The Impact of BEPS on the Fight Against Harmful Tax Practices: Risks... and Opportunities for the EU

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B.T.R. 396 **Abstract**

At the end of the 1990s, the OECD published a report on Harmful Tax Competition [1] *and, in parallel, the EU addressed the issue via its* Code of Conduct on Business Taxation. [2] *Fifteen years later, both the OECD and the EU are back on the topic, willing to go further in their fight against harmful tax practices. Do they look at the problem in the same way? Are the solutions they propose similar or at least compatible? Can the EU benefit from OECD inputs on the matter? This article tries to provide answers to those questions from an EU law point of view, focusing on transparency requirements,* IP *tax incentives and relationship with third countries (in particular developing ones).*

Introduction

"Governments cannot stand back while their tax bases are eroded through the actions of countries which offer taxpayers ways to exploit tax havens and preferential regimes to reduce the tax that would otherwise be payable to them"

stated the OECD in its *1998 Report on Harmful Tax Competition: An Emerging Global Issue*.[3] More than 15 years later, this concern remains high on the OECD agenda and it gets addressed by Action 5 of the BEPS Action Plan.

Action 5 calls for a modernisation of the work on harmful tax practices which was begun by the OECD in the 1990s, focusing its new priorities on improving transparency, favouring spontaneous exchange on rulings related to preferential tax regimes and also engaging non-OECD members in the project. ***B.T.R. 397*** [4]

The issue of harmful tax competition had a similar development in the EU. In 1997 the Council of the European Union, together with representatives of the Governments of the Member States, passed a resolution on a Code of Conduct for business taxation,[5] the aim of which was to co-ordinate Member States' corporate tax measures in order to avoid harmful competition among them, capable of endangering the Internal Market. This EU intent to regulate tax competition was further strengthened by the development of a specific State aid policy in the area of business taxation.[6]

That said, despite the points in common between the OECD and EU approach in countering harmful tax measures, it appears that the OECD BEPS strategy in that area has its own specific features, which could impact EU policy and even end up, in certain cases, being harmful to the EU itself. This article will first discuss the relevance to the EU of the focus the OECD decided to put on transparency and will then explore the side effects of BEPS Action 5 on the Internal Market with special attention being paid to intellectual property (IP) incentives (patent boxes). Finally the article will illustrate briefly the potential (positive) consequences of BEPS on the EU tax policy towards developing countries.

Publicity ("transparency"): magic cure or crowbar?

Transparency has become one of the main drivers of the recent reforms both in the EU and at international level. It is one of the three pillars of the BEPS Action Plan; it has caused the reshaping of the Global Forum and of its monitoring role (peer review process)[7] and it underlies the substantial progress made in the area of exchange of information, such as the various modifications of Article 26 of the OECD Model Tax Convention and the adoption of a Global Common Reporting Standard in 2014.[8]

Transparency has also been an essential tool in the OECD and EU strategy in the fight against harmful tax measures. Originally, favourable tax schemes for foreign investors and multinational groups put into place by Member States were typically ring-fenced, clearly deviating from the ***B.T.R. 398** corporate tax regime normally applicable to other (resident) taxpayers and were provided by a more or less explicit legislative or regulatory framework (often subject to administrative authorisation). Within the EU, tax regimes of this sort have been eradicated under the parallel action of the Code of Conduct Group (formerly the Primarolo Group) and of the European Commission (under State aid rules).

However, it can be observed that far from having disappeared, preferential tax regimes have simply mutated towards a more discrete, less visible form. They are less explicitly ring-fenced than before; in fact, within the EU, regimes explicitly restricted to non-residents or somehow isolated from the domestic economy are now unlikely to be found. They are also less traceable. Some of these regimes lack a clear legal basis and take rather the form of individual administrative decisions (rulings), which at first glance are the mere implementation of general concepts, rules or principles applicable to cross-border situations. This is in particular the case as regards the application of double taxation conventions or the tax treatment of cross-border movement of taxpayers, assets or services/goods.[9]

For example, inexplicably generous applications of transfer pricing standards may result in measures harmful to the Internal Market, as the Commission suggests in four State aid formal investigations opened some months ago.[10] In the relevant opening decisions, the Commission suspects the Member States concerned to have departed from generally accepted international (OECD) standards for the allocation of a certain item or not to have duly justified specific transfer pricing choices.[11] Without commenting on the substance of those allegations, it is interesting to notice that the Commission has started a systematic review of the tax rulings of Member States,[12] acknowledging that these instruments may be used by Member States not only to provide legal certainty but also to advantage certain businesses unduly.

