the group intangible property is centralized in one entity. In those situations in order to regard such entity as the “functional owner” under this new IRR regime, one would be required to evidence entrepreneurial substance in terms of functions, control, risks and costs.

16 Comments to the Discussion Draft can be found at: http://www.oecd.org/ctp/transfer-pricing/Intangibles_Comments.pdf. Comments to the Revised Discussion Draft can be found at: http://www.oecd.org/tax/transfer-pricing/comments-intangibles-discussion-draft.htm.

In this respect, commentators have highlighted the criticalities of the new IRR regime in two respects. First, it has been pointed out that international business is increasingly globalized: strategic resolutions can be taken everywhere by groups' top management located around the globe, labor can be shared, divided or outsourced and decentralized fast decisions in an international environment are the rule. Therefore, evaluation and documentation of control and decision-making of international firms is, for practical purposes, not really feasible[17]. So it appears not reasonable to ground IRR policies on the structure of decision-making of international firms. In conclusion, a claim is made that the transfer pricing OECD principles on IRR to be reliable need to incorporate a good degree of certainty to and thus are not suitable to be based on such reliance on decision-making processes[18].

Secondly, according to commentators, the level of substance and control required to attribute the IRR should, wherever possible, be tested by reference to comparable transactions between third parties, rather than by a mere hypothesis about arm's length behavior. These commentators point out that guidelines on IRR as currently drafted are too strict in terms of requirements for an entity to be entitled to IRR. In this respect, some commentators note that there are a number of arm's length situations where a party obtains the right to share intangible related returns by investing in the development of intangibles or purchasing intangible rights, while performing little or no "control" activity other than due diligence at the outset.

Such a party in practice only bears the risks associated with the loss of its initial investment and the volatility of intangible related returns. For example, senior executives who may not have a technical background are often responsible for deciding to invest in research and development projects or to acquire target companies which they believe own attractive intangible property. In these cases, the executives may or may not seek the counsel of their own development groups.

Therefore, real caution should be taken when adopting the notion of control in relation to activities creating intangible assets. Outsourcing R&D activities (e.g. by way of a R&D contract) between independent parties is sometimes pursued because the principal entity does not have the resources or competence to perform these functions. The principal might therefore not have the ability to control and/or manage the process in any detail but only in a high level management sense. Hence, the meaning of control is crucial and the allocation of functions required by the Revised Discussion Draft may be misleading.

17 On the impact of transfer pricing constraint on strategic behaviour and governance of multinational groups see: Wolfgang Schon in "Transfer Pricing: Business Incentives, International taxation and Corporate Law, ibidem, 47-7; Moritz Heimann and Stefan Reichelstein, "Transfer Pricing in Multinational Corporations:an Integrated Tax and Management Perspective", in "Fundamentals", cit. supra, note 1, 11-13; Scott Wilkie, "Reflecting on the Arm's Length Principle: What is the Principle, Where Next?", ibidem, 141-142 and 147-150.

18 In general on the impact of guidelines in this area see: Josè Calderon, "The OECD Transfer Pricing Guidelines as a Source of Tax Law", Intertax, 2007-1, 4-29.

In summary, according to the vast majority of the commentators the newly introduced concept of control seems particularly at odds with arm's length behavior. As in all transfer pricing matters, the question in these cases should still be to determine what happens at arm's length when two enterprises engage in transactions comparable to those of the taxpayer. In many cases at arm's length, unrelated entities are engaged to perform work in their core competency without direct supervision or "control" by their counterparty. There is, of course, nothing unusual in a case where all details of an activity are performed under the control of the entity which employs the personnel with the requisite skills. If that transaction occurs between associated enterprises, the transfer pricing rules should not endeavor to re-characterise the relationship, as long as the "control" exercised by the principal is of a sort that could be observed at arm's length.

3. b. Negative IRR and the importance of reciprocity and consistency

The second interesting concept introduced by commentators addresses consistency and reciprocity in connection with the current lack of guidance by the OECD on a negative IRR. It has been argued that the Revised Discussion Draft should make clear that if other group members agree to support the development of intangible property on a limited risk basis in exchange for fixed current compensation, they should not have any possible residual claim to an additional share of residual profits or losses resulting from the employment of the intangible property. Rather, in such cases, the proper inquiry should be whether the current compensation received by the limited risk participants was arm's-length for their contributions or not.

This holds particularly true because a small number of products that engendered R&D costs actually lead to success on the market, while most products (and their R&D costs) do not generate profits, with the result that the owner of intellectual property bears risk and losses for those products. Although the Revised Discussion Draft foresees that IRR can be negative, it is difficult to understand how such adverse effects can be allocated to the different units of the multinational group. Moreover, it is unclear how national tax authorities may accept that losses are attributed without proper consideration of legal ownership of the intellectual property.

A pure "loss scenario" is not explicitly considered in the Revised Discussion Draft. If the IRR is negative, however, a reallocation of IRR to the entity that performed research activities or actively controlled them, would have the consequence that this loss could be claimed in the jurisdiction of that entity.

An example may help to make the case more comprehensible. A large pharmaceutical multinational group launches an intensive and costly research and development program in connection with a possible blockbuster drug. The research and development activities are performed by an entity located in a high tax jurisdiction (service provider) on the basis of a contract research agreement with the supposed IP-owner, an entity of the group located in a low tax jurisdiction (principal). Despite the large investments, the research program fails to reach the expected result and the project is abandoned.

