tax notes international®

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

The Revised OECD Transfer Pricing Guidance on Intangibles: A Critical Analysis

by Oliver R. Hoor

Oliver R. Hoor

Oliver R. Hoor is a tax partner (head of transfer pricing and the German desk) with ATOZ Tax Advisers (Taxand Luxembourg).

The author would like to thank Samantha Schmitz, chief knowledge officer at ATOZ, for her assistance.

In this article, the author examines the guidance contained in the 2017 revisions to Chapter VI of the OECD's transfer pricing guidelines for transactions involving intangibles. After reviewing the revised guidelines, he analyzes the new framework, including its likely effect on the structuring of multinational enterprises and its interaction with the arm's-length principle.

Last summer the OECD released the 2017 revision of its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the OECD guidelines). Notably, the OECD has amended several chapters in accordance with the final reports on actions 8-10 and 13 of its base erosion and profit-shifting project. This article provides an overview of the guidance in Chapter VI of the OECD guidelines, titled, "Special Considerations for Intangibles," and critically analyzes the new transfer pricing framework for controlled transactions involving intangibles.

I. Introduction

In many multinational enterprises, a significant portion of value creation is attributable to the ownership and exploitation of valuable intangibles such as trademarks, brands, and patents. MNEs can influence the attribution of income from intangibles through the location — or cross-border relocation — of the ownership of intangibles.

While the general guidance in chapters I through III of the OECD guidelines applies to transactions involving intangibles, Chapter VI provides comprehensive guidance specially tailored to determining arm's-length conditions for transactions that involve the use or transfer of intangibles under article 9 of the OECD model tax convention.

Transfer pricing aspects of transactions involving intangibles were a key topic in the OECD BEPS project since the OECD identified these transfers as one of the main techniques MNEs employ when engaging in profit shifting and base erosion. In the 2017 version of the OECD guidelines, the previous Chapter VI has been deleted in its entirety and replaced by new guidance, the result of the OECD's work on action 8 of the BEPS project.[1]

Through action 8, the OECD sought to develop rules that would prevent BEPS caused by MNEs moving intangibles among group members by:

> (i) adopting a broad and clearly delineated definition of intangibles; (ii) ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation; (iii) developing

[1] The OECD's work on the new transfer pricing guidance on intangibles started as early as 2010, when the OECD announced the project on intangibles that was eventually included in the BEPS action plan released in July 2013.

For more *Tax Notes International* content, please visit www.taxnotes.com.

transfer pricing rules or special measures for transfer of hard-to-value intangibles.

II. Transfer Pricing Rules for Intangibles

A. Overview

The new transfer pricing standard applicable to intangibles is fundamentally different from the previous interpretation of the arm's-length principle. In a nutshell, the key points in the new guidance on controlled transactions involving intangibles are:

- taken alone, legal ownership of intangibles by an associated enterprise does not determine entitlement to returns from the exploitation of intangibles;
- associated enterprises performing important value-creating functions regarding the development, enhancement, maintenance, protection, and exploitation of the intangibles (DEMPE functions) can expect appropriate remuneration;
- an associated enterprise assuming risks associated with DEMPE functions must exercise control over those risks and have the financial capacity to assume the risks;
- the entitlement of any member of the MNE group to profit or loss from the differences between actual and expected profits will depend on which entity assumes the risks that caused these differences, whether the entity is performing the important functions regarding the DEMPE functions or contributing to the control over the economically significant risks, and whether it is determined that arm's-length remuneration of these functions would include a profit-sharing element;
- an associated enterprise providing funding and assuming the related financial risks, but not performing any functions involving the intangible, can generally expect only a risk-adjusted return on its funding;
- if the associated enterprise providing funding does not exercise control over the financial risks associated with the funding, then it is only entitled to a risk-free return;
- guidance on the situations in which different valuation techniques can appropriately be used is expanded; and
- taxpayers must perform a rigorous transfer pricing analysis to ensure that transfers of hard-to-value intangibles are priced at arm's length.

B. Identifying Intangibles

Paragraph 6.6 of Chapter VI of the OECD guidelines defines the term "intangible" as:

> something that is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.

Notably, accounting or legal definitions of intangibles are not decisive for transfer pricing purposes.

