DEMPE Functions and the RACI Concept – More Clarity or Confusion Ahead?

Intangibles are gaining more and more importance in the global value chain of multinational enterprises. In light of related developments pursuant to the BEPS Project, this article examines some challenging fields of the transfer pricing aspects of intangibles, i.e. identifying the ownership and assessing contributions to intangibles, which particularly includes the DEMPE concept. Moreover, the article outlines considerations and challenges in view of the practical application of the RACI model in a value chain or value contribution analysis, or in other transfer pricing documentation elements, and argues that the model should be applied with prudence in business practice.

1. Introduction

According to various sources, multinational enterprises (MNEs) are increasing their investments in intangible assets (rather than tangible assets) because intangibles seem to be playing a more and more strategically important role in the value creation process of an MNE. A well-maintained structure to manage intangible assets is thus key in the business setup of MNEs.

From a transfer pricing perspective, challenges occur in many areas, e.g. the identification, characterization and valuation of intangibles. One of the most controversial areas where a considerable number of tax disputes has mushroomed in the aftermath of the BEPS Project is the attribution of intangible-related profits. Compliance with the arm’s length principle in this regard means identifying entities that contribute to transactions involving intangibles and allocating intangible-related profits among those entities in the same way as it would have happened in a third-party context. Taking this as the starting point, this article describes significant developments of the BEPS Project related to the attribution of intangible-related profits, i.e. (i) identifying the owner(s) of relevant intangibles; (ii) assessing intangible-related contributions; and (iii) determining the arm’s length remuneration for said contributions, where some practical issues in an MNE are highlighted, based on experience. Lastly, this article provides practical considerations regarding the application of theories in a business context and aims to deliver some food for thought for industry practitioners, with respect to the development, enhancement, maintenance, protection and exploitation (DEMPE) functions approach and the responsible, accountable, consulted and informed (RACI) model.

2. Key Related BEPS Developments

2.1. Identifying the owner(s) of an intangible

The identification of the owner(s) of an intangible and the determination of relevant contributions to such an intangible is the necessary precondition before assigning the appropriate amount of an intangible-related return (if any) to the right contributor. However, it should be noted that this approach implicitly assumes that the amount of intangible-related return to be allocated, which is only a share of the overall return from the underlying intercompany transactions, has been determined in a justifiable way beforehand, which is not an easy exercise in business practice.

In the context of transfer pricing, the ownership of intangibles can be classified from different perspectives, the most common types of ownership being legal ownership and economic ownership. It is worth mentioning that the OECD, to avoid confusion, does not make any reference to economic ownership in its new Transfer Pricing guidelines published in July 2017 after the BEPS Project (2017 OECD Guidelines). In fact, there is no clear-cut nor internationally agreed definition for the term “economic ownership”. Consequently, what constitutes economic ownership varies across a range of countries. Nonetheless, to present a comprehensive picture, this article will cover the much-disputed topic of economic ownership. In practice, it is often the case that the legal owner of an intangible can also be regarded as its economic owner. However, different entities may be considered to have a relevant stake in legal ownership and economic ownership, respectively. Furthermore, it sometimes happens that a certain type of ownership is assigned to more than one single entity.
2.1.1. Legal ownership

In a transfer pricing analysis, legal rights and contractual arrangements form the starting point. This is also true for intercompany transactions involving intangibles. The determination of the legal owner of an intangible is fairly straightforward compared to the consideration of economic ownership, which will be discussed subsequently. The determination of legal ownership generally involves the examination of the terms and conditions of written contractual arrangements or other legal documents, such as relevant registrations, licence agreements, other relevant contracts and other indicia of legal ownership, including the contractual assumption of risks in the relations between associated enterprises as contractual parties.

Some types of intangibles can be legalized. For certain types of intangibles, the right to use may be protected under specific intellectual property laws and registration systems. Examples include patents, trademark and copyrights. As a result, the legal ownership can be identified through public records, such as patent or trademark registrations. Other types of intangibles are not protectable under specific intellectual property registration systems. However, they may be protected against unauthorized appropriation or imitation under unfair competition legislation or other enforceable laws, or by contract, for instance, trade dresses, trade secrets and know-how. In that case, legal ownership can be identified through applicable laws or governing contracts. As a rule, the legal owner will be considered as owner of the intangible for transfer pricing purposes, unless the facts and circumstances encountered provide different indications.