Against this scenario, the solution that both the OECD and the EU propose is to promote transparency of "untransparent" practices. The pun seems banal but the strategy is not. Transparency in this context is intended both to mean flow of information towards and among tax authorities[13] and to inform EU public opinion, hence promoting a sort of enhanced corporate ***B.T.R. 399** "social responsibility" in the area of taxation.[14] As the Commission stated in its March 2015 Communication:

"the Commission will assess whether additional public disclosure of certain corporate tax information should be introduced, in a way which goes beyond administrative co-operation and provides public access to a limited set of tax information of multinational companies." [15]

Transparency seems to be the magic cure to the illnesses of international taxation. However, unlimited transparency—even between tax administrations, let alone in the general public—has its drawbacks. Misinterpretation of data made public may result in additional tax audits and tax liability, due to attempts by certain States to increase their slice of the cake, sometimes in violation of international rules. It could also lead to unjustified reputational damage, due to publication of truncated information as regards the tax positions of multinational taxpayers or the tax regime of certain jurisdictions. Moreover, transparency cannot be seen as an objective in itself. Especially within the EU, where legal powers have been transferred at a supranational level, transparency cannot be an alternative to tax harmonisation—and therefore a justification of the *status quo*. Conversely, one should hope that measures taken in order to increase transparency of tax practices by public authorities and taxpayers will have a crowbar effect, opening the doors to a larger harmonisation of tax rules at the EU level, in particular with regard to corporate taxation. Such a hypothesis appears to be in line with the latest European Commission initiatives, considering the fact that the release of the Tax Transparency Package[16] has been followed by the announcement of an Action Plan in the area of corporate taxation by the summer of 2015.

Moreover, transparency has a fundamental, more political (in the noble sense) virtue. It does not only concern efficiency of tax collection through better exchange of information between tax administrations but is an essential tool in fostering a public, informed debate among stakeholders on the objectives of the rules governing the international allocation of taxing powers. Viewed from this perspective, fundamental changes are occurring in the perception of tax issues, suggesting the creation of an "international tax community", where discussions about the shaping of an international tax system are no longer limited to international and national tax administrations (and tax professionals' organisations) but are subject to public discussion. In this new context, epitomised by the BEPS initiative, technical arguments based on efficiency of tax collection and the political and economic balance of power have to be balanced with international tax ethics concerns. ***B.T.R. 400***

As stated above, a similar achievement is not banal; but it should not be surprising either. After all, what is truly surprising is that this whole process has taken so much time. Tax is a societal issue: when (at least some) taxpayers go global so should the reference concepts of fairness, equity and justice. The lack of a global tax authority does not hinder this phenomenon: "global" taxpayers have to face equity concerns promoted in a public sphere by a "global" civil society, that is, a network of citizens, private organisations and even national authorities. As global thinkers such as Habermas pointed out long ago, the emergence of public opinion and of a concept of publicity is intimately linked with the development of democracy.[17] In this process, the general press plays a pivotal role. Recent facts seem to confirm this trend in the area of international taxation, as the *Offshore* and the *Luxleaks* [18] investigations and the subsequent revelations and reactions have shown.

Is BEPS Action Item 5 harmful for the EU?

As indicated earlier, the EU and the OECD worked in parallel throughout more than a decade to address the issue of harmful tax competition which was seen as the adoption by States of measures of a fiscal nature with the aim of attracting foreign capital and which were considered detrimental to free and fair competition. The definition and identification of harmful tax regimes by both international organisations during the 1990s and 2000s largely overlapped, so that those parallel initiatives mutually reinforced one another. In the present BEPS context, however, the question may be asked whether the OECD commitment does bring an added value to the European work or whether it actually undermines the efforts of the Union to safeguard the Internal Market.