Paragraph 6.16 defines two commonly used categories of intangibles, namely marketing intangibles and trade intangibles. A marketing intangible is defined as "an intangible that relates to marketing activities, aids in the commercial exploitation of a product or service, and/or has an important promotional value for the product concerned." Marketing intangibles may include trademarks, trade names, customer lists, customer relationships, or proprietary market and customer data that are employed in or as an aid to the marketing and selling of goods or services to customers. A trade intangible is defined as "a commercial intangible other than a marketing intangible."

Moreover, reference is made to "unique and valuable" intangibles that are defined in paragraph 6.17 as "intangibles (i) that are not comparable to intangibles used by or available to parties to potentially comparable transactions, and (ii) whose use in business operations (e.g. manufacturing, provision of services, marketing, sales or administration) is expected to yield greater future economic benefits than would be expected in the absence of the intangible."

Chapter VI also illustrates several other types of intangibles often considered in transfer pricing analyses, including patents, know-how and trade secrets, trademarks, trade names, and brands.

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes International* content, please visit www.taxnotes.com.

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

C. Ownership and the Role of DEMPE Functions

1. Analytical Framework

Section B of Chapter VI provides an analytical framework to ensure, as paragraph 6.32 explains, that members of an MNE group that perform functions, contribute assets, and assume risks regarding intangibles are appropriately compensated for their involvement. According to paragraph 6.34, analyzing transactions between associated enterprises involving intangibles requires the following steps:

- Identify the intangibles used or transferred in the transaction with specificity and identify the specific, economically significant risks associated with the DEMPE functions for those intangibles.
- Identify all relevant contractual arrangements, with special emphasis on determining legal ownership of intangibles based on the terms and conditions of legal arrangements (including relevant registrations, license agreements, and other relevant contracts) and other indicia of legal ownership. Also, identify relevant contractual rights and obligations, including contractual assumption of risks between the associated enterprises.
- Identify the parties performing functions, using assets, and managing risks involving the DEMPE functions in relation to the intangibles using a functional analysis, with particular attention to which parties control any outsourced functions and control specific, economically significant risks.
- Confirm the consistency between the terms of the relevant contractual arrangements and the actual conduct of the parties. Determine whether the party assuming economically significant risks actually controls the risks and has the financial capacity to assume the risks related to the DEMPE functions as to the intangibles.
- Delineate the actual controlled transactions involving the DEMPE functions in light of the legal ownership of the intangibles, the other relevant contractual relationships under relevant registrations and contracts, and the conduct of the parties, including their relevant contributions of functions, assets, and risks, taking account of the detailed guidance on the allocation of risks in Chapter I of the OECD guidelines.
- When possible, determine arm's-length prices for these transactions that reflect each party's contributions, including functions performed, assets used, and risks assumed (unless a transaction, as accurately delineated, involves the exceptional circumstances detailed in section D.2 of Chapter I of the OECD guidelines that allow it to be disregarded for transfer pricing purposes).

2. Ownership and Contractual Arrangements

As a principle, the legal owner of an intangible will be considered the owner for transfer pricing purposes. Paragraph 6.40 states that when no legal owner can be identified under the applicable law or relevant contracts, then the member of the MNE group that controls decisions about the exploitation of the intangible and has the practical capacity to restrict others from using the intangible will be considered the legal owner of the intangible for transfer pricing purposes.

However, paragraph 6.42 emphasizes that the determination of legal ownership and the determination of an arm's-length remuneration under the guidance provided in Chapter VI are two distinct topics. For transfer pricing purposes, legal ownership of intangibles, taken alone, does not confer any right to retain returns derived by the MNE group from exploiting the intangible, even though those returns may initially accrue to the legal owner because of its legal or contractual right to exploit the intangible.

The new Chapter VI shifts from a model in which the legal owner has the right to retain residual income derived from the exploitation of intangibles to a model under which income derived from intangibles is attributed to all the members of the MNE group that perform DEMPE functions. Hence, the rules emphasize the production factor labor over capital and the assumption of development risks.

This is contrary to comparable transactions entered into by independent enterprises in comparable circumstances. Thus, the new standard does not enforce the conditions that independent parties would have agreed upon. This gives rise to significant doubts as to the consistency of the new guidance with the arm's-

For more *Tax Notes International* content, please visit www.taxnotes.com.

length principle in article 9 (1) of the OECD model income tax treaty.