However, if no legal owner of the intangible is identifiable after examining relevant laws or written contracts, it is suggested by the OECD that the entity in an MNE group that effectively controls important decisions concerning the exploitation of the intangible and which has the de facto capacity to restrict others from using the intangible is considered as the legal owner of the intangible for transfer pricing purposes. It is worth iterating that legal ownership, albeit important, is just the starting point of a transfer pricing analysis involving intangibles. As a key takeaway from the BEPS Project, legal ownership alone is not considered enough for an entity to ultimately retain the full amount of intangible-related profits.

2.1.2. Economic ownership

The concept of economic ownership is much more disputable in the field of transfer pricing than the concept of legal ownership. It could be argued that economic ownership is linked to the notion of “economic fairness.” In contrast to legal ownership, economic ownership could be more closely linked to the ultimate retention of intangible-related returns. An entity that invests resources in terms of personnel, decision-making and financial funds into research and development (R&D) activities, for example, thus contributing to the development or maintenance of technology-related intangibles, should be entitled to a fair share of intangible-related returns for its contributions. In other words, if one entity makes valuable contributions to a transaction involving intangibles, for example, by providing assets or financial funds to R&D projects conducted, bearing certain risks and performing specific functions related to said R&D activities, this entity becomes the economic owner (or co-owner) of the intangibles created through the R&D activities. In prior years, the basic premise on which the economic ownership claim was based in a contract R&D context may often have been the bearing of costs and expenses with respect to the R&D activities performed by affiliated companies in an MNE group.

On the other hand, fiscal authorities in different countries interpret the ambiguous term “economic ownership” in different ways. Those diverging views result from the decisive relevance which may (or may not) be attributed to the provision of funds to the value creating activities under consideration. Some OECD member countries may be in favour of the formal standpoint that funding an activity like R&D in itself may be sufficient to justify the economic ownership claim, while many others also require that intangible-related principal functions need to be performed in addition.

The OECD sides with the latter group of member countries and shows a clear preference for the “substance-over-form” approach in its new guidance provided under the BEPS Final Report on Actions 8-10. The OECD does not use the term “economic ownership” in its guidance, but puts a lot of emphasis on active functional involvement when elaborating the substance requirement in the.

-----------------------------
4. OECD Guidelines, supra n. 3, at para. 6.34.
5. Id. at para. 6.40.
8. OECD Guidelines, supra n. 3, at para. 6.42.

9. Economic ownership is a concept full of controversies and diverging interpretations in practice. The OECD Guidelines (2017) do not choose to include this concept, while the UN Manual on Transfer Pricing (2017) links this concept to the right to share in the return from economically-owned intangibles. See United Nations Practical Manual on Transfer Pricing for Developing Countries para. B.2.3.2.67 (United Nations 2017) [hereinafter UN Manual]. Despite this observation, the authors decided to elaborate the concept of economic ownership, in particular with the consideration in mind that it is an important aspect in the theory related to intangibles, albeit disputable.


11. Lagarden, supra n. 10, at p. 337.


13. Helderman et al., supra n. 12, at p. 359.
context of the transfer pricing aspects of intangibles.\textsuperscript{14} In other words, in order to justify the ultimate entitlement to intangible-related returns, the entity concerned should be able to demonstrate that it is performing and/or controlling important functions related to the intangibles in question (i.e. the DEMPE approach, which will be described in more detail in the next section). Some scholars believe that the functional involvement required to manage the DEMPE of valuable intangibles goes beyond the functions required to manage the underlying R&D risks.\textsuperscript{15} Notwithstanding the importance of certain functions performed in the context of intangibles, it would be misleading to presume that functions have more weight than risks and assets in a transfer pricing analysis. Rather, the OECD makes it clear that functions, risks and assets are equally important in the analytical framework of transfer pricing,\textsuperscript{16} and the authors of this article certainly agree with this consideration. Indeed, functions, risks and assets work in such an integrated way that they should not be analysed in isolation. Essentially, all these factors are relevant to determine the ultimate allocation of intangible-related profits. For example, the assumption of R&D risks is supported by a sufficient degree of functions performed and assets used for the management and control of such risks. Consequently, it seems intuitive that a mere shell company, with excessive capital endowment but little additional functionality, can by no means justify the retention of all intangible-related profits resulting from intercompany transactions in which it is involved.