On the one hand, it is true that in many aspects the work of the two institutions continues to be similar or even complementary. Indeed, the most recent reports of the EU Code of Conduct Group to the Council refer constantly to the work of the OECD.[19] Furthermore, the larger geographical scope of OECD provision boosts the effectiveness of certain EU measures, as is the case with exchange of tax rulings, in which many third countries get involved as members of the OECD.

On the other hand, there are also side effects to be taken into account. The EU approach has several constraints, namely those represented by fundamental freedoms and State aid rules, which taken together embody a very far-reaching and border-crossing conception of equality and non-discrimination. It is within the limits of those principles and rules that the EU shapes its policy against harmful tax competition. Unlike the EU, the OECD has no legislative power and fully recognises the sovereign (absolute) power of States to frame their tax system as they please. As the OECD acknowledged in 2000: ***B.T.R. 401***

"the work on harmful tax practices is not intended to promote the harmonization of income taxes or tax structure generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates." [20]

Therefore the solutions proposed by the OECD do not have to comply with supranational rules,[21] and may rather be mere policy recommendations based on observation of what is the rationale of operators' behaviour.

As regards harmful tax practices, the most interesting example so far of potential conflict between the OECD and EU approach concerns IP incentives, in particular patent boxes. Preferential tax regimes may indeed take the form of apparently general measures, whose real effect is not—or not completely—in line with the objectives of the tax legislator. This is the case with "ill-designed" tax incentives, that is, tax incentives granted in the framework of a specific—legitimate—policy objective but which, in fact, contribute to harmful tax competition. For example, the so-called patent boxes, which have been enacted by several Member States over the last few years, are supposed to foster research and innovation, but in fact they may turn out to be a suitable instrument for attracting foreign companies without a proper link to the taxing State and encouraging the shifting of profits through royalties payments from States where "real" economic activity has taken place.

Mainly under pressure from some Member States, different EU institutions verified the EU compatibility of Member States' patent boxes and other R&D incentives under State aid provisions, fundamental freedoms and the Code of Conduct,[22] without coming to a conclusion that existing mechanisms violated those rules and principles.[23]

Recently, the OECD proposed a new approach as regards patent boxes,[24] the modified nexus approach, with the aim of restricting the benefit of that type of incentive to income linked to substantial research activities carried out in the jurisdiction granting the advantage. This approach relies on the previous OECD work on **harmful tax practices**, and more particularly on the 12th factor set out in the 1998 Report. According to this factor, a regime could be considered as **harmful** if it "encourages purely **tax**-driven operations or arrangements" and is

"designed in a way that allows taxpayers to derive benefits from the regime while engaging in operations that are purely **tax**-driven and involve no substantial activities. ***B.T.R. 402** " [25]

However, the modified nexus approach has to be regarded as innovative, since it defines the content of a substantial activity in the area of R&D.

The core of the solution promoted by the OECD is mainly a matter of economic link. As the OECD said,

"the very conceptual basis of the Modified Nexus Approach is intended to ensure that, in order for a significant proportion of IP income to qualify for benefits, a significant proportion of the actual R&D activities must have been undertaken by the qualifying taxpayer itself." [26]

As a result, once a proper nexus between the IP item of a taxpayer and his relative research efforts is set, the measure is not deemed **harmful**. After several modifications to the initial draft, qualifying expenditures may be incurred by persons other than the taxpayer itself. This is, for example, the case of outsource expenditure to non-related parties. Related party outsource expenditure (and IP acquisition costs), however, may only be taken into account up to 30 per cent of the qualifying expenses of the concerned company (so-called up-lift of qualifying expenditure).[27]

Such an approach, based on substance, does not conflict in principle with the objectives of the **EU** Internal Market. As the CJEU repeatedly held, **EU** freedoms of movement aim at protecting operators engaging in genuine economic activities, which have to be distinguished from artificial (abusive) arrangements that may not be covered by **EU** law.[28] Moreover, the substance requirement is also a European concept, as it is referred to by the Code of Conduct for business taxation as a criteria for assessing **harmful tax** measures: the third criteria refers indeed to "advantages […] granted even without any real economic activity and substantial economic presence within the Member State offering such **tax** advantages."[29]