3. Functions, Assets, and Risks

The OECD guidelines emphasize functional value creation, stating that all members of the group should receive an appropriate compensation for any functions they perform, assets they use, and risks they assume regarding the DEMPE functions for an intangible. Consequently, as laid out in paragraph 6.48, the functional analysis should focus on identifying which members:

- perform and exercise control over DEMPE functions;
- provide funding and other assets; and
- assume the various risks associated with the intangible.

When identifying the economically significant risks with specificity, paragraph 6.61 notes that it is important to distinguish between financial risks linked to providing funding for the investments and the operational risks linked to the operational activities for which that funding is used (for example, development risk).

In paragraph 6.65, the OECD guidelines list some of the risks that may be important in a functional analysis of transactions involving intangibles, including:

- risks involving the development of the intangibles;
- the risk of product obsolescence;
- infringement risk;
- product liability and similar risks involving products and services based on the intangibles; and
- exploitation risks (that is, uncertainties regarding the returns to be generated by the intangible).

The following paragraphs, particularly 6.66, clarify that the assumption of risks as it involves the DEMPE functions entails being responsible for the consequences if the risk materializes.

Further, paragraph 6.49 states that the relative importance of group members' various contributions to the creation of intangible value (that is, the form of functions performed, assets used, and risks assumed) will vary depending on the circumstances. An MNE group member that makes more significant contributions in a particular case should, according to paragraph 6.55, receive greater remuneration relative to other members. Some important functions, including those identified in paragraph 6.56, will have special significance. Unfortunately, however, the ultimate assessment of the relative importance of contributions is a very subjective exercise — different tax administrations may have different views, which can create a risk of double or multiple taxation.

4. Remuneration Under the Revised Guidance

The OECD guidelines — and specifically paragraph 6.51 — confirm that MNE groups are free to structure their operations, including the DEMPE functions involving intangibles, as they see fit. It is not essential for the legal owner to physically perform all the DEMPE functions through its own personnel to be entitled to retain or be attributed a portion of the return derived by the MNE group from exploiting the intangibles. In practice, some DEMPE functions may be outsourced either to independent or to associated enterprises.

However, as paragraphs 6.51 and 6.71 dictate, the legal owner of an intangible will be entitled to all ex ante returns derived from the MNE group's exploitation of the intangible only if it:

- performs and controls all DEMPE functions involving the intangible;
- provides all assets, including funding, necessary for the DEMPE functions; and
- assumes all the risks related to the DEMPE functions.

Under paragraph 6.61, when one member of an MNE group funds some or all of the DEMPE functions while another member of the group performs all the relevant functions, the entity providing the funds should generally expect only a risk-adjusted return on its funding, assuming that it exercises control over the financial risk associated with the provision of funding. Paragraph 6.62 clarifies that the risk-adjusted return should be based on the cost of capital or the return of a realistic alternative investment with comparable economic characteristics. Other financing options realistically available to the party receiving the funds should also be considered.

While legal ownership does not require the performance of all DEMPE functions, there is an

For more Tax Notes International content, please visit www.taxnotes.com.

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

expectation that the legal owner can exercise control over the risks and has the financial capacity to assume the risks. However, if the legal owner neither controls nor performs the DEMPE functions, then paragraph 6.54 decrees that the legal owner would not be entitled to any ongoing benefit attributable to the outsourced functions. When the legal owner of an intangible outsources specific DEMPE functions and an associated enterprise exercises control over those functions, paragraph 6.53 states that the latter should be compensated for those functions.

5. Application to Specific Fact Patterns

The OECD guidelines also consider the application of the guidance on intangibles to specific fact patterns including (i) the development and enhancement of marketing intangibles (paragraph 6.76 et seq.), (ii) research and development and process improvement arrangements (paragraph 6.79 et seq.), and (iii) payments for the use of the company name (paragraph 6.81).

Regarding distribution and marketing arrangements, a key issue is whether the marketer or distributor is to be compensated only for providing promotion and distribution services or whether the marketer or distributor should also be compensated for enhancing the value of the trademarks and other marketing intangibles by virtue of functions performed, assets used, and risks assumed.