In a nutshell, in a post-BEPS world, having a legal title or a mere provision of funding cannot ensure that the concerned entity is able to ultimately retain a substantial part of the intangible-related profits. In an accurate description of the actual transaction involving intangibles, economic ownership, as represented by the actual conduct of the involved entities with respect to (contract) R&D activities for example, prevails over legal ownership, which is defined by legal and contractual terms and conditions.

### 2.2. Assessing intangible-related contributions

After identifying the entities claiming legal and/or economic ownership, the next step would be to assess the contributions these entities make towards the creation of the intangibles’ value. The involved entities should be properly remunerated by allocating the intangible-related profits – which need to be separated from the overall transactional profits beforehand – in accordance with the relative contributions that they have made. As mentioned previously, the legal title to the intangibles may not by itself ultimately entitle an entity to a major amount of intangible-related profits. Instead, the functional contributions behind the economic ownership notion in the form of functions performed, risks assumed and assets used are relevant for the determination of the ultimate entitlement to a certain share of the intangible-related profits to the transaction parties involved. In the new transfer pricing guidelines resulting from the BEPS Project, the OECD has identified certain principal functions within the value chain in relation to intangibles. It has also clarified that the financial funding function is subordinate and the intangible-related profits to be allocated to the funding function should be limited. In the following section, a more detailed background regarding the principal functions related to intangibles is provided, as well as a guiding framework of rules to allocate intangible-related profits to those functions.

#### 2.2.1. The DEMPE approach and its variations

As outlined by the OECD, when determining the entity or entities within an MNE group that are ultimately entitled to share in the returns derived by the group from exploiting intangibles, a related issue is which entity or entities within the group has or have ultimately borne the costs, investments and other burdens associated with the DEMPE of intangibles.\textsuperscript{17} Though it is not expressly stated by the OECD, this reflects the notion of economic ownership.\textsuperscript{18} Following this line of thinking, the OECD has listed the important functions related to intangibles, i.e. DEMPE functions, that are ultimately decisive with respect to the allocation of intangible-related profits. From a cash flow perspective, the legal owner of an intangible may receive the proceeds from the exploitation of that intangible in the first place. But the legal owner would then have to appropriately compensate those entities that have made relevant functional contributions to the DEMPE of the intangible in question. In the end, the involved entities, whether they are the legal owners or economic owners, should retain an amount of intangible-related profit consistent with their respective contribution to the value creation related to the intangible. In this way, the arm’s length principle is accurately applied to intangibles in a transfer pricing context, according to the 2017 OECD Guidelines.

On the other hand, the UN Manual describes DAEMPE functions, thus slightly modifying the OECD approach, to denote the important functions related to intangibles, i.e. the development or acquisition of intangibles from third parties, their enhancement, maintenance, protection and exploitation.\textsuperscript{19} The inclusion of “acquisition” as an additional important function is not meant to diverge from the general guidance contained in the OECD BEPS Final Report on Actions 8-10, but rather to clarify that intangibles can be acquired by an MNE group either through (self-)development activities or by an outright acquisition from a third party.\textsuperscript{20}

Moreover, China has introduced the concept of DEMPEP functions by defining “promotion” as another extension of the initial OECD approach in its Bulletin 6 “Implementation Measures for Special Tax Adjustments and


\textsuperscript{15} Helderman et al., supra n. 12, at p. 362.

\textsuperscript{16} OECD Guidelines, supra n. 3, at para. 1.39.

\textsuperscript{17} OECD Guidelines, supra n. 3, at para. 6.32.

\textsuperscript{18} Kroppen, supra n. 7.

\textsuperscript{19} UN Manual, supra n. 9, at paras. B.1.6.12. and B.5.3.13.

\textsuperscript{20} Id., at para. B.5.3.14.
Mutual Agreement Procedures” released in April 2017. According to Bulletin 6, entities making contributions to the DEMPEP of important intangibles should be granted proper intangible-related returns. Otherwise, the Chinese tax administration will make an adjustment to the taxable income of the Chinese entity under consideration. By officially recognizing promotion as a separate function crucial for the value creation of intangibles, China shows a clear intention of targeting the added value derived from promoting foreign brands and products on the Chinese market. It is expected that China will increase tax resources on auditing the marketing activities performed locally and the related marketing intangibles created.