However, the OECD approach could conflict with **EU** law, if it turns out that the link to be established is between the amount of qualifying expenditure and a particular jurisdiction, rather than the activity of a taxpayer, consisting therefore in an unjustified restriction upon cross-border research activities. Indeed, for the OECD, the nexus approach is based on the "substance requirement", that prevents taxable profits from being artificially shifted away from the countries where value is created.[30] On the other hand, under **EU** law, measures establishing a clear link between place of R&D expenditure and **tax** benefit, which therefore exclude from the benefit of ***B.T.R. 403** the measure research activities on the only ground that they have been carried in another Member State, are incompatible with the **EU** fundamental freedoms. This has been explicitly stated by the European Commission,[31] as well as by the CJEU in *Laboratoires Fournier SA v Direction des vérifications nationales et internationales* [32] and *Commission of the European Communities v Kingdom of Spain*.[33]

However, it remains unclear whether the substance the OECD seems to look for, on the wave of the recent evolution to the nexus approach,[34] is a particular link between IP profits and a specific activity of a company, or between those profits and the jurisdiction in which the research has been carried out.[35]

The issue of compatibility of the nexus approach with **EU** law has already been addressed within the Code of Conduct Group. Indeed, the Group was given a mandate by the ECOFIN Council to analyse all existing patent boxes within the **EU** in the light of the third criterion of the Code of conduct.[36] The Group relied much on the OECD work to interpret this concept and endorsed the modified nexus approach, which was originally developed in a joint statement between two OECD countries which are also **EU** Member States, the UK and Germany.[37]

According to a Report of the Code of Conduct Group, "following the request of some delegations, the Group has also examined, with the assistance of the Council Legal Service, the compatibility of the modified nexus approach with EU law and especially with the freedom of establishment and the freedom to provide services. It was then considered that, although it could be said that the modified nexus approach did not treat comparable situations in a discriminatory manner, this of course did not preclude the possibility of a particular national measure being found incompatible with the Treaty freedoms in the future because of a restriction to the right of companies to choose where ***B.T.R. 404*** they carry out their R&D activities. This would depend on the legal and factual context of the case".[38]

Such a statement seems a rather clear acknowledgment of the possibility that a conflict with the fundamental freedoms is a very actual one.

In conclusion, the modified nexus approach developed within the OECD and endorsed by the EU Code of Conduct Group raises rather ambivalent issues when analysed in the light of the current EU legal framework. On the one hand, it provides for a solution to a problem that could not be tackled so far under existing rules, whether the prohibition of State aid, the EU fundamental freedoms or the soft law of the Code of Conduct. On the other hand, the proposed approach constitutes a rather strict territorial (national) application of the requirement of substance, and could contradict the principles of an Internal Market without economic borders and a unified European research area (as stated in Article 179 of the Treaty on the Functioning of the European Union (TFEU)). Hence, should the EU conform to this territorial interpretation of the substance principle, it would find itself applying a concept that could harm the harmonisation process and undermine its power to control and regulate the matter, possibly in violation of the fundamental freedoms as interpreted in the CJEU case law.[39] In the opposite scenario, the EU could adapt the substance requirement to the specificities of the Internal Market, in which every Member State should be treated as a part of a *unicum*. In this case, Member States would have to promote other Member States' R&D activities in the same way they promote their own.[40] In any event, the measures adopted by Member States which aim at implementing the modified nexus approach will have to be analysed very carefully in the light of EU law.[41]

EU tax policy towards developing countries: from illusion to disillusion … and back?

A few years ago the EU engaged in an effort to promote good governance in tax matters towards third countries. In two communications, the Commission focused on promoting transparency, exchanging information and fair tax competition, while tackling tax evasion and tax avoidance on as broad a geographical basis as possible.[42] The underlying idea was that the implementation of the principles of good governance in the tax area would result in enhanced growth prospects ***B.T.R. 405*** and poverty reduction in developing countries, while strengthening tax systems at a global level, for the mutual benefit of the EU and its partners.[43]

In 2011, the European Parliament, in a remarkable resolution,[44] supported the Commission's attempt to go beyond the issues of harmful tax practices and fight against tax fraud and avoidance by integrating those policies in the broader scope of the Millennium Development goals.[45] The Parliament, despite recognising that