Regarding R&D arrangements, the transfer pricing analysis should examine whether the R&D service provider possesses unique skills and experience relevant to the research, assumes risks (for example, if the provider undertakes so-called blue sky research), uses its own intangibles, or is controlled and managed by a party other than the legal owner of the intangible. If the provider does undertake the foregoing, then compensation based on a cost-plus basis (with a modest markup) may not reflect the anticipated value of the contribution of the research team in all cases.

As for the use of the company name, the guidelines state that no payment should be recognized for transfer pricing purposes for the simple recognition of group membership or the use of the group name merely to reflect the fact of group membership. However, if the use of the name provides a financial benefit to members of the group, then the legal owner of the intangible can charge an arm's-length royalty for the use of the intangible by other members of the group. This payment should consider the financial benefit to the user of the name; the costs and benefits associated with other alternatives; and the relative contributions to the value of the name made by the legal owner and the entity using the name in terms of functions performed, assets used, and risks assumed. The emphasis is on the potential impact the user may have on the creation or enhancement of the name's value in its jurisdiction — again placing more importance on DEMPE functions than legal ownership.

D. Use or Transfer of Intangibles

The identification and examination of intangibles for transfer pricing purposes is, as paragraph 6.87 notes, generally relevant to two categories of transactions: (i) transactions involving transfers of intangibles or rights in intangibles, and (ii) transactions involving the use of intangibles in connection with the sale of goods or the provision of services.

Paragraphs 6.88 through 6.103 address the first category of transactions including (i) the transfer of intangibles or rights in intangibles, (ii) the transfer of combinations of intangibles, and (iii) the transfer of intangibles or rights in intangibles in combinations with other business transactions.

Controlled transactions involving the transfer of rights in intangibles may involve a transfer of all rights in the intangibles — for example, a sale of the intangible or a perpetual, exclusive license — or only limited rights — for example, a license or similar transfer of limited rights to use an intangible subject to geographical restrictions, limited duration, or carrying restrictions on the right to use, exploit, reproduce, further transfer, or further develop the intangible.

Importantly, the labels applied to transactions do not control the transfer pricing analysis — instead, the facts and circumstances of each individual case must be examined.

Restrictions in license and similar agreements regarding the use of an intangible in the development of new intangibles or new products are often of significant importance in a transfer pricing analysis because those limitations may

For more *Tax Notes International* content, please visit www.taxnotes.com.

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

affect the value of the rights transferred and the comparability of transactions that otherwise involve identical or comparable intangibles.

Regarding transfers of combinations of intangibles, the OECD guidelines address two related issues, namely, the interaction between different intangibles (that is, some intangibles are more valuable in combination with other intangibles than on a stand-alone basis) and the importance of ensuring that all intangibles transferred in a particular transaction are identified.

Not every controlled transaction involving intangibles includes the transfer of intangibles. Rather, as is addressed in paragraph 6.104, transactions can include the use of intangibles as part of the sale of goods or the performance of services. These transactions may involve the use of intangibles by one or both parties to a controlled transaction in the manufacture of goods sold to an associated enterprise, in connection with the marketing of goods purchased from an associated enterprise, or during the performance of services on behalf of an associated enterprise.

E. Supplemental Guidance

While the principles set out in chapters I–III of the OECD guidelines apply when determining an arm's-length remuneration for the use or transfer of intangibles, those principles can sometimes be difficult to apply to controlled transactions involving intangibles. Therefore, section D of Chapter VI provides supplemental guidance for transactions involving intangibles including:

- general supplemental guidance for all transactions involving intangibles;
- specific guidance for transactions involving the transfer of intangibles or rights in intangibles;
- supplemental guidance regarding the transfer of intangibles or rights in intangibles whose value is highly uncertain at the time of the transfer;
- an approach to pricing hard-to-value intangibles; and
- supplemental guidance for transactions involving the use of intangibles in connection with the sale of goods or the provision of services (that is, when there is no transfer of rights in the intangibles).

III. Critical Analysis of the New Framework

A. Overview

The new transfer pricing standard applicable to transactions involving intangibles represents a fundamental change from the previous guidance. This will have a significant impact on the way MNEs manage their business activities when it comes to intangibles.