As further described by the OECD, certain important functions within the DEMPE context have special significance. Yet, the specific nature of any fact pattern is subject to a case-by-case analysis before a final conclusion can be reached about the relative importance of one particular DEMPE function over another. Generally speaking, those important functions with special significance include the direction of and establishing priorities for creative undertakings, determining the course of “blue-sky” research, exercising control over strategic decisions regarding intangible development programmes, the design and control of research and marketing programmes, management and control of budgets, making important decisions regarding the defence and protection of intangibles, or conducting ongoing quality control over functions performed by independent or associated enterprises that may have material effects on the value of an intangible.

Though it might appear so at a first glance, the concept of DEMPE is not limited to functions. It reflects a contribution of assets and/or assumption of risks as well. Consequently, entities physically performing a full set of DEMPE functions and assuming respective DEMPE-related risks with respect to relevant intangibles will certainly be entitled to the entire or at least a major share of the intangible-related profits.

On the other hand, the OECD makes it clear that bearing costs related to R&D activities does not, in itself, create an entitlement to intangible-related returns. It is important that the entity entitled to intangible-related returns also bears the costs of respective R&D activities. However, an entity that bears intangible-related costs, but does not perform or control important functions or important risks associated with the funding activities, will not be remunerated in the same way as entities that do. For the mere provision of funding, an entity will either obtain a risk-free return or a risk-adjusted return, if that entity also assumes financial risks related to the funding. Nonetheless, it is arguable that this does not necessarily reflect market reality among independent third parties, for example, with a view to financial investors in venture capital undertakings or in the insurance industry.

2.2.2. Risk control functions

It is not essential for an entity to conduct all DEMPE-related activities in an intangible context through its own personnel to ultimately retain proceeds from the exploitation of the intangible. It is not uncommon to outsource certain functions in a third-party scenario, which could also happen in the context of MNEs. Therefore, not only should entities physically performing the DEMPE-related activities be properly remunerated, but also entities performing important control functions related to the DEMPE of intangibles. This latter group should also be compensated on an arm’s length basis. In that respect, another very important concept in the framework of Chapter VI of the 2017 OECD Guidelines is the risk control function when determining the arm’s length remuneration.

According to the revised Chapter I of the 2017 OECD Guidelines, an entity assuming a specific risk would need to exercise control over the risk as well as have the financial capability to assume the risk. The risk control feature requires the capability to perform decision-making functions and the actual performance of such functions related to that specific risk, particularly as to whether and how to take the risk, whether and how to respond to it and whether and how to mitigate it. To fulfil the requirement of possessing the capability to perform decision-making functions and actually performing such functions, the entity needs to have capable and authoritative personnel to execute and enforce the decision-making process, i.e. the so-called decision-makers. Clearly, the risk control concept underlines the important role of human capital in value creation. Besides, the financial capability to assume risk is defined in practical terms as access to funding to take on or to lay off the risk, to pay for risk mitigation functions and to bear the financial consequences of the risk, if it materializes.

In view of the risk control concept, contract R&D is still a feasible set-up to structure intangibles in an MNE in a post-BEPS world. In a contract R&D setting, the principal entity outsources R&D work to an associated enter...

23. OECD Guidelines, supra n. 3, at para. 6.56.
27. Kroppen, supra n. 7.
29. Id., at para. 1.60.
30. Id., at para. 1.65. It is also pointed out that day-to-day risk mitigation can be outsourced, but control of risk related to the risk mitigation activities is required in this case.
31. Id., at para. 1.66.
33. OECD Guidelines, supra n. 3, at para. 1.64.
prise (the performer company) to develop intangibles. As a result, the principal entity owns the intangibles developed in the R&D activities and receives proceeds (or bears losses) from exploiting the intangibles. On the other hand, the principal entity pays the performer company a fixed amount of money for its performance of said R&D activities. Throughout the contract R&D transaction, the principal entity takes the lead, places the order, provides guidance and assesses the quality of the R&D work on a regular basis, while the performer company conducts day-to-day research work following the guidelines and supervision of the principal entity. Importantly, only the principal entity is responsible for the success or failure of exploiting the intangibles on the market. While the performer entity only bears the business operation risk of its performance, i.e. ensuring that a certain level of quality is constantly met in conducting the R&D work, such risk cannot be compared with the risks that the principal entity takes over with the whole contract R&D activities, as they are linked to subsequent DEMPE functions related to these activities. That is why the performer entity is only entitled to a pre-determined amount of intangible-related profits and the residual of the intangible-related profits, showing a certain level of volatility on the market side, lies with the principal entity.