"good governance in tax matters cannot be exported or imposed from outside, and that it is up to each of the countries to decide its own tax policy,"

asked the Commission

"to include a tax governance clause, including monitoring of its implementation, in relevant agreements between the EU and third countries".[46]

Interestingly enough, the Parliament also expressed some criticism as regards tax treaties (and therefore indirectly as regards the OECD Model Tax Convention), by highlighting the "unfortunate effect of tax treaties on the distribution of tax revenues", and by pleading that double taxation conventions

"should be reviewed for fairness, which implies the possibility of granting the primary right to tax in the source country where real activities are pursued." [47]

However, such an apparent willingness to reconcile EU international tax and development policies did not carry any tangible results. On the contrary, in a 2012 Recommendation providing criteria to identify third countries which do not meet minimum standards of good governance in tax matters, the Commission narrowed the scope of good tax governance to the compliance with international and EU standards as regards transparency and exchange of information, on the one hand, and harmful tax measures in the area of business taxation, on the other.[48] The Recommendation set the procedure for Member States to issue blacklists of non-complying third countries, encouraging Member States either not to sign double tax conventions with non-complying countries or, in the presence of such treaties, to renegotiate or even terminate them.[49] Apart from those unilateral measures, the Commission suggested that Member States should "consider offering closer cooperation and assistance to third countries, especially **B.T.R. 406* developing ones" but only "in order to assist those third countries in fighting effectively against tax evasion and aggressive tax planning."[50]

This switch from a (mildly) co-operative to a defensive or even punitive approach is not particularly farsighted. Against this scenario, the OECD may help the EU in boosting a fair and conscious dialogue on tax matters with developing countries again. Since the beginning of the work on BEPS (and even before), the OECD involved developing countries and non-members in a broad discussion on the project in order to get useful inputs from their side[51] and it summarised its findings in a Report to the G20 Development Working Group on the impact of BEPS in low income countries.[52] Moreover, the OECD is willing to carry on this co-operation and to shape it in a more structured fashion, by inviting developing countries to attend the meetings of the Committee on Fiscal Affairs, by setting up regional networks of tax policy and administration officials and by supporting capacity building on BEPS issues in those countries.

Hopefully, this co-operation with developing countries at the OECD level will provide suggestions for the EU to better address the issue of good tax governance in relation to third countries thereby facilitating a better balance between good tax governance and development policies.

Conclusion

Undoubtedly, the OECD BEPS Project will affect—positively or negatively—the European policy in the fight against harmful tax measures. Three areas seem particularly concerned: transparency of preferential tax regimes, substance (in relation to patent boxes) and relationship with developing countries.

Transparency appears to be the area in which the OECD and EU work is particularly convergent. Such effort in promoting exchange of information between States and general public awareness of the issues at stake in international taxation is welcome. However, considering the fundamental institutional differences between the OECD and the EU, in particular as to their rule-making power, the EU should not limit itself to those objectives, but should also envisage a relaunch of the tax harmonisation process.

As to the fight against harmful tax measures, the EU and the OECD also have a common tradition dating back to the 1990s of following parallel—and often convergent—paths. The EU also has the advantage of being able to enforce, besides political commitments such as the Code of Conduct, hard-law rules and principles governing the Internal Market, namely those concerning prohibition of State aid and protection of the fundamental freedoms. However, in the light of the most recent developments as regards the application of substance requirement to IP tax **B.T.R. 407* incentives, this could also represent a constraint, since territoriality conditions have to be balanced against EU integration objectives.[53]

Lastly, the OECD approach to developing countries in the framework of the BEPS project could inspire the EU to reorientate its somewhat contradictory good tax governance policy towards third countries. The various OECD initiatives aiming at establishing a more open and co-operative dialogue with non-member countries, and in particular developing countries, could serve as guidance to the EU in overcoming its rather defensive approach to the matter, centered on the fight against tax havens.

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Footnotes

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3 *OECD, **Harmful** **Tax** Competition: An Emerging Global Issue, above fn.1, 37*.