Moreover, readers might question whether the new standard is still consistent with the arm's-length principle in article 9 of the OECD model tax convention, which compares the conditions made or imposed in controlled transactions to conditions agreed upon between independent parties in comparable transactions under comparable circumstances.

B. Impact on Contemporary IP Structures

The guidance in the revised Chapter VI will substantially affect how MNEs handle controlled transactions involving intangibles. Crucially, the massive shift from focusing on the legal (and economic) ownership of intangibles to prioritizing functional value creation through the DEMPE concept will pressure multinationals to reconsider their intellectual property management strategy, organizational structure, and remuneration model.

MNEs may take either a centralized or decentralized approach toward the ownership and management of intangibles. Some MNEs use a mixed strategy in which some intangibles are owned by operational entities within the MNE structure (for example, full-fledged manufacturers or full-fledged distributors) while others are owned by an IP company or principal entity.

When MNE groups use IP companies to centrally manage some or all of their intangibles, the IP company frequently grants licenses to associated enterprises — and, potentially, independent enterprises — to use the intangibles in exchange for royalty payments. Under the old system, determining an arm's-length royalty often proved challenging given the unique character of intangibles.

Moreover, the development of intangibles often involved an R&D service provider that performed research services for the principal

For more *Tax Notes International* content, please visit www.taxnotes.com.

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

entity (both members of the MNE group), which acquired ownership of the results of the research before knowing whether it would generate income. Through the assumption of the research risk, the principal was entitled to ownership of the (potential) intangible resulting from the research and the related profit derived from the intangible.

Under the new guidance, labor — not capital — is the presumptive source of business profits. The provider of labor rather than the provider of capital has a residual claim to business profits. The party financing the activity receives some kind of fixed remuneration, while the remaining profits are attributed to entities performing DEMPE functions. Under the new OECD guidelines, when the entity that provides funding and assumes the related financial risks does not perform any DEMPE functions involving an intangible, it can only expect a risk-adjusted return on its funding. If that entity does not exercise control over the financial risks associated with the funding, it is not entitled to anything more than a risk-free return.

The new standard seems to discourage centralized intangible ownership models. However, if an IP company or principal entity performs all or a significant portion of the DEMPE functions, it will still be entitled to all (or a large share) of the income derived from the intangibles. Thus, the new framework incentivizes an MNE using a centralized ownership structure to not only have that central entity provide financing, but also to transfer economic activity and DEMPE functions to the entity. In other cases, MNEs may prefer to manage intangibles in a decentralized fashion, with the entities that use particular intangibles also owning those intangibles to avoid intricate transfer pricing issues and related tax risks.

Business restructurings involving existing intangibles are, however, often problematic. The taxation of (potential) latent capital gains upon the transfer of intangibles is one impediment. Also, determining an arm's-length price for the transfer of intangibles is complicated and often scrutinized by tax administrations during tax audits.

C. A Non-Arm's-Length Standard?

The new Chapter VI is part of the OECD's work on BEPS action 8, which targets cashbox companies that lack substance, are highly capitalized, and that are commonly resident in low-tax jurisdictions. Under the old guidance, these companies could become the legal owners of intangibles and claim significant amounts of royalties in accordance with the arm's-length principle. While the stated objective was to "align transfer pricing outcomes with value creation," the OECD clearly intends for the revised guidance to tackle perceived abuses.

However, as a matter of principle, the arm's-length standard in article 9 of the OECD model tax convention is not an antiabuse rule but a bilateral concept intended to appropriately allocate profits between source and residence state. By its very nature, it cannot be used to tackle abusive tax practices.

Although it is explicitly stated that the guidance in Chapter VI is tailored to help determine arm's-length conditions for transactions that involve the use or transfer of intangibles, it is more than questionable whether the new standard is consistent with the arm's-length principle.

That principle requires that the conditions made or imposed in controlled transactions are in line with the conditions that independent parties would agree to for comparable transactions under comparable circumstances. Thus, third-party behavior is the standard that associated enterprises must adhere to for the conditions of their controlled transactions to be considered proper for tax and transfer pricing purposes. The framework in the new Chapter VI does not, however, seem to enforce transfer pricing outcomes that might be expected in transactions between independent parties.