When structuring the contract R&D, it is very important to ensure that the principal company assumes important risks related to the DEMPE of intangibles to reach the viable profit allocation outcome as described above. From a practical perspective, the principal entity should exercise sufficient control over the outsourced R&D activities, by bearing respective costs and having employees with capability and authority to decide, for example, whether to engage the performer company, in what type of R&D projects it should be engaged, what the budget assigned to the R&D projects should be and also to assess and control the outcome of the R&D activities. On the other hand, a situation is conceivable where the substantial control over the R&D projects, initially exercised by the principal company, could gradually shift to the performer company over the course of the R&D projects, thus leaving the principal entity potentially with nothing more than formally approving decisions made by the performer company, or merely setting up the policy environment relevant for managing the risks involved with the DEMPE functions conduct. Then, the performer company is (or becomes) the party in substance exercising the risk control function and, consequently, it should be remunerated additionally to reward such performance, to comply with the arm’s length principle.

Some scholars have correctly summarized three categories of functions or activities related to the creation of intangible values from a managerial decision-making perspective. They are: (i) operational (execution) level activities, namely the day-to-day administration or contract R&D activities; (ii) tactical (procedure) level activities, i.e. functions that create value or value-adding activities, e.g. management of staff, monitoring the performance of the R&D activities, controlling budgets, setting medium-term policies; and (iii) strategic (policy) level activities, that is, activities of an executive board nature, which have a major impact on the whole organization, e.g. strategic decision-making, without necessarily having the required expertise to steer, control and monitor the ongoing R&D activities. As an observation of the BEPS Project development with respect to transfer pricing aspects of intangibles, the important functions established by the OECD are the operational-level activities and the tactical-level activities, rather than the high-end activities at top management or board level.

In a nutshell, control over risks and the performance of DEMPE functions are the two main areas of consideration when determining to whom and how much intangible-related profit is to be allocated. Accordingly, at the centre of the debate is the identification of the decision-maker(s), i.e. the entity that is legitimately entitled to the major part of intangible-related profits, because of the new development of the OECD BEPS Project. In that respect, the RACI model, a tool used by MNEs in their business for identifying the role of entities (i.e. which entity in the group is responsible, accountable, consulted and informed) for a business unit and/or in a business process concerned, might be practically useful in a transfer pricing analysis going forward.

2.2.3. The RACI model and alternatives

The RACI model is one of many business management tools to assign roles and responsibilities to participants regarding chief tasks and those tools are collectively known under the headline “responsibility assignment matrix”. The responsibility assignment matrix is, and has been, widely used in project management for decades and its origin can be traced back to the early 1970s. From the perspective of transfer pricing, the responsibility assignment matrix could also be a useful technique in a value chain analysis where there is a need to assess the participation of involved entities and the value each entity has added in the controlled transactions considered. The potential usefulness of the RACI model in the application of the transactional profit split method (TPSM) has been briefly touched upon in the 2014 Discussion Draft on TPSM and in other literature sources. However, the application of the RACI model involves a substantial amount of judgement from the business side. Being prudent, the OECD does not officially recognize the RACI model, nor does it reject it expressly for use in a transfer pricing analysis. Likewise, the authors agree...
that the RACI model is certainly useful in analysing transfer pricing aspects of intangibles in a post-BEPS world, however, its usefulness should not be overestimated. The following outline is aimed to present an overview of the RACI model and its alternatives, merits and limitations that a transfer pricing analysis involving intangibles may reveal when applying the RACI model in practice.

The responsibility assignment matrix describes the roles and responsibilities of resources to conduct a business process. Therefore, a responsibility assignment must consider three elements, i.e. roles, resources and business processes. For the implementation of a responsibility assignment matrix, usually various resources are listed horizontally, key projects (or business processes) are listed vertically, and the roles (or responsibilities) of each resource are then mapped in the matrix in each business process. In different responsibility assignment matrices, the covered roles (or responsibilities) may vary. For example, in the RACI model the covered roles are defined as responsible, accountable, consulted and informed, as the acronym indicates. Depending on the level at which the matrix is implemented, the resources could be personnel, departments, business units, legal entities, etc. The business process is designed to reflect the key milestones (or key tasks) of a project or ongoing business operations in an MNE. In practice, the responsibility assignment matrix will only be applied to relevant projects and processes, i.e. those that are linked to the strategic objectives of the entity or unit under consideration.40