4 On **harmful** **tax** **practices** within the **BEPS** project, see *OECD, Action Plan on Base Erosion and Profit Shifting (Paris: OECD Publishing, 2013)*, available at: http://www.oecd.org/ctp/BEPSActionPlan.pdf [Accessed July 9, 2015], 18; *OECD, Countering **Harmful** **Tax** **Practices** More Effectively, Taking into Account Transparency and Substance, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2014)*, available at: http://dx.doi.org/10.1787/9789264218970-en [Accessed July 9, 2015].

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9 It is likely that European Commission decisions as well as the case law of the CJEU contributed to this shifting, by condemning de jure and de facto selective tax measures as incompatible State aid. See *European Commission and Kingdom of Spain v Government of Gibraltar and UK (Joined Cases C-106/09 and C-107/09) (November 15, 2011) [2011] ECR I-11113*.

10 European Commission, State aid SA.38944 (2014/C)—Luxembourg, Alleged aid to Amazon by way of a tax

ruling; State aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP)—Netherlands, Alleged aid to Starbucks; State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)—Ireland, Alleged aid to Apple; State aid SA. 38375 (2014/NN) (ex 2014/CP)—Luxembourg, Alleged aid to FFT. For a comment in the light of **BEPS**, see P. Rossi-Maccanico, "Fiscal State Aids, **Tax** Base Erosion and Profit Shifting" (2015) 24(2) EC **Tax** Review 63.

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16 *European Commission, Communication from the Commission to the European Parliament and the Council on tax transparency to fight tax evasion and avoidance*, above fn.13.

17 *J. Habermas, Strukturwandel der Öffentlichkeit (Frankfurt: Suhrkamp, 1961), 2nd edn 1990*, see in particular Ch.VI., para.23, on the ambivalence of the concept of publicity within social states.

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26 *OECD, Action 5: Agreement on Modified Nexus Approach for IP Regimes (Paris: OECD Publishing, 2015), 5.*

27 *OECD, Action 5: Agreement on Modified Nexus Approach for IP Regimes*, above fn.26, 3–4.

28 On the principle of abuse of rights in **EU** (direct) **tax** law, see for example *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v IRC (C-196/04) [2006] ECR I-7995*; *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt (C-324/00) [2002] ECR I-11779* at [27]. For a critical comment, see T. O'Shea, "**Tax** Avoidance and Abuse of **EU** Law" (2011) 11 EC **Tax** Journal 77; R.

de la Feria, "Prohibition of Abuse (Community) Law—The Creation of a New General Principle of EC Law Through Tax" (2008) 45(2) Common Market Law Review 395; *L. De Broe, International Tax Planning and Prevention of Abuse: A Study under Domestic Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies (IBFD, 2008), 755* and following; *A. Arnull, "What are General Principles of EU Law?" in R. de la Feria and S. Vogenauer, Prohibition of Abuse of Law—A New General Principle of EU Law (Oxford: Hart Publishing, 2009), 18–23*; D. Weber, "Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ—Part 1" (2013) 53(6) European Taxation 251.

29 *Council of the European Union and the Representatives of the Governments of the Member States, Resolution on a Code of Conduct for business taxation*, above fn.5, para.B n.3.

30 See *OECD, Countering **Harmful Tax Practices** More Effectively, Taking into Account Transparency and Substance, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2014), 27.*

31 This has been clarified in the Commission's reasoned opinion on the Irish regime of royalty income in 2007. See *European Commission, Press Release, Direct taxation: Commission requests Ireland to end discriminatory rules on tax treatment of patent royalties (IP 07/408, March 23, 2007)*, available at: http://europa.eu/rapid/press-release_IP-07-408_en.htm?locale=en [Accessed July 9, 2015].

32 *Laboratoires Fournier SA v Direction des vérifications nationales et internationales (C-39/04) (March 10, 2005) [2005] ECR I-2057* at [26].

33 *Commission of the European Communities v Kingdom of Spain (C-248/06) (March 13, 2008) [2008] ECR I-00047* (not available in English).

