

# EU and OECD aspects of IP-regimes

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## Timeline

**2000 – 2010 From EU Lisbon Strategy to Europe 2020**

**2006 – EC Communication on R&D tax incentives**

**2007 – EU Code of Conduct approvals**

**2008 – EU State aid approval Patent box Spain**

**2013 – German concerns....**

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25

## Timeline continued

**2013 – EU concerns on patent regimes UK and Cyprus**

**2013 – EU Code of Conduct review all patent regimes**

**2013 – OECD BEPS action point 5: harmful tax practices**

**2014 – EC State aid investigations**

**2014 – Results EU, EC and OECD?**

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26

## 2006 EC Communication on R&D tax incentives COM(2006)728

**Aim: EU R&D investment 3% of GDP by 2010 (2% from private sector)**

**Tools: (amongst others) tax incentives**

**EU compatibility required: fundamental freedoms / state aid**

**No territorial restrictions allowed**

**No restrictions on potential beneficiaries**

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## 2006 EC Communication on R&D tax incentives

Design recommendations:

Corporate tax (super) deductions / accelerated depreciation

Corporate tax credits / tax refunds

Wage tax reductions for R&D staff

**Focus on R&D expense side. IP income regimes?**

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## 2003 – 2008: EU Council Code of Conduct Group on patent boxes

- Approval: France - royalty regime 2003
- Approval: Hungary - royalty regime 2005

No need for assessment:

- Netherlands 2007
- Belgium 2008
- Spain 2008
- Luxembourg 2008

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## 2008: EC State aid approval for Spanish patent box: no aid (N480/2007)

**Qualifying IP:** self-developed technological IP: patents, secret formulae or processes, designs or models, plans, or information concerning industrial, commercial or scientific experience.

**Not qualifying:** income from acquired IP, income from trade marks, copyright of literary, artistic or scientific work including cinematograph films, image rights, software, lease of industrial, commercial or scientific equipment

**Taxable base:** 50% exemption on gross income, Development costs fully deductible from the general taxable income at the regular rate.

**Effective tax rate:** 15%

**Cap:** eligible income at six times development costs

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## 2008: EC State aid approval for Spanish patent box: no aid (N480/2007)

Derogation from the ordinary corporate taxation rules

Open to any undertaking

Irrespective of size, legal structure or sector

The fact that not every undertaking decides to self-develop a qualifying intangible asset merely reflects and economic reality

Some undertakings may profit from the measure more than others but this does not necessarily make the measure selective

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## 2007 - 2014 EU Code of Conduct Group vs Switzerland

EC State aid decision C(2007)411

Holding, management, mixed companies

Pressure leading to Swiss proposals to amend / abolish regimes  
(including principal structures and finance branche rules)

Corporate Tax Reform III 2015:

Introducing a **license box** with advantageous tax rates applicable  
to royalties and other intellectual property

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## 2013 – German concerns in the EU Council



Wolfgang Schäuble  
German Minister of Finance

"IP regimes lead to unfair competition for foreign investment"

Source: Tax Notes International, July 29, 2013

"That's no European spirit. You could get the idea they are  
doing it just to attract companies."

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## 2013 - 2014: EU - EC - OECD actions

### EU Council Code of Conduct Group

- CY, UK, BE (amendment)
- EC: potentially harmful – Group: no consensus
- 'IP regimes reduce tax on highly mobile activity without incentivizing significant additional R&D&I activity'
- Review all and report to ECOFIN December 2014

### European Commission State aid

- 'the Commission has received indications that special tax regimes seem to mainly benefit highly mobile businesses and do not trigger significant additional research and development activity'
- Review all

### OECD Forum on harmful tax practices

- BEPS action point 5
- 'Supporting investment in knowledge capital 2013' questioning the effectiveness of IP regimes. May attract mobile income to a jurisdiction rather than substantial R&D activities.
- Review all and report to G-20 September 2014

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## Patent regimes under review 2014

### EU and EC:

<b>ES 2008</b>	<b>HU 2003</b>
<b>FR 1971</b>	<b>NL 2007 (2010)</b>
<b>BE 2008</b>	<b>LU 2008</b>
PT 2014,	UK 2013
CY 2012	MT 2010