In the RACI model, the four roles covered, i.e. responsible, accountable, consulted and informed, carry specific meanings in a business management context. "Responsible" describes those employees who do the work to complete a task. At least one "responsible" role (the one who really does the job) should therefore be assigned in each business process. It is optional to have a "support" function, which is meant to help the "responsible" to complete a business process or certain tasks within the latter. In that respect, the RACI model may be extended to a "RASCI" variation. "Accountable" implies the employee who is ultimately answerable for the correct and thorough completion of a given task, and the one who delegates the work to those bearing the responsible role. In other words, an "accountable" manager must sign off (approve) the work that the responsible provides. In business, there must be only one accountable specified for each task or deliverable, to ensure a transparent division of labour and clear understanding of who is responsible for what. From a transfer pricing perspective, the "accountable" role closely resembles the decision-maker in the risk control function. "Consulted" refers to those whose opinions are sought, typically subject matter experts, and with whom there is two-way communication. Finally, the "informed" are those who are kept updated on the progress or status of a given task, project or process (often only on the completion of a task or deliverable) and with those persons there is just one-way communication. For transfer pricing purposes, the "informed" only plays a passive role in the process as an information recipient. Therefore, this role does not contribute to the value creation in the process or project under consideration. With a view to the categories of functions or activities from a managerial decision-making perspective outlined in the preceding section, it should be borne in mind that, in business practice, RACI roles will be exercised in parallel at an operational, tactical and strategic level and also in the performance of the different D(A)EMPE(P) functions as described in section 2.2.1., by the same or different decision-makers.

Similar to the RACI model, there are several variations to the RACI participation types-responsibility assignment matrix. For example, the PACSI model is an adapted version where the roles covered are: perform (responsible), accountable, control, suggest (consulted) and informed. In comparison to the RACI model, the "control" function is added to represent the person or function reviewing the result of an activity, other than the accountable. The control role has a right of veto, which has a binding effect. Therefore, it is very useful for the analysis of organizations where the output of activities under the accountability of a single person can be reviewed and vetoed by multiple stakeholders, due to the collaborative nature of the organizational culture.41 Moreover, the DACI model is another version that has been used to describe centralized decision-making in organizations, and to clarify who can reopen discussion processes in this respect. The DACI model contains four roles: driver, approver (accountable), contributor (responsible) and informed, where the driver is the one who steers the whole project.

Translated into the transfer pricing language, the RACI model can serve as a helpful instrument to describe actual transactions. Table 1 shows an example of using the RACI model to map roles and responsibilities of affiliated entities involved in the DEMPE of intangibles. It should be borne in mind, however, that the development of the RACI matrix relies on a substantial amount of business judgment to identify the major contributing entities, the economically significant functions in the research or marketing process and, most importantly, the role of the entities involved in the DEMPE of intangibles. At this stage, the RACI model remains an instrument to perform a more detailed functional analysis at a qualitative level and this can present a clearer view of which entity is the R&D or marketing performer and which entity is the decision-maker behind the activities conducted.

An innovative approach is the implementation of the RACI model into a value chain analysis as described in the following section, by combining the mapping of roles


40. An entity or unit under consideration in this context may be certain personnel, departments, business units or legal entities, etc.

in business processes with numerical weights indicating the relative contribution of the functions performed and roles exercised in an R&D or marketing project, to estimate the relative contribution of each entity to the R&D or marketing project under consideration at a quantitative level. Again, for assigning the relative weight to each function and role, collecting and aligning all relevant expert opinions from the business managers involved represents considerable work.

Many literature sources have confirmed that business insights are important and essential for a reliable performance of a transfer pricing analysis. That certainly supports the notion of the usefulness of the RACI model in a transfer pricing analysis. However, it cannot be denied that the RACI model is not a rigorous economic exercise. It rather requires a substantial amount of subjective judgment in its application, especially if it is used for value chain analysis purposes. Therefore, it is conceivable that tax authorities may have serious doubts about accepting a transfer pricing outcome solely relying on a RACI model-supported transfer pricing analysis. Therefore, it is the authors’ view that the RACI model cannot replace a comprehensive and sound arm’s length analysis in business practice. However, it can be considered as a helpful instrument to accurately describe the actual transactions and to corroborate the arm’s length nature of the concerned transaction, as described in the subsequent section in more detail.