34 The link with the taxing jurisdiction is mentioned in several official documents:

OECD, OECD Secretary-General Report to G20 Finance Ministers: Istanbul, Turkey, February 2015 (2015), 7: available at: http://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-february-2015.pdf [Accessed July 9, 2015]; *Germany-UK Joint Statement: Proposals for New Rules for Preferential IP Regimes (November 11, 2014)*, available at: http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Taxation/Articles/2014-11-11-rules-on-preferential-ip-regimes-joint-statement.html?__act=renderPdf&__iDocId=329908 [Accessed July 9, 2015].

35 The modified nexus approach is not strictly territorial, as it allows the taking into consideration of expenditures incurred in a foreign permanent establishment or outsourced to foreign unrelated parties. However, the 30% limitation in the case of outsourcing to related parties (even if remunerated at arm's length) particularly disfavours intragroup cross-border outsourcing to foreign subsidiaries.

36 A specific mandate to interprete this criteria was given by the Council to the Code of Conduct Group in December 2013, see Report of December 11, 2014, protocol No. 16553/1/14, para.9.

37 *Germany-UK Joint Statement: Proposals for New Rules for Preferential IP Regimes*, above fn.34.

38 Report of the Code of Conduct Group (Business Taxation) of December 11, 2014 to the ECOFIN Council, protocol No. 16553/1/14, para.11.

39 Alternatively, that could be an occasion to revise the existing case law, as several academics criticised the potential consequences of the CJEU case law on Member States' tax autonomy, see L. De Broe, "The ECJ's Judgment in Argenta: narrow interpretation of the preservation of the balanced allocation of taxing rights between Member States. A headache for tax designers of tax incentives in the Union" (2013) 5 EC Tax Review 210.

40 R. Sanz-Gomez, "The OECD's nexus approach to IP boxes:

a European Union law perspective" (2015) (12) WU International Taxation Research Paper Series 22.

41 On the compatibility of the nexus approach with EU law, and on R&D incentives in general, see P. Arginelli, "Innovation through R&D Tax Incentives: Some Ideas for a Fair and Transparent Tax Policy" (2015) 7(1) World Tax Journal (Journals IBFD).

42 See *European Commission, Communication to the Council, the European Parliament and the European Economic and Social Committee on Promoting Good Governance in Tax Matters, COM (2009) 201 of April 28, 2009* and on *Tax and Development: Cooperating with Developing Countries on Promoting Good Governance in Tax Matters, COM (2010) 163 of April 21, 2010*. See also the *PwC study, Transfer Pricing and Developing Countries—Final Report (commissioned by the European Commission in 2011)*, available at: http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/transfer_pricing_dev_countries.pdf [Accessed July 10, 2015].

43 *Tax and Development: Cooperating with Developing Countries on Promoting Good Governance in Tax Matters*, above fn.42, 4.

44 European Parliament, Resolution of 8 March 2011 on Tax and Development—Cooperating with Developing Countries on Promoting Good Governance in Tax Matters [2012] OJ C199E/37–48. See also *E. Joly, Report on Tax and Development—Cooperating with Developing Countries on Promoting Good Governance in Tax Matters (2010/2101(INI)) (February 4, 2011, A7-0027/2011)*.

45 *Tax and Development: Cooperating with Developing Countries on Promoting Good Governance in Tax Matters*, above fn.42, 2.

46 European Parliament, Resolution of 8 March 2011, above fn.44, paras 17 and 18.

47 European Parliament, Resolution of 8 March 2011, above fn.44, para.60.

48 European Commission, Communication of December

6, 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, C(2012) 8805 final, available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8805_en.pdf [Accessed July 9, 2015].

49 European Commission, Communication of December 6, 2012, above fn.48, para.4.3.

50 European Commission, Communication of December 6, 2012, above fn.48, para.6.1.

51 See *OECD, The BEPS Project and Developing Countries: from Consultation to Participation (2014)*, available at: http://www.oecd.org/ctp/strategy-deepening-developing-country-engagement.pdf [Accessed July 9, 2015].

52 *OECD, Part 1 of a Report to G20 Development Working Group on the Impact of BEPS in low income Countries (2014)*, available at: http://www.oecd.org/tax/tax-global/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf [Accessed July 9, 2015].

53 On this issue, see E. Traversa, "Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States" (2014) 6(3) World Tax Journal 315.