In this case, according to the proposed guidance on the IRR, the multinational group may follow a brilliant tax planning strategy. If the service provider is able to show that the principal did not undertake the active control functions mentioned by the Revised Discussion Draft, it may argue that, according to the OECD guidance, it was entitled to the IRR and, therefore, it should take a deduction of the costs incurred in connection with the failed research program without being recognized of a service fee from the Principal.

The situation might be even more complex if, in the example above, the principal company were also located in a high tax jurisdiction. In such a case, the tax authorities of the principal company would be interested in demonstrating that the principal did not undertake the necessary active control functions and, therefore, the loss connected to the unsuccessful program coould be attributed to the real owner of the IRR.

3.c. Other limitations of the IRR approach

There are other two relevant issues which did not really surface in the debate on IRR and which essentially point out to the fact that, in light of the organizational dynamic structure of international firms, there is a significant risk that the proposed OECD approach, in certain cases, may prove insufficient for the purposes of an accurate determination of the entitlement to the IRR.

First, the Revised Discussion Draft does not provide sufficient guidance in connection with the role of the company's directors. When the Revised Discussion Draft focuses on the concept of active control to entitle a member company to the IRR, it does not provide guidance on whether this active control has to be exercised by the company's employees, or also by directors.

The Revised Discussion Draft makes reference to the control definition embedded in Paragraph 9.23 of the OECD Guidelines, where it is stated that "control should be understood as the capacity to make decisions to take on the risk (decision to put the capital at risk) and decisions on whether and how to manage the risk, internally or using an external provider. This would require the company to have people – employees or directors – who have the authority to, and effectively do, perform these control functions".

The language of paragraph 9.23 of the OECD Guidelines does not however provide a complete answer to the question of control. If active control functions can be performed by directors and not necessary by employees, the OECD should also clarify what happens if the director of a member company is also an employee of another group member company which is involved in the same control function. Moreover, additional guidance should be provided in case two member companies share the directors and both are involved in intangible development functions.

It would also be important to clarify whether the directors need to be resident in the State of the member company, whether the directors can perform similar roles in other member companies, whether decisions regarding the relevant intellectual property has to be taken officially during the Board meetings of the company and locally, whether directors should be paid by the relevant member company, and so on.

The second issue which did not surface in the debate on IRR is that the Revised Discussion Draft failed to consider that functional and control analysis may change over time, while the entitlement to the IRR is defined at a given point in time. The result of this mismatch is that a given IRR may not reflect the underlying causal dynamics that results from functional and control functions analysis.

Functions and risks connected to the group intellectual property and related intangibles are dynamic by default in international firms. It may happen that intangible property is initially disregarded and then contributed for the development of new intangible products. It may also happen that the first generation of products resulting from intangible property is not successful, while subsequently another member company may develop an upgraded version of such products that become very profitable. Moreover the strategic control decisions regarding intangible property are taken over time by different employees and directors working in different member companies. If any strategic control decision taken in connection with a certain intangible theoretically entitles to a portion of the IRR, multiple profit split approaches may become the rule with all the connected criticalities and sophistications.

IV. THE CONNECTIONS BETWEEN THE INTANGIBLES PROJECT AND THE BEPS ACTION PLAN

The OECD's BEPS Action Plan introduced at the G20 Finance Ministers' meeting in Moscow identifies fifteen specific actions that will give governments the domestic and international instruments to prevent corporations from paying little or no taxes[19].

As highlighted by most commentators, the BEPS Action Plan is interconnected with the OECD Intangibles Project, in so far as it devotes three of its fifteen Actions on substantive transfer pricing issues. The main goal of the the BEPS Action Plan is to ensure that transfer pricing outcomes are in line with value creation. Indeed the main concerns raised in the BEPS Action Plan relate to income shifting and the creation of "stateless income" through transfers of intangibles, the allocation of risks and capital, and transactions which would not, or would only very rarely, occur between third parties[20].

In that regard, the OECD Intangible Project appears to be the first OECD action requested in response to Action 8, Action 9 and Action 10 of the BEPS Action Plan. More in detail, according to Action 8, the OECD shall develop rules to prevent BEPS by moving intangibles among group members. This will involve, among other things, ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation.

19 Action Plan on Base Erosion and Profit Shifting. OECD, Paris, 2013.
20 See Georg Kofler, "The BEPS Action Plan and Transfer Pricing: The Arm's Length Standard Under Pressure?", British Tax Review, Issue 5, 2013.

According to Action 9, the OECD shall develop rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members. Allocation of profits arising from intangibles based on value creation implies that transfer pricing rules be adapted to ensure that inappropriate returns will not accrue to an entity solely because it has assumed risks or provided capital.

Finally, Action 10 of the BEPS Action Plan. More requires the OECD to develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties. This will involve adopting transfer pricing rules or special measures to: (i) clarify the circumstances in which transactions can be recharacterised; (ii) clarify the application of transfer pricing methods, in particular profit splits, in the context of global value chains; and (iii) provide protection against common types of base eroding payments, such as management fees and head office expenses.

There is however no complete overlapping between the BEPS Action Plan and the OECD Intangibles Project. While the former is launched by the OECD to tackle on a global basis aggressive tax planning and shifting of profits to law tax jurisdictions, the latter is simply aimed at re-writing Chapter VI of the OECD Guidelines.

Thus the OECD Intangibles Project is addressed to tax administrations and multinational enterprises irrespectively of the fact that one of the entity involved in an inter-company transaction is located in a low tax jurisdiction and is intended to provide guidance also to multinational enterprises that consider transfer pricing as a mere compliance issue rather than a tax planning issues.