2.2.4. Practical considerations

From an industry practitioner’s perspective and going forward, it is important to better understand and consider the scope and limitations of the DEMPE approach, as well as the RACI model, described in the sections above. The OECD has taken a clear stance by adopting an unprecedented prescriptive approach to transfer pricing documentation in Chapters V and VI of the 2017 OECD Guidelines. This approach has been successively adopted and even extended further by different legislators and fiscal authorities around the world, meaning that it unfortunately deviates from the internationally agreed common basis reached in the BEPS Project in October 2015. Therefore, the authors expect that companies will continue to adapt to this growing trend, by establishing additional or entirely new documentation materials and content to support their arm’s length position, employing the DEMPE approach and potentially the RACI model as well, thus reflecting the new concepts referred to by the OECD and staying compliant in view of increasing domestic transfer pricing documentation requirements.

The following figure sets out to explain and summarize the linkages between the DEMPE approach, the RA(S)CI model and transfer pricing documentation. The approach and the model both have an internal focus, as they are dealing with the documentation related to certain capabilities, competencies, processes and structures of an entity or unit under consideration in a transfer pricing context.

The qualitative DEMPE functions concept and its variants show function-related and structure-related features in the sense of answering the “Who is doing what?” question. In that respect, function is related to the role performed/responsibility taken by certain decision-makers (e.g. individuals or teams). Tasks and their practical performance/conduct also fall under this function-related category (i.e. in the sense of physically exercising a function). The structural feature relates to the organizational setting (e.g. organizational units, i.e. decision-making bodies (e.g. boards, committees), departments (e.g. R&D, production, marketing, sales) or entities) in which people operate and which provides the infrastructure to a business process performed, to conduct an intercompany transaction.

At the same time, the DEMPE functions concept clearly displays process-related features also, thus reflecting the answer to the question “How are things done?”. That is, the development, management (i.e. planning, monitoring, steering) and the organization (i.e. establishment) of the business processes i.e. workflow(s) employed in intercompany transactions. A DEMPE function, as such, can also be considered as (part of) a business process. Obviously, the function, structure and process features are linked to the conduct of intercompany transactions, as shown in Figure 1.

However, from the authors’ viewpoint, it would render the DEMPE functions approach and the RACI model utterly meaningless in business practice and transfer pricing documentation, if one were to apply it as a minute, “atomistic” description of a single intercompany transaction as such. This is because the DEMPE approach and the RACI model can be applied to more or less aggregated levels of business processes under consideration, even down to the most detailed level of an intercompany transaction. However, in...
that case, the practical challenge would be to determine how the lower-level analysis results and the relative value contributions provided by different transaction partners should be aggregated to convey a meaningful overall result, i.e. without getting lost in a host of documentation details, including impressive excel sheets, in case of a quantitative approach, as outlined below. It is also important to bear in mind that the value of intangibles is jointly created by an interplay of DEMPE-related functions and respective contributions. The relative importance and extent of such contributions by DEMPE function may vary based on the individual facts and circumstances of the overall case at hand. Therefore, applying the DEMPE approach on its own, with or without an integration of the RACI model, as a substitute for a more comprehensive comparability analysis may seriously undermine the reliability of the respective TP documentation or TP outcome, if individual DEMPE functions or related (incremental) contributions are represented in isolation only, thus failing to appropriately capture the “full picture”, including the interrelation of all DEMPE functions.

As a potential level of analysis underlying the DEMPE approach, the RA(S)CI model refers to people (their function and/or role; also, in the sense of “significant people functions”) and organizational structure (i.e. the hierarchies/organizational units that engage in decision-making), thus mirroring the function- and structure-related features of DEMPE functions in carrying out intercompany transactions, as explained above.

Moreover, as an analytical and descriptive tool, the RA(S)CI model is an integral part of a value chain, value contribution or DEMPE analysis as outlined in Figure 1. Using the DEMPE functions approach and the RA(S)CI model to qualitatively describe intercompany transactions and parties’ conduct from a sufficiently high-level perspective can make a comparability analysis more comprehensive, or enhance or extend a function and risk analysis as a more specific TP documentation element. In this regard, the DEMPE approach can even be applied as a general tool for TP documentation, i.e. beyond the mere scope of intangible-related transactions and the attribution of intangible-related returns, as described in Chapter VI of the 2017 OECD Guidelines.