In the open market, the party that — in exchange for legal ownership — funds the development of intangibles and takes the related development risks without knowing whether the work will be successful typically has the right to enjoy the residual profit (or losses) deriving from the intangible. Under these circumstances, it should suffice that the financing entity manages the functions involving the funding, rather than requiring it to perform the underlying R&D activity for which the funding is used. Further, when the entity funding the development of an intangible lacks the ability to monitor the R&D

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more Tax Notes International content, please visit www.taxnotes.com.

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

activities performed by a service provider, the funding entity should not be expected to lose its right to receive the residual profit. Instead, the parties might agree to a variable remuneration that aligns their interests in these situations.[2]

The new transfer pricing standard applicable to intangibles goes further, requiring more substance than might be expected in transactions between third parties. Under the new standard, too much importance is placed on the production factor of labor — through the emphasis on DEMPE functions — instead of capital, putting independent and group companies on a different footing and risking distortions in resource allocations. It follows that the new standard does not enforce the conditions that independent parties would agree upon.

The new Chapter VI shifts from a model in which intangibles are owned by the entity providing the capital for the development of the intangible (and assuming the related development risks) to a model in which intangibles are owned by all members of the MNE group that perform DEMPE functions. In other words, the right to claim the residual profit depends on performing functions rather than legal ownership (that is, acquiring the intangibles via the funding of research projects).

When performing a transfer pricing analysis, the new guidance no longer focuses on assessing which entity assumes the risks of the research (which is determinative for the ownership of the intangible) or on future projections regarding the intangibles. Instead, the focus has shifted to the entity performing or controlling DEMPE functions for the intangibles.

Unfortunately, assessing the relative importance of different DEMPE functions is a highly subjective exercise and different tax administrations may arrive at different conclusions. This unpredictable outcome is very problematic for businesses and will result in chronic, long-lasting legal uncertainty. Transactions may be challenged years after they took place or long after a business model was implemented by tax administrations that have their own opinions as to which profit drivers are the most important.

Finally, since the new guidance on intangibles does not seem to be consistent with the arm's-length principle, the question arises: How does this affect the mechanism of article 9 of the OECD model tax convention that focuses on the conditions that would have been agreed upon by independent parties? Notably, contracting states will agree to perform a corresponding adjustment for the elimination of double taxation only if a transfer pricing adjustment performed by the other contracting state is consistent with the arm's-length principle. This problem becomes even more evident when considering controlled transactions involving entities resident in several jurisdictions.

IV. Conclusion

The 2017 revision of the OECD guidelines includes a new Chapter VI, which turns the transfer pricing treatment of controlled transactions involving intangibles upside-down. The new guidance is part of the OECD's work on action 8 of the BEPS project, which targeted cashboxes without substance. As analyzed above, the new framework seems to consider the arm's-length principle an antiabuse provision and the new guidelines do not enforce the standard of third-party behavior.

Under the new guidelines, the entity providing capital is left with a debt-like return while the remaining profits are attributed to entities performing DEMPE functions. When the entity that provides funding and assumes the related financial risks does not perform any DEMPE functions related to an intangible, it can only expect a risk-adjusted return on its funding. Should this entity not exercise control over the financial risks associated with the funding, it is not entitled to anything more than a risk-free return.[3] Evidently, the new transfer pricing standard in Chapter VI is favorable for large, highly industrialized countries like Germany or France that have an educated workforce that can manage intangibles' functions.

[2] *See* Andrea Musselli and Alberto Musselli, "Rise of a New Standard: Profit Location in Countries of Important Intangible Functions Managers," 24(5) *International Transfer Pricing Journal* 331 (Sept./Oct. 2017).

[3] *Id.*, at 339.

For more *Tax Notes International* content, please visit www.taxnotes.com.

These changes will significantly affect MNE groups, requiring them to review their supply chains and the way they manage their intangibles. However, the new guidance may not always have the intended effect of shifting remuneration derived from the exploitation of intangibles away from entities that centrally manage IP. Instead, the new guidance creates a real incentive to transfer economic activities to the jurisdictions where principal entities or IP companies already reside. Ultimately, the new standard is likely to cause legal uncertainty, a massive administrative burden, and (potentially) double taxation. ■

© 2018 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes International* content, please visit www.taxnotes.com.