### OECD:

CH Nidwalden 2011

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## 2013-2014 EC State aid review

Criteria and concern	Review de jure and facto
Criteria art. 107 TFEU	Review de jure
1. Advantage	Review de facto:
2. Selective	✓ name companies
3. State resource	✓ sectors
4. Distort competition	✓ content of ruling
✓ Patent box Spain precedent (N480/2007)	✓ underlying documents including facts on activities, functions and risk
✓ EU Procedural Regulation LU information injunction	✓ qualifying income and benefit

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## 2013-2014 EU Code of Conduct review

Criteria	Review de jure and de facto
Criteria Council Code of Conduct 1997	<ul style="list-style-type: none"> <li>• focus on substance: following OECD FHTP</li> <li>• focus on ringfencing: foreign versus domestic beneficiaries</li> </ul>
1. Ringfencing I	
2. Ringfencing II	<ul style="list-style-type: none"> <li>• effective tax rate not relevant</li> </ul>
3. Substance	
4. Profit allocation	
5. Transparency	

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## 2013-2014 OECD FHTP – BEPS 5 review

Criteria	Review on substance
<p>Guiding criteria</p> <ol style="list-style-type: none"> <li>1. No or low effective tax rate</li> <li>2. Ringfencing</li> <li>3. Lack of transparency</li> <li>4. Lack of effective exchange of information</li> </ol> <p>BEPS action point 5: ...improving transparency,</p> <ul style="list-style-type: none"> <li>• including compulsory spontaneous exchange on rulings related to preferential regimes, and on</li> <li>• requiring substantial activity for any preferential regime.</li> </ul>	<p>In current TP approach: profit allocation in the box on the basis of</p> <ul style="list-style-type: none"> <li>• important functions</li> <li>• legal ownership and</li> <li>• economic risk</li> </ul> <p>Does this mean: substance or significant development and active management?</p>

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## Elements of the reviewed IP regimes

<b>Qualifying IP</b>	<p>Safe?</p> <ul style="list-style-type: none"> <li>• self-developed patented IP</li> <li>• self developed non-patented know how (technological IP)</li> <li>• acquired IP + further development</li> </ul> <p>Concerns EU and OECD?</p> <ul style="list-style-type: none"> <li>• acquired IP without further development</li> <li>• IP from related party outsourcing</li> <li>• any copyright of literary, artistic or scientific work including cinematograph films,</li> <li>• any trade mark, brandname, logo</li> <li>• software and internet domain names</li> </ul>
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## Elements of the reviewed IP regimes

<b>Eligible income</b>	<b>Safe?</b>
	<ul style="list-style-type: none"> <li>• direct royalty</li> <li>• embedded royalty</li> <li>• capital gains</li> </ul>
	<b>Concerns EU and OECD?</b>
	<ul style="list-style-type: none"> <li>• transfer pricing approach</li> <li>• formula-based approach</li> </ul>
	<b>Solution?</b>
	<ul style="list-style-type: none"> <li>• limit eligible income to eligible development cost ratio?</li> <li>• safeharbours ?</li> </ul>

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## Elements of the reviewed IP regimes – safe?

<b>Tax incentive</b>	<ul style="list-style-type: none"> <li>• tax base exemption for eligible income up to</li> <li>• 50% - 80% - 100%</li> </ul>
<b>Effective tax rate</b>	<ul style="list-style-type: none"> <li>• 15% - 10% - 5% - 2,5% - 0%</li> </ul>
<b>Cap</b>	<ul style="list-style-type: none"> <li>• none</li> <li>• x-times development costs</li> </ul>
<b>R&amp;D expenses</b>	<ul style="list-style-type: none"> <li>• 100% deductible</li> <li>• recapture development costs</li> </ul>
<b>Ruling practice</b>	<ul style="list-style-type: none"> <li>• advance certainty on qualifying IP and eligible income</li> <li>• ranging from 3 to 10 year period</li> <li>• Concern EU and OECD: lack of transparency?</li> <li>• spontaneous exchange of information? OECD and EU?</li> </ul>

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## Conclusions ?

OECD FHTP and EU Code of Conduct (political procedure) ?

EC State aid investigations (legal procedure) ?

Existing beneficiaries ?

BEPS 4 and unilateral defensive measures e.g. Austria?