Also, and going beyond the qualitative description level, the RA(S)CI model can be employed as an anchor for quantification of the TP documentation elements mentioned. When distinct percentage weights are attributed to different RA(S)CI roles (“scoring approach”), this can enable and facilitate the relative quantification of value contributions per business process, in relation to value drivers identified, and assigned to entity types involved, or in a more detailed characterization of the DEMPE of intangibles exercised by transaction parties involved. Such quantification at a sufficiently high-process level may, among other factors, also serve as a basis for the application of TPSM.44 However, a (relative) quantification does not necessarily add value “by definition” to the TP documentation provided by the taxpayer. Hence, from the authors’ perspective, it clearly appears to be overdone, if a quantitative value chain, value contribution or DEMPE analysis would deliberately be requested by tax authorities going forward.

Therefore, DEMPE functions on the one hand and RA(S)CI roles exercised within the DEMPE functions and business processes, on the other, reflect different levels of analysis and using them can support the documentation of an attribution of intangible-related returns in a more or less detailed fashion. Despite its subjective nature, the DEMPE approach has received widespread attention among tax authorities and companies over the last 3 years, probably to the surprise of the OECD. According to one of the author’s experiences, requests for documentation in this regard are now even set in current tax audits covering the years before the respective Final Reports on the BEPS Project were published in October 2015. It is conceivable that tax authorities consider this as a means to establish a better negotiation position with the taxpayer in an already complex audit situation, where it is obvious that not all the facts and circumstances presented by the taxpayer can be interpreted in a straightforward, objective and unambiguous way in hindsight by the tax authorities involved. Companies need to find answers (and do) to satisfy these novel documentation and audit requests, as mentioned above.

44. OECD, supra n. 3, at p. 23 et seq.
3. Conclusions
In a post-BEPS world, a large number of changes have emerged with respect to transfer pricing aspects of intangibles, entailing several uncertainties. More and more tax disputes around the allocation of intangible-related profits are ongoing, driven by these recent changes.

As far as the BEPS development is concerned, it is obvious that legal ownership alone and a mere provision of funding is not regarded by the OECD as enough to justify an ultimate entitlement to intangible-related profits. The entity that provides funds will either obtain a risk-free return, if it does not bear any financial risks related to the funded R&D activities, or a risk-adjusted return, to reflect the additional financial risks borne, which appears to be disputable, as indicated in section 2.2.1. To retain a substantial share of intangible-related profits, an entity would need to possess substance with respect to the DEMPE of intangibles in the form of functions performed, risks assumed and assets used, according to the 2017 OECD Guidelines. Furthermore, an arm’s length condition of intra-group transactions involving intangibles is that the associated entities have the appropriate functionality and resources to control DEMPE-related risks, i.e. their own employees need to have appropriate knowledge to add value and control the relevant risks, if the entity does not perform the R&D activities itself, for example. On the other hand, a rather broad grey area exists, for example, how to determine specifically intangible-related profits in the first place and then, how to allocate such intangible-related profits where several entities perform DEMPE functions or assume DEMPE-related risks, etc.

Nevertheless, well-established business management tools can also be useful in a transfer pricing analysis involving intangibles, and even beyond. A prominent example in this regard is the RA(S)CI model. On the one hand, the RA(S)CI model can help to describe a differentiating view on contributions that certain entities have made to a given task, project or business process, and the outcome is likely to reflect business reality in a more comprehensive manner. On the other hand, an application of the RA(S)CI model requires a detailed and comprehensive process analysis, as well as discretionary views and judgments from management’s side so, as such, it does not represent a watertight economic study. As far as this article is concerned, the RACI model gains its relevance and importance in transfer pricing analysis by supporting a functional and comparability analysis according to Chapter III of the 2017 OECD Guidelines, and a value chain, value contribution or a DEMPE analysis. However, in no way can the RACI model on its own be a substitute for an arm’s length test. Likewise, if the DEMPE approach on its own is not applied properly, it may also result in misleading documentation and/or unreliable TP outcomes. The authors believe that tax authorities will ask for extra information on DEMPE functions beyond the three-tiered approach to TP documentation endorsed by the OECD. Given the tension in the post-BEPS tax environment and the DEMPE approach per se being very controversial, more tax disputes in this respect can be expected in tax